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IP Insider

Trolls Rush In to Avoid Fed Procedure Change

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This story has been revised to reflect updated numbers for filings on Nov. 30.

A record number of patent lawsuits were filed in U.S. district courts Monday, as nonpracticing entities rushed to avoid a change in the law that took effect today requiring plaintiffs to spell out in detail in their complaints how their patent is being infringed.

Approximately 259 patent cases were filed Monday, according to the legal analytics company Lex Machina, 15-18 times the average number filed in one day. Last year, only 14 patent cases were filed on the Monday after the Thanksgiving holiday weekend.

The burst of filings have been increasing steadily in the past week. They came in advance of a change in federal pleadings standards that took effect Dec. 1.

A rewrite of the Federal Rules of Civil Procedure eliminated "Form 18," a patent-specific form that enabled plaintiffs to file patent suits with bare-bones claims. For nonpracticing entities commonly referred to as patent trolls, the change was unwelcome, as they had relied on Form 18 to file cookie-cutter suits against multiple defendants with complaints that contained few details about the alleged infringement. Plaintiffs needed only to specify that the plaintiff owned the patent, that the defendant's product infringed the patent and that the plaintiff suffered damages.

"The former pleading standard was a relic of the 1940s and set a low bar for what has to be included to state a claim in a patent infringement suit," said Chris Mammen, a partner and patent litigator at Hogan Lovells who has been tracking the effect of the rule change.

"NPEs exploited Form 18, filing thinly plead complaints that were not supported by facts," Mammen said.

Now that Form 18 is gone, many attorneys expect that two U.S. Supreme Court decisions, *Twombly* and *Iqbal*, will dictate the new standard. Under those rulings, plaintiffs must plead

sufficiently detailed facts that show their claims for relief are plausible. And district court judges have discretion in how they handle complaints that fail to meet the standard.

But the law does not actually specify what the new standard should look like. Patent reform legislation that would have addressed this issue has not progressed through Congress. So now, pleading requirements may vary from judge to judge until the courts sort it out, said Matt Levy, patent counsel for the Computer and Communications Industry Association, which lobbies for change in the law to stop frivolous NPE lawsuits.

That would help explain why the patent-friendly Eastern District of Texas saw so many of the complaints filed Monday. Seventy-six percent of the cases were filed there. This is in contrast to the 45 percent of all patent cases filed so far this year in the Eastern District, Mammen said.

More specifically, 196 patent complaints were filed in one district court in one day, suggesting that NPEs, who prefer to litigate in the Eastern District, were making a last push to take advantage of Form 18.

RPX Corp., which helps companies avoid the risk of patent litigation, also reported the record number of patent filings, putting the Monday number at 258. The previous record was set on April 23, 2014, when plaintiffs anticipated patent reform legislation would apply retroactively to April 24, prompting them to file 190 patent suits.

The number of patent cases filed within the last week or 10 days has also been unusually high. RPX's data says 440 complaints were filed between Nov. 24 and 30. Lex Machina's data shows that in the period beginning a week before Thanksgiving through Monday, 572 patents suits were filed in district courts. Last year, 176 were filed in the same period, Mammen said.

"Plaintiffs filed before Dec. 1 because they didn't want to risk going into the unknown," Levy said. "They know what the rule was yesterday. They don't know what it is today."

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