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Comparison Of The Most Popular Patent Venues

Law360, New York (December 10, 2009) -- The Eastern District of Texas, Central District of California, Districts of New Jersey and Delaware, and Northern District of California are the most popular venues for patent infringement actions.

In 2008, there were 2,909 patent cases initiated in the United States; in 2007, there were 2,896 cases. For both of those years, these five districts accounted for approximately 40 percent of all patent cases filed.[1]

A comparison of these venues provides useful information for venue selection.

Eastern District of Texas

No district has been more popular over the last 10 years for patent cases than the Eastern District of Texas.[2]

Plaintiffs succeed at trial almost 72 percent of the time, which is noticeably more often than the national average of 57 percent.[3] The median damages awarded in patent infringement suits from 1995 until 2007 was \$19,689,237.[4]

A finding of patent invalidity by a jury in the Eastern District is rare.[5] The judges are experienced in handling patent cases. While the district is comprised of six divisions with eight Article III judges and eight magistrate judges, the majority of patent cases are handled by Judges Ward, Davis, Folsom and Clark.[6]

In 2001, Judges Ward, Clark, and Davis adopted local patent rules, and in 2005, local patent rules were adopted for the entire district.[7] The local patent rules provide some potential advantages for litigants.

For example, by mandating early disclosure of all relevant documents and prior art, and by limiting opportunities to modify infringement and invalidity contentions, some claim that defendants are placed at a disadvantage to plaintiffs who can prepare and identify documents to support their position prior to suit.[8]

Because of its rapid growth in popularity, the time to trial in this venue for patent cases has increased from what it was a decade ago.

For example, while the median time to trial for all civil cases is 18.5 months,[9] anecdotal evidence indicates that there is a much longer time to trial for patent cases. Patent cases filed in 2008, for example, were being set for trial in 2011.[10]

In addition, patent cases filed in this jurisdiction typically have minimal nexus-in-fact. The ratio of patent lawsuits initiated versus patents issued to companies in the district may illuminate whether a given district's popularity is due to forum shopping.[11]

The ratio for Texas as a whole is 3.6 patent infringement lawsuits filed for every one patent that is issued to a Texas-based company,[12] and the ratio for the Eastern District of Texas is likely much more pronounced.

In other words, because of the district's location and demographics, patent suits brought in the Eastern District of Texas are less likely brought by companies litigating in their home venue than cases initiated in venues containing more commercial centers, such as in the Northern and Southern Districts of California.

As such, this means that witnesses and counsel will likely face long travel times. In addition, and as has been well-publicized recently, this may make a case more susceptible to transfer.[13]

Central District of California

The Central District of California is comprised of three divisions and has 34 Article III judges and 23 magistrate judges. The median time to trial for civil cases is 22 months[14] and the median damages awarded in patent infringement suits from 1995 until 2007 was \$10,000,777.[15]

The district has not adopted local patent rules, although certain judges have adopted rules of practice for patent cases.

A higher percentage of plaintiffs reach favorable results at trial in this district than the national average, with a verdict in favor of patentees declared 68 percent of the time.[16]

This district is also known for encouraging parties to reach an early settlement of their dispute, before either side has incurred significant litigation costs.[17]

Judges in this district have a reputation as being knowledgeable about patent proceedings. And, because of the location of this district, cases filed there are likely to have a relation to the district.

However, this district has a very crowded docket. In 2008, it was the third busiest docket in the United States in terms of private civil case filings, behind the Southern District of New York and the Eastern District of Pennsylvania.[18]

Further, as noted above, it takes nearly two years for a civil case to reach trial, and patent cases typically take significantly longer.

District of New Jersey

This district is comprised of three divisions with twenty-four Article III judges and twelve magistrate judges.

The median time to trial for civil cases is 38.5 months[19] and the median damages awarded in patent infringement suits from 1995 until 2007 was \$21,634,708, which is the highest among these five districts.[20]

One of the most interesting things about the District of New Jersey are the provisions of its recently enacted patent local rules governing cases arising under the Hatch-Waxman Act.

