

2009 PATENT LITIGATION SURVEY

A Little Less Buzz

Our survey shows that patent litigators continued to be busy in 2008, though by the time the year ended they were definitely feeling the recession's sting.

—By Joe Mullin

Was there ever any doubt that 2007 would be hard to top on the patent litigation front? It was, after all, a year that saw a big jump in the number of infringement suits filed and an even sharper spike in the number of defendants targeted in those suits. Reaching those figures again in 2008 seemed unlikely even before the recession's toll on the broader economy began to affect patent litigation. And in the year's final quarter, the downturn's impact really kicked in.

By the time 2008 ended, the U.S. Court of Appeals for the Federal Circuit had issued its much-discussed *Bilski* ruling on the patentability of business methods, Congress still hadn't passed patent reform, and the number of patent suits filed was down by about 8 percent from 2007 (the number of defendants dropped by 24 percent). Given the slowdown, it shouldn't be surprising that there's been something of a shake-up in the rankings in the latest edition of our annual patent litigation survey. The survey measures which firms are getting the bulk of this lucrative work.

Another anomaly about last year: In our survey, we used a different definition of how long a case must be

active for a firm to get credit for it than we have in the past. This year, we returned to our traditional way of doing things (for a further explanation of methodology, see page 3). Once we'd done that, we decided it made sense to compare the 2009 list to the one we produced two years ago (see chart at right). By any measure, Fish & Richardson comes out on top. While the firm's 77-case workload in 2008 represented a 21 percent dip from the previous year, it was down just 3 percent from the 79 cases it handled while claiming the number one spot in 2007. Kirkland & Ellis ranked second, despite taking on a few less cases than it did two years ago. Two other top firms—Foley & Lardner and Howrey—slipped on the list from two years ago, despite essentially taking on a similar number of cases. Jones Day also suffered a modest drop after seeing a 23 percent dip in the amount of new work it took on last year compared to two years ago.

New to our list this year: Quinn Emanuel Urquhart Oliver & Hedges, which sits at number three. Among firms that improved their rankings, Kenyon & Kenyon rose to number four after nearly doubling its total from two years ago. Finnegan, Henderson, Farabow, Garrett &

Dunner actually did handle twice as many cases—and rose to number five as a result. Not bad in a tough year.

How tough? Data compiled by Stanford University Law School’s IP Litigation Clearinghouse shows that 2,605 patent suits were filed in 2008, compared to the 2,840 filed in 2007. The slide in new patent suits was particularly severe in the last four months of the year, according to the Stanford data. Last November, for example, just 114 new patent suits were filed, making it the least active month in terms of such disputes in the past three years. In November 2007, by comparison, 240 patent suits were filed; in November 2006, the figure was 196. As the number of suits dropped, so did the number of defendants. Stanford data shows that figure dropping from 9,042 in 2007 to 6,857 last year.

Some practitioners say they’ve seen anecdotal evidence that the decreases in new filings and defendants may mask the actual loss of patent litigation work that law firms are experiencing. Recessionary pressures, these lawyers say, are prompting companies to look for ways to end litigation quickly. “If there is an early settlement to be had, companies are going to

do what they can,” says Katherine Lutton, Fish & Richardson’s head of litigation. She adds that it’s also increasingly common for lawsuits to be filed as “placeholders” in case a negotiation doesn’t work out, even though they’re not being actively litigated.

Firms that had strong years used different strategies to do so. “We understand the pain clients are feeling, and we want them to perceive us as their business partners,” says Claude Stern, who chairs Quinn Emanuel’s IP practice, which is playing defense in 40 patent cases filed in 2008. (Almost half of those cases were filed in Texas’s Eastern District, which, with 300 total cases filed, continues to be the nation’s busiest venue.)

Stern says flexible pricing plans and a fierce attention to efficiency have helped his firm compete. One example of this client-friendly approach, he says, is Quinn’s offer to work on individual motions—transfer motions, say—on contingency. If Quinn loses the motion, the client doesn’t pay.

Another firm weathering the recession well is Wilson Sonsini, which rose from thirty-second place two years ago to number 19 this year. A decision to build a

WHICH FIRMS WERE BUSIEST OVERALL?

