Venue Transfers Within East Texas: The Case To Know

By Matthew Zorn

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Defendants in patent cases wanting to steer clear of East Texas juries ought to take note of the lesser used type of transfer under Section 1404(a) — the divisional or "Radmax transfer." After Cray, companies without a physical presence in the Eastern District of Texas are generally outside the reach of "Marshall law." That leaves a long list of companies subject to infringement suits in the Eastern District, however. Notably, many companies have physical presences in the northern Dallas suburbs and thus have a physical presence within the Eastern District of Texas. These companies may want to consider transfer to the Sherman Division under the Fifth Circuit case Radmax.[1]

In Radmax the Fifth Circuit held that the factors governing interdistrict transfers also apply to divisional transfers within the district. In the case, it was undisputed that the events giving rise to the cause of action occurred in the Tyler Division. The parties and likely witnesses resided in Tyler too. None of the parties or witnesses resided in the Marshall Division. Defendant filed a motion to transfer the case from the Marshall Division to the Tyler Division court on grounds that Tyler was clearly more convenient. The district court applied the traditional Fifth Circuit convenience factors, concluded that, in essence, the rather close proximity of Tyler and Marshall meant that the former was not a "clearly more convenient" venue, and denied the motion.[2]

Radmax then petitioned the Fifth Circuit for a writ of mandamus, and the Fifth Circuit granted the writ. First, the court noted that the Gilbert factors apply equally to divisional transfers, noting that the text of Section 1404(a) includes both transfers to any other "district" or "division." Then, the court concluded that the district court had abused its discretion in denying the transfer to Tyler. In particular, the Fifth Circuit clarified the 100-mile "threshold" or "rule" of Volkswagen I and II.[3] Under the 100-mile rule, the cost of attendance for witnesses has greater significance when the distance to the transferee forum exceeds 100 miles. The district court had discounted this factor since the distance from Marshall to Tyler is less than 100 miles. However, the Fifth Circuit opined that this was error, holding that when the distance falls below 100 miles, the cost of attendance factor should not be discounted entirely but rather carries less force.

Radmax illustrates that plaintiffs may choose which division to file in, but that choice is not necessarily fixed. While the case affirms that the usual Gilbert convenience factors apply to divisional transfers, in practice, only a few should be relevant. Factors such as the availability of compulsory process or administrative difficulties flowing from court congestion will be neutral across divisions. By contrast, other factors, such as the local interest in resolving the dispute and the locations of documents and witnesses, could vary greatly between divisions.

The absence of certain factors means that success of a Radmax motion largely turns on the distribution of the parties, documents and witnesses within the Eastern District.

Therefore, opposing the conventional interdistrict transfer motion can put plaintiffs in a bind on a Radmax transfer in the alternative. Plaintiffs opposing interdistrict transfers typically must demonstrate connections to the Eastern District. However, in many cases, those connections to the district reside exclusively in Plano or some other Dallas suburb — in the Sherman Division. If plaintiff's only hook to the Eastern District is a store or operations center in Plano, then the Sherman Division is "clearly more convenient" than the Marshall Division.[4] In other words, to oppose a transfer out of the Eastern District, patent plaintiffs often must create an evidentiary record supporting a transfer to the Sherman Division. Even more, since Sherman to Marshall is over the 100-mile threshold, the "cost of attendance" factor carries its usual force.

Yet Radmax is rarely invoked in patent cases. One reasonable explanation is that Radmax, a gender discrimination case, has not received much attention among the patent bar. Another is that after a Radmax transfer, Eastern District rules still apply. The local rules and case schedule will probably remain the same. The ruling judge may also elect to continue presiding over the case. Thus, the main effect of a Radmax transfer is a new trial venue and a different jury pool. But in the Eastern District of Texas, the change in the venire could be important.

Some have theorized that, compared to the suburban or urban juries in other patent-heavy jurisdictions, rural East Texas juries tend to be different. Many articles and blogs have been written about East Texas juries.[5] Regardless of whether this theory is true, one thing should be clear: It should not be true of the jury pool in the Sherman Division. The Sherman Division overwhelmingly draws from Collin and Denton Counties, which comprise the highly educated and affluent suburbs of Dallas and one the fastest growing populations in the nation.[6] Much of this growth comes from non-native Texans moving to the Dallas area to work in the technology-laden areas of Plano, Richardson and Frisco. Each of Collin and Denton Counties is bigger than any other division in the Eastern District alone. Collin County has the highest median family income in Texas, and Denton County is not far behind. Plano, located mostly within Collin County, is so deprived of lower-skilled labor that local businesses reportedly have to import workers from other areas to fill positions.[7] Thus, in terms of education and affluence, juries drawn from the Sherman Division should be on par with a Northern California jury. On average, a Sherman Division jury ought to be one of the most affluent and highly educated in the nation.

