

The Texas Lawbook

Free Speech, Due Process and Trial by Jury

New Patent Lawsuits Continue Decline in TX

By MARK CURRIDEN

(Sept. 24) – The number of new patent infringement complaints brought by businesses and individuals in Texas during the first half of 2018 was the lowest this decade.

Lawsuits alleging patent violations continued to decline during the first six months of this year in East Texas, which only a year ago was the patent litigation capital of the world. South and West Texas also witnessed steep drops in patent infringement activity.

Federal courts in the Dallas-Fort Worth area, however, have seen a major increase in the number of newly filed patent cases.

Intellectual property law experts say these trends are the direct result of a series of U.S. Supreme Court decisions and federal legislation during the past four years designed to crackdown on bogus patent claims and restrict the court jurisdictions where even legitimate patent disputes can be filed.

“The statistics showing a decline in patent litigation in the Eastern District of Texas are not surprising, as it has been happening for a couple years,” said Foley Gardere IP Partner Terrell Miller. “But there are early signs the pendulum may be starting to swing back a little to the plaintiffs.”

The predicted demise of the Eastern District was premature, as it is still in the top three federal courts in the country for new patent filings according to legal experts.

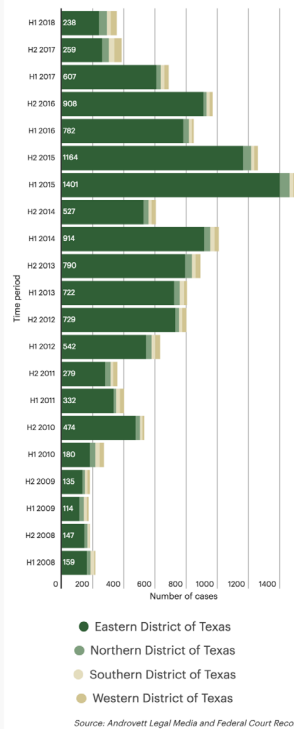
“The Eastern District patent docket is not dead by any means,” said Greenberg Traurig counsel Rene Trevino. “Despite the decline, it is one of the busiest patent courts in the country and it is still an attractive jurisdiction to litigate patent disputes.”

New data provided exclusively by Androvett Legal Media to *The Texas Lawbook* shows that:

There were 238 new patent infringement cases filed in the Eastern District of Texas, which runs from Beaumont to Marshal and includes Plano, during the first half of 2018 – an 8 percent drop from the second half of 2017 and a 60 percent decline from H1 2017. In fact, it is one-sixth the number of new patent cases filed during the first six months of 2015.

Federal courts in the Southern District of Texas, which is dominated by Houston, reported 24 new patent complaints between January and June 2018 – 35 percent fewer than in H2 2017 but the same number as one year earlier.

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The Western District, which includes Austin and El Paso, had 37 patent lawsuits filed in H1 2018 – down 19.5 percent from H2 2017, but still more than periods during the past decade.

The big exception is the Northern District of Texas, which reported 53 new patent infringement cases filed in its federal courts during the first half of 2018 – a 29 percent jump from H2 2017 and nearly 50 percent more than from H1 2017. In fact, it is the second highest number of patent lawsuits ever filed in the Northern District.

The Northern District implemented a pilot program in March 2016 that sends all patent infringement cases to three judges – Chief Judge Barbara Lynn and District judges David Godbey and Ed Kinkeade – and adopted streamlined procedures similar to those in the Eastern District.

“The reason for the decline in patent filings in the Eastern District and the reason for increase in the Northern District and somewhat in the Southern District are the same: TC Heartland,” said Amir Alavi, a partner at Ahmad Zavitsanos Anapagos Alavi Mensing in Houston. “There is an overall reduction in patent cases being filed, but cases that used to be filed in the Eastern District are now being filed in the Northern and Southern districts.”

In *TC Heartland v. Kraft Foods*, the Supreme Court ruled that patent disputes must be filed in judicial venues where the defendant is incorporated, headquartered or has its place of business. As a result, the patent docket in the courts of Delaware, where many businesses are incorporated, skyrocketed.

“The impact has been that there is a huge backlog of cases in Delaware,” Alavi said. “So, if I have a choice of filing my patent case in Delaware or the Northern District of Texas, I’m going to pick the Northern District.”

“Clients want predictability of costs, judges, procedures and time,” he said. “The Northern District, because of its pilot project, offers some of the predictability that came in the Eastern District.”

Dallas IP legal expert Paul Skiermont of Skiermont Derby agreed.

“If Delaware is viewed as a black hole where patent cases languish, lawyers will get creative to avoid the backlog and we will see renewed efforts to expand venue,” Skiermont said. “I think the judges in the Eastern District are taking a more expansive view of what physical presence means. Some of those views have been reversed and some have been upheld.”

Wes Hill, a partner at Ward, Smith & Hill in Tyler, said the decline in the East Texas federal court dockets may end up being good for patent litigation in the district.

“The number of patent cases filed this year in the Eastern District is similar to the number filed here in 2010,” Hill said. “This allows the Eastern District to get back to its roots – allows cases to get to trial more quickly because the bad cases have been weeded out and the courts can focus on the good cases.”

Trevino, Alavi and other patent law experts say that the crackdown on so-called on venue or forum shopping is actually having an unanticipated negative impact: the cost of patent litigation is increasing.

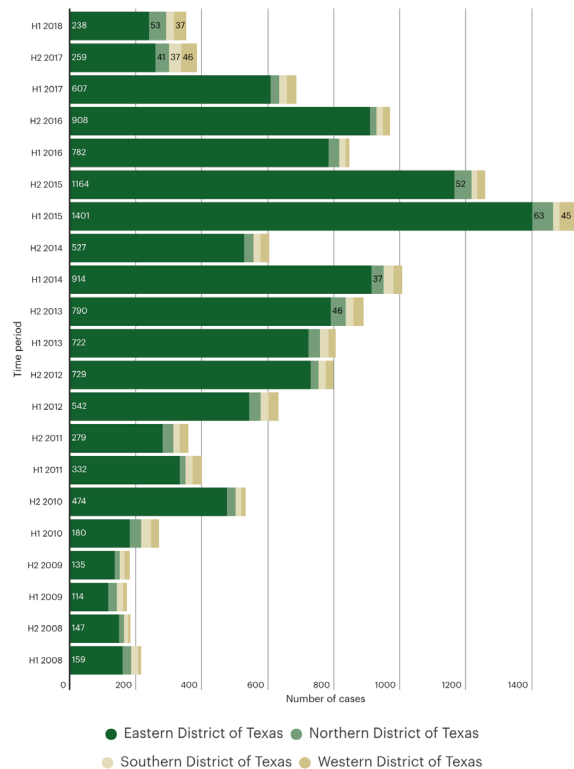
“TC Heartland has definitely driven up the cost of patent cases,” Alavi said. “All these cases that would have been in the Eastern District are now being spread out to judges all across the country and it is causing a lot of uncertainty and unpredictability.”

Trevino agreed.

“Because these patent cases are being transferred to jurisdictions with little or no track record for

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Source: Androvett Legal Media and Federal Court Records

patent litigation, we know very little about the judges who are now getting these cases or the local rules and procedures in these unknown venues,” Trevino said. “As a result, clients are

having to pay more to their lawyers to do the necessary research on these unknown judges and jurisdictions.”