

## Even With Pandemic, Patent Suit Filings Held Steady In 2021

By Ryan Davis

*Law360 (May 18, 2022, 11:45 PM EDT)* -- The COVID-19 pandemic doesn't seem to have put a damper on new patent lawsuit filings, which effectively stayed the same in 2021 as the year before, with attorneys suggesting the increased role of litigation funding for patent disputes is driving a steady pace of cases.

There were 4,063 patent cases filed in U.S. district courts last year, only 61 more than in 2020, which had seen a slight uptick from the year before, according to a new report from Lex Machina. Those minor increases, which coincided with the pandemic, reversed a trend where the number of patent suits had fallen each year between 2015 and 2019.

### Patent Cases Held Steady in 2021

The number of patent cases filed in 2021 was essentially the same as the number filed in 2020.



Source: Lex Machina • Created with Datawrapper

When courts and everyday life shut down in the spring of 2020, "I think everyone thought that COVID was going to contract litigation, and it actually didn't," said Benjamin Stern of Nutter McClennen & Fish LLP, who said the numbers staying flat was "frankly a surprise."

Emer Simic of Neal Gerber & Eisenberg LLP echoed that point, saying, "One takeaway is that, given that we've seen a pretty steady number of filings in the last two to three years, COVID has really not had a huge impact on the number of case filings."

"I think we all surprised ourselves with how readily both courts and litigants were able to adapt to remote procedures," she said, and even with the disruptions, it's largely been business as usual.

One change in the patent litigation landscape that may have been keeping patent filings afloat is the increased interest litigation funding companies have shown in backing patent plaintiffs, said Blair Jacobs of McKool Smith.

Funding companies previously gravitated toward commercial litigation, based on a view that such cases "were more predictable and a better investment," he said. "That has changed."

In the past few years, major funding companies have increasingly backed intellectual property cases, driven in part by some substantial recent patent verdicts, and begun hiring patent attorneys to evaluate cases, Jacobs said. That has made patent litigation more viable for patent owners who don't have millions of dollars to finance it themselves, he noted.

"As more litigation funding companies are more comfortable with patent litigation, certainly that does offer the opportunity for litigants to access that pool of capital to support their case," said Clint Crosby of Baker Donelson Bearman Caldwell & Berkowitz PC.

There's now less of a stigma around litigants and law firms working with litigation funders than in the past, and that may spur even more suits supported by funding in the future, since the ability to bring a suit is less tied to the economy, Stern said.

"I've had more clients in the past six to eight months ask me about litigation funding and ask me to inquire about litigation funding than I've ever had before," he said.

One type of patent dispute that appears to be on the wane is litigation over abbreviated new drug applications for generic drugs. Last year, 253 such cases were filed — the lowest number since 2012 and a continuation of a decline seen each year since 2017, when 410 ANDA cases were filed.

Part of that has to do with regulations about when ANDAs can be filed, the action that spurs patent suits. Filings are tied to the U.S. Food and Drug Administration's approval of new chemical entities, which can only be challenged with ANDAs after five years. There was a dip in approvals of new entities about five years ago, Simic said.

