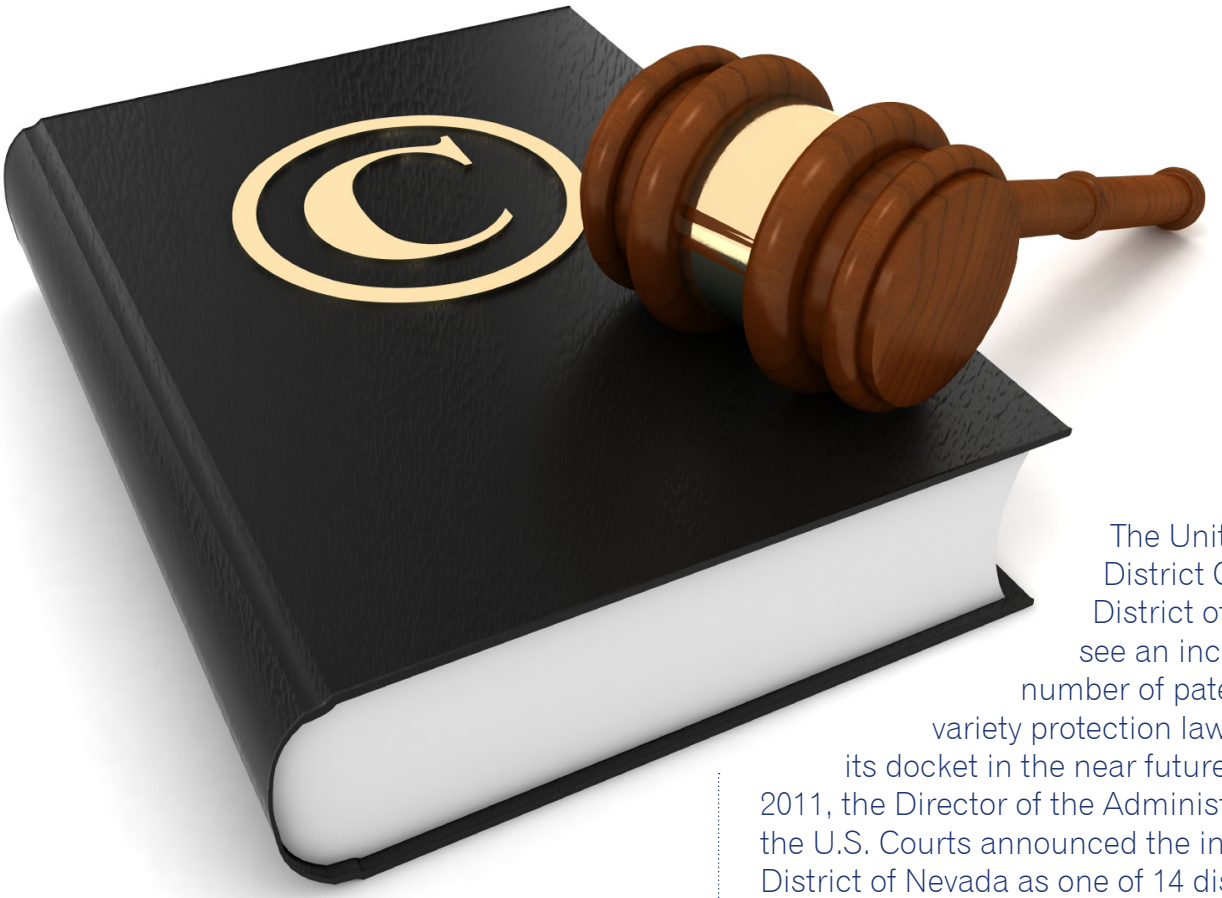

NEVADA SELECTED AS PATENT PILOT PROGRAM JURISDICTION

BY RYAN COBB, ESQ.

The United States District Court for the District of Nevada may see an increase in the number of patent and plant variety protection lawsuits filed in its docket in the near future. On June 7, 2011, the Director of the Administrative Office of the U.S. Courts announced the inclusion of the District of Nevada as one of 14 district courts selected to participate in the 10-year Patent Pilot Program.[1] The program commenced on September 19, 2011, and intends to enhance the efficiency and expertise of federal judges in patent and plant variety protection issues by routing these cases to judges who have expressed an interest in presiding over patent matters. Through participation in the Patent Pilot Program and the newly adopted Local Rules for Patent Law cases,[2] the District of Nevada could become a district of choice for filing patent infringement actions due to enhanced familiarity and efficiencies in handling patent cases.

What is the Patent Pilot Program?

In January 2011, President Obama signed Public Law No. 111-349 and created the Patent Pilot Program in select district courts.[3] The law tasked the Director of the Administrative Office of the U.S. Courts with the duty to designate courts from a variety of districts of different sizes throughout the country to participate

in the program. One requirement applicable to the District of Nevada was that at least three of these selected courts have fewer than 10 district judges. To ensure sufficient interest, the districts were required to have at least two judges requesting to participate in the program.[4] Here in Nevada, three federal district court judges asked to serve as designees for patent cases: Chief Judge Robert C. Jones, Judge Philip M. Pro and Judge Gloria M. Navarro. The interest of these judges, combined with the requirement for the inclusion of districts with fewer than 10 district judges, allowed the District of Nevada to participate in the Program.

In addition to Nevada, 13 other districts were selected:

- Central District of California
- Northern District of California
- Southern District of California
- Southern District of Florida
- Northern District of Illinois
- District of Maryland
- District of New Jersey
- Eastern District of New York
- Southern District of New York
- Western District of Pennsylvania
- Western District of Tennessee
- Eastern District of Texas
- Northern District of Texas.[5]

A majority of these selected districts preside over a significant percentage of the nation's patent trials. The District of Nevada's inclusion in this group will, at the very least, increase its profile on the radar of patent attorneys.

