

VENUE MENU

CONSIDERATIONS ON WHERE TO FILE SUIT

Gary M Hoffman and Manu Bansal
Pillsbury Winthrop Shaw Pittman LLP¹

Your client has decided that it now wants to bring a patent infringement suit but has several options as to where the alleged infringing defendant can be sued. What are some of the considerations going into the best district court forum in which to initiate the suit? There are both statistical elements and subjective elements that should go into this determination. The present analysis focuses primarily on the statistical side, but will provide a list of some of the subjective non-statistical elements at the end.

The district courts (16) selected for consideration are the primary district courts where patent litigation suits have been filed since 2010. From 2010 to the end of 2015, the number of new patent suits grew by 259% in these courts. While the numbers listed for 2016 are just from the first 9 months of the year, it appears that there is a fall off this year in new suits; extrapolating the new suits would be about 4000 for these 16 courts.

It is of particular interest that during this time period, the number of new patent suits filed in the Eastern District of Texas increase 895 % from 2010 to 2015. A number of people had expected that with the changes in the joinder rules created by the American Invents Act and the application of the venue rules as to each separate defendant now sued in separate lawsuits that the number of lawsuits filed in the Eastern District of Texas would drop significantly starting in 2013. However, as seen from these figures, just the opposite has happened. It may be that while a number of defendants were sued in one action, they are now sued in separate actions.²

Just looking at the total number of lawsuits filed in the Eastern District of Texas may be misleading. While a lawsuit can be filed in any district court, the issue is whether the court will keep the case or transfer the case to another district or dismiss the case. It has been reported that through the first 9 months of 2016, 57% of the motions to transfer filed in the ED Tx were granted. However, in 2015, only about 120 motions to transfer were files.³

¹ Gary M Hoffman is a senior counsel and Manu Bansal, PhD, is a patent agent at Pillsbury, Winthrop, Shaw Pittman LLP

² See http://mcsmith.blogs.com/eastern_district_of_texas/2016/09/index.html.

³ http://mcsmith.blogs.com/m/eastern_district_of_texas/2016/09/no-infringement-claims-invalid-in-intel-v-htc-case.html.

As of December 1, 2015, Form 18 of the Federal Rules of Civil Procedure for the filing of direct infringement patent lawsuits was abolished. This required patent owners to subsequently file much more detailed patent complaints. According to data from Lex Machina, case filings on November 30, 2015, a record 259 patent cases were filed.⁴

Why have so many patent actions continued to be filed in E.D. Tex? Looking at the statistics may help to provide some insights. Also, it appears that the courts in E.D. Tex have not transferred out hugh numbers of cases.

In 2015, almost ½ of all new patent cases were filed in the E.D.Tex. In connection with such filings, non-practicing entities accounted for 68 percent of the cases filed in the first half of 2015. In fact, of the 2,540 cases filed in the Eastern District of Texas in all of 2015, 1,968 (or 77 percent) of them were brought by "high volume filers" (those filing at least 10 cases per year).⁵

Other factors include the percentage of cases where motions for attorney fees file by the defendant are granted and how the court treats Section 101 motions. As indicated in a recent article in Law 360 authored by attorneys at the Finnegan firm:

Indisputably, some patent reformers view the Eastern District of Texas as a patent friendly venue with recent statistics showing favorable outcomes for patentees. For example, on [motions file by defendants seeking] awards of attorneys' fees post-*Octane Fitness*, in 2015, the Eastern District of Texas granted only 9 percent of such motions, as compared to 33 percent nationwide. And, on § 101 challenges, in 2015, the court granted (or partially granted) only 33 percent of all motions to find asserted patents ineligible, as compared to 64 percent nationwide.² Thus, defendants in that court are statistically more likely to endure longer litigation because early motions under § 101 are more likely denied, and the recovery of attorneys' fees remains very limited.⁶

The reports from Lexmachina analysis indicates that:

To gain more insight into patent litigation, cases can be broken down according to whether the plaintiff* has filed at least 10 other cases within a 365 day span (high volume) or not (low volume). This simple behavioral measure reveals that patent litigation in the Eastern District of Texas and in the District of Delaware differs starkly from litigation in other districts: a far higher percentage of E.D.Tex. and D.Del. litigation is from high volume plaintiffs. Moreover, in those two districts, high