RANK 2009	RANK 2007	FIRM NAME	TOTAL DISTRICT COURT CASES
1	1	Fish & Richardson	77
2	3	Kirkland & Ellis	57
3	N/A	Quinn Emanuel	54
4	13	Kenyon & Kenyon	52
5	18	Finnegan, Henderson	50
5	7	Niro, Scavone	50
7	11	Morrison & Foerster	46
8	N/A	Wilmer	44
9	5	Howrey	43
9	2	Jones Day	43
9	N/A	Knobbe, Martens	43
12	24	Alston & Bird	42
13	6	Greenberg Traurig	41
14	27	DLA Piper US	40
14	4	Foley & Lardner	40
16	N/A	K&L Gates	39
16	N/A	McKool Smith	39
18	N/A	Akin Gump	35
19	32	Wilson Sonsini	34
20	11	Baker Botts	31
20	9	McDermott Will	31
20	27	Winston & Strawn	31
23	N/A	Covington & Burling	30
23	27	Fulbright & Jaworski	30
25	22	Michael Best	28
25	16	Perkins Coie	28
27	27	Goodwin Procter	27
28	N/A	McCarter & English	26
29	9	Cooley Godward	25
29	21	Ropes & Gray	25
31	18	Kilpatrick Stockton	23
31	32	Morgan, Lewis	23
33	N/A	Gibson, Dunn	22
34	36	Fitzpatrick, Cella	21
34	N/A	Hunton & Williams	21
34	N/A	McAndrews, Held	21
37	18	Sidley Austin	20

Other Firms Worth Noting

Two of the busiest federal districts in the country for patent litigation are Delaware and the Eastern District of Texas. In both instances, firms located in those jurisdictions rack up significant caseloads by acting as local counsel to out-of-town firms.

Only one Texas firm—Gillam & Smith, a two-partner shop in Marshall—responded to our survey this year, and didn’t play a role in enough cases to earn a spot on any of our lists.

Meanwhile, three mid-size Delaware firms participated this year, as they have

in past years: 97-lawyer Morris, Nichols, Arsht & Tunnell (51 cases: 17 defense, 34 plaintiff), 86-lawyer Potter Anderson & Corroon (42: 24, 18), and 148-lawyer Richards, Layton & Finger (42: 31, 11). All three of these Wilmington-based firms can, and do, handle patent cases on their own, but they also often function as local counsel for out-of-town firms that file suit in Delaware. That’s why we’ve opted to recognize their efforts here, rather than with the large firms on our main lists—J.M. ■

practice representing generic drugmakers has helped diversify the firm's traditional high-tech client base. The strategy appears to be paying off. Clients like Mylan Pharmaceuticals, Inc., which accounted for five of the firm's 28 defense cases, and Impax Laboratories, Inc., aren't shy about taking on brand-name drugmakers in court.

The firm's move toward generic drugmakers could prove even more fruitful

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if President Barack Obama's push for health care reform is successful, says Michael Ladra, the senior partner in Wilson Sonsini's patent litigation group. The administration's goal of reining in health care costs, he says, would logically be a boon to inexpensive versions of brand-name drugs. And under the current system, a generic generally can't make it to market without either challenging or dodging a brand-name drugmaker's patents in court. "All these health care initiatives are looking toward reducing costs, and more generic drugs lower the cost of care," Ladra says. "If anything, I think it's going to become more significant."

Kenyon & Kenyon also boosted its practice working for generic drugmakers. Its clients include Teva Pharmaceuticals USA, which merged with Barr Laboratories, Inc., last November to become the

world's biggest generic manufacturer. In 2008 Teva's ever-expanding product lines attracted more than 40 new suits from branded drug companies. Kenyon also did defense work for large corporate clients, including carmakers, which continued to be targeted by patent-holding companies.

The 2008 statistics indicate that the true peak period of the patent-holding companies—also known as nonpracticing entities and "patent trolls"—may well be over, with some losing trials and others seeing suits moved out of their favored venue, the Eastern District of Texas.

"Defendants are doing better," says J. Michael Jakes of Finnegan, Henderson. "And there's more risk involved."

Not that the holding company suits have simply stopped. Far from it. Consider just one example: the prolific patent-licensing shop run by San Jose patent lawyers Kevin Zilka and Dominic Kotab. Zilka and Kotab, under the names Aloft Media and Stragent, filed 11 lawsuits against a combined 53 defendants in 2008. All but one of the top five firms on our list are defending against at least one Zilka-Kotab lawsuit. Lawyers from Finnegan and Quinn are involved in four suits apiece.

