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FORUM SELLING

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FORUM SELLING

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ABSTRACT

Forum shopping is problematic because it may lead to forum selling. For diverse motives, including prestige, local benefits, or re-election, some judges want to hear more cases. When plaintiffs have wide choice of forum, such judges have incentives to make the law more pro-plaintiff because plaintiffs choose the court. While only a few judges may be motivated to attract more cases, their actions can have large effects because their courts will attract a disproportionate share of cases. For example, judges in the Eastern District of Texas have attracted patent plaintiffs to their district by distorting the rules and practices relating to case assignment, joinder, discovery, transfer, and summary judgment. As a result of these efforts, more than a quarter of all patent infringement suits were filed in the Eastern District of Texas in 2014. Consideration of forum selling helps justify constitutional constraints on personal jurisdiction. Without constitutional limits on jurisdiction, some courts are likely to be biased in

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favor of plaintiffs in order to attract litigation. This Article explores forum selling through five case studies: patent litigation in the Eastern District of Texas and elsewhere; class actions and mass torts in "magnet jurisdictions" such as Madison County, Illinois; bankruptcy and the District of Delaware; ICANN domain name arbitration; and common law judging in early modern England.

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INTRODUCTION

Forum shopping is frequently decried, but there is little consensus about why it is bad or whether the problem is serious. Some argue that forum shopping violates the rule of law, makes litigation unpredictable, or is unfair to defendants. Others claim it is harmless or even beneficial. This Article suggests that, in non-contractual settings, forum shopping is problematic because it leads to forum selling. For diverse motives, such as prestige, local benefits, or re-election, some judges want to hear more of certain types of cases. When plaintiffs have a wide choice of forum, such judges have incentives to make the law more pro-plaintiff because plaintiffs choose the court with the most pro-plaintiff law and procedures.

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While only a few judges may be motivated to attract more cases, their actions can have large effects because their courts will attract a disproportionate share of cases. For example, judges in the United States District Court for the Eastern District of Texas, likely motivated by prestige and the desire to benefit the local economy, have sought to attract patent plaintiffs to their district and have distorted the rules and practices relating to case assignment, joinder, discovery, transfer, and summary judgment in a pro-patentee (plaintiff) direction. As a result of their efforts, over a quarter of all patent infringement suits in 2014 and almost one-half in the first part of 2015 were filed in the Eastern District of Texas,[1] in spite of the fact that this district is home to no major cities or technology firms.

Consideration of forum selling helps explain the constitutionalization of personal jurisdiction. Without constitutional constraints on assertions of jurisdiction, some courts are likely to be biased in favor of plaintiffs in order to attract litigation and thus benefit themselves or their communities. While personal jurisdiction is often justified as addressing issues such as convenience and sovereignty, the danger of forum selling suggests that personal jurisdiction is also an important safeguard against biased judging. Since impartial judging is a key Due Process concern, forum selling helps explain why restrictions on state assertions of personal jurisdiction are properly addressed by the Due Process Clause. In addition, although the choice between federal districts is not generally of constitutional concern, the example of the Eastern District of Texas shows that even federal judges can be affected by forum selling. Therefore, it is wise that the Federal Rules of Civil Procedure and federal statutes usually restrict jurisdiction and venue for cases in federal court.

This Article focuses on non-contractual litigation. Forum selling in contractual settings may be beneficial. When sophisticated parties use forum-selection clauses to choose the forum in their contracts, they have an incentive to choose a forum that provides unbiased, efficient adjudication because doing so maximizes the value of their transaction.[2] As a result, states that want to attract contractual litigation would do so by offering procedures that favor neither side. Contracting parties seem to prefer to

1. *See infra* Table 1.

2. Whether forum selection clauses in cases not involving sophisticated parties are beneficial is much less clear. *See* Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1243 (2003). Technically, the domain name dispute system discussed in Part II.C is contractual because the domain name owner agrees to it in its contract with the domain name registrar. Nevertheless, because all registrants must agree to the system, and because the system allows trademark owners to unilaterally choose the dispute resolution provider, we do not think this system results in unbiased, efficient adjudication. *See infra* Part II.C.

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litigate in New York courts, and there is evidence that "New York's dominance" is the result of "affirmative and successful efforts to induce parties to select New York as the provider of law and forum for large commercial contracts."[3] The methods that New York has chosen, such as the creation of a "commercial division" with expert judges and streamlined case management, seem aimed at providing efficient adjudication rather than plaintiff-friendly procedures.[4] For similar reasons, when parties jointly and consensually choose arbitrators or a court after a dispute arises, the results may also be beneficial, even in non-contractual disputes.[5] The potentially beneficial effect of competition when forum selection is consensual helps to explain the strong federal policies in favor of enforcement of forum selection clauses[6] and arbitration.[7]

The non-contractual, non-consensual situations analyzed in this Article are unlike those discussed in the previous paragraph because forum selection is unilateral. The plaintiff ordinarily chooses the court, so courts compete by catering to plaintiffs. While Todd Zywicki has noted that jurisdictional competition can be either "good or bad . . . depending on the institutional structure surrounding it and the incentives of the parties partaking in it,"[8] this Article makes a much simpler claim. Jurisdictional competition may be good when parties mutually choose the forum, but it is very likely to be bad when one party, the plaintiff, selects the court unilaterally.

A counterargument in favor of forum shopping and forum selling asserts that most courts and judges are inefficiently pro-defendant. If so, jurisdictional rules that give judges an incentive to be more pro-plaintiff and that allow plaintiffs to choose the judges who are more favorable to them could redress what would otherwise be an inefficient pro-defendant

3. Geoffrey P. Miller & Theodore Eisenberg, *The Market for Contracts*, 30 CARDOZO L. REV. 2073, 2098 (2009).

4. *See id.* at 2094–95.

5. *See* ERIN A. O'HARA & LARRY E. RIBSTEIN, THE LAW MARKET 87–96 (2009); Jonathan Remy Nash & Rafael I. Pardo, *An Empirical Investigation into Appellate Structure and the Perceived Quality of Appellate Review*, 61 VAND. L. REV. 1746–47, 1803 (2008) (suggesting that bankruptcy appellate panels, "by virtue of their structural features, would be perceived to provide a quality of appellate review superior to that of their district court counterparts"). Whether arbitration clauses in consumer or employment contracts are beneficial is unclear. Robert Berner & Brian Grow, *Banks vs. Consumers (Guess Who Wins)*, BLOOMBERG BUS. WK. 72 (June 16, 2008), http://www.bloomberg.com/bw/stories/2008-06-04/banks-vs-dot-consumers-guess-who-wins.

6. *See* Carnival Cruise Lines v. Shute, 499 U.S. 585, 593–97 (1991).

7. Federal Arbitration Act, 9 U.S.C. § 1–307 (2012).

8. Todd J. Zywicki, *Is Forum Shopping Corrupting America's Bankruptcy Courts?*, 94 GEO. L.J. 1141, 1146 (2006).

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bias. However, the case studies in this Article suggest forum selling has not been beneficial. For example, most commentators argue that patent law is currently too strong and that patent assertion entities (known pejoratively as "patent trolls") are impeding technological progress.[9] In this context, the Eastern District of Texas's pro-patentee bias and particular attractiveness to patent assertion entities aggravates the problem and makes the law worse.

Forum selling bears some resemblance to the competition for corporate chartering. Some argue that competition has led to a "race to the top" because corporate managers who choose the state of incorporation have incentives to maximize firm value by selecting the state with the best corporate law.[10] While competition for incorporation may plausibly lead to efficient law, no similar argument can be made in the litigation context, except, as noted above, in contractual situations. The plaintiff generally chooses where the case will be litigated, and there is no reason to think that plaintiffs prefer adjudication that maximizes social welfare. They prefer courts that increase their expected recoveries and minimize their costs. As a result, competition among courts is likely to result in a pro-plaintiff bias.[11]

To some, the term "forum selling" may have a negative connotation suggestive of corrupt, unethical, or otherwise wrongful behavior. That is not our intention. Rather, we use the term "forum selling" because its similarity to "forum shopping" highlights the relationship between jurisdictional choice, plaintiffs' filing decisions, and judicial action. We use the term broadly to include all efforts to attract litigation to a court. It therefore includes socially beneficial efforts like those seen for contract litigation between sophisticated parties. In the non-consensual situations that are the focus of this Article, our claim is only that efforts to attract litigation are socially undesirable because they are likely to produce inefficient pro-plaintiff law. We make no judgment about the ethical or moral issues surrounding forum selling. For example, reasonable people could disagree about whether a judge who uses broad discretion on procedural matters in a pro-plaintiff manner to attract litigation has acted

9. DAN L. BURK & MARK A. LEMLEY, THE PATENT CRISIS AND HOW THE COURTS CAN SOLVE IT 3 (2009) ("Patent owners—and the Federal Circuit itself—are beset on all sides by those complaining about the proliferation of bad patents and the abuse of those patents in court.").

10. *See* FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 217–18 (1991). *But see* Lucian Arye Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435, 1438 (1992) (arguing there is a "race for the bottom" in which "states are driven to offer rules that benefit managers at the expense of shareholders").

11. *See* Daniel Klerman, *Jurisdictional Competition and the Evolution of the Common Law*, 74 U. CHI. L. REV. 1179, 1182–83 (2007); LYNN LOPUCKI, COURTING FAILURE 241 (2005).

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differently than a judge who does so because of ideological preferences and whether either or both of these are unethical or otherwise "wrongful." These questions are not our concern. Rather, our focus is on the systemic consequences of forum selling.

This Article explores forum selling through five case studies: patent litigation in the Eastern District of Texas and elsewhere; class actions and mass torts in "magnet jurisdictions" such as Madison County, Illinois; bankruptcy and the District of Delaware; the Internet Corporation for Assigned Names and Numbers ("ICANN") domain name arbitration; and common law judging in early modern England. Although these areas have been studied by specialists, their implications for personal jurisdiction and venue more generally have not been explored. For example, Lynn LoPucki wrote a book and a series of articles exploring the ways in which bankruptcy courts were being "corrupted" by their competition for cases.[12] Competition for patent cases is analyzed by Jonas Anderson, who argues that competition is particularly likely when courts are specialized and advocates random assignment of cases to judges as the solution.[13] Mark Geist and Milton Mueller have examined competition among private dispute resolution providers deciding domain names disputes.[14]

This Article builds on prior work that Daniel Klerman has done on jurisdiction and jurisdictional competition. In 2007, Klerman argued that loose jurisdictional rules in pre-modern England led to competition among courts and a pro-plaintiff bias in the development of the common law.[15] More recently, Klerman coined the phrase "forum selling" and identified it as a potential problem in modern litigation.[16] This Article uses detailed case studies to show that forum selling is a reality in several areas of law.

12. LOPUCKI, *supra* note 11. *See infra* Part II.B.

13. J. Jonas Anderson, *Court Competition for Patent Cases*, 163 U. PENN. L. REV. 631, 683, 693 (2015). Jonas Anderson and the authors of this Article conceived of their articles independently and only became aware of each other's work in August 2014, when both had nearly complete drafts. *See also* Stefan Bechtold & Jens Frankenreiter, *Forum Selling in Germany: Supply-Side Effects in Patent Forum Shopping* (unpublished manuscript) (on file with authors).

14. Michael Geist, *Fair.com?: An Examination of the Allegations of Systemic Unfairness in the ICANN UDRP*, 27 BROOK. J. INT'L L. 903, 918 (2002); Milton Mueller, *Rough Justice: A Statistical Assessment of ICANN's Uniform Dispute Resolution Policy*, 17 INFO. SOC'Y 151, 152 (2001).

15. Klerman, *supra* note 11. This work, in turn, built upon the insights of William Landes, Richard Posner, and Bruce Hay, who noted incentives for a pro-plaintiff bias when plaintiffs have choice of forum. William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 254–55 (1979); Bruce L. Hay, *Conflicts of Law and State Competition in the Product Liability System*, 80 GEO. L.J. 617, 643–44 (1992).

16. Daniel Klerman, *Personal Jurisdiction and Product Liability*, 85 S. CAL. L. REV. 1551,1554 (2012); Daniel Klerman, *Rethinking Personal Jurisdiction*, 6 J. LEGAL ANALYSIS 245 (2014) [hereinafter Klerman, *Rethinking*].

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The major contributions of this Article are to show that forum selling is not restricted to one or two legal areas, that in non-consensual contexts it leads to inefficient distortions of substantive law, procedure, and trial management practices, and that it can be cured by constricting jurisdictional choice. Prior work has seen judicial efforts to attract litigation as an anomaly peculiar to particular areas of the law, rather than a general problem to be considered in the design of legal systems.

While this Article focuses on the implications of forum selling for jurisdiction and venue, forum selling also sheds light on many other phenomena. For scholars of judicial decisionmaking, it suggests that judges' ideological preferences and desire for leisure may sometimes be outweighed by competitive pressure to attract cases. For procedure scholars, the techniques used by courts to attract cases while evading judicial review suggest that doctrines that restrict appellate review, such as the final judgment rule and the abuse of discretion standard of review, may encourage strategic behavior by trial judges. This Article also contributes to the debate over rules versus standards by suggesting that standards may be less desirable because they provide more leeway for motivated judges to tilt the law in a pro-plaintiff way.

Part I analyzes forum selling in patent litigation in depth. Part II shows that forum selling is a potential problem in any legal system and in any legal field by briefly discussing class actions and mass torts, bankruptcy, domain name disputes, and early modern common law judging. Part III generalizes from the case studies, and Part IV explores possible solutions. A short conclusion follows.

I. PATENTS AND THE EASTERN DISTRICT OF TEXAS

A. FORUM SHOPPING IN PATENT CASES

Due to weak personal jurisdiction and venue constraints, a patentee can usually "choose to initiate a lawsuit in virtually any federal district court."[17] Until the late 1980s, venue in patent cases was rather restrictive,[18] but in 1988, Congress amended the general venue statute, 28 U.S.C. § 1391(c), to define a corporation's residence "for purposes of venue" as any district in which the corporation would be subject to personal

17. Jeanne C. Fromer, *Patentography*, 85 N.Y.U. L. REV. 1444, 1451 (2010). *See also* Kimberly A. Moore, *Forum Shopping in Patent Cases: Does Geographic Choice Affect Innovation?*, 79 N.C. L. REV. 889, 901 (2001).

18. 28 U.S.C. § 1400(b) (1957). *See also* Fourco Glass Co. v. Tansmirra Prods. Corp., 353 U.S. 222, 226–28 (1957).

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jurisdiction, if that district were considered a state.[19] Despite the Supreme Court's recent decisions questioning the "stream of commerce" theory of personal jurisdiction in product liability cases,[20] the Federal Circuit has held that jurisdiction is proper if the accused products are sold in the forum state, whether those sales are made directly by the alleged infringer or through established distribution networks.[21] Because most accused infringers are corporations whose products are sold nationwide, most patent plaintiffs can sue in any district.[22]

Forum shopping in patent cases has been extensive since at least the late 1990s,[23] but the Eastern District of Texas emerged in the mid-2000s as the favored forum,[24] despite lacking major population, corporate, or technology centers.[25] Outside the top ten in patent filings as late as 2003, the district surged to take the top spot in 2007.[26] As shown in Table 1, the Eastern District of Texas had the most patent cases in six of the last eight years and the second most in the other two years.

19. VE Holding Corp. v. Johnson Gas Appliance Co., 917 F.2d 1574, 1578 (Fed. Cir. 1990) (citing 28 U.S.C. § 1391(c) (1988)).

20. *See* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780 (2011); Asahi Metal Indus. Co. v. Superior Ct. of Cal., 480 U.S. 102 (1987).

21. Beverly Hills Fan Co. v. Royal Sovereign Corp., 21 F.3d 1558, 1565–69 (Fed. Cir. 1994); AFTG-TG, LLC v. Nuvoton Tech. Corp., 689 F.3d 1358, 1363–64 (Fed. Cir. 2012) (asserting that "the law remains the same after *McIntyre*" and thus that *Beverly Hills Fan* remains controlling precedent).

22. *See* Megan M. La Belle, *Patent Litigation, Personal Jurisdiction, and the Public Good*, 18 GEO. MASON L. REV. 43, 70 (2010); Moore, *supra* note 17, at 895.

23. Moore, *supra* note 17, at 901–07.

24. Yan Leychkis, *Of Fire Ants and Claim Construction: An Empirical Study of the Meteoric Rise of the Eastern District of Texas as a Preeminent Forum for Patent Litigation*, 9 YALE J. L. & TECH. 193, 204–05 (2007).

25. *See infra* Table 1. The Eastern District of Texas runs from the outer edges of the Dallas and Houston metropolitan areas to Oklahoma on the north, the Gulf of Mexico on the south, and Arkansas and Louisiana on the east. The Sherman Division includes Dallas suburbs like Plano and The Colony, but only a miniscule number of patent cases are filed there. *See* James C. Pistorino & Susan J. Crane, *2011 Trends in Patent Case Filings: Eastern District of Texas Continues to Lead Until America Invents Act is Signed*, PERKINS COIE 10 (March 2012), https://www.perkinscoie.com/images/content/2/0/v2/2058/pl-12-03pistorinoarticle.pdf (showing Eastern District of Texas filings by division); PACER, https://www.pacer.gov/map.html (last visited Oct. 12, 2015) (providing a map outlining the boundaries of the districts in Texas).

26. *See infra* Table 1.

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TABLE 1. Top Ten Most Popular Districts for Patent Cases, 2007–2014 (% of Total Cases)[27]

District	*'07*	*'08*	*'09*	*'10*	*'11*	*'12*	*'13*	*'14*	*'15 1st Half*	*'07 - 1st Half '15*
Eastern District of Texas	13%	11%	9%	10%	12%	23%	24%	28%	44%	21%
District of Delaware	6%	6%	9%	9%	14%	18%	22%	19%	8%	14%
Central District of California	12%	8%	11%	8%	9%	9%	7%	7%	5%	8%
Northern District of California	5%	6%	6%	6%	6%	5%	4%	5%	5%	5%
Northern District of Illinois	5%	6%	5%	6%	6%	4%	4%	3%	2%	4%
District of New Jersey	7%	6%	6%	6%	5%	3%	2%	6%	5%	5%
Southern District of New York	4%	5%	6%	4%	4%	3%	2%	2%	2%	3%
Southern District of California	2%	3%	3%	2%	2%	3%	4%	2%	2%	2%
Southern District of Florida	2%	1%	2%	2%	2%	2%	3%	1%	2%	2%
District of Massachusetts	2%	2%	2%	3%	2%	1%	2%	1%	1%	2%
National Total	2775	2573	2547	2769	3574	5454	6115	5077	3141	34,025

These figures *understate* the Eastern District's share of patent litigation prior to 2012. Patentees, especially patent assertion entities, sometimes sued several unrelated defendants in a single lawsuit, a practice far more common in the Eastern District of Texas than elsewhere.[28] Ten percent of all patent cases were filed in the Eastern District of Texas in 2010, but 25% of all patent infringement defendants were sued there.[29]

27. Data was obtained from Lex Machina. LEX MACHINA, https://lexmachina.com (data obtained on Aug. 22, 2015).

28. *See* Greg Reilly, *Aggregating Defendants*, 41 FLA. ST. U. L. REV. 1011, 1023–25 (2014).

29. James Pistorino, *Concentration of Patent Cases in Eastern District of Texas Increases in 2010*, 81 BNA PAT., COPYRIGHT & TRADEMARK J. 803 (2011),

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Congress prohibited suing multiple unrelated defendants in one suit in the America Invents Act, effective September 16, 2011.[30] Subsequently, plaintiffs simply brought suits against individual infringers rather than against multiple defendants. Since plaintiffs' preferred court remained the same, the Eastern District's share of patent infringement cases soared to 23% in 2012, 24% in 2013, and 28% in 2014.[31] In the first half of 2015, the Eastern District's share of cases again jumped significantly, with the district now handling 44% of the nation's patent litigation.[32]

B. HOW DOES THE EASTERN DISTRICT OF TEXAS ATTRACT CASES?

While some attribute the Eastern District's popularity to non-judicial factors, like a pro-patentee jury pool that values property rights or an uncongested docket,[33] this Article argues that judges in the Eastern District have consciously sought to attract patentees and have done so by departing from mainstream doctrine in a variety of procedural areas in a pro-patentee (pro-plaintiff) way. Judges in the Eastern District have themselves acknowledged a desire to attract patent cases. For example, Judge T. John Ward, the original architect of the Eastern District's patent docket, explained that "when I came to the bench, I sought out patent cases."[34] While each of these procedural deviations may be capable of neutral explanation or justification in isolation, their cumulative effect tilts the handling of patent cases in the Eastern District of Texas in favor of patentees.

The Eastern District's use of procedural rules and discretion in procedural matters to attract cases is almost completely shielded from appellate review by the abuse of discretion standard of review applicable to most procedural decisions, the harmless error doctrine, and the final judgment rule.[35] Some appellate judges, however, have taken notice. For example, Justice Scalia called the Eastern District a "renegade" jurisdiction.[36]

http://www.perkinscoie.com/files/upload/PL_11_04Pistorino.pdf.

30. David O. Taylor, *Patent Misjoinder*, 88 N.Y.U. L. REV. 652, 693 (2013).

31. *See supra* Table 1.

32. *Id*.

33. *See* Leychkis, *supra* note 24, at 209–15; Xuan-Thao Nguyen, *Justice Scalia's "Renegade District": Lessons for Patent Law Reform*, 83 TUL. L. REV. 111, 141 (2008).

34. Allan Pusey, *Marshall Law: Patent Lawyers Flock to East Texas Court for its Expertise and 'Rocket Docket,'* DALL. MORNING NEWS, Mar. 26, 2006, at 1D.

35. *See, e.g.*, STEPHEN C. YEAZELL, CIVIL PROCEDURE 677–81, 683–91, 703–13 (8th ed. 2012).

36. Transcript of Oral Argument at 11, eBay Inc. v. MercExchange L.L.C, 547 U.S. 388 (2006) (No. 05-130).

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1. Hostility to Summary Judgment

Perhaps nothing increases the patentee's chances of a favorable resolution more than making it to trial. Patentees win over 60% of the time at trial.[37] By contrast, only 29% of grants of summary judgment are in favor of patentees.[38] As in other substantive areas, summary judgment is overwhelmingly sought by patent defendants.[39] Thus, "a jurisdiction that grants many summary judgment motions is likely to be a defense jurisdiction, while a court that allows many matters to go to trial is likely to end up favoring the patentee."[40]

As shown in Table 2, judges in the Eastern District of Texas grant summary judgment at less than one-quarter the rate of judges in other districts. Only Delaware even approaches the Eastern District of Texas, and its summary judgment rate is twice that of the Eastern District of Texas.

