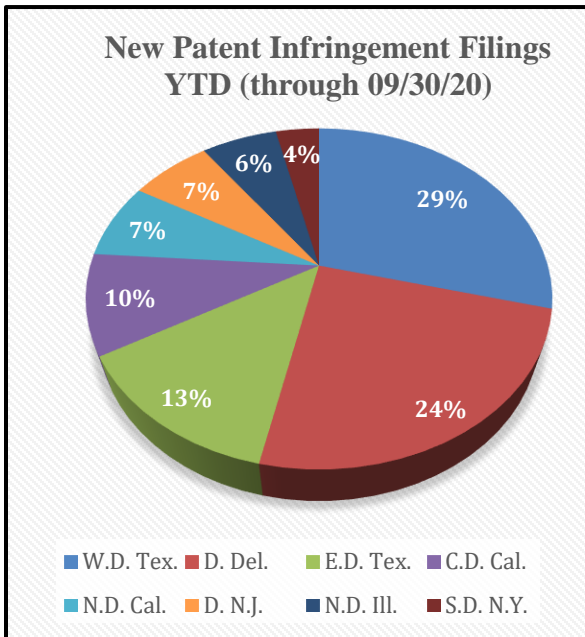


**Patent Rocket Docket: Let’s move things along**  
*New Rules from the Busiest Patent District in America*

By: Reid Huefner & Peggy Herrmann | October 2, 2020

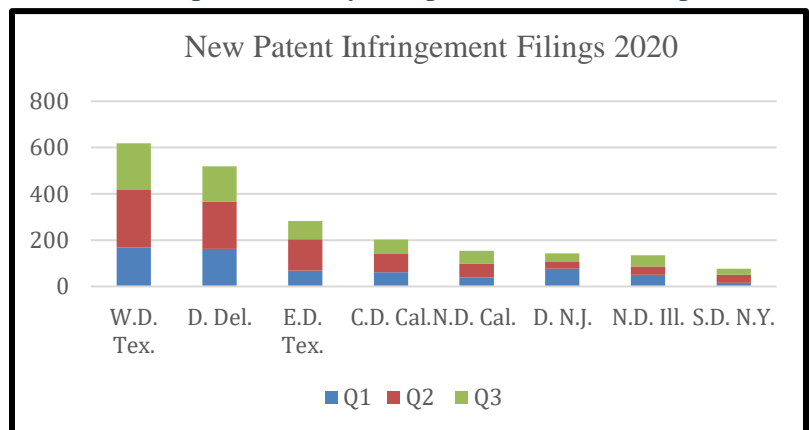


Since Judge Alan Albright took the bench in the Western District of Texas in 2018, the former patent litigator’s extensive experience, as well as the rise of Austin as a tech hub, has driven patent infringement filings to that District, with 618 new patent infringement filings this year through September 30, 2020.<sup>1</sup> To streamline the patent case docket, Judge Albright has, in the past three months (including last week), issued two orders governing the patent proceedings before him, as well as a [standing divisional order](#) resuming trials this week that had been delayed by the COVID-19 pandemic. Understanding of these rules of the Western District of Texas, Waco Division will help attorneys and their clients better navigate their cases in this hotbed of patent litigation.

As one can imagine, after [TC Heartland v. Kraft Foods Group Brands](#),<sup>2</sup> the increased patent infringement filings

in the Western District are accompanied by an increase in motions to transfer cases for improper venue. To help dispose of these issues early in the case, “the Court generally grants leave for the parties to conduct targeted discovery” regarding venue such as the defendant’s operations in the district and whether the defendant has an established place of business in the district. However, all discovery, besides that related to venue, jurisdiction, and claim construction, is stayed until after the *Markman* hearing. When discovery disputes do arise, before a party can file a motion to compel discovery, the parties must have a phone call with Judge Albright (arranged via his clerk) and must submit “neutral and non-argumentative” summaries of the discovery disputes prior to the conference and before the Judge grants any leave to file a motion to compel.

Judge Albright has also provided guidance and limitations regarding *Markman* hearings. To help focus the proceedings, each party is generally



<sup>1</sup> Unified Patents Portal: <https://portal.unifiedpatents.com/>.

<sup>2</sup> 137 S.Ct. 1514 (2017) (holding that venue in a patent infringement action against a domestic corporation is only proper in a district in the corporation’s state of incorporation or in a district where the defendant has committed acts of infringement and had a regular and established place of business.

limited terms for claim construction to 10 terms in cases involving one or two patents, to 12 terms in cases involving three to five patents, and to 15 terms in cases involving more than five patents. However, if the parties believe in good faith that further construction is needed, then the Court is open to that discussion.

To further drive efficient case resolution, the *Markman* hearing is scheduled (on Judge Albright’s [default schedule](#)) for 23 weeks after the case management conference—earlier than other high-volume patent litigation districts.

Event	W.D. Tex. Waco Div.	Average	D. Del.	E.D. Tex.	C.D. Cal.	N.D. Cal.	N.D. Ill.
<i>Markman</i> hearing	23 weeks after CMC or sooner	6-13 months after CMC	No LPR	~25 weeks after CMC	No LPR	~28 weeks after CMC	10-11 months after CMC
Trial <sup>3</sup>	52 weeks after <i>Markman</i> hearing (~1.8 years)	2.5 years	2.1 years	2.2 years	2.3 years	2.7 years	4 years

Additionally, Judge Albright’s order governing patent proceedings further altered the procedure at the *Markman* hearings. Specifically, the court issues a preliminary claim construction before the *Markman* hearing, and if either party disagrees with the court’s preliminary claim construction, that party presents first. However, if both parties disagree with the court’s preliminary claim construction, then the plaintiff will present first. The Judge has further ordered that the parties meet and confer, not once but twice (week 26 and week 39 after the claim construction hearing), to narrow the number of patents claim and prior art references being asserted. If the parties cannot agree to narrow the case, then the Judge is willing to step in to help resolve the narrowing. Judge Albright has also added more detail to his rules regarding rebuttal expert witnesses for indefinite or claim construction arguments. The parties must disclose the identities of the rebuttal expert witnesses 16 weeks after the case management conference, as well as the scope of their expected testimony.

Given the huge number of filings in the District and Judge Albright’s public statements that, absent special circumstances, he will not stay cases pending the outcomes of IPRs<sup>4</sup> and that he can “probably get a patent trial resolved more quickly than the PTAB can,”<sup>5</sup> all eyes are turned to the Western District of Texas, Waco Division to see how trials on its aggressive schedule play out.

<sup>3</sup> PWC 2018 Patent Litigation study

<sup>4</sup> See, “WDTX judge days its not a plaintiff’s paradise, but that won’t stoop rights owners flocking here,” *Lexology*, April 11, 2020, <https://www.lexology.com/library/detail.aspx?g=399f2532-f151-41ab-ba79-bad5cdd9cca0>.

<sup>5</sup> Eakin, Britain, “West Texas Judge Says He Can Move Faster Than PTAB”, *Law360.com* (Nov. 27, 2019), <https://www.law360.com/articles/1224105/west-texas-judge-says-he-can-move-faster-than-ptab>.