Implementation of the Patent Pilot Program

The program commenced on September 19, 2011, and only cases filed on or after that date are eligible to participate. When a patent case is filed in the district court, it follows the existing assignment procedures applicable to every other lawsuit filed in federal court. Even those judges who have not been designated to receive patent cases under the program will continue to receive them. However, under the pilot program, a non-designated district judge may decline to accept the patent case assigned to him or her – but can only do so up to 30 days after its filing. If the judge declines the case, the court then randomly reassigns it to one of the three designated judges. Notably, this reassignment of cases does not affect the general transferability of the case.[6]

While Public Law No. 111-349 sets out the fundamental requirements for the program, it also delegates to the individual districts the determination of the most effective methods to administer the program in their jurisdiction. To prevent overloading the dockets of the designated judges, the District of Nevada's implementation of the program allows the designated judges to relinquish one of their assigned civil or criminal cases to the non-designated judges when the designated judge receives a declined patent case. Some of the other districts participating in the program will weigh the cases and allow judges to give up multiple "lighter" cases in exchange for each patent case taken. Here in the District of Nevada, the chief judge has additionally been given the ability to adjust the caseloads of the district judges so as to ensure equality of workload if the one-to-one case exchange creates an imbalance in the dockets of the district judges.

Additionally, throughout the 10-year course of the program, the Director of the Administrative Office of the U.S. Courts will track the efficiency and results after appeal of the litigation involved in the program across all participating districts. The public law establishing the program requires assessments at the five-year and 10-year marks to measure its progress.

These assessments will include an analysis of:

(a) the degree of success in developing expertise in patent and plant variety protection cases,

continued on page 14

NEVADA SELECTED AS PATENT PILOT PROGRAM JURISDICTION

continued from page 13

(b) the improved efficiencies of the courts by reason of such gained expertise, and

(c) a comparison between the groups of designated and non-designated judges with respect to:

(i) the rate of reversal by the Court of Appeals for the Federal Circuit relating to the issues of claim construction and substantive patent law, and

(ii) the time period elapsed between the filing date for the case to the date on which the trial begins or summary judgment is entered.[7]

The courts will then use the statistics developed from this study to determine how to best proceed in handling patent and plant variety protection cases in the future.

Why is the Program Needed?

The program stems from a need to improve the efficiencies and reversal rate of the district courts in patent cases. The combination of the many unique characteristics of patent litigation and the low percentage of patent cases on a district court's docket results in a situation where the judges may be unfamiliar with patent litigation. The Court of Appeals for the Federal Circuit, the appellate court with jurisdiction over all appeals from patent cases, reverses more than 40 percent of all patent infringement cases it hears – a relatively high number in comparison to other appeals.[8] This high reversal rate results primarily from the combination of the difficulty and quantity of the issues involved in patent cases. Although patent trials share a majority of characteristics with general civil litigation, patent cases include some unique aspects apart from their highly technological issues that do not exist in other areas of litigation.

One of these unique aspects is what is known as a *Markman* hearing on claim construction.[9] These hearings take place in the pre-trial stage of the patent case and define the language of each term in the patent claims at issue. They analyze and separately define each term in the claims. When the parties do not agree on a definition, the presiding judge makes a determination as to the term's definition – a determination that is a question of law.

As the claims define the scope of the patent, the meanings of such terms defining the claims are especially important to the outcome of the case. In fact, the *Markman* hearings frequently determine the viability of a party's case. Because the claim construction taking place at the *Markman* hearings is a question of law, each claim definition more or less becomes a separately appealable issue. This leads to a significant number of appealable issues and a particularly difficult appellate process, which results in the frequent overturning of a district court judge's claim construction. The hope of the Patent Pilot Program is that the designated judges will become more comfortable and efficient in their handling of patent litigation and have a lower reversal rate on appeal.

Effects Stemming from Participation in the Patent Pilot Program

In combination with the newly adopted Local Rules for Patent Law cases, the Patent Pilot Program could cause Nevada to see an increase in patent litigation filings as attorneys seek out judges with more expertise in patent cases as well as a more expeditious resolution to those matters. This increased activity in the patent docket may lead to more patent litigation opportunities for Nevada law firms. As patents promise to remain integral assets to companies, patent litigation will continue to serve as an important option for maintaining a company's market edge. Because of its inclusion in the Patent Pilot Program, Nevada should serve as a district of choice in these future patent fights. ■

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1 United States Courts, District Courts Selected for *Patent Pilot Program*, available at http://www.uscourts.gov/news/newsview/11-06-07/District_Courts_Selected_for_Patent_Pilot_Program.aspx (last visited August 26, 2011).
2 See, D. Nev. LR 16.1-1 – 16.1-21 (2011).
3 Patent Cases Pilot Program, Pub. L. No. 111-349, 124 Stat. 3674 (2011).
4 Id.
5 United States Courts, *District Courts Selected for Patent Pilot Program,* available at http://www.uscourts.gov/news/newsview/11-06-07/District_Courts_Selected_for_Patent_Pilot_Program.aspx (last visited August 26, 2011).
6 Pub. L. No. 111-349(a)(1)(A)-(D) (2011).
7 Pub. L. No. 111-349(e)(1)(A)-(C) (2011).
8 United States Court of Appeals for the Federal Circuit, Affirmance and Reversal Rates for *District Court Patent Infringement Appeals,* available at http://www.cafc.uscourts.gov/images/stories/the-court/statistics/Caseload_Patent_Infringement_Affirmance_and_Reversal_Rates_2001-2010.pdf (last visited July 12, 2011).
9 *Markman v. Westview Instruments, Inc.,* 517 U.S. 370 (1996).