⁴ <https://lexmachina.com/category/analytics-articles/>

⁵ <http://www.finnegan.com/resources/articles/articlesdetail.aspx?news=13ab8326-f735-4c32-94e1-1de956c5db8e>

⁶ Id.

volume plaintiffs drive most of the volatility in case filings, both in time (i.e. spikes and dips within Eastern Texas) and between districts (i.e. Delaware's decline corresponds to the rise in Eastern Texas). In contrast, litigation by low volume plaintiffs is relatively consistent across time and districts.⁷

The number of new filings of patent litigations in E.D. Tex. are likely to be lower in 2016 than 2015, although still the highest in the country. Some people have indicated the belief that this is due to the heightened pleading standards; but it may be too early to say definitively.⁸

Number of Patent Cases Filed Per Year -- Top 16 Districts

Court	2010	2011	2012	2013	2014	2015	2016
E.D. Tex.	284	417	1251	1496	1427	2541	1332
D. Del.	253	485	1002	1335	946	545	355

⁷ <https://lexmachina.com/2016-third-quarter-litigation-trends/>

⁸ <http://www.iam-media.com/blog/Detail.aspx?g=83977628-3f7f-4a81-a36a-ec41c61d8d18> and http://mcsmith.blogs.com/eastern_district_of_texas/2016/07/edtx-patent-case-filing-trends-new-case-allocation-and-procedures.html

C.D. Cal.	224	317	519	421	335	299	265
N.D. Cal.	177	220	264	248	259	229	139
D. N.J.	155	180	160	145	286	272	166
N.D. Ill.	173	217	238	223	157	163	203
S.D. NY	108	152	144	136	121	155	91
S.D. Fla.	67	63	134	187	111	131	123
S.D. Cal.	56	80	142	225	75	80	85
D. Mass.	70	87	79	119	52	71	43
M.D. Fla.	70	80	78	58	90	71	52
E.D. Va.	62	73	86	91	84	52	45
N.D. Tx.	40	46	59	77	63	115	41
W.D. Wash.	51	61	44	39	40	55	19
E.D. Pa.	38	33	54	24	13	32	9
W.D. Wisc.	38	39	35	26	29	17	10

Totals by year

1866 2550 4289 4850 4088 4828 2978

Looking at the number of cases filed in a jurisdiction only tells part of the story. There are many other factors that need to be analyzed to try to understand why people file in a particular jurisdiction. Some of those factors are: who wins the cases, what percentage actually go to trial and median time to trial or other resolution. While the highest success rate for patent owners is in the District of New Jersey at 75.7%, this may be driven in part by the number of pharma patent suits against generics in this jurisdiction. But, only 25% of the cases in D.N.J. go to trial; 75% do not go to trial. Hence many are likely settled or dismissed before trial.

The Middle District of Florida also has a very high success rate for patent owners, 75.6%. However, only about 21% go to trial and compared to other jurisdictions, a lot fewer cases are filed in the M.D.Fla.

In contrast in the E.D.Tex., 43.7% of the cases go to trial and the patent owner wins in 50% of these cases. Another factor to be considered is the time to get to trial, which is a critical factor in some cases especially if the patent owner is trying to get an injunction against a competitor.

To help in reviewing the various statistics, the following 4 charts are sorted first by the number of cases resolved each year, then by the win rate for patent owners, then by the percentage of cases going to trial, then by the time to trial and finally the time to resolution. Depending on the facts in each case, one or another of these may be most important to the plaintiff in selecting a forum.

The number of IPRs being filed has grown substantially over the last few years. Typically, once the defendant files an IPR, the defendant moves to stay the litigation. While many courts grant such stays, the E.D.Tex grants a lower percentage of such motions.⁹

Data for courts that resolved 25 or more cases on the merits between January 2010 - October 2016

[Sorted by Number of Cases Resolved¹⁰](#)

⁹ <http://www.iptos.org/index.php?mact=News.cntnt01.print.0&cntnt01articleid=445&cntnt01showtemplate=false&cntnt01returnid=97>