Trial-focused litigants seeking a change in venue might want to consider whether to argue a Radmax transfer in the alternative. Doing so requires almost no additional effort or expense. Under Radmax, the district court applies the same law to the same facts as it would in an ordinary transfer motion. So making a Radmax argument in the alternative requires at most a single paragraph. While litigants have yet to do this with any regularity in the Eastern District, the availability of the procedure in the Fifth Circuit should not be questioned. Indeed, Radmax has been invoked a handful of times in patent cases outside the Eastern District. For example, in the Southern District of Texas, then-U.S. District Judge Gregg Costa moved a patent case[8] from Galveston to Houston, while in a different patent case[9] Judge George Hanks refused to do the same. The Western District of Texas also granted a Radmax transfer to move a patent case from Austin to San Antonio.[10]

Of course, a Radmax transfer may not be appropriate to seek in many patent cases. However, litigants should carefully weigh the option, an opportunity to gain a trial advantage

that requires little to no additional expense. And, for litigants who want the predictability and well-seasoned trial judges of the Eastern District, but prefer to avoid a more rural jury, a Radmax transfer to the Sherman Division may be even more appealing than a transfer out of the District entirely.

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[1] In re Radmax, 720 F.3d 285 (5th Cir. 2013).

[2] North v. Radmax Ltd., 2:12-cv-00405-JRG, Dkt. No. 24 at 1 (E.D. Tex. Mar. 25, 2013).

[3] Radmax, 720 F.3d 288–89 (citing In re Volkswagen AG ("Volkswagen I"), 371 F.3d 201, 204–05 (5th Cir. 2004) ("When the distance between an existing venue for trial of a matter and a proposed venue under § 1404(a) is more than 100 miles, the factor of inconvenience to witnesses increases in direct relationship to the additional distance to be traveled.")).

[4] See Radmax, 720 F.3d at 290 & n.12 (implying that "where only the plaintiff's choice weighs in favor of denying transfer and where the case has no connection to the transferor forum and virtually all of the events and witnesses regarding the case" are in the transferee forum, transfer is "obviously compelled").

[5] See, e.g., Blackman et al., East Texas Jurors in Patent Litigation, The Jury Expert (March 1, 2010), http://www.thejuryexpert.com/2010/03/east-texas-jurors-and-patent-litigation/; Karima Bawa, Why East Texas is Ground Zero for Settling Patent Cases, The Globe and Mail (July 3, 2015), https://beta.theglobeandmail.com/report-on-business/rob-commentary/why-east-texas-is-ground-zero-for-settling-patent-cases/article25254121/.

[6] Tracy M. Cook, Dallas-Fort Worth Has Top Two Spots in U.S. Based on 5-year Economic Forecast, Dallas News (August 10, 2017), https://www.dallasnews.com/business/economy/2017/08/10/two-dallas-fort-worth-counties-lead-nation-economic-growth-potential-next-five-years ("Denton and Collin counties are projected to be the nation's fastest growing economies over the next five years, according to an Oxford Economics forecast.").

[7] Homa Bash, Plano's Highly-Educated Population Makes It a Challenge to Hire Restaurant, Hotel Workers, NBCDFW, (June 5, 2017), http://www.nbcdfw.com/news/local/Planos-Highly-Educated-Population-Makes-It-a-Challenge-to-Hire-Restaurant-Hotel-Workers-426630241.html.

[8] TechRadium Inc. v. FirstCall Network, Inc., 2013 WL 4511326, at *4 (S.D. Tex. Aug. 23, 2013).

[9] Sandbox Logistics LLC v. Grit Energy Sols. LLC, 2016 WL 4400312, at *7 (S.D. Tex. Aug. 17, 2016).

[10] MiMedex Group, Inc. v. Texas Human Biologics, Ltd. and Tissue Transplant Tech., Ltd., 1: 14-cv-464-LY, Dkt. No. 24 (W.D. Tex. Aug. 12, 2016).