37. John R. Allison et al., *Understanding the Realities of Modern Patent Litigation*, 92 TEX. L. REV. 1769, 1790 (2014).

38. *See id.* at 1778–79, 1785, 1788, 1790, and E-mail from David Schwartz to Greg Reilly (Sept. 5, 2014) (on file with authors) (both sources identifying 542 summary judgment grants, 155 for the patentee).

39. Allison et al., *supra* note 37, at 1778–79, 1785, 1788, 1790, and E-mail from David Schwartz to Greg Reilly (Sept. 5, 2014) (on file with authors) (identifying 1296 summary judgment motions, 927 (72%) sought by the accused infringer).

40. Mark A. Lemley, *Where to File Your Patent Case*, 38 AIPLA Q.J. 401, 403 (2010).

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TABLE 2. Summary Judgment Rate in Popular Patent Districts (1/1/2000–6/30/2015)[41]

District	*Summary Judgments*	*Total Cases Resolved*	*Summary Judgment Rate*
Eastern District of Texas	50	6421	0.8
District of Delaware	76	4787	1.6
Central District of California	212	4478	4.7
Northern District of California	143	2673	5.3
Northern District of Illinois	82	2392	3.4
District of New Jersey	68	1986	3.4
Southern District of New York	89	1819	4.9
Southern District of California	30	1135	2.6
Southern District of Florida	30	1124	2.7
District of Massachusetts	43	1013	4.2
All Districts (excluding E.D. Tex.)	1490	40,364	~~4.5~~ 3.7

The infrequency of summary judgment is not just the result of fewer motions by the parties.[42] The Eastern District is far less likely to grant a summary judgment motion than elsewhere. One study found that the Eastern District's summary judgment motion win rate (26.2%) paled in comparison to other popular districts, like the Northern District of California (45%), the Central District of California (48.2%), the Northern District of Illinois (38.1%), and even the District of Delaware (32%).[43]

41. *See infra* Appendix 2.

42. From January 1, 2000 to June 30, 2015, only 9.6% of orders regarding summary judgment, a proxy for motions for summary judgment, were from the Eastern District of Texas, even though the Eastern District accounted for 15.1% of patent litigation in this period. LEX MACHINA, http://lexmachina.com (data obtained is on file with authors).

43. Andrei Iancu & Jay Chung, *Real Reasons the Eastern District of Texas Draws Patent Cases—Beyond Lore and Anecdote*, 14 SMU SCI. & TECH. L. REV. 299, 316–17 & n.88 (2011) (analyzing data from 1991–2010).

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Another more comprehensive study found that accused infringers prevail on summary judgment on patent invalidity only 18% of the time in the Eastern District of Texas, compared to 31% nationwide.[44] Similarly, patent defendants prevail on non-infringement motions 45% of the time in the Eastern District, but 62% nationwide.[45] Unsurprisingly, the Eastern District's hostility to summary judgment corresponds to a higher trial rate: 8% of patent cases go to trial in the Eastern District of Texas, second only to the District of Delaware (11.8%), and far above the national average of 2.8%.[46]

Some suggest that the Eastern District of Texas's hostility to summary judgment is the result of general judicial philosophy, not a desire for patent cases.[47] Beyond any general antipathy to summary judgment, Eastern District judges are particularly hostile to summary judgment in patent cases. Patent litigants, but not other litigants, are required to seek permission before filing summary judgment motions via a five-page letter brief and are prohibited from moving for summary judgment if permission is denied.[48] Moreover, Eastern District judges implicitly acknowledge that patentees are attracted to the district by the fact that they are averse to summary judgment, emphasizing that they "believe in trial by jury."[49]

44. Allison et al., *supra* note 37, at 1784, 1793 (analyzing data from 2008–2009).

45. *Id.* at 1790, 1793.

46. Lemley, *supra* note 40, at 411–13 (analyzing districts with twenty-five or more outcomes).

47. Paul M. Janicke, *The Judicial Panel on Multidistrict Litigation: Now a Strengthened Traffic Cop for Patent Venue*, 32 REV. OF LITIG. 497, 502 (2013) ("[S]ummary judgment as a tool of judicial disposition was somewhat culturally foreign in the Eastern District . . . .").

48. Chief Judge Leonard Davis, Standing Order Regarding Letter Briefs, Motions *In Limine*, Exhibits, Deposition Designations, and Witness Lists, at 1 (E.D. Tex. Apr. 23, 2014), http://www.txed.uscourts.gov/cgi-bin/view_document.cgi?document=24456; Judge Rodney Gilstrap, Sample Docket Control Order & Sample Docket Control Order—Patent, http://www.txed.uscourts.gov/page1.shtml?location=info:judge&judge=17; Judge Michael H. Schneider, Sample Patent Scheduling and Discovery Order & Sample Non-Patent Scheduling and Discovery Order, http://www.txed.uscourts.gov/page1.shtml?location=info:judge&judge=9. In 2015, Judge Gilstrap extended this requirement to dispositive motions prior to a claim construction order on invalidity for failure to claim patentable subject matter under 35 U.S.C. § 101. *See* Judge Rodney Gilstrap, Sample Docket Control Order—Patent, http://www.txed.uscourts.gov/page1.shtml?location=info:judge&judge=17. This is significant because the Federal Circuit has endorsed resolving Section 101 issues on the pleadings prior to claim construction via a Rule 12(b)(6) motion to dismiss. *See, e.g.*, OIP Techs., Inc. v. Amazon.com, Inc., 788 F.3d 1359, 1362 (Fed. Cir. 2015); *id.* at 1364–65 (Mayer, J., concurring). Judge Gilstrap subsequently loosened this requirement so that the parties need only meet and confer, not seek permission, before filing pre-claim construction Section 101 motions. Michael C. Smith, *New ED Tex Tools for Handling Pre-Markman 101 Motions*, EDTEXWEBLOG.COM (Nov. 11, 2015, 3:22 PM), http://mcsmith.blogs.com/eastern_district_of_texas/2015/11/new-ed-tex-tools-for-handling-pre-markman-101-motions.html.

49. Symposium, *The History and Development of the EDTX as a Court with Patent Expertise: From TI Filing, to the First Markman Hearing, to the Present*, 14 SMU SCI. & TECH. L. REV. 253, 263 (2011) [hereinafter Symposium] (statement of Judge Leonard Davis).

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Former Chief Judge Davis said he was "cautiously optimistic" about the future of the patent docket after the retirement of its architect, Judge Ward, in part because Judge Ward's replacement, Judge Gilstrap, "come[s] out of the Eastern District [and] will have largely the same belief system," including the "belie[f] in trial by jury."[50]

Hostility to summary judgment is particularly advantageous to patent plaintiffs in the Eastern District of Texas because juries in the Eastern District have a pro-patentee reputation. Patentees win 72% of jury trials in the Eastern District compared to 61% nationwide.[51] The low summary judgment rate, coupled with pro-patentee juries, gives patentees substantial leverage in settlement negotiations. Thus, whether a case goes to trial or not, the result is more likely to favor the patentee.

2. Judge Shopping

Patentees have the unique opportunity in the Eastern District of Texas to choose their judge. As one leading Eastern District practitioner put it, "I will say that there is something happening in the Eastern District that you do not have in the big commercial areas—lawyers generally know who their judge is going to be in the Eastern District of Texas."[52]

The norm in federal district courts is random assignment among judges within a district.[53] Since 2011, the Patent Pilot Program has relaxed this norm in patent cases in fourteen districts. To increase patent expertise in the district courts, the program allows a judge initially assigned a patent case to have it reassigned to a judge who has chosen to hear more patent cases,[54] with the reassignment random among all program judges in the district.[55] Almost all participating districts have at least three program judges. Non-program judges also often decline to reassign patent cases.[56]

50. *Id.*

51. Allison et al., *supra* note 37, at 1793–94.

52. Symposium, *supra* note 49, at 257–58.

53. Theodore Eisenberg et al., *Does the Judge Matter? Exploiting Random Assignment on a Court of Last Resort to Assess Judge and Case Selection Effects*, 9 J. EMPIRICAL LEGAL STUD. 246, 247 (2012).

54. *District Courts with Patent-Heavy Dockets*, TEXAS LAW (June 8, 2011), https://law.utexas.edu/judicial-clerkships/2011/06/08/district-courts-with-patent-heavy-dockets/.

55. Ron Vogel, *The Patent Pilot Program: Reassignment Rates and the Effect of Local Patent Rules*, N.Y. INTELL. PROP. L. ASS'N BULL. 17–18 (Oct./Nov. 2013), http://www.fr.com/files/Uploads/Documents/Vogel.NYIPLABulletin.Pilot-Patent-Program-Reassignment-Rates-and-Effects-of-Local-Rules.OctNov2013.pdf.

56. *Id.* ("Between September 19, 2011 and October 10, 2013, 5,681 patent cases were filed in Program districts. Of those 5,681 patent cases, 2,037 were initially assigned to non-patent judges and 649 of those 2,037 cases were re-assigned.").

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Thus, even under the Patent Pilot Program, the odds of being assigned a particular judge are at best one-third and usually far less.

In contrast to the random assignment norm, the Eastern District of Texas assigns cases based on the division in which they were filed, and plaintiffs can choose to file in any division simply by selecting it from a drop-down menu in the electronic filing system. Selecting the division effectively selects the judge because the Eastern District specifies *ex ante* via a public order the allocation of cases filed in each division. For example, at the outset of the Eastern District's popularity in 2006, patentees filing in the Marshall division were told they had a 70% chance of being assigned to Judge Ward, those filing in Tyler a 60% chance of Judge Davis, those filing in Sherman a 65% chance of Judge Schell, and those filing in Texarkana a 90% chance of Judge Folsom.[57]

Although aspects of this assignment system pre-date the Eastern District's patent litigation boom,[58] the Eastern District provided patent plaintiffs with *even greater* judge-shopping opportunities than other litigants. For example, according to the February 10, 2009 "General Order" governing case assignment, Judge Ward received 100% of patent cases from Marshall and Texarkana, but only 90% and 10%, respectively, of other civil cases.[59] Since 2009, the assignment system has changed with the appointment of new judges and other factors, but patent plaintiffs have retained their unique ability to choose the judge with a high degree of confidence.[60] As a result, over the past decade, a patentee filing in the Eastern District of Texas knew it had at least a 50% (and often far closer to 100%) chance of having a particular judge simply by clicking on a particular division from a drop-down menu when electronically filing its case.[61]

There was no particular reason why patentees should be given a choice of division, much less a choice of judge, as patent cases almost never have a greater connection to one division of the Eastern District than

57. U.S. Dist. Ct. E.D. Tex. General Order 06-13, http://www.txed.uscourts.gov/cgi-bin/view_document.cgi?document=1956 (Aug. 18, 2006).

58. U.S. Dist. Ct. E.D. Tex. General Order 98-5, http://www.txed.uscourts.gov/cgi-bin/view_document.cgi?document=2090 (Apr. 1998).

59. U.S. Dist. Ct. E.D. Tex. General Order 09-4, http://www.txed.uscourts.gov/cgi-bin/view_document.cgi?document=19368 (Feb. 10, 2009).

60. U.S. Dist. Ct. E.D. Tex. General Order 11-2, http://www.txed.uscourts.gov/cgi-bin/view_document.cgi?document=20087 (Mar. 3, 2011).

61. *The Attorney's "How To" Guide for Civil Case Opening*, TEX. E. DIST. COURT 4 (June 11, 2014), http://www.txed.uscourts.gov/cgi-bin/view_document.cgi?document=2353.

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another.[62] As noted above, patent cases generally have a tenuous connection to the Eastern District based on the sale of a few allegedly infringing products somewhere in the district.[63]

Patentees have used their ability to judge shop. From January 2010 to September 15, 2011—when Judge Ward was receiving 75% of Marshall civil cases and Judge Davis 95% of Tyler patent cases—96% of patent defendants were sued in Marshall or Tyler,[64] even though those divisions are further from the population centers of Dallas-Fort Worth and Houston than the Sherman and Beaumont divisions. In the three months after Judge Ward retired on October 1, 2011, patent litigation shifted overwhelmingly to Judge Davis,[65] but then shifted to Judge Gilstrap after he was confirmed and gained the confidence of patent litigators.[66]

The Eastern District has maintained its case assignment system despite contrary instructions from Congress as part of the Patent Pilot Program. Congress specified that patent cases initially "are *randomly assigned* to the judges of the district court,"[67] but the Eastern District's order implementing the Patent Pilot Program provides that "[p]atent cases, like all other civil cases, will be assigned to the division in which they are filed and in the ratios specified in this court's latest general order regarding district judge civil case assignments."[68]

This discussion of judge shopping reveals that forum selling is a phenomenon of competition, both among districts and among judges. Some aspects of forum selling, such as rules requiring permission to file summary judgment, are made on a district-wide basis. In contrast, it is particular judges who want (or do not want) more cases and who make the case-by-case determinations, such as allowing joinder or consolidation, that make the district and/or their court more attractive. By allowing judge shopping, the Eastern District of Texas makes the judge-specific aspects of forum selling more visible. In addition, by allowing judge shopping, the Eastern

62. For this reason, some districts assign patent cases district-wide, even when they use a division-based assignment system for other civil cases. U.S. Dist. Ct. N.D. Cal. General Order 44, "Assignment Plan" § D(3) (amended Dec. 17, 2013), http://www.cand.uscourts.gov/generalorders.

63. *See supra* text accompanying notes 20–22.

64. Pistorino & Crane, *supra* note 25, at 9–10.

65. *Id*.

66. Owen Byrd & Brian Howard, *2013 Patent Litigation Year in Review*, at 2, 6, LEX MACHINA, https://www.law.berkeley.edu/files/2013_Patent_Litigation_Year_in_Review_Full_Report_(MLex_Machina).pdf (last visited Oct. 22, 2015).

67. Pub. L. No. 111-349 § 1, 124 Stat. 3674 (2011) (codified at 28 U.S.C. § 137 note) (emphasis added).

68. U.S. Dist. Ct. E.D. Tex., General Order No. 11-11, http://www.txed.uscourts.gov/cgi-bin/view_document.cgi?document=20787 (Aug. 22, 2011).

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District facilitates competition on the district level because those judges in the Eastern District who do not want to hear more patent cases do not have to do so, and so can consent to district-wide measures to attract patent litigation (such as patent local rules) without fear that they personally will have to hear more patent cases.

3. Loose Interpretation of Joinder Rules

In the late 2000s, a popular tactic among patentees, especially patent assertion entities, was to sue multiple unrelated defendants accused of infringing the same patent in a single lawsuit.[69] Suing defendants collectively allowed patentees to decrease their own costs and increase the coordination costs and strategic difficulties for defendants. It also allowed patentees to use one defendant with some connection to the forum as an anchor to prevent transfer by other defendants with little or no connection.[70] Although one of us has previously suggested that defendants could benefit from being sued collectively,[71] patentees' own actions demonstrate that they perceived a significant strategic advantage from suing unrelated defendants collectively. On the last day before the effective date of a new statutory provision banning joinder of unrelated defendants in a single patent lawsuit, the most patent cases in recent memory were filed: 50 suits against 800 defendants.[72]

A plaintiff may join multiple defendants in the same suit only if the claims "aris[e] out of the same transaction, occurrence, or series of transactions or occurrences."[73] The overwhelming weight of district court authority, subsequently endorsed by the Federal Circuit, held that claims against "separate companies that independently design, manufacture and sell different products in competition with each other"[74] did not arise from the same transaction or occurrence, even if the products were accused of infringing the same patent and operated similarly.[75] Rather, "an actual link"

69. Reilly, *supra* note 28, at 1024. Patent assertion entities filed 19% of patent cases but sued 28% of defendants between 2000 and 2008. Colleen V. Chien, *Of Trolls, Davids, Goliaths, and Kings: Narratives and Evidence in the Litigation of High-Tech Patents*, 87 N.C. L. REV. 1571, 1599, 1603 (2009).

70. Taylor, *supra* note 30, at 672–78.

71. *See generally* Reilly, *supra* note 28 (discussing benefits of multi-defendant suits generally, with particular reference to multi-defendant patent suits).

72. Tracie L. Bryant, Note, *The America Invents Act: Slaying Trolls, Limiting Joinder*, 25 HARV. J.L. & TECH. 687, 687 (2012).

73. FED. R. CIV. P. 20(a)(2)(A).

74. Androphy v. Smith & Nephew, Inc., 31 F. Supp. 2d 620, 623 (N.D. Ill. 1998).

75. *See, e.g.*, *In re* EMC Corp., 677 F.3d 1351, 1357 & n.2, 1359 & n.3 (Fed. Cir. 2012); Pergo, Inc. v. Alloc, Inc., 262 F. Supp. 2d 122, 128 (S.D.N.Y. 2003).

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between the products was required, such as a relationship between the defendants, the use of identically sourced components, or overlap in the products' development or manufacture.[76]

The Eastern District of Texas, and a few districts following it,[77] held that patent infringement claims arise from the same transaction or occurrence if there is "some connection or logical relationship" between the claims—which would exist "if there is some nucleus of operative facts or law," such as allegations that the defendants infringed the same patent or had products that were not "dramatically different."[78] As a result, multi-defendant patent cases became concentrated in the Eastern District. By 2010, patent cases in the Eastern District of Texas had an average of thirteen defendants, compared to 3.9 in the Northern District of California, 3.7 in the Central District of California, and 3.5 in the District of Delaware.[79]

Congress responded in 2011 with the America Invents Act ("AIA").[80] The AIA only permitted joinder or consolidation for trial if the allegations involved "the same accused product or process" and clarified that "allegations that [the defendants] each have infringed the patent or patents in suit" were insufficient.[81] The provision specifically targeted the Eastern District of Texas.[82]

Although technically complying with the AIA's anti-joinder provision, judges in the Eastern District of Texas limited its impact. They ruled that the Act did not apply retroactively,[83] and in contrast to other districts, continued to apply their lenient joinder standard to cases filed before the AIA.[84] The Federal Circuit ultimately granted mandamus,

76. *See EMC*, 677 F.3d at 1359.

77. *See id.* at 1357 & n.2 (recognizing that the Eastern District of Texas's approach was in the minority).

78. MyMail, Ltd. v. Am. Online, Inc., 223 F.R.D. 455, 456–57 (E.D. Tex. 2004).

79. Pistorino, *supra* note 29.

80. Pub. L. No. 112-29, 125 Stat. 284 (2011) (amending U.S.C. tit. 25).

81. 35 U.S.C. § 299 (2012).

82. Taylor, *supra* note 30, at 700, 704.

83. Maya M. Eckstein et al., The (Unintended) Consequences of the AIA Joinder Provision, AIPLA Spring Meeting (May 10–12, 2012), http://www.hunton.com/files/Publication/c4abf2b5-ac78-4b18-8c65-8e02608284d8/Presentation/PublicationAttachment/0f8412f9-9d41-444d-8b47-90e694a54abe/AIPLA_Joinder_Paper.pdf. *E.g.*, Ganas LLC v. Sabre Holdings Corp., 2011 U.S. Dist. LEXIS 154632, at *28–29 (E.D. Tex. Oct. 19, 2011).

84. *See, e.g.*, Lodsys, LLC v. Brother Int'l Corp., No. 2:11–cv–90–JRG, 2012 U.S. Dist. LEXIS 31456, at *17–21 (E.D. Tex. Mar. 8, 2012); Imperium (IP) Holdings, Inc. v. Apple, Inc., No. 4:11–CV–163, 2012 U.S. Dist. LEXIS 10333, at *6–14 & nn.2–3 (E.D. Tex. Jan. 20, 2012) (report and recommendation of magistrate judge).

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holding that joinder of unrelated defendants was improper even before the AIA.[85] In response, Eastern District judges consolidated cases for pre-trial purposes, which provides the functional equivalent of joinder until the point of trial.[86] Since consolidated cases are largely managed like a single lawsuit, wholesale consolidation "relieves patent plaintiffs of many of the financial impediments that Congress [in the AIA] sought to impose upon them."[87]

4. Pro-Plaintiff Management of Multi-Defendant Cases

The Eastern District of Texas's case management of multi-defendant and consolidated cases also benefits patentees. Eastern District judges often require defendants to file a single brief or present a single oral argument on crucial issues, such as claim construction, imposing the same page and time limits for the multiple defendants in aggregate as for the single plaintiff.[88] Recently, they have required the defendants to agree on a "lead defendant" for claim construction (or have one chosen by the court). The lead defendant must file a single claim construction brief addressing all shared claim construction issues, and other defendants may only file ten-page supplemental briefs limited to "additional" issues unique to that defendant.[89]

Historically, the judges in the Eastern District also were loath to order separate trials for unrelated defendants, scheduling a single trial for anywhere from four to eighteen defendants.[90] In common trials, the Eastern District judges often gave the multiple defendants collectively the same amount of time to present their defenses as they gave the single plaintiff.[91]

85. *In re* EMC Corp., 677 F.3d 1351 (Fed. Cir. 2012).

86. *See* Jan Wolfe, *East Texas Judges Test Joinder Limits in Patent Reform's Wake*, CORP. COUNSEL (Aug. 22, 2012); *Multi-Defendant Joinder Under the America Invents Act: Much Ado About Nothing?*, QUINN EMANUEL URQUHART & SULLIVAN, LLP (Dec. 20, 2012), http://www.jdsupra.com/legalnews/multi-defendant-joinder-under-the-americ-97136/. Other districts also consolidate related patent cases. *Id.*

87. Eckstein, *supra* note 83.

88. Data Treasury Corp. v. Wells Fargo & Co., No. 2:05-cv-00291-DF-CMC (E.D. Tex. Jan. 12, 2009) (order extending time allotted for hearing) (2.5 hours per "side" for claim construction hearing with single plaintiff and several unrelated defendants).

89. Michael C. Smith, *Lead Defendant Designation for Claim Construction Purposes*, EDTEXWEBLOG.COM (Aug. 14, 2012, 3:36 PM), http://mcsmith.blogs.com/eastern_district_of_texas/2012/08/lead-defendant-designation-for-claim-construction-purposes.html.