District Court	Number of cases resolved	Plaintiff-Patent Owner Won	Defendant - Accused Infringer Won	Patent Owner Win Rate	Resolution by Judgment on Pleadings, Summary Judgment and JMOL	Percentage of Cases to Trial	Median Time to Trial (in years)	Median Time to Resolution (in years)
All district courts with 25+ cases	2683	1564	1119	58.3%	809	21.9%	2.28	1.63
D. Del.	352	186	166	52.8%	88	36.6%	2.12	2.38
C.D. Cal.	345	226	119	65.5%	105	7.8%	2.17	1.02
E.D. Tex.	247	124	123	50%	65	43.7%	2.3	2.35
D. N.J.	247	187	60	75.7%	40	25.1%	2.24	1.79
S.D. N.Y	196	131	65	66.8%	55	16.32%	2.35	1.12
N.D. Cal.	192	77	115	40.1%	93	22%	2.43	2.12

¹⁰ The data for “resolved cases” include cases that were resolved by default judgment, judgment on the pleadings, summary judgment, trial, consent judgment and judgment as a matter of law. The data does not reflect settlements, procedural resolutions and cases not yet resolved.

N.D. Ill.	165	59	106	35.7%	50	7.8%	4	1.4
M.D. Fla.	74	56	18	75.6%	16	21.6%	2	1.32
D. Mass	68	34	34	50%	26	25%	2.17	1.76
S.D. Cal.	64	38	26	60%	40	23.4%	2.05	2.11
E.D. Va.	54	24	30	44.4%	25	29.6%	1.14	1.12
N.D. Tex.	51	30	21	58.8%	18	13.7%	>0.9	1.52
S.D. Fla.	51	33	18	64.7%	15	21.5%	1.42	1.21
W.D. Wash.	48	24	24	50%	21	16.7%	>0.9	1.54
W.D. Wisc.	39	17	22	43.6%	25	46.1%	1.62	1.61
E.D. Pa.	29	17	12	58.6%	8	10.3%	>0.9	1.2

Data for courts that resolved 25 or more cases on the merits between January 2010 - October 2016

[Sorted by Patent Owner Win Rate](#)

District Court	Number of cases resolved	Plaintiff-Patent Owner Won	Defendant - Accused Infringer Won	Patent Owner Win Rate
D. N.J.	247	187	60	75.7%
M.D. Fla.	74	56	18	75.6%
S.D. N.Y.	196	131	65	66.8%
C.D. Cal.	345	226	119	65.5%
S.D. Fla.	51	33	18	64.7%
S.D. Cal.	64	38	26	60%
N.D. Tex.	51	30	21	58.8%
E.D. Pa.	29	17	12	58.6%
D. Del.	352	186	166	52.8%

E.D. Tex.	247	124	123	50%
D. Mass	68	34	34	50%
W.D. Wash.	48	24	24	50%
E.D. Va.	54	24	30	44.4%
W.D. Wisc.	39	17	22	43.6%
N.D. Cal.	192	77	115	40.1%
N.D. Ill.	165	59	106	35.7%

Often the comment is heard about E.D.Tex being the most pro patent jurisdiction and that it is a great place to bring any patent suit, especially for weak patents. However, if one focuses just on the statistics in the chart above where patent owners most often win, it can be seen from the chart that there are many jurisdictions much more favorable to a patent owner. But in addition to the success rates, you need to analyze the potential for any Section 101 motions, stays pending IPRs and damage awards. For example, 43.7% of the cases in E.D.Tex go to trial; this is higher than all of the other jurisdictions except for W.D.Wisc, where the percentage of patent owners winning at trial is lower than for the E.D.Tex.

Data for courts that resolved 25 or more cases on the merits between January 2010 - October 2016

Sorted by Percentage of Cases to Trial

District Court	Number of cases resolved	Patent Owner Win Rate	Percentage of Cases to Trial	Median Time to Trial (in years)
W.D. Wisc.	39	43.6%	46.1%	1.62
E.D. Tex.	247	50%	43.7%	2.3
D. Del.	352	52.8%	36.6%	2.12
E.D. Va.	54	44.4%	29.6%	1.14
D. N.J.	247	75.7%	25.1%	2.24
D. Mass	68	50%	25%	2.17
S.D. Cal.	64	60%	23.4%	2.05
N.D. Cal.	192	40.1%	22%	2.43
M.D. Fla.	74	75.6%	21.6%	2
S.D. Fla.	51	64.7%	21.5%	1.42
W.D. Wash.	48	50%	16.7%	>0.9

S.D. N.Y	196	66.8%	16.32%	2.35
N.D. Tex.	51	58.8%	13.7%	>0.9
E.D. Pa.	29	58.6%	10.3%	>0.9
C.D. Cal.	345	65.5%	7.8%	2.17
N.D. Ill.	165	35.7%	7.8%	4

