FORUM SELLLING

DANIEL KLERMAN* AND GREG REILLY

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ABSTRACT

Forum shopping is problematic because it may lead to forum selling. For diverse motives, such as 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 distorted the rules and practices relating to case assignment, joinder, discovery, transfer, and summary judgment in order to attract patent plaintiffs to their district. As a result of their efforts, nearly a quarter of all patent infringement suits were filed in the Eastern District of Texas in 2012 and 2013. 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.

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 not a serious problem

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* Charles L. and Ramona I. Hilliard Professor of Law and History, University of Southern California Gould School of Law. dklerman@law.usc.edu, www.klerman.com.

◊ Assistant Professor of Law, California Western School of Law. greilly@cwsl.edu. The authors thank Robert Ahdieh, Jonas Anderson, Jonathan Barnett, John Coffee, Conde Cox, Marc Galanter, Paul Gugliuzza, Herbert Hovenkamp, Sam Issacharoff, Louis Kaplow, Alexi Lahav, Jack Lerner, Lynn LoPucki, Mark Lemley, Mike Madison, Rafael Pardo, Richard Posner, Mark Ramseyer, Robert Rasmussen, Jennifer Rothman, David Schwartz, Ted Sichelman, Carolyn Sissoko, Daniel Sokol, David Schwartz, David Taylor, Jonathan Zittrain, and participants at the Intellectual Property Scholars Conference and Emory and USC Law School Faculty Workshops for helpful comments and suggestions.
and should be given less attention. This article suggests that, in non-contractual settings, forum shopping is problematic because it leads to forum selling. For diverse motives, such as prestige, local benefits, or re-election, some judges want to hear more cases. When plaintiffs have wide choice of forum, such judges have incentives to make the law more pro-plaintiff, because plaintiffs will 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, motivated by prestige and the desire to benefit the local economy, have distorted the rules and practices relating to case assignment, joinder, discovery, transfer, and summary judgment, in order to attract patent plaintiffs to their district. As a result of their efforts, nearly a quarter of all patent infringement suits were filed in the Eastern District of Texas in 2012 and 2013, 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 constraint 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 a constitutional concern, the example of the Eastern District of Texas shows that even federal judges can be affected by forum selling, so it is wise that the Federal Rules of Civil Procedure and federal statutes usually restrict venue for cases in federal court.

This article focuses on non-contractual litigation. Forum selling in contractual settings may lead to efficiency. 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. As a result, states that want to attract contractual litigation would do so by offering procedures that favor neither side. Contracting parties seem to prefer to 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.”\(^1\) 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.\(^2\) The market for contractual litigation is plausibly efficient, because both parties must consent to a forum selection clause, so a court that wants parties to choose it must seem advantageous to both plaintiffs and defendants.\(^3\)

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2. Id at 2094.
3. Whether forum selection clauses in form contracts are efficient is a much more complicated question. For a discussion of the issue, see Daniel Klerman, “Personal Jurisdiction and Product Liability,” 85 Southern California Law Review 1551, 1572-74 (2012). Also, it is possible that competition for commercial cases results in better adjudication of those cases, but is inefficient overall because it diverts resources and the best judges from non-contractual cases.
For similar reasons, when parties jointly choose the forum in non-contractual contexts, the results may also be efficient. For example, if sophisticated parties choose arbitration after a dispute arises, they are likely to choose expert arbitrators and procedures that strike a mutually beneficial balance between speed, cost and accuracy. Knowing that favoring one side or another would make selection less likely in future cases, arbitrators have incentives to be fair rather than biased. Similarly, in the bankruptcy context, in some circuits, parties have the choice to bring their appeals to a single district court judge or to a bankruptcy appellate panel composed of three bankruptcy judges. The fact that all parties must consent to adjudication before a bankruptcy appellate panel, and the fact that bankruptcy judges see these panels as enhancing their prestige, seem to have spurred bankruptcy appellate panels to provide high quality decisions.

The non-contractual, non-consensual situations analyzed in this article are different, because, in these contexts, forum selection is unilateral. The plaintiff ordinarily chooses the court, so courts compete by catering to plaintiffs. This simple distinction -- whether forum selection is unilateral or mutual -- is the most important determinant of whether jurisdictional competition is efficient or inefficient. 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,” this paper 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 the attendant forum selling asserts that most courts and judges are inefficiently pro-defendant. This pro-defendant bias may come from appointment processes dominated by conservative governors and presidents, from the power of business to fund judicial elections, or from the ideological and class proclivities of judges as a result of their upper-middle class status. 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 lead to greater efficiency by redressing what would otherwise be an inefficient pro-defendant bias. While this argument has some plausibility, it is not convincing for two reasons. First, the selection process is not so lopsided. Democratic presidents and governors are also involved in judicial selection, and trial lawyers and unions are key funders of judicial elections. While some judges may be biased in favor of defendants, others are liberal. Second, the case studies in the rest of this paper suggest that the legal changes wrought by forum selling have not been efficient. For example, most commentators argue that patent law is currently too strong and that patent assertion entities (a.k.a. patent trolls) are impeding technological progress. In this context, the Eastern District of Texas’s pro-patentee bias and

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particular attractiveness to patent assertion entities aggravates the problem and makes the law less efficient.

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.7 Stefan Bechtold and Jens Frankenreither are writing a paper analyzing patent litigation in the European Union and suggest that courts, especially German courts, are actively trying to attract patent cases.8 Competition for patent cases in the United States is analyzed by Jonas Anderson, who argues that competition is particularly likely when courts are specialized, and advocates random assignment of cases to judges as the solution.9 Mark Geist and Milton Mueller have examined competition among private dispute resolution providers deciding cases involving domain names.10

This article builds on prior work that Daniel Klerman has done on jurisdiction and jurisdictional competition. In the mid-2000s, 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.11 More recently, Klerman coined the phrase “forum selling” and identified it as a potential problem in modern litigation.12 The present article uses detailed case studies to show that forum selling is not just a risk, but a reality in several areas of law.

The forum selling discussed in this article bears some resemblance to the competition for corporate chartering. In that context, scholars debate whether there is a “race to the top” or a “race to the bottom.”13 Some argue that competition has led to more efficient corporate law,
because corporate managers who chose the state of incorporation have incentives to maximize firm value by incorporating in the state with the best corporate law. Others argue that managers often act in their own self-interest and may incorporate in places that protect managers, even when doing so would reduce firm value. While one can make plausible arguments that competition for incorporation leads to efficient law, no similar argument can be made in the litigation context. 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.\footnote{For similar arguments, see 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).} As noted above, the only exception to this argument relates to situations where affected parties have an ability to select the forum before a dispute arises through forum selection clauses and similar devices. The ability to bargain beforehand restricts bias in contract cases and may also affect bankruptcy, where one can argue that debtors, who choose where to file for bankruptcy, have reasons to choose courts that treat creditors fairly.\footnote{See infra at \_\_.}

The major contributions of this article are to show that forum selling is not restricted to one or two legal areas, that 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 danger inherent in the design of legal systems. The danger is usually avoided by jurisdictional rules that constrain plaintiffs to choose among a small number of courts. When jurisdictional rules fail to constrain, a few judges can exert a large, negative influence. While most judges have no interest in attracting more cases, a small number of motivated judges can have an enormous effect, because they can attract a large fraction of cases in the relevant legal field. The best way to prevent forum selling, and the inefficient law it encourages, is to constrict jurisdictional choice so that even a judge who wanted to attract a disproportionate share of cases could not do so.

While this article focuses on the implications of forum selling for jurisdiction and venue, forum selling also sheds light on many other phenomena. For scholars of judicial decisionmaking, it suggests that judges’ ideological preferences and desire for leisure may sometimes be outweighed by competitive pressures 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. As to the debate over rules versus standards, this article suggests that standards may be less desirable when forum selling exists or

\footnote{14 For similar arguments, see 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).}

\footnote{15 See infra at \_.}
is likely, as open-ended standards provide more leeway for motivated trial judges to tilt application of governing 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 common law judging. Section IV explores possible solutions, and Section V concludes.

II. PATENTS AND THE EASTERN DISTRICT OF TEXAS

“[T]he most common motive for forum shopping” is the “selection of the law to be applied to the case.” Patent litigation would seem to be a poor candidate for forum shopping. Patent law is a uniform body of federal law, with exclusive jurisdiction in federal courts and nationwide appellate jurisdiction in the U.S. Court of Appeals for the Federal Circuit. Yet, forum shopping in patent cases is rampant.

Even with formally uniform law, courts can create forum shopping opportunities by the way they interpret and apply the law. Commentators normally assume these differences result from biographical, ideological, or other pre-existing commitments and view courts as passive and “relatively objective” in forum choice. The following case study of “forum selling” in patent cases, especially in the U.S. District Court for the Eastern District of Texas, demonstrates otherwise. In some circumstances, courts actively work to attract cases by expressing receptiveness to litigation, increasing efficiency and expertise, and, more troublingly, distorting procedure in favor of plaintiffs.

