

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 explain constitutional constraints on personal jurisdiction. Without constitutional limits on jurisdiction, some courts are likely to be biased in favor of plaintiffs in order to attract litigation. This article explores forum selling through five case studies: patent litigation and 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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I. 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 the 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 reelection, 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 with the most pro-plaintiff law and procedures. 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, 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, 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 courts 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. It therefore 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.¹ As a result, states that want to attract contractual litigation would do so by offering procedures that favor neither side.

¹ Whether forum selection clauses in cases not involving sophisticated parties are beneficial is much less clear. Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203 (2003). Technically, the domain name dispute system discussed in Section III.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.

Contracting parties seem to prefer to 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.”² 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. 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.³ 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 clauses⁴ and arbitration.⁵

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,”⁶ 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 counter-argument 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 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.⁷ 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

² Geoffrey P. Miller & Theodore Eisenberg, *The Market for Contracts*, 30 CARDOZO L. REV. 2073, 2098 (2009).

³ ERIN A. O’HARA AND LARRY E. RIBSTEIN, *THE LAW MARKET* 85-96 (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 (2008). Whether arbitration clauses in consumer or employment contracts are beneficial is unclear. Robert Berner & Brian Grow, *Banks vs. Consumers (Guess Who Wins)*, BUSINESS WEEK 72 (June 4, 2008).

⁴ *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991).

⁵ Federal Arbitration Act, 9 U.S.C. § 1 et seq.

⁶ Todd J. Zywicki, *Is Forum Shopping Corrupting America’s Bankruptcy Courts?*, 94 GEO. L. REV. 1141, 1146 (2006)

⁷ DAN L. BURK & MARK A. LEMLEY, *THE PATENT CRISIS AND HOW THE COURTS CAN SOLVE IT* (2009).

corporate law.⁸ 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, minimize their costs, and reduce delay. As a result, competition among courts is likely to result in a pro-plaintiff bias.⁹

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 that 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 inefficiently 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 her broad discretion on procedural matters in a pro-plaintiff manner to attract litigation has acted 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 and 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. Although each of these areas has 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.¹⁰ Competition for patent cases is analyzed by Jonas Anderson, who argues that competition is particularly likely when courts are specialized, and advocates random

⁸ FRANK H. EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 212-27 (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).

⁹ Daniel Klerman, *Jurisdictional Competition and the Evolution of the Common Law*, 74 U. CHI. L. REV. 1179, 1182-3 (2007); LYNN LOPUCKI, *COURTING FAILURE* 241 (2005).

¹⁰ LoPucki, *supra* note 9; Part III.B, *infra*.

assignment of cases to judges as the solution.¹¹ Mark Geist and Milton Mueller have examined competition among private dispute resolution providers deciding domain names disputes.¹²

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.¹³ More recently, Klerman coined the phrase “forum selling” and identified it as a potential problem in modern litigation.¹⁴ The present article uses detailed case studies to show that forum selling is a reality in several areas of law.

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 decision-making, 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 order doctrine 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.

Section II analyzes forum selling in patent litigation in depth. Section III 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

¹¹ J. Jonas Anderson, *Court Competition for Patent Cases*, 163 U. PENN. L. REV. (forthcoming 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).

¹² Michael Geist, *Fair.com?: An Examination of the Allegations of Systemic Unfairness in the ICANN UDRP*, 27 BROOK. J. INT’L L. 903 (2002); Milton L. Mueller, *Rough Justice: A Statistical Assessment of ICANN’s Uniform Dispute Resolution Policy*, 17 INFORMATION SOC’Y 151 (2001).

¹³ Klerman, *supra* note 9. 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 and Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235,254-55 (1979); Bruce Hay, *Conflicts of Law and State Competition in the Product Liability System*, 80 GEO. L. J. 617, 643-44 (1992).

¹⁴ Daniel Klerman, *Personal Jurisdiction and Product Liability*, 85 S. CAL. L. REV. 1551, 1554 (2012) (hereinafter, “Klerman, *Product Liability*”); Daniel Klerman, *Rethinking Personal Jurisdiction*, 6 J. LEGAL ANALYSIS 245 (2014) (hereinafter, “Klerman, *Rethinking*”).

common law judging. Section IV generalizes from the case studies. Section V explores possible solutions, and Section VI concludes.

II. 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.”¹⁵ Prior to 1957, venue in patent cases was rather restrictive,¹⁶ but in 1988, Congress amended the general venue statute, 28 U.S.C. § 1391(c), to define a corporation’s residence “for all venue purposes” as any district in which the corporation would be subject to personal jurisdiction, if that district were considered a state.¹⁷ Despite the Supreme Court’s recent decisions questioning the “stream of commerce” theory of personal jurisdiction in product liability cases,¹⁸ 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.¹⁹ Because most accused infringers are corporations whose products are sold nationwide, most patent plaintiffs can sue in any district.²⁰

Forum shopping in patent cases has been extensive since at least the late 1990s,²¹ but the Eastern District of Texas emerged in the mid-2000s as the favored forum,²² despite lacking major population, corporate, or technology centers.²³ Outside the top ten in patent filings as late

¹⁵ Jeanne C. Fromer, *Patentography*, 85 N.Y.U. L. REV. 1444, 1451 (2010); Kimberly A. Moore, *Forum Shopping in Patent Cases: Does Geographic Choice Affect Innovation?*, 79 N.C. L. REV. 889, 901 (2001).

¹⁶ 28 U.S.C. § 1400(b) (1957); *Fourco Glass Co. v. Tansmirra Prods. Co.*, 353 U.S. 222, 226 (1957).

¹⁷ *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574, 1578 (Fed. Cir. 1990).

¹⁸ *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011); *Asahi Metal Indus. v. Superior Ct. of Cal.*, 480 U.S. 102 (1987).

¹⁹ *Beverly Hills Fan Co. v. Royal Sovereign Corp.*, 21 F.3d 1558, 1565-69 (Fed. Cir. 1994); *AFTG-TG v Nvoton Technology*, 689 F. 3d 1358, 1363 (Fed. Cir. 2012) (asserting that “the law remains the same after *McIntyre*” and thus that *Beverly Hills Fan* remains controlling precedent).

²⁰ Megan M. LaBelle, *Patent Litigation, Personal Jurisdiction, and the Public Good*, 18 GEO. MASON L. REV. 43, 70 (2010); Moore, *supra* note 15, at 895.

²¹ Moore, *supra* note 15.

²² Yan Lechkis, *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 (2007).

²³ 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. James C. Pistorino & Susan J. Crane, *2011 Trends in Patent Case Filings: Eastern District of Texas Continues to Lead Until*

as 2003, the district surged to take the top spot in 2007. 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.

TABLE 1: Top 10 Most Popular Districts for Patent Cases, 2007-2014 (% of Total Cases)²⁴

District	2007	2008	2009	2010	2011	2012	2013	2014	2015 1 st Half	2007 - 1 st Half 2015
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

America Invents Act is Signed, Perkins Coie, March 2012, at 10
http://www.perkinscoie.com/files/upload/PL_12_03PistorinoArticle.pdf.

²⁴ Data from Lex Machina.

single lawsuit, a practice far more common in the Eastern District of Texas than elsewhere.²⁵ 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.²⁶ Congress prohibited suing multiple unrelated defendants in one suit in the America Invents Act, effective September 16, 2011.²⁷ As a result, 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. 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.

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,²⁸ 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 themselves have 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."²⁹ 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 discretion standard of review applicable to most procedural decisions, the harmless error doctrine, and the final judgment rule. Some appellate judges, however, have taken notice. For example, Justice Scalia called the Eastern District a "renegade" jurisdiction.³⁰

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

²⁶ James Pistorino, *Concentration of Patent Cases in Eastern District of Texas Increases in 2010*, 81 BNA PATENT, COPYRIGHT & TRADEMARK JOURNAL 803 (2011), available at http://www.perkinscoie.com/files/upload/PL_11_04Pistorino.pdf.

²⁷ David O. Taylor, *Patent Misjoinder*, 88 N.Y.U. L. REV. 652 (2013).

²⁸ Leychkis, *supra* note 22, at 209-215; Xuan-Thao Nguyen, *Justice Scalia's "Renegade District": Lessons for Patent Law Reform*, 83 TUL. L. REV. 111, 141 (2008).

²⁹ Allan Pusey, *Marshall Law: Patent lawyers flock to East Texas court for its expertise and "rocket docket,"* THE DALLAS MORNING NEWS, March 26, 2006, available at http://www2.aipla.org/Content/ContentGroups/Issues_and_Advocacy/Articles_on_Patent_Reform/MarshallLaw.pdf.

³⁰ Transcript of Oral Argument at 11, *eBay v. MercExchange*, 547 U.S. 388 (2006) (No. 05-130).

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.³¹ By contrast, only 29% of grants of summary judgment are in favor of patentees.³² As in other substantive areas, summary judgment is overwhelmingly sought by patent defendants.³³ 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."³⁴

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

TABLE 2: Summary Judgment Rate in Popular Patent Districts (2000-1st Half 2015)³⁵

District	Summary Judgment Outcomes	Total Outcomes	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

³¹ John Allison et al., *Understanding the Realities of Modern Patent Litigation*, 92 TEX. L. REV. 1769, 1787-90 (2014).

³² *Id.* at 1778-79, 1785, 1788, 1790 & Email from David Schwartz to Greg Reilly, dated Sept. 5, 2014 (on file with authors) (identifying 542 summary judgment grants, 155 for the patentee).

³³ *Id.* (identifying 1296 summary judgment motions, 927 (72%) sought by the accused infringer).

