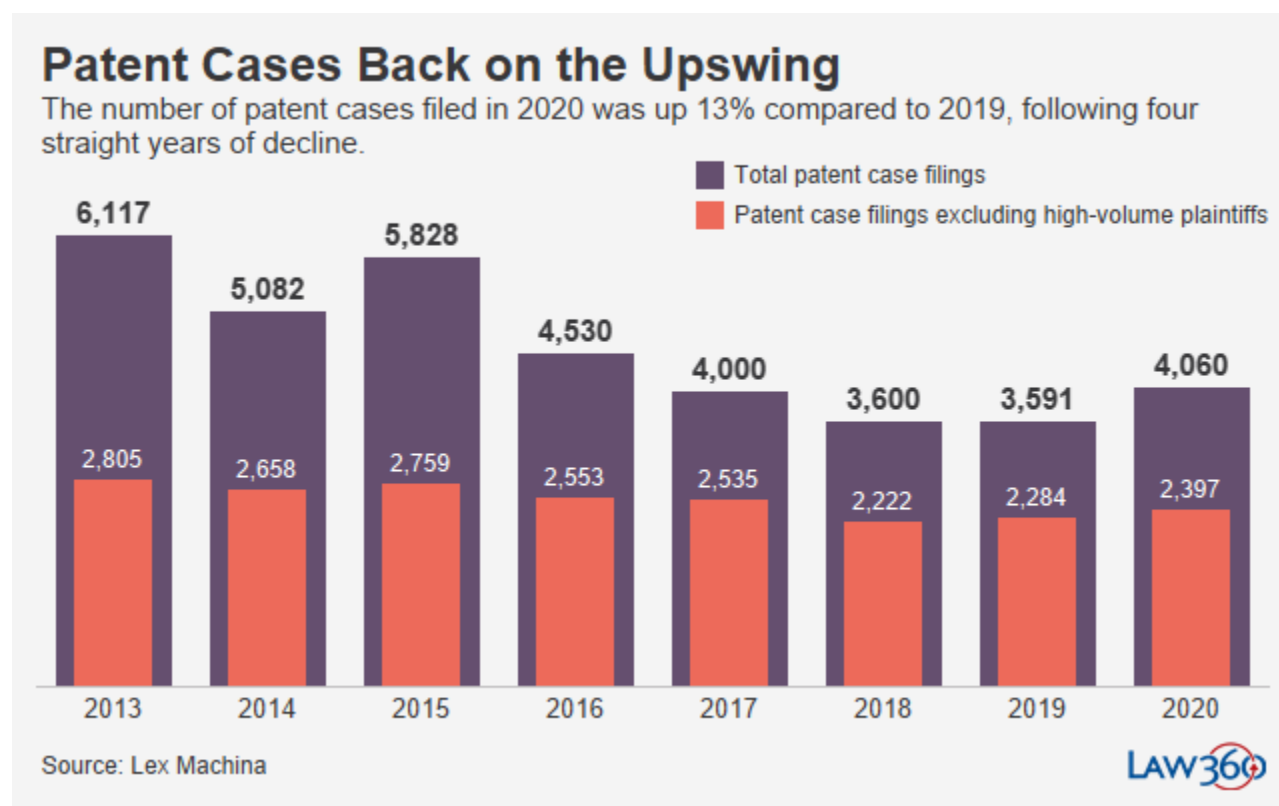


Fast Courts, Big Funders Kept Patent Suits Flowing In 2020

By Dani Kass

Law360 (March 10, 2021, 11:05 PM EST) -- Following a four-year decline in new patent litigation, case numbers rose in 2020, and attorneys have attributed the increase to an enhanced ability to dodge patent challenges, the COVID-19-induced recession and the presence of litigation funders.

Despite the pandemic, there were 4,060 patent cases filed in 2020, according to a new report from Lex Machina. That's the first time there's been an uptick since 2015, although it was only a slight increase: up from 3,591 in 2019 and 3,600 in 2018.



