

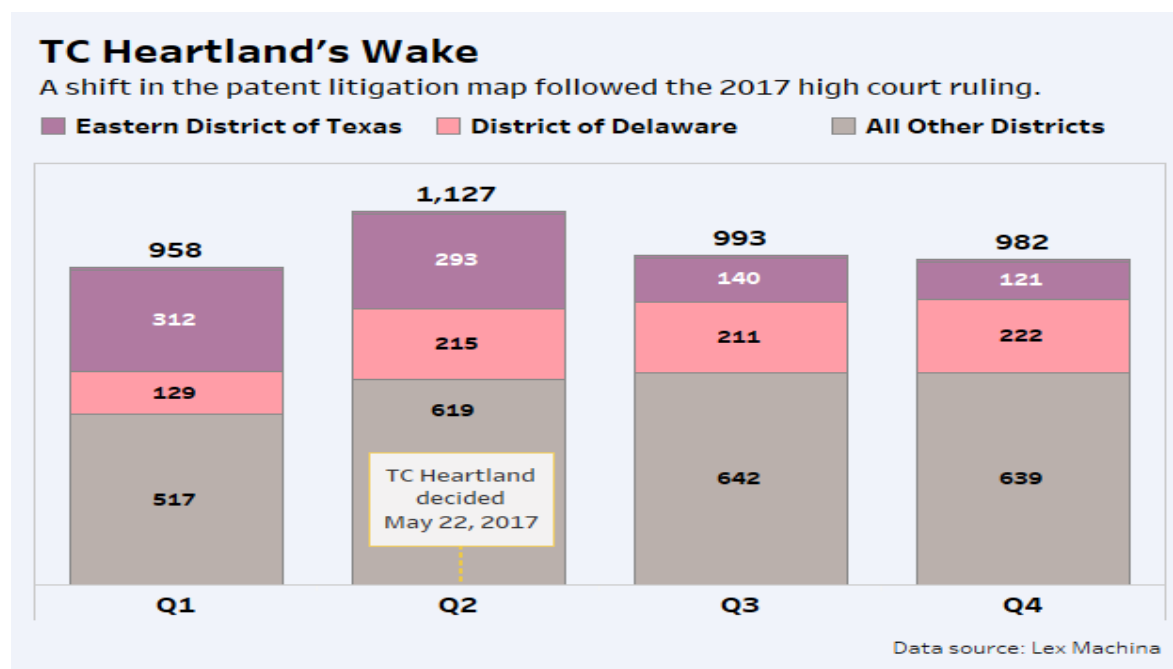
New Normal Takes Shape After TC Heartland Shakeup

By Ryan Davis

Law360 (February 7, 2018, 8:03 AM EST) -- The number of patent complaints filed in the Eastern District of Texas dropped significantly following the U.S. Supreme Court's TC Heartland ruling while Delaware and other venues saw more action, but attorneys say they don't expect filing trends to change much more going forward.

According to statistics compiled by Lex Machina in a new report, there were 312 patent suits filed in the reputedly plaintiff-friendly Eastern District of Texas in the first quarter of 2017, before the high court's May ruling tightened venue rules for patent litigation. But in the fourth quarter of the year, only 121 suits were filed in East Texas.

In contrast, 129 suits were filed in the District of Delaware in the first quarter, but that shot up to 222 in the fourth quarter. Other districts also saw an increase as patent plaintiffs struck out for new territories that were more likely to be proper venues under TC Heartland.



All of those numbers are in line with what many observers expected when the justices cast aside precedent that had given patent owners a free hand to file suits in just about any district and instead held that companies can only be sued where they are incorporated or have a place of business. And though it's been only seven months since the court's ruling, attorneys expect the current filing trends to remain steady.

"I do think we've probably reached some sort of equilibrium sooner than is often the case with a decision of this magnitude," said Megan Woodworth of Venable LLP.

That's in part because many litigants had anticipated a decision like *TC Heartland* and had begun refining filing strategies even before it came down, she said. In addition, the Federal Circuit's *In re: Cray* decision months later, which defined a "place of business" for patent venue purposes, resolved many questions about where suits can be filed.

