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Texas Patent Trials Halted Due To COVID-19 Spike

By **Katie Buehler**

Law360 (November 20, 2020, 9:18 PM EST) -- Eastern District of Texas Judge Rodney Gilstrap announced Friday he's postponing all jury trials until March, a decision he was reluctant to make but felt necessary due to the rapidly increasing number of COVID-19 cases in Texas and the travel restrictions out-of-state attorneys and witnesses were facing.

Judge Gilstrap's announcement comes days after chief judges in the Northern and Western districts of Texas postponed all trials scheduled through the end of the year and after the Southern District of Texas postponed all trials scheduled through Jan. 19.

Judge Gilstrap said it was a difficult call to make because of the time and effort court staff had undertaken to resume in-person trials during the pandemic. But the judge, who presides over one of the busiest patent dockets in the country, ultimately said he felt compelled to order continuances in cases slated for trial.

"We now face a dangerously rising rate of increase in COVID-19 cases and swelling hospitalizations in this district and across the country," Judge Gilstrap said. "Despite the court's optimism that an efficacious vaccine may become widely available in the coming months, the court is persuaded that the current status of the public health in the Marshall Division of the Eastern District of Texas requires it to continue all in-person jury trials."

In a footnote, Judge Gilstrap alluded to a recent **COVID-19 outbreak** in U.S. District Judge Amos L. Mazzant III's Sherman, Texas, courthouse, about 150 miles northwest of Marshall. That brought home the changing reality of the pandemic, he said.

Judge Gilstrap entered identical orders in three patent cases that were on deck for a Dec. 4 start date, pushing them to March 1. Although the three were set for that date, only one would have gone to trial. As part of his COVID-19 protocols, Judge Gilstrap has only tried one case per month since he restarted trials in August.

He also had three patent cases lined up for Jan. 4, but they have now been pushed to April 5, according to court records.

Samsung Display Co., Sony Interactive Entertainment America LLC and Cisco Systems Inc., the three defendants that had been scheduled for Dec. 4, had all **filed motions this week** to delay their trials by three months. They cited the recent spike in COVID-19 cases nationwide and travel restrictions that require self-quarantine periods for their non-Texas attorneys and witnesses, the timing of which would possibly affect their ability to be with their families over the winter holidays.

Judge Gilstrap addressed those concerns in his order.

"Mindful of its docket largely populated with complex civil cases, where parties, witnesses, and staff often reside internationally or in domestic locations with a variety of travel restrictions and quarantines, the court feels compelled to find that in-person jury trials must be continued," he said.

Samsung and Sony also referred in their continuance motions to the Sherman outbreak. In that case, Judge Mazzant **initially postponed** the trial for two weeks after learning a dismissed juror had tested positive for the virus, but as the case count increased to 15, he ultimately **granted a mistrial**

Nov. 17, saying he'll reschedule for sometime in 2021.

"Trials during COVID are safe until they quickly pivot to very dangerous, and that pivot point is invisible and impossible to detect until it is too late," Sony said in its motion.

Solas OLED Ltd., who has accused Samsung of infringing three mobile screen display technology patents, was the only plaintiff who challenged the continuance motions before the judge issued the delay order.

On Friday, Solas argued a three-month delay would "severely prejudice" it and that Samsung's belief that a March trial would be safer than a December one is an "incorrect assumption."

"Finally, this court has successfully tried numerous cases during the pandemic while mitigating the risk to jurors, witnesses, attorneys and court staff," Solas said. "There is no reason why this trial should be any different."

Texas currently leads the nation in COVID-19 cases, reporting more than 1 million since the pandemic started. Over the last seven days alone, the state has recorded more than 64,000 new cases, according to data from the state's Department of State Health Services. Texas has the second-highest total death count with more than 20,000 COVID-19 deaths. Only New York has more, with over 33,000 deaths.

Jennifer Haltom Doan, a partner with Haltom & Doan in Texarkana, who tried a patent case in Judge Gilstrap's court in October, called the Sherman outbreak "really unfortunate" but also said courts have to find a way to proceed even during the pandemic to avoid backlogs and unjustly hurting parties involved in the disputes.

"It doesn't change how I feel about the need to try these cases and not have the requests stack up and delay, or to leave prisoners in prison when they want to have their cases tried," she said.

Since the Sherman mistrial, the clerk's office in the Eastern District's Tyler courthouse has closed after a court staffer tested positive for the virus, and the district's Texarkana courthouse, which also houses the Western District of Arkansas, has been closed until Dec. 7 after two non-U.S. Courts employees who worked in the building tested positive for the coronavirus, Eastern District clerk David O'Toole said.

Judges in the Eastern District, which has held 20 in-person jury trials since the start of the pandemic, started making calls to postpone trials and hold hearings remotely in their individual courthouses last week, before the Sherman mistrial was called.

U.S. Judge Robert W. Schroeder III, in Texarkana, told Apple Inc. and Maxell Ltd. during a Nov. 12 hearing that he was continuing their patent dispute to March from its Dec. 7 trial setting, although the court record doesn't indicate his reasoning.

Judge Schroeder has also approved virtual hearings. He's allowing post-trial hearings between VirnetX Inc. and Apple Inc. after a \$502.8 million infringement verdict to be **held via videoconference**.

Judge Mazzant, who had successfully held seven trials without reports of positive test results before the current outbreak, announced Nov. 17 he would postpone all trials through the end of the year, and the Sherman courthouse is closed out of precaution until Dec. 4.

Haltom & Doan said judges in the Eastern District have worked hard to prevent an outbreak like Sherman's. Along with employing various safety procedures in their respective courthouses, the judges have maintained a policy of allowing potential jurors to opt out for any COVID-19-related reason.

Cisco had applauded those efforts in its Nov. 19 motion to continue, but argued that the scales favored delaying trials.

"Cisco notes the remarkable efforts of this court — and other courts in the district — to keep the

courthouse doors open and continue to resolve cases, fairly balancing the need to proceed with cases against the ascertainable health risks at any given time," the company said. "In striking that balance here, Cisco respectfully suggests that the scale favors a brief continuance of this case."

Michael Smith, partner in charge of Siebman Forrest Burg & Smith LLP's Marshall office, said it will be interesting to see if the demographics of jury pools change after this second wave of COVID-19 cases, as well as the Sherman outbreak. He said the district could find that fewer Texans are willing to participate in trials.

"I believe that what a juror thought in June and in September is different," he said. Future juries could be "significantly more concerned than they are now."

Judge Gilstrap noted in his Friday order that he will hold some motion practice via virtual proceedings during this postponement but that it is only fair to hold jury trials in person.

"Jury trials are innately human experiences," the judge said in a footnote. "More is often communicated in a courtroom nonverbally than verbally ... Such factors as cadence, tone, inflection, delivery and facial expression are as vital to due process as is the applicable statute or case law."

--Editing by Gemma Horowitz.

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