Data for courts that resolved 25 or more cases on the merits between January 2010 - October 2016

Sorted by Time to Trial

District Court	Number of cases resolved	Patent Owner Win Rate	Percentage of Cases to Trial	Median Time to Trial (in years)
E.D. Va.	54	44.4%	29.6%	1.14
S.D. Fla.	51	64.7%	21.5%	1.42
W.D. Wisc.	39	43.6%	46.1%	1.62
M.D. Fla.	74	75.6%	21.6%	2
S.D. Cal.	64	60%	23.4%	2.05
D. Del.	352	52.8%	36.6%	2.12
D. Mass	68	50%	25%	2.17
C.D. Cal.	345	65.5%	7.8%	2.17
D. N.J.	247	75.7%	25.1%	2.24
E.D. Tex.	247	50%	43.7%	2.3
S.D. N.Y	196	66.8%	16.32%	2.35
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N.D. Ill.	165	35.7%	7.8%	4
W.D. Wash.	48	50%	16.7%	>0.9
N.D. Tex.	51	58.8%	13.7%	>0.9
E.D. Pa.	29	58.6%	10.3%	>0.9

Data for courts that resolved 25 or more cases on the merits between January 2010 - October 2016

Sorted by Time to Resolution

District Court	Number of cases resolved	Plaintiff-Patent Owner Won	Defendant - Accused Infringer Won	Resolution by Judgment on Pleadings, Summary Judgment and JMOL	Median Time to Resolution (in years)
C.D. Cal.	345	226	119	105	1.02
S.D. N.Y.	196	131	65	55	1.12
E.D. Va.	54	24	30	25	1.12
E.D. Pa.	29	17	12	8	1.2
S.D. Fla.	51	33	18	15	1.21
M.D. Fla.	74	56	18	16	1.32

N.D. Ill.	165	59	106	50	1.4
N.D. Tex.	51	30	21	18	1.52
W.D. Wash.	48	24	24	21	1.54
W.D. Wisc.	39	17	22	25	1.61
D. Mass	68	34	34	26	1.76
D. N.J.	247	187	60	40	1.79
S.D. Cal.	64	38	26	40	2.11
N.D. Cal.	192	77	115	93	2.12
E.D. Tex.	247	124	123	65	2.35
D. Del.	352	186	166	88	2.38

Data for courts that resolved 25 or more cases on the merits between January 2010 - October 2016

Sorted by Awarded Damages

District Court	Number of cases resolved	Patent Owner Win Rate	Percentage of Cases to Trial	Median Time to Trial (in years)	Median Time to Resolution (in years)	Average Awarded Damages per year (in USD millions)
W.D. Wisc.	39	43.6%	46.1%	1.62	1.61	44.4
E.D. Tex.	247	50%	43.7%	2.3	2.35	30.7
E.D. Va.	54	44.4%	29.6%	1.14	1.12	23.7
D. Del.	352	52.8%	36.6%	2.12	2.38	22.5
N.D. Tex.	51	58.8%	13.7%	>0.9	1.52	21.4
N.D. Cal.	192	40.1%	22%	2.43	2.12	20.1
S.D. Fla.	51	64.7%	21.5%	1.42	1.21	19.1
W.D. Wash.	48	50%	16.7%	>0.9	1.54	17.6
S.D. Cal.	64	60%	23.4%	2.05	2.11	16.6
S.D. N.Y.	196	66.8%	16.32%	2.35	1.12	16.0
D. N.J.	247	75.7%	25.1%	2.24	1.79	8.2
D. Mass	68	50%	25%	2.17	1.76	7.0

N.D. Ill.	165	35.7%	7.8%	4	1.4	3.36
C.D. Cal.	345	65.5%	7.8%	2.17	1.02	1.75
M.D. Fla.	74	75.6%	21.6%	2	1.32	1.4
E.D. Pa.	29	58.6%	10.3%	>0.9	1.2	0.97

Even if the chances of going to trial are high and the chances for the patent owner to be successful at trial are both high, what are the potential damage awards in the particular jurisdiction? On average, the highest damage awards are from the E.D.Tex. Of course, potential damages are dependent on the facts of the specific case, but the E.D.Tex tends to be more liberal in amount of damages awarded.