Because of the triggers built into the act, in a typical Hatch-Waxman case, the potential defendant knows the patents that will be asserted, the identity of the plaintiff, and the time frame for filing the complaint.

This district's local patent rules address the reverse role of the parties in such actions by switching the deadlines for serving invalidity contentions and non-infringement contentions.

This is beneficial to the patentee since litigating in New Jersey gives it the benefit of seeing the defendants' documents and contentions before it is required to produce any documents to the defendant.

On the other hand, the time to trial in this district is the longest of the districts investigated.

Further, plaintiffs reach favorable results at trial 50 percent of the time, which is less than the national average of 57 percent, and is the lowest success rate of the districts investigated for this article.[21]

District of Delaware

This district leads all others with 60 patent filings for each judgeship (2008). As a result, the district has one of the most experienced benches in handling patent infringement cases in the United States.

The district has only one division in Wilmington, with three Article III judges and two magistrate judges. The median time to trial for civil cases is 25 months[22] and the median damages awarded in patent infringement suits from 1995 until 2007 was \$8,691,600.[23]

This venue has gained a reputation as a plaintiff's venue based on trials resulting in the plaintiff's favor 62.5 percent of the time, which is slightly more often than the national average of 57 percent.[24]

Also, more than 60 percent of Fortune 500 companies are incorporated in Delaware.[25]

Thus, establishing a basis for jurisdiction over many potential accused infringers is automatic and the district does not often look favorably on motions to transfer where Delaware corporations are involved.

As with the Eastern District of Texas, patent cases filed in this district often have very little nexus-in-fact to the district other than arguably the act of incorporation in Delaware.

For further example, the ratio of patent cases to patents for 2008 for Delaware is almost 21 to 1, which implies a very high percentage of companies travel to litigate in Delaware.[26]

Therefore, even though a party is incorporated there, few documents or witnesses would be located in Delaware. Further, the district has not yet adopted local patent rules.

Northern District of California

Given its proximity to the Silicon Valley, cases filed in this district are likely to have a relation to the district, and given the high number of cases filed here, the judiciary has substantial experience with patent cases.

The district has three divisions, 17 Article III judges, 11 magistrate judges, and it adopted local patent rules in 2000.[27]

And, in light of recent case law transferring cases to California,[28] it would not be surprising to see an increase in patent litigation in the Northern District of California due to patentees bringing suit against California companies in California in the first instance, instead of filing suit in, for example, the Eastern District of Texas and undergoing the expense of opposing a motion to transfer.

On the other hand, the forum has a long time to trial and, statistically, juries in this district are relatively reluctant to find for the patentee as compared to other jurisdictions.

The median time to trial for civil cases is 30 months[29] and the median damages awarded in patent infringement suits from 1995 until 2007 was \$8,696,631, which was on par with Delaware as being the lowest for the districts investigated.[30]

The Northern District of California also had the second lowest trial success rate (57.5 percent) of the jurisdictions investigated.

Conclusion

In summary if, as is typically the case, the defendant is a corporation, so long as the parties have not entered a contract containing a forum selection clause, a patent suit can be filed anywhere the defendant does sufficient business to be subject to personal jurisdiction — which, given the threshold necessary to establish personal jurisdiction, means that most corporations can be sued in any federal court.

Thus, the question facing most patent owners before filing suit is not where can the suit be filed, but rather where should the suit be filed. While these five districts are most popular, they have several distinguishing factors for a party selecting venue.

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[1] Data from 2008 and 2007 Annual Reports by Director of Judicial Business of United States Courts, www.uscourts.gov/judbususc/judbus.html.

[2] Julie Cresswell, So Small a Town, So Many Patent Suits, N.Y. Times, Sept. 24, 2006, available at www.nytimes.com/2006/09/24/business/24ward.html?pagewanted=1&_r=1.

[3] Aron Levko, Vincent Torres, & Joseph Teelucksingh, 2008 Patent Litigation Study: Damages awards, success rates and time-to-trial (PricewaterhouseCoopers LLP 2008) at 14, www.pwc.com/us/en/forensic-services/publications/2008-patent-litigation-study.jhtml.