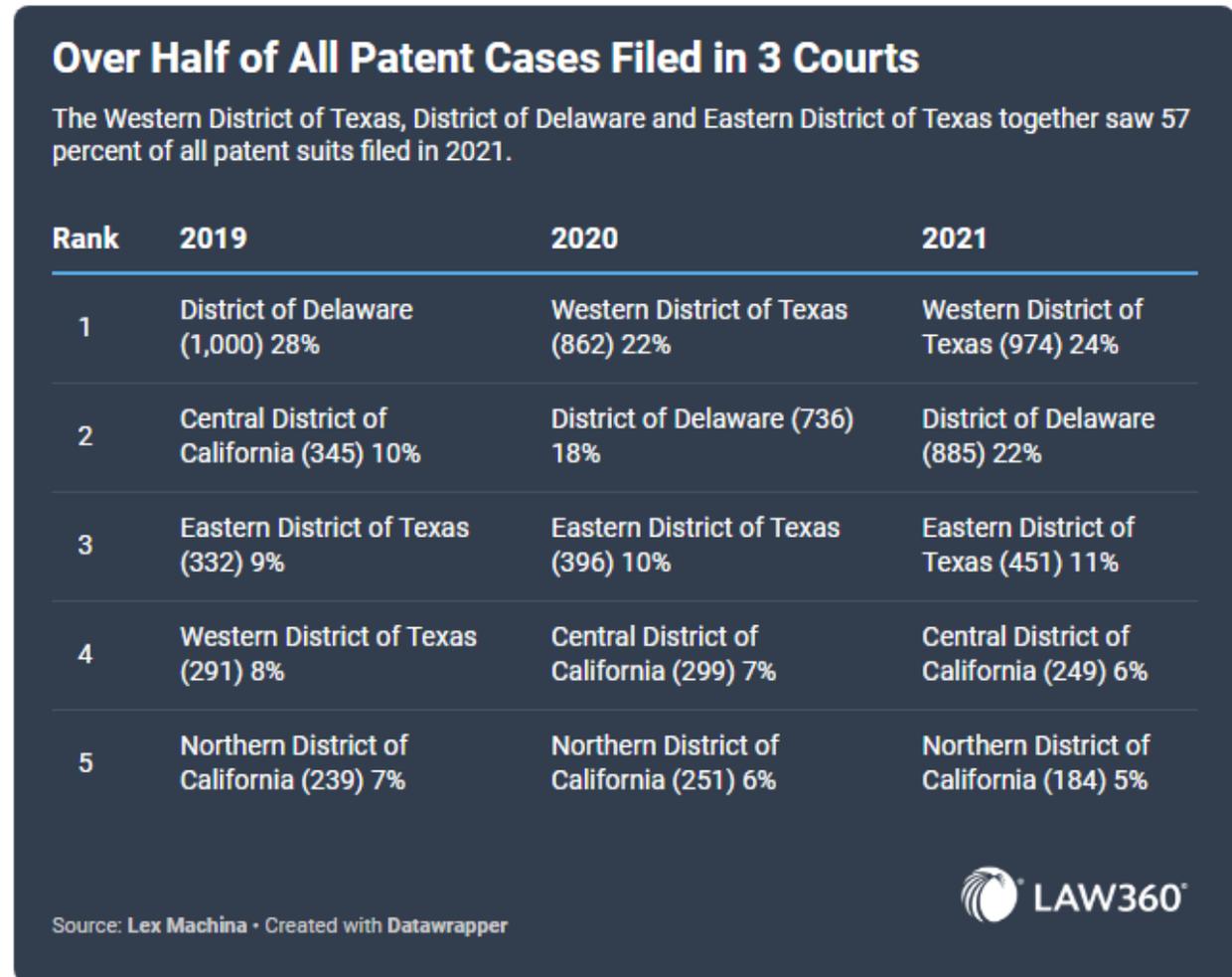
"That's one potential reason for this decline that we're seeing," she said. FDA approvals have recently been on the rise, so there could be more ANDA filings and more litigation soon, she said.

In addition to the lower number of FDA approvals, some pharmaceutical companies shut facilities down during the pandemic, which may have contributed to the decline in ANDA litigation, said Blake Coblenz of Cozen O'Connor. With those two factors no longer an issue, "I think the numbers are going to start

going up again," he said.

When patent suits are filed, they have become increasingly concentrated in certain courts over the past three years, Lex Machina's report shows. In 2019, 47% of all patent complaints were filed in three courts: the District of Delaware, the Central District of California and the Eastern District of Texas.

By 2021, the top three courts were different, but together, they claimed an even larger share of new patent cases, at 57%. The Western District of Texas took the top spot with 24% of cases, as plaintiffs are drawn by what they view as friendly policies from Judge Alan Albright, closely followed by the District of Delaware and the Eastern District of Texas.