³⁴ Mark A. Lemley, *Where to File Your Patent Case*, 38 AIPLA Q.J. 1, 4 (2010).

³⁵ Appendix 2.

The infrequency of summary judgment is not just the result of fewer motions by the parties.³⁶ 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%).³⁷ 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. Similarly, patent defendants prevail on non-infringement motions 45% of the time in the Eastern District, but 62% nationwide.³⁸ 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%.³⁹

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.⁴⁰ Nevertheless, 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.⁴¹ Moreover, Eastern District judges implicitly acknowledge that patentees are attracted

³⁶In Lex Machina through June 30, 2015, only 9.6% of orders regarding summary judgment, a proxy for motions for summary judgment, are from the Eastern District of Texas, even though the Eastern District accounted for 15.1% of patent litigation in this period.

³⁷ 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, 317 (2011) (analyzing data from 1991-2010).

³⁸ Allison et al., *supra* note 31, at 1784, 1790, 1793 (analyzing data from 2008-2009). The percentages for summary judgment of non-infringement include stipulated judgments of non-infringement.

³⁹ Lemley, *supra* note 34, at 12-14.

⁴⁰ 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...”).

⁴¹ 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), available at http://www.txed.uscourts.gov/cgi-bin/view_document.cgi?document=24456; Judge Rodney Gilstrap, Sample Docket Control Order – Patent & Sample Docket Control Order, available at <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, available at <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 (May 2015), available at <http://www.txed.uscourts.gov/page1.shtml?location=info:judge&judge=17>. This is significant

to the district by the fact that they are averse to summary judgment, emphasizing that they “believe in trial by jury.”⁴² 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.”⁴³

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.⁴⁴ 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.”⁴⁵

The norm in federal district courts is random assignment among judges within a district.⁴⁶ 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,⁴⁷ with the reassignment random among all program judges in the district.⁴⁸ Almost all participating districts have at least three program judges. Non-program judges also often decline

[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.*, No. 2012-1696, slip op. at 5 \(Fed. Cir. June 11, 2015\); *id.*, concurrence slip op. at 1-2 \(Mayer, J., concurring\).](#)

⁴² *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 History*”) (statement of Judge Leonard Davis).

⁴³ *Id.*

⁴⁴ Allison et al., *supra* note 31, at 1793-94.

⁴⁵ *Symposium History*, *supra* note 42, at 257-258.

⁴⁶ 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).

⁴⁷ http://www.uscourts.gov/news/newsview/11-06-07/District_Courts_Selected_for_Patent_Pilot_Program.aspx.

⁴⁸ Ron Vogel, *The Patent Pilot Program: Reassignment Rates and the Effect of Local Patent Rules*, N.Y. INTELLECTUAL PROPERTY LAW ASSOCIATION BULLETIN at 17-18 (Oct./Nov. 2013), available at <http://www.fr.com/files/Uploads/Documents/Vogel.NYIPLABulletin.Pilot-Patent-Program-Reassignment-Rates-and-Effects-of-Local-Rules.OctNov2013.pdf>

to reassign patent cases.⁴⁹ 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, more importantly, specifies *ex ante* via a public order the allocation of cases filed in each division. For example, in 2006 at the outset of the Eastern District's popularity, 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.⁵⁰

Although aspects of this assignment system pre-date the Eastern District's patent litigation boom,⁵¹ the Eastern District provided patent plaintiffs *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.⁵² 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.⁵³ 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.⁵⁴

There was no particular reason why patentees should be given a choice of division, much less choice of judge, as patent cases almost never have a greater connection to one division of the Eastern District than another.⁵⁵ 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.

Patentees have used their ability to judge shop. From January 2010-September 15, 2011 – when Judge Ward was receiving 75% of Marshall civil cases and Judge Davis 95% of Tyler

⁴⁹ *Id.*

⁵⁰ U.S. Dist. Ct. E.D. Tex. General Order 06-13, available at: http://www.txed.uscourts.gov/cgi-bin/view_document.cgi?document=1956.

⁵¹ U.S. Dist. Ct. E.D. Tex. General Order 98-5, available at http://www.txed.uscourts.gov/cgi-bin/view_document.cgi?document=2090.

⁵² U.S. Dist. Ct. E.D. Tex. General Order 09-4, available at http://www.txed.uscourts.gov/cgi-bin/view_document.cgi?document=19368.

⁵³ U.S. Dist. Ct. E.D. Tex. General Order 11-2, available at http://www.txed.uscourts.gov/cgi-bin/view_document.cgi?document=20087.

⁵⁴ The Attorney's "How To" Guide for Civil Case Opening 4, available at http://www.txed.uscourts.gov/cgi-bin/view_document.cgi?document=2353.

⁵⁵ 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), available at <http://www.cand.uscourts.gov/generalorders>.

patent cases – 96% of patent defendants were sued in Marshall or Tyler,⁵⁶ 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,⁵⁷ but then shifted to Judge Gilstrap after he was confirmed and gained the confidence of patent litigators.⁵⁸

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,”⁵⁹ 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.”⁶⁰

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.⁶¹ 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.⁶² Although one of us has previously suggested that defendants could benefit from being sued collectively,⁶³ 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.⁶⁴

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.”⁶⁵ The overwhelming

⁵⁶ Pistorino & Crane, *supra* note 23, at 9-10.

⁵⁷ *Id.*

⁵⁸ Owen Byrd & Brian Howard, *2013 Patent Litigation Year in Review*, at 2, 6, LEX MACHINA, available at <https://lexmachina.com/2014/05/patent-litigation-review/>.

⁵⁹ 28 U.S.C. § 137 note § 1, Pub. L. No. 111-349 (Jan. 4, 2011) (emphasis added).

⁶⁰ U.S. Dist. Ct. E.D. Tex., General Order No. 11-11, available at coop.txed.uscourts.gov/binary/GO-11-11.pdf.

⁶¹ Reilly, *supra* note 25, at 1023-25. 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, 1578 (2009).

⁶² Taylor, *supra* note 27, at 672-678.

⁶³ Reilly, *supra* note 25.

⁶⁴ Tracie L. Bryant, Note, *The America Invents Act: Slaying Trolls, Limiting Joinder*, 25 HARV. J.L. & TECH. 687, 687-688 (2012).

⁶⁵ Fed. R. Civ. P. 20(a)(2)(A).

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” did not arise from the same transaction or occurrence, even if the products were accused of infringing the same patent and operated similarly.⁶⁶ Rather, “an actual link” 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.⁶⁷

The Eastern District of Texas, and a few districts following it,⁶⁸ held that patent infringement claims arose from the same transaction or occurrence “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.”⁶⁹ 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 13 defendants per case, 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.⁷⁰

Congress responded in 2011 in the America Invents Act (“AIA”). 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.⁷¹ The provision specifically targeted the Eastern District of Texas.⁷²

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 retroactively⁷³ and, in contrast to other districts, continued to apply their lenient joinder standard to cases filed before the AIA.⁷⁴ The Federal Circuit ultimately granted mandamus, holding that joinder of unrelated defendants was improper even before the AIA.⁷⁵ In response, Eastern District judges

⁶⁶ *Pergo, Inc. v. Alloc, Inc.*, 262 F. Supp. 2d 122, 128 (S.D.N.Y. 2003); *Androphy v. Smith & Nephew, Inc.*, 31 F. Supp. 2d 620, 623 (N.D. Ill. 1998); *In re EMC Corp.*, 677 F.3d 1351, 1357 & n.2, 1359 & n.3 (Fed. Cir. 2012).

⁶⁷ *EMC*, 677 F.3d at 1359.

⁶⁸ *Id.* at 1357 & n.2.

⁶⁹ *MyMail, Ltd. v. Am. Online, Inc.*, 223 F.R.D. 455, 4457 (E.D. Tex. 2004).

⁷⁰ *Pistorino*, *supra* note 26, at 4.

⁷¹ 35 U.S.C. § 299.

⁷² *Taylor*, *supra* note 27, at 700, 704.

⁷³ *Ganas LLC v. Sabre Holdings Corp.*, No. 2:10-CV-320-DF, 2011 WL 8183246, at *8 (E.D. Tex. Oct. 19, 2011); Maya M. Eckstein et al., *The (Unintended) Consequences of the AIA Joinder Provision*, AIPLA Spring Meeting (May 10-12, 2012), available at http://www.hunton.com/files/Publication/c4abf2b5-ac78-4b18-8c65-8e02608284d8/Presentation/PublicationAttachment/0f8412f9-9d41-444d-8b47-90e694a54abe/AIPLA_Joinder_Paper.pdf.

⁷⁴ *Lodsys, LLC v. Brother Int’l Corp.*, No. 2:11-cv-90-JRG, 2012 WL 760729, at *5-6 (E.D. Tex. Mar. 8, 2012); *Imperium (IP) Holdings, Inc. v. Apple, Inc.*, No. 4:11-CV-163, 2012 WL 461775, at *2-3 & n.2 (E.D. Tex. Jan. 20, 2012) (Report & Recommendation).

