

A Sea of Change for Patent Plaintiffs in Texas



A recent order issued in Texas could have a rippling effect on cases filed not only in Texas but throughout the entire nation, as patent practitioners may now turn to the nation’s other patent litigation hotspots.

By James J. DeCarlo, Rose Cordero Prey and Jade Li-Yu Chen | September 28, 2022 | New Jersey Law Journal

Plaintiffs who file patent infringement cases in the Western District of Texas, Waco Division, are no longer guaranteed to be on Judge Albright’s docket. Pursuant to an Order from the Chief Judge of the Western District of Texas, patent cases filed on or after July 25, 2022, are to be “randomly assigned” to 12 judges across the district. This article discusses the rippling effect this Order may have on cases filed not only in Texas but throughout the entire nation.

Judge Alan Albright, a former patent litigator and the sole district court judge in Waco since 2018, has made known his private practice experience as well as his experience as a jurist in trying patent cases. He also introduced a set of rules and procedures specific to patent cases, which some perceived as welcoming to plaintiffs. For example, Judge Albright is known for promoting accelerated trial schedules and staging discovery in a manner that streamlines the presentation of patent issues. Furthering this plaintiff-friendly perception is Judge Albright’s record of relying on his

fast-paced scheduling to deny stays of litigation pending inter-partes review proceedings before the U.S. Patent and Trademark Office, as well as his record on denying transfers out of his district.

With Judge Albright taking the bench, Waco became the newest “capital” for patent litigations. According to Lex Machina, a legal analytics service provider, only four patent cases were filed in Waco in 2017, prior to Judge Albright’s arrival. By 2021, 932 patent cases had been filed in the division within a single year, which amounted to more than 23% of the entire nation’s patent cases being filed in Waco and thus handled by Judge Albright.

Apparently in light of these statistics and after Supreme Court Chief Justice John Roberts questioned, in his 2021 Year-End Report on the Federal Judiciary, the case assignment procedures in certain district court divisions that effectively allowed a plaintiff to select a particular judge, Chief Judge Orlando Garcia in the Western District of Texas issued an Order that dictates the distribution of patent cases filed in Waco. In the Order, Chief Judge Garcia explains that “[u]pon consideration of the volume of new patent cases,” all new patent cases filed in Waco are to be randomly assigned among 12 judges across the Western District of Texas, which includes the San Antonio, Del Rio, Austin, El Paso Midland/Odessa and Pecos Divisions. Thus, “until further order of the Court,” a ticket to Judge Albright’s courtroom is no longer guaranteed for those who file a patent case in Waco.

The Order stresses random assignment and “equitably distribut[ing]” cases. But it remains to be seen whether other factors will sway the ultimate distribution of patent cases in the district. Notably, the district permits judges to reassign cases by mutual consent, and this flexibility continues to be available after July 25. See Order at 1 n.1; May 10, 2021, Amended Order Assigning the Business of the Court at Item XVIII(a). For example, Judge Yeakel recently transferred a case to Judge Albright citing the judges’ mutual consent. See Case No. 6:22-cv-00821, Dkt. 7. At the time of the transfer, Judge Albright was already assigned a separate case filed by the same plaintiff asserting the same patent, indicating that judicial efficiency likely motivated the transfer. Judge Moses likewise transferred a case to Judge Albright, where the case was a “re-file” of a previously dismissed lawsuit in Judge Albright’s court. See Case No. 6:22-cv-00845, Dkt. 12; Case No. 6:22-cv-00319, Dkt. 24.

It also remains to be seen whether assignment of patent cases in Waco can truly be statistically “random” given Judge Albright’s past cases. To date, while each of the 12 judges named in the Order has been assigned new patent cases filed in Waco since the Order came down, Judge Albright still presides over almost half of those new cases (i.e., 30 out of 61 cases filed in Waco between July 25 and Sept. 9, 2022, according to Lex Machina). In addition to taking cases that were initially assigned to other judges under the Order as discussed above, Judge Albright appears to have taken on many new cases filed by plaintiffs who had already asserted the same or related patents in Waco prior to the issuance of the Order. For example, Judge Albright presides over all cases filed in between August and Sept. 9, 2022, by KT Imaging USA, LLC (five cases), Peter Pedersen (five cases), Halliburton Energy Services, Inc., et al. (two cases), and Traxcell Technologies LLC (two cases). Each of these plaintiffs had previously litigated the patent(s)-in-suit before Judge Albright.