A. Forum Shopping in Patent Cases

1. The Ability to Forum Shop in Patent Cases

18 See Section _, infra.
20 Kevin M. Clermont & Theodore Eisenberg, Exorcising the Evils of Forum Shopping, 80 CORNELL L. REV. 1507, 1515-16 (1995); see also, e.g., Debra Lyn Bassett, The Forum Game, 84 N.C. L. REV. 333, 370 (2006) (“[T]he attractions of the laws of one state over another are the inevitable consequence of our governmental structure and are within the province of the states.”); Jonathan R. Macey & Geoffrey P. Miller, Toward an Interest-Group Theory of Delaware Corporate Law, 65 Tex. L. Rev. 469, 499-502 (1987) (“The Delaware judiciary, therefore, would be viewed as an exogenous variable in the interest-group dynamic we are describing.”).
Due to weak personal jurisdiction and venue protections for defendants, a patentee can often “choose to initiate a lawsuit in virtually any federal district court.”\(^2\) Unless a federal statute directs otherwise, federal district courts have the same personal jurisdiction as courts of the state in which they sit.\(^2\) Specifically, personal jurisdiction must be authorized under a state statute, normally referred to as a “long-arm statute,” and the exercise of jurisdiction must be consistent with constitutional due process.\(^2\) Modern long-arm statutes pose no obstacle to jurisdiction in patent cases, because they generally confer jurisdiction to the extent allowed by the U.S. Constitution or over tortious acts committed in the state.\(^2\) The Federal Circuit has held that due process is satisfied as long as accused products are sold in the forum state, whether those sales are made directly by the alleged infringer or through established distribution networks.\(^2\) Despite the Supreme Court’s recent decisions questioning the “stream of commerce” theory of personal jurisdiction in product liability cases,\(^2\) courts in patent cases continue to adhere to a broader view of personal jurisdiction.\(^2\) Because most accused infringers are corporations whose products are sold nationwide, personal jurisdiction is rarely challenged in patent cases.\(^2\)

Since 1948, the patent venue statute has allowed patent infringement suits to be brought “in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business.”\(^2\) In 1957, the Supreme Court interpreted “the judicial district where the defendant resides” to mean “the state of incorporation only.”\(^2\) Thus, a defendant in a patent infringement suit could be sued in a very


\(^{22}\) See Akro Corp. v. Luker, 45 F.3d 1541, 1544 (Fed. Cir. 1995); Fed. R. Civ. P. 4(k)(1)(A).


\(^{24}\) Douglas D. McFarland, *Dictum Run Wild: How Long-Arm Statutes Extended to the Limits of Due Process*, 84 B.U. L. REV. 491, 494-498, 525-531 (2004). Even states that do not explicitly or by judicial interpretation allow jurisdiction to the limits allowed by the Constitution, allow jurisdiction when a tortious act is committed in the state, which would cover any time an accused product is made, sold, offered for sale, or used in the state.


\(^{27}\) 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).


\(^{29}\) 28 USC 1400(b). The statute prior to 1957 was not much different. See Fourco Glass Co. v. Tansmirra Prods. Co., 353 U.S. 222, 224-226 (1957).

limited number of districts: (1) a district in the state in which the defendant was incorporated or (2) a district in which the defendant had committed an act of infringement (such as manufacturing or selling an infringing product) and had a regular and established place of business. However, 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. The Federal Circuit subsequently applied this change to the venue in patent cases. A patent infringement suit now can be brought in any district in which the defendant would be subject to personal jurisdiction. As noted above, defendants in most patent infringement suits are subject to personal jurisdiction in every district, so the venue does not constrain forum choice.

2. An Overview of Forum Shopping in Patent Cases

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

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31 See 8 DONALD S. CHISUM, CHISUM ON PATENTS § 21.02[2][c] & n.44 (describing split authority as to whether jurisdiction laid in every district of the state of incorporation or only the district that also was home to the principal place of business).
33 VE Holding Corp. v. Johnson Gas Appliance Co., 917 F.2d 1574, 1575 (Fed. Cir. 1990).
34 Because personal jurisdiction is a statewide inquiry but venue is a district-by-district inquiry, venue remains an additional restriction in a small subset of cases where the accused infringer has contacts with one district in a state but is sued in a different district. See 28 U.S.C. § 1391(d).
37 The Eastern District of Texas runs from the Arkansas and Louisiana borders on the east to the outer edges of the Dallas and Houston metropolitan areas on the west and from the Oklahoma border on the north to the Gulf of Mexico on the south. See http://www.justice.gov/usao/txe/district_divisions.html. The northern part of the district includes portions of the Dallas metropolitan area, including cities like Plano and The Colony, and some corporate headquarters. See Xuan-Thao Nguyen, Justice Scalia’s “Renegade District”: Lessons for Patent Law Reform, 83 TUL. L. REV. 111, 120-121 (2008). However, only a miniscule number of patent cases are filed in the Sherman Division, which includes the parts of the Dallas area, compared to the more remote Marshall and Tyler Divisions. See, e.g., James C. Pistorino & Susan J. Crane, 2011 Trends in Patent Case Filings: Eastern District of Texas Continues to Lead Until America Invents Act is Signed, Perkins Coie, March 2012, at 10 http://www.perkinscoie.com/files/upload/PL_12_03PistorinoArticle.pdf; James C. Pistorino, 2012 Trends in Patent Case Filings: Eastern District of Texas Most
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 five of the last seven years and the second most in the other two years.

**TABLE 1: Top 10 Most Popular Districts for Patent Cases, 2007-2013**

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<tbody>
<tr>
<td>Eastern District of Texas</td>
<td>358</td>
<td>289</td>
<td>235</td>
<td>283</td>
<td>414</td>
<td>1247</td>
<td>1494</td>
<td>4320</td>
<td>16.9%</td>
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<tr>
<td>District of Delaware</td>
<td>157</td>
<td>166</td>
<td>228</td>
<td>253</td>
<td>485</td>
<td>1002</td>
<td>1336</td>
<td>3627</td>
<td>14.2%</td>
</tr>
<tr>
<td>Central District of California</td>
<td>320</td>
<td>187</td>
<td>267</td>
<td>216</td>
<td>308</td>
<td>499</td>
<td>399</td>
<td>2196</td>
<td>8.6%</td>
</tr>
<tr>
<td>Northern District of California</td>
<td>134</td>
<td>162</td>
<td>163</td>
<td>175</td>
<td>217</td>
<td>260</td>
<td>248</td>
<td>1359</td>
<td>5.3%</td>
</tr>
<tr>
<td>Northern District of Illinois</td>
<td>140</td>
<td>144</td>
<td>132</td>
<td>172</td>
<td>216</td>
<td>236</td>
<td>222</td>
<td>1262</td>
<td>4.9%</td>
</tr>
<tr>
<td>District of New Jersey</td>
<td>196</td>
<td>159</td>
<td>143</td>
<td>153</td>
<td>177</td>
<td>159</td>
<td>144</td>
<td>1131</td>
<td>4.4%</td>
</tr>
<tr>
<td>Southern District of New York</td>
<td>102</td>
<td>105</td>
<td>111</td>
<td>104</td>
<td>150</td>
<td>141</td>
<td>131</td>
<td>844</td>
<td>3.3%</td>
</tr>
<tr>
<td>Southern District of California</td>
<td>59</td>
<td>67</td>
<td>71</td>
<td>55</td>
<td>78</td>
<td>141</td>
<td>227</td>
<td>698</td>
<td>2.7%</td>
</tr>
<tr>
<td>Southern District of Florida</td>
<td>65</td>
<td>32</td>
<td>43</td>
<td>64</td>
<td>63</td>
<td>133</td>
<td>185</td>
<td>585</td>
<td>2.3%</td>
</tr>
<tr>
<td>District of Massachusetts</td>
<td>54</td>
<td>49</td>
<td>59</td>
<td>69</td>
<td>86</td>
<td>80</td>
<td>124</td>
<td>521</td>
<td>2.0%</td>
</tr>
<tr>
<td>National Total</td>
<td>2745</td>
<td>2527</td>
<td>2502</td>
<td>2714</td>
<td>3531</td>
<td>5418</td>
<td>6091</td>
<td>25528</td>
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</tr>
</tbody>
</table>

These figures actually **understate** the Eastern District’s share of patent litigation prior to 2012. Patentees, especially patent assertion entities (pejoratively known as “patent trolls”), sometimes sued several unrelated defendants in a single lawsuit, a practice far more common in the Eastern District of Texas than elsewhere. For example, on average, 13 defendants were sued per patent case in the Eastern District of Texas in 2010, compared to less than four defendants per case in other popular districts. Eleven 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. Congress prohibited suing multiple unrelated defendants in one suit in the America Popular for Plaintiffs (Again) But 11 Percent Fewer Defendants Named Nationwide, Perkins Coie, February 2013, at 10, [http://www.perkinscoie.com/files/upload/LIT_13_02Pistorino_2012Article.pdf](http://www.perkinscoie.com/files/upload/LIT_13_02Pistorino_2012Article.pdf).

**37** Data courtesy of Lex Machina and on file with authors.


Invents Act, effective September 16, 2011. As a result, plaintiffs simply brought suits against individual infringers rather than multiple defendants. Since plaintiffs’ preferred court remained the same, the Eastern District’s share of patent infringement cases soared to 23% in 2012 and rose again to 25% in 2013.

B. Evidence of Forum Selling in the Eastern District of Texas

The concentration of patent litigation in the Eastern District of Texas is a constant source of discussion, and discomfort, among patent litigators. By contrast, it has received only limited attention in the academic literature. Some attribute the Eastern District’s popularity to natural factors, like a pro-patentee jury pool that values property rights or an uncongested docket. Others point to higher quality adjudication than elsewhere: quicker, more efficient case disposition, and experienced and expert judges.

In contrast, this article argues that judges in the Eastern District have consciously sought to attract patentees by departing from mainstream doctrine in a variety of procedural areas in a consistently pro-patentee (pro-plaintiff) way. A motivated district like the Eastern District of Texas can offer patentees what they ultimately want, improved chances of a successful outcome. This does not require “[s]imply offering victory to the highest bidder” or engaging in any other corrupt practice. Because procedure inevitably influences outcome, the Eastern District of Texas can favor the patentee through its local rules, interpretation of the Federal Rules of Civil Procedure, case management decisions, and other exercises of judicial discretion that increase the chances of a favorable settlement or merits decision. These procedural levers are better shielded from appellate review than substantive decisions.

1. The “Rocket Docket”

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

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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 fifth fastest among districts with significant patent dockets. Efficient and prompt dispute resolution is something to which the judicial system aspires. Yet, a fast docket generally favors plaintiffs more than defendants and therefore can attract litigation. Quick resolution allows the plaintiff to obtain a recovery sooner and at a lower cost. 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. Quick resolution may be particularly important to patent plaintiffs who practice their invention, as infringement is often an on-going violation with continuing market consequences.

Commentators sometimes assume that the Eastern District’s speedy time to trial was the coincidental result of natural factors like its small docket, the decline of products liability and medical malpractice cases due to tort reform, or the absence of criminal cases. To the contrary, the Eastern District made a conscious effort to resolve patent cases quickly. According to Chief Judge Leonard Davis, the judges believe in “getting cases to trial quickly, firm trial 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.; Symposium on Emerging Intellectual Property Issues, “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, 254 (2011) (statement of Mike McKool).

