

The Texas Lawbook

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WDTX & EDTX: Resolving America's Patent Disputes or 'Judicial Hellholes'?

AUGUST 30, 2021 MARK CURRIDEN

The U.S. Constitution makes patents real property. No place in the U.S. holds property rights with more importance than Texas. And it makes sense that the Lone Star State is the patent litigation capital of America.

The first six months of 2021 proved it true once again.

New data shows that businesses, individuals and educational institutions filed more patent infringement lawsuits during the first half of this year in Texas than in any other two states combined, including Delaware and California.

Texas has two of the three busiest patent dockets in the U.S. – the Eastern and Western districts of Texas – and, as a result, is building one of the deepest and most experienced intellectual property bars in the world.

Leaders of some technology companies criticize Texas courts for being too accommodating to intellectual property plaintiff's lawyers who bring frivolous patent litigation from so-called patent trolls, which they claim are bad for business.

In fact, one association of large technology companies has described some federal courts in Texas as "judicial hellholes." They point to a landmark \$2.2 billion jury verdict in a patent infringement case in Waco just six months ago.

Most IP legal experts, however, say that patent trolls – companies that file "nuisance lawsuits" based on flimsy evidence of the validity of the patent in hopes of achieving quick and easy settlements – comprise an extremely low percentage of the patent litigation in Texas. The frivolous complaints that are filed are easily identified and can be weeded out by the courts, they say.

Purported patent owners lodged 790 complaints in the four federal court districts in Texas between Jan. 1 and June 30 – a 15% increase over the final six months of 2020, according to new statistics provided to *The Texas Lawbook* by Androvett Legal Media Research.

“Companies have spent a lot of money on research and development and to acquire their patent portfolios, and now they are taking steps to protect their patents or figuring out the value of their patents and extracting that value,” said Baker Botts intellectual property law partner Christa Brown-Sanford.

The Western District of Texas – specifically the Waco Division – continues to be the hottest patent docket in the country.

There were 503 new patent infringement complaints filed in the Western District during the first six months of 2021 – a 21% jump from the previous six months, the Androvett data shows. The WDTX patent docket recorded 29% more new cases than the 389 suits filed in the Delaware federal district, which ranks as the second busiest court for patent disputes.

Patent Litigation Trends							
	EDTX	NDTX	SDTX	WDTX	Texas	Northern California	Delaware
H1 2021	228	33	26	503	790	81	389
H2 2020	186	46	39	415	686	128	277
H1 2020	218	42	33	454	747	115	314
H2 2019	164	22	23	173	382	113	366
H1 2019	171	33	23	101	328	201	446
H2 2018	264	55	27	51	397	163	378
H1 2018	238	53	24	37	352	164	308
H2 2017	259	41	37	46	383	128	347
H1 2017	607	27	24	27	685	82	297
H2 2016	908	21	18	22	969	82	254
H1 2016	782	34	18	12	846	108	202
H2 2015	1164	52	19	23	1258	85	294
H1 2015	1401	63	20	45	1529	136	253
H2 2014	527	29	20	28	604	128	420
H1 2014	914	37	29	26	1006	128	525
H2 2013	790	46	23	31	890	129	598
H1 2013	722	34	27	22	805	120	737
H2 2012	729	23	22	25	799	128	607
H1 2012	542	35	24	31	632	133	390
H2 2011	279	33	19	26	357	117	310
H1 2011	332	17	22	27	398	122	176
H2 2010	474	27	17	13	531	128	127
H1 2010	180	35	30	25	270	78	132
H2 2009	135	15	15	14	183	76	137
H1 2009	114	27	20	11	172	92	96
H2 2008	147	16	13	6	182	83	80
H1 2008	159	26	21	9	215	84	89

Source: Androvett Legal Media and Federal Court Records

The Eastern District of Texas, once predicted to be neutered as a patent litigation jurisdiction after the U.S. Supreme Court’s decision in *T.C. Heartland v. Kraft Foods*, recorded 228 new lawsuits alleging patent violations – an 18% increase. The EDTX has the third largest patent docket in the country.

“It is probably faster right now to get a trial date in a patent case in the Eastern District than in the Western District because the Eastern District has fewer cases on its judges’ dockets,” said [Michael Heim](#), who represents plaintiffs and defendants in patent disputes.

The Northern and Southern federal districts experienced declines in new patent disputes submitted.

Lawyers sued 33 alleged patent violators in the Northern District during the first half of 2021 – down 28% from the final six months of 2020. The Southern District recorded 26 new patent cases between Jan. 1 and June 30 – a decline of 33%, according to the Androvett data.

Legal experts say the second half of 2020 is more comparable than the first half of last year because of the impact of pandemic from March to June.

While the Western and Eastern districts of Texas witnessed significant increases in new patent filings this year, the federal courts of Delaware experienced the largest jumps. The Androvett data shows that there were 389 patent infringement lawsuits filed in Wilmington during the first half of 2021 – up 40% from the final six months of 2020.

California federal courts bucked the trend. The four California districts recorded 233 new patent cases during the first six months of this year – down 15% from the previous six months.

But it is the Western District of Texas that continues to garner attention.

During the first six months of 2018, businesses, individuals and nonprofits filed only 37 patent infringement cases in the WDTX.

In September 2018, President Donald Trump appointee Alan Albright, a long-time intellectual property litigator and former federal magistrate who tried patent cases, was sworn in as a new U.S. district judge sitting in Waco.