"Lawyers have been resourceful, I'm amazed," said McKool Smith principal Alan L. Whitehurst. "Lawyers in this space, they're busier than ever before."

Whitehurst said the increase is likely the combination of several factors that pushed companies hesitant to file patent cases to finally pull the trigger.

"I do think there's been a backlog for a long time," he said. "There's been so much uncertainty with 101, [inter partes review], venue, trial dates, damages, especially on standard essential patents, that all of a sudden you're seeing — with [Judge Alan] Albright especially in the [Western District of Texas] — a lot of these issues have been cleared up."

For example, he said companies are filing more suits about semiconductors and fewer about business methods and e-commerce, since the former is less likely to be invalidated under Section 101 of the Patent Act.

Judge Albright, who joined the bench in late 2018, has promised to get cases to trial quickly, meaning companies don't have to decide whether to wait two or three years to see their case resolved.

"It's like we used to see in the Eastern District of Virginia: justice delayed is justice denied," Whitehurst said. "Albright is committed to moving these cases forward, and he's said repeatedly that he's not going to stay for IPRs. That's a large factor in the increase that we're seeing in the Western District of Texas."

The other impact of Judge Albright not staying cases for inter partes review is that fewer patents are actually being reviewed by the Patent Trial and Appeal Board. Using a piece of precedent called *Fintiv*, the PTAB has started turning away patent challenges if the parallel district court litigation is likely to be decided around the time of its own final written decision.

"The fact that there are more discretionary denials of institutions by the PTAB is pushing a number of clients to say, 'Let's pull the trigger now,' because you may get an advantage," said Finnegan Henderson Farabow Garrett & Dunner LLP partner Laura Masurovsky. "The other side may not be ready to file [at the] PTAB, and the further along you can say that your district court case is toward resolution or how quickly it will get to resolution, that may also bear on either the PTAB denying institution under its discretionary authority, or the district court saying, 'I don't think we need a stay anyway.'"

Masurovsky also said patent suits are likely to go up during recessions as a different way of bringing in income.