See 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 2.2 years, with a range of 0.8 years (Eastern District of Virginia) to 2.9 years (Southern District of California).


settings, and not deviating from them.” They accomplished this through short discovery periods and other deadlines.54

Beyond just 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 T. John 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.”55 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.”56

Unsurprisingly, the docket slowed as patent litigation became increasingly concentrated in the Eastern District of Texas. The median time to trial between 2008 and 2013 was 2.3 years, ranking 13th 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, trial, summary judgment, or dismissal) was even slower, ranking 19th among districts with significant patent dockets.57

57 See Appendix 1. Professor Lemley previously noted the Eastern District’s slow time to resolution, attributing this to congestion caused by the Eastern District’s popularity. See Mark A. Lemley, Where to File Your Patent Case, 38 AIPLA Q.J. 1, 17 (2010). Interestingly, the Eastern District’s time to termination decreased as the district became more congested, from 323
The slowing docket led commentators to predict that the district’s popularity would wane in favor of other, faster districts. 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. Nor is there any reason to think that faster districts would be able to maintain this speed if patent litigants suddenly flocked to them.

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.” 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

days (2000-2007) to 276 days (2008-2013). Time to termination does not appear to actually reflect docket speed. Rather, it appears to reflect the nature of resolution (settlement, summary judgment, trial, etc.). More resolutions by trial will increase time to termination compared to more resolutions by summary judgment or early settlement. The Eastern District has a slightly lower settlement rate, a significantly lower summary judgment rate, and a higher trial rate than other districts. See infra, Section __; Mark A. Lemley, Where to File Your Patent Case, 38 AIPLA Q.J. 1, 5-6 (2010). 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.” Mark A. Lemley, Where to File Your Patent Case, 38 AIPLA Q.J. 1, 12-19 (2010). For time to termination just of tried cases, the Eastern District jumps to eighth among districts with significant patent dockets and first of the five busiest districts. See Appendix 1.


See Appendix 1. The Eastern District’s median time to trial was 2.3 years between 2008 and 2013, compared to an average median time to trial in districts with significant patent dockets of 2.6 years.

See Mark A. Lemley, Where to File Your Patent Case, 38 AIPLA Q.J. 1, 17 (2010) (“[I]f everyone moves to a fast district, it can easily become a slow district as a result.”); see also Xuan-Thao Nguyen, Justice Scalia’s “Renegade District”: Lessons for Patent Law Reform, 83 TUL. L. REV. 111, 132-133 (2008) (describing how increased filings threatened the speed of the E.D. Va.’s “rocket docket”).

judges’ claims to the contrary. In recent years, the gap between time to trial in civil cases generally and patent cases specifically is narrowing. Ultimately, the continued (and increasing) popularity of the Eastern District of Texas demonstrates that commentators have overestimated the importance of the “rocket docket” in attracting litigation. Speedy resolution is certainly a factor attracting patentees to the Eastern District. But speed alone does not appear to be determinative. The Eastern District of Texas is offering advantages to the patentee greater than just a potentially socially desirable speedy docket.

2. The Lack of Summary Judgment and the Threat of a Jury

More than a speedy resolution, patentees want a favorable resolution. Perhaps nothing increases the patentee’s chances for a favorable resolution more than making it to trial. Patentees win over 60% of the time at trial. By contrast, only 29% of grants of summary judgment are in favor of patentees. As in other substantive areas, summary judgment is overwhelmingly sought by patent defendants. Thus, “a jurisdiction that grants many summary judgment motions is...”

62 Symposium on Emerging Intellectual Property Issues, “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, 266 (2011) (statement of Judge T. John Ward) (“When the patent docket started growing, I started two different systems, as I think it would be unfair to have all other litigation fall in chronological order like we traditionally have done.”).
63 See Appendix 3 which shows that, although patent cases take longer than non-patent cases (probably because they are more complex), the difference has been decreasing over time. In the six years starting October 1, 2001, patent cases took 5.9 months longer than other civil cases (21.9-16.3 months), while in the subsequent six years, the difference had dropped twenty percent and was only 4.6 months (27.0-22.4).
65 Data is derived from John Allison et al., Understanding the Realities of Modern Patent Litigation, 92 TEX. L. REV. 1769, 1778-79, 1785, 1788, 1790 (2014). That paper does not specify grants of summary judgment on invalidity or inequitable conduct but that information was obtained from the authors of Allison et al. See Email from David Schwartz to Greg Reilly, dated Sept. 5, 2014 (on file with authors). The Allison et al. study identified 542 observations of grants of summary judgment, 155 of which were in favor of the patentee and 387 of which were in favor of the accused infringer. See also Mark A. Lemley, Where to File Your Patent Case, 38 AIPLA Q.J. 1, 3-4 (2010) (“[M]ost summary judgment rulings favor defendants in patent cases, but . . . juries tend to be far more pro-patentee.”). Interestingly, both patentees and accused infringers win 42% of the summary judgment motions they bring, though patentees bring far fewer motions. This is consistent with the expectation that patentees will only bring the strongest motions because they expect to fare worse on summary judgment.
66 Data derived from John Allison et al., Understanding the Realities of Modern Patent Litigation, 92 TEX. L. REV. 1769, 1778-79, 1785, 1788, 1790 (2014) (identifying 1296 observations where summary judgment was sought, 927 of which (72%) were sought by the accused infringer).
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.”

As shown in Table 2, judges in the Eastern District of Texas grant summary judgment at less than one-third the rate as judges in other popular patent districts. Only Delaware even approaches the Eastern District.


<table>
<thead>
<tr>
<th>District</th>
<th>Summary Judgment Outcomes</th>
<th>Total Outcomes</th>
<th>Summary Judgment Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Eastern District of Texas</td>
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<td>4804</td>
<td>0.9</td>
</tr>
<tr>
<td>District of Delaware</td>
<td>48</td>
<td>3868</td>
<td>1.2</td>
</tr>
<tr>
<td>Central District of California</td>
<td>163</td>
<td>3903</td>
<td>4.2</td>
</tr>
<tr>
<td>Northern District of California</td>
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<td>2369</td>
<td>4.8</td>
</tr>
<tr>
<td>Northern District of Illinois</td>
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<td>2226</td>
<td>3.2</td>
</tr>
<tr>
<td>District of New Jersey</td>
<td>49</td>
<td>1804</td>
<td>2.7</td>
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<tr>
<td>Southern District of New York</td>
<td>77</td>
<td>1657</td>
<td>4.6</td>
</tr>
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<td>Southern District of California</td>
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<td>1012</td>
<td>2.5</td>
</tr>
<tr>
<td>Southern District of Florida</td>
<td>28</td>
<td>992</td>
<td>2.8</td>
</tr>
<tr>
<td>District of Massachusetts</td>
<td>37</td>
<td>945</td>
<td>3.9</td>
</tr>
<tr>
<td>All Significant Patent Districts (excluding E.D. Tex.)</td>
<td>942</td>
<td>28095</td>
<td>3.4</td>
</tr>
</tbody>
</table>

The infrequency of summary judgment is not just the result of fewer opportunities. 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%). Another more comprehensive study found that accused infringers are granted summary judgment on patent invalidity in only 18% of such motions in the Eastern District of Texas, compared to 31% nationwide. Similarly, although patent defendants prevail on non-

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68 See Appendix 2.
69 Fewer summary judgment motions do seem to be made in the Eastern District of Texas. In Lex Machina’s database, only 7.3% of orders regarding summary judgment, which are a rough proxy for motions for summary judgment, are from the Eastern District of Texas, even though the Eastern District accounted for 12.9% of patent litigation in the period covered by Lex Machina. The most likely reason is that patentees are filing fewer summary judgment motions in the Eastern District because the prospects of success are lower. Data courtesy of Lex Machina and on file with authors. Data covers January 1, 2000-September 22, 2014 and was accessed September 24, 2014.
infringement motions 45% of the time in the Eastern District, the nationwide rate is 62%. 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%.

Some suggest that the Eastern District of Texas’s hostility to summary judgment is the result of general judicial philosophy, not a conscious effort to attract patent cases. 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.

Hostility to summary judgment is an important tool to attract patentees. Patentees can be reasonably confident their case will not end in summary judgment. This is particularly advantageous, 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. 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.

Eastern District judges implicitly acknowledge that patentees are attracted to the district by the fact that they are averse to summary judgment, emphasizing that they “believe in trial by

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73 See Paul M. Janicke, *The Judicial Panel on Multidistrict Litigation: Now a Strengthened Traffic Cop for Patent Venue*, 32 Rev. of Litig. 497, 502 (2013) (“Summary judgment as a tool of judicial disposition was somewhat culturally foreign in the Eastern District, the judges being more prone to resolve cases by trials.”); see also Symposium on *Emerging Intellectual Property Issues*, “Move Over, Federal Circuit-Here is the Fifth Circuit's Law on Transfer of Venue,” 14 SMU Sci. & Tech. L. Rev. 191, 199 (2011) (keynote address of Hon. Patrick E. Higginbotham) (attributing popularity pro-patentee perception of Eastern District of Texas to the fact that “you have a district that follows the rules. If it is a material fact issue it goes to trial.”).


In fact, 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.”

