

Client Alert

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Why Is My Company Being Sued For Patent Infringement In Waco, Texas?

Nestled midway between Dallas and Austin, Waco, Texas, with a population of around 144,000 people, is the home of the Texas Ranger Hall of Fame and Museum, the Dr. Pepper Museum, Baylor University, and Chip and Joanna Gaines' Magnolia Market; and it now has one of the busiest courts for patent infringement in the nation.

Approximately one in five new patent cases in 2020 were filed in the Waco Division of the Western District of Texas (WDTX). Although other cities in the District, such as Austin, San Antonio, and El Paso, are considerably larger, the overwhelming majority of patent cases are filed in Waco. This article discusses several factors that have led to Waco, Texas, being home to the hottest patent docket in the country, and what to expect if you are sued there.

The business of buying and enforcing patents has been brisk for over two decades and attracts considerable investment dollars. Indeed, patent cases filed by investors who purchase patents they choose not to practice or commercialize (so-called non-practicing entities (NPEs)) represent anywhere from one-third to one-half of all patent cases filed each year. Despite a dip in new case filings from 2017-2019, the most recent trend shows an increase in NPE activity in 2020. This activity is helping to drive cases in the WDTX since the NPE patent enforcement business model generally includes bringing cases in fora that are fast, predictable, and perceived as being friendly to patent plaintiffs.

Until recently, the go-to patent jurisdiction was the Eastern District of Texas (EDTX). Indeed, in 2016, approximately 40% of all patent cases were filed in the EDTX. That changed abruptly in 2017 with the Supreme Court's decision in *TC Heartland LLC v. Kraft Foods Group Brands LLC*, 137 S. Ct. 1514 (2017), which limited the choice of venue for most patent cases to a district where a corporate defendant "resides" or "has committed acts of infringement and has a regular and established place of business"—essentially limiting venue to where a defendant is incorporated or maintains a brick and mortar place of business. The EDTX, which is largely comprised of smaller towns and cities, does not satisfy this test for a significant number of potential targets of NPEs. Thus, patent plaintiffs have been forced into filing in other established patent jurisdictions where venue is appropriate under *TC Heartland*. Such jurisdictions include, for example, Delaware (the state of incorporation for a significant number of companies) and California (the home of many technology companies targeted by NPEs). Within two years after *TC Heartland*, EDTX filings fell dramatically to around 10% of all cases filed.

Unlike the EDTX, the WDTX, which includes Austin, hosts a large compliment of technology companies with physical facilities in the district. As a result, many companies that could escape a patent case filed in the EDTX after *TC Heartland* may not find similar relief in the WDTX.

Immediately after *TC Heartland*, however, the WDTX was not on most patent plaintiff's radar as a forum of choice. That changed in September 2018, when Judge Alan Albright received his commission to the Federal bench in the WDTX, Waco Division. Judge Albright had served as a magistrate judge in Austin in the WDTX in the 1990s; he then was in private practice focusing on intellectual property cases.

Unlike some judges, Judge Albright enjoys patent cases and has expressly stated that his goal is for Waco to become a destination for sophisticated patent litigation. Borrowing from the playbook of Judge T. John Ward, who built the EDTX into a patent litigation destination in the early 2000s, Judge Albright quickly put in place a set of local patent rules to administer patent cases quickly and efficiently, with the goal of moving cases to trial within 18 months or less of the complaint being filed. However, Judge Albright did not simply copy the EDTX rules. Instead, he drafted rules using his experience on the bench as a magistrate judge and his many years as a successful private practitioner in the America Invents Act era of *inter partes* review (IPR). As a result, Judge Albright's cases often move faster than a corresponding IPR, recently causing the USPTO to deny institution of otherwise timely IPR petitions based on discretionary grounds in some cases. Judge Albright frequently speaks to industry and legal groups, promoting Waco as a welcoming jurisdiction for patent cases. As a result, within two short years, Judge Albright's court is now one of the busiest patent courts in the country and receives praise from both plaintiff and defense counsel for efficiently and effectively managing patent cases. Judge Albright built a forum for patent litigation, and like a Field of Dreams, the patent cases have come!

Although Judge Albright has developed a sophisticated and effective court for managing patent cases, one thing outside his control is the jury pool. Prior to its rise as a patent litigation destination, the tendencies of EDTX jury pools were established through landmark personal injury cases, primarily stemming from the oil industry. The WDTX does not have a similar reputation.

The first jury trial in a patent case before Judge Albright is coming to a close this week. Regardless of the outcome of this first case, it is too early to generalize or predict how juries may respond to interlopers bringing their patent cases to Waco. Waco is not Marshall; and any plaintiff assuming a jury in one Texas community is interchangeable with another is making a mistake. The two courts may be less than 200 miles apart, but the educational background, employment industries, and values of the jury pool cannot and should not be presumed to be the same.

A defendant sued for patent infringement in Waco, Texas, should expect orderly case management with a predictable schedule leading to a prompt trial, a judge who understands and enjoys patent law, and a jury pool that reflects the values of a new home for patent cases in the Western District of Texas.

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