90. *See, e.g.*, CEATS, Inc. v. Continental Airlines, Inc., No. 6:10-CV-120, at 6–7 (E.D. Tex. Feb. 14, 2012) (order denying motion for separate trials); Wi-Lan, Inc. v. HTC Corp., No. 6:13-CV-242 (E.D. Tex. Mar. 18, 2013) (order denying motion for separate trials).

91. *See, e.g.*, CEATS, Inc. v. Continental Airlines, Inc., No. 6:10cv120 (E.D. Tex. Feb. 23, 2012) (order designating trial times); Wi-Lan, Inc. v. HTC Corp., No. 6:10-CV-521 (E.D. Tex. June 28, 2013) (order designating trial times).

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Defendants were thus forced to focus on common issues, rather than on potentially successful defenses peculiar to one or two defendants. Notably, former Chief Judge Davis raised the possibility of a single invalidity or inequitable trial for multiple unrelated defendants, even after the AIA prohibited consolidating unrelated defendants for trial.[92]

The Eastern District's case management procedures simplify the patentee's case and reduce its costs, while at the same time increasing the required coordination and conflict among defendants, undermining any efficiency benefits. They also make it more difficult for each defendant to pursue individualized issues or its own strategy for common issues, preventing potentially persuasive arguments from being presented to the judge or jury. Finally, these trial management practices increase the possibility of jury or judicial confusion. A judge or juror may misattribute stronger evidence against one defendant to another defendant for whom the evidence is weaker or allow the larger revenues of one defendant to influence damages against smaller defendants.

5. Hostility to Transfer

Patentees are unlikely to file in the almost always inconvenient Eastern District of Texas unless they are confident their cases will remain in the district long enough to obtain its benefits. The judges in the Eastern District have gone to great lengths to provide patentees this assurance.

Prior to 2008, the Eastern District normally transferred patent cases only when a case involving the same or a related patent was presently or previously pending in the transferee district.[93] Beginning in December 2008, the Federal Circuit dramatically rejected the Eastern District's restrictive approach to transfer.[94] Over the next several years, the Federal Circuit granted ten mandamus petitions ordering the Eastern District of Texas to transfer patent cases to other districts, even though the circuit had never previously used mandamus to order transfer.[95] During this period, the

92. *See* Network-1 Security Solutions, Inc. v. Alcatel-Lucent USA Inc., No. 6:11-CV-492-LED-JDL, at 7 (E.D. Tex. Jan. 17, 2013) (order granting in part Defendants' motion to sever) ("Are there some issues that should be tried first as to some *or all parties*, such as invalidity or inequitable conduct?" (emphasis added)). Consolidation would be allowed, if the accused infringer waived the protection of the statute. *Id*.

93. Robert A. Matthews, Jr., *Patent Happenings, December 2009*, JDSUPRA BUS. ADVISOR (Dec. 1, 2009), http://www.jdsupra.com/post/documentViewer.aspx?fid=52cc121b-d1f4-4ad5-829b-21dc66802091.

94. *See In re* TS Tech USA Corp., 551 F.3d 1315, 1319–21 (Fed. Cir. 2008).

95. Paul R. Gugliuzza, *The New Federal Circuit Mandamus*, 45 IND. L. REV. 343, 346 & n.8 (2012).

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Federal Circuit granted nearly 50% of mandamus petitions from the Eastern District of Texas, an astronomical rate for an extraordinary remedy.[96] The Federal Circuit granted only one of nine mandamus petitions seeking transfer from other districts during the same period.[97]

The Federal Circuit's multiple mandamus orders to the Eastern District of Texas were necessitated by the district's repeated efforts to evade or limit the transfer standard set out by the Federal Circuit.[98] For example, in its first mandamus order, *In re TS Tech*, the Federal Circuit ordered transfer because:

> [T]here is no relevant connection between the actions giving rise to this case and the Eastern District of Texas . . . . None of the companies have an office in the Eastern District of Texas; no identified witnesses reside in the Eastern District of Texas; and no evidence is located within the venue.[99]

In a subsequent case, the Eastern District sidestepped the import of *TS Tech* by weighing against transfer the fact that the patentee's lawyers "converted into electronic format 75,000 pages of documents . . . and transferred them to the offices of its litigation counsel in Texas."[100] The Federal Circuit granted mandamus in *In re Hoffmann-La Roche*, finding that "[a] plaintiff's attempts to manipulate venue in anticipation of litigation or a motion to transfer" should be given no weight.[101]

Judge Ward subsequently gave significant weight to the patentee's claim that its principal place of business was in Longview, in the Eastern District of Texas, even though the patentee was not registered to do business in Texas, shared its Texas office space with another of its litigation counsel's clients, was incorporated in Michigan, maintained a registered office in Michigan, and was run by Michigan residents.[102] The district court declined to determine whether the patentee opened its Longview "office" for venue or legitimate business reasons.[103] In *In re Zimmer Holdings*, the Federal Circuit rejected this attempt to sidestep its

96. *Id.* at 346.

97. *Id.* at 346 & n.10.

98. *See In re* Genentech, Inc., 566 F.3d 1338, 1342–44 (Fed. Cir. 2009) (rejecting Eastern District's distinguishing of *TS Tech* because fact witnesses in transferee forum were not "key witnesses"); *In re* Acer Am. Corp., 626 F.3d 1252, 1254–56 (Fed. Cir. 2010) (rejecting Eastern District's distinguishing of *Genentech* because none of the companies are headquartered in the Eastern District, the nearest one being in Round Rock, Texas, 300 miles away).

99. *TS Tech*, 551 F.3d at 1321.

100. *In re* Hoffmann-La Roche Inc., 587 F.3d 1333, 1336–37 (Fed. Cir. 2009).

101. *Id.* at 1337.

102. *In re* Zimmer Holdings, Inc., 609 F.3d 1378, 1379–80 (Fed. Cir. 2010).

103. *Id.* at 1380.

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prior rulings, finding that the patentee's "presence in Texas appears to be recent, ephemeral, and an artifact of litigation" and that this "is a classic case where the plaintiff is attempting to game the system by artificially seeking to establish venue."[104]

Similarly, Judge Davis found a local interest based on his acceptance "without scrutiny" that the patentee's principal place of business was in Tyler, where the patentee had office space and maintained documents, even though the patentee employed no individuals in Tyler, was operated from the United Kingdom, and had incorporated in Texas only sixteen days before filing suit.[105] The Federal Circuit again disagreed, finding that the patentee's connections were "no more meaningful, and no less in anticipation of litigation, than the others we reject."[106]

Despite the Federal Circuit's intervention, the Eastern District's transfer rate actually decreased after *TS Tech*, from 9% in 2000–2008 to 5% in 2009–the first half of 2015.[107] The success rate on transfer motions in the Eastern District also decreased after *TS Tech*.[108] While either decrease could have a neutral explanation in isolation,[109] together they suggest that the Eastern District of Texas has retrenched in the face of oversight by the Federal Circuit.

Commentators have attributed the Eastern District of Texas's reluctance to transfer cases to "[t]he court's enthusiasm for patent cases, coupled with the restorative effect of patent litigation on Marshall's economy," i.e., forum selling.[110] Even former Chief Judge Folsom explained the Eastern District's popularity, in part, by saying that "a certain amount of assurance that a judge was likely not to transfer those [patent] cases is obviously important from the plaintiff's standpoint."[111]

Despite its resistance to transfer, the Eastern District of Texas does

104. *Id.* at 1381.

105. *In re* Microsoft Corp., 630 F.3d 1361, 1362, 1364 (Fed. Cir. 2011).

106. *Id.* at 1365.

107. LEX MACHINA, http://lexmachina.com (data obtained is on file with authors).

108. Paul M. Janicke, *Patent Venue and Convenience Transfer: New World or Small Shift?*, 11 N.C. J. L & TECH. ON. 1, 24 (2009).

109. A decrease in transfer rate could indicate that *TS Tech* and its progeny deterred some patentees from filing cases in the Eastern District that lacked a relationship to the district. A decrease in transfer motion success rate could indicate that *TS Tech* and its progeny incentivized defendants to be more aggressive in seeking transfer and bring weaker motions.

110. Gugliuzza, *supra* note 95, at 378.

111. John R. Bone & David A. Haas, *Interview with Former Chief Judge David Folsom of the U.S. District Court for the Eastern District of Texas*, STOUT RISIUS ROSS 2 (2013), http://www.srr.com/assets/pdf/interview-chief-judge-david-folsom.pdf.

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transfer a greater percentage of patent cases than other districts (6.8% versus 4.5%).[112] However, patent cases in the Eastern District usually have no connection whatsoever to the district. As a result, transfer is often appropriate under applicable statutes, which prioritize the convenience of the parties. Other popular districts are located where patent defendants reside, such as Los Angeles, Silicon Valley, and Chicago. It is not surprising that fewer cases filed there are transferred.

In addition, the most comprehensive study of transfer motions, covering 1991–2010, found that transfer motions were successful only 34.5% of the time in the Eastern District of Texas, compared to over 50% of the time in other major patent districts.[113] Studies focused on more recent years have suggested a higher success rate, though still lower than elsewhere.[114]

6. Refusing to Stay Pending Reexamination

Reexamination is a procedure by which the United States Patent and Trademark Office ("USPTO") reconsiders the validity of the patent and can result in cancellation of the patent, narrowing of the scope of the patent, or confirmation of the patent.[115] Stays pending reexamination favor the accused infringer at the patentee's expense. First, because reexaminations only consider patent validity, not infringement and damages, a stay necessarily delays even a successful patentee's recovery. Second, reexaminations are significantly cheaper than litigation and postpone or eliminate expensive discovery, thereby reducing the patentee's settlement leverage.[116] Third, reexamination proceedings use legal standards less favorable to the patentee, including a preponderance of the evidence standard for invalidity (rather than the clear and convincing evidence

112. *See infra* Appendix 2; Janicke, *supra* note 108, at 23–24.

113. Iancu & Chung, *supra* note 43, at 315. Among the most popular districts, only the District of Delaware had a similarly low transfer rate. *Id.*

114. *See* Chester S. Chuang, *Offensive Venue: The Curious Use of Declaratory Judgment to Forum Shop in Patent Litigation*, 80 GEO. WASH. L. REV. 1065, 1086, 1095 (2012) (finding 48% success rate in E.D. Tex. and 53.2% nationwide for 2000–2008 in non-declaratory judgment cases); Janicke, *supra* note 108, at 22–24 (finding E.D. Tex. success rate of 38% for 2006, 47% for 2007 when controlling for related cases transferred separately, and 31% for 2008, substantially lower than C.D. Cal., N.D. Ill., and D.N.J.). Notably, Chuang's nationwide number includes only contested motions, whereas his Eastern District number appears to include all transfer motions, inflating the comparative success rate in the Eastern District.

115. Greg H. Gardella & Emily A. Berger, *United States Reexamination Procedures: Recent Trends, Strategies and Impact on Patent Practice*, 8 J. MARSHALL REV. INTELL. PROP. L. 381, 382–83 (2009).

116. J. Jason Williams et al., *Strategies for Combating Patent Trolls*, 17 J. INTELL. PROP. L. 367, 373–74 (2010).

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standard) and a broadest reasonable construction standard for claim construction.[117] Fourth, and relatedly, 75% of ex parte and 95% of inter partes reexaminations resulted in narrowed or cancelled patent claims.[118] Patent cancellation ends all litigation, and narrowing often has the same effect. Although an imperfect comparison due to selection effects and other differences between litigation and reexamination, only 43% of validity decisions in litigation resulted in invalidity findings.[119] Ultimately, a forum-shopping patentee often will want a district in which it can be relatively confident that the litigation will not be stayed if the defendant files for reexamination.

Motions to stay pending reexamination are granted over half the time nationwide,[120] but are granted only about one-third of the time in the Eastern District of Texas.[121] Perhaps deterred by this low success rate, fewer stay motions were made in the Eastern District (1% of total 2013–2014 case filings) than in the District of Delaware (2.2%), Central District of California (3.4%), Northern District of California (11%), and Northern District of Illinois (5%). As a result, the Eastern District's stay rate in 2013–2014 was only 0.4% of filed cases, significantly lower than districts like the District of Delaware (1.3%) and Northern District of California (6.5%).[122]

Once again, the Eastern District of Texas has resisted supervisory oversight. The America Invents Act instituted a special post-issuance review for so-called "covered business methods" and expressly authorized district courts to stay litigation pending these proceedings.[123] Although

117. *See* Eric J. Rogers, *Ten Years of Inter Partes Reexamination Appeals: An Empirical View*, 29 SANTA CLARA COMPUTER & HIGH TECH. L.J. 305, 317–18 (2013). A "broadest reasonable construction" increases the chances the claim will be invalid because it covers what is obvious or already exists. *Id.* at 318 ("During examination, there is no presumption of validity, and, thus, no goal to construe claims so as to preserve validity.").

118. Alan W. Kowalchyk & Joshua P. Graham, *Patent Reexamination: An Effective Litigation Alternative?*, 3 LANDSLIDE 47, 48 (2010) (relying on USPTO data through June 2009).

119. Allison et al., *supra* note 37, at 1801.

120. Rogers, *supra* note 117, at 320 (citing several sources).

121. *See* Gardella & Berger, *supra* note 115, at 398 (citing reported cases from 1981–2009); Matthew Smith, *Stays Pending Reexamination*, PATENTLYO (Nov. 1, 2009), http://patentlyo.com/patent/2009/11/the-following-guest-post-is-by-matthew-smiththe-grant-rate-of-motions-to-stay-is-highly-judge-dependent-and-somewhat-less-ob.html (granting reexamination in 20% of cases in the Eastern District for 2008 and 2009).

122. Austin Champion, *Stays of Litigation Pending Post-AIA Patent Review*, KLEMCHUK KUBASTA LLP, 46, 48, 53 (Mar. 28, 2014), http://media.wix.com/ugd/99abb3_5fb5144d89784208a1f02dcb0eebe003.pdf (dividing granted stays by reported total case filings to reach results).

123. *See* Market-Alerts Pty. Ltd. v. Bloomberg Finance L.P., 922 F. Supp. 2d 486, 489 (D. Del. 2013).

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Congress did not mandate a stay, the legislative history suggested that stays should be issued in most cases.[124] The statute reflected this by adding an additional factor to the normal stay analysis addressing the burden of litigation[125] and providing a rare right to interlocutory review of stay decisions.[126] Judge Gilstrap in the Eastern District of Texas issued the first ever denial with prejudice of a motion to stay pending a covered business method patent proceeding.[127] In his denial, he acknowledged and rejected the conclusion of other district courts that the added burden-of-litigation factor was intended to make it easier for defendants to obtain a stay.[128] The Federal Circuit subsequently reversed and ordered a stay.[129]

7. The "Rocket Docket"

The most common explanation for the Eastern District of Texas's popularity is its quick case schedules, or "rocket docket."[130] During the Eastern District's rise in popularity from 2000 to 2007, the median time to trial in the Eastern District was only 1.8 years. This was the fastest among the five busiest patent districts and eighth fastest among districts with significant patent dockets.[131]

Efficient and prompt dispute resolution is something to which the judicial system aspires. Yet a fast docket generally favors plaintiffs. Quick resolution allows the plaintiff to obtain a recovery sooner and at a lower cost.[132] Similarly, the threat of an early trial promotes a quicker settlement.

124. *See id.* at 496 & n.14.

125. *See id.* at 496.

126. *See, e.g.*, VirtualAgility, Inc. v. Salesforce.com, Inc., 759 F.3d 1307, 1309–10 (Fed. Cir. 2014) (recognizing "the AIA expressly created an immediate right of appeal of stay decisions . . . [and] gave us jurisdiction over the interlocutory appeals").

127. *See* Michele C. Bosch, *Eastern District of Texas Issues First-Ever CBM-Related Denial of Stay Without Leave to Refile*, FINNEGAN: AMERICA INVENTS ACT (Feb. 3, 2014), http://www.aiablog.com/post-grant-proceedings/eastern-district-of-texas-issues-first-ever-cbm-related-denial-of-stay-without-leave-to-refile/#more-1067.

128. VirtualAgility, Inc. v. Salesforce.com, Inc., No. 2:13–cv–00011–JRG, 2014 U.S. Dist. LEXIS 2286, at *6–7 (E.D. Tex. Jan. 9, 2014), *rev'd*, 759 F.3d 1307.

129. *VirtualAgility*, 759 F.3d 1307.

130. *See* Julie Creswell, *So Small a Town, So Many Patent Suits*, N.Y. TIMES (Sept. 24, 2006), http://www.nytimes.com/2006/09/24/business/24ward.html; Pusey, *supra* note 34; Symposium, *supra* note 49, at 254 (statement of Mike McKool).

131. *See infra* Appendix 1(a). Here and elsewhere, "districts with significant patent dockets" is defined as the twenty-five most popular districts for patent litigation over the past ten years. The average median time to trial in these districts (excluding the Eastern District) was 2.1 years, with a range of 0.8 years (Eastern District of Virginia) to three years (District of Colorado). Nationwide, the median time to trial in this period was two years.

132. Moore, *supra* note 17, at 908. *See also* Lemley, *supra* note 40, at 403 ("Because a patent usually expires after twenty years, it is a wasting asset; every year waiting to enforce the right in court

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The pressure on the defendant to settle often builds as trial approaches, and a fast docket means this pressure will build quicker.[133] The plaintiff also has a strategic advantage from a fast pace because it can prepare before filing, and the defendant must play catch-up to develop its defense.[134] As one commentator put it, "[s]peed kills defendants."[135]

Commentators sometimes assume that the Eastern District's speedy time to trial was the coincidental result of natural factors like its small docket,[136] the decline of products liability and medical malpractice cases due to tort reform,[137] or the absence of criminal cases.[138] To the contrary, the Eastern District made a conscious effort to resolve patent cases quickly. According to former Chief Judge Leonard Davis, the judges believe in "getting cases to trial quickly, firm trial settings, and not deviating from them."[139] They accomplished this through short discovery periods and other deadlines.[140]

Beyond a general commitment to swift justice, the Eastern District of Texas's fast patent docket was part of a concerted effort to appeal to patentees. Judge Ward, the original architect of the Eastern District's patent docket, decided upon taking the bench in 1999 to "fashion a system that would attract even more intellectual property litigation" by relying on special patent rules with short timelines and "the generally high metabolism of the Eastern District . . . [to] attract[] patent cases that couldn't be heard in other patent-laden districts in states such as California, Virginia and Wisconsin."[141] Similarly, former Chief Judge David Folsom explained that "what made East Texas a popular venue" was that "in the early time period of those [patent] cases being filed, Judge Ward and I

is a year that the patentee does not have exclusivity in the market.").

133. *See* Lemley, *supra* note 40, at 914–15.

134. Moore, *supra* note 17, at 908.

135. Mark Liang, *The Aftermath of TS Tech*, 19 TEX. INTELL. PROP. L. J. 29, 44 (2000).

136. *See* Symposium, *supra* note 49, at 254 (statement of Mike McKool).

137. *See* Leychkis, *supra* note 24, at 209–10.

138. *See* Nguyen, *supra* note 33, at 141.

139. Symposium, *supra* note 49, at 263 (statement of Judge Leonard Davis).

140. For example, the disclosure process in the Eastern District's patent local rules begins one to two months sooner than in other districts. *See* Travis Jensen, *Infringement Contentions Summary Chart*, LOCAL PATENT RULES, http://www.localpatentrules.com/wp-content/uploads/2014/03/Chart%20Infringement%20Contentions.pdf. In the beginning, Judge Ward only provided four months for discovery, and even after the district became popular, parties had only nine months for discovery, compared to eighteen months in the Northern District of California. *See* Alfonso Garcia Chan, *Proposed Patent Local Rules for Adoption by Texas' Federal District Courts*, 7 COMPUTER L. REV. & TECH. J. 149, 203–09 (2003); Leychkis, *supra* note 24, at 209.

141. Pusey, *supra* note 34.

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always tried to maintain a scheduling order that would have the case ready for trial within 18 months, maybe 24 months of the filing date."[142]

Unsurprisingly, the docket slowed as patent litigation became increasingly concentrated in the Eastern District of Texas. The median time to trial between 2008 and the first half of 2015 was 2.3 years, ranking eleventh among districts with significant patent dockets and third among the five busiest patent districts.[143] The Eastern District's median time to termination (e.g., settlement, trial, summary judgment, or dismissal) was similarly slower, ranking tenth among districts with significant patent dockets.[144]

The slowing docket led commentators to predict that the district's popularity would wane in favor of other, faster districts.[145] The exact opposite has occurred: patent litigation has become even more concentrated in the Eastern District.[146] In truth, the district remains faster than average, despite handling nearly a quarter of the country's patent litigation.[147] Nor is there any reason to think that faster districts would be able to maintain this speed if patent litigants suddenly flocked to them.[148]

The Eastern District's continued speed results from conscious efforts by its judges to maintain some semblance of a "rocket docket" by "allowing some limited discovery before there is a scheduling conference to help keep the cases moving" and "considering rule changes in order to speed the docket back up."[149] The Eastern District of Texas may even be

142. Bone & Haas, *supra* note 111, at 2–3.

143. *See infra* Appendix 1(b).

144. *See id*. Lemley attributed the Eastern District's slowness to congestion. Lemley, *supra* note 40, at 415. However, the Eastern District's time to termination *decreased* as the district became more congested, from 312 days (2000–2007) to 246 days (2008–6/30/2015). *See infra* Appendix 1(a)–(b). Thus, time to termination appears to reflect the type of resolution (e.g., settlement, summary judgment, trial, etc.), not docket speed. The Eastern District has a slightly lower settlement rate, a significantly lower summary judgment rate, and a higher trial rate than other districts, all of which increase time to termination. *See* Iancu & Chung, *supra* note 43, at 317–18. For time to termination just of tried cases, the Eastern District is ninth among districts with significant patent dockets and second of the five busiest districts. *See infra* Appendix 1(b). The one district with a similarly high trial rate, the District of Delaware, also had a noticeably slower time to "resolution" than time to "trial." *See id.*

145. Fromer, *supra* note 17, at 1483 (suggesting that the Western District of Wisconsin is an "up-and-comer"); Lemley, *supra* note 40, at 404 ("Speculation abounds about the next hot forum for patent litigation—the Western District of Wisconsin? The Southern District of Florida?").

