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IP: The Eastern District of Texas issues a reality check in 2013

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BY CYRUS MORTON, ANGELA MUÑOZ-KAPHING

Many patent plaintiffs continue to flock to the Eastern District of Texas as often as the current venue laws will let them. The district continues to vie with Delaware for the most patent cases in the country. For years this rush to the "Right Side" of Texas was driven by the popular belief that juries from Marshall to Beaumont simply hand out huge awards to everyone who comes calling with a patent. Like most conventional wisdom, there was some basis for it: In the early-to-mid 2000s, plaintiffs won 18 straight verdicts. But since then it's been around half plaintiff's verdicts, half defense. And recently, defendants have been on a roll, by our count winning 11 of 15 trials in 2013. The results of 2013 are worth a closer look for anyone on either side of the "v."

In 2013, the defendants in three cases obtained the ultimate "take nothing" jury verdict as three Eastern District of Texas juries found the patent claims invalid and not infringed. An additional seven juries concluded that the asserted claims in the cases before them were not infringed. Of this group, four juries found that the asserted claims were valid. The remaining three juries were not asked to determine validity. The defense verdicts were rounded out by two co-defendants who proved that the asserted claims were invalid for failure to add one or more inventors. In that case, validity and infringement were bifurcated and the infringement issue was not tried to a jury following the invalidity verdict.

The non-infringement and/or invalidity verdict count does not account for the plaintiffs' wins that defendants might count as their own because they kept the damages number very low. In November 2013, an Eastern District of Texas jury awarded plaintiff TQP Development, LLC $2.3 million in damages following its finding that the asserted claims were infringed and valid. This award is less than half of the $5.1 million that plaintiff claimed in damages. Likewise, the jury in Ericsson Inc. et al. v. D-Link Corporation, et al. found that defendants infringed claims in only three of the five asserted patents. The jury awarded Ericsson damages from each of the defendants ranging from as low as $435,000 up to $3.6 million.

At least in 2013, these trends in results do not seem to be judge or division dependent. The plaintiff and defendant win/loss rates in 2013 were evenly dispersed throughout the Eastern District of Texas. Of the four plaintiff verdicts, two were in the Marshall division and two were in the Tyler division. Six of the defense verdicts were registered in the Marshall division, and the remaining verdicts were decided by juries in the Tyler and Sherman divisions.

The results of 2013 may be surprising to some. For instance, The American Tort Reform Association labeled the Eastern District of Texas a "Judicial Hellhole" for patent litigation, and noted again this year that it is a favorite venue for non-practicing entities (NPEs) because the juries are perceived to be "plaintiff-friendly." Now, the results of 2013 may be somewhat of an anomaly — as may the plaintiffs' streak in the early-to-mid 2000s. But the results still speak for themselves. Any litigant, be they a solo inventor, major corporation, patent assertion entity, university, or smaller company, would be wise to take note. Planning your litigation strategy, and forecasting likely outcomes, obviously involves more than just getting in front of, or running away from, an Eastern District of Texas jury. Let's see what 2014 brings.

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