3. Judge-Shopping

Patentees have the unique opportunity in the Eastern District of Texas to choose their judge. The norm in federal district courts is random assignment among judges within a district. 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, with the reassignment random among all program judges in the district. Almost all participating

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districts have at least three program judges. Non-program judges also often decline to reassign patent cases.\textsuperscript{82} Thus, even under the Patent Pilot Program, the odds of being assigned a particular judge are at best one-third and normally 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, publicly specifies the allocation of cases filed in each division among the judges. For example, in 2006 at the outset of the Eastern District’s popularity, filing in the Marshall division resulted in a 70\% chance of being assigned to Judge Ward, filing in Tyler a 60\% chance of Judge Davis, filing in Sherman a 65\% chance of Judge Schell, and filing in Texarkana a 90\% chance of Judge Folsom.\textsuperscript{83}

Although this assignment system pre-dates the Eastern District’s patent litigation boom,\textsuperscript{84} the Eastern District provided patent plaintiffs even greater judge-shopping opportunities than other litigants.\textsuperscript{85} As of February 10, 2009, Judge Ward received 100\% of patent cases from Marshall and Texarkana (but only 90\% and 10\%, respectively, of other civil cases); Judge Schell 100\% of Sherman patent cases (but only 50\% of other civil cases), Judge Davis 100\% of Tyler


\textsuperscript{83} See U.S. Dist. Ct. E.D. Tex. General Order 06-13, available at:


patent cases (but only 60% of other civil cases), and Judge Clark 100% of Beaumont and Lufkin patent cases (but only 27% and 65%, respectively, of other civil cases).86

This period of absolute certainty lasted a year. In January 2010, Judge Ward returned to taking 75% of Marshall civil cases, Judge Folsom 90% of Texarkana civil cases, and Judge Schell 50% of Sherman civil cases, with no patent-specific carve-outs. Patent-specific carve-outs remained in Tyler, where Judge Davis took 95% of patent cases (but 50% of other civil cases) and Beaumont and Lufkin, where Judge Clark took 100% of patent cases (but 40% and 50%, respectively, of other civil cases).87 These assignments remained essentially the same for three years, with Judge Gilstrap taking Judge Ward’s place upon his retirement.88 In January 2013, now Chief Judge Davis started taking only 50% of Tyler civil cases, with no carve-out for patent cases, but Judge Gilstrap began taking 100% of Marshall civil cases and Judge Schneider 100% of Texarkana civil cases.89

In sum, 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.90 There was no particular reason why patentees should be given a choice of division, as patent cases almost never have a greater connection to one division of the Eastern District than another.91 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. The ability to judge-shop allows the patentee to select the most favorable judge: the one with the fastest docket, the greatest hostility to summary judgment, the most receptiveness to

broad discovery requests, etc. Conversely, if there were a judge known to be less favorable, the patentee could simply not file in a division from which that judge receives cases.

Patentees 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 patent cases – 50% of patent defendants were sued in Marshall, 46% in Tyler, and less than 4% in the remaining four divisions. Notably, Sherman and Beaumont, not Marshall and Tyler, are closest to the population centers in Dallas-Fort Worth and Houston. In the three months after Judge Ward retired on October 1, 2011, patent litigation shifted overwhelmingly to Judge Davis: 76% of patent defendants were sued in Tyler, less than 20% in Marshall, and 4% in the other divisions. Filing trends again shifted after Judge Ward’s replacement, Judge Gilstrap, was confirmed (and perhaps vetted by patentees). During 2013, when Judge Gilstrap was receiving 100% of Marshall civil cases, 63% of Eastern District patent cases were filed in Marshall.

The Eastern District of Texas’s popularity has been directly connected to judge-shopping by a leading Eastern District practitioner: “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.” 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,” 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.” While the statute provides that if declined by a non-participating judge, patent cases are “randomly reassigned to 1 of those judges” participating in

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95 Judge Gilstrap is known for being interested in patent cases and maintaining a speedy docket. See Ryan Davis, Eastern Texas Judge Has Nation’s Busiest Patent Docket, LAW360 (May 13, 2014), http://www.law360.com/articles/536886/eastern-texas-judge-has-nation-s-busiest-patent-docket. He also is resistant to summary judgment. See Section _, supra.
the program and virtually every other participating district specifies procedures for random reassignment, the Eastern District is silent on the means of reassignment.

4. Discovery

Discovery is the most significant contributor to the high costs of patent litigation. Discovery costs fall disproportionately on defendants, because “the bulk of the relevant evidence usually comes from the accused infringer.” Thus, accused infringers benefit when discovery is reduced or postponed. Patentees seek to expand and expedite discovery to increase the amount of information revealed, defendants’ costs, and their own leverage in settlement.

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. 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. The Eastern District’s rule puts the onus on the defendant to decide the relevance of documents, under penalty of sanctions, rather than on the plaintiff to justify the relevance of documents. The likely result is broader document production. In fact, the Eastern District judges tout the broader disclosure of information in their district as an advantage compared to elsewhere.

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103 In re Genentech, Inc., 566 F.3d 1338, 1345 (Fed. Cir. 2009) (quotations omitted).
107 See 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).
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.\textsuperscript{108} However, the requirement is likely to have a larger effect in patent cases than other cases. Patent cases already have disproportionately high discovery costs.\textsuperscript{109} According to a leading Eastern District lawyer, the mandatory production requirement is particularly advantageous to plaintiffs in patent cases because “discovery in a patent case is at a different level than it is in other cases.”\textsuperscript{110}

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.\textsuperscript{111} The then-Chief Judge of the Federal Circuit specifically 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.”\textsuperscript{112} The Federal Circuit Advisory Committee also has issued a model order that seeks to both delay and reduce e-discovery.\textsuperscript{113} 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”\textsuperscript{114} and has gained acceptance in many district courts.\textsuperscript{115} The Eastern District of Texas has 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.”\textsuperscript{116}

5. Multi-Defendant Litigation

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

\textsuperscript{108} See 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).


lawsuit. 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. Patentees valued the ability to sue unrelated defendants in a single suit. The Eastern District of Texas catered to patentees’ penchant for multi-defendant litigation both by being receptive to this practice and by managing multi-defendant litigation in ways that benefitted patentees.

a. Permitting Multi-Defendant Cases

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.” The overwhelming weight of district court authority, subsequently endorsed by the Federal Circuit, held that claims against “separate companies that independently design, manufacture and sell different products in competition with each other” did not arise from the same transaction or occurrence, even if the products were accused of infringing the same patent and operated similarly. 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.

The Eastern District of Texas, and a few districts following it, 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.” As a result, multi-defendant patent cases became concentrated in the Eastern District. From 2006 to 2010, other leading patent districts averaged between two and four defendants per case – presumably related entities like parent and

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119 On September 15, 2011, the last day before the AIA’s anti-joinder provision went into effect, had the most patent cases filed in recent memory: 50 suits against 800 defendants. See Tracie L. Bryant, Note, The America Invents Act: Slaying Trolls, Limiting Joinder, 25 HARV. J.L. & TECH. 687, 687-688 (2012). One of us previously suggested that defendants could benefit from being sued collectively, contrary to conventional wisdom. See Greg Reilly, Aggregating Defendants, 41 FLA. ST. U. L. REV. 1011 (2014).


122 In re EMC Corp., 677 F.3d 1351, 1359 (Fed. Cir. 2012).

123 Id. at 1357 & n.2. A few other district court decisions adopted the minority position, but almost always by following Eastern District of Texas precedent with little analysis. See, e.g., Sprint Comm’ns Co. v. TheGlobe.com, 233 F.R.D. 615, 617 (D. Kan. 2006).

subsidary companies or manufacturers and retailers – but the number of defendants per case steadily increased in the Eastern District of Texas. 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.

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. The provision specifically targeted the Eastern District of Texas.

Although technically complying with the AIA’s anti-joinder provision, judges in the Eastern District of Texas have limited its impact. They ruled it did not apply retroactively, and continued to apply their lenient joinder standard to cases filed before the AIA. In contrast, other districts viewed the AIA’s provision as reflecting pre-existing law and applied it to pending cases. The Federal Circuit ultimately granted mandamus in a pre-AIA Eastern District case and ruled that joinder of unrelated defendants with independent products was improper even before the AIA. In response, Eastern District judges began severing defendants only to then consolidate the cases for all pre-trial purposes. Since consolidated cases are largely managed

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

b. Managing 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. 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.

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. In common trials, the Eastern District judges gave the multiple defendants collectively the same amount of time to present their defenses as they gave the single plaintiff. 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 invalidity or


inequitable trial for multiple unrelated defendants, even after the AIA prohibited consolidating unrelated defendants for trial.\textsuperscript{139}

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.

6. Retaining Cases

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.

a. Hostility to Transfer

The “conventional view” is that the Eastern District of Texas has “protected its large patent docket by being disinclined to transfer cases to other districts.”\textsuperscript{140} Yet, as shown in Table 3, the Eastern District transfers cases significantly more frequently than other leading patent districts.

\textbf{TABLE 3: Transfer Rate in Ten Most Popular Patent Districts (2000-2014)}\textsuperscript{141}

<table>
<thead>
<tr>
<th>District</th>
<th>Transfers</th>
<th>Total Outcomes</th>
<th>Transfer Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Eastern District of Texas</td>
<td>385</td>
<td>4804</td>
<td>8</td>
</tr>
<tr>
<td>District of Delaware</td>
<td>209</td>
<td>3868</td>
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<tr>
<td>Central District of California</td>
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<td>3903</td>
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</tr>
<tr>
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<tr>
<td>Northern District of Illinois</td>
<td>133</td>
<td>2226</td>
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<tr>
<td>District of New Jersey</td>
<td>61</td>
<td>1804</td>
<td>3.4</td>
</tr>
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<td>Southern District of New York</td>
<td>75</td>
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<tr>
<td>Southern District of Florida</td>
<td>53</td>
<td>992</td>
<td>5.3</td>
</tr>
</tbody>
</table>

\textsuperscript{139} See 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)). The statute does allow the accused infringer to waive its protections, but Chief Judge Davis had already separately raised the possibility of waiver. \textit{Id.; see also} 35 U.S.C. § 299(c).


\textsuperscript{141} See Appendix 2.
Professor Janicke relies on similar data to conclude that there is “little validity” to “the perception that it was impossible, or nearly so, to get a patent infringement case transferred out of the Eastern District of Texas.”\(^\text{142}\) Professor Janicke assumes that cases brought in the Eastern District are similar for transfer purposes as those brought elsewhere.\(^\text{143}\) However, the Eastern District should have a significantly higher transfer rate than other districts. It is far less likely to satisfy the traditional convenience and public interest factors governing transfer than corporate, industrial, or technology centers like Los Angeles, Silicon Valley, and Chicago.

