

## Texas Judges Refuse to Let Pandemic Hamper Justice System

NOVEMBER 29, 2021

*This article was originally published in [Texas Lawyer](#). Any opinions in this article are not those of Winston & Strawn or its clients. The opinions in this article are the authors' opinions only.*

When 2021 began, the uncertainty of the patent jury trial loomed large in the Eastern and Western districts of Texas. In the face of the pandemic and new variants, as well as unprecedented Winter Storm Uri, these courts tried to find a way to keep the civil jury system going. Through hard work and determination, they have been successful. This year's Eastern District of Texas Bench Bar Conference had record attendance. Between the Eastern and Western Districts, the courts have tried 21 patent jury trials and two trade secret misappropriation jury trials to verdict in 2021, which is more than other jurisdictions have been able to do. As we observe below, these courts successfully moved their dockets forward, have resumed nearly a typical trial schedule, and are serving as examples of the strength of our civil jury system.

### **Patent Owners Continue to File More Cases in Texas**

According to Docket Navigator, patent owners have filed nearly 3,500 patent infringement cases in the district courts in 2021. Two-thirds of those were filed in Texas, Delaware, and California. As of Oct. 31, 2021, 796 cases were filed in the Western District and 363 cases were filed in the Eastern District, while 707 cases were filed in the District of Delaware and 468 in the California district courts. Even though there have been more defense verdicts in the Western District, it is on track to have more cases filed in 2021 than in 2020. Similarly, Judge Rodney Gilstrap has had more cases filed in 2021 than in 2020. Even with the increase in patent cases and the backlog of pandemic-delayed trials, a review of recent scheduling orders confirms that both districts are maintaining their target pace when it comes to claim construction hearings and trial consistency and transparency in the process allow for some predictability, even though the jury outcomes, as in any venue and jurisdiction, remain unpredictable.

### **Texas Courts Have Seen Nearly an Equal Number of Defense Wins and Plaintiff Wins in Patent Jury Trials in 2021**

So far for 2021, the Eastern and Western districts have tried 21 patent jury trials to verdict. The Western District has had nine patent jury trials in 2021, with five patent owner wins and four accused infringer wins. The damage awards were \$2 billion, \$29.5 million, \$14 million, \$13 million, and \$1 million. The Eastern District has had 12 patent jury trials in 2021 with seven patent owner wins and five accused infringer wins. The damage awards ranged from \$825,000

to \$308.5 million. Judge Amos Mazzant III also presided over two trade secret misappropriation cases resulting in jury verdicts awarding the plaintiffs roughly \$100 million and \$150 million. To date, there have been nearly as many defense wins as plaintiff wins in patent cases in two of the busiest patent venues in the country. That the patent jury trial outcomes are almost tied at this point in the year suggests there is more to these venues than the reflexive “plaintiff friendly” moniker.

**Pretrial and Posttrial Motions Are Given Careful Consideration**

The Eastern and Western districts see more than their fair share of pretrial and posttrial motions. Notwithstanding the volume of motions, many of the 2021 rulings demonstrate the courts are giving motions careful consideration. For example, after a jury awarded a \$308.5 million verdict in Personalized Media, Gilstrap determined the asserted patent was unenforceable based on prosecution laches. Judge Alan Albright twice has awarded sanctions for misconduct (once against a plaintiff and once against a defendant) and indicated in an October 2021 hearing that he is “taking very seriously” how the court should respond to plaintiff Freshub’s inclusion of baseless allegations of anti-Semitism in its motion for new trial, which has been denied. Additionally, Albright consistently has dismissed without prejudice willfulness claims pursuant to Rule 12, and just recently in the Video Share trial granted defendant Google’s Rule 50 motion as to willfulness at the close of plaintiff’s case-in-chief. The Eastern District of Texas has not granted a motion for enhanced damages without some evidence of copying or intent to harm, even though the jury may have found willful infringement, and has only awarded enhanced damages once in 2021. For example, Mazzant denied a motion for enhanced damages even though the jury found willfulness in addition to its \$172.5 million damages award because the case was a “garden variety” patent case.

**Proposed Patent Legislation Will Not Impact the Eastern or Western Districts Any Time Soon**

Whether it is Kentucky Rep. Thomas Massie’s Restoring America’s Leadership in Innovation Act of 2021 (f/k/a Restoring America’s Leadership in Innovation Act of 2018) seeking to abolish the Patent Trial and Appeal Board and clarify Section 101; Sens. Patrick Leahy and John Cornyn’s Restoring America Invents Act seeking to eliminate discretionary denials under Fintiv; or the Pride in Patent Ownership Act seeking to add disclosure requirements for changes in patent ownership, legislation impacting the Eastern and Western districts does not appear to be close to being presented for a vote. While the focus of many proposed bills is the PTAB and Section 101, the patent system itself could benefit from promoting the participation of diverse inventors in the patent system, which is what the Unleashing American Innovators Act seeks to do. Even if Leahy’s announcement that he will not seek reelection in 2022 were an incentive to advance improvements, it seems unlikely that modest improvements are a possibility for the foreseeable future.

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- [Danielle Williams](#)
- [Thomas M. Melsheimer](#)

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Danielle Williams



Thomas M. Melsheimer

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