

Marshall law

Patent lawyers flock to East Texas court for its expertise and 'rocket docket'

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By ALLEN PUSEY / The Dallas Morning News

MARSHALL, Texas – In the quiet streets that surround the old Harrison County Courthouse, there's a bustle these days not easily noticed – even by the residents of this once powerful cotton and railroad town.



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The 105-year-old Harrison County Courthouse in Marshall is being renovated to add a state-of-the-art courtroom for federal patent lawsuits.

It's the bustle of briefcases. For the past five years, a steadily increasing stream of intellectual property lawyers from Boston, New York, San Francisco and all points Texas have filled the chain hotels along U.S. Highway 59, making the town of Marshall an unlikely hub in the lucrative universe of patent infringement litigation.

In private airplanes and rental cars, they converge during the workweek at the tiny federal courthouse wearing dark, expensive suits and carrying PowerPoint presentations to fight over millions in claims for and against big-name companies – Bausch & Lomb, Sony, Wells Fargo, DaimlerChrysler, to name a few – regarding soft contact lenses or telephone relays or data-compression files.

Patent litigation "is a big deal here, a really big deal," said Connie Ware, president of the Marshall Chamber of Commerce. "And we're glad to have it."

The town is so glad that it's refurbishing the 105-year-old Harrison County Courthouse to include a state-of-the-art courtroom for the federal court system to accommodate even more patent litigation; so glad that many of the local lawyers who once specialized in personal injury cases are turning their attention to intellectual property law.

In fact, patent litigation has become an integral part of the docket in other Eastern District courts, particularly Sherman, Tyler and Texarkana – and Marshall is hustling to maintain pace.

The numbers are impressive. From January 2000 through February 2006, there were 441 patent cases filed in the Eastern District. Of those, 60 percent were filed in Marshall.

But that surge of specialized litigation has also caused raised eyebrows in some legal circles. They wonder how an East Texas town of 25,000 – even if it was named after Supreme Court Justice John Marshall – came to harbor an oversized share of intellectual property disputes.

"When someone mentions Marshall, Texas, in a meeting, our litigators just shake their heads," said Carter G. Phillips, a frequent Supreme Court litigator in Washington, D.C. "Nobody understands how all those patent cases show up in such a small town."

Trolls and pirates

The town has been mentioned in courtroom briefs and legal publications – often unflatteringly – as a hotbed for "patent trolls" and "patent pirates," investors who buy up patents solely to sue big companies that might be producing products that have benefited from the patents they've acquired.

"There's some of that," said Michael C. Smith, a local attorney who represents patent clients from both sides. "But the truth is a little more mundane."

For more than 40 years, the Eastern District of Texas has had the reputation of maintaining a "rocket docket" – strict limits on legal wrangling and depositions, backed up by a firm trial date.

As a result, a case that might take three to five years to resolve in a slow-moving district like Dallas takes 12 to 15 months in Marshall.

And Mr. Smith – supported by other lawyers who've tried cases in Marshall – says the district has simply developed a reputation for handling patent cases with a sense of competence and urgency not found in many other venues.

"Regardless of the side of the case you're on, a lawyer in a patent case wants one of two things to happen: You want to win, or you want to get out of the case losing as little money as you can," said Mr. Smith. "And time is money."

Willem G. Schuurman, an Austin-based attorney for Vinson & Elkins, said the fast pace of litigation practiced in East Texas is attractive. And he gives U.S. District Judge T. John Ward in particular high marks for being well-prepared and well-versed in the particulars of the cases he hears.

But Mr. Schuurman says such hell-for-leather litigation does create an additional advantage for patent-holder plaintiffs who already hold an advantage by the nature of patent law. And a ruling of infringement results in a near-automatic injunction that can stop the work of some manufacturers in their tracks.

"Patent law assumes that the patent holder has a right to his invention, even if it's sometimes unclear what the invention actually is, and juries generally agree with that," said Mr. Schuurman. "Not many cases go to trial because defendants know that they are likely to lose."