⁷⁵ *EMC*, 677 F.3d 1351.

consolidated cases for pre-trial purposes.⁷⁶ 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.”⁷⁷

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 like claim construction, imposing the same page and time limits for the multiple defendants in aggregate as for the single plaintiff.⁷⁸ 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 10 page supplemental briefs limited to “additional” issues unique to that defendant.⁷⁹

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.⁸⁰ 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.⁸¹ Defendants were thus forced to focus on common issues, rather than on potentially successful defenses peculiar to one or two defendants. Notably, Chief Judge Davis raised the possibility of a single

⁷⁶ Jan Wolfe, *East Texas Judges Test Joinder Limits in Patent Reform’s Wake*, CORPORATE COUNSEL (Aug. 22, 2012), available at <http://www.lalaw.com/news-events/news/upload/EAST-TEXAS-JUDGES-TEST-JOINDER-LIMITS-IN-PATENT-REFORMS-WAKE.pdf>; Quinn Emanuel Urquhart & Sullivan, LLP, *Multi-Defendant Joinder Under the America Invents Act: Much Ado About Nothing?* (Dec. 20, 2012), available at <http://www.jdsupra.com/legalnews/multi-defendant-joinder-under-the-america-97136/>. Other districts also consolidate related patent cases. *Id.*

⁷⁷ Eckstein, *supra* note 73; Wolfe, *supra* note 76.

⁷⁸ *Data Treasury Corp. v. Wells Fargo & Co.*, No. 2:05-cv-00291-DF-CMC, Dkt. 211 (E.D. Tex. Jan. 12, 2009) (2.5 hours per “side” for claim construction hearing with single plaintiff and several unrelated defendants).

⁷⁹ Michael C. Smith, *Lead Defendant designation for claim construction purposes*, EDTXWEBLOG.COM (Aug. 14, 2012), available at http://mcsmith.blogs.com/eastern_district_of_texas/2012/08/lead-defendant-designation-for-claim-construction-purposes.html.

⁸⁰ *CEATS, Inc. v. Continental Airlines, Inc.*, No. 6:10cv120, Dkt. 888 (E.D. Tex. Feb. 14, 2012); *Wi-Lan, Inc. v. HTC Corp.*, No. 6:13-CV-242, Dkt. 369 (E.D. Tex. Mar. 18, 2013);

⁸¹ *CEATS, Inc. v. Continental Airlines, Inc.*, No. 6:10cv120, Dkt. 917 (E.D. Tex. Feb. 23, 2012); *Wi-Lan, Inc. v. HTC Corp.*, No. 6:10-CV-521, Dkt. 419 (E.D. Tex. June 28, 2013)

invalidity or inequitable trial for multiple unrelated defendants, even after the AIA prohibited consolidating unrelated defendants for trial.⁸²

The Eastern District's case management procedures simplify the patentee's case and reduces 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.⁸³ Beginning in December 2008, the Federal Circuit dramatically rejected the Eastern District's restrictive approach to transfer.⁸⁴ 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.⁸⁵ During this period, the Federal Circuit granted nearly 50% of mandamus petitions from the Eastern District of Texas, an astronomical rate for an extraordinary remedy.⁸⁶ The Federal Circuit granted only one of nine mandamus petitions seeking transfer from other districts during the same period.⁸⁷

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

⁸² *Network-1 Security Solutions, Inc. v. Alcatel-Lucent USA Inc.*, No. 6:11-CV-492-LED-JDL, Dkt. 363 at 7 (E.D. Tex. Jan. 17, 2013) ("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.*

⁸³ Robert A. Matthews Jr., *Update – Transfer of Venue in the E.D. Texas*, Patent Happenings (December 2009), available at <http://www.jdsupra.com/post/documentViewer.aspx?fid=52cc121b-d1f4-4ad5-829b-21dc66802091>.

⁸⁴ *In re TS Tech USA Corp.*, 551 F.3d 1315 (Fed. Cir. 2008).

⁸⁵ Paul R. Gugliuzza, *The New Federal Circuit Mandamus*, 45 IND. L. REV. 343, 346 & n.8 (2012).

⁸⁶ *Id.* at 346.

⁸⁷ *Id.* at 346 & n.10.

Federal Circuit.⁸⁸ For example, in its first mandamus order, *In re TS Tech*, the Federal Circuit ordered transfer because “there 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.”⁸⁹

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.”⁹⁰ 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.⁹¹

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.⁹² The district court declined to determine whether the patentee opened its Longview “office” for venue or legitimate business reasons.⁹³ In *In re Zimmer Holdings*, the Federal Circuit rejected this attempt to sidestep its 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.”⁹⁴

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.⁹⁵ 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.”⁹⁶

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 2015.⁹⁷ The

⁸⁸ *In re Genentech, Inc.*, 566 F.3d 1338, 1342-44 (Fed. Cir. 2009) (rejecting Eastern District’s distinguishing *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 *Genentech* because one defendant was headquartered in Round Rock, Texas, outside of the Eastern District and 300 miles from the courthouse in Marshall).

⁸⁹ *TS Tech*, 551 F.3d at 1321.

⁹⁰ *In re Hoffmann-La Roche Inc.*, 587 F.3d 1333, 1336-37 (Fed. Cir. 2009).

⁹¹ *Id.*

⁹² *In re Zimmer Holdings, Inc.*, 609 F.3d 1378, 1379-80 (Fed. Cir. 2010).

⁹³ *Id.*

⁹⁴ *Id.* at 1381.

⁹⁵ *In re Microsoft Corp.*, 630 F.3d 1361, 1362, 1364 (Fed. Cir. 2011).

⁹⁶ *Id.* at 1365.

⁹⁷ Data from Lex Machina and on file with authors.

success rate on transfer motions in the Eastern District also decreased after *TS Tech*.⁹⁸ While either decrease could have a neutral explanation in isolation,⁹⁹ 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.¹⁰⁰ 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 perspective."¹⁰¹

Despite its resistance to transfer, the Eastern District of Texas does transfer a greater percentage of patent cases than other districts (6.8% versus 4.5%).¹⁰² 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.¹⁰³ Studies focused on more recent years have suggested a higher success rate, though still lower than elsewhere.¹⁰⁴

6. Refusing to Stay Pending Reexamination

⁹⁸ Paul M. Janicke, *Patent Venue and Convenience Transfer: New World or Small Shift*, 11 N.C. J. L. & TECH. ON. 1, 24, (2009)

⁹⁹ 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.

¹⁰⁰ Gugliuzza, *supra* note 85, at 378.

¹⁰¹ 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 at 2, Stout Risius Ross (2013), available at: <http://www.srr.com/article/interviewformer-chief-judge-david-folsom-us-district-courteastern-district-texas>.

¹⁰² Appendix 2; Janicke, *supra* note 98, at 23-24.

¹⁰³ Iancu & Chung, *supra* note 37, at 315. Among the most popular districts, only the District of Delaware had a similarly low transfer rate. *Id.*

¹⁰⁴ 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 98, 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.

Reexamination is a procedure by which the Patent Office 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.¹⁰⁵ 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.¹⁰⁶ 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 standard) and a broadest reasonable construction standard for claim construction.¹⁰⁷ Fourth, and relatedly, 75% of ex parte and 95% of inter partes reexaminations resulted in narrowed or cancelled patent claims.¹⁰⁸ 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.¹⁰⁹ 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,¹¹⁰ but are granted only about one-third of the time in the Eastern District of Texas.¹¹¹ 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%).¹¹²

¹⁰⁵ Greg H. Gardella & Emily A. Berger, *United States Reexamination Procedures: Recent Trends, Strategies and Impact on Patent Practice*, 8 J. MARSHALL REV. INTELL. P. L. 381, 382-383 (2009).

¹⁰⁶ J. Jason Williams et al., *Strategies for Combatting Patent Trolls*, 17 J. Intell. Prop. L. 367, 373-374 (2010).

¹⁰⁷ Eric J. Rogers, *Ten Years of Inter Partes Reexamination Appeals: An Empirical View*, 29 SANTA CLARA COMPUTER & HIGH TECH. L.J. 305, 317-318 (2013). A "broadest reasonable construction" increases the chances the claim will be invalid because it covers what is obvious or already exists.

¹⁰⁸ Alan W. Kowalchuk & Joshua P. Graham, *Patent Reexamination: An Effective Litigation Alternative?*, 3 No. 1 LANDSLIDE 47, 48 (2010) (relying on USPTO data through June 2009).

¹⁰⁹ Allison et al., *supra* note 31, at 1801.

¹¹⁰ Rogers, *supra* note 107, at 320 (citing several sources).

¹¹¹ Gardella & Berger, *supra* note 105, at 398 (2009) (reported cases, 1981-2009); Matthew Smith, *Stays Pending Reexamination*, PATENTLYO (Nov. 1, 2009) (20% grant rate in Eastern District for 2008 and 2009).

¹¹² Austin Champion, *Stays of Litigation Pending Post-AIA Patent Review* at 46, 48, 53 (Mar. 28, 2014), available at http://www.dbaip.com/monthly_cle/2014%20Materials/Champion.pdf (calculated by dividing granted stays by reported total case filings).

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.¹¹³ Although Congress did not mandate a stay, the legislative history suggested that stays should be issued in most cases.¹¹⁴ The statute reflected this by adding an additional factor to the normal stay analysis addressing the burden of litigation¹¹⁵ and providing a rare right to interlocutory review of stay decisions.¹¹⁶ 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 proceeding¹¹⁷ 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.¹¹⁸ The Federal Circuit subsequently reversed and ordered a stay.¹¹⁹

7. The “Rocket Docket”

The most common explanation for the Eastern District of Texas’s popularity is its quick case schedules, or “rocket docket.”¹²⁰ During the Eastern District’s rise in popularity from 2000-2007, 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.¹²¹

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.¹²² Similarly, the threat of early trial promotes quicker

¹¹³ *Market Alerts Pty. Ltd. v. Bloomberg Finance L.P.*, 922 F. Supp. 2d 486, 489 (D. Del. 2013).

¹¹⁴ *Id.* at 496 & n.14.

¹¹⁵ *Id.* at 496.