[4] *Id.*

[5] Yan Leychkis, Of Fire Ants and Claim Construction: An Empirical Study of the Meteoric Rise of the Eastern District of Texas as a Preeminent Forum for Patent Litigation, 9 Yale J. L. & Tech 193, 211 (2007) (“[I]t has taken eighteen years of patent infringement trials for an Eastern District jury to find a patent invalid; it happened for the first time ever in the 2006 case Hyperion Solutions Corp. v. OutlookSoft Corp.”).

[6] *Id.* at 206.

[7] Mary A. Robbins, Eastern District Rocket Docket Decelerates in Marshall Division, *Texas Lawyer* (Aug. 18, 2008), available at www.law.com/jsp/tx/PubArticleTX.jsp?id=1202423817064&slreturn=1&hbxlogin=1.n; see Michael C. Smith, 2004 AIPLA Spring Meeting: Eastern District of Texas Patent Rules mcsmith.blogs.com/eastern_district_of_texas/2004_patent_rules_ed_texas.pdf.

[8] Leychkis, *supra*, 9 *Yale J. L. & Tech.* at 219; but see Norman H. Beamer & Janis Lee, Freedom of Choice: Some courts are more popular than others for patent litigation, 133 *The Recorder* 158 (Aug. 17, 2009), available at www.ropesgray.com/files/upload/Article_Freedom_9-17-09.pdf.

[9] Data from 2008 Federal Court Management Statistics, www.uscourts.gov/fcmstat/index.html.

[10] Robbins, *supra*, at www.law.com/jsp/tx/PubArticleTX.jsp?id=1202423817064&slreturn=1&hbxlogin=1.n.

[11] Kimberly A. Moore, Forum Shopping in Patent Cases: Does Geographic Choice Affect Innovation, 79 *N.C. L. Rev.* 889, 904-07 (2001).

[12] Data from 2008 Annual Report by the Director of Judicial Business of United States Courts, www.uscourts.gov/judbususc/judbus.html, and the U.S. Patent and Trademark Office's database of issued patents, patft.uspto.gov/.

[13] See *In re TS Tech USA Corp.*, 551 F.3d 1315 (Fed. Cir. 2008).

[14] Data from 2008 Federal Court Management Statistics, www.uscourts.gov/fcmstat/index.html.

[15] Levko, *supra*, 2008 Patent Litigation Study at 14.

[16] *Id.*

[17] Moore, *supra*, 79 *N.C. L. Rev.* at 912.

[18] Data from 2008 Annual Report by the Director of Judicial Business of United States Courts, www.uscourts.gov/judbususc/judbus.html.

[19] Data from 2008 Federal Court Management Statistics, www.uscourts.gov/fcmstat/index.html.

[20] Levko, *supra*, 2008 Patent Litigation Study at 14.

[21] *Id.*

[22] Data from 2008 Federal Court Management Statistics, www.uscourts.gov/fcmstat/index.html.

[23] Levko, *supra*, 2008 Patent Litigation Study at 14.

[24] *Id.*

[25] Entrepreneurs Discover Benefits of Incorporating in Delaware While Comparing Competing Costs With The Delaware Company's Quote & Compare Service, www.reuters.com/article/pressRelease/idUS95680+26-Mar-2009+PRN20090326 (Mar. 26, 2009).

[26] See Moore, *supra*, 79 N.C. L. Rev. at 904-07; data from 2008 Annual Report by the Director of Judicial Business of United States Courts, www.uscourts.gov/judbususc/judbus.html, and the U.S. Patent and Trademark Office's database of issued patents, patft.uspto.gov/.

[27] Roderick M. Thompson, Northern District of California Local Rules for Patent Cases, library.findlaw.com/1999/Jan/1/127570.html.

[28] See *In re Genentech*, 566 F.3d 1338 (Fed. Cir. 2009) (transferring to Northern District of California suit brought by foreign company against two companies headquartered in California).

[29] Data from 2008 Federal Court Management Statistics, www.uscourts.gov/fcmstat/index.html.

[30] Levko, *supra*, 2008 Patent Litigation Study at 14.