Transfer does appear to be harder to get from the Eastern District of Texas than elsewhere. 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.\(^\text{144}\) Studies focused on more recent years have suggested a higher success rate, though still lower than elsewhere.\(^\text{145}\)

In any event, the case law starkly illustrates the Eastern District of Texas’s resistance to transferring patent cases. Prior to 2008, the Eastern District only transferred patent cases when a case involving the same or a related patent was presently or previously pending in the transferee district.\(^\text{146}\) Beginning in December 2008, the Federal Circuit dramatically rejected the Eastern

<table>
<thead>
<tr>
<th>District of Massachusetts</th>
<th>23</th>
<th>945</th>
<th>2.4</th>
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<tr>
<td>All Significant Patent Districts (excluding E.D. Tex.)</td>
<td>1300</td>
<td>28095</td>
<td>4.6</td>
</tr>
</tbody>
</table>


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. 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. The Federal Circuit granted only one of nine mandamus petitions seeking transfer from other districts during the same period.

The Federal Circuit’s multiple mandamus orders to the Eastern District of Texas were necessitated by the district’s repeated efforts to evade or limit the transfer standard set out by the Federal Circuit. For example, in its first mandamus order in *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.”

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.” 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.

Despite the Federal Circuit’s strong statement against weighing litigation-driven tactics, 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

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147 In re TS Tech USA Corp., 551 F.3d 1315 (Fed. Cir. 2008).
151 See, e.g., In re Genentech, Inc., 566 F.3d 1338, 1342-44 (Fed. Cir. 2009) (rejecting Eastern District’s distinguishing *TS Tech* based on 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* based on fact that one defendant was headquartered in Round Rock, Texas, outside of the Eastern District and 300 miles from the courthouse in Marshall); Federal Circuit’s Transfer Decisions Forcing Plaintiffs to Re-evaluate Their Eastern District of Texas Strategy, Morrison & Foerster LLP Client Alert (Jan. 8, 2010), available at [http://www.mofo.com/resources/publications/2010/01/federal-circuits-transfer-decisions-forcing-pla](http://www.mofo.com/resources/publications/2010/01/federal-circuits-transfer-decisions-forcing-pla) (describing how Federal Circuit rejected Eastern District’s distinguishing *TS Tech* as only applying when witnesses, evidence, and parties were centralized in another forum rather than decentralized across the country).
152 *TS Tech*, 551 F.3d at 1321.
153 In re Hoffmann-La Roche Inc., 587 F.3d 1333, 1336-37 (Fed. Cir. 2009).
154 *Id.*
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. The district court declined to determine whether the patentee
opened its Longview “office” for venue or legitimate business reasons. 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.”

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. 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.”

Despite the Federal Circuit’s intervention, the Eastern District’s transfer rate has actually
decreased in recent years, from 9.2% in 2000-2007 to 7.9% in 2008-2014. The success rate on
transfer motions in the Eastern District also decreased after TS Tech. While either decrease
could have a neutral explanation in isolation, together they suggest that the Eastern District of
Texas has retreated 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. 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.”

155 In re Zimmer Holdings, Inc., 609 F.3d 1378, 1379-80 (Fed. Cir. 2010).
156 Id.
157 Id. at 1381.
158 In re Microsoft Corp., 630 F.3d 1361, 1362, 1364 (Fed. Cir. 2011).
159 Id. at 1365.
160 Data courtesy of Lex Machina and on file with authors. Data accessed September 22, 2014
161 Paul M. Janicke, Patent Venue and Convenience Transfer: New World or Small Shift, 11 N.C.
J. L & TECH. ON. 1, 24, (2009)
162 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.
(2012).
164 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.
b. Refusing to Stay Pending Reexamination

Another way that a defendant can change, at least partially, the location of a patent dispute is to file for reexamination in the Patent and Trademark Office and then seek a stay of the litigation pending the reexamination. 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.165

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.166 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.167 Fourth, and relatedly, 75% of ex parte and 95% of inter partes reexaminations resulted in narrowed or cancelled patent claims.168 Patent cancellation ends all litigation, and narrowing often has the same effect. By comparison, only 43% of validity decisions in litigation resulted in invalidity findings.169 Thus, a forum shopping patentee will look for a district in which it can be relatively confident that the litigation will not be stayed if the defendant files for reexamination.

165 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). Reexamination can be either ex parte, in which a requester (often an accused infringer) asks the Patent Office to reconsider the validity based on certain evidence and arguments but has no on-going participation in the reexamination, or inter partes, in which the requester provides on-going responses to the patentee’s arguments and amendments. Id. at 383. The America Invents Act also added a Post Grant Review procedure that allows a broader range of invalidity challenges but must be filed within nine months of patent issuance. See Rebecca D. Hess & Angela Y. Dai, Effect of New PTO Patent Review Proceedings on Concurrent Patent Disputes in U.S. District Court or the ITC: Have the Chances of a Stay Increased?, 25 No. 7 INTELL. PROP. & TECH. L.J. 3, 3-4 (2013).


167 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). Since only invalidity is at issue in reexamination, a “broadest reasonable construction” standard hurts the patentee because the increased breadth of the claims increases the chances the claim will cover what already exists or is obvious in the field.


Motions to stay pending reexamination are granted over half the time nationwide, but are granted only about one-third of the time in the Eastern District of Texas. 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%).

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. Although Congress did not mandate a stay, it indicated in the legislative history that it stays should be issued in most cases. The statute confirms this by adding an additional factor to the normal stay analysis addressing the burden of litigation and providing a rare right to interlocutory review of stay decisions. Despite the clear Congressional intent, Judge Gilstrap in the Eastern District of Texas issued the first ever denial with prejudice of a motion to stay pending a covered business method patent proceeding. In his denial, he acknowledged and rejected the conclusion of other district courts that the added burden-of-litigation factor was

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intended to make it easier for defendants to obtain a stay. The Federal Circuit subsequently reversed and ordered a stay.

7. Is the Eastern District of Texas Forum Selling?

a. Affirmative Evidence

The evidence above establishes a strong case that the Eastern District of Texas is tilting procedural rules in a pro-patentee manner to attract and retain patent cases. Would this evidence pass a hypothetical “beyond a reasonable doubt” standard? Maybe not. But we do believe this evidence would pass a hypothetical “clear and convincing” evidence standard.

The Eastern District judges acknowledge that they attempted to attract patent litigation and consciously did so through the use of procedural rules. Judge Ward, the original architect of the Eastern District’s patent docket, explained that after trying one patent case in practice he “enjoyed the intellectual challenge” and “when I came to the bench, I sought out patent cases.” Similarly, Chief Judge Davis explained that shortly after he took the bench, Judge Ward “suggested that if I wanted some interesting cases to work on, I might consider adopting these patent rules. I said I would rather handle interesting cases than uninteresting cases ... so I adopted the patent rules in standing order and started handling them. I, like Judge Ward and everybody else, thought we may have a few of these and it will be sort of an interesting thing.”

The judges even connect some of the pro-patentee procedures to these efforts, including the speedy docket, hostility to summary judgment, and resistance to transfer.

The desire to attract patent cases and the consistently pro-patentee procedures are unlikely coincidental. Some Eastern District judges acknowledge that pro-patentee procedures that can be cast in a positive light – such as an “efficient” docket or a commitment to jury trials – are intentional efforts to attract patent litigation. Other pro-patentee procedures – such as hostility to transfer and the ability to judge shop – are also likely to be intentional efforts to attract patent litigation, but, since they are less defensible, it is not surprising that Eastern District judges do not openly acknowledge that they were adopted to attract cases. Finally, if the pro-

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183 See Sections supra.
patentee procedures were simply coincidental, the Eastern District’s efforts to limit and sidestep oversight from the Federal Circuit and Congress are far more puzzling.

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. Regardless, even generally applicable procedures have been modified to particularly favor patent plaintiffs, like the need to seek permission to file summary judgment motions only in patent cases or the patent-specific carve outs in the case assignment system. Other pro-plaintiff procedures are unique to patent cases, like the resistance to stays pending PTO proceedings and non-random case assignment.

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.” The authors of that study recognize its limits. Lemley et al. only included final merits decisions by judges and excluded trial verdicts, denials of summary judgment, and other interim rulings like claim construction, motions in limine, or evidentiary rulings. The omitted decisions could create better outcomes for patentees by increasing the chances the patentee will reach a jury (which are consistently pro-patentee in the Eastern District and elsewhere), prevail at trial, or obtain a favorable settlement without a final judicial decision. Lemley et al. also acknowledge potential selection effects that make the Eastern District of Texas’s pool of cases weaker than elsewhere, such as the high percentage of cases brought by nonpracticing entities (which tend to have worse substantive outcomes).

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186 Cf. Symposium on Emerging Intellectual Property Issues, “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, 257 (2011) (statement of Judge John Ward) (suggesting that products liability cases had disappeared in the Eastern District, other civil cases were uninteresting, and patent cases were more challenging).


