

## New Patent Rocket Docket Rises in Wisconsin

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Patent attorneys are hailing the Western District of Wisconsin as the nation's newest so-called rocket docket, characterized by speedy trials and a jury pool friendly to patent holders.

Patent case filings are climbing in the district based in Madison, including cases involving companies headquartered outside the area. Lawyers say they're attracted by the district's educated jury pool, which reflects the work force and populace connected to the University of Wisconsin and the thriving local high-technology sector.

Although lawyers say rulings on summary judgment motions are more common in the court than in other popular patent forums such as the eastern districts of Texas and Virginia, lawyers representing patent plaintiffs say they're not afraid to take their chances in the district when they've got a solid case.

As of March 14, 10 patent cases were filed in the district, compared with 50 in 2007, 25 in 2006, 20 in 2005 and 33 in 2004, according to clerk Theresa M. Owens.

Plaintiffs have a high win rate in the district, said Mike Modl, a partner at Madison's Axley Brynerson, whose work as local counsel for outside patent lawsuit filers has climbed steadily over the past five years.

Modl cited PricewaterhouseCoopers International Ltd.'s recent report on patent litigation, which placed the district seventh when it comes to trial success rates, with patent holders winning 66.7 percent of the time between 1995 and 2007. The study placed the district first for its summary judgment success rate, with patent holders prevailing in 36.4 percent of cases.

The study, which was based on case filing data in several databases, noted that the district's median time to trial of 0.91 years between 1995 to 2007 placed it second behind the Eastern District of Virginia, which had a median time of 0.88 years.

In the PricewaterhouseCoopers standings, Wisconsin's Western District ranked fifth for overall success rates for plaintiffs between 1995 and 2007.

"If you're a patent holder, the Western District [of Wisconsin] is a great place to be," Modl said.

Modl said he's been local counsel on nearly a dozen cases in the district during the past 12 months, which is more than he's handled in that capacity in any year. Modl is currently serving as local counsel in a patent infringement case filed by Canadian soap manufacturer DEB Worldwide Healthcare Inc., which claims that alcohol-based foaming hand sanitizer made by cleaning chemical company Betco Corp. in Toledo, Ohio, infringes on one of its patents. *DEB Worldwide Healthcare v. Betco Corp.*, No. 3:08-cv-00052 (W.D. Wis.).

DEB Worldwide's lead attorney on the case, Rick McCaulley Jr., an intellectual property litigation partner in Sidley Austin's Chicago office, said that "[s]peed was certainly one of the factors that weighed heavily in our decision." DEB Worldwide filed the case in January and a trial is scheduled for February 2009.

Betco's lawyers at Toledo intellectual property boutique Emch, Schaffer, Schaub & Porcello, who have asked the court to transfer the case to the Northern District of Ohio, declined to comment.

McCaulley noted that DEB Worldwide's ultimate parent company is in the United Kingdom, and that both companies do "significant business" in Wisconsin.

Foley & Lardner has made its clients aware of the district's speed and "encouraged them to file there," said Jeff Simmons, an

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intellectual property litigation partner in the firm's Madison office.

One of Foley's current patent infringement cases is for General Electric Co. and several subsidiaries, which sued miniature ultrasonic imaging device maker SonoSite Inc. of Bothell, Wash., over its ultrasound systems. *General Electric Co. v. SonoSite Inc.*, No. 3:07-cv-00273 (W.D. Wis.).

The short trial cycle is attractive to general counsels, who are typically tied to corporate budgeting cycles, Simmons said.

"They can plan out expenses, get it all booked and out of the way in one year," Simmons said.

Although it offers speedy trials, Wisconsin's Western District is far more likely to rule on summary judgment motions than the Eastern District of Texas, which can be risky for plaintiffs, said Bruce W. Slayden II, an intellectual property partner in the Austin, Texas, office of Houston's Baker Botts.

Slayden is representing an inventor and the estate of a second inventor in a case against Flexible Foam Products Inc., a Spencerville, Ohio, company that manufactures open cell polyurethane foam, used in furniture cushions and other products. *Carson v. Flexible Foam Products Inc.*, No. 3:08-cv-00095 (W.D. Wis.).

Slayden's clients are based outside of Wisconsin, but Flexible Foam has a manufacturing plant within Wisconsin's Western District, so the venue is appropriate, he said. His clients want a speedy trial and the possibility of a summary judgment "didn't run us away" from Wisconsin, he said.

Time to trial and the risk of a summary judgment are competing concerns but a strong case tips the balance toward the district with a rapid docket, said Ron E. Shulman, an intellectual property litigation partner at Wilson Sonsini Goodrich & Rosati in Palo Alto, Calif.

"If you have a good case and the concern is getting to trial, notwithstanding the high summary judgment rate you might choose Wisconsin," Shulman said.

Shulman is currently representing patent holders in two patent infringement cases filed in Wisconsin's Western District by two nonlocal companies in October. *Eppendorf A.G. v. Bio-Rad Laboratories Inc.*, No. 3:07-cv-00623; *SanDisk Corp. v. Phison Electronics Corp.*, No. 3:07-cv-00605 (W.D. Wis.).

Although the district is "historically very quick to trial," the court's future pace is uncertain because of an injury to Judge John C. Shabaz this year, said Shulman. The judge has been out since Feb. 1 for rotator cuff surgery. The court is awaiting a date for his return.

The district has two regular judges and a full-time magistrate judge, which is a judge appointed by a district court judge for an eight- or four-year term.

When he learned about Shabaz's injury, Shulman voluntarily dismissed a case he filed in January in order to refile it in another district. *Nuance Communications Inc. v. Abby Software House*, No. 3:08-cv-00042 (W.D. Wis.)

On March 11, Chief U.S. District Court Judge Barbara B. Crabb issued an order assigning 50 percent of all civil cases except for a few categories to the magistrate while Shabaz rehabilitates.

Simmons said any problem might be short-lived because Shabaz announced in October that he plans to take senior status, which involves a reduced workload, on or before January 2009. "If he stays on the bench and stays active [after that], it could make the court even faster," he said. "Then they'd have three judges."

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