¹¹⁶ *VirtualAgility, Inc. v. Salesforce.com, Inc.*, ---F.3d---, 2014 WL 3360806, at *2 (Fed. Cir. July 10, 2014).

¹¹⁷ 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), available at <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>.

¹¹⁸ *VirtualAgility, Inc. v. Salesforce.com, Inc.*, No. 2:13-cv-00011-JRG, 2014 WL 94371, at *2, 7-8 (E.D. Tex. Jan. 9, 2014), *rev’d*, ---F.3d---, 2014 WL 3360806.

¹¹⁹ *VirtualAgility*, 2014 WL 3360806.

¹²⁰ Julie Creswell, *So Small a Town, So Many Patent Suits*, THE NEW YORK TIMES (Sept. 24, 2006); Pusey, *supra* note 29; *Symposium History*, *supra* note 42, at 254 (statement of Mike McKool).

¹²¹ Appendix 1. Here and elsewhere “districts with significant patent dockets” is defined as the 25 most popular districts for patent litigation over the past 10 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 3 years (District of Colorado). Nationwide the median time to trial in this period was 2 years.

¹²² Lemley, *supra* note 34, at 14.

settlements. The pressure on the defendant to settle often builds as trial approaches, and a fast docket means this pressure will build quicker. 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.¹²³ As one commentator put it, “Speed kills defendants.”¹²⁴

Commentators sometimes assume that the Eastern District’s speedy time to trial was the coincidental result of natural factors like its small docket,¹²⁵ the decline of products liability and medical malpractice cases due to tort reform,¹²⁶ or the absence of criminal cases.¹²⁷ 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.”¹²⁸ They accomplished this through short discovery periods and other deadlines.¹²⁹

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.”¹³⁰ 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 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.”¹³¹

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 11th among districts with significant patent dockets and third among the five busiest patent districts. The Eastern District’s median time to termination (*e.g.*, settlement,

¹²³ Moore, *supra* note 15, at 908.

¹²⁴ Mark Liang, *The Aftermath of TS Tech*, TEX. INTELL. PROP. L. J. 29, 44 (2000).

¹²⁵ *Symposium History*, *supra* note 42, at 254 (statement of Mike McKool).

¹²⁶ Leychkis, *supra* note 22, at 215.

¹²⁷ Nguyen, *supra* note 28, at 141.

¹²⁸ *Symposium History*, *supra* note 42, at 263 (statement of Judge Leonard Davis).

¹²⁹ For example, the disclosure process in the Eastern District’s patent local rules begins 1-2 months sooner than in other districts. Travis Jensen, *Infringement Contentions Summary Chart, Local Patent Rules: Patent Rules Made Easy*, available at <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 18 months in the Northern District of California. Alfonso Garcia Chan, *Proposed Patent Local Rules for Adoption by Texas’ Federal District Courts*, 7 COMPUTER L. REV. & TECH. J. 149, 203-209 (2003); Leychkis, *supra* note 22, at 209.

¹³⁰ Pusey, *supra* note 29.

¹³¹ Bone & Haas, *supra* note 101, at 2.

trial, summary judgment, or dismissal) was similarly slower, ranking 10th among districts with significant patent dockets.¹³²

The slowing docket led commentators to predict that the district's popularity would wane in favor of other, faster districts.¹³³ The exact opposite has occurred – patent litigation has become even more concentrated in the Eastern District. In truth, the district remains faster than average, despite handling nearly a quarter of the country's patent litigation.¹³⁴ Nor is there any reason to think that faster districts would be able to maintain this speed if patent litigants suddenly flocked to them.¹³⁵

The Eastern District's continued speed results from conscious efforts by the 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."¹³⁶ The Eastern District of Texas may even be maintaining its patent "rocket docket" and popularity at the expense of its non-patent civil docket, despite the judges' claims to the contrary.¹³⁷ 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 fifty percent.¹³⁸

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

¹³² Appendix 1. Lemley attributed the Eastern District's slowness to congestion. Lemley, *supra* note 34, at 17. However, the Eastern District's time to termination *decreased* as the district became more congested, from 312 days (2000-2007) to 246 days (2008-2013). Thus, time to termination appears to reflect the type of resolution (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. Lemley, *supra* note 34, at 5-6. 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. Appendix 1. 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." *Id.*

¹³³ Fromer, *supra* note 15, at 1483 (Western District of Wisconsin); Lemley, *supra* note 34, at 28-29 (Eastern District of Virginia, Western District of Wisconsin, and Middle District of Florida).

¹³⁴ Appendix 1. 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.

¹³⁵ Lemley, *supra* note 34, at 17 ("[I]f everyone moves to a fast district, it can easily become a slow district as a result.").

¹³⁶ Samuel F. Baxter, *Eastern District of Texas: Fair and Just Patent Outcomes for Plaintiffs and Defendants*, THE METROPOLITAN CORPORATE COUNSEL (Sept. 1, 2007), available at <http://www.metrocorpocounsel.com/articles/8817/eastern-district-texas-fair-and-just-patent-outcomes-plaintiffs-and-defendants>.

¹³⁷ *Symposium History*, *supra* note 42, at 266 (statement of Judge T. John Ward).

¹³⁸ Appendix 3.

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.¹³⁹ Discovery costs fall disproportionately on defendants, because “the bulk of the relevant evidence usually comes from the accused infringer.”¹⁴⁰ 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. 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.¹⁴¹ Notably, the Eastern District of Texas is especially popular with patent assertion entities, as compared to practicing patentees.¹⁴²

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.¹⁴³ 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.¹⁴⁴ 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

¹³⁹ KIMBERLY A. MOORE, ET AL. PATENT LITIGATION & STRATEGY 156 (3d ed. 2008); Professors’ Letter in Support of Patent Reform Legislation at 1 (Nov. 25, 2013) (hereinafter, “Professors’ Letter”), available at <http://www.patentlyo.com/files/professorsletteronrolls.pdf>.

¹⁴⁰ *In re Genentech, Inc.*, 566 F.3d 1338, 1345 (Fed. Cir. 2009) (quotations omitted).

¹⁴¹ Professors’ Letter, *supra* note 139, at 1.

¹⁴² In 2013, 38% of patent cases filed by non-practicing entities were filed in the Eastern District of Texas. RPX Corporation, 2013 NPE Litigation Report at 18 (2014), available at <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. Part II.A, *supra*.

¹⁴³ Sample Discovery Order for Patent Cases Assigned to Judge Rodney Gilstrap and Judge Roy Payne, available at <http://www.txed.uscourts.gov/page1.shtml?location=info;judge&judge=17>; Discovery Order, Chief Judge Leonard Davis, available at http://www.txed.uscourts.gov/cgi-bin/view_document.cgi?document=2191; Order Governing Proceedings, Judge Ron Clark, available at http://www.txed.uscourts.gov/cgi-bin/view_document.cgi?document=2379; Scheduling & Discovery Order, Judge Michael H. Schneider, available at <http://www.txed.uscourts.gov/page1.shtml?location=info;judge&judge=9>.

¹⁴⁴ Leychkis, *supra* note 22, at 219.

production. In fact, the Eastern District judges tout the broader disclosure of information in their district as an advantage compared to elsewhere.¹⁴⁵

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.¹⁴⁶ 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.¹⁴⁷ 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."¹⁴⁸

The Eastern District maintains its discovery system even as Congress 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.¹⁴⁹ 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."¹⁵⁰ The Federal Circuit Advisory Committee also has issued a model order that seeks to both delay and reduce e-discovery.¹⁵¹ This order was "intended to be a helpful starting point for district courts to use in requiring the responsible, targeted use of e-discovery in patent cases"¹⁵² and has gained acceptance in many district courts.¹⁵³ 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 result in "a larger amount of disclosure."¹⁵⁴

¹⁴⁵ Michael C. Smith, *Things Not To Do Three Weeks Before Trial #1: Don't Produce New Documents*, EDTEXWEBLOG.COM (June 22, 2011) (quoting Judge Clark).

¹⁴⁶ *Id.*

¹⁴⁷ Chief Judge Randall R. Rader, *The State of Patent Litigation*, 21 FED. CIR. B.J. 331, 336 (2011).

¹⁴⁸ *Symposium History*, *supra* note 42, at 265 (statement of Mike McKool).

¹⁴⁹ Dennis Crouch, *Patent Reform 2013 – A Discussion Draft*, PATENTLYO (Sept. 25, 2013), available at <http://www.patentlyo.com/patent/2013/09/patent-reform-2013-1.html>.

¹⁵⁰ Rader, *supra* note 147, at 334.

¹⁵¹ Daniel B. Garrie, *The Federal Circuit Tries to Change the Tune to the E-Discovery Dance*, 22 FED. CIR. B.J. 347, 347-348 (2012).

¹⁵² Federal Circuit Advisory Committee, "E-Discovery Model Order" at 2, available at http://www.cafc.uscourts.gov/images/stories/announcements/Ediscovery_Model_Order.pdf

¹⁵³ Guy Eddon, *The Mystery of the Federal Circuit Advisory Council's Short-Lived Model Orders*, 26 No. 5 INTEL. PROP. & TECH. L.J. 7, 8 (2014).

¹⁵⁴ Garrie, *supra* note 151, at 351.

C. *The Motive for Forum-Selling in the Eastern District of Texas*

Forum selling runs counter to conventional wisdom that judges want to reduce their caseload,¹⁵⁵ not attract more cases. In particular, judges are thought to dislike patent cases.¹⁵⁶ 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 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.”¹⁵⁷ 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.”¹⁵⁸ Similarly, Chief Judge Davis acknowledged, “I would rather handle interesting cases than uninteresting cases.”¹⁵⁹

Tort reform by the Texas legislature eliminated complex products liability cases from the Eastern District’s docket.¹⁶⁰ Because it lacks major cities, corporations, or technology centers, the district did not have many other complex cases.¹⁶¹ 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 Chief Judge Davis, and subsequently by Judge Gilstrap, all of whom have expressed interest in patent cases.