146. *See supra* Table 1.

147. *See id*. The Eastern District's median time to trial was 2.3 years between 2008 and the first half of 2015, compared to an average median time to trial in other districts with significant patent dockets of 2.5 years and a median time to trial in all other districts of 2.4 years.

148. Lemley, *supra* note 40, at 416 ("[I]f everyone moves to a fast district, it can easily become a slow district as a result.").

149. Samuel F. Baxter, *Eastern District of Texas: Fair and Just Patent Outcomes for Plaintiffs*

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maintaining its patent "rocket docket" and popularity at the expense of its non-patent civil docket, despite the judges' claims to the contrary.[150] Since 2007, when the Eastern District became the most popular district for patent litigation, the median time to trial in non-patent cases has gone up by almost 40%.[151]

Ultimately, the continued (and increasing) popularity of the Eastern District of Texas demonstrates that commentators have overestimated the importance of the "rocket docket" in attracting litigation. Speedy resolution is certainly a factor attracting patentees to the Eastern District. But speed alone does not appear to be determinative. The Eastern District of Texas is offering advantages to the patentee greater than just a potentially socially desirable speedy docket.

8. Discovery

Discovery is the most significant contributor to the high costs of patent litigation.[152] Discovery costs fall disproportionately on defendants because "the bulk of the relevant evidence usually comes from the accused infringer."[153] Thus, accused infringers often benefit when discovery is reduced or postponed; conversely, patentees often seek to expand and expedite discovery to increase the amount of information revealed, defendants' costs, and their own leverage in settlement.[154] Because patent assertion entities do not have commercial products and tend to have less complex business operations than practicing patentees, the asymmetry in discoverable information between patent assertion entities and accused infringers may be even greater.[155] Notably, the Eastern District of Texas is especially popular with patent assertion entities, as compared to practicing patentees.[156]

and Defendants, METROPOLITAN CORPORATE COUNSEL (Sept. 1, 2007), http://www.metrocorpcounsel.com/articles/8817/eastern-district-texas-fair-and-just-patent-outcomes-plaintiffs-and-defendants.

150. Symposium, *supra* note 49, at 266 (statement of Judge T. John Ward) (suggesting that he had two separate tracks, one for patent cases and another for non-patent civil cases, to prevent the patent docket from delaying the non-patent docket).

151. *See infra* Appendix 3.

152. *See* KIMBERLY A. MOORE, ET AL., PATENT LITIGATION & STRATEGY 156 (3d ed. 2008) ("Discovery is the most tedious, burdensome, and expensive part of patent litigation."); *Professors' Letter in Support of Patent Reform Legislation* 1 (Nov. 25, 2013) [hereinafter *Professors' Letter*], https://www.eff.org/files/2013/11/25/prof_ltr_nov_25.pdf (reprinting letter from sixty law professors to Congress).

153. *In re* Genentech, Inc., 566 F.3d 1338, 1345 (Fed. Cir. 2009) (internal quotation marks omitted).

154. *See* Leychkis, *supra* note 24, at 219.

155. *See Professors' Letter*, *supra* note 152, at 1.

156. In 2013, 38% of patent cases filed by non-practicing entities were filed in the Eastern District

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In the Eastern District of Texas, parties must produce all documents "that are relevant to the pleaded claims or defenses involved in this action" in conjunction with initial disclosures and without awaiting a discovery request.[157] This greatly speeds up discovery. Defendants must complete their document collection and production—probably the most costly aspect of discovery—within a few months of the case filing.[158] The Eastern District's rule puts the onus on the defendant to decide the relevance of documents, under penalty of sanctions, rather than on the plaintiff to justify the relevance of documents. The likely result is broader document production. The Eastern District of Texas judges themselves emphasize that standard practice in the district requires broader disclosure of information than in other districts.[159]

Mandatory production of all relevant documents is not limited to patent cases and apparently pre-dates the Eastern District of Texas's rise to prominence in patent litigation.[160] However, the requirement is likely to have a larger effect in patent cases than in the other, less complex cases on the Eastern District's docket. Patent cases already have high discovery costs.[161] According to a leading Eastern District lawyer, the mandatory production requirement is perceived as particularly advantageous to plaintiffs in patent cases because "discovery in a patent case is at a different level than it is in other cases."[162]

The Eastern District maintains its discovery system even as Congress

of Texas. *2013 NPE Litigation Report*, RPX CORP. 18, http://www.rpxcorp.com/wp-content/uploads/2014/01/RPX-2013-NPE-Litigation-Report.pdf. By contrast, 25% of all 2013 patent litigation was filed in the Eastern District. *See supra* Part I.A.

157. Sample Discovery Order for Patent Cases Assigned to Judge Rodney Gilstrap and Judge Roy Payne, U.S. DIST. COURT E. DIST. OF TEX., http://www.txed.uscourts.gov/page1.shtml?location=info:judge&judge=17 [hereinafter Sample Gilstrap and Payne] (follow "Disovery Order – Patent" hyperlink under "Sample Patent Forms" heading). *See also* Discovery Order, Chief Judge Leonard Davis, http://www.txed.uscourts.gov/cgi-bin/view_document.cgi?document=2191; Order Governing Proceedings, Judge Ron Clark 4, http://www.txed.uscourts.gov/cgi-bin/view_document.cgi?document=2379; Scheduling & Discovery Order, Judge Michael H. Schneider, U.S. DIST. COURT E. DIST. OF TEX., http://www.txed.uscourts.gov/page1.shtml?location=info:judge&judge=9 (follow "Scheduling and Discovery Order" under "Sample Patent Forms" heading).

158. *See* Leychkis, *supra* note 24, at 219.

159. *See* Michael C. Smith, *Things Not To Do Three Weeks Before Trial #1: Don't Produce New Documents*, EDTEXWEBLOG.COM (June 22, 2011, 1:29 PM) (quoting Judge Clark), http://mcsmith.blogs.com/eastern_district_of_texas/2011/06/things-not-to-do-three-weeks-before-trial-1-dont-produce-new-documents.html.

160. *Id*.

161. *See* Chief Judge Randall R. Rader, *The State of Patent Litigation*, 21 FED. CIR. B.J. 331, 336 (2011) ("Patent cases, in particular, produce disproportionally high discovery expenses.").

162. Symposium, *supra* note 49, at 265 (statement of Mike McKool).

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and other courts move in the opposite direction, delaying and limiting discovery in patent cases. Legislation pending in Congress would stay discovery pending claim construction and reduce the patentee's ability to get some discovery.[163] The then-Chief Judge of the Federal Circuit criticized the Eastern District's discovery requirements at the district's Judicial Conference, saying that "blanket stipulated orders requiring the production of all relevant documents leads to waste."[164] The Federal Circuit Advisory Committee also issued a model order that sought to both delay and reduce e-discovery.[165] This order was intended to be a guide for district courts in developing a more limited, targeted approach to e-discovery in patent litigation,[166] and gained acceptance in many district courts.[167] The Eastern District of Texas adopted a model order to address e-discovery, but with "significant revisions" to the Federal Circuit Advisory Council's model that require "a larger amount of disclosure."[168]

C. THE MOTIVE FOR FORUM SELLING IN THE EASTERN DISTRICT OF TEXAS

Forum selling runs counter to conventional views that judges want to reduce their caseload,[169] not attract more cases. In particular, judges are thought to dislike patent cases.[170] Why have judges in the Eastern District of Texas gone to such great lengths to attract them? We explore several possible incentives that might make forum selling rational. We do not necessarily suggest that these incentives are causing the judges to

163. *See* Dennis Crouch, *Patent Reform 2013—A Discussion Draft*, PATENTLYO (Sept. 25, 2013), http://www.patentlyo.com/patent/2013/09/patent-reform-2013-1.html.

164. Rader, *supra* note 161, at 334.

165. Daniel B. Garrie, *The Federal Circuit Tries to Change the Tune to the E-Discovery Dance*, 22 FED. CIR. B.J. 347, 347–48 (2012).

166. The model order was originally published on the Federal Circuit's website but was subsequently removed out of concern that doing so suggested endorsement by the Court itself. *See* Jason Rantanen, *The Disappearing Federal Circuit Advisory Council Model Orders*, PATENTLYO (Aug. 12, 2013) (including link to model order).

167. *See* Guy Eddon, *The Mystery of the Federal Circuit Advisory Council's Short-Lived Model Orders*, 26 No. 5 INTELL. PROP. & TECH. L.J. 7, 8 (May 2014), http://documents.jdsupra.com/c8daec93-f470-4336-96f4-9352ba6bbf72.pdf.

168. Garrie, *supra* note 165, at 349.

169. *See* Christopher R. Drahozal, *Judicial Incentives and the Appeals Process*, 51 SMU L. REV. 469, 476 (1989) (surmising that judges prefer to maintain a caseload that does not constrain leisure time nor the ability to exercise judicial judgment).

170. *See* Janice M. Mueller, *Crafting Patents For The Twenty-First Century: Maximize Patent Strength and Avoid Prosecution History Estoppel in a Post-Markman/Hilton Davis World*, 79 J. PAT. & TRADEMARK OFF. SOC'Y 499, 503 (1997) ("Faced with ever-more-crowded trial dockets and mounting pressure to hear criminal cases quickly, judges may understandably view patent trials as time-intensive and technically complex.").

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consciously skew in a pro-patentee direction. It is possible that the incentives subconsciously affect how the judges view the case, the issues, and the "right" outcome.

It is important to remember that we do not claim that all, or even most, federal judges want to hear more patent cases. Our argument only requires that a few judges in the Eastern District of Texas want to do so. Loose jurisdiction and venue rules allow plaintiffs to bring a large fraction of all patent cases in the Eastern District, and the district's case assignment rules enable a few judges to hear most of those cases. Thus, a handful of idiosyncratic judges can have a large, nationwide impact.

1. Interesting Cases

The Eastern District of Texas judges attribute their efforts to attract patent cases to a desire for more interesting work. Judge Ward said he sought out patent cases upon joining the bench because he "enjoyed the intellectual challenge."[171] Former Chief Judge Davis said he adopted Judge Ward's patent rules and tried to attract patent cases because he "wanted some interesting cases to work on."[172] Similarly, Judge Davis acknowledged, "I would rather handle interesting cases than uninteresting cases."[173]

Tort reform by the Texas legislature eliminated complex products liability cases from the Eastern District's docket.[174] Because it lacks major cities, corporations, or technology centers, the district did not have many other complex cases.[175] Patent cases offered more interesting and challenging work. Because of the Eastern District's case assignment system, patent cases were primarily handled by Judge Ward and Judge Davis, and subsequently by Judge Gilstrap, all of whom have expressed interest in patent cases.[176]

2. Prestige and Reputation

An alternative, or complementary, explanation for the Eastern District of Texas's forum selling is that the judges enjoy the prominence that comes

171. Pusey, *supra* note 34.

172. Symposium, *supra* note 49, at 256 (statement of Judge Davis).

173. *Id.*

174. *See id.* at 257 (statement of Judge Ward) ("Products liability dockets are gone and have started to change.").

175. *Id.* at 256 ("Nothing would be worse than trying nothing but FELA [railroad workers' compensation statute] cases.").

176. *See supra* text accompanying notes 57–61.

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from being the premier forum for patent litigation. The district and its judges have been discussed in *The New York Times*,[177] the Supreme Court,[178] and the halls of Congress.[179] The judges, especially Judge Ward, are sought-after speakers at patent events throughout the country.[180] These are not the type of opportunities normally available to judges in a rural district. Some suggest that Judge Ward "loves the attention."[181]

3. Helping the Local Economy

In New York, Chicago, or San Francisco, the idea that litigation could have a significant impact on the local economy seems far-fetched. The economies of rural districts are different. The economic benefits that patent litigation has brought to Marshall, Tyler, and elsewhere in the Eastern District have accrued both to the local bar specifically and to the public more broadly.

Long before East Texas was a hotbed for patent litigation, it was a focal point for personal injury, products liability, and medical malpractice litigation, including major class actions against the asbestos, pharmaceutical, and tobacco industries.[182] But tort reform by the Texas legislature limited the fees that could be made in those cases and, consequently, reduced the number of such cases brought in East Texas.[183] Local lawyers in the late 1990s and early 2000s were looking for new areas with more business and money. The patent litigation boom filled that role perfectly, allowing many local lawyers to keep earnings steady by transitioning their practices into patent litigation.[184]

177. Creswell, *supra* note 130.

178. Transcript of Oral Argument, *supra* note 36, at 10–11.

179. Taylor, *supra* note 30, at 704 (quoting Senator Kyl during debate of anti-joinder provision of AIA: "This provision effectively codifies current law as it has been applied everywhere outside of the Eastern District of Texas.").

180. News Service, *Ward at Center of Flight-Plan Change in Texas 'Rocket Docket,'* SOUTHEAST TEXAS RECORD (Mar. 3, 2009, 3:00 AM), http://setexasrecord.com/news/217682-ward-at-center-of-flight-plan-change-in-texas-rocket-docket.

181. *Id.*

182. *See* Creswell, *supra* note 130.

183. Alan Cohen, *From PI to IP*, IP L. & BUS. (Nov. 2005), http://mcsmith.blogs.com/eastern_district_of_texas/files/IP.pdf.

184. *Id.*; Creswell, *supra* note 130. *But see* Ronen Avraham & John M. Golden, *From PI to IP: Yet Another Unexpected Effect of Tort Reform* (unpublished paper) (on file with author). Avraham and Golden do not find a general relationship between states that enacted tort reform and a rise in IP litigation, nor do they find a relationship between courts that try to attract patent litigation and patent litigation filings. Nevertheless, we do not consider these facts to be inconsistent with our thesis. We do not claim that tort reform always leads courts to try to attract IP litigation, but rather that it did so in the Easter District of Texas. In addition, Avraham and Golden use adoption of patent local rules to measure efforts to attract patent litigation. This is a very weak way of measuring efforts to attract patent

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It is possible that Judge Ward, a former products liability lawyer, sought to attract patent litigation, at least in part, to help local lawyers struggling in the face of tort reform.[185] Regardless, the practices in the Eastern District have benefitted local lawyers. Experienced patent litigants consider it necessary to have a lawyer from the specific town in which the case is pending (e.g., Tyler or Marshall) as co-counsel with national patent counsel, not just a lawyer from Dallas, Houston, or Austin who is admitted in the Eastern District. Local counsel normally play a larger role in the Eastern District than elsewhere, as a result of both local practices and official court rules.[186] Judges in the Eastern District actively promote local lawyers, suggesting that "they're a big benefit to the court because they understand our rules and what we expect, and they make the cases, I think, go much more smoothly."[187] They have said that they "don't think national firms utilize local counsel at the trials as much as they should."[188]

Patent litigation is also important to the broader economy of the Eastern District. No less than the president of the Marshall Chamber of Commerce has said that patent litigation "is a big deal here, a really big deal . . . . And we're glad to have it."[189] The manager of the local Hampton Inn described how 90% of his business one month came from the law firms trying a major patent case.[190] The local Fairfield Inn bought a subscription to PACER, the docket system for the federal courts, to cold-call lawyers scheduled for trial and sell them rooms. The owner of a wine and specialty store attributed one-sixth of her sales to patent litigators, describing them as "definitely a huge asset." Multiple local entrepreneurs renovated old buildings to rent office space and "war rooms" to visiting lawyers in town

litigation because local rules are among the least important things that the Eastern District of Texas did to attract patent litigation. In addition, the content of the rules matters more than their existence.

185. Creswell, *supra* note 130, at 8 (quoting leading local lawyer Sam Baxter as attributing the Eastern District's patent litigation boom to the fact that patent litigation was where the money was and that there was a lack of good lawsuits for local lawyers).

186. *See* Sample Gilstrap and Payne, *supra* note 157, ¶ 9(b) (emphasis in original) (requiring "an **in-person** conference involving lead and local counsel or all parties" for discovery disputes); Cohen, *supra* note 183 ("Local firms often wind up taking the lead role at trial, becoming de facto trial counsel.").

187. Michael C. Smith, *Texas Lawyer–"Patent Law: Best Practices as Seen From the Bench" with Judge Gilstrap and Judge Payne–Part 1*, EDTEXWEBLOG.COM (June 2, 2013, 6:40 PM), http://mcsmith.blogs.com/eastern_district_of_texas/2013/06/this-weeks-texas-lawyer-contains-part-1-of-a-may-1-roundtable-discussion-patent-law-best-practices-as-seen-from-the-b.html (statement of Judge Gilstrap).

188. *Id.*

189. Pusey, *supra* note 34.

190. Creswell, *supra* note 130.

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for patent hearings and trials.[191] Corporations, like Samsung, that are frequently sued in the Eastern District have become "benefactors" of its communities, funding scholarships for local students, donating supplies for local schools, and sponsoring an outdoor ice skating rink across the street from the Marshall federal courthouse.[192]

Perversely, the Federal Circuit's transfer decisions have further benefitted the local economy. Patentees have attempted to manufacture a connection to the district by renting office space to store documents, opening actual offices in the district, hiring local employees, and even establishing or moving their entire operations to east Texas.[193] Unsurprisingly, the Eastern District has endorsed these efforts, despite inconsistency with Federal Circuit precedent and push back from the Federal Circuit.[194]

It is doubtful that economic development was a motive for Judges Ward and Davis when they first decided to attract patent cases. The magnitude of the economic benefits would have been difficult to foresee in the early 2000s.[195] Once the patent litigation boom started, however, the pressure on the Eastern District judges to maintain it must have been substantial. Many local law firms transitioned their practices entirely or substantially from personal injury to intellectual property and even hired new lawyers specializing in patent law.[196] And many businesses were started or expanded based substantially (hotels and restaurants) or entirely (legal office space and "war rooms") on the back of patent litigation.[197] The

191. *Id*.

192. Joe Mullin, *Patent Troll Claims to Own Bluetooth, Scores $15.7M Verdict Against Samsung*, ARS TECHNICA, (Feb. 17, 2015, 4:48 PM), http://arstechnica.com/tech-policy/2015/02/patent-troll-claims-to-own-bluetooth-scores-15-7m-verdict-against-samsung.

193. *See* Pusey, *supra* note 34 ("Office suites housing nothing but banker's boxes and patent paperwork are not uncommon in Marshall."); Dan Wallach, *Patent Troll Case Lands in Beaumont*, BEAUMONT ENTER. (Apr. 16, 2014, 8:44 AM), http://www.beaumontenterprise.com/news/crime/article/Patent-troll-case-lands-in-Beaumont-5406545.php (describing patent assertion entity that opened Beaumont office with one employee for litigation reasons); William J. Watkins Jr., *Does East Texas Hold a Patent on Predatory Litigation?*, LONGVIEW NEWS-JOURNAL (Jan. 3, 2014, 10:00 PM), http://www.news-journal.com/news/2014/jan/03/watkins-does-east-texas-hold-a-patent-on-predatory/ ("A number of trolls claim East Texas as their headquarters and have set up Texas LLCs to ensure their cases are not transferred to another venue.").

194. *See* Megan Woodhouse, Note, *Shop 'Til You Drop: Implementing Federal Rules of Patent Litigation Procedure*, 99 GEO. L.J. 227, 229–30 (2010) (discussing Federal Circuit and patent forum shopping).

195. Symposium, *supra* note 49, at 256 (statement of Judge Davis) ("I, like Judge Ward and everybody else, thought we may have a few of these [patent cases] and it will be sort of an interesting thing.").

196. Cohen, *supra* note 183.

197. *See* Creswell, *supra* note 130.

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evaporation of the Eastern District's patent docket would "devastate Marshall's economy" and have dire financial consequences for many local lawyers and citizens.[198] Whether consciously or subconsciously, the judges of the Eastern District—long-time residents of the towns in which they sit and former colleagues of many of the local lawyers[199]—likely would want to maintain the patent docket that had brought so much to their communities.

4. Personal Gain

Finally, the judges in the Eastern District of Texas may have a personal stake in attracting patent litigation. The patent litigation boom likely has financially benefitted some of the judges' family and friends. For example, both Judge Ward and Judge Davis have sons who practice law in the Eastern District of Texas and focus on patent litigation.[200] Notably, Judge Ward's son started as a personal injury lawyer, but his practice became almost entirely patent litigation as the Eastern District began attracting such cases.[201] To be fair, Judge Ward's son is a magna cum laude graduate of Texas Tech Law School and a former Fifth Circuit law clerk.[202] But whether they intended it or not, his practice, and that of Judge Davis's son, presumably benefitted from the patent litigation boom in the Eastern District and their fathers' prominence. Others close to the Eastern District judges also may have benefitted,[203] though in small towns like Tyler and Marshall, separating benefits to the local community from benefits to the judges' friends and family may be impossible.

More directly, the Eastern District of Texas's concentration of patent litigation provides the judges with lucrative financial opportunities upon retiring from the bench. Judge Ward joined his son's firm, Ward & Smith, prominently highlighting his judicial experience to promote his practice. The firm's website, for example, notes his ability to "conduct mock trials

198. Nate Raymond, *Taming Texas*, AM. LAW., Mar. 2008, at 103.

199. Symposium *supra* note 49, at 256 (statement of Judge Folsom) (noting that Judge Folsom, Judge Ward, and Judge Davis all practiced in the Eastern District of Texas).

200. *See* THE DAVIS FIRM P.C., http://www.bdavisfirm.com (last visited Oct. 23, 2015); *T. John "Johnny" Ward Jr.*, WARD, SMITH & HILL, PLLC, http://www.wsfirm.com/attorneys/johnny-ward/ (last visited Oct. 23, 2015) [hereinafter *Ward Jr. Biography*].

201. Josh Gerstein, *Texas Judge's Son Withdraws from Lawsuit in Fast-Running Odometer Case*, N.Y. SUN (Aug. 29, 2007), www.nysun.com/national/texas-judges-son-withdraws-from-lawsuit-in-fast/61550/.

202. *Ward Jr. Biography*, *supra* note 200.

203. *See* Creswell, *supra* note 130 ("In one patent case that eventually was settled, the plaintiffs hired an accountant whose clients included Judge Ward.").