A more comprehensive study of outcomes in patent litigation by Allison et al. (including Professor Lemley) included denials of summary judgment and jury verdicts. Allison et al. concluded that the Eastern District of Texas was “significantly more likely to rule for the patentee.”¹⁹⁰ We consider the different results in Lemley et al. and Allison et al. to be consistent with our forum selling hypothesis. Perhaps the Eastern District is not making pro-patentee final substantive decisions (e.g., granting summary judgment for the patentee), decisions that would permit the most effective appellate oversight. Rather, it is making pro-patentee procedural decisions, like denying summary judgment, that are just as beneficial to the patentee but are better protected from appellate review.¹⁹¹

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.”¹⁹² Judge Ward has pointed to his low reversal rate to rebut claims of a pro-patentee bias.¹⁹³ 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. Selection effects based on what cases and what issues are appealed also have unknown impact. In any event, the most 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%.¹⁹⁴

b. The Shortcomings of Alternative Explanations

What could explain the Eastern District of Texas’s popularity except for forum selling? The Eastern District is not a generally busy court, as is true of the Central District of California or Southern District of New York. The Eastern District handles only 1% of all civil cases but 24% of patent cases, and patent cases account for 36% of the Eastern District’s docket compared to 2% of the nationwide civil docket.¹⁹⁵ Nor is the Eastern District home to a well-known

¹⁹⁵ See Appendix 4.
technology cluster like Silicon Valley in the Northern District of California, the pharmaceutical industry in the District of New Jersey, or the life sciences industry in the Southern District of California.\textsuperscript{196}

As previously mentioned, Eastern District judges and defenders of the Eastern District in practice and academia point to neutral values like predictability, consistency, expertise, specialized rules, and great “customer service.”\textsuperscript{197} 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.\textsuperscript{198} As shown in Table 4, the Eastern District had only 2.5% of declaratory judgment filings from 2008-2013, despite having 17.4% of all patent cases. Declaratory judgment actions were less than 1% of patent cases filed in the Eastern District, far lower than the 6.3% nationwide total.

\begin{footnotesize}
\begin{enumerate}
\item[198] This may be in part due to personal jurisdiction doctrine, which makes it difficult for an accused infringer to seek a declaratory judgment in a district other than the patentee’s home district. See Megan M. LaBelle, \textit{Patent Litigation, Personal Jurisdiction, and the Public Good}, 18 GEO. MASON L. REV. 43 (2010)
\end{enumerate}
\end{footnotesize}
TABLE 4—PERCENTAGE OF ALL PATENT CASES AND DECLARATORY JUDGMENT ACTIONS, 2008-2013199

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<tr>
<td>Eastern District of Texas</td>
<td>17.4%</td>
<td>2.5%</td>
<td>0.9%</td>
</tr>
<tr>
<td>District of Delaware</td>
<td>15.2%</td>
<td>8.0%</td>
<td>3.3%</td>
</tr>
<tr>
<td>Central District of California</td>
<td>8.2%</td>
<td>9.8%</td>
<td>7.5%</td>
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<tr>
<td>Northern District of California</td>
<td>5.4%</td>
<td>13.9%</td>
<td>16.2%</td>
</tr>
<tr>
<td>Northern District of Illinois</td>
<td>4.9%</td>
<td>2.8%</td>
<td>3.6%</td>
</tr>
<tr>
<td>District of New Jersey</td>
<td>4.1%</td>
<td>4.3%</td>
<td>6.5%</td>
</tr>
<tr>
<td>Southern District of New York</td>
<td>3.3%</td>
<td>3.8%</td>
<td>7.3%</td>
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<tr>
<td>Southern District of California</td>
<td>2.8%</td>
<td>2.7%</td>
<td>5.9%</td>
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<tr>
<td>Southern District of Florida</td>
<td>2.3%</td>
<td>1.6%</td>
<td>4.6%</td>
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<tr>
<td>District of Massachusetts</td>
<td>2.0%</td>
<td>2.7%</td>
<td>8.0%</td>
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<tr>
<td>Nationwide Total</td>
<td></td>
<td></td>
<td>6.3%</td>
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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 sought to create expert patent judges in thirteen districts across the country. Likewise, patent local rules have now been adopted by one-third of all federal district courts and hardly distinguish the Eastern District of Texas in a way that would justify its continued popularity.200

Finally, as many note,201 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.202 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.

199 Data courtesy of Lex Machina and on file with authors.
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.

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

Forum selling runs counter to conventional wisdom about judges. Judges normally are seen as trying to reduce their caseload, not attract more cases. More sophisticated analysis of judicial motivations recognizes that, in addition to reducing workload, judges are motivated by prestige, influence and reputation within the legal community, promotion, personal interest, and ideological preferences. More accurately, “procedural rules permit judges to dispose of unwanted cases yet still allow them to utilize their substantive knowledge in those areas in which they have particular expertise or interest.”

But judges are thought to dislike patent cases. 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. Without direct access to the judges’ mind, a definite conclusion is impossible. However, the incentives to have initially attracted patent litigation may have been different than for the subsequent efforts to retain it. Both the general importance of patent litigation today and the extreme concentration of patent cases in a single district were impossible to predict in the early 2000s. As discussed below, certain incentives that derive from these factors (e.g., revitalization of the local economy or retirement opportunities for judges) are unlikely to have caused the initial forum selling. But they may be very relevant to efforts to retain the docket once it existed. 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.


Additionally, 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.” 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.”

Tort reform by the Texas legislature eliminated complex products liability cases from the Eastern District’s docket. Because it lacks major cities, corporations, or technology centers, the district did not have many other complex cases. Patent cases diversified the caseload and offered more interesting and challenging work. Or as Chief Judge Davis put it, “I would rather handle interesting cases than uninteresting cases.” 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 acknowledged a desire to attract patent cases. Their heavy patent docket resulted in a reduced docket for these judges of other civil cases they deemed less desirable.

2. Prestige and Reputation

An alternative, or complementary, explanation for the Eastern District of Texas’s forum
selling is that the judges enjoy the prominence that comes from being the premier forum for
patent litigation. The district and its judges have been discussed in *The New York Times*,213
the Supreme Court,214 and the halls of Congress.215 The judges, especially Judge Ward, are sought-
after speakers at patent events throughout the country.216 These are not the type of opportunities
normally available to judges in a rural district.

Judges Ward and Davis began their efforts to attract patent cases shortly after joining the
bench,217 and ambitious new judges in the early 2000s easily could have seen patent litigation as
a rising field in which they could make their names. Some suggest that Judge Ward “loves the
attention” and “believes ‘most if not all patent cases should be heard in his court.’”218 Of course,
it is possible that Judge Ward and the other Eastern District judges truly believe they are better at
handling patent cases than other district judges. But they may also enjoy the prominence that the
Eastern District’s patent docket provides.

213 Julie Creswell, *So Small a Town, So Many Patent Suits*, THE NEW YORK TIMES (Sept. 24,
2006)
214 Xuan-Thao Nguyen, *Justice Scalia’s “Renegade District”: Lessons for Patent Law Reform*,
83 TUL. L. REV. 111, 112 (2008) (describing comments by Justice Scalia during Supreme Court
oral argument).
statements of Senator Kyl during debate of anti-joinder provision of AIA).
216 See *Ward at center of flight-plan change in Texas ‘rocket docket’*, SOUTHEAST TEXAS
Association Event: Strategic Use of Post-Grant Proceedings in Light of Patent Reform (Oct. 11,
(Hon. T. John Ward, speaker); Sid Venkatesan, Report from the ND Cal’s Special Patent
Program Judges Fogel, Illston, Davis, and Robinson (Feb. 11, 2014), available at
blogs.orrick.com/norcal-ip/2014/02/11/report-from-the-nd-cals-special-patent-program-judges-
foleg-illston-davis-and-robinson/ (mentioning Judge Leonard Davis as speaker at event in
Northern District of California).
and “rocket docket,”* THE DALLAS MORNING NEWS, March 26, 2006, available at
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, 256 (2011) (statement of
Judge Davis)
218 See *Ward at center of flight-plan change in Texas ‘rocket docket’*, SOUTHEAST TEXAS
But notoriety and prestige are not the same thing. The Eastern District was called a “renegade jurisdiction” in the Supreme Court,\(^{219}\) Congress has been highly critical of the Eastern District’s performance, and popular press coverage has been mainly unflattering.\(^ {220}\) Unless the judges enjoy playing the villain or only care about their reputation among a limited section of the public or bar (a possibility addressed in the next section), the desire for prestige or notoriety is unlikely to have sustained forum selling efforts for nearly a decade in the face of opposition from Congress and the Federal Circuit.

### 3. Patent Litigation as Economic Development

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.\(^ {221}\) 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.\(^ {222}\) Local lawyers in the late 1990s and early 2000s were looking for new areas in which there was more business and money.\(^ {223}\) The patent litigation boom in the Eastern District of Texas filled that role perfectly, allowing many local lawyers to keep earnings steady by transitioning their practices into patent litigation.\(^ {224}\)

Some have suggested 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.\(^ {225}\) Regardless, the practices in the Eastern District have benefitted local lawyers making


\(^{220}\) Xuan-Thao Nguyen, *Justice Scalia’s “Renegade District”: Lessons for Patent Law Reform*, 83 TUL. L. REV. 111, 112 (2008) (“It has become a fashionable practice lately for lawyers of major corporations and national newspapers to join in the chorus, criticizing the United States District Court for the Eastern District of Texas (EDTX) for its patent rocket-docket with ‘speedy judges.’”).


\(^{225}\) See Julie Creswell, *So Small a Town, So Many Patent Suits*, THE NEW YORK TIMES (Sept. 24, 2006) (quoting leading local lawyer Sam Baxter as attributing Eastern District’s patent litigation
the switch to patent litigation. Experienced patent litigants consider it necessary to have a lawyer from the specific town in which the case is pending (e.g., Tyler or Marshall) as co-counsel with national patent counsel, not just a lawyer from Dallas, Houston, or Austin that 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. Similarly, 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.” Judges Gilstrap and Payne have said that they “don’t think national firms utilize local counsel at the trials as much as they should.”

Even if one accepts that an increase in litigation could benefit the local bar, it still may be hard to believe that litigation could be the principal industry of a region, just like tourism or mining. But that seems to be the case in east Texas. 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.” 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 boom to fact patent litigation was where the money was and lack of good lawsuits for local lawyers).

Inn bought a subscription to Pacer, the docket system for the federal courts, to cold-call lawyers scheduled for trial and sell them rooms.232 The owner of a wine and specialty store attributed one-sixth of her sales to patent litigators, describing them as “definitely a huge asset.”233 And multiple local entrepreneurs renovated old buildings to rent office space and “war rooms” to visiting lawyers in town for patent hearings and trials.234

Perversely, the Federal Circuit’s transfer decisions, and the Eastern District’s resistance to them, have further benefitted the local economy (beyond just retaining litigation). 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.235 Unsurprisingly, the Eastern District has endorsed these efforts, despite inconsistency with Federal Circuit precedent and push back from the Federal Circuit.

Was economic development for local lawyers and businesses part of the initial plan of Judges Ward and Davis to attract patent cases? It is doubtful. The magnitude of the economic benefits would have been difficult to foresee in the early 2000s.236 Patent litigation was just beginning to have its current prominence. Even the most popular district then accounted for only

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236 See Symposium on Emerging Intellectual Property Issues, “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, 256 (2011) (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.”).
10% of all patent litigation, far less than the quarter of patent litigation now concentrated in the Eastern District of Texas. 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. Courtrooms were refurbished with the latest technology. 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. The judges of the Eastern District – long-time residents of the towns in which they sit and former colleagues of many of the local lawyers – naturally would want to maintain the patent docket that had brought so much to their communities.

