

PATENT AND TRADEMARK LAW

Expert Analysis

The Patent Litigation Comeback Of 2020

The COVID-19 pandemic of 2020 hammered the legal landscape and brought countless new challenges. The pandemic triggered devastation, both economic and otherwise, and disrupted operations in the courts and across the broader legal industry.

Despite the recession—or partly as a result of it—2020 was also a year of growth for patent litigation in the United States. This column provides a look back at patent litigation filing statistics in recent years across district courts in the United States, with an eye towards current trends that in all likelihood will continue deep into 2021.

2020: A Surge in Patent Litigation

Beginning first with recent filing counts, Figure 1 provides annual counts for patent cases filed in U.S.

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district courts from the beginning of 2017 to the end of 2020. After a decline in case filings to approximately 3,500 in 2018 and 2019, nearly 4,000 patent cases were filed in 2020, marking a return to 2017 levels.

This increase in filings is no surprise. At the start of the pandemic, this column analyzed prior periods of economic downturns as a basis for considering the then-budding pandemic-driven recession and its potential impact on intellectual property strategy in 2020. Robert Maier, How Will the Economic Downturn Impact US Patent Practice, *New York Law Journal*, Volume 263, No. 101 (May 27, 2020). The conclusion at that time, based in part on application of a prior study by a group of academics and the Chief Economist

at the U.S. Patent and Trademark Office, was that a combination of macroeconomic factors, coupled with a rise in third-party investment in patent litigation, would likely lead to an increase in patent litigation in 2020. Alan Marco et al., *Do Economic Downturns Dampen Patent Litigation?*, 12 *J. Empirical Legal Stud.* 481 (2015).

That much has now come to pass. The increase in patent litigation in 2020 after some years of decline was partly driven by those broader macroeconomic factors, further fueled by a continuing torrent of litigation funding in patent cases. Indeed, as the economy became increasingly unpredictable in the first half of 2020, funders flocked to litigation, including patent cases, as an investment vehicle—a loose hedge and ultimate diversification, because the outcomes of patent litigations are completely untethered to unpredictable markets and broader economic trends. It is no surprise given this continuing rise in litigation

funding that non-practicing entity or patent troll cases (i.e., those filed by companies that purchase patents with the goal of asserting and monetizing them, sometimes by questionable means) skyrocketed, and by mid-2020 already had increased 30% from just two years prior. Joe Mullin, *Fighting Abusive Patent Litigation During a Year of Health Crisis: 2020 Year In Review*, Electronic Frontier Foundation (Dec. 31, 2020).

The Same Circuits Were Hotbeds of Patent Litigation in 2020

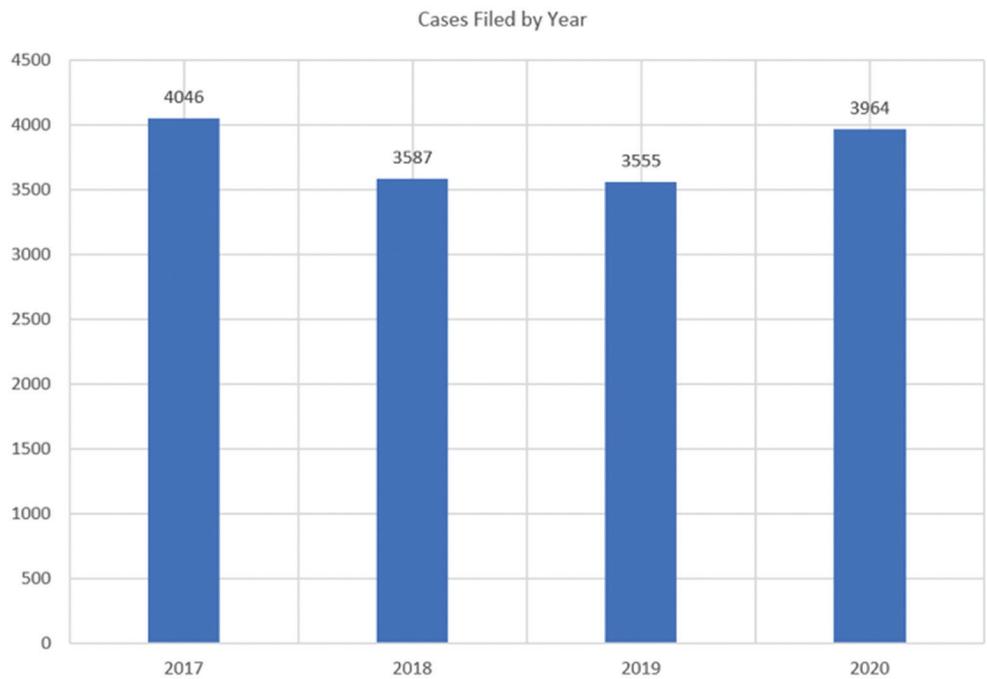
As in the past, the rise in patent cases was heavily concentrated in three circuits in particular that have for years dominated the share of patent litigation across the U.S.: the Third, Fifth, and Ninth Circuits. These three circuits have for years been home to some of the most active district courts for patent litigation in the United States, particularly centralized in California, Delaware, and Texas.

Going Westward in Texas

There is no great surprise that the bulk of the cases filed in 2020 continued to remain concentrated in Texas, as has typically been the case for years now. That said, while the Eastern District of Texas was formerly home to the vast majority of new patent cases nationwide, the bulk of new case filings have now shifted to the Western District

FIGURE 1

Patent Case Filings in U.S. District Courts, 2017 to 2020 (Data from Docket Navigator)



of Texas. As illustrated in Figure 3, which provides a breakdown of patent cases filed in Texas, while all four districts in Texas experienced an increase in patent litigation filings in 2020 compared to the prior year, the Western District of Texas saw the largest increase—and it's not close.