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and [M]arkman hearings for clients in patent cases."[204] Perhaps unsurprisingly, Ward & Smith had more open patent cases in 2013 than any other Texas firm and more than any firm with a nationwide practice other than IP powerhouse Fish & Richardson.[205] Similarly, Judge Folsom opened, and is the only attorney in, the Texarkana office of the Texas law firm, Jackson Walker L.L.P. His firm's website touts his judicial experience in patent cases to promote his significant involvement "with the firm's intellectual property litigation matters" and "his practice on mediation and arbitration, specifically in mediating patent and complex commercial cases."[206]

Following his former colleagues into private practice, Judge Davis retired from the bench in 2015 and joined the Dallas office of Fish & Richardson to provide "strategic consulting in patent litigation and complex commercial litigation, in addition to handling case evaluations, settlement strategies, mock trials, and mock Markman hearings."[207] Fish & Richardson's press release announcing the move specifically noted that during Judge Davis's tenure on the bench, "the Eastern District's patent docket grew from fewer than 10 cases in 2002 to more than 1,000 pending actions in 2015."[208] Finally, former Magistrate Judge Charles Everingham opened the Longview, Texas office of the international law firm Akin Gump (and remains the only full-time member of the office), again prominently highlighting his service in "one of the busiest patent litigation courts in the federal system" to promote his practice, "advis[ing] clients on intellectual property litigation matters, with a particular focus on patent litigation."[209]

Having three district judges retire into private practice in less than four years is highly unusual. Three judges are 25% of the district judges who served on the Eastern District in this time period.[210] By comparison, of the

204. *T. John Ward*, WARD, SMITH & HILL, PLLC, http://www.wsfirm.com/attorneys/t-john-ward/ (last visited Oct. 23, 2015).

205. *See* Byrd & Howard, *supra* note 66, at 7. Several Delaware-only law firms also had more open cases than Ward & Smith. *Id.*

206. *David Folsom*, JACKSON WALKER LLP, www.jw.com/David_Folsom (last visited Oct. 23, 2015).

207. *Former Eastern District of Texas Federal Judge Leonard Davis Joins Fish & Richardson*, FISH & RICHARDSON (May 18, 2015), http://www.fr.com/news/federal-judge-davis-joins-fish/.

208. *Id.*

209. *Charles Everingham IV*, AKIN GUMP, www.akingump.com/en/lawyers-advisors/charles-everingham.html (last visited Oct. 23, 2015).

210. *History of the Federal Judiciary: U.S. District Courts for the Districts of Texas*, FED. JUD. CENT., http://www.fjc.gov/servlet/nGetCourt?cid=158&order=c&ctype=dc&instate=tx (last visited Oct. 23, 2015).

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2143 Article III judges (district or circuit level) who served over a forty-year period between 1970 and 2009, only seventy-seven, or 4%, resigned or retired to enter the private sector.[211]

Again, it is doubtful the Eastern District judges foresaw or intended the potential economic benefits to themselves or their family and friends when they first sought out patent cases in the early 2000s. But it is naïve to think they are unaware of the financial opportunities the patent litigation boom has brought. Nor would it be surprising if the remaining judges consciously or subconsciously wanted to keep these opportunities open, whether or not they ever ultimately pursue them, by retaining the district's popularity for patent litigation.

D. ALTERNATIVE EXPLANATIONS AND COUNTERARGUMENTS

Eastern District judges and defenders of the Eastern District in practice and academia argue that the district has attracted so many cases because it provides predictable, consistent, fast, and expert justice.[212] These neutral values should be as attractive to accused infringers as to patentees, and yet accused infringers filing declaratory judgment actions almost never choose the Eastern District of Texas. The Eastern District had only 2.5% of declaratory judgment filings from 2000 through the first half of 2015, despite having 15.1% of all patent cases. Declaratory judgment actions were 1.3% of patent cases filed in the Eastern District, far lower than the 7.6% nationwide total.[213]

In theory, some accused infringers that want to file their declaratory judgment actions in the Eastern District may not do so because personal jurisdiction in patent declaratory judgment actions is more restrictive than in patent infringement actions.[214] Nevertheless, differences in jurisdictional rules cannot account for the low rate of declaratory judgment filings in the Eastern District. Even when the Eastern District of Texas is the patentee's

211. Stephen B. Burbank et al., *Leaving the Bench 1970–2009: The Choices Federal Judges Make, What Influences Those Choices, and Their Consequences*, 161 U. PA. L. REV. 1, 12–13, 56, 64 (2012). An additional forty-six judges left because of inadequate salary, other employment, or dissatisfaction. *Id.* at 13, 63. Adding these forty-six judges to the seventy-seven who left to enter private practice increases the percentage to only 6%. During this time period, fifty-three Article III judges resigned and seventy retired for these reasons. *Id.* The difference between resignation and retirement is whether the judge's service entitles him or her to a pension. *Id.* at 10.

212. *See* Iancu & Chung, *supra* note 43, at 308, 314; Nguyen, *supra* note 33, at 124, 136–43; Christopher P. Gerardi, *Inside the Busiest Patent Court in America: A Discussion with Chief Judge Davis*, FTI J. (Feb. 2014), http://ftijournal.com/article/inside-the-busiest-patent-court-in-america.

213. *See infra* Appendix 5.

214. For this reason, an accused infringer may have difficulty seeking a declaratory judgment in a district other than the patentee's home district. La Belle, *supra* note 22, at 68–73.

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home district, accused infringers virtually never file declaratory judgment actions there.[215] In 2012 and 2013, there were thirty-seven declaratory judgment actions filed nationwide in which all defendants (patentees) had a principal place of business in the Eastern District of Texas and therefore were indisputably subject to personal jurisdiction and venue in that district.[216] Yet only two, or 5.4%, were filed in the Eastern District. By contrast, 25% (2730 of 10,987) of non-declaratory judgment patent infringement cases were filed in the Eastern District of Texas in 2012 and 2013.[217] Thus, even accused infringers who clearly could file declaratory judgment actions in the Eastern District overwhelmingly do not do so. Accused infringers do not share the Eastern District's defenders' view that the district provides speedy, expert, and unbiased adjudication.

Moreover, expertise does not explain the Eastern District's initial rise to popularity at the expense of districts with much more patent litigation experience at the time (e.g., Central or Northern District of California). Nor does it explain its increasing popularity even after institution of the Patent Pilot Program, which has fostered expertise in thirteen districts across the country.

Finally, as many note,[218] the plaintiff-friendly juries of east Texas are certainly part of its draw: patentees win patent trials 72% of the time in the Eastern District, compared to 61% nationwide.[219] This is complementary, not contradictory, to forum selling. Favorable juries make it easier for judges to use discretionary case management tactics, like speedy dockets or denial of summary judgment, to create favorable outcomes for patentees that are insulated from appellate review.

Ultimately, commentators are correct that predictability and consistency drive the popularity of the Eastern District of Texas. But it is predictably and consistently *pro-patentee procedures and outcomes* that are the attraction.

Some have asked, "If the Eastern District is so plaintiff-friendly, why don't all patent plaintiffs file there?" While there is no clear answer to that

215. *See infra* Appendix 5.

216. LEX MACHINA, http://lexmachina.com (data obtained is on file with authors). We reviewed every patent declaratory judgment complaint from 2012 and 2013 in Lex Machina that alleged that the accused infringer's or infringers' address(es) were exclusively in the Eastern District. In seven additional cases, one but not all defendants had a principal place of business in the Eastern District; none were filed in the Eastern District.

217. *Id.*

218. *E.g.*, Iancu & Chung, *supra* note 43, at 300–03; Leychkis, *supra* note 24, at 210–15.

219. Allison et al., *supra* note 37, at 1793–94.

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question, many patentees find it beneficial to sue in their home district, where juries may be more sympathetic and litigation costs lower. This may help explain why the Eastern District has a disproportionate share of suits by patent assertion entities. Because they do not make things, such entities employ relatively few people and are therefore less likely to benefit from sympathetic juries in their home districts.

Three issues give us some pause in reaching a forum selling conclusion but ultimately none of them is persuasive. First, some of the pro-patentee procedures pre-date and are not unique to patent cases: e.g., the speedy docket, case assignment system, and broad discovery requirements. We note the possibility that these procedures were developed to forum sell for the mass tort cases that once dominated the Eastern District's docket.[220] Regardless, even generally applicable procedures have been modified to particularly favor patent plaintiffs, like the need to seek permission to file summary judgment motions only in patent cases or the patent-specific carve outs in the case assignment system. Other pro-plaintiff procedures are unique to patent cases, like the resistance to stays pending USPTO proceedings.

In any event, patent litigation is unlike other civil litigation in the Eastern District of Texas. Failing to adjust general procedures for the complexity of patent cases may be as beneficial as patent-specific procedures. For example, a speedy docket and propensity for jury trials may be desirable in a simple contract case but severely hinder the defense of a complex patent case. Mandatory, early document production is less significant when the documents are few or evenly spread between the parties, but provides patentees with significant leverage since document productions in patent cases are massive and predominantly from the accused infringer.[221]

Second, a study of final judicial decisions by Lemley et al. concluded that the Eastern District of Texas was "not significantly more likely to produce patentee wins."[222] A more comprehensive study of outcomes in patent litigation by Allison et al. (including Professor Lemley) concluded that the Eastern District of Texas was "significantly more likely to rule for

220. *See* Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659, 660–75 (1989) (describing special procedures adopted in Eastern District in 1980s for mass asbestos cases opposed by defendants and sometimes rejected by Fifth Circuit: e.g., shortening discovery time, use of offensive preclusion to limit defendants' defenses, consolidation, and class actions).

221. *See supra* text accompany note 153.

222. Mark A. Lemley et al., *Does Familiarity Breed Contempt Among Judges Deciding Patent Cases?*, 66 STAN. L. REV. 1121, 1139 (2014).

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the patentee."[223] The latter study is more relevant because it included denials of summary judgment, which, as discussed above, are one of the principle ways that the Eastern District favors patent plaintiffs.

Third, "if the court were unduly biased in favor of plaintiffs, one might expect frequent appellate reversals on the merits," but some evidence suggests that the Federal Circuit "reverse[s] the Eastern District at about the same rate as it reverses other district courts."[224] Judge Ward has pointed to his low reversal rate to rebut claims of a pro-patentee bias.[225] We disagree that pro-patentee bias necessarily correlates with high reversal rates. As explained, pro-patentee bias can be effectively introduced through procedural tools that are subject to less frequent and more deferential appellate review.[226] In any event, a more recent study of the Eastern District's reversal rate, covering 2009 through part of 2012, found it to be significantly higher than in other busy patent districts, with a reversal rate of 55.1% compared to an average of 37.8%.[227]

E. FORUM SELLING BEYOND THE EASTERN DISTRICT OF TEXAS

Although no other district has been as persistent or as successful in attracting patent litigation as the Eastern District of Texas, several other districts have tried, some with more success than they desired.

1. Former Forum Sellers?: The Eastern District of Virginia and District of Delaware

Before forum-shopping patentees headed to east Texas, the Eastern District of Virginia was their forum of choice, though it only ranked eighth with 3% of patent litigation even at its late 1990s peak.[228] The popularity of the Eastern District of Virginia was attributed to factors that are consistent with forum selling, namely its "rocket docket," resistance to summary judgment, and increased chances of trial.[229] The Eastern District of Virginia also offered the patentee early and quick discovery and a divisional

223. Allison et al., *supra* note 37, at 1791–92.

224. Paul R. Gugliuzza, *The Federal Circuit as a Federal Court*, 54 WM. & MARY L. REV. 1791, 1838–39 (2013). *See also* Iancu & Chung, *supra* note 43, at 306–08 (discussing appellate affirmance rate).

225. Pusey, *supra* note 34.

226. *See infra* text accompanying notes 338–39.

227. Teresa Lii, *Shopping for Reversals: How Accuracy Differs Across Patent Litigation Forums*, 12 CHI.-KENT J. INTELL. PROP. 31, 43–44 (2013).

228. Lemley, *supra* note 40, at 404; Moore, *supra* note 17, at 903–06.

229. Moore, *supra* note 17, at 908–14.

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assignment system that increased the predictability of the judge.[230] Eastern District of Virginia judges promoted their approach to patent litigation to practitioners and touted it as a way to reduce litigation costs.[231] Patentees flocked to the Eastern District of Virginia, congestion increased and the judges saw a threat to their unique reputation for expedient case resolution. Rather than take steps to speed it back up, like the judges in the Eastern District of Texas did, the judges in the Eastern District of Virginia sought "to turn off the flow of [patent] cases"[232] and "actively discourage litigants from filing patent cases in their district" by dismissing more cases for lack of personal jurisdiction, granting transfer motions in cases without a direct connection to the forum, and implementing a district-wide assignment system that eliminated judge shopping.[233]

The District of Delaware's share of patent cases has long exceeded what one would expect based on its general civil case filings or its location in relation to technology centers.[234] As shown in Table 1, Delaware is the only district that approaches east Texas in its share of patent litigation and the only other district whose share has increased significantly in recent years. The District of Delaware has many of the indicators of forum selling: a low summary judgment rate,[235] a high percentage of cases resolved by trial (the highest in the country),[236] a quick time to trial,[237] and resistance to changes of forum.[238] The district's small size—four allotted judgeships, with a vacancy for most of the past decade—provides significant judicial predictability.

Interestingly, while patent local rules traditionally have been seen as a way to attract litigants, Delaware's lack of such rules may have given it a

230. George F. Pappas & Robert G. Sterne, *Patent Litigation in the Eastern District of Virginia*, 35 IDEA 361, 366–69 (1995).

231. T.S. Ellis III, *Quicker and Less Expensive Enforcement of Patents: United States Courts*, 5 CASRIP PUBLICATION SERIES: STREAMLINING INT'L INTELL. PROP. 11, 14–19 (2000); T.S. Ellis III, *Distortion of Patent Economics By Litigation Costs*, 5 CASRIP PUBLICATION SERIES: STREAMLINING INT'L INTELL. PROP. 22, 25 (2000).

232. Roderick R. McKelvie, *Forum Selection in Patent Litigation: A Traffic Report*, 19 No. 8 INTELL. PROP. & TECH. L.J. 1, 4 (2007).

233. Nguyen, *supra* note 33, at 132–34.

234. *See* Moore, *supra* note 17, at 903–06. Delaware is notably popular among accused infringers seeking declaratory judgments. *See infra* Appendix 5. There may be neutral reasons for its popularity, such as the ease of establishing personal jurisdiction over corporations incorporated in Delaware.

235. *See infra* Appendix 2.

236. *See* Lemley, *supra* note 40, at 411–13.

237. *See id.* at 414–18.

238. *See* Gardella & Berger, *supra* note 115, at 398 (39% grant rate on stays pending reexamination in reported cases, 1981–2009); Iancu & Chung, *supra* note 43, at 315 (35.8% grant rate on motions to transfer, 1991–2010).

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competitive advantage in recent years. Patent local rules tend to produce a claim construction decision earlier in the case than in Delaware, and Delaware's delay in claim construction may benefit patentees by increasing uncertainty and encouraging settlement.[239] Statistically, patentees do significantly better in the District of Delaware than elsewhere, both in terms of overall case outcomes[240] and final decisions by judges.[241] Like the Eastern District of Texas, the District of Delaware is a small district with an active local bar, and judges seem to want to help local lawyers.[242] As in the Eastern District of Texas, personal gain may be a motive for attracting patent litigation. Two judges (50% of the allotted judgeships) resigned and entered private practice in less than a decade, highlighting their judicial experiences to market their patent litigation practices.[243] Former Judge Farnan joined his two sons who already were practicing patent litigation in Delaware, and their firm now is counsel (often as local counsel) in more patent cases than any firm with a nationwide practice other than Fish & Richardson.[244]

In the face of soaring patent dockets (and perhaps the changing composition of the bench), judges in Delaware now seem to regret past efforts to attract patent litigation. Transfers and stays pending reexamination appear to be more easily obtained in Delaware than before.[245] More significantly, the court commissioned a Patent Study Group that had an officially neutral charge of identifying "best practices" but was widely seen as aiming to curb abusive patent litigation by patent assertion entities and others.[246] In response, Judges Robinson and Stark (but not yet Judges Sleet and Andrews) changed how they handle patent cases. Many, though not all, of the changes are likely to benefit accused infringers at the expense of patentees, including an emphasis on early claim construction, a ban on "plain and ordinary meaning" arguments for claim

239. *See* Frederick L. Cottrell III et al., *Nonpracticing Entities Come to Delaware*, FED. LAW. 62, 64–66 (Oct./Nov. 2013).

240. *See* Allison et al., *supra* note 37, at 1791–92.

241. *See* Lemley et al., *supra* note 222, at 1139–40.

242. *See* Zywicki, *supra* note 8, at 1182–84 (describing similar possibility with bankruptcy cases).

243. *See Joseph J. Farnan, Jr.*, FARNAN LLP, http://www.farnanlaw.com/Joe-Farnan-Bio.html (last visited Oct. 23, 2015); *Roderick R. McKelvie*, COVINGTON & BURLING LLP, http://www.cov.com/rmckelvie (last visited Oct. 23, 2015).

244. Byrd & Howard, *supra* note 66, at 7. *See also Attorneys*, FARNAN LLP, http://farnanlaw.com/About-Farnan-Law-Firm-Lawyers.html (last visited Oct. 23, 2015).

245. *See* Cottrell, *supra* note 239, at 64–65.

246. *See* BARNES & THORNBURG LLP, *"The Times They Are A-Changin'"—Delaware's Judge Stark Outlines New Patent Case Management Practices*, NAT'L. L. REV. (May 16, 2014), http://www.natlawreview.com/article/times-they-are-changin-delaware-s-judge-stark-outlines-new-patent-case-management-pr.

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construction (popular among patentees), early disclosure of the patentee's damages model, and presumptively treating related cases separately for purposes of scheduling.[247] Patentees have gotten the message. Patent filings in Delaware were down 34% through the start of September 2014 compared to the same time period in 2013. The decline began in March 2014, when Judge Robinson implemented the Patent Study Group's recommendations, with a further decline after Judge Stark implemented the recommendations in July 2014.[248] Ultimately, Delaware handled 19% of the nation's patent litigation in 2014, compared to 22% the year before. In the first half of 2015, Delaware's share of patent litigation dropped precipitously, with the district handling only 8% of patent infringement cases.[249]

2. The Western District of Pennsylvania

The former chief judge of the Western District of Pennsylvania said that the district wanted to attract out-of-state patent litigation.[250] The Western District adopted local patent rules on January 1, 2005—the third district in the country to do so—despite ranking thirty-fourth in number of patent cases in 2004 with only twenty-three.[251] In doing so, the district "was making a statement that it wanted more patent cases."[252] Likewise, the Western District pursued, and was chosen for, participation in the Patent Pilot Program despite hearing relatively few patent cases. The front page of the Western District of Pennsylvania's website even has a specific link for "Patent Information"—the only substantive area with such a link—

247. *See* Leonard P. Stark, Dist. of Del., *Revised Procedures for Managing Patent Cases* (June 18, 2014), http://www.ded.uscourts.gov/sites/default/files/Chambers/LPS/PatentProcs/LPS-Patent Procedures.pdf; Presentation of Hon. Leonard P. Stark on Patent Study Group to Del. Fed. Bar Ass'n IP Section (May 13, 2014), http://www.ded.uscourts.gov/news/presentation-honorable-leonard-p-stark-findings-patent-study-group. These changes were adopted by at least one but not necessarily both of Judges Robinson and Stark.

248. Brian C. Howard, *2014 Patent Litigation Trends in E.D. Texas and D. Del.*, LEX MACHINA BLOG (Sept. 3, 2014), https://lexmachina.com/2014-patent-litigation-trends-e-d-texas-d-del/.

249. *See supra* Table 1.

250. Molly Hensley-Clancy, *U.S. District Court of Western Pennsylvania Attracts Patent Cases: Pilot Program Steers Out-of-State Suits Here to Address Growing Demand in Specialized Law*, PITTSBURGH POST-GAZETTE (July 23, 2012, 4:00 AM), http://www.post-gazette.com/business/legal/2012/07/23/U-S-District-Court-of-Western-Pennsylvania-attracts-patent-cases/stories/201207230211.

251. *See* Travis Jensen, *Local Patent Rules: Patent Rules Made Easy*, ADOPTION DATES http://www.localpatentrules.com/adoption-dates (last updated Nov. 2014); LEX MACHINA, http://lexmachina.com (data obtained is on file with authors).

252. Douglas M. Hall, *Western District Patent Pilot Court Attracts Attention*, LEGAL INTELLIGENCER (Apr. 30, 2013), http://www.pietragallo.com/keep-informed.php?action=view&id=272.

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even though patent cases constitute only 1% of the Western District's civil docket.[253]

Those associated with the Western District of Pennsylvania provide several motives for wanting to attract more patent infringement cases. First, more patent cases would provide employment opportunities for area lawyers as local counsel even in cases filed by large out-of-state firms.[254] Second, the Western District's court clerk "predict[ed] that larger firms may also establish local offices in the area in the coming years," which would benefit both the local bar and economy.[255] Similarly, commentators have suggested that having a "sophisticated and experienced local venue to handle patent disputes should only serve to foster and support" the region's efforts to develop its technology sector.[256] Third, the former chief judge may have been motivated by the prospect of enhancing the reputation of the court.[257] None of these motives are, of course, inconsistent with the idea that judges in the Western District of Pennsylvania also wanted to further the goals of the Patent Pilot Program—improving patent litigation by concentrating patent cases in a small number of districts where judges wanted to hear such cases and might have or develop expertise.

These efforts have had no impact. Other than a bump in 2012 resulting from the Judicial Panel on Multi-District Litigation transferring fourteen related cases to the Western District,[258] the district's patent filings have remained steady for the past decade, fluctuating between eleven and thirty-nine per year, but with no apparent upward trend.[259]

253. There were thirty-eight patent case filings from April 1, 2012 through March 31, 2013. LEX MACHINA, http://lexmachina.com (data obtained is on file with authors). In the same time period, there were 2686 total civil case filings. *Federal Judicial Caseload Statistics: Table C*, U.S. DIST. COURTS, (March 31, 2013), http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2013/tables/C00Mar13.pdf.

254. *See* Hensley-Clancy, *supra* note 250 ("The increase in the number of patent cases in Western Pennsylvania also will likely affect area patent attorneys.").

255. *Id.*

256. Hall, *supra* note 252.

257. *See* Hensley-Clancy, *supra* note 250. That article states, "Judge Lancaster said he hopes that the combination of specialized patent judges and rules will continue to attract more out-of-state cases to the area. The reputation of the local district court, Judge Lancaster said, could be greatly impacted." While we think the best interpretation of these sentences is that Judge Lancaster thought the reputation of the court would be enhanced by an increased number of out-of-state cases, it is also possible that he thought the district's reputation would be enhanced by patent local rules and participation in the Patent Pilot Program, irrespective of any change in the district's patent caseload.