2. Prestige and Reputation

¹⁵⁵ Christopher R. Drahozal, *Judicial Incentives and the Appeals Process*, 51 SMU L. REV. 469, 476 (1989).

¹⁵⁶ 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)

¹⁵⁷ Pusey, *supra* note 29.

¹⁵⁸ *Symposium History*, *supra* note 42, at 256 (statement of Judge Davis)

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 256 (statement of Judge Ward).

¹⁶¹ *Id.* (“Nothing would be worse than trying nothing but FELA [railroad workers’ compensation statute] cases.”).

An alternative, or complementary, explanation for the Eastern District of Texas's forum selling is that the judges enjoy the prominence that comes from being the premier forum for patent litigation. The district and its judges have been discussed in *The New York Times*,¹⁶² the Supreme Court,¹⁶³ and the halls of Congress.¹⁶⁴ The judges, especially Judge Ward, are sought-after speakers at patent events throughout the country.¹⁶⁵ These are not the type of opportunities normally available to judges in a rural district. Some suggest that Judge Ward “loves the attention.”¹⁶⁶

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. 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. 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.¹⁶⁷

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.¹⁶⁸ 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

¹⁶² Creswell, *supra* note 120.

¹⁶³ *Supra* note 30.

¹⁶⁴ Taylor, *supra* note 27, at 704 (quoting statements of Senator Kyl during debate of anti-joinder provision of AIA).

¹⁶⁵ *Ward at center of flight-plan change in Texas ‘rocket docket’*, SOUTHEAST TEXAS RECORD (Mar. 3, 2009) (hereinafter, “*Ward at center*”), available at <http://setexasrecord.com/news/217682-ward-at-center-of-flight-plan-change-in-texas-rocket-dcoekt>.

¹⁶⁶ *Ward at center*, *supra* note 165.

¹⁶⁷ Creswell, *supra* note 120; Alan Cohen, *From PI to IP*, IP LAW & BUSINESS (Nov. 2005), available at <http://iplawandbusiness.law.com/display.php/file=/texts/1105/texas1105>; Ronen Avraham & John M. Golden, *From PI to IP: Yet Another Unexpected Effect of Tort Reform* (unpublished paper).

¹⁶⁸ Creswell, *supra* note 120 (quoting leading local lawyer Sam Baxter as attributing Eastern District's patent litigation boom to fact patent litigation was where the money was and lack of good lawsuits for local lawyers).

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.¹⁶⁹ 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.” They have said that they “don’t think national firms utilize local counsel at the trials as much as they should.”¹⁷⁰

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.”¹⁷¹ 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. 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 for patent hearings and trials.¹⁷² 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.¹⁷³

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.¹⁷⁴ Unsurprisingly, the Eastern

¹⁶⁹ Cohen, *supra* note 167 (noting “locals firms often wind up taking the lead role at trial, becoming de facto trial counsel”); Sample Discovery Order for Patent Cases Assigned to Judge Rodney Gilstrap and Judge Roy Payne, ¶ 9(b), available at <http://www.txed.uscourts.gov/page1.shtml?location=info:judge&judge=17> (requiring “an **in-person** conference involving lead and local counsel or all parties” for discovery disputes (bold in original)).

¹⁷⁰ 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), available at 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.

¹⁷¹ Pusey, *supra* note 29.

¹⁷² Creswell, *supra* note 120.

¹⁷³ Joe Mullin, *Patent troll claims to own Bluetooth, scores \$15.7M verdict against Samsung*, ARS TECHNICA, (Feb. 17, 2015), <http://arstechnica.com/tech-policy/2015/02/patent-troll-claims-to-own-bluetooth-scores-15-7m-verdict-against-samsung/>.

¹⁷⁴ Pusey, *supra* note 29 (“Office suites housing nothing but banker’s boxes and patent paperwork are not uncommon in Marshall.”); William J. Watkins Jr., *Does East Texas hold a patent on predatory litigation?*, LONGVIEW NEWS-JOURNAL (Jan. 4, 2014), available at <http://www.news-journal.com/opinion/forum/watkins-does-east-texas-hold-a-patent-on->

District has endorsed these efforts, despite inconsistency with Federal Circuit precedent and push back from the Federal Circuit.

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.¹⁷⁵ 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.¹⁷⁶ 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. The evaporation of the Eastern District’s patent docket would “devastate Marshall’s economy” and have dire financial consequences for many local lawyers and citizens.¹⁷⁷ 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 lawyers¹⁷⁸ – 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.¹⁷⁹ 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.¹⁸⁰ To be fair, Judge Ward’s son is a magna cum

[predatory-litigation/article_44f6fc73-c7cc-5dcc-b886-263b2493a0d3.html](http://www.beaumontenterprise.com/news/crime/article/Patent-troll-case-lands-in-Beaumont-5406545.php) (“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.”); Dan Wallach, *Patent troll case lands in Beaumont*, BEAUMONT ENTERPRISE (Apr. 16, 2014), available at <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).

¹⁷⁵ *Symposium History*, *supra* note 42, 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.”).

¹⁷⁶ Cohen, *supra* note 167.

¹⁷⁷ Nate Raymond, *Waiting for the End of the World*, THE AMERICAN LAWYER, at 103 (Mar. 2008).

¹⁷⁸ *Symposium History*, *supra* note 42, at 256 (statement of Judge Folsom) (noting that Judge Folsom, Judge Ward, and Judge Davis all practiced in the Eastern District of Texas).

¹⁷⁹ <http://www.bdavisfirm.com/>; <http://www.wsfirm.com/attorneys/johnny-ward/>.

¹⁸⁰ Josh Gerstein, *Texas Judge’s Son Withdraws from Lawsuit in Fast-Running Odometer Case*, THE NEW YORK SUN (Aug. 29, 2007), available at www.nysun.com/national/texas-judges-son-withdraws-from-lawsuit-in-fast/61550/

laude graduate of Texas Tech Law School and a former Fifth Circuit law clerk.¹⁸¹ 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,¹⁸² 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 and [M]arkman hearings for clients in patent cases."¹⁸³ Perhaps unsurprisingly, Ward & Smith had more open patent cases in 2013 than any other Texas firm and more than any national law firm other than IP powerhouse Fish & Richardson.¹⁸⁴ 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."¹⁸⁵

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."¹⁸⁶ Fish & Richardson's press release announcing the move specifically noted that during Chief 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." 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."¹⁸⁷

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

¹⁸¹ <http://www.wsfirm.com/attorneys/johnny-ward/>.

¹⁸² Creswell, *supra* note 120 ("In one patent case that eventually was settled, the plaintiffs hired an accountant whose clients included Judge Ward.").

¹⁸³ <http://www.wsfirm.com/attorneys/t-john-ward/>.

¹⁸⁴ Byrd & Howard, *supra* note 58, at 7. Several Delaware law firms also had more open cases than Ward & Smith. *Id.*

¹⁸⁵ www.jw.com/David_Folsom/

¹⁸⁶ Fish & Richardson, *Former Eastern District of Texas Federal Judge Leonard Davis Joins Fish & Richardson* (May 18, 2015), <http://www.fr.com/news/federal-judge-davis-joins-fish/>.

¹⁸⁷ www.akingump.com/en/lawyers-advisors/charles-everingham.html.

time period.¹⁸⁸ By comparison, of the 2143 Article III judges (district or circuit level) who served over a 40 year period between 1970 and 2009, only 77, or 4%, resigned or retired to enter the private sector.¹⁸⁹

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 Counter-Arguments

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.¹⁹⁰ 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.¹⁹¹

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.¹⁹² Nevertheless, differences in jurisdictional rules cannot account for the low rate of declaratory judgment filings in the Eastern

¹⁸⁸ Federal Judicial Center, History of the Federal Judiciary: U.S. District Courts for the Districts of Texas, Judges of the Eastern District of Texas, <http://www.fjc.gov/servlet/nGetCourt?cid=158&order=c&ctype=dc&instate=tx>.

¹⁸⁹ 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 46 judges left because of inadequate salary, other employment, or dissatisfaction. *Id.* at 13, 63. Adding these 46 judges to the 77 who left to enter private practice increases the percentage to only 6%. During this time period, 53 Article III judges resigned and 70 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.

¹⁹⁰ Christopher Gerardi, *Inside the Busiest Patent Court in America: A Discussion with Chief Judge Davis*, FTI JOURNAL (Feb. 2014), available at <http://ftijournal.com/article/inside-the-busiest-patent-court-in-america>; Iancu & Chung, *supra* note 37, at 308-319; Nguyen, *supra* note 28, at 120-121, 136-138, 141-142.

¹⁹¹ Appendix 5.

¹⁹² For this reason, an accused infringer may have difficulty seeking a declaratory judgment in a district other than the patentee’s home district. LaBelle, *supra* note 20.

District. Even when the Eastern District of Texas is the patentee's home district, accused infringers virtually never file declaratory judgment actions there. 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.¹⁹³ Yet, only two, or 5.4%, were filed in the Eastern District. By contrast, 25% (2,730 of 10,987) of non-declaratory judgment patent infringement cases were filed in the Eastern District of Texas in 2012 and 2013.¹⁹⁴ 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, 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 Districts 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,¹⁹⁵ 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.¹⁹⁶ 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 is the attraction.