Judge Albright implemented new patent litigation procedures and has seen his patent docket jump 1350% during the past three years.

“When looking to file a patent case, you first look for a judge who understands patent law and who enjoys handling patent trials, and Judge Albright is that person,” said Heim, a partner at Heim, Payne & Chorush in Houston “There are a lot of judges who are outright hostile to patent cases.”

Most IP lawyers clearly agree. During the past two years, more than 1,500 new patent infringement cases have been added to Judge Albright’s docket.

“Lawyers for both plaintiffs and defendants truly enjoy litigating their cases in front of Judge Albright,” said Winston & Strawn partner [Tom Melsheimer](#), who represents clients on both sides of the “v.”

“The judge is hard working, understands the issues, treats lawyers with respect and dignity and works hard to get the right result,” Melsheimer said. “That being said, I have been surprised at the pure volume of cases that have been filed in Waco. The

pandemic may have given lawyers at companies more time to identify more patent violations, which led to more cases.”

Melsheimer also noted that Judge Albright is much quicker to allow the parties in a case to conduct hearings via Zoom than many other judges.

“In the Western District and the Eastern District, the standing orders are clear and understandable and so you know what you are going to get,” said Derek Gilliland, a patent law partner at Sorey & Gilliland in Longview.

“In addition, there are so many corporations with offices or operations in the Western District, which satisfies the issue of venue,” Gilliland said.

But not everyone is happy that the Western District has become a hotbed for IP litigation.

The Computer and Communications Industry Association, a Washington, D.C.-based trade group whose members include Facebook, Intel, Twitter, Amazon and Uber, blasted the Western District and Judge Albright for being too friendly to patent plaintiffs, especially so-called patent trolls.

In an email to supporters Thursday, CCIA suggested that the American Tort Reform Foundation should consider adding the Waco Division to its next list of “Judicial Hellholes.”

“Patent trolls reap big money from pressing dubious charges of patent infringement against our country’s real innovators and job creators,” CCIA wrote in its Aug. 26 email blast. “The worst cases of abuse are found in Central Texas just off IH-35 between Austin and Dallas.”

“As we’ve noted, non-practicing entities (NPEs), a.k.a. patent trolls, have found a welcoming court in Waco,” CCISA wrote. “These shell companies hiding behind hedge funds, which are in turn backed by private equity and foreign investors, are relentless in their lawsuits.”

In fact, the largest damage award verdict of 2021 came from a jury in Waco in March when a panel of citizens ruled that technology giant Intel infringed on two patents held by hedge-backed VLSI Technology and awarded \$2.2 billion in damages. Intel is appealing.

To be sure, most respected patent trial lawyers agree that so-called patent trolls are a plague on the system, but they point out that most such cases can be weeded out if their patents are illegitimate.

“Lawsuits filed to obtain a nuisance value settlement are a black eye on the industry,” Heim said. “We can all see when patent lawsuits are frivolous.”

“But those who claim that all NPEs are patent trolls ignore this simple fact: At the end of the day, a patent is a property right. It can be bought and sold,” he said.

Legal experts put part of the responsibility of patent trolls’ successes on large companies, such as those that are CCIA members, who far too often pay the \$75,000 or so quick nuisance settlement to be dismissed from the case instead of employing top level legal teams to fight the frivolous lawsuits.

“Companies need to spend the money and force the patent trolls to show their cards,” Gilliland said. “The trolls have no intention of litigating their claims. Some companies and their lawyers have figured out that if they don’t settle right away, the trolls’ demands go down. And if they continue to hold out and fight, the trolls will eventually walk away.”

In interviews with more than a dozen judges and lawyers who regularly handle patent infringement cases, the experts agree that there are two primary legal issues in these disputes: Is the patent valid and did the defendant infringe?

Most IP lawyers say anti-patent litigation groups falsely accuse all NPEs of being patent trolls.

NPEs can be businesses, individuals, universities or even nonprofits that are either the original inventor of the patented technology or an entity that purchased the patent from the original inventor. For the most part, NPEs do not manufacture products related to the patents they own.

Private equity firms, for example, purchase valid patents from distressed technology companies or businesses seeking to sell assets to raise capital.

“Some of the largest companies in the world are selling their patent portfolios in order to raise cash,” Heim said.

Court documents show that IBM, Kodak, Nortel and even Google have sold some of their patents for hundreds of millions of dollars.

“There is a fundamental misapprehension between the high number of patent lawsuits and patent troll litigation,” Melsheimer said. “These NPEs are going to file their lawsuits. It is only a question of whether the lawsuits are filed in Waco, the Eastern District or Toledo, Ohio.”

Many patent industry insiders contend that the term “patent troll” was initially coined by former Intel assistant general counsel Peter Detkin. In a bit of irony, Detkin is now

managing partner of Intellectual Ventures, a private equity firm that acquires patents in order to profit from enforcement of those patents.

Only seven weeks after a Waco jury awarded VLSI the \$2.2 billion, another jury in Judge Albright's court completely rejected VLSI's patent infringement claims for \$3 billion. In fact, three-fourths of all civil federal jury verdicts since 2018 have been in favor of corporate defendants.

"Most of the companies that complain of trolls also engage in pretrial tactics that are clearly frivolous in efforts to delay or avoid trials or derail completely legitimate litigation," Gilliland said.