258. Charles Bieneman, *Multidistrict Litigation Under The AIA*, SOFTWARE INTELL. PROP. REP. (June 11, 2012), http://swipreport.com/multidistrict-litigation-under-the-aia/.

259. LEX MACHINA, http://lexmachina.com (data obtained is on file with authors).

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The experience of the Western District of Pennsylvania shows that it is not enough to simply tell patentees you want them; you also must give them something they want. While the district has signaled its desire for more patent cases, it has not skewed its procedures in favor of patent plaintiffs. It granted summary judgment at a slightly higher rate than average.[260] Patentees won only 27% of decisions on the merits in the Western District of Pennsylvania,[261] comparable to the national average of 26%.[262] During the period from 2008 through the first half of 2015, it was slower in time to termination than all of the twenty-five most popular patent districts and slower in time to trial than all but seven of them.[263] The Western District's transfer rate was lower than all but four of the twenty-five most popular patent districts,[264] but that is not attractive to patent litigants without practices and procedures that make patentees want to file there in the first place.

II. FORUM SELLING OUTSIDE OF PATENT LITIGATION

Forum selling is not restricted to patents. This section briefly explores four other areas where forum selling seems to have occurred. These examples were chosen to show that forum selling has occurred in many times, court systems, and fields of law. The existence, techniques, and motives for forum selling in these areas are not as clear as in patents and would benefit from in-depth exploration.

260. The Western District of Pennsylvania's summary judgment rate was 4.3, right in the middle of the top twenty-five most popular patent districts. *See infra* Appendix 2.

261. Pauline M. Pelletier, *The Impact of Local Patent Rules on Rate and Timing of Case Resolution Relative to Claim Construction: An Empirical Study of the Past Decade*, 8 J. BUS. & TECH. L. 451, 483 (2013). The same study shows a 38% win rate for patentees in the Eastern District of Texas and a 43% win rate in the District of Delaware. *Id.* The percentage of decisions on the merits won by the patentee was calculated using Table 6 by dividing the number in column a (claimant win) by the sum of columns a and b (defendant win). *Id.*

262. *See* Allison et al., *supra* note 37, at 1787.

263. *See infra* Appendix 1(b).

264. *See infra* Appendix 2.

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A. MASS TORTS AND CLASS ACTIONS IN STATE COURTS[265]

In the 1990s and early 2000s, there were persistent complaints about unfair administration of class actions and mass torts in state courts. Plaintiffs' lawyers seem to have disproportionately filed cases in a small number of districts, including Madison County, Illinois and Jefferson County, Mississippi. Richard "Dickie" Scruggs, the once-successful and later-jailed plaintiffs' lawyer, referred to these places as "magic jurisdictions":

> [A reason for the explosion of asbestos litigation] is what I call the "magic jurisdiction," or jurisdictions where the judiciary is elected with verdict money. The trial lawyers have established relationships with the judges that are elected; they're State Court judges; they're populous [populists?]. They've got large populations of voters who are in on the deal, they're getting their place [piece?] in many cases. And so, it's a political force in their jurisdiction, and it's almost impossible to get a fair trial if you're a defendant in some of these places. The plaintiff lawyer walks in there and writes the number on the blackboard, and the first juror meets the last one coming out the door with that amount of money. Now a lot of times those get set aside on appeal, like in Texas, for example. A lot of you folks have succeeded in electing a very conservative Supreme Court, that reverses a lot of these things, but in order to get there you got to find [fight?] it. It's pretty tough to handle a hundred or five hundred million-dollar judgment; it ties up your credit, your company; stock gets a hard hit; and so they're forced into a settlement.
>
> There are probably a dozen magic jurisdictions around the country where this is really a dangerous thing. The cases are not won in the courtroom. They're won on the back roads long before the case goes to trial. Any lawyer fresh out of law school can walk in there and win the case, so it doesn't matter what the evidence or the law is. The jury is going to come back with a large number and the judge is going to let it go to the jury, often on punitive damages. The proliferation of these magic jurisdictions, where plaintiffs join together in large groups even if they're not from those counties, is one of the reasons that the asbestos

265. This section is based primarily on Mark A. Behrens & Cary Silverman, *Now Open for Business: The Transformation of Mississippi's Legal Climate*, 24 MISS. C. L. REV. 393 (2005); John H. Beisner & Jessica Davidson Miller, *They're Making a Federal Case Out of It . . . in State Court*, 25 HARV. L.J. & PUB. POL'Y 143 (2001); David W. Clark, *Life in Lawsuit Central: An Over-View of the Unique Aspects of Mississippi's Civil Justice System*, 71 MISS. L.J. 359, 369 (2001); Patrick M. Hanlon & Anne Smetak, *Asbestos Changes*, 62 N.Y.U. ANN. SURV. AM. L. 525 (2007); David Maron & Walker W. (Bill) Jones, *Taming an Elephant: A Closer Look at Mass Tort Screening and the Impact of Mississippi Tort Reforms*, 26 MISS. C. L. REV. 253, 277–90 (2007).

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> phenomenon has proliferated—the litigation has proliferated like it did.[266]

The magic jurisdiction phenomenon is made possible by the complete diversity rule (which allows plaintiffs to prevent removal to federal court by joining a non-diverse local defendant, such as a retailer)[267] and loose interpretation of personal jurisdiction rules. In many courts, it is sufficient for one plaintiff to have a connection to the forum for the court to take jurisdiction over all cases involving the same tortious action, even if the other plaintiffs had no connection with the forum. As a result, courts in rural Mississippi or Illinois have adjudicated cases involving plaintiffs from across the United States.[268]

Such assertions of jurisdiction are doctrinally problematic. They seem to be based on the concept of "pendent personal jurisdiction," under which a court with personal jurisdiction over one claim can also adjudicate closely related claims against the same defendant by different plaintiffs, even though the court would not have jurisdiction over the related claims if those cases were filed separately.[269] For example, a New Yorker injured by Johns Manville asbestos manufactured in Colorado and purchased and used in New Jersey, could not sue by himself in Madison County, Illinois.[270] Nevertheless, if a person who was injured by Manville asbestos purchased and used in Madison County brought a nationwide class action there on behalf of all persons injured by Manville asbestos, the court would take jurisdiction. Similarly, if a lawyer joined together plaintiffs from Madison County and elsewhere, then the court would take jurisdiction.[271] Unlike the doctrine of pendent subject matter jurisdiction, which has been the subject of both Supreme Court cases and federal legislation, pendent personal jurisdiction has been analyzed in only one appellate court.[272]

266. Steve Hantler, *Towards Greater Judicial Leadership on Asbestos Litigation*, Civ. Just. F., No. 41 (April 2003), http://www.manhattan-institute.org/html/cjf_41.htm. *Accord* Peter J. Boyer, *The Bribe*, NEW YORKER (May 19, 2008) (less complete, but possibly more accurate version of quote).

267. *See* YEAZEL, *supra* note 35, at 211.

268. *See* Behrens & Silverman, *supra* note 265, at 395, 397–99; Clark, *supra* note 265, at 369.

269. *See, e.g.*, Action Embroidery Corp. v. Atlantic Embroidery Inc., 368 F.3d 1174, 1180–81 (9th Cir. 2004) (explaining and adopting pendent personal jurisdiction); Klerman, *Rethinking*, *supra* note 16 at 289–91 (discussing and critiquing pendent personal jurisdiction); 2 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 6.26, at 616–17 nn.35–37 (5th ed. 2012) (analyzing pendent personal jurisdiction).

270. Klerman, *Rethinking*, *supra* note 16 at 290–91.

271. *See id.*

272. Bristol-Myers Squibb Co. v. Superior Court, 175 Cal. Rptr. 3d 412, 439 (Ct. App. 2014) (upholding personal jurisdiction in a product liability lawsuit by California and non-California plaintiffs because "[w]hen a defendant must appear in a forum to defend against one claim . . . judicial economy, avoidance of piecemeal litigation, and overall convenience of the parties is best served by" compelling

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Some judges have been explicit about their desire to attract cases. The Philadelphia Court of Common Pleas has a special Complex Litigation Center. In 2009, the President Judge, Pamela Pryor Dembe, told a legal reporter that "the court's budgetary woes could be helped by reviving Philadelphia's role as the premier mass torts center in the country," that "we're taking business away from other courts," and that "lawyers are an economic engine for Philadelphia because out-of-state lawyers stimulate the local economy by eating at local restaurants, staying in city hotels and hiring local counsel."[273] To ensure that litigation benefits local lawyers, judges in the Complex Litigation Center are "very strict on requiring out-of-state lawyers to have local co-counsel at every mass tort program meeting."[274] The center also adopted some controversial practices that were criticized as favoring plaintiffs. For example, cases were sometimes "reverse bifurcated," which means that damages were ascertained before liability.[275] That practice is perceived to favor plaintiffs because jurors may be more disposed to find defendants liable after they have become sympathetic to plaintiffs by hearing testimony about the extent of their injuries.[276] Another criticized practice was the consolidation of related cases, which was seen, as in the patent context, as making it difficult for defendants to mount individualized defenses.[277] The Philadelphia Complex Litigation Center seems to have been a victim of its own success. The flood of cases slowed down the court and attracted critical press.[278] In 2012, the court modified its procedures to curb reverse bifurcation and restrict consolidation; soon thereafter, filings dropped by 70%.[279]

a defendant to "answer other claims in the same suit arising out of a common nucleus of operative facts"), *cert. granted*, 337 P.3d 1158 (Cal. 2014). This case involved the joinder of a state law claim and a claim over which the court might have had federal subject matter jurisdiction and personal jurisdiction pursuant to a federal statute authorizing nationwide service of process. An appellate court has never decided whether pendent personal jurisdiction would be extended when all joined claims arose under state law.

273. Amaris Elliott-Engel, *For Mass Torts, a New Judge and a Very Public Campaign*, 239 NO. 50 LEGAL INTELLIGENCER 1, 8 (Mar. 16, 2009).

274. *Id.*

275. American Tort Reform Foundation, *Judicial Hellholes 2010/2011*, at 3–5 (2010). *Accord In re* Mass Tort and Asbestos Programs, General Court Regulation No. 2012-01 (Ct. Com. Pl. Phila. Cty. 2012) [hereinafter Mass Tort and Asbestos Programs] (ending reverse bifurcation in asbestos cases).

276. *See* Mass Tort and Asbestos Programs, *supra* note 275.

277. *See* American Tort Reform Foundation, *supra* note 275, at 3–5.

278. The American Tort Reform Foundation called Philadelphia the number one "Judicial Hellhole" for 2010/2011. *Id. Cf.* Mark A. Behrens, *Philadelphia Tort Litigation: Forum Shopping and Venue Reform*, FEDERALIST SOC'Y (May 23, 2012), http://www.fed-soc.org/publications/detail/philadelphia-tort-litigation-forum-shopping-and-venue-reform.

279. *See* Elliott-Engel, *supra* note 273, at 8–9; Philadelphia Court of Common Pleas, General Court Regulation No. 2012-01 (Feb. 15, 2012).

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Judges in magnet jurisdictions use a variety of techniques to make their courts attractive to plaintiffs. Many are very similar to those used in the Eastern District of Texas, including broad interpretation of joinder rules,[280] reluctance to grant summary judgment or other dispositive motions,[281] trial management and scheduling that disadvantages defendants,[282] refusal to dismiss cases on forum non conveniens,[283] and venue rules that allow plaintiffs to choose their preferred courthouse.[284] In addition, because state courts have more latitude over substantive and evidentiary law, judges in magnet jurisdictions also make their courts more attractive to plaintiffs through doctrines that facilitate punitive damages and that allow plaintiffs' lawyers to present expert testimony that would flunk the *Daubert* test. Here's a vivid description of litigation before a judge in Madison County, Illinois:

> [T]he judge to which all asbestos cases were assigned, Nicholas Byron, implemented a system that made a fair trial almost impossible. The court routinely denied pre-trial dispositive motions, often without troubling to receive a written opposition from the plaintiffs. It refused to require plaintiffs either to plead or to provide in discovery information necessary for the defense of the case. While failing to enforce plaintiffs' discovery obligations in any meaningful way, it very readily limited the defense of the case for technical discovery violations. The sheer number of major cases set for trial—in 2003, more mesothelioma cases were set for trial in Madison County than in New York City—and the speed with which cases got to trial overwhelmed the ability of defendants to prepare each case. Also, the court frequently set several cases for trial on the same day, allowing the plaintiffs' attorney to select the one that would proceed. The defendants could not prepare for every case and were not willing to bet on picking out the one that would go to trial. All of this led to one conclusion: cases in Madison County simply had to be settled, no matter what the cost.[285]

Whether such practices are typical (or even accurately described) is unfortunately difficult to know. There have been very few rigorous empirical studies about magnet jurisdictions, and most of them have been produced by lawyers who routinely represent defendants.

Why would judges so tilt the scales of justice toward plaintiffs? As in

280. *See* American Tort Reform Foundation, *supra* note 275, at 27; Hanlon & Smetak, *supra* note 265, at 549–52.

281. *See* Hanlon & Smetak, *supra* note 265, at 597–600.

282. American Tort Reform Foundation, *supra* note 275, at 27.

283. Hanlon & Smetak, *supra* note 265, at 553–54.

284. *See* Clark, *supra* note 265, at 377.

285. Hanlon & Smetak, *supra* note 265, at 554 (footnotes omitted).

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the Eastern District of Texas, two motives seem to be related to the special social and economic dynamics of rural districts: cozy relations between bench and bar, and a desire to help the local economy. In addition, because these are state courts, two other considerations are relevant: judicial elections and local county finance. Judges in magnet jurisdictions tend to be elected, and before the mid-2000s, the plaintiffs' bar played a dominant role in financing judicial campaigns. In addition, some counties (like Delaware in the corporate chartering area) seem to have received a substantial fraction of their revenue from court fees generated by litigants who primarily hailed from out of state.

One way that state courts attract class action litigation is by their willingness to allow settlements that benefit plaintiffs' lawyers and defendants, but not plaintiffs. Litigation against General Motors ("GM") relating to alleged defects in truck fuel tanks provides a vivid illustration.[286] The lawyers negotiated a settlement and then asked for class certification and approval of the settlement. A federal district court certified the class and approved the settlement, but the Third Circuit reversed because it found that the plaintiffs' lawyers had failed to adequately represent the class and that the settlement was unfair because it consisted primarily of $1000 coupons for future purchases of GM trucks.[287] The Third Circuit also criticized the plaintiffs' lawyers' $9.5 million fee.[288] The parties thereafter shifted their litigation from federal court to Louisiana state court, where essentially the same class action was certified and the same settlement approved.[289]

In the early 2000s, some states began tightening their rules. For example, business interests financed the campaigns of judicial and legislative candidates who enacted reforms that curbed some of the worst abuses. Hearings on the Class Action Fairness Act highlighted the problem of magnet jurisdictions, and Congress responded in 2005 by passing that Act, which relaxed the complete diversity requirement in class actions, thus allowing defendants to remove such cases to federal court. Because federal courts have been much less hospitable to class actions (especially nationwide class actions based on state law), federal jurisdiction was seen as a cure to the problem. Whether that turns out to be the case depends on whether plaintiffs' lawyers are able to exploit loopholes in the Act and on

286. *In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liabs., 55 F.3d 768 (3d. Cir. 1995).

287. *Id.*

288. *Id.* at 819–22.

289. White v. Gen. Motors Corp., 718 So. 2d 480 (La. Ct. App. 1998).

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whether federal districts emerge that try to attract plaintiffs through expansive interpretations of pendent personal jurisdiction and practices used in patent litigation in the Eastern District of Texas, such as reluctance to grant dispositive motions.[290] In addition, while the Class Action Fairness Act curbs state court jurisdiction over class actions, it leaves largely untouched state court jurisdiction over mass torts brought as joined claims.[291]

As with patent litigation in the Eastern District of Texas, the management of class actions and mass torts in state courts has its defenders. Some members of Congress challenged the existence of magnet jurisdictions during hearings on the Class Action Fairness Act, and some academics have defended Madison County, although the best research focused on medical malpractice rather than class actions or mass torts.[292] As noted above, there is little rigorous empirical work in this area, so it is hard to be sure. Nevertheless, if critics of magnet jurisdictions are correct, class actions and mass torts in state court provide a vivid example of forum selling with striking parallels to patent litigation. Although the overwhelming majority of state court judges discharge their responsibilities even-handedly, a small number of judges in a handful of districts have been able to exercise disproportionate influence by twisting the law to favor plaintiffs who have the power to choose their courts and thus bestow benefits on the judges, the local bar, and nearby economy more generally.

B. BANKRUPTCY

Bankruptcy is probably the area in which court competition has been most extensively studied and debated. Starting in 1999, Lynn LoPucki and distinguished co-authors, including Theodore Eisenberg and Joe Doherty, wrote a series of articles on the topic. In 2005, LoPucki published a book that synthesized his arguments. The following passage from the book summarizes his main argument:

290. According to one commentator, after the Class Action Fairness Act, "class action plaintiffs have flocked to favored districts, perhaps most notably the Central and Northern districts of California, and all but fled from others." David L. Balser et al., *Interlocutory Appeal of Class Certification Decisions Under Rule 23(f): An Untapped Resource*, 83 BNA U.S. L. WK. 703, 704 (Nov. 11, 2014). Balser presents no evidence that these districts are trying to attract cases.

291. 28 U.S.C. § 1332(11)(A)–(B) (2012) (CAFA applies only to "monetary relief claims of 100 or more persons . . . involv[ing] common questions of law or fact"). Nevertheless, for claims based on a single event, if seventy-five or more claims are joined, there may be federal jurisdiction. 28 U.S.C. § 1369(a) (2012) (disputes "aris[ing] from a single accident, where at least 75 natural persons have died in the accident at a discrete location").

292. *See, e.g.*, Neil Vidmar et al., *"Judicial Hellholes:" Medical Malpractice Claims, Verdicts, and the "Doctor Exodus" in Illinois*, 59 VAND. L. REV. 1309 (2006).

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> In 1974 and 1975 the Bankruptcy Rules Committee adopted venue rules that gave big bankrupt companies a wide choice of courts. In so doing, the committee inadvertently triggered court competition. Forum shopping was a modest 20 percent to 40 percent during the first 15 years after the rules were adopted . . . .
>
> The sleepy, one-judge Delaware court that had attracted not a single big case in the decade of the 1980s entered the competition in 1990. It did so by ripping the Continental Airlines case out of the jaws of the Houston bankruptcy court and flaying Continental's secured creditors and lessors. Impressed with what they saw, the case placers brought the Delaware court more. By the end of 1996, the Delaware court had 87 percent of the big-case bankruptcy market nationwide. The results of Delaware's reorganizations were disastrous. Depending on how one measured, the Delaware-reorganized companies were two to ten times as likely to fail as companies reorganized in other courts (i.e. courts other than Delaware and New York). The apparent causes of the high failure rates were the very same reasons the case placers chose Delaware: speed of proceedings and the judges' willingness to approve whatever the debtor and its allies proposed . . . .
>
> [To attract cases, courts] authorized larger fees for bankruptcy professionals and relaxed their conflict of interest standards. Instead of squeezing failed executives out, the courts allowed more of them to stay and even approved multimillion-dollar bonuses to "retain" them. Instead of reorganizing companies—which required full disclosure to creditors—managers took to selling their companies to investors who would hire the managers to continue running them and give the managers as much as 5 to 10 percent of the equity. The courts approved the deals even when the prices offered were apparently inadequate and only a single bidder showed up for the auction.[293]

In many ways, the story told by LoPucki for bankruptcy is strikingly similar to the argument made above for patent litigation. Jurisdictional choice led some judges to compete for cases and the result was inefficient law. Even some of the techniques were similar. Like judges in the Eastern District of Texas, Delaware bankruptcy judges devised non-random case assignment procedures that allowed parties to shop for judges.[294] Like the Eastern District of Texas, Delaware bankruptcy judges created speedy procedures that favored the party who chose the court (and thus could plan ahead), and structured decisions in ways that insulated them from appellate

293. LOPUCKI, *supra* note 11, at 254–56.

294. *See id.* at 80–83 (describing how Delaware judges provided ex parte communication about court assignments to potential parties before they filed).

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review.[295] In addition, the motives to attract cases were remarkably similar: increased status and power for the judges and more business for local lawyers.[296] It is also interesting that the District of Delaware, the court which most aggressively courted bankruptcy cases, was also, at least for a time, a participant in the competition for patent litigation.

Many aspects of forum selling, however, are unique to the bankruptcy context. For example, bankruptcy cases are not started by a plaintiff, but rather are usually initiated by the debtor company itself.[297] LoPucki calls those with the power to choose where the company files bankruptcy "case placers." Those people include "lawyers, corporate executives, banks, and investment bankers."[298] In most of his book, LoPucki emphasizes the role that corporate executives and their lawyers play in choosing the court. Thus, to attract cases, the bankruptcy court must favor the company and its management rather than those one might ordinarily consider plaintiffs in the bankruptcy process (e.g., creditors).

Another unique aspect of bankruptcy competition is that the venue statute is, on its face, restrictive. Cases can be filed only where the corporation has its "domicile, residence, [or] principal place of business" or where there is a pending case concerning a corporate "affiliate."[299] Nevertheless, this statute effectively gives large debtors the ability to file anywhere because companies choose where they are incorporated and headquartered and can change those locations if it suits them. Bankruptcy courts themselves determine where the "principal place of business" is, and if they want to hear the case, they can be convinced that the firm is headquartered where the CEO happens to live and has a small office or in office suites rented for the purpose of establishing residence for bankruptcy purposes.[300] In addition, most large corporations have many subsidiary "affiliates."[301] By forcing a subsidiary located in one location to file for bankruptcy first, the parent and all other subsidiaries can then file in that same place.

Another aspect of bankruptcy litigation that is different from patent is that bankruptcy judges do not have life tenure. They are appointed for

295. *Id.* at 67 ("Judge Balick included her ruling on the secured creditors' requests as part of her order confirming Continental's plan . . . . The effect of the inclusion was to make it virtually impossible for the secured creditors to appeal the ruling.").