While patent practitioners say they expect the decline in "discretionary" suits—the kind that flush companies are quick to file to get a competitive edge during boom times—to continue, it's difficult to know how deep the recession will cut in terms of patent litigation. The rules of patent enforcement changed

entirely with the creation of the U.S. Court of Appeals for the Federal Circuit in 1982, and those rules are now coming up against the first serious economic test.

"People are struggling to maintain market share, and one typical tool to do so is the patent," says Wilson Sonsini's Ladra. But that only means more work for lawyers if there's a market worth preserving, or if significant royalties can be won, he adds. When products aren't selling, the questions that excite patent lawyers (Who invented what first? What is it all worth?) don't always seem worth going to court over—especially when the average cost of a high-stakes patent case is more than \$4 million.

In the future, decisions to pick up that kind of cost could become even more difficult, depending on how the U.S. Supreme Court winds up ruling in the *Bilski* case and whether Congress ever does manage to reform the nation's patent system. For the moment, expect the struggling economy to make negotiating more attractive than going to court.

"Companies talk first and see if they can do a deal, rather than pull the trigger on litigation right away," says Finnegan's Jakes, who, as it happens, authored the *Bilski* cert petition and will be arguing the case before the Supreme Court this fall "And that's not a bad trend. That's totally a good thing."

Not necessarily what you'd expect to hear from a litigator. ■

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METHODOLOGY: Earlier this year, *IP Law & Business* contacted more than 300 law firms and asked them to provide us with a list of patent lawsuits they filed in federal district court in 2008. To be considered for this survey, the cases had to be active as of February 1, 2009. (Measuring cases this way returned us to what had been our practice prior to last year, when we considered any cases filed in calendar year 2007 that remained open for at least two months.) We did not count cases before the International Trade Commission or appellate courts. Some firms listed multiple district court cases with the same plaintiff. If those cases involved the same patent, highly similar technology, or consolidated discovery, we counted them all as one.

INTELLECTUAL PROPERTY LITIGATION PRACTICE

Approach

In response to the critical strategic importance of intellectual property assets, Michael Best & Friedrich LLP has developed one of the largest groups of intellectual property litigators in the Midwest. Our superior IP litigation experience is evidenced by IP Law & Business (August/September 2009), which ranked Michael Best among the top 25 IP firms in the nation for patent litigation in terms of both the number of District Court cases filed in 2008.

Attorneys

Our intellectual property litigators are, first and foremost, litigators who know how to try and win cases before judges and juries. They demonstrate the ability to master even the most technical of subject matters, from mechanical to electrical to computers to biotechnology. Many have experience as judicial clerks at the Federal District Court or Circuit Court level, including the Federal Circuit Court of Appeals, which has exclusive jurisdiction over all patent matters. Our litigators also are adjunct professors, frequent lecturers and authors, and participate as editors of various publications.

Clients

We represent both plaintiffs and defendants throughout the Midwest and across the country, from emerging businesses to nationally-known corporations.

Practice

This team has successfully litigated major patent, trademark, internet, false advertising, copyright, trade secret and rights of publicity and privacy cases in federal and appellate courts in almost every circuit in the country, the Federal Circuit Court of Appeals and the International Trade Commission.

We seek to develop approaches to further the business interests of the client. The Michael Best IP Litigation Team works with clients to develop the most effective business approach to the dispute. When appropriate, we seek to resolve disputes in manners other than litigation if consistent with our client's best interests. At all times, we also provide the strength, resolve and capability to handle trial matters exceptionally well. We serve our clients by aggressively enforcing intellectual property rights against infringement and other claims, advising in cases of potential infringement of others, and evaluating the validity and enforceability of those rights.

Our intellectual property litigators master the technical aspects of their cases while maintaining focus on the overall themes in litigation. This is particularly important in areas such as patent litigation, where the legal doctrines are frequently quite intertwined, so that helpful facts on some issues can be detrimental as to other issues. Our experience allows us access to carefully select experts, so that the judge or jury is able to develop a true understanding and appreciation of our clients' cases. Our litigators highlight the themes in their cases through the creative use of exhibits and technology in the courtroom.

For more information about Michael Best's Intellectual Property Litigation Team, please contact J. Donald Best, Chair, Intellectual Property Litigation Group, at 608.283.2272, or jdbest@michaelbest.com.

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