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.¹⁹⁷ 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

¹⁹³ 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.

¹⁹⁴ Data from Lex Machina and on file with authors.

¹⁹⁵ Iancu & Chung, *supra* note 37, at 301-303; Leychkis, *supra* note 22, at 210-215.

¹⁹⁶ Allison et al., *supra* note 31, at 1793-94.

¹⁹⁷ Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659, 660-675 (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).

carve outs in the case assignment system. Other pro-plaintiff procedures are unique to patent cases, like the resistance to stays pending PTO 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.

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.”¹⁹⁸ 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 the patentee.”¹⁹⁹ The later study is more relevant, because it included denials of summary judgment, which, as discussed above, is 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.”²⁰⁰ Judge Ward has pointed to his low reversal rate to rebut claims of a pro-patentee bias.²⁰¹ 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. 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%.²⁰²

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

¹⁹⁸ Mark A. Lemley et al., *Does Familiarity Breed Contempt Among Judges Deciding Patent Cases?*, 66 STAN. L. REV. 1121, 1140 (2014).

¹⁹⁹ Allison et al., *supra* note 31, at 1791-92.

²⁰⁰ Paul R. Gugliuzza, *The Federal Circuit as a Federal Court*, 54 WM. & MARY L. REV. 1791, 1838-39 (2013); Iancu & Chung, *supra* note 37, at 306-308.

²⁰¹ Pusey, *supra* note 29.

²⁰² Teresa Lii, *Shopping for Reversals: How Accuracy Differs Across Patent Litigation Forums*, 12 CHI.-KENT J. INTELL. PROP. 31, 43-44 (2013).

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.²⁰³ 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.²⁰⁴ The Eastern District of Virginia also offered the patentee early and quick discovery and a divisional assignment system that increased predictability of the judge.²⁰⁵ Eastern District of Virginia judges promoted their approach to patent litigation to practitioners and touted it as a way to reduce litigation costs.²⁰⁶ 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” 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.²⁰⁷

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.²⁰⁸ 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,²⁰⁹ a high percentage of cases resolved by trial (the highest in the country),²¹⁰ a quick time to trial,²¹¹ and resistance to changes of forum.²¹² The district’s small size – four

²⁰³ Lemley, *supra* note 34, at 5; Moore, *supra* 15, at 903-906.

²⁰⁴ Moore, *supra* note 15, at 908-914.

²⁰⁵ George F. Pappas & Robert G. Sterne, *Patent Litigation in the Eastern District of Virginia*, 35 IDEA 361, 366, 369, 376 (1995).

²⁰⁶ Judge T.S. Ellis III, *Quicker and Less Expensive Enforcement of Patents: United States Courts*, 5 CASRIP PUBLICATION SERIES: STREAMLINING INT’L INTELLECTUAL PROPERTY 11 (2000) & Judge T.S. Ellis III, *Distortion of Patent Economics By Litigation Costs*, 5 CASRIP PUBLICATION SERIES: STREAMLINING INT’L INTELLECTUAL PROPERTY 22, 25 (2000), both available at <https://www.law.washington.edu/casrip/symposium/Number5/pub5atcl3.pdf>.

²⁰⁷ Roderick R. McKelvie, *Forum Selection in Patent Litigation: A Traffic Report*, 19 No. 8 INTELL. PROP. & TECH. L.J. 1, 2 (2007); Nguyen, *supra* note 28, at 132-134.

²⁰⁸ Moore, *supra* note 15, at 903-906. Delaware is notably popular among accused infringers seeking declaratory judgments. Appendix 5. There may be neutral reasons for its popularity, such as the ease of establishing personal jurisdiction over corporations incorporated in Delaware.

²⁰⁹ Appendix 2.

²¹⁰ Lemley, *supra* note 34, at 12.

²¹¹ *Id.*

²¹² Gardella & Berger, *supra* note 105, at 398 (35.8% grant rate on stays pending reexamination in reported cases, 1981-2009); Iancu & Chung, *supra* note 37, at 317 (35.8% grant rate on motions to transfer, 1991-2010).

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 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.²¹³ Ultimately, patentees do statistically significantly better in the District of Delaware than elsewhere, both in terms of overall case outcomes²¹⁴ and final decisions by judges.²¹⁵ 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.²¹⁶ 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.²¹⁷ Former Judge Farnan joined 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 national firm other than Fish & Richardson.²¹⁸

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.²¹⁹ More significantly, the court commissioned a Patent Study Group with an officially neutral charge of identifying "best practices" but widely seen as aiming to curb abusive patent litigation by patent assertion entities and others.²²⁰ 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 construction (popular among patentees), early disclosure of the patentee's damages model, and presumptively treating related cases separately for purposes of scheduling.²²¹ Patentees have

²¹³ Frederick L. Cottrell III et al., *Nonpracticing Entities Come to Delaware*, FEDERAL LAWYER (Oct./Nov. 2013).

²¹⁴ Allison et al., *supra* note 31, at 1791-92.

²¹⁵ Lemley et al., *supra* note 198, at 1139-40.

²¹⁶ Zywicki, *supra* note 6, at 1182-84 (describing similar possibility with bankruptcy cases).

²¹⁷ <http://www.cov.com/rmckelvie/> (Roderick McKelvie); <http://www.farnanlaw.com/Joe-Farnan-Bio.html> (Joseph Farnan).

²¹⁸ <http://farnanlaw.com/index.html>; Byrd & Howard, *supra* note 58, at 7.

²¹⁹ Cottrell, *supra* note 213, at 64-65.

²²⁰ Barnes & Thornburg LLP, "The Times They Are A-Changin'" – Delaware's Judge Stark Outlines New Patent Case Management Practices, *The National Law Review* (May 16, 2014), available at <http://www.natlawreview.com/article/times-they-are-changin-delaware-s-judge-stark-outlines-new-patent-case-management-pr>.

²²¹ Honorable Leonard P. Stark, District of Delaware Revised Procedures for Managing Patent Cases (June 18, 2014), <http://www.ded.uscourts.gov/sites/default/files/Chambers/LPS/PatentProcs/LPS->

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 2014.²²² 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.²²³

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.²²⁴ The Western District adopted local patent rules on January 1, 2005 – the third district in the country to do so – despite ranking 34th in number of patent cases in 2004 with only 23.²²⁵ In doing so, the district “was making a statement that it wanted more patent cases.”²²⁶ Likewise, the Western District pursued, and was chosen for, participation in the Patent Pilot Program despite hearing relative 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 – even though patent cases constitute 1% of the Western District’s civil docket.²²⁷

[PatentProcedures.pdf](#); Presentation of Hon. Leonard P. Stark on Patent Study Group to Delaware Federal Bar Association 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.

²²² Brian C. Howard, *2014 Patent Litigation Trends in E.D. Texas and D. Del.*, LEX MACHINA BLOG (Sept. 3, 2014).

²²³ See Table 1, *supra*.

²²⁴ 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), available at <http://www.post-gazette.com/business/legal/2012/07/23/U-S-District-Court-of-Western-Pennsylvania-attracts-patent-cases/stories/201207230211>.

²²⁵ Travis Jensen, “Adoption Dates”, Local Patent Rules: Patent Rules Made Easy, <http://www.localpatentrules.com/adoption-dates/>. Statistics from Lex Machina, on file with authors.

²²⁶ Jonathan C. Parks, *Western District Patent Pilot Court Attracts Attention*, THE LEGAL INTELLIGENCER (Apr. 30, 2013), available at <http://www.pietragallo.com/keep-informed.php?action=view&id=272>.

²²⁷ Patent case filings from April 1, 2012 through March 31, 2013 were 38 (data from Lex Machina, on file with authors). Total civil case filings in the same time period were 2686. U.S. District Courts—Civil Cases Commenced, Terminated, and Pending During the 12 Month Periods Ending March 31, 2012 and 2013, Federal Judicial Caseload Statistics, Appendix Table C, available at:

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.²²⁸ 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.²²⁹ 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.²³⁰ Third, the former chief judge may have been motivated by the prospect of enhancing the reputation of the court.²³¹ 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 14 related cases to the Western District,²³² 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.²³³

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.²³⁴ Patentees won only 27% of decisions on the merits in the Western District of Pennsylvania,²³⁵

<http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2013/tables/C00Mar13.pdf>.

²²⁸ Hensley-Clancy, *supra* note 224.

²²⁹ *Id.*

²³⁰ Parks, *supra* note 226.

²³¹ Molly Hensley-Clancy, *supra* at n. 223. 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.

²³² Charles Bieneman, *Multidistrict Litigation Under The AIA*, THE SOFTWARE INTELLECTUAL PROPERTY REPORT (June 11, 2012), <http://swipreport.com/multidistrict-litigation-under-the-ai/>.

²³³ Data from Lex Machina and on file with authors.

²³⁴ The Western District of Pennsylvania's summary judgment rate was 3.6%, right in the middle of the top 25 most popular patent districts. Appendix 2.

²³⁵ 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. &

comparable to the national average of 26%.²³⁶ During the period from 2008 through the first half of 2015, it was slower in time to termination than all of the 25 most popular patent districts and slower in time to trial than all but seven of the 25 most popular districts.²³⁷ The Western District's transfer rate was lower than all but four of the 25 most popular patent districts,²³⁸ but that is not attractive to patent litigants without practices and procedures that make patentees want to file there in the first place.

III. 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.

A. *Mass Torts and Class Actions in State Courts*²³⁹

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 plaintiff's 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

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.*

²³⁶ Allison et al., *supra* note 31, at 1787.

²³⁷ Appendix 1.