296. *Id.* at 20–21, 95.

297. *See id.* at 15–16.

298. *Id.* at 16–18.

299. 28 U.S.C. § 1408 (2012).

300. *Cf.* LOPUCKI, *supra* note 11, at 31–33.

301. *Id.* at 34–37.

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fourteen-year terms. When the judge is up for renewal, the "committee that passes on reappointments will probably survey the members of the local bankruptcy bar regarding the quality of the judge's prior service."[302] The reappointment process for bankruptcy judges, like the fact that state court judges in "magic jurisdictions" are elected, gives bankruptcy judges an additional reason to attract cases and thus keep the bar happy.

The wide range of decisions made by bankruptcy judges also gives them an extremely broad set of tools with which to attract cases, including awarding high fees to bankruptcy lawyers, paying lawyers every thirty days rather than according to the 120 day default set by the Bankruptcy Code, allowing managers to retain their jobs by not appointing bankruptcy trustees to run companies, paying retention bonuses to corporate executives, and releasing executives from personal liability.[303]

When lawyers and judges in other states noticed that most large bankruptcies were filed in Delaware, they set up committees to figure out how to attract cases to their courts (or at least to ensure that local companies filed for bankruptcy in their courts).[304] Those committees usually recommended paying lawyers higher fees and other practices pioneered by Delaware. If judges in those courts failed to follow Delaware practices, case placers would stop filing in their districts.[305] The Southern District of New York has been especially successful in competing with Delaware; although the District of Delaware remained the most popular district for large bankruptcy cases in the period from 2007 to 2012, the Southern District of New York had almost as many.[306] Nevertheless, the fact that two courts now dominate rather than one does not alter LoPucki's principal point: that courts have competed to attract cases.

Delaware also developed ingenious strategies for dealing with the large number of bankruptcies filed there. Instead of transferring cases to other districts, Delaware invited bankruptcy judges from other districts to sit as "visiting judges." Of course, doing so was risky because those judges might not follow the practices that made Delaware so attractive in the first place. Nevertheless, if a visiting judge failed to follow Delaware

302. *Id*. at 20–21.

303. *See id*. at 126, 133, 140–57, 180.

304. *See id*. at 124–28, 132–33.

305. *See id*. at 133–34 (describing the downfall of Chicago as a popular bankruptcy destination).

306. Samir Parikh, *Modern Forum Shopping in Bankruptcy*, 46 CONN. L. REV. 159, 180, 209–26 (2013) (the District of Delaware had fifty-eight large cases, all of which were "forum shopped," whereas the Southern District of New York had forty-three large cases, of which thirty-three were "forum shopped").

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practices—for example, if the judge proposed transferring a case to another district or not confirming a reorganization plan—the case was swiftly reassigned to another judge.[307] As one visiting judge explained:

> [Y]ou have to be fair to the district judges, too. It's their district. It's an economic thing. A lot of money flows to Delaware because of these cases. It supports a cottage industry of local counsel. The money goes to everything from cabs, to the train station, to hotels. You can't get a hotel room there some nights, and who goes to Delaware? It's very important to them. You've got to look at all sides. As a visiting judge, you have to be sensitive to the local culture.[308]

LoPucki argues that the competition for cases was bad public policy. It meant that more of the firm's assets went to pay lawyer and professional fees, and less went to pay creditors. It meant that managers whose incompetence and fraud drove companies into bankruptcy kept their jobs and were insulated from liability. Most importantly, it meant that companies that might have successfully reorganized collapsed. Even though a reorganization plan might be approved, the reorganized firm was more likely to fail again soon thereafter. For the period 1991–1996, when most large corporations filed for bankruptcy in Delaware, 54% of firms that reorganized in Delaware failed within five years, compared to 31% in New York and only 14% in other courts.[309] When other courts copied Delaware's practices, "they reproduced Delaware's failure . . . [R]efiling rates in the rest of the country jumped to roughly the same level as refiling rates in Delaware."[310]

Of course, Delaware's bankruptcy judges have their defenders. Even LoPucki admits that competition made judges "more responsive and accessible. They scheduled hearings for the convenience of the lawyers and litigants, not merely for their own. They published rules and guidelines . . . . [They made] the bankruptcy reorganization process more predictable."[311]

Others, however, went further in defending Delaware. Robert Rasmussen, although acknowledging the existence of competition,[312] questions the empirical basis of LoPucki's claim that Delaware's practices led reorganized firms to fail more often. He argues that one must

307. LOPUCKI, *supra* note 11, at 93–96.
308. *Id.* at 95.
309. *Id*. at 112–17.
310. *Id*. at 122.
311. *Id*. at 117.
312. Robert K. Rasmussen, *Empirically Bankrupt*, 2007 COLUM. BUS. L. REV. 179, 219 (2007).

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distinguish between traditional cases (where a reorganization plan is worked out after the firm files for bankruptcy) and pre-packaged cases (where the debtor and most creditors negotiate the reorganization plan before filing).[313] For traditional cases, which are the focus of most bankruptcy scholarship, the failure rate of Delaware firms is not different in a statistically significant way from the failure rate of firms reorganizing in other busy districts.[314]

Kenneth Ayotte and David A. Skeel Jr. argue that the apparently high failure rate of firms that reorganize in Delaware is not attributable to problematic practices of Delaware bankruptcy judges, but rather to selection: "Firms that are more likely to underperform in the future, all else equal, will rationally select a cheaper, faster bankruptcy procedure."[315] That is, firms that are more likely to fail are more likely to choose Delaware. In addition, Ayotte and Skeel argue that if one uses a better measure of post-bankruptcy performance—earnings before interest, taxes, depreciation, and amortization ("EBITDA")—rather than operating losses, firms that reorganized in Delaware perform as well as firms that reorganized elsewhere.[316]

One reason that bankruptcy competition might not lead to deleterious effects is that creditors have some influence over where firms file for bankruptcy. Because the debtor will need the cooperation of creditors, especially secured creditors, debtors consult with creditors about where to file. This gives the creditors the ability to constrain managerial choices that would reduce firm value. Of particular importance is the emergence of debtor-in-possession ("DIP") financing. Lenders who provide funding for the firm in bankruptcy demand control over where the firm will file and over many decisions during the bankruptcy itself. Such lenders have an incentive to ensure that managers do not use the process to enrich themselves at the expense of creditors.[317]

C. DOMAIN NAME DISPUTE RESOLUTION[318]

A more exotic example of forum selling comes from the world of online dispute resolution. Since 1999, any entity that registers a domain

313. *See id.* at 228.

314. *See id.* at 227–30.

315. Kenneth Ayotte & David A. Skeel, Jr., *An Efficiency-Based Explanation for Current Corporate Reorganization Practice*, 73 U. CHI. L. REV. 425, 441 (2006).

316. *Id.* at 444–49, 452.

317. *Id.* at 462–67.

318. This section is based primarily on Geist, *supra* note 14 and Mueller, *supra* note 14.

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name must agree to resolve trademark disputes in accordance with the Uniform Domain-Name Dispute Resolution Policy ("UDRP").[319] Under that policy, registrants agree to arbitrate trademark disputes with an arbitration provider approved by the Internet Corporation for Assigned Names and Numbers ("ICANN"). A unique feature of this system is that, in most cases, the complainant (plaintiff) unilaterally chooses the "dispute-resolution service provider" and the provider unilaterally chooses the arbitrator. That is, a trademark owner who claims that a domain name infringes its trademark unilaterally chooses the entity in charge of choosing the arbitrator.

Although ICANN had initially certified three dispute resolution providers, two swiftly came to dominate the market: the National Arbitration Forum ("NAF") and World Intellectual Property Organization ("WIPO").[320] Not surprisingly, according to the first researchers to analyze the system, Milton Mueller and Michael Geist, trademark owners "win more frequently" with these two providers.[321] In contrast, the dispute resolution provider with a lower trademark owner win rate, eResolution, left the market after less than two years.[322] The dominant position of WIPO seems to have emerged after it had established a track record of ruling for the trademark owner.[323]

The incentive to tilt law in favor of complainants is obvious. The dispute resolution providers are funded by fees paid by the complainant. In some cases, forum selling was blatant in that dispute resolution providers advertised their pro-complainant decisions and win rates.[324] For example, the NAF, one of the two dominant dispute resolution providers, sent out eleven press releases in mid-2001, and ten of them touted trademark owner victories.[325]

At least in the early years of the system, the key mechanism by which arbitration providers favored complainants was by their selection of arbitrators. The roster of arbitrators associated with each provider was not

319. Geist, *supra* note 14, at 918; Mueller, *supra* note 14, at 152.

320. Geist, *supra* note 14, at 905–06.

321. *Id.* at 909. *See also* Mueller, *supra* note 14, at 157.

322. Geist, *supra* note 14, at 906.

323. Michael Geist, *WIPO Wipes Out Domain Name Rights*, GLOBE & MAIL (Aug. 24, 2000), http://www.theglobeandmail.com/incoming/wipo-wipes-out-domain-name-rights/article4166906/.

324. *See* Geist, *supra* note 14, at 907–08; Stacey H. King, *The "Law That It Deems Applicable": ICANN, Disputes Resolution, and the Problem of Cybersquatting*, 22 HASTINGS COMM. & ENT. L.J. 452, 500 (2000).

325. Geist, *supra* note 14, at 907–08. NAF advertised similarly to banks when marketing its arbitration services to them. *See* Berner & Grow, *supra* note 5.

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very different, and in fact, some arbitrators were on the rosters of several providers. Nevertheless, the arbitration providers chose arbitrators by a non-random system. Analysis of arbitrator selection showed that among dominant providers, arbitrators who decided most often in favor of the complainant received more cases, while persons with reputations for decisions protective of domain name owners were seldom if ever selected as sole arbitrators. Instead, when more defendant-protective arbitrators were chosen, they were placed on three-person panels where their influence would be diluted. The use of three-person panels is relatively rare because it requires the domain name owner (defendant) to pay substantial fees.[326]

As in other cases of alleged forum selling, the UDRP has its defenders. Most prominently, Jay Kesan and Andres Gallo performed impressive statistical analysis and concluded that the key determinant of arbitration provider success is efficiency, not complainant bias.[327] It is possible that they do not find bias because they look at a broader period of time than earlier researchers and that the system improved over time. It is also possible that the monthly data that Kesan and Gallo use is too fine-grained to find patterns because trademark owners choose providers based on their long-term reputations, not the prior two months' decisions. While Kesan and Gallo's analysis is impressive, it is hard to reconcile with the more damning (but simpler) statistics produced by earlier researchers and with the anecdotal evidence. It would be helpful if others analyzed the data to see how the simple statistics produced by Mueller and Geist can be reconciled with the more sophisticated analysis produced by Kesan and Gallo.

D. COMMON LAW JUDGING IN EARLY MODERN ENGLAND[328]

Forum selling is not a purely contemporary phenomenon. There is evidence that it affected common law decisionmaking in the period 1600–1799. During that period, litigants could choose to bring most property, contract, and tort cases in any of the three common law courts: Common Pleas, King's Bench, and Exchequer.[329] Examination of the decisions of

326. *See* Geist, *supra* note 14, at 928–30; Zak Muscovitch, *2010 Domain Name Dispute Study*, DNATTORNEY.COM (Mar. 2010), http://www.dnattorney.com/study2010.shtml; *2012 Domain Dispute Study*, DNATTORNEY.COM (Aug. 28, 2012), http://www.dnattorney.com/NAFdomainnamedisputestudy2012.shtml.

327. Jay P. Kesan & Andres A. Gallo, *The Market for Private Dispute Resolution Services—An Empirical Re-Assessment of ICANN-UDRP Performance*, 11 MICH. TELECOMM. TECH. & L. REV. 285, 326 (2005).

328. This section is based primarily on Klerman, *supra* note 11.

329. *See* Klerman, *supra* note 11, at 1186.

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these courts suggests that the judges, especially the judges of King's Bench, tried to attract cases by making the law more attractive to plaintiffs—creating new causes of action and making it easier for plaintiffs to prevail. Examples of such pro-plaintiff trends include the expansion of the enforceability of oral contracts (*indebitatus assumpsit*), the narrow range of contract defenses (primarily fraud and duress), and the creation of cheaper and swifter property remedies in King's Bench (ejectment).[330] King's Bench, which was the most innovative and aggressive of the courts, rose from a backwater with a small caseload to the dominant court.[331]

Common law judges had a number of incentives to want to hear more cases. As in any age, some judges liked the power and influence that came from a large and prestigious caseload. In addition, before 1799, common law judges were paid in part from court fees paid by litigants.[332]

Like other situations involving forum selling, the common law system has its defenders. Adam Smith and more recently, Todd Zywicki, have argued that the primary effects of jurisdictional competition were beneficial—swifter justice.[333] Given that governmental officials were often criticized for delay and less than diligent performance, it is possible that competition and pecuniary incentives provided just the right carrots to cause judges to improve their performance without becoming excessively or inefficiently pro-plaintiff. On the other hand, the pro-plaintiff character of the common law was sometimes so blatant that it triggered legislation (such as the Statute of Frauds restricting the enforceability of oral contracts) or the creation of defenses in Chancery (such as protections against double collection of debts or mistake).

III. GENERALIZING FROM THE CASE STUDIES

The five case studies—patents, class actions and mass torts, bankruptcy, domain name dispute resolution, and common law judging in early modern England—share a number of common features. Most importantly, all involve situations in which the party initiating suit could choose to sue in multiple places. It is not possible to completely explain

330. *See id.* at 1190–92.

331. *See id.* at 1188 ("[T]he court introduced many procedural and substantive improvements that increased its caseload.").

332. *See id.* at 1187–89.

333. *See* Todd J. Zywicki, *The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis*, 97 NW. U. L. REV. 1551, 1586 (2003) ("Thus, interjurisdictional competition forced courts to abstract away from particular cases to higher conceptual categories and provided a powerful impetus for the improvement and rationalization of the law.").

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why some districts forum sell and others do not. Forum selling is an entrepreneurial activity. Just as we cannot predict which individuals will become successful entrepreneurs, we cannot predict which judges and which districts will be successful forum sellers. Nevertheless, just as one can identify institutions that make entrepreneurship more likely in some places than others, one can identify factors that make forum selling more likely in particular places.

In addition, the most successful competitors seem to share some common characteristics. The Eastern District of Texas does not include major cities or industries. Similarly, most of the places that are considered magic jurisdictions for class actions and mass torts are largely rural. For example, Madison County's largest city is Granite City, and it has a population of less than 30,000. Since there is so little other economic activity in these districts, litigation is seen as a potentially significant engine of economic growth. The fact that litigation looms so large in these districts has several important implications. It means that, if the judges do not attract litigation, they are unlikely to get interesting or important cases. It also means that, if they do attract litigation, they are likely to gain local prestige as persons who help lawyers and business in the district more generally. Conversely, lawyers and other business people are likely to pressure the judges to act in ways that attract and retain litigation business, and politicians will defend them.[334] This local pressure also means that judges can credibly commit to maintain their favorable practices, so case placers can be confident that policies will not change after the case has been filed. Another advantage of small districts is that they have fewer judges, so it is easier for them to agree upon, and coordinate to implement, policies that attract litigation. Finally, to the extent that forum selling has negative consequences for defendants and others affected by litigation, judges in districts with smaller local economies are less likely to care because the individuals and businesses that are harmed are less likely to be local.

The ability of small districts to compete derives from jurisdictional rules that allow a court to exercise power over a nationwide problem based on effects in the forum, even if those effects were only a small part of the total harm, and even though adjudication in one forum would have nationwide effects. For example, patent infringement suits usually involve products that are distributed nationally or internationally, but the Eastern

334. *See, e.g.*, Joseph R. Biden, Jr., *Give Credit to Good Courts*, LEGAL TIMES, June 20, 2005, (defending Delaware bankruptcy courts and arguing against venue reform).

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District of Texas asserts jurisdiction based on a small number of products sold there, even though a finding of infringement (or non-infringement) will affect products no matter where they are sold in the United States.[335] Class action and mass tort lawsuits involving nationwide plaintiffs and the bankruptcy of a large corporation similarly involve situations where the harm is nationwide or international, but even a court in a small rural county has the opportunity to enter a judgment binding everywhere (or at least in the entire United States).

Of course, some courts that compete are not located in districts that are otherwise economically insignificant. Before Delaware, the Southern District of New York was the dominant district for large bankruptcy cases, and bankruptcy districts that included major cities, such as Chicago and Houston, copied many of Delaware's practices in an attempt to attract (or at least retain) big bankruptcy cases.[336] State courts in Philadelphia have actively and publicly adopted procedures to encourage mass tort cases, and the Eastern District of Virginia, which was for a time a leading competitor for patent cases, includes Arlington, which is in the Washington, D.C. metropolitan area. Nevertheless, it is notable that districts that include large cities seem to compete less hard and are less likely to be successful. This may reflect the converse of the factors that make rural districts so effective. Judges in urban districts are likely to have interesting cases even if they do not actively compete. Similarly, the local bar is likely to have lucrative caseloads regardless of what the judges do. Others in the local economy are unlikely to notice whether litigation is booming. If judges do for a time compete, local businesses that are negatively affected may exert pressure for more even-handed justice, thus leading to reversal of the practices favorable to plaintiffs and case placers. Therefore, judges in urban districts seem unable to compete successfully over long periods of time. Rise and fall patterns are discernable with respect to mass torts in Philadelphia and patent cases in the Eastern District of Virginia.

In competing, courts are likely to adopt methods that immunize their decisions from appellate review. Federal courts that compete need to be concerned that their decisions will be reversed by appellate courts that have no interest in helping one district gain a disproportionate share of litigation and may be offended by "renegade" jurisdictions that try to do so. Thus, the Eastern District of Texas has focused its efforts to attract litigation on procedural issues, such as trial management or transfer of venue, that are

335. *See supra* notes 21–22 and accompanying text.
336. *See supra* Part II.B.

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reviewed only for abuse of discretion.[337] In addition, it has focused on decisions that do not qualify as final judgments, such as joinder or the denial of summary judgment. Such decisions cannot be immediately reviewed and thus are unlikely to be reviewed at all because most cases settle.[338] Similarly, in the bankruptcy context, first-day orders, decisions on how often to pay professionals, and other techniques Delaware used to attract cases are usually effectively unreviewable. In early modern England, the judges of King's Bench often used "legal fictions" to attract cases because fictions made the record on appeal seem legally correct, and appellate courts were severely restricted in their ability to question facts in the record.[339]

Another common theme is that forum selling is not inevitable, even if the relevant law gives plaintiffs or case placers broad choice of forum. For the first fifteen years after the enactment of the modern bankruptcy statute, no court seems to have attempted to attract cases. In addition, even when competition exists, not all courts compete. Only a handful of districts have even tried to attract patent cases.[340] Competition seems to have been more widespread for bankruptcy cases, although even in this context only the District of Delaware and districts encompassing about a dozen major cities seem to have entered the fray.[341]

In order to attract cases, courts do some things that are genuinely good, including increasing speed and predictability. Nevertheless, it would be a mistake to think that is all that courts do to compete. Plaintiffs and other case placers are concerned about speed and predictability only as means to the end of increasing their expected recovery. Consider, for

337. *See supra* notes 35, 107–112 and accompanying text.

338. A decision to deny summary judgment is almost completely immune from appellate review. If the case proceeds to trial, the appellate court will not review the denial of summary judgment. Chesapeake Paper Prods. Co. v. Stone & Webster Eng'g Corp., 51 F.3d 1229, 1234–37 (4th Cir. 1995); Edward H. Cooper, *Revising Civil Rule 56: Judge Mark R. Kravitz and the Rules Enabling Act*, 18 LEWIS & CLARK L. REV. 591, 600 (2014). Many courts, including the Fifth and Federal Circuits, also hold that a district court has discretion to deny summary judgment, even if the criteria set out in Rule 56 and Supreme Court precedents have been met. *Id.* at 599. Nor is a challenge via extraordinary writ of mandamus likely to succeed. *See* Major Michael J. Davidson, *A Modest Proposal: Permit Interlocutory Appeals of Summary Judgment Denials*, 147 MIL. L. REV. 145, 201 (1995). Interlocutory appeal under 28 U.S.C. § 1292 (2012) requires permission of the district court judge, and a forum selling judge is unlikely to grant such permission. Finally, the collateral order doctrine is very narrow and available only for very special issues not generally relevant to the types of cases discussed in this Article. Cooper *supra* note 338, at 202–05.

339. Daniel Klerman, *Legal Fictions as Strategic Instruments* (Sept. 16, 2013) (unpublished manuscript) (on file with authors).

340. *See supra* Table 1.

341. *See* Parikh, *supra* note 306, at 177–80.

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example, summary judgment. Summary judgment generally speeds case resolution and is more predictable because it involves judges rather than juries. Nevertheless, the Eastern District of Texas and District of Delaware both make it difficult for parties to get summary judgment, which primarily advantages defendants.[342] Similarly, jurisdictions that attract class action and mass tort cases are those that make it easier, not harder to get to juries. In the bankruptcy context, low fees to professionals could be as predictable as high fees, but bankruptcy judges know that only the latter attract cases. In addition, speed is not unambiguously good. Since the plaintiff or case placer can prepare its case in advance of filing, but other litigants ordinarily cannot, tight timetables advantage plaintiffs and case placers because they may not give other litigants sufficient time to prepare.[343]

Based on his analysis of patent and bankruptcy litigation, Jonas Anderson argues that forum selling is more common in areas of law with specialized courts or specialized judges.[344] The fact that forum selling has occurred in American mass torts and class actions and in pre-modern English common law courts suggests that forum selling can occur even without specialized courts. In addition, specialized courts would seem to reduce the danger of forum selling. The existence of the Federal Circuit, a single appellate court for patent cases, *reduces* opportunities for forum selling by making it harder for courts to compete based on differences in substantive law. Anderson acknowledges this, but argues "when legal differences among fora are eliminated, forum shoppers turn their attention to administrative and procedural nuances among courts."[345] While it is true that the Federal Circuit makes it difficult for district courts to compete by offering better substantive law, this does not mean that the inability to offer better substantive law made competition more likely. The opposite is more likely. Instead, the fact that competition is so intense in bankruptcy and patent reflects the unusually loose jurisdiction and venue provisions governing these areas. These loose rules mean that patent owners and case placers can choose to sue or file in nearly any district, which is not true for plaintiffs in most areas of law.

