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Move Over Marshall, There's a New Sheriff in Town—The Rise of Waco and the Western District of Texas

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Since the mid-2000s, mention Marshall, Tyler, Sherman, Beaumont or Texarkana to an experienced patent litigator and you would get knowing nods about this string of small Texas towns, tips on their favorite BBQ or Tex-Mex restaurants, and war stories about the big patent wars fought there. The Eastern District of Texas, along with the District of Delaware and the Northern and Central Districts of California, rose to prominence as the primary battlegrounds for major technology companies and their non-practicing distant cousins ("NPEs") to determine the scope and monetary value of their innovations.

Given the Supreme Court's restatement of venue requirements in *TC Heartland*, Waco is not where you would expect the new center of US patent litigation to arise. Deep in the heart of the Texas Bible Belt, Waco lacks the abundance of technology companies commonly found in its District neighbors to the south, such as Austin and San Antonio. Even with Austin's prominence as a hi-tech hub, the Western District had only 2.5% of the patent cases filed nationwide in 2018.

That changed dramatically, however, with the appointment of District Judge Alan Albright to the Waco Courthouse in September 2018. A former patent litigator, Judge Albright intentionally adopted a combination of patent owner-friendly policies and special court rules to attract patent plaintiffs (the party with first pick on venue) to his courtroom. As a result, 792 patent cases were assigned to Judge Albright in 2020, the most of any judge in the country by a very wide margin. The caseload shifted west, but not past the I-35 corridor.

So why the recent rush to file in Waco? To be clear, most patent suits filed in Waco are by NPEs looking for a faster and more predictable road to settlement and not necessarily the largest possible jury award. But as the recent verdict in *VLSI v. Intel* revealed, when given the right case, juries in the Western District have no trouble granting the $1Billion+ awards seen in the other major patent venues. For non-practicing plaintiffs, filing in Waco also has the benefits of knowing exactly who your judge will be and that the chance of an early invalidation of the asserted patent(s) by either the court or the PTAB is essentially zero.

The case assignment practice used in the Western District guarantees that as long as the case is first

filed in Waco, it will be assigned to Judge Albright. This is true even if the location of facilities, witnesses and documents make the case more convenient to another Division in the District. Once assigned to Judge Albright, he retains supervision of the matter even if the case transfers later to Austin or San Antonio at the request of the litigants.

Of particular interest to non-practicing plaintiffs, Judge Albright has never granted a pleading stage motion for lack of patentable subject matter (often called “101” or “Alice” motions). Judge Albright’s well-publicized judicial philosophy is that given a patent’s presumption of validity, such motions are appropriate only after claim construction discovery is completed and a Markman order is entered.

Nor does Judge Albright typically grant 28 U.S.C. §1404(a) motions to transfer venue outside of the Western District for the convenience of witnesses and evidence given the large number of technology companies located in Austin. After repeated criticism from the Federal Circuit for delaying his consideration of fully briefed venue motions until after claim construction, Judge Albright this week entered Standing Order er that requires all venue motions to be determined prior to claim construction. This Order goes into effect immediately. Whether Judge Albright’s new procedure will lead to granting more transfer requests remains to be seen, however. Each time he was reprimanded by the Federal Circuit for delaying consideration of transfer until after claim construction, Judge Albright quickly issued a flat denial of the motion.

Despite Judge Albright’s recent Order providing for faster determination of venue challenges, there are still multiple factors making Waco a preferred destination for patent disputes. Judge Albright’s standing Order Governing Proceedings for Patent Cases (OGP), issued 26 February 2020, provides a very accelerated time to trial, usually within 18 months of the initial case management conference. The OGP also, uniquely, stays all discovery other than what is necessary for claim construction until after the Markman hearing and generally limits the number of terms for construction to ten, unless the parties can convince the court that more are required for that case. From the perspective of NPE’s, the restrictions contained in the OGP tend to minimize discovery expenses prior to claim construction and encourage more meaningful settlement discussions once the court’s constructions are known.

In view of his streamlined time to trial, Judge Albright is also predisposed to deny motions to stay his proceedings pending a validity challenge via IPR before the PTAB. Judge Albright has publicly stated that he will not stay cases pending the outcome of an IPR absent special circumstances, since he believes that patent owners deserve jury trials in federal court and that he can “get a patent trial resolved more quickly than the PTAB can.” Without a stay, and in view of a Markman decision and likely trial date before the PTAB could issue a final written decision, the PTAB may increasingly rely on these facts to deny institution of IPRs under 35 U.S.C. §314(b) for cases pending in the Western District.

Taking these features together (ability to pick your judge, low likelihood of early invalidation of the asserted patent, low chance of transfer, lower initial discovery costs and a fast timeline to trial), it is easy to see why the Western District became the overwhelming favorite jurisdiction of plaintiffs in 2020. Will it continue in 2021? Probably, as long as Judge Albright is at the helm. In many respects, having a large portion of the lower-end NPE cases consolidated in one court with expedited procedures and limited discovery is a reasonable way to keep the cost of such nuisance suits contained. At the same, the Chief Judge in the WDTX has left whether to hold trials during the Covid pandemic to the individual discretion of each Judge. As demonstrated by the recent *VLSI v. Intel* trial, Judge Albright believes trials can proceed safely during the pandemic when the proper precautions are taken.

Should other judges in the Western District decide they want a larger slice of the patent docket, however, all it might take to throw the current system into chaos would be a change in the way patent cases are assigned (such as a move to the “wheel” approach used in the Northern District of California). Suddenly, the predictability and uniformity of Judge Albright’s approach could completely fall apart as different Judges adopt their own rules and systems. In light of Judge Albright’s enthusiasm for building the largest patent docket in the country, however, significant changes to Western District practice appear unlikely at this time. Indeed, the *VLSI* verdict likely made plaintiffs’ view of the potential pot of gold in Waco shine just a little bit brighter.

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