

Intellectual Property Alert

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Eastern District of Texas Creates “Track B” for Efficient Management of Patent Cases

On February 25, Chief Judge Leonard Davis of the Eastern District of Texas issued a general order regarding a new specialized case management procedure available for patent cases in the district.¹ The order creates a special track, known as Track B, for patent infringement cases and is designed to provide litigants with an option that may allow more efficient resolution of patent cases. The Eastern District of Texas is the first district in the nation to adopt a second track under its local patent rules to expedite certain patent cases.

The provisions of the order are directed primarily to disclosure deadlines and seek to provide the parties as well as the court with a comprehensive understanding of the case in a very short amount of time. Specifically, the order requires the following disclosures:

- The plaintiff is required to serve its infringement contentions and produce all licenses or settlement agreements concerning the patents-in-suit and any related patents within two weeks after all of the defendants have filed their answers.
- Within a month thereafter, the defendants are required to disclose summary sales information reflecting the quantity of accused products, as well as related unaccused products, sold in the United States, along with information about the revenues from those sales.
- Within two weeks thereafter, the plaintiff is required to produce a good faith estimate of its expected damages, including a summary description of the method used to arrive at that estimate.
- Within two weeks of plaintiff's damages disclosures, the defendant must serve its invalidity contentions. At this point, the plaintiff is required to request a case management conference with the court. The parties are required to meet and confer before the conference and file a joint discovery plan addressing any relevant issues.
- The order requires the parties to immediately proceed with claim construction related disclosures, serving each other with their disputed claim terms and proposed claim constructions, as set forth in the district's local patent rules.

In comparison with a traditional case schedule, now known as “Track A,” which generally takes at least a year before the parties have a clear understanding of issues such as damages, a patent infringement

¹ General Order Regarding Track B Initial Patent Case Management Order, GO-14-03 (E. D. Tex. Feb. 25 2014), available at http://www.txed.uscourts.gov/cgi-bin/view_document.cgi?document=24330.

case on Track B would require disclosure of infringement and invalidity contentions, proposed claim constructions, prior licenses of the patents-in-suit, a summary of sales information for the accused products, and a disclosure of plaintiff's damage model less than three months after the answer is filed. Discovery during this initial period is limited to five interrogatories, five requests for production, and five requests for admission per side. The court expects that the expedited schedule would result in additional efficiencies and cost savings in patent cases.

Below is a chart comparing the differences between Track A and Track B.

ACTIVITY	TRACK A TIMING (Approximate Days after the answer is filed)	TRACK B TIMING (Days after the answer is filed)
Plaintiff serves infringement contentions	<i>On average</i> , 45 days from the answer date (due no later than 10 days before the court's status conference)	14 days
Plaintiff produces all licenses or settlement agreements concerning the patents-in-suit and any related patents	<i>Typically, at least</i> 12 months from the answer date (this information is generally produced during the latter part of the discovery period)	14 days
Defendant discloses sales and revenue information	<i>Typically</i> , at least 12 months from the answer date (this information is generally produced during the latter part of the discovery period)	44 days
Plaintiff produces estimate of damage, including a summary description of the method used to arrive at that estimate	<i>Typically</i> , at least 15-18 months from the answer date (this information is generally produced as part of the plaintiff's damages expert report)	58 days
Defendant serves invalidity contentions	<i>On average</i> , 90 days from the answer date (due 45 days after infringement contentions are served)	72 days
Parties exchange a list of claim terms to be construed by the court	<i>On average</i> , 100 days from the answer date (due 10 days after invalidity contentions)	82 days
Total Time from Answer Date	15-18 months	82 days

Track B would allow litigants to have a substantial amount of information that might be valuable in evaluating a case after just three months of litigation—information that might not otherwise be available for 12 to 18 months into a case on Track A.

Election of Track B procedures in a patent infringement case can be made jointly by the parties before the deadline for all of the defendants to answer or otherwise respond. Failing a joint election, the court can sua sponte order the case to be placed on Track B, although the order notes that the traditional Track A will continue to be the default procedure in the district. The order also requires judges to enter a protective order immediately upon election of Track B, so as to allow parties to make sensitive disclosures required under Track B. Finally, the order allows any additional party that is added to the case subsequent to the election of Track B to object to the use of these expedited procedures.

The court intends that, under Track B, the court will have enough information about the case well before the management conference to allow the court to set a schedule and impose discovery limitations that

“bear an appropriate relationship to the likely value of the case.” The order further warns parties that sparse or misleading disclosures that lack a good faith basis will invite appropriate sanctions from the court.

Defendants in patent infringement cases generally face enormous expenses resulting from the mandatory discovery requirements implemented in the district, and such discovery generally precedes a meaningful damages disclosure from the plaintiff. Defendants seeking to avoid extensive discovery early in the case may therefore benefit from opting for Track B. However, such defendants should also be prepared to produce financial information relating to the accused products and serve invalidity contentions on relatively short notice. Track B may also be attractive to plaintiffs seeking to obtain early disclosure of defendants’ sales data and a speedy resolution of their claims. But plaintiffs opting for Track B will need to be prepared to produce all license or settlement agreements related to the patents-in-suit and to disclose their damages model less than two months after the answer is filed. Time will tell whether parties to patent cases in the district will see mutual benefit in opting for Track B or whether judges will exercise their discretion to assign a substantial number of cases to Track B.

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