

Retailers in Texas Beware – Waco is Open for Business for Patent Cases

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Nestled midway between Dallas and Austin, Waco, Texas, with a population of around 144,000, is home to 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 in the nation for patent infringement cases. Waco is part of the Western District of Texas (WDTX), which covers 92,000 square miles, including San Antonio, Austin, Del Rio, El Paso, Midland, and Pecos. For retailers, this vast footprint means they may have a physical presence in the Western District and thus, potentially be a target for a patent infringement case in Waco.

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 to 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. Retailers are no stranger to this trend and are often targets in these cases.

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). *TC Heartland* 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 to where a defendant is incorporated or maintains a brick and mortar place of business. The EDTX, 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 to file in other established patent jurisdictions where venue is

appropriate. Such jurisdictions include 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 hosts a large compliment of retail companies with physical facilities in the district. Many companies that could escape a patent case filed in the EDTX may not find similar relief in the WDTX. This is particularly true of brick and mortar retailers. Indeed, whereas some retailers were able to take active steps to avoid a physical presence in the EDTX, it will likely be more difficult for national and regional retailers to avoid a presence in the more populous WDTX.

Having a single store anywhere in the district may be enough to satisfy *TC Heartland* and put those retailers in the cross hairs of a WDTX-filed patent case. This will come into play in two situations. First, if the manufacturer of an accused product does not have a physical presence in the WDTX, a plaintiff may still elect to bring suit against the retailer selling that the product. Second, in the case of infringement allegations based on technology solutions used by retailers, (e.g., apps, telephony systems, etc.), there may not be a single vendor responsible for the overall system in question and the retailer may need to defend the suit. Retailers thus should continue to expect to face a growing number of patent cases in Waco.

Those sued in Waco should know that that Federal court has only one judge: Judge Alan Albright, who received his commission to the bench in September 2018. Judge Albright enjoys patent cases and has expressly stated that his goal is for Waco to become a destination for sophisticated patent litigation. In furtherance of this objective, 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. Judge Albright built a forum for patent litigation, and like a Field of Dreams, the patent cases have come. One element outside his control, however, 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. Regardless of the outcome, it is too early to generalize or predict how juries may respond to interlopers bringing their patent cases to Waco. Any plaintiff assuming a jury in one Texas community is interchangeable with another is making a mistake.

Overall, be aware that having a store, a physical presence, or even employees located in the WDTX may expose a retailer as a target for patent infringement lawsuits in Waco. Understanding the dynamics of this jurisdiction will be helpful in obtaining a favorable outcome, whether through settlement or by taking the case to trial.

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