²³⁸ Appendix 2.

²³⁹ This section is based primarily on John H. Beisner & Jessica Davidson Miller, *They're Making a Federal Case Out of It...In State Court*, 25 HARV. J. L. & PUB. POL'Y 143 (2001); Patrick M. Hanlon & Anne Smetak, *Asbestos Changes*, 62 N.Y.U. ANN. SURV. AM. L. 525 (2007); 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); Mark A. Behrens & Cary Silverman, *Now Open for Business: The Transformation of Mississippi's Legal Climate*, 24 MISS. C. L. REV. 393 (2005); 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, 278 (2007).

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 phenomenon has proliferated....²⁴⁰

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) and by 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.

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.²⁴¹ 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. Nevertheless, if a person who was injured by Manville asbestos purchased and used in that 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, the court would take jurisdiction. Unlike the doctrine of pendent subject matter jurisdiction, which has been the subject of both

²⁴⁰ Civil Justice Forum No. 41 April 2003; Peter J. Boyer, *The Bribe*, THE NEW YORKER (May 19, 2008) (less complete, but possibly more accurate version of quote).

²⁴¹ Klerman, *Rethinking*, *supra* note 14; *Action Embroidery v Atlantic Embroidery*, 368 F. 3d 1174 (9th Cir. 2004); 2 NEWBERG ON CLASS ACTIONS § 6.26 (5th ed. 2012).

Supreme Court cases and federal legislation, pendent personal jurisdiction has been analyzed in only one appellate court.²⁴²

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.” To ensure that litigation benefits local lawyers, she is “very strict on requiring out-of-state lawyers to have local co-counsel at every mass tort program meeting.”²⁴³ 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. 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. 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. 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.²⁴⁴ In 2012, the court modified its procedures to curb reverse bifurcation and restrict consolidation. Soon thereafter, filings dropped by seventy percent.²⁴⁵

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, reluctance to grant summary judgment or other dispositive motions, trial management and scheduling that disadvantages defendants, refusal to dismiss cases on forum non conveniens, and venue rules that allow plaintiffs to choose their preferred courthouse. In addition, because state courts have more latitude over substantive and evidentiary

²⁴² *Bristol-Myers Squibb v. Superior Court of San Francisco County*, 2014 Westlaw 3817538 (Cal. App. June 30, 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 [sic] best served by” compelling a defendant to “answer other claims in the same suit arising out of a common nucleus of operative facts”). This case involved the joinder of a state law claim and a claim over which the court had federal subject matter jurisdiction and personal jurisdiction pursuant to a federal statute authorizing nationwide service of process. Whether pendent personal jurisdiction would be extended when all joined claims arose under state law has never been decided by an appellate court.

²⁴³ Amaris Elliott-Engel, *For Mass Torts, a New Judge and a Very Public Campaign*, THE LEGAL INTELLIGENCER (Mar. 16, 2009).

²⁴⁴ ATRA called Philadelphia the number one “Judicial Hellhole” for 2010/2011. ATRA Foundation, *Judicial Hellholes 2010/2011*, at 3-5 (2010); Mark A. Behrens, *Philadelphia Tort Litigation: Forum Shopping and Venue Reform*, FEDERALIST SOC’Y PRAC. GROUPS 55 (2012).

²⁴⁵ Elliott-Engel, *supra* note 243; Philadelphia Common Pleas, General Court Regulation No. 2012-01.

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.²⁴⁶

Whether such practices are typical (or even accurately described) is unfortunately difficult to know. There has been very little rigorous empirical work about magnet jurisdictions, and most of the work that has been done has been produced by lawyers who routinely represent defendants.

Why would judges so tilt the scales of justice toward plaintiffs? As in 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 seem (like Delaware in the corporate chartering area) 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 relating to alleged defects in truck fuel tanks provides a vivid illustration. 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

²⁴⁶ Hanlon & Smetak, *supra* note 239, at 554.

future purchases of GM trucks.²⁴⁷ The Third Circuit also criticized the plaintiffs' lawyers' \$9.5 million fee.²⁴⁸ 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.²⁴⁹

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 in 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 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.²⁵⁰ 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.²⁵¹

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.²⁵² 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

²⁴⁷ *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liability Litig.*, 55 F. 3d 768 (3rd Cir. 1995)

²⁴⁸ *Id.* at 819-22

²⁴⁹ *White v. General Motors Corp.*, 718 So. 2d 480 (Ct. App. La. 1998).

²⁵⁰ According to one commentator, post-CAFA, "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. Balsler et al., *Interlocutory Appeal of Class Certification Decisions Under Rule 23(f): An Untapped Resource*, 83 BNA U.S. Law. Week 703, 704 (Nov. 11, 2014). Balsler presents no evidence that these districts are trying to attract cases.

²⁵¹ If 75 or more claims are joined, there may be federal jurisdiction. 28 U.S.C.

§ 1369(a)(disputes "aris[ing] from a single accident, where at least 75 natural persons have died in the accident at a discrete location."); 28 U.S.C. 1332(11)(A)("monetary relief claims of 100 or more persons...involv[ing] common questions of law or fact.").

²⁵² Neil Vidmar et al., '*Judicial Hellholes: Medical Malpractice Claims, Verdicts, and the Doctor Exodus*' in *Illinois*, 59 VAND. L. REV. 1309 (2006).

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:

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.²⁵³

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

²⁵³ LoPucki, *supra* note 9, at 254-56.

assignment procedures that allowed parties to shop for judges.²⁵⁴ 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 review.²⁵⁵ In addition, the motives to attract cases were remarkably similar: increased status and power for the judges and more business for local lawyers.²⁵⁶ 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. 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.”²⁵⁷ 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.”²⁵⁸ 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, can be convinced that the firm is headquartered where the CEO happens to live and have a small office or in office suites rented for the purpose of establishing residence for bankruptcy purposes.²⁵⁹ In addition, most large corporations have many subsidiary “affiliates”. 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 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.”²⁶⁰ 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

²⁵⁴ *Id.* at 81-82.

²⁵⁵ *Id.* at 67.

²⁵⁶ *Id.* at 20-21, 95.

²⁵⁷ *Id.* at 17.

²⁵⁸ 28 U.S.C. § 1408.

²⁵⁹ LoPucki, *supra* note 9, at 31-33.

²⁶⁰ *Id.* at 21.

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.²⁶¹

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).²⁶² 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.²⁶³ 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 2007 to 2012, the Southern District of New York had almost as many.²⁶⁴ 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 practices – for example, if he proposed transferring a case to another district or not confirming a reorganization plan – the case was swiftly reassigned to another judge.²⁶⁵ As one visiting judge explained:

[Y]ou have to be fair to the district judges. 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.²⁶⁶

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, fifty-four percent of firms that

²⁶¹ *Id.* at 126, 133, 140-157, 180.

²⁶² *Id.* at 124-32.

²⁶³ *Id.* at 133-34.

²⁶⁴ Samir Parikh, *Modern Forum Shopping in Bankruptcy*, 46 CONN. L. REV. 159, 180, 209-226 (2013) (the District of Delaware had 58 large cases, all of which were "forum shopped," whereas the Southern District of New York had 43 large cases, of which 33 were "forum shopped").

²⁶⁵ LoPucki, *supra* note 9, at 93-96.

²⁶⁶ *Id.* at 95

reorganized in Delaware failed within five years, compared to thirty-one percent in New York and only fourteen percent in other courts.²⁶⁷ 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."²⁶⁸

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."²⁶⁹

Others, however, went further in defending Delaware. Robert Rasmussen, although acknowledging the existence of competition,²⁷⁰ questioned the empirical basis of LoPucki's claim that Delaware's practices led reorganized firms to fail more often. He argued that one must 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). 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.²⁷¹

Ayotte and Skeel 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."²⁷² 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 – EBITDA rather than operating losses – firms that reorganized in Delaware perform as well as firms that reorganized elsewhere.²⁷³

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.²⁷⁴

²⁶⁷ *Id.* at 112-117.

²⁶⁸ *Id.* at 122.

²⁶⁹ *Id.* at 17.

²⁷⁰ Robert Rasmussen, *Empirically Bankrupt*, 2007 COLUM. BUS. L. REV. 179, 219.

²⁷¹ *Id.* at 227-230.

²⁷² Kenneth Ayotte and David A. Skeel, Jr., *An Efficiency-Based Explanation for Current Corporate Reorganization Practice*, 73 U. CHI. L. REV. 425, 441 (2005).

²⁷³ *Id.* at 444-449, 452.

²⁷⁴ *Id.* at 462-467.

C. Domain Name Dispute Resolution²⁷⁵

A more exotic example of forum selling comes from the world of online dispute resolution. Since 1999, any entity that registers a domain name must agree to resolve trademark disputes in accordance with the Uniform Domain-Name Dispute Resolution Policy (UDRP).²⁷⁶ Under that policy, registrants agree to arbitrate trademark disputes with an arbitration provider approved by ICANN (the Internet Corporation for Assigned Names and Numbers). 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 has initially certified three dispute resolution providers, two swiftly came to dominate the market, NAF and WIPO.²⁷⁷ Not surprisingly, according to first researchers to analyze the system, Milton Mueller and Mark Geist, trademark owners “win more frequently” with these two providers.²⁷⁸ In contrast, the dispute resolution provider with a lower trademark owner win rate, eResolution, left the market after less than two years.²⁷⁹ The dominant position of WIPO seems to have emerged after it had established a track record of ruling for the trademark owner.²⁸⁰

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.²⁸¹ 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.²⁸²

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 very different, and in fact some arbitrators were on the rosters of several providers. Nevertheless, the arbitration providers choose arbitrators by a non-random system. Analysis of arbitrator selection showed that at the 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

²⁷⁵ This section is based primarily on Geist, *supra* note 12; Mueller, *supra* note 12.

