

Patent Litigation Trends To Watch In 2021

By **Dani Kass**

Law360 (January 3, 2021, 12:02 PM EST) -- As the end of the COVID-19 pandemic comes into sight, attorneys are watching how a backlog of intellectual property trials will work their way through the system. They're also expecting those trials to follow 2020's pattern of featuring high-dollar verdicts. Here are five trends on the horizon for patent litigation in 2021.

Trials Getting Back On Track

The coronavirus pandemic threw off the 2020 trial timeline at courts across the nation, and 2021 is going to be the year of playing catch-up.

"The judges we're dealing with are triple tracking, quadruple tracking the trial schedule for January," said Frank DeCosta, a Finnegan Henderson Farabow Garrett & Dunner LLP partner. "[Judges have said] once we start getting into calendar year 2021, 'I literally am putting three or four trials on top of each other.'"

He said the pandemic-based delay is making bench trials seem more alluring, especially if litigation funders who want to get things moving are involved.

Roger Fulghum of Baker Botts said he expects jury trials to be largely paused through February, especially given a recent coronavirus outbreak during a trial in the Eastern District of Texas, but once a vaccine becomes widespread, things will pick back up again.

While lawyers spent 2020 getting used to conducting remote depositions and hearings, Sterne Kessler Goldstein & Fox PLLC's J.C. Rozendaal said 2021 might be the year where we'll see if more judges get comfortable with remote trials.

"I would have to think they will, particularly for bench trials like in the Hatch-Waxman space, [and] I think we're gonna have to get used to that," he said. "We're already seeing it at the [U.S. International Trade Commission], but the jury trial is really the last big question mark. My instinct is that eventually judges are going to suck it up and do those remotely too, but that remains to be seen."

PTAB Discretion Stays Front and Center

The Patent Trial and Appeal Board's discretion to reject petitions for inter partes reviews became one of

the hottest topics of 2020, and attorneys say that's likely to stretch into 2021. This year will see whether the U.S. Patent and Trademark Office engages in official rulemaking to codify its discretionary denial precedent, and whether a suit challenging said precedent will sway a California federal court.

Finnegan's DeCosta pointed to the PTAB's precedential decision in *Fintiv*, which lets the board weigh the advanced stage of parallel litigation in other courts when deciding whether to institute review. That's been pushing patent owners to sue for infringement in courts that move quickly, like the Western District of Texas, in the hopes of shutting down a PTAB challenge, he said.

"We've always had these timing issues ... with the interplay between IPRs and district court filings, but now we have this third dimension of time that creates another ticking time bomb where you're choosing a jurisdiction as a patent holder that relates to the *Fintiv* factors, [and as a] challenger of the patents, you're also making sure you have to accelerate your petition process," he said.

Dickinson Wright PLLC partner John Artz said he'll be watching whether the Biden administration will alter the USPTO's course on discretionary issues.

"Do they continue the way the patent office has been going to expand the ability to exercise their discretion to decline to hear IPRs, or are they going to scale that back a bit?" Artz said. "[Practitioners] find it a bit stressful because there is no ability to right what's a perceived wrong, because there's no ability to appeal on the institution. If you lay out a strategy that involves having the patents get considered in IPR and the patent office ultimately decides they don't want to do it, that can cause a lot of issues both for the client and for the attorneys."

High Verdicts Draw Litigation Funding

Mark Stallion, who leads the IP team at Greensfelder Hemker & Gale PC, noted that 2020 brought in a series of high verdicts in patent cases, and he expects that to continue into the new year.

There were at least three verdicts surpassing \$500 million — VirnetX's \$503 million win over Apple, PanOptis' \$506 million victory over Apple, and the California Institute of Technology's \$1.1 billion verdict against Apple and Broadcom — along with a \$1.9 billion judgment against Cisco in a patent bench trial and a \$1.1 billion judgment against Kite Pharma, stemming from a \$752 million verdict in December 2019.

Stallion said the enormous numbers were likely driven by the high-stakes nature of the litigation and the increasing presence of litigation funders, who are paying not only for smaller organizations to continue to trial, but to continue with appeals longer instead of having to settle.

"You're seeing now that's allowing the patent owner to maybe take on a longer litigation battle than they may have otherwise done, even on the appeals," he said. "These damages are equating to these large dollar amounts. Even if it's \$100 million, that more than funds the litigation for some of these funding companies."

Federal Circuit 'Policing' Venue

The courts are likely to continue having to draw the lines on how venue is determined in patent litigation.

"We haven't seen the last of TC Heartland working its way through the system," Sterne Kessler's Rozendaal said of the U.S. Supreme Court's key venue ruling from 2018, which had limited infringement suits to where a defendant is incorporated or has a place of business, or where an act of infringement has been committed.

Rozendaal noted that rulings by U.S. District Judge Alan D. Albright of the Western District of Texas — who has been actively encouraging patent cases to be filed in his court — have prompted the Federal Circuit to use mandamus powers to transfer cases out of his court a handful of times.

Additionally, the Federal Circuit issued a key decision limiting venue in cases over generic drugs in late 2020. That ruling in *Valeant v. Mylan* allows Hatch-Waxman Act suits to be filed where a generics maker is incorporated or where it performed actions related to its application to market a generic drug.

"There's a heightened interest on the part of the Federal Circuit in policing venue and the idea that it's going to be hard for districts to hang onto cases unless there's a real connection to the venue," Rozendaal said.

5G Technology Heads To Court

Experts say they're expecting infringement litigation over 5G technology to pick up in 2021, now that the technology is rolling out in the U.S.

The patent litigation over 5G would cover a broad range of technologies, said Fish & Richardson principal Kurt Glitzenstein. His examples ranged from cell phones to the internet of things — the wide expanse of products that connect to the internet, from home security systems to factory equipment.

Likewise, Baker Botts' Fulghum said he hasn't seen 5G cases yet, but that's going to change.

"We all think 5G cases are coming," he said.

--Editing by Alyssa Miller.