IV. SOLUTIONS

Since a necessary prerequisite for forum selling is jurisdictional choice, the easiest way to restrain forum selling is to narrow the plaintiff's

342. *See supra* Table 2.
343. *See supra* notes 134–135 and accompanying text.
344. Anderson, *supra* note 13, at 636–37.
345. *Id.* at 684.

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(or case placer's) jurisdictional choices. In fact, forum selling is relatively rare, in large part because in most situations, jurisdictional rules give plaintiffs only a few places in which they can sue. That means even a court that attracted all cases within its jurisdiction would still attract only a small fraction of all litigation. What makes the patent, bankruptcy, mass tort, and class action rules different is that they effectively give litigants the ability to sue anywhere, and thus give motivated courts the ability to attract a large fraction of that litigation.

Restricting jurisdictional choice in patent litigation is relatively easy. Congress could amend the patent venue statute to require patent owners to sue in the defendant's principal place of business or largest market. This solution is similar to Jeanne Fromer's proposal "to constrain venue to require suit in the district of the principal place of business of any of the defendants."[346] She points out that her proposal would constrain forum shopping while fostering beneficial "clustering" of cases in districts with industry or technological expertise.[347] Fromer's proposal would not allow suit in the place of incorporation because that would "sacrifice[] the benefit of clustering suits by industry [and create] a megacluster of patent cases in the District of Delaware."[348] Forum selling suggests another reason not to allow suits in the state of incorporation. Since Delaware may have been a competitor for patent suits, allowing suits in the state of incorporation as well as the principal place of business would enable Delaware, a court with a track record of forum selling, to compete for nearly any case involving a large corporate defendant.

Nevertheless, our proposal would also allow suit in the defendant's largest market for the allegedly infringing product. While forcing all patent litigation to the defendant's principal place of business would largely eliminate forum selling and the pro-plaintiff biases it causes, this could lead to an equally harmful pro-defendant bias. Courts and jurors in the defendant's principal place of business may be inclined to favor the local employer. In addition, companies might strategically choose to locate their principal place of business in districts with a pro-defendant reputation, thus giving courts additional incentives to favor patent defendants.[349] The district that includes the largest market for the defendant's products is

346. Fromer, *supra* note 17, at 1478.

347. *Id.* at 1479.

348. *Id.* at 1492.

349. Klerman, *Rethinking*, *supra* note 16, at 264. Fromer briefly discusses the possibility that "a company might choose to locate its principal place of business in a district with favorable substantive rules," but dismisses the possibility as "unlikely" and correctable by "searching review" by the Federal Circuit. Fromer, *supra* note 17, at 1491.

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likely to be more neutral between patentee and alleged infringer, and adding a single additional potential venue is unlikely to stimulate destructive competition among courts.

Restricting jurisdictional choice is likely to be more effective than the solution advocated by Jonas Anderson. He argues that districts should be required to randomly assign cases to judges.[350] While it is true that non-random case assignment is one of the methods districts use to make themselves more attractive to patent infringement plaintiffs, it is just one method and banning its use is unlikely to have a large effect for two reasons. First, several courts that compete or have competed for patent litigation, including the District of Delaware and Western District of Pennsylvania, have always used random assignment. Second, most districts that compete for patent cases have relatively few judgeships, so even with random assignment, a litigant is still likely get a favorable judge. The District of Delaware, for example, has only four judges.[351] The Eastern District of Texas is somewhat larger, with eight judgeships.[352] Since a majority of the judges on these courts seem to support pro-patentee policies, requiring random assignment would only slightly increase the possibility that a case would be assigned to a judge not interested in attracting cases through pro-plaintiff decisions.[353]

As discussed above, bankruptcy venue provisions are formally narrow, restricting suit primarily to the debtor's principal place of business and place of incorporation. In practice, these criteria do not constrict where a large company can file for bankruptcy because case placers can choose the company's place of incorporation and headquarters, as well as whether to have an affiliate file in a preferred forum first.[354] As a result, competition in bankruptcy does not undermine the idea that forum selling is a consequence of broad jurisdictional choice and thus could be largely eliminated through appropriate restrictions on jurisdiction and venue.

In fact, Lynn LoPucki argues that to eliminate competition, it would probably be sufficient to remove the state of incorporation and the state where an affiliate had previously filed for bankruptcy from the venue statute.[355] Others suggest that competition between districts could be made

350. Anderson, *supra* note 13, at 693.

351. *See* U.S. DIST. CT.: DIST. DEL., http://www.ded.uscourts.gov (last visited Oct. 23, 2015).

352. *See* U.S. DIST. CT.: E. DIST. TEX., http://www.txed.uscourts.gov/page1.shtml?location=info (last visited Oct. 23, 2015).

353. *See supra* text accompanying note 141.

354. *See supra* Part II.B.

355. *See generally* LoPucki, *supra* note 11.

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beneficial if firms were required to commit to a particular bankruptcy district while they were still healthy.[356] For example, a firm might be encouraged to state in its corporate charter where it would file for bankruptcy if it got into trouble.[357] In this situation, potential creditors could know in advance the bankruptcy court that would hear the case, and if the court systematically favored management or insiders—for example, by paying excessive fees to lawyers or selling assets to insiders at low prices—then creditors would demand higher interest rates. There would thus be market pressure for firms to choose a better bankruptcy court. In turn, that would encourage courts that wanted to hear more bankruptcy cases to make efficient bankruptcy law.

For the moment, at least, the problem of competition for class actions seems to have been solved by pushing them into federal court. Of course, as the examples of bankruptcy and patents show, even federal courts are not immune from competitive pressure. Nevertheless, several features of federal court make competition in class actions less likely. Because class actions can often be filed in multiple districts, it is likely that competing plaintiff's attorneys will file cases in several districts. The cases will then be referred to the Multidistrict Litigation Panel, which then sends all the related cases to a single court for pretrial proceedings. Since that single court is chosen by the Panel, rather than the litigants, competition is minimized.[358]

The power of the Multidistrict Litigation Panel to assign related cases filed in different places to any district for pretrial processing suggests possible reforms for patent and bankruptcy litigation as well. Patent and bankruptcy cases could also be assigned to districts by a centralized process. For example, Jonas Anderson suggests that patent infringement cases be randomly assigned to judges who have indicated an interest in hearing patent cases.[359] Similarly, Lynn LoPucki has suggested that Congress establish three or four bankruptcy courts for large bankrupt firms and that cases be assigned to the most convenient court by a judge not selected by anyone related to the firm. In a similar spirit, domain name disputes could be randomly assigned by ICANN to an approved provider, perhaps after giving both parties an opportunity to exclude one or two

356. *See, e.g.*, Robert K. Rasmussen & Randall S. Thomas, *Timing Matters: Promoting Forum Shopping by Insolvent Corporations*, 94 NW. U. L. REV. 1357, 1359 (2000).

357. *Id.* at 1402.

358. *See* Bieneman, *supra* note 258.

359. Anderson, *supra* note 13, at 644. Anderson ultimately rejects this solution because it would be costly for individuals and small companies to sue far from their homes. Instead, he favors the "more modest fix" of randomizing within districts. *Id.* at 637–38.

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providers from consideration. The combination of random assignment with the exclusion of providers disfavored by *either* party could give providers incentives to compete by developing reputations for fairness, rather than reputations for favoring the trademark owner.

Broad interpretations of the doctrine of general jurisdiction also have the possibility of generating forum selling. That danger has not materialized because most courts interpret general jurisdiction to apply rather narrowly only to the state where a corporation is incorporated or domiciled.[360] Nevertheless, some courts have held that a corporation is subject to general jurisdiction where it has a factory, employs large numbers of people, or conducts a large amount of business.[361] Such broad conceptions of general jurisdiction would mean that any district could compete for large cases by adopting plaintiff-friendly practices. Fortunately, recent Supreme Court cases have restricted general jurisdiction to the state or states where the corporation is "at home," by which the Court seems to mean a small number of states, and perhaps just headquarters and incorporation states.[362]

Another area of potential danger is federal statutes that authorize nationwide service of process. These statutes are sometimes interpreted to mean that defendants in certain causes of action, such as antitrust, securities, or ERISA, can be sued in any district. Such broad jurisdictional choice makes forum selling possible, although it does not seem to have materialized.[363] Part of the reason may be that many of those statutes are interpreted narrowly to allow suit only when the defendant has contacts with the state in which the federal district court is located. Other courts allow wide jurisdictional choice only when the defendant is foreign and does not have contacts with any particular state. For the future, to prevent forum selling, Congress and the courts should make clear that plaintiffs cannot ordinarily sue in any district.

CONCLUSION

Although forum shopping is usually analyzed as a problem created by strategic plaintiffs, this Article suggests that courts are sometimes a key

360. *See, e.g.*, Daimler AG v. Bauman, 134 S. Ct. 746 (2014).

361. *See* Klerman, *Rethinking*, *supra* note 16, at 262.

362. *Daimler*, 134 S. Ct. at 754, 760–61; Goodyear Dunlop Tires Operations v. Brown, 131 S. Ct. 2846, 2851, 2854, 2857 (2011).

363. One reason that forum selling does not seem to have materialized in antitrust or securities cases is that many such cases are subject to multidistrict litigation proceedings, which make the place where a case was initially filed much less important.

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part of the problem. While judges usually want to hear fewer cases and are motivated to apply the law even-handedly, in some circumstances, a few judges seek to hear more cases in order to bring prestige to themselves and business to local lawyers and the local economy. That is, sometimes forum shopping by plaintiffs leads to forum selling by judges. While some of the things judges do to attract cases may be beneficial, often efforts to attract cases favor those with the power to choose where the case will be brought. In the patent context, that means favoring patentees over alleged infringers. In the bankruptcy context, that means favoring debtors and managers over creditors. In the class action and mass tort context, it means favoring injured individuals over corporate defendants.

Forum selling is made possible by statutes, rules, and judicial decisions that give plaintiffs wide choice of forum. Such jurisdictional choice means that motivated courts can attract litigation from all over the country (and potentially all over the world). Thus, the simplest way to prevent forum selling is to constrict jurisdictional choice. Much of the Supreme Court's personal jurisdiction doctrine has that effect, even though it was not consciously designed to prevent forum selling. The existence of constitutional constraints probably explains why forum selling is relatively rare. Conversely, the danger of forum selling helps to justify constitutional constraints on jurisdiction, which have been challenged as lacking doctrinal or pragmatic justification. Nevertheless, because jurisdictional rules, statutes, and constitutional doctrine have not been designed to prevent forum selling, there are a few areas, such as patent and bankruptcy, where parties have substantial jurisdictional choice and where some judges have distorted the law to attract cases. Of course, most judges have not participated in that competition, but when there is wide jurisdictional choice, a small number of motivated judges can have a large negative impact because their courts will attract a large fraction of all litigation.

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APPENDIX 1a. Speed in Twenty-Five Busiest Patent Districts and W.D. Pa. 2000–2007

District	*Time to Term.(All)*	*# Trials*	*Time to Trial*	*Time to Term. (Tried Cases)*
E.D. Tex.	312	33	650	974
D. Del.	364	86	654	1238
C.D. Cal.	210	38	703	1048
N.D. Cal.	309	40	855	1252
N.D. Ill.	215	22	770	934
D.N.J.	225	19	930	1125
S.D.N.Y.	226	27	934	1293
S.D. Cal.	231	11	1071	1419
S.D. Fla.	207	14	404	573
D. Mass.	267	30	1048	1314
D. Minn.	247	13	881	926
M.D. Fla.	241	15	634	911
E.D. Mich.	270	7	945	1067
E.D. Va.	160	21	279	414
N.D. Ga.	235	4	1000	1332
N.D. Tex.	227	9	818	1127
D. Utah	261	8	436	1340
W.D. Wash.	181	8	644	752
D. Colo.	198	6	1103	1128
E.D. Pa.	294	9	917	1204
N.D. Ohio	210	3	630	797
S.D. Tex.	264	13	731	1050
W.D. Tex.	270	7	904	1098
E.D.N.Y.	270	7	775	775
W.D. Wis.	156	15	318	335
Average Top 25 except E.D. Tex.	239	18	766	1019
W.D. Pa.	208	4	1436	1788
All Districts	244	585	731	1097
All Except E.D. Tex.	243	552	746	1101

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APPENDIX 1b. Speed in Twenty-Five Busiest Patent Districts and W.D. Pa. 2008–6/30/2015

District	*Time to Term. (All)*	*# Trials*	*Time to Trial*	*Time to Term. (Tried Cases)*
E.D. Tex.	246	149	833	1024
D. Del.	316	161	775	1074
C.D. Cal.	238	41	769	929
N.D. Cal.	272	45	857	1127
N.D. Ill.	218	20	1165	1785
D.N.J.	295	74	962	1106
S.D.N.Y.	273	43	772	973
S.D. Cal.	300	17	756	1116
S.D. Fla.	119	13	519	751
D. Mass.	273	25	871	1193
D. Minn.	278	6	1271	1294
M.D. Fla.	267	17	773	920
E.D. Mich.	252	10	1680	1781
E.D. Va.	182	18	404	484
N.D. Ga.	225	6	1124	1159
N.D. Tex.	252	12	815	885
D. Utah	275	5	1420	1681
W.D. Wash.	230	8	978	954
D. Colo.	210	6	1136	1705
E.D. Pa.	274	5	726	1030
N.D. Ohio	207	8	846	1089
S.D. Tex.	277	10	875	1037
W.D. Tex.	274	6	903	1337
E.D.N.Y.	267	3	1274	1537
W.D. Wis.	235	23	552	729
Average Top 25 Except E.D.Tex.	250	24	926	1153
W.D. Pa.	391	9	980	996
All Districts	255	849	850	1097
All Except E.D. Tex.	257	700	858	1110

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Notes. Unless otherwise stated, data were obtained from Lex Machina, www.lexmachina.com, and accessed on August 21, 2015. Lex Machina collects and verifies PACER data for district court patent litigation. It updates nightly; cleans and evaluates the raw PACER data to eliminate errors; indexes and tags the data; and offers various summary and analytic tools. *See* https://lexmachina.com/features/how-it-works/. Time is median number of days to the event. The twenty-five busiest patent districts are based on data from the last ten years collected by Lex Machina. Speed data were obtained by viewing Lex Machina's summary page for each district. Date was restricted to 1/1/00 through 12/31/07 and 1/1/08 through 06/30/15. Time to termination was determined by selecting the "cases that were terminated" option and identifying the median provided by Lex Machina (using the labels feature). Time to trial and time to termination (tried cases) were determined by selecting the "cases that went to trial" option and identifying the median for "Trial" and "Termination." When there were more than ten trials, Lex Machina identified the median. If not, the median was hand-calculated from the data provided. For "All Districts," speed data was obtained by clicking on Lex Machina's tab "Cases"; selecting the "Timing" subtab; Case Type was restricted to Patent; Terminated Date was restricted to 1/1/00 through 12/31/07 and 1/1/08 through 06/30/15 to obtain "time to termination (all cases)"; Trial Date was restricted to 1/1/00 through 12/31/07 and 1/1/08 through 06/30/15 to obtain "number of trial," "time to trial," and "time to termination (tried cases)." To obtain information for all districts except E.D. Tex., these steps were repeated but with "Court" restricted to exclude E.D. Tex.

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APPENDIX 2: Summary Judgment and Transfer Rates in Top Twenty-Five Patent Districts and W.D. Pa.

District	*Total Resolutions*	*SJ for Plaintiff*	*SJ for Defendant*	*Total SJs*	*SJ Rate*	*Transfers*	*Transfer Rate*
E.D. Tex.	6421	7	43	50	0.8	434	6.8
D. Del.	4787	13	63	76	1.6	233	4.9
C.D. Cal.	4478	47	165	212	4.7	137	3.1
N.D. Cal.	2673	19	124	143	5.3	89	3.3
N.D. Ill.	2392	13	69	82	3.4	145	6.1
D.N.J.	1986	21	47	68	3.4	67	3.4
S.D.N.Y.	1819	12	77	89	4.9	81	4.5
S.D. Cal.	1135	5	25	30	2.6	42	3.7
S.D. Fla.	1124	2	28	30	2.7	63	5.6
D. Mass.	1013	12	31	43	4.2	23	2.3
D. Minn.	940	7	27	34	3.6	26	2.8
M.D. Fla.	860	4	14	18	2.1	50	5.8
E.D. Mich.	853	6	32	38	4.5	28	3.3
E.D. Va.	819	2	35	37	4.5	115	14.0
N.D. Ga.	781	7	9	16	2.0	34	4.4
N.D. Tex.	774	3	14	17	2.2	50	6.5
D. Utah	679	4	17	21	3.1	7	1.0
W.D. Wash.	640	5	27	32	5.0	25	3.9
D. Colo.	638	3	14	17	2.7	29	4.5
E.D. Pa.	680	2	13	15	2.2	32	4.7
N.D. Ohio	596	6	17	23	3.9	17	2.9
S.D. Tex.	586	6	34	40	6.8	30	5.1
W.D. Tex.	445	1	17	18	4.0	22	4.9
E.D.N.Y.	568	1	13	14	2.5	24	4.2
W.D. Wis.	424	6	44	50	11.8	54	12.7
Top 25 except E.D. Tex.	31,690	207	956	1163	3.7	1423	4.5
W.D. Pa.	303	5	8	13	4.3	9	3.0
All Districts	46,785	295	1245	1540	3.3	2235	4.8
All Except E.D. Tex.	40,364	288	1202	1490	3.7	1801	4.5

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Notes. The twenty-five busiest patent districts are based on data from the last ten years collected by Lex Machina. Data were based on information in Lex Machina for the time period 1/1/00 through 6/30/15 and accessed on August 21, 2015. Outcome information is generated by clicking on Lex Machina's "Cases" tab and then choosing the "Case Resolutions" subtab. Results were then restricted to Case Type "Patent" and the date range 01/01/00 through 06/30/15. This provided the "All Districts" information. Data for all districts except E.D.Tex. were generated by restricting "Courts" to exclude the E.D. Tex. Data for specific districts were generated by restricting "Court" to that district. Lex Machina provides information on outcomes broken down by "Claimant Win"; "Claim Defendant Win"; "Likely Settlement"; "Procedural." "Total Resolutions" was calculated by adding all of these categories together. Summary judgment for plaintiff is based on the "summary judgment" subcategory of "Claimant Win." Summary judgment for defendant is based on the summary judgment subcategory of "Claim Defendant Win." Transfers are based on the "interdistrict transfer" subcategory of "Procedural." Rates were calculated by dividing the number by total resolutions.

APPENDIX 3: Median Time to Trial in Eastern District of Texas (Months)

Time Period	*All Civil Cases*	*Patent Cases*
10/1/01 – 9/30/02	14.0	17.5 (n=2)
10/1/02 – 9/30/03	17.0	23.7 (n=3)
10/1/03 – 9/30/04	15.4	21.4 (n=3)
10/1/04 – 9/30/05	15.9	17.2 (n=3)
10/1/05 – 9/30/06	17.7	25.2 (n=10)
10/1/06 – 9/30/07	18.0	21.3 (n=8)
10/1/01 – 9/30/07 (Avg. of Medians)	***16.3***	***21.1***
10/1/07 – 9/30/08	18.5	23.8
10/1/08 – 9/30/09	25.0	27.7
10/1/09 – 9/30/10	21.7	30.5
10/1/10 – 9/30/11	23.7	26.5
10/1/11 – 9/30/12	24.8	32.1
10/1/12 – 9/30/13	20.5	22.7
10/1/13 – 9/30/14	21.9	25.8
10/1/07 – 9/30/13 (Avg. of Medians)	***22.3***	***27.0***

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Notes. Data for all civil cases were obtained from the Administrative Office of the U.S. Courts at http://www.uscourts.gov/Statistics/FederalCourtManagementStatistics.aspx. The median is reported in months and in twelve-month periods ending on September 30. Because the source provides only yearly information, not collective information over several years, the 2001–2007 and 2007–2013 period information is calculated by averaging the yearly medians. Data for patent cases were obtained by Lex Machina and accessed on August 21, 2015 in a manner similar to that described in Appendix 1, except with different date restrictions. Prior to the twelve-month period ending September 30, 2008, there were ten or fewer patent trials in the Eastern District of Texas in each twelve-month period, which is arguably too low to reliably report a median. The number of trials is provided when ten or under.

APPENDIX 4. Case Filings for All Civil Cases and Patent Cases (April 1, 2012–March 31, 2013)

	E.D. Tex.	*National Total*	*% of Filings in the E.D. Tex.*
Patent	1351	5633	24.0%
All Civil	3744	271,950	1.4%
Percentage of Civil Cases that Were Patent Cases	36.1%	2.1%	…

Notes. Patent data were obtained through Lex Machina and accessed on August 21, 2015 by clicking on the "Cases" tab and restricting to the date range. Eastern District patent data were obtained by then further restricting by district to E.D. Tex. All civil filings for both the Eastern District and nationwide were obtained from U.S. District Courts—Civil Cases Commenced, Terminated, and Pending During the Twelve Month Periods Ending March 31, 2012 and 2013, Federal Judicial Caseload Statistics, Appendix Table C, http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2013/tables/C00Mar13.pdf.

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APPENDIX 5. Share of Patent Declaratory Judgment Actions in Popular Patent Districts (2000-06/30/15)

District	*% of All National Patent Cases*	*% of National Patent Declaratory Judgment Action*	*% of Patent Cases in District Filed as Declaratory Judgments*
Eastern District of Texas	15.1%	2.5%	1.3%
District of Delaware	11.0%	6.1%	4.2%
Central District of California	9.1%	6.5%	5.5%
Northern District of California	5.6%	11.4%	15.3%
Northern District of Illinois	4.9%	4.4%	6.9%
District of New Jersey	4.5%	3.5%	6.0%
Southern District of New York	3.8%	3.2%	6.4%
Southern District of California	2.4%	3.2%	10.2%
Southern District of Florida	2.2%	2.6%	9.0%
District of Massachusetts	2.2%	3.2%	11.3%
Nationwide Total	…	…	7.6%

Notes. Raw data were obtained through Lex Machina and accessed on August 21, 2015 by clicking on the "Cases" tab and restricting to the Patent Case Type and the appropriate date range. Declaratory judgment numbers were then obtained by restricting by the Declaratory Judgment Case tag. District-specific information was obtained by further restricting to the appropriate district by the Courts tag.

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