The number of patent filings in Waco has already declined by more than 50%. While 61 new patent cases have been filed since the issuance of the Order, Lex Machina reports a total of 128 cases filed in Waco over the same period of time last year. Meanwhile, the overall patent filings in the entire Western District of Texas decreased by around 44%, comparing the 75 cases filed between July 25 and Sept. 3, 2022, with the 135 cases filed over the same period of time in 2021. This same decline in

patent cases is not seen generally country wide. Last year 502 new patent cases were filed between July 25 and September 3, while this year 499 new patent cases have been filed over the same time period.

As patent plaintiffs reconsider their filing strategy, other district courts appear to have taken on cases that might have been filed in Waco absent the new assignment rule. As an example, the Northern District of California has nearly doubled its patent docket, with 33 cases filed there as of Sept. 9, 2022, as opposed to only 18 cases filed there during the same period in 2021.

Prior to the Order, in 2022, the Western District of Texas was handling 24% of all patent cases in the country, followed by the District of Delaware (18%), the Eastern District of Texas (12%), and the Northern and Central Districts of California (each 5%). Following the Order, as of Sept. 9, 2022, the District of Delaware has surpassed the Texas courts, with 19% of the new patent cases filed in Delaware. The Western District of Texas has already dropped to second place with 15% of the caseload, followed by the Eastern District's 13% and the California courts' 7% and 5%, respectively. Thus, while the full effect of the Order remains to be seen, it seems that patent plaintiffs are already reacting to this new assignment rule.

Litigators know that forum selection is unlikely to disappear as an issue, and this segment of litigation calculus is an ever-developing area of the law. Since the decision in *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, a plaintiff can no longer simply assert that a defendant regularly conducts business in a district to establish venue, as “a domestic corporation ‘resides’ only in its State of incorporation for purposes of the patent venue statute.” 137 S. Ct. 1514, 1517 (2017); *see also In re Google LLC*, 949 F.3d 1338, 1345 (Fed. Cir. 2020) (holding that, to establish venue, “‘regular and established place of business’ requires the regular, physical presence of an employee or other agent of the defendant conducting the defendant’s business at the alleged ‘place of business.’”). Waco was an attractive district given the large number of potential defendants satisfying the venue statute there.

Yet with this new Order eliminating the assurance that Judge Albright would hear patent cases filed in Waco, patent practitioners may now turn to the nation’s other patent litigation hotspots. Patent plaintiffs may be more willing to go to districts such as Delaware or California, where corporate business and technology ties abound. Those who can enforce patents in the Western District of Texas may also prefer the certainty of filing in other divisions. For instance, while a patent case filed in Waco is to be assigned to one of the 12 judges named in the Order, a plaintiff who files in Austin expects only “one-third of the uncertainty” as there are only four judges in that division, which is itself a growing metropolitan area and thus potentially attractive for venue purposes.

On the other hand, plaintiffs may prioritize different considerations when it comes to “old” (i.e., litigated) patents or overlapping patents across multiple litigations. Indeed, even with the new assignment rule, cases involving overlapping patents are still being centralized before one judge even if initially assigned to different judges pursuant to the Order. In addition, where new cases involve patents that have already been litigated in Waco, those cases appear to have been assigned to Judge Albright under the “random” assignment rule. Plaintiffs seeking to enforce the same patents in Judge Albright’s court have affirmatively stated so in their complaints in order to effectively relate their new cases to pending ones. Practitioners may expect plaintiffs, including prolific non-practicing

entities, to continue to file in Waco if asserting patents that are already or have been in Judge Albright's court.

Thus, while questions remain over the distribution of patent cases filed in Waco, it will come as no surprise if, for the foreseeable future, Waco continues to be one of the more popular patent litigation forums in the country. Only time will tell if the tide has really gone out.

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