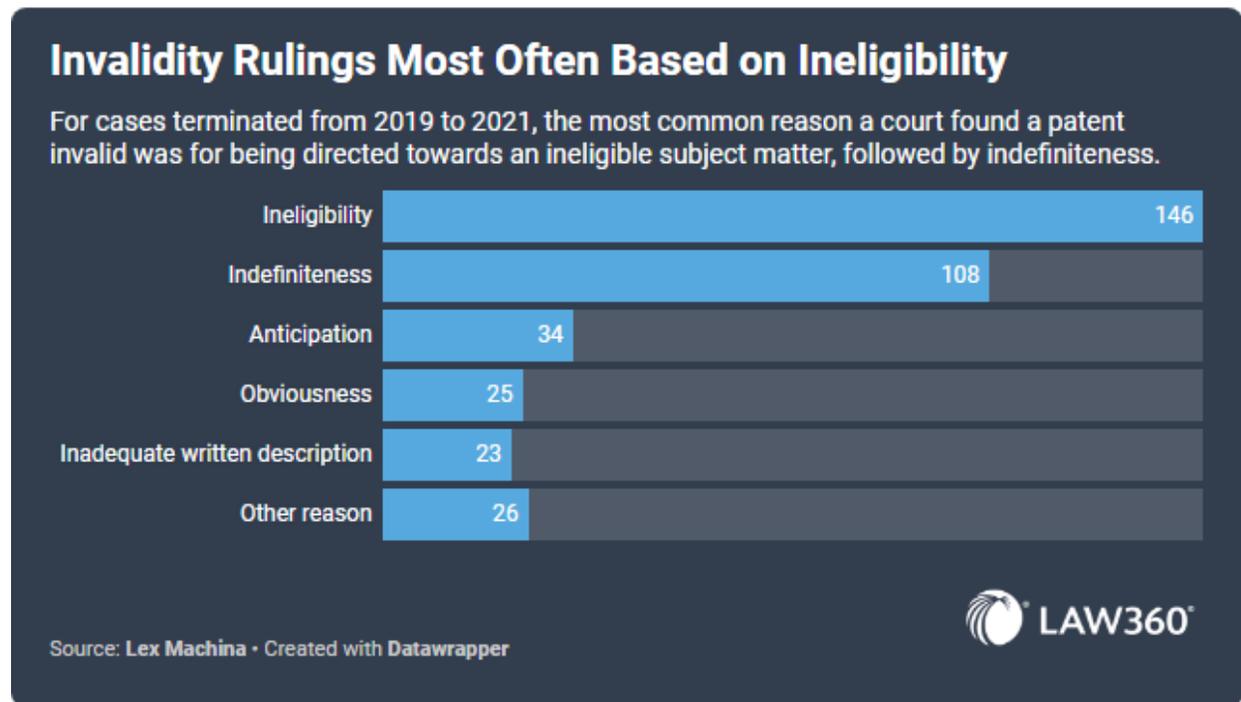


The consolidation of cases in a few districts tends to perpetuate itself, because "parties want to be in jurisdictions that are familiar with patent cases," Stern said. "When judges are less familiar with these cases, it's less predictable, and there are more variables."

Part of the attraction of the Texas courts is that they offer fast trial schedules, which is appealing to plaintiffs because it puts pressure on defendants and can help patent owners avoid challenges at the Patent Trial and Appeal Board.

So if the vast number of cases filed in Texas means those courts become backlogged and can no longer offer fast trials, "plaintiffs' lawyers are going to seek out other jurisdictions," Stern said.

The report also analyzed the reasons given when patents were invalidated in court in the past three years. By far the most common conclusion was that the patents were invalid for claiming subject matter like abstract ideas and laws of nature, followed by holdings that the patents were indefinite. Far fewer involved findings that the patents were obvious or anticipated.



The U.S. Supreme Court's *Alice v. CLS Bank* ruling from 2014, which held that abstract ideas implemented using computers can't be patented, inspired countless challenges to patent eligibility. In part because the law is unclear on what constitutes an abstract idea, eligibility is now a popular defense for accused infringers, and it often succeeds at the judgment-on-the-pleadings stage.

