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EASTERN DISTRICT ROCKET DOCKET DECELERATES IN MARSHALL DIVISION

Cases Filed Now May Not Get Trial Dates Until Late 2011 or Early 2012

by MARY ALICE ROBBINS

The voluminous filings of patent cases in the U.S. District Court for the Eastern District of Texas in Marshall has slowed the "rocket docket" that Judge T. John Ward launched in early 2001 by promulgating rules meant to expedite the disposition of patent infringement suits.

Jeffrey Plies, an intellectual property litigation associate with Dechert in Austin, says the Eastern District has become a victim of its own popularity.

"It's attracting a lot of patent cases, but that's meant it's drowning in its own success," Plies says.

Plies says Dechert filed a patentee's suit in the Marshall Division on Dec. 31, 2007. At a July 29 status conference, Ward set the case for trial on June 6, 2011, he says.

It wasn't an isolated case. U.S. Magistrate Judge Chad Everingham of Marshall says he and Ward held July 29 status conferences for about 30 cases, the bulk of which were filed in the latter half of 2007. Trial settings for those cases are in the summer of 2011, Everingham says.

Everingham says his best guess is that cases being filed now will be set for trial in late 2011 or early 2012.

Appointed to the federal bench in 1999 by then-President Bill Clinton, Ward adopted rules for his court in early 2001 to speed up the handling of patent cases. Ward says the rules he adopted are a modified version of

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STAR Court Helps Felony Prostitution Probationers Leave Life on the Streets

by JOHN COUNCIL

Last month, Patricia walked in to Judge Lana

STUDENTS GRADE THEIR LAW SCHOOLS IN KEY CATEGORIES

by JEANNE GRAHAM

The grades are in. Students gave

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the patent rules used by federal courts in the Northern District of California. In 2005, the other judges in the Eastern District — which includes courts in Beaumont, Lufkin, Marshall, Sherman and Texarkana — adopted those rules districtwide.

Ward attributes the current long delay between the time patent suits are filed and the time they go to trial to the large number of case filings.

"There are just so many cases, I can't handle them all," Ward says.

The Eastern District of Texas had the highest number of patent suits filed in the United States in the last fiscal year, which ended Sept. 30, 2007. According to statistics provided by Dave Maland, clerk of the court for the Eastern District, plaintiffs filed 358 cases in the district last year, compared to the 334 filed in the Central District of California in Los Angeles, the runner-up, for the same period.

"The numerosity cropped up in Marshall particularly," Maland says. His statistical charts show 232 patent cases were filed in the Marshall Division in the last calendar year, compared to 79 in Tyler, the division with the second highest number of filings in 2007.

Everingham, who served as Ward's law clerk before he became a U.S. magistrate judge in April 2007, says that in 2002 and 2003, the Marshall Division set cases for trial within 13 to 15 months after the suits were filed.

As noted on Maland's statistical charts, patentees filed 31 cases in the Marshall Division in 2003. The number of filings in Marshall has climbed steadily since then, with 69 in 2004, 103 in 2005 and 134 in 2006.

emphasis on a plaintiff's choice of forum.

Ward says, "I try to follow the law as I understand it."

Patent litigator Doug Cawley, a shareholder in McKool Smith in Dallas, says the U.S. Congress has tried in its last three sessions to pass legislation that included provisions to limit forum-shopping by plaintiffs. Cawley, who follows such legislation, says the House passed H.R. 1908 in September 2007 but the Senate could not come up with a bill that would pass in that chamber.

Michael C. Smith, who also monitors patent legislation, says U.S. Sen. Patrick Leahy, D-Vt., abandoned the Senate's version of the bill, S. 1145, in April after determining that he did not have enough votes to win passage.

"The legislation doesn't appear to be going anywhere in this Congress," says Smith, a partner in Siebman, Reynolds, Burg, Phillips & Smith in Marshall.

Cawley says he believes such legislation is unnecessary because of the length of time it takes to move cases to trial in the Marshall Division, combined with the fact that defendants are having good experiences with judges and juries in the Eastern District.

Patentees' Preference

Several patent attorneys attribute the slowdown in the rocket docket to the combination of increased filings and the requirement that courts hold hearings in patent suits to interpret the claims in patents. In 1996's *Markman, et al. v. Westview Instruments Inc., et al.*, a unanimous U.S. Supreme Court affirmed the Federal U.S. Circuit Court of Appeals' decision that the construction of a patent,

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Ward says Everingham has helped with the patent caseload and is trying cases in which parties on both sides have given their consent. "It helps a lot," Ward says.

Everingham says he has tried four patent suits, including one that settled during trial, since taking the bench.

Maland says the number of patent case filings in Marshall is down slightly this year. During the 12-month period ending Aug. 11, the Marshall Division had 229 cases filed, Maland's charts show. During the same 12-month period, the Tyler Division had 70 patent case filings; the Lufkin and Texarkana Divisions had 20 filings each; the Sherman Division had eight and Beaumont had three, according to the charts.

However, U.S. District Judge Leonard Davis of Tyler says he currently has about 100 patent suits pending and has not encountered difficulties in managing that caseload. Davis estimates that, in most instances, the patent cases in his court are going to trial within 24 to 30 months after they are filed.

"Our rocket is still flying high," Davis says.

Ted D. Lee, immediate past chairman of the State Bar of Texas Intellectual Property Section and a shareholder in San Antonio's Gunn & Lee, says the docket in Ward's court is so clogged, because so many patentees file suit there based on the perception that the Eastern District is pro-patentee.

"The perception of the people who are getting sued is that the playing field is not level," says Lee, who usually represents defendants in patent cases filed in the Eastern District.

Lee says it's almost impossible for a defendant to get a motion for change of venue granted, because Ward places such