TI's contribution

Judge Ward, a longtime trial attorney and Clinton appointee, knows this well. Fifteen years ago, he was a trial lawyer on the losing side of a \$27 million verdict for patent infringement filed by Dallas-based Texas Instruments.

"I lost, but I enjoyed the intellectual challenge," said Judge Ward, "so when I came to the bench, I sought out patent cases."

In fact, it was cases filed by TI in the early 1990s that placed Marshall on the intellectual property docket. Mr. Smith, who was a law clerk at the time, credits Dallas lawyer Richard Agnich with the connection.

Mr. Agnich, who was general counsel for Texas Instruments at the time, accepts the credit. Because patent litigation can be filed anywhere the patent has been infringed, a patent holder can file in virtually any federal court. He said the company chose East Texas to avoid protracted litigation, and others have followed suit.

"It costs at least \$500,000 to take a case to trial," said Mr. Agnich. TI "decided that we'd be better off finding out sooner than later if we have a case."

By 1999, when Judge Ward succeeded legendary jurist William Wayne Justice, Marshall already had more than a few patent cases, thanks to TI. But Judge Ward decided to fashion a system that would attract even more intellectual property litigation.

He patterned his local patent rules after some he admired in the Northern District of California. Those rules, and the generally high metabolism of the Eastern District, he said, began attracting patent cases that couldn't be heard in other patent-laden districts in states such as California, Virginia and Wisconsin.

Besides TI, other major companies took their disputes to Marshall: Nokia vs. Kyocera; Nortel vs. Ciena; Raytheon vs. Oracle; Nike vs. Adidas; and Samsung vs. Matsushita.

But so did a new kind of company, the patent holding company. And Mr. Agnich has been out in front.

Mr. Agnich is a director of Austin-based Forgent Networks Inc., a patent holding company that has made more than \$100 million enforcing U.S. Patent 4,698,672 – a data compression computer program that creates the popular JPEG digital image files.

Forgent, a publicly traded company, acquired the patent in the 1997 acquisition of Compression Labs and has been using the threat of litigation to pressure licensing agreements from the makers of digital cameras, camera phones and computer software makers.

When Forgent filed suit against EchoStar Communications Corp. – the Dish Network folks – it was in Marshall. And though the case has been moved to California, the process has unnerved patent users who fear that the technologies they've been using may be under full-throttle legal attack.

Anonymous parties

Office suites housing nothing but banker's boxes and patent paperwork are not uncommon in Marshall.

Instead of outraged inventors looking for recognition for their inventions, the new patent litigators prefer anonymous complex partnerships and limited liability corporations. And it is on these anonymous companies that "patent users" – as manufacturers call themselves in litigation – heap their contempt.

Emery Simon, counselor to the Business Software Alliance, says patents acquired in the wake of the dot-com bust are now being "monetized" through litigation. The mere threat of infringement litigation – and the injunction that could follow – forces legitimate companies to settle instead of fight.

"The law simply weighs too heavily in favor of these patent holders – whether you call them pirates or trolls – and something needs to be done about it," Mr. Simon said.

Judge Ward, however, says the problem is overstated, and appellate statistics support his view. Only once has he been overruled in a patent matter, and even then, only partially. Although the 10 jury verdicts in his court have favored the patent-holder plaintiffs, none of the judgments has been unduly large.

There is, however, trouble on the horizon. Patent cases that used to take eight to 12 months to resolve are now taking 20 to 24 months. And districts in Pennsylvania and Wisconsin are promoting their own rocket dockets to bring intellectual property cases their way.

Asked why the docket has slowed, Judge Ward didn't ponder deeply. Although patent issues are more challenging these days, he said, the issues usually focus on something simple. And so can his court's unaccustomed delays.

"I've just got too many patent cases," the judge said.

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