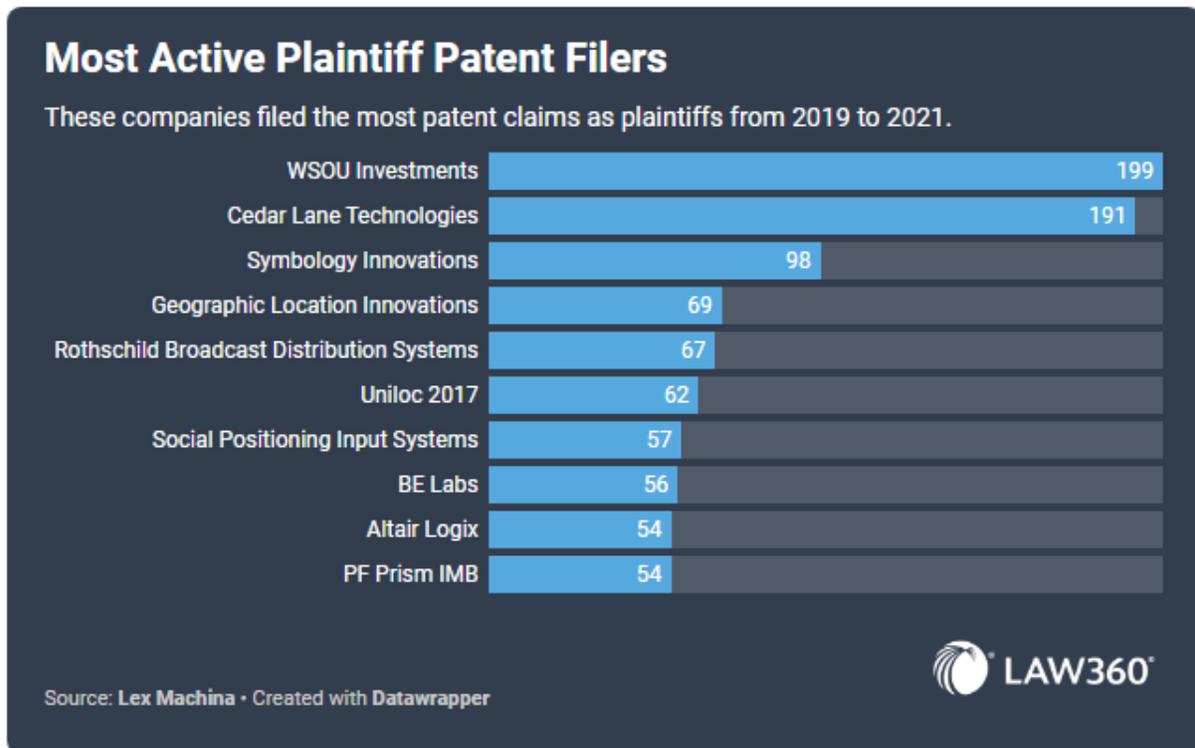
Similarly, the high court's 2014 decision in *Nautilus v. Biosig* relaxed the standard for proving that a patent is invalid as indefinite, and courts have in turn found many invalid at the summary judgment stage.

Ineligibility and indefiniteness have "proved to be very useful in trying to dispose of cases early," said Simic, who noted that "they're attractive for that reason, but if they're successful, we're not seeing cases decided on these more traditional grounds," like anticipation and obviousness, which often need to be resolved at trial.

When infringement was found, the total amount of damages awarded was substantial, the report also found. A total of \$3.97 billion in damages was awarded in patent cases in 2021, down from \$4.98 billion in 2020. Still, the 2021 damages figure was the third-highest in any year since 2013, behind \$4.04 billion awarded in 2016.

The report also identified the companies that filed the most patent lawsuits over the past few years, a list dominated by patent licensing firms. Two companies outpaced all others: WSOU Investments LLC with 199 cases and Cedar Lane Technologies Inc. with 191.

Rounding out the top five were Symbology Innovations LLC, Geographic Location Innovations LLC and Rothschild Broadcast Distribution Systems.



High-tech companies topped Lex Machina's list of those hit with the most patent suits from 2019 to 2021, led by Samsung, Google, Apple, Microsoft and Amazon, which are predominantly targeted by suits from patent licensing companies, like those on the list of frequent filers.

Both of those lists illustrate that lawsuits by so-called nonpracticing entities are a major part of the overall patent landscape and show that "NPEs are not going away," Coblenz said.

For companies that are primarily in the business of litigation rather than making products, the coronavirus had a minimal effect, he said, so "that's probably a good reason why you saw that the numbers stayed steady through the years of the pandemic and continue to do so."

--Editing by Marygrace Anderson and Dave Trumbore.

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