4. Patent Cases As Personal Gain

Finally, the judges in the Eastern District of Texas may have a personal stake in attracting patent litigation, beyond simply more interesting work or community development, such as preserving the district’s judgeships, offering economic benefits for family and friends, and creating profitable retirement opportunities for themselves. Preservation of the district’s judgeships may be more institutional self-interest than personal self-interest. In 2002, Congress authorized a temporary judgeship for the Eastern District that would expire after ten years (with the first vacancy thereafter not being filled). In recent years, Congress twice extended this temporary judgeship, so that it now expires in 2015. Moreover, the Judicial Conference requested additional new judgeships for the Eastern District.

244 See http://www.fjc.gov/history/home.nsf/page/courts_district_tx_sc.html.
District.\textsuperscript{245} In doing so, it specifically cited the district’s high caseloads,\textsuperscript{246} which result from patent litigation. In response, bills proposed in Congress would make the Eastern District’s temporary judgeship permanent \textit{and} create two new permanent judgeships.\textsuperscript{247} Thus, without the patent litigation boom, the Eastern District would have seven judgeships today; as a result of it, the district could have ten judgeships in the near future.

Indirectly, the patent litigation boom may have financially benefitted some of the judges’ family and friends. For example, both Judge Ward and Chief Judge Davis have sons who practice law in the Eastern District of Texas and focus on patent litigation.\textsuperscript{248} 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.\textsuperscript{249} To be fair, Judge Ward’s son is a magna cum laude graduate of Texas Tech Law School and a former Fifth Circuit law clerk.\textsuperscript{250} But it is hard to imagine his practice, and that of Judge Davis’s son, have not benefitted from the patent litigation boom in the Eastern District and their fathers’ prominence.\textsuperscript{251} Others close to the Eastern District judges also may have benefitted,\textsuperscript{252} 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. Although pecuniary interest is a commonly discussed motivating factor in most lines of work, such analysis of federal judges is rare, because judges of the same rank are paid the same salary, have almost no opportunity to obtain additional compensation during their tenure, and have little chance for promotion. Similarly, “[p]romotion to jobs outside the judiciary is discouraged” by backloaded judicial compensation (lower salaries but full salary with cost of living increases for

\begin{footnotesize}
\begin{enumerate}
\item See “Senators Coons, Leahy introduce bill to create 91 new judgeships,” (July 30, 2013), \url{http://www.coons.senate.gov/newsroom/releases/release/senators-coons-leahy-introduce-bill-to-create-91-new-judgeships}.
\item See \url{http://www.bdavisfirm.com/}; \url{http://www.wsfirm.com/attorneys/johnny-ward/}.
\item Josh Gerstein, \textit{Texas Judge’s Son Withdraws from Lawsuit in Fast-Running Odometer Case}, \textit{The New York Sun} (Aug. 29, 2007), available at \url{www.nysun.com/national/texas-judges-son-withdraws-from-lawsuit-in-fast/61550/}
\item Julie Creswell, \textit{So Small a Town, So Many Patent Suits}, \textit{The New York Times} (Sept. 24, 2006) (“In one patent case that eventually was settled, the plaintiffs hired an accountant whose clients included Judge Ward.”).
\end{enumerate}
\end{footnotesize}
Nevertheless, due to the significant amount of money to be made in patent litigation, lucrative opportunities exist for judges with expertise in patent law. For example, several Federal Circuit judges have retired and entered private practice in recent years, rather than take senior status.

The same is true of the Eastern District of Texas judges. 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.” 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. 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.” And 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.”

Having two district judges, or 25% of the Eastern District’s allotted Article III judgeships (plus a magistrate judge), retire into private practice in less than two years is highly unusual. By comparison, between 1970 and 2009, only 80 Article III judges resigned for any reason and only 53 in situations remotely comparable to the Eastern District judges. In no decade did judicial resignations exceed 4% of allotted judgeships.

254 Judges Michel, Gajarsa, and Rader have done so.
256 Owen Byrd & Brian Howard, *2013 Patent Litigation Year in Review*, at 7, LEX MACHINA. Several Delaware law firms also had more open cases than Ward & Smith. *Id.*
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. Patent litigation was not the big-money industry it has become, and the idea that nearly a quarter of patent litigation would be concentrated in a single district would have been fanciful. 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 wanted to keep these opportunities open – whether or not they ever ultimately pursue them – by retaining the district’s popularity for patent litigation.

D. Forum Selling Beyond the Eastern District of Texas

The Eastern District of Texas’s forum selling seems to confirm Justice Scalia’s colorful description of the district as a “renegade jurisdiction.” However, the Eastern District may actually be a trailblazer, not a renegade, in its efforts to attract patent cases.

1. A Buyer’s Market?: An Overview of Efforts to Attract Patent Cases

There are four potential stages to judicial efforts to attract litigation: (1) expressing a receptiveness to a particular type of case and encouraging the filing of such cases in the forum; (2) adopting rules and procedures that arguably improve the quality of litigation, such as by increasing efficiency (e.g., patent local rules) or expertise (e.g., participating in the Patent Pilot Program); (3) distorting procedural rules in a pro-plaintiff manner; and (4) resisting and undermining efforts by appellate courts and legislatures to correct the pro-plaintiff distortions.

District judges are fairly open about their desire to attract patent cases. The Chief Judge of the Western District of Pennsylvania hoped the “combination of specialized patent judges and rules will continue to attract more out-of-state cases to the area.” Likewise, a Southern District of California judge said that the district participated in the Patent Pilot Program to bring more patent cases to San Diego.

Numerous districts have taken affirmative steps to attract patent litigation, particularly by adopting local patent rules and/or participating in the Patent Pilot Program. Thirty-one districts,

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264 Judge Dana Sabraw made these comments during a panel at the Patent Conference 4 at the University of San Diego Law School on April 4, 2014. See http://www.sandiego.edu/law/school/events/detail.php?focus=46153. Greg Reilly was in the audience and personally heard this statement.
nearly one-third of all federal district courts, have adopted specialized local rules to manage patent cases.265 Some were already popular districts that wanted to enhance consistency, uniformity, and predictability within the district.266 But others did so in the hopes of attracting more patent cases.267 Why else would the District of Idaho or Eastern District of Washington adopt specialized local rules for their two patent cases per year?268

The same is true of the Patent Pilot Program. Participating districts were chosen either because they were one of the top 15 patent districts in 2010 or because they expressed a particular interest in patent cases (and adopted patent local rules).269 That means that the six participating districts outside the top 15 – the Eastern District of New York, Western District of Pennsylvania, District of Maryland, District of Nevada, Northern District of Texas, and Western District of Tennessee – expressly signaled a desire for more patent litigation.270

While the first two stages of forum selling – advertising interest in patent cases and enacting patent local rules – are common in patent litigation, it is less clear how many, if any, other districts have tilted procedures in the patentee’s favor to attract cases.271 Perhaps this is why the Eastern District of Texas has maintained its dominant position despite increasing competition. It goes further than any other court. The following sections consider this question.

271 Cf. John C. Connell et al., 3 Reasons NJ May Be New IP Venue Of Choice, Law360 (Jan. 30, 2009) (suggesting that District of New Jersey’s patent local rules “giv[e] plaintiffs unique procedural advantages which facilitate more expeditious resolution” compared to other patent local rule jurisdictions”).
2. Regretful Forum Sellers? The Eastern District of Virginia and the District of Delaware

The Eastern District of Virginia and the District of Delaware are obvious places to start. The Eastern District of Virginia was the focus of patent forum shopping before the rise of the Eastern District of Texas, while the District of Delaware has rivaled the Eastern District of Texas in popularity in recent years. Both may have initially sought to attract patent litigation but subsequently regretted the decision and altered procedural rules to discourage patentees from filing in their districts. This reversal is further evidence of the way district courts can, and do, actively participate in forum choice.

a. Eastern District of Virginia

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. 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. The Eastern District of Virginia also offered the patentee early and quick discovery and a divisional assignment system that increased predictability of the judge. Eastern District of Virginia judges promoted their approach to patent litigation to practitioners and touted it as a way to reduce litigation costs. Yet, even at its height in the late 1990s, the Eastern District of Virginia had a high transfer rate and worse outcomes for patentees than many other leading districts. Thus, unlike the Eastern District of Texas, the Eastern District of Virginia may have limited its competition for patent cases to steps that arguably improve adjudication, like increasing efficiency.

In any event, as 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.  

b. District of Delaware

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. As shown in Table 5, 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.

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279 See Kimberly A. Moore, *Forum Shopping in Patent Cases: Does Geographic Choice Affect Innovation?*, 79 N.C. L. REV. 889, 903-906 (2001). Surprisingly given its pro-patentee tendencies, Delaware also is popular among accused infringers seeking declaratory judgments. *See supra* Table 4. There are potentially neutral explanations for Delaware’s popularity, such as the ease of establishing personal jurisdiction because Delaware is the state of incorporation for most major companies.
TABLE 5: Share of Total Patent Cases of Top 10 Districts, 2007-2013

<table>
<thead>
<tr>
<th>District</th>
<th>% of Total Patent Cases 2007-2011</th>
<th>% of Total Patent Cases 2012-2013</th>
<th>Change</th>
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<tbody>
<tr>
<td>Eastern District of Texas</td>
<td>11.3%</td>
<td>23.8%</td>
<td>+12.5</td>
</tr>
<tr>
<td>District of Delaware</td>
<td>9.2%</td>
<td>20.3%</td>
<td>+11.1</td>
</tr>
<tr>
<td>Central District of California</td>
<td>9.3%</td>
<td>7.8%</td>
<td>-1.5</td>
</tr>
<tr>
<td>Northern District of California</td>
<td>6.1%</td>
<td>4.4%</td>
<td>-1.6</td>
</tr>
<tr>
<td>Northern District of Illinois</td>
<td>5.7%</td>
<td>4.0%</td>
<td>-1.7</td>
</tr>
<tr>
<td>District of New Jersey</td>
<td>5.9%</td>
<td>2.6%</td>
<td>-3.3</td>
</tr>
<tr>
<td>Southern District of New York</td>
<td>4.1%</td>
<td>2.4%</td>
<td>-1.7</td>
</tr>
<tr>
<td>Southern District of California</td>
<td>2.4%</td>
<td>3.2%</td>
<td>+0.8</td>
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<tr>
<td>Southern District of Florida</td>
<td>1.9%</td>
<td>2.8%</td>
<td>+0.9</td>
</tr>
<tr>
<td>District of Massachusetts</td>
<td>2.3%</td>
<td>1.8%</td>
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The District of Delaware has many of the indicators of forum selling: a low summary judgment rate, a high percentage of cases resolved by trial (the highest in the country), a quick time to trial, and resistance to changes of forum. The district’s small size – four allotted judgeships, with a vacancy for most of the past decade – provides significant judicial

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280 Percent of Total Patent Cases calculated using data from Table 1.
281 See Appendix 2.
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 benefits patentees by increasing uncertainty and encouraging settlement. Ultimately, patentees do statistically significantly better in the District of Delaware than elsewhere, both in terms of overall case outcomes and final decisions by judges.

