



Podcast Transcript

Patent Litigation: How Low Can You Go?

Date: April 18, 2024

Guest: Jen Kurcz, **Host:** Leeann Lee

Run Time: 8:21

For questions and comments contact:



Jennifer M. Kurcz

Partner

Chicago

T: +1.312.416.6282 | jkurcz@bakerlaw.com

Lee: There is no question that new patent litigation case filings are down across the board. However, the reason for the downward trend depends on whom you ask. Our attorneys examine the numbers behind the decline and enlist their insights and experiences to explain the drop in filings. In BakerHostetler's inaugural Intellectual Property Perspectives Thought Leadership piece, the Intellectual Property Practice Group highlights myriad IP-related topics that are at the forefront of industry developments inspired by client wins and current challenges and trends. I'm Leeann Lee, and you're listening to BakerHosts.

On today's episode, we discuss new federal district court patent cases in the three busiest district courts across the country. To provide us with insight into this topic, we have Jen Kurcz, a partner in the Intellectual Property Group at BakerHostetler. Jen leads BakerHostetler's IP team for the Chicago office and is a seasoned patent litigator with more than 20 years of experience representing technology companies on both sides of the V. Her experience is heavily concentrated on district court litigation, federal appeals, and PTAB proceedings. She works with clients to provide insightful and practical advocacy, often drawing on her depth of knowledge and experience in computer science litigation. Welcome to the show, Jen.

Kurcz: Thank you.

Lee: So, to start off, BakerHostetler recently published an article analyzing patent filing trends over the last several years in various courts, as well as across the country. At a high level, can you walk us through the trends that your team observed for district court filings?

Kurcz: Yes, of course. Our team pulled data from the last several years off of Docket Navigator and charted the number of new district court patent cases that were filed between 2019 to 2023. We also looked at the number of cases in the most popular patent filing jurisdictions as well: the Western District of Texas, the Eastern District of Texas, and the District of Delaware. And when we analyzed the data, we discovered that patent filings across the country dropped close to 20% in 2023 as compared to 2022. In fact, 2023 was the lowest number of filings since 2010. We also noticed a drop in patent filings in the District of Delaware and the Western District of Texas but an increase in filings in the Eastern District of Texas.

Lee: Okay. So, can we back up and have you explain how patent cases wind up in a given court in the first place?

Kurcz: Sure. The Supreme Court requires that to file a patent case in a given court, you have to make sure that venue is proper. Venue is proper based either on number one, where a defendant is incorporated, or number two, where the defendant has committed an act of infringement and has a regular and established place of business. And under these venue rules, there's a few courts that rise to the top year after year.

Lee: So, how does venue then impact which courts patent holders file in most often?

Kurcz: Since over 70% of Fortune 500 companies incorporate in Delaware, it is no surprise that Delaware sees a lot of patent filings, consistently in the top three of all courts. It is a state where there is venue over many, many companies. But on the second prong, you can really file anywhere there is infringement and where the defendant has a regular place of business. So, that is where you get a huge draw to two Texas courts.

First, the Eastern District of Texas in Marshall has drawn patent owners for over 20 years because of litigant-friendly judges, first Judge Ward and then Judge Gilstrap, and rules that allow cases to get to trial much more quickly. When filing in that court, the plaintiff knows they get that judge and those rules. And in 2018, a new venue popped up that attracted patent filers in droves, the Western District of Texas. And that is when Judge Albright, a former patent litigator, was appointed to the bench in Waco, Texas. He promptly put in place patent rules to make the cases proceed quickly and advertises at conferences around the country. He is also reluctant to wipe out patent cases at an early stage, and since he is the only judge in Waco, plaintiffs were assured of getting Judge Albright and his rules when filing there.

Lee: Interesting. So, let's start with the patent filings across the country. What do you think caused the dramatic drop in the number of filings?

Kurcz: As with any trend, it is likely driven by a number of different factors. First, economic headwinds. Given rising interest rates, the cost of money is higher. Litigation funders need greater success to turn greater profits. So, that certainly could be putting downward pressure on filings.

Second, there was a decrease by certain prolific patent filers in the number of lawsuits brought in 2023. For example, while the patent filer IP Edge was responsible for several hundred of filings in 2022, it looks like they brought just a handful of additional suits in 2023. This alone could make up much of the drop in filings just by itself.

Lee: Wow. So, what do you believe drove the change in the number of filings at a jurisdictional level?

Kurcz: Let's start with Delaware. So, with respect to Delaware, by the end of 2022, Judge Connolly began critically assessing who the real parties and interests were. He issued standing orders designed to require parties to disclose funding arrangements. This seemed to have a chilling effect on filers who were concerned about being exposed before this court. So, likely the drop in Delaware was caused by these new rules.

The new rule changes also likely drove the drop in the Western District of Texas. In mid-2022, the Western District of Texas changed how patent filings are assigned. It was no longer the case that a party could file in the Waco division and stay there, getting Judge Albright. Now, if you file in the Waco division, your case could be randomly assigned to one of a dozen judges within the entire Western District of Texas, which includes Austin, and numerous judges who are less friendly to patent litigants. Again, this likely had a chilling effect on litigants who had planned to file before Judge Albright and may have had to reevaluate their filing strategy in the wake of this order.

And then finally, it seems like this order may have subsequently driven some of those filers back to the Eastern District of Texas, where the number of cases actually rose. It seems like patent holders likely decided against filing in the Western District of Texas as frequently, instead just filed their case back in the Marshall Division of the Eastern District of Texas, where they were assured to get Judge Gilstrap.

Lee: Okay. So, looking ahead, what does BakerHostetler project will occur with patent litigation in 2024?

Kurcz: While it is hard to predict future trends, it doesn't seem that the number of patent filings can get much lower. It seems like the economy is heating up again. Interest rates seem to be holding steady, and thus we expect more filings in 2024 than we saw in 2023.

Lee: This has been a great conversation. Thank you so much, Jen.

Kurcz: You're welcome. I'm happy to be here.

Lee: If you have any questions for Jen, her contact information is in the show notes. For more information on the Thought Leadership piece, we encourage you to download the document on bakerlaw.com. As always, thanks for listening to BakerHosts.

Comments heard on BakerHosts are for informational purposes and should not be construed as legal advice regarding any specific facts or circumstances. Listeners should not act upon the information provided on BakerHosts without first consulting with a lawyer directly. The opinions expressed on BakerHosts are those of participants appearing on the program and do not necessarily reflect those of the firm. For more information about our practices and experience, please visit bakerlaw.com.