²⁷⁶ Geist, *supra* note 12, at 918; Mueller, *supra* note 12 at 152

²⁷⁷ Geist, *supra* note 12, at 905-6.

²⁷⁸ Geist, *supra* note 12, at 909.

²⁷⁹ Geist, *supra* note 12, at 910.

²⁸⁰ Michael Geist, WIPO Wipes Out Domain Name Rights, *Globe & Mail*, Aug. 24, 2000.

²⁸¹ Geist, *supra* note 12, at 907-908; 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).

²⁸² Geist, *supra* note 12, at 907-908. NAF advertised similarly to banks when marketing its arbitration services to them. *See* Berner & Grow, *supra* note 3.

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.²⁸³

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 was efficiency, not complainant bias.²⁸⁴ 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 used was too fine-grained to find patterns, because trademark owners choose providers based on their long-term reputations, not the prior two month's 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 England²⁸⁵

Forum selling is not a purely contemporary phenomenon. There is evidence that it affected common law decision making 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. Examination of the decisions of 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). 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.

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. Although there is some ambiguity about how such fees were distributed, they may have provided judges and other court staff a pecuniary incentive to attract more cases.

²⁸³ Geist, *supra* note 12, at 928-30; Zak Muscovitch, *2010 Domain Name Dispute Study*, <http://www.dnattorney.com/study2010.shtml>; DNAttorney, *2012 Domain Dispute Study*, <http://www.dnattorney.com/NAFdomainnamedisputestudy2012.shtml>.

²⁸⁴ 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 (2005).

²⁸⁵ This section is based primarily on Klerman, *supra* note 9.

As in other situations, 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.²⁸⁶ 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).

IV. 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.

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.²⁸⁷ 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 District of Texas asserts

²⁸⁶ Todd Zywicki, *The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis*, 97 NW. U. L. REV. 1551, 1581-621 (2003).

²⁸⁷ Joseph R. Biden, Jr., *Give Credit to Good Courts*, LEGAL TIMES (June 20, 2005) (defending Delaware bankruptcy courts and arguing against venue reform).

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 U.S. 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 a court, even a court in a small rural county, has the opportunity to enter a judgment binding everywhere (or at least in the entire U.S.).

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. 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. Thus, 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 reviewed only for abuse of discretion. 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.²⁸⁸ Similarly, in the bankruptcy context,

²⁸⁸ 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 Products v. S & W Engineering*, 51 F. 3d 1229 (4th Cir. 1995); Edward H. Cooper, *Revising Civil Rule 56: Judge Mark R. Kravitz & 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 be succeed. 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 requires permission of the district court judge, and a forum selling judge is unlikely to grant such permission. Finally, the collateral

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.²⁸⁹

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. 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.

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 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, because summary judgment primarily advantages defendants. 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.

Based on his analysis of patent and bankruptcy litigation, Jonas Anderson has argued that forum selling is more common in areas of law with specialized courts or specialized judges. 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 that "when legal differences among fora are eliminated, forum shoppers turns their attention to administrative and procedural nuances among courts."²⁹⁰ 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

order doctrine is very narrow and available only for very special issues not generally relevant to the types of cases discussed in this article. *Id.* at 202-205.

²⁸⁹ Daniel Klerman, "Legal Fictions as Strategic Instruments" (unpublished manuscript, on file with authors).

²⁹⁰ Anderson, *supra* note 11, at ___.

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.

V. SOLUTIONS

Since a necessary prerequisite for forum selling is jurisdictional choice, the easiest way to restrain forum selling is to narrow the plaintiff's (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 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 defendant." She points out that her proposal would constrain forum shopping while fostering beneficial "clustering" of cases in districts with industry or technological expertise.²⁹¹ 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."²⁹² Forum selling suggests another reason not to allow suits in the state of incorporation. Since Delaware is 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. Forcing all patent litigation to the defendant's principal place of business, while it would largely eliminate forum selling and the pro-plaintiff biases it causes, 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.²⁹³ The district which includes the largest market for the defendant's products is likely to be more neutral

²⁹¹ Fromer, *supra* note 15, at 1478-79.

²⁹² *Id.* at 1492.

²⁹³ Klerman, *Rethinking*, *supra* note 14. 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 15, at 1491.

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.²⁹⁴ He argues that districts should be required to randomly assign cases to judges. 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. The Eastern District of Texas is somewhat larger, with eight judgeships. 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.

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.²⁹⁵ 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. Others have suggested that competition between districts could be made beneficial if firms were required to commit to a particular bankruptcy district while they were still healthy.²⁹⁶ For example, a firm might be encouraged to state in its corporate charter where it would file for bankruptcy if it got into trouble.²⁹⁷ 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

²⁹⁴ Anderson, *supra* note 11, at ___.

²⁹⁵ Part III.B, *supra*.

²⁹⁶ Robert K. Rasmussen & Randall S. Thomas, *Timing Matters: Promoting Forum Shopping by Insolvent Corporations*, 94 NW. U. L. REV. 1357 (2000).

²⁹⁷ *Id.* at 1402.

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.

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 has suggested that patent infringement cases be randomly assigned to judges who have indicated an interest in hearing patent cases.²⁹⁸ 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 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. 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. 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.²⁹⁹

Another area of potential danger are federal statutes that authorize nationwide service of process. These statutes are sometimes interpreted to mean that defendants in such 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.³⁰⁰ 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.

²⁹⁸ Anderson, *supra* note 11, at ___. 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. *Supra* __.

²⁹⁹ Daimler v. Bauman, 134 S. Ct. 746, 754, 760, 761 (2014); Goodyear Dunlop v. Brown, 131 S. Ct. 2846, 2851, 2854, 2857 (2011).

³⁰⁰ One reason that forum selling does not seem to have materialized in antitrust or securities cases is that many such cases are the subject to MDL proceedings, which make the place where a case was initially filed much less important.

VI. CONCLUSION

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

APPENDIX 1: SPEED IN 25 BUSIEST PATENT DISTRICTS AND W.D. Pa.

District	2000-2007				2008-6/30/2015			
	Time to Term. (All Cases)	# Trials	Time to Trial	Time to Term (Tried Cases)	Time to Term. (All Cases)	# Trials	Time to Trial	Time to Term (Tried Cases)
E.D.Tex.	312	33	650	974	246	149	833	1024
D.Del.	364	86	654	1238	316	161	775	1074
C.D.Cal.	210	38	703	1048	238	41	769	929
N.D.Cal.	309	40	855	1252	272	45	857	1127
N.D.Ill.	215	22	770	934	218	20	1165	1785
D.N.J.	225	19	930	1125	295	74	962	1106
S.D.N.Y.	226	27	934	1293	273	43	772	973
S.D.Cal.	231	11	1071	1419	300	17	756	1116
S.D.Fla.	207	14	404	573	119	13	519	751
D.Mass.	267	30	1048	1314	273	25	871	1193
D.Minn.	247	13	881	926	278	6	1271	1294
M.D.Fla.	241	15	634	911	267	17	773	920
E.D.Mich.	270	7	945	1067	252	10	1680	1781
E.D.Va.	160	21	279	414	182	18	404	484
N.D.Ga.	235	4	1000	1332	225	6	1124	1159
N.D.Tex.	227	9	818	1127	252	12	815	885
D.Utah	261	8	436	1340	275	5	1420	1681
W.D.Wash.	181	8	644	752	230	8	978	954
D.Colo.	198	6	1103	1128	210	6	1136	1705
E.D.Pa.	294	9	917	1204	274	5	726	1030
N.D.Ohio	210	3	630	797	207	8	846	1089
S.D.Tex.	264	13	731	1050	277	10	875	1037
W.D.Tex.	270	7	904	1098	274	6	903	1337
E.D.N.Y.	270	7	775	775	267	3	1274	1537
W.D.Wis.	156	15	318	335	235	23	552	729
Average Top 25 except E.D.Tex.	239	18	766	1019	250	24	926	1153
W.D.Pa.	208	4	1436	1788	391	9	980	996
All Districts	244	585	731	1097	255	849	850	1097
All Districts Except E.D.Tex.	243	552	746	1101	257	700	858	1110

Notes. Unless otherwise stated, data were obtained from Lex Machina, www.lexmachina.com. 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 25 busiest patent districts are based on data from the last 10 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 was determined by selecting the "cases that went to trial" option and identifying the median for "Trial" and "Termination." When there were more than 10 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.

APPENDIX 2: SUMMARY JUDGMENT & TRANSFER RATES IN TOP 25 PATENT DISTRICTS & 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 Districts Except E.D. Tex.	40,364	288	1202	1490	3.7	1801	4.5

Notes. The 25 busiest patent districts are based on data from the last 10 years collected by Lex Machina. Data were based on information in Lex Machina for the time period 1-1-00 through 6-30-15. 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 01-01-2000 through 06-30-2015. 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

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 12 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 in a manner similar to that described in Appendix 1, except with different date restrictions. Prior to the 12 month period ending September 30, 2008, there were ten or less patent trials in the Eastern District of Texas in each 12 month period, which is arguably too low to reliably report a median. The number of trials is provided when 10 or under.

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

	E.D. Tex.	National Total	Percentage 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 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 12 Month Periods Ending March 31, 2012 and 2013, Federal Judicial Caseload Statistics, Appendix Table C, available at:

<http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2013/tables/C00Mar13.pdf>

***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 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.