As a result, many patent plaintiffs have moved away from filing in the Eastern District of Texas, where establishing that venue is proper may be a challenge, and toward either Delaware, where most companies are incorporated, or the accused infringer's home district, where fights over venue can be avoided.

Courts will continue to grapple with follow-on venue-related issues for the foreseeable future, but those issues are unlikely to have a dramatic impact on where suits are filed, said Adam Hudes of Mayer Brown LLP.

"It may shift around the margins, but overall this is the equilibrium we'll be living with for the near future," he said.

After the court's decision, many observers speculated that the type of plaintiffs that sue many companies at the same time, which make up the bulk of the Eastern District of Texas patent docket, could take several approaches with their new filings. As it turns out, each of those strategies has been used by various plaintiffs, Woodworth said.

For instance, some have continued to sue in the Eastern District of Texas and make an effort to show that venue is appropriate even under the new rules. Others have decamped to Delaware, where the state's status as a hot spot for incorporation often makes venue a non-issue. Still others have started spreading their cases to districts around the country and suing where the defendants are based.

Clearly, scores of plaintiffs are continuing to rely on the Eastern District of Texas and its policies widely seen as favoring patent owners and driving settlement, even with the new venue rules.

"You can best describe the impact on the Eastern District of Texas as down but not out," Woodworth said. "It certainly hasn't gone to extinction as a few people might have predicted. For a district of its size, it has a significant number of cases being filed there."

Chad Landmon of Axinn Veltrop & Harkrider LLP said he didn't expect to see over 100 suits each quarter still being filed in East Texas.

"I'm surprised there's not an even greater increase in Delaware and a further decrease in the Eastern District of Texas," he said.

At the same time, many plaintiffs have turned to Delaware, which has been second to the Eastern District of Texas for patent complaints for years. Hudes said the district's experienced judges make it attractive to plaintiffs, and so do some policies that tend to push cases to trial.

"Plaintiffs lawyers are more accepting of Delaware as a venue and have less incentive to fight against venue there," he said.

The District of Delaware, where two of the four judgeships are vacant, has enlisted judges from the Eastern District of Pennsylvania to sit by designation and help hear cases. Hudes said that it has therefore been "business as usual" for litigants in recent months, even with the influx of patent filings.

However, the Delaware uptick has been somewhat modest. The 222 cases filed there in the fourth quarter don't hold a candle to some of the busiest quarters in the Eastern District of Texas, where it was common for over 400 patent complaints per quarter to be filed in recent years. In one quarter in 2015, it attracted a whopping 839 cases.

The modest increase in Delaware suggests that patent complaints are now more spread out around the country. Other districts in Texas, California, Washington and possibly Massachusetts, all of which are home to many large companies, will likely get more suits in the future.

What happens to cases filed in those districts, which have not often been in the patent spotlight, could influence where future suits are filed.

"We're still seeing this shake out and play out," Landmon said. "Certainly everyone will be sitting back to look at what's going on and how different jurisdictions deal with the venue issue and with patent cases in general."

For instance, if a certain district not currently known as a patent hot spot starts issuing rulings that are broadly favorable to plaintiffs or begins imposing sizable damages awards, other plaintiffs may seek to file there to get in on the action.

But even if that happens, "it's hard to believe that would cause any more than a blip," Hudes said, in part because TC Heartland will likely make it difficult for most plaintiffs to file suit in a newly appealing venue unless the defendant has a connection there.

Results in districts newer to the patent game likely won't change the reality that many suits will

continue be filed in Delaware, Texas and a handful of other locales. While overall filing trends may not shift much as courts grapple with venue issues like what constitutes a place of business, those issues will remain hotly contested in individual cases and will keep attorneys busy.

The Federal Circuit's post-TC Heartland decisions "certainly didn't give all the answers," Woodworth said. "District courts will still have a lot of decisions on this issue, and there will be increasing motion practice that is not going to settle down soon."

--Editing by Jeremy Barker and Aaron Pelc.

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