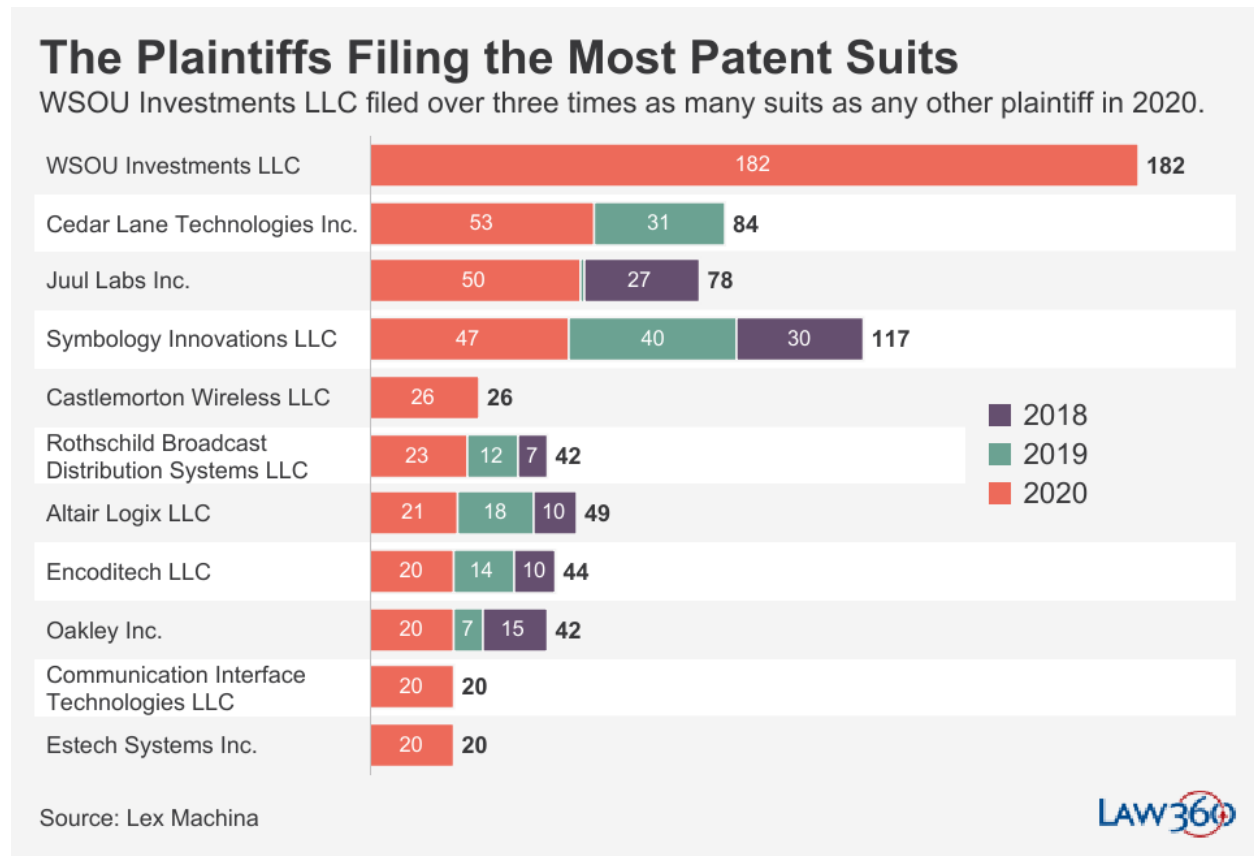
"People who are seeing declines in certain areas of economic growth look for other ways to monetize their assets or get returns on their investment, or as a hedge against some of what may be happening to their other investments," she said. "Those that are feeling some of the pinch may use litigation as a backstop for what they are not able to succeed in in other arenas."

The Finnegan partner also pointed to steady litigation from nonpracticing entities during the pandemic, and support garnered by litigation funders.

"In general, we're seeing an increase in our new clients asking us to file contentious matters and also an

increase in the supporting financing from litigation funders," she said.

WSOU Investments LLC, a company that Lex Machina designates as a "high-volume plaintiff," brought the most cases of the year, at a whopping 182. It was followed by Cedar Lane Technologies Inc. and Juul Labs Inc., with about 50 cases each. On the defendant end, Google LLC was the company sued most, with 48 cases, followed by Samsung Electronics America Inc. and Microsoft Corp.



Lex Machina said several of the WSOU cases were asserting patents it had obtained from companies including Nokia.

There was also a big increase in cases decided on default judgment, up to 79 in 2020 from 41 in 2019. Masurovsky said this was likely due to defendants being sued for infringing design patents as a way of targeting foreign counterfeit goods.

"A lot of these folks don't respond, or it's not clear exactly who they all are. A number of these are the 'versus 69 John Does' kind of cases," she said. "[They've] been convenient for plaintiffs to then be able to shut down the counterfeit entities or get them removed from sites like Amazon or Etsy or wherever they're selling their goods. This has been another weapon in the larger picture of trying to stop the sale of counterfeit goods."

Last year also had a record amount of damages, Lex Machina found, with \$4.7 billion awarded across 52 cases. Those included particularly large verdicts in *The California Institute of Technology v. Broadcom*

Ltd. et al. and Centripetal Networks Inc. v. Cisco Systems Inc.

Given that 2021 has already seen a \$2.2 billion verdict against Intel, Masurovsky said she only expects that to increase.

"We're hardly into 2021, and we're already almost eclipsing or getting halfway to where we were in 2020," she said, adding later that "if the Intel verdict is any measure, I think 2021 will see this trend continue with more and more cases, and more and more interesting verdicts, and this is going to be a boom time for patent litigation."

--Editing by Marygrace Murphy.

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