Cases filed in the Western District in 2020 more than doubled the number filed in the Eastern District. The primary reason the Western District of Texas now tops the list of popular patent litigation jurisdictions is that Judge Alan Albright, a former patent litigator during his days in private practice who assumed his position on the bench there in 2018, has advanced specialized

procedures for patent cases and developed a reputation for moving cases very rapidly through his court. See, e.g., Syed Fareed, Q&A Session with Judge Alan Albright, Baker Botts (Nov. 18, 2020). In addition, this district includes Austin, the “Silicon Hills” that continue to grow into a burgeoning tech town, with the companies moving there being the types of companies that frequently find themselves in the crosshairs of patent assertion campaigns.

Patent holders still have more limited choices than in the past as to where they can bring suit against accused infringers, thanks to the Supreme Court's 2017 decision in *TC Heartland*, which restricts the ven-

FIGURE 2

Cases Filed in 1st to 11th Circuits, 2017 to 2020 (Data from Docket Navigator)

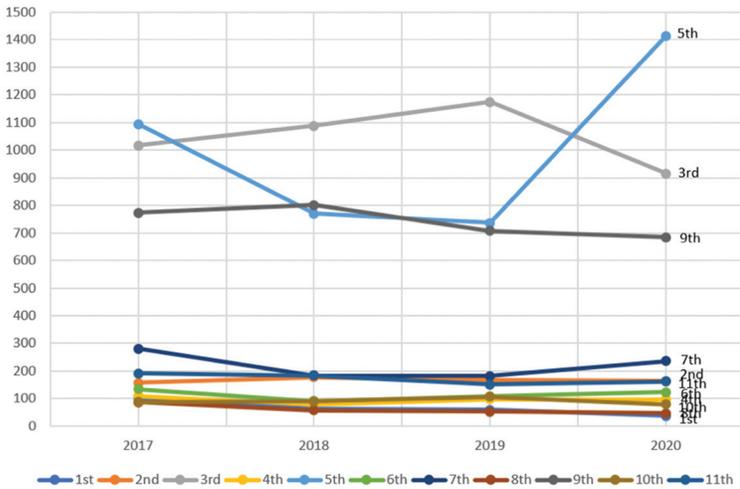
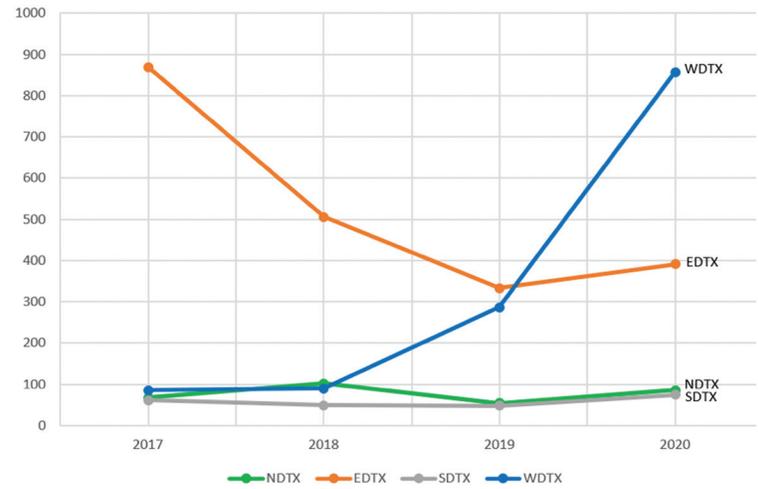


FIGURE 3

Cases Filed in Texas District Courts, 2017 to 2020 (Data from Docket Navigator)



ues in which any given defendant may be sued in a patent case. But given the numbers, that decision has not had any significant impact on patent holders' abilities to sue defendants in the Western District.

Tea Leaves for 2021

All signs point to sustained increasing patent litigation activity into 2021, and perhaps beyond. As to the macroeconomic indicators discussed in last year's column, the conditions now are similar to those at the start of the pandemic. The TED spread, which is a measure of industrywide credit risk, remains low. U.S. Gross Domestic Product partially rebounded in the third quarter of 2020, though with signs of some weakening momentum and limited investment, despite a red-hot stock market and government infusions through stimulus packages. *U.S. third-quarter GDP*

growth revised slightly higher, CNBC (Dec. 22, 2020). Raging virus spread and the risk of further shutdowns into Q1 remain in the short term, at least until vaccines can be distributed more broadly. The relevant macroeconomic conditions all lean in favor of more patent litigation across U.S. district courts.

And these factors will also continue to be compounded by elevated patent transactions activity—often a leading indicator of increased assertion of those patents that change hands, as it stands to reason that a company that pays money to acquire a portfolio of patents typically does so intending to recoup the initial investment, and then some, through monetization and ultimately assertion efforts. See Matthew Bultman, *Patent Lawsuits on Rise, Buying Spree Hints More to Come*, Bloomberg

Law (June 12, 2020). This transaction activity goes hand-in-hand with increased patent litigation funding activity, which will continue to stoke new case filings.

The bottom line is that corporations who frequently find themselves defending patent assertions—and even those that do not—should continue to expect increased patent litigation activity through 2021 and beyond, and maintain all best practices in what will likely persist as a high-risk environment. And companies incorporated in Texas, or those with places of business in the Western District, should remain prepared to defend patent cases there.