Delaware’s pro-patentee procedures do not appear to be coincidental. As early as 2000, the district had an Intellectual Property Advisory Committee where the judges met with outside and in-house counsel to discuss how patent cases could be handled more efficiently. The judges acknowledged that “we tell lawyers that we find the cases interesting and enjoy doing them.” Likewise, commentators suggested the district “sought to be an attractive district for patent litigation by providing expeditious dispositions and more judicial pretrial involvement than many other districts are able to provide.” Delaware, like the Eastern District of Texas, may have resisted Federal Circuit oversight that threatened its patent docket. The district often treated the defendant’s incorporation in Delaware as dispositive of transfer motions, effectively preventing transfer for most large companies. The Federal Circuit rejected this approach as inconsistent with Supreme Court precedent. In subsequent decisions, Delaware judges limited the impact of the Federal Circuit’s decision by giving incorporation in Delaware “substantial weight.”

Finally, many of the motives for forum selling identified for the Eastern District of Texas could apply to the District of Delaware. As a small district with an active local bar and substantial connections between bench and bar, there may be pressure on judges to attract and

286 See Frederick L. Cottrell III et al., Nonpracticing Entities Come to Delaware, FEDERAL LAWYER (Oct./Nov. 2013).
292 See In re Link_A_Media Devices Corp., 662 F.3d 1221 (Fed. Cir. 2011).
retain local patent work. 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. 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.

In the face of soaring patent dockets (and perhaps the changing composition of the bench), judges in Delaware now seem to regret their past efforts to attract patent litigation. Transfers and stays pending reexamination appear to be more easily obtained in Delaware than before. 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. 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. Patentees have gotten the message. Patent filings in Delaware were down 34% through the start of September 2014 compared to the same time period in 2013. The decline began in March 2014, when Judge

297 See Frederick L. Cottrell III et al., Nonpracticing Entities Come to Delaware, FEDERAL LAWYER 64-65 (Oct./Nov. 2013).
Robinson implemented the Patent Study Group’s recommendations, with a further decline after Judge Stark implemented the recommendations in July 2014. 300

3. Failed or Mistaken Forum Sellers? The Western District of Pennsylvania and Western District of Wisconsin

It is hard not to have a little sympathy for the Western District of Pennsylvania. The district has done everything to advertise its desire for patent litigation short of cold-calling patentees and inviting them to file. The chief judge is on record as saying that the district wants to attract out-of-state patent litigation to boost its prestige. 301 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. 302 In doing so, the district “was making a statement that it wanted more patent cases.” 303 Likewise, the Western District pursued, and was chosen for, participation in the Patent Pilot Program despite once again ranking 34th in number of patent cases in 2010, this time with only 16. 304 Again, the objective was to generate more patent litigation. 305 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. 306

306 From April 1, 2012 through March 31, 2013 (the most recent time comparative data is available), 38 patent cases were filed in the Western District out of 2686 total civil cases. Patent case filings courtesy of Lex Machina and on file with authors. Total civil case filings 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:
Those associated with the Western District of Pennsylvania provide several motives for forum selling. First, there is the reputation and prestige cited by the chief judge. Second, more patent cases would provide employment opportunities for area lawyers as local counsel even in cases filed by large out-of-state firms. Third, 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. 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.

These efforts 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, the district’s patent filings have remained steady for the past decade:


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The story seems similar in the Western District of Wisconsin. For years, Madison was seen as the next Marshall, Texas, portrayed as catering to patentees. Proponents pointed to its

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312 See Allen A. Arnsten & Jeffrey A. Simmons, *The Tundra Docket: Western District of Wisconsin*, IP LAW360 (Mar. 12, 2008), available at [http://www.foley.com/files/Publication/fd6105c7-b684-4b77-a854-0483dbc02d9/Presentation/PublicationAttachment/b02b1718-129b-47db-a0ef-064873ebf4ec/IPLaw360_3-12-08.pdf](http://www.foley.com/files/Publication/fd6105c7-b684-4b77-a854-0483dbc02d9/Presentation/PublicationAttachment/b02b1718-129b-47db-a0ef-064873ebf4ec/IPLaw360_3-12-08.pdf).
“rocket docket” (one of, if not the, fastest in the country) and some evidence of pro-patentee outcomes.\textsuperscript{313} The district also had a high percentage of cases reaching trial\textsuperscript{314} and significant predictability in judge assignments resulting from only two active judgeships.\textsuperscript{315} Finally, Western District judges made some public comments suggesting hostility to transfer.\textsuperscript{316} Yet, despite predictions, the Western District of Wisconsin has no more patent cases now than it did in the mid-2000s, though with some fluctuations:

\textbf{TABLE 5: W.D. Wis. Patent Cases, 2004-2013\textsuperscript{317}}

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<td>33</td>
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<td>40</td>
<td>25</td>
<td>38</td>
<td>44</td>
<td>31</td>
<td>26</td>
</tr>
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</table>

Why haven’t western Pennsylvania and western Wisconsin attracted more patent litigation? Here, the stories diverge somewhat. 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. Nothing obvious distinguishes western Pennsylvania from any other district. From 2008-2013, it was slower in time to termination than all but two of the 25 most popular patent districts and slower in time to trial (though with only seven trials) than all but six of the 25 most popular districts.\textsuperscript{318} It granted summary judgment at a slightly higher rate than average,\textsuperscript{319} to the benefit of accused infringers. Patentees won only 27\% of cases decided

\textsuperscript{313} See Allen A. Arnsten & Jeffrey A. Simmons, \textit{The Tundra Docket: Western District of Wisconsin}, IP LAW360 (Mar. 12, 2008), available at http://www.foley.com/files/Publication/fd6105c7-b684-4b77-a854-0483dbcc02d9/Presentation/PublicationAttachment/b02b1718-129b-47db-a0ef-064873ebf4cc/IPLaw360_3-12-08.pdf; see also Appendix 1.


\textsuperscript{315} See Allen A. Arnsten & Jeffrey A. Simmons, \textit{The Tundra Docket: Western District of Wisconsin}, IP LAW360 (Mar. 12, 2008), available at http://www.foley.com/files/Publication/fd6105c7-b684-4b77-a854-0483dbcc02d9/Presentation/PublicationAttachment/b02b1718-129b-47db-a0ef-064873ebf4cc/IPLaw360_3-12-08.pdf.

\textsuperscript{316} See Eileen McDermott, \textit{The Birth of a Rocket Docket}, MANAGING IP at 20, 22 (Nov. 2008) (“[S]omething that we do that is helpful to patent lawsuits is that we allow cases to remain here even in the lack of some actual connection to the district. . . . [O]ur judges have the philosophy for every case that they presumptively will keep it.”); Megan Woodhouse, Note, \textit{Shop ‘til You Drop: Implementing Federal Rules of Patent Litigation Procedure To Wear Out Forum Shopping Patent Plaintiffs}, 99 GEO. L.J. 227, 243-244 (2010) (describing how Judge Crabb declined to follow Federal Circuit mandamus decision on transfer on the technically correct, but questionable, ground that the Federal Circuit was applying Fifth Circuit law).

\textsuperscript{317} Courtesy of Lex Machina: https://law.lexmachina.com/court/table#Patent-tab.

\textsuperscript{318} See Appendix 1.

\textsuperscript{319} The Western District of Pennsylvania’s summary judgment rate was 3.6\%, right in the middle of the top 25 most popular patent districts. See Appendix 2.
on the merits in the Western District of Pennsylvania,\textsuperscript{320} comparable to the national average of 26%.\textsuperscript{321} The only obvious advantage to patentees is the Western District’s transfer rate, which was lower than all but four of the 25 most popular patent districts.\textsuperscript{322} Of course, there is little reason for a patentee to want to stay in western Pennsylvania if it is not going to do better there.

If western Pennsylvania demonstrates the need to offer patentees an actual advantage to attract patent litigation, the experience in western Wisconsin shows that speed and efficiency are not enough. Defendants do fine in the Western District of Wisconsin. Summary judgment, a favorite defense tool, is twice as common in western Wisconsin (an astronomical 11%) than in any other of the 25 most popular patent districts.\textsuperscript{323} Patentees win 25% of cases decided on the merits,\textsuperscript{324} about the same as the national average of 26%.\textsuperscript{325} And, contrary to some suggestions, defendants sued in western Wisconsin are not stuck there: the Western District of Wisconsin has a 13% transfer rate, the second highest among the 25 most popular patent districts behind only the (anti-forum selling) Eastern District of Virginia.\textsuperscript{326}

Western Wisconsin may not actually have been trying to forum sell. The district has taken no obvious steps to attract patent litigation. It has not adopted patent local rules, is not participating in the Patent Pilot Program, and has not had judges making public statements about the desire for patent litigation. To the contrary, long-time Magistrate Judge Crocker said that “we didn’t ask the patent suits to come here and we’re not going to do anything that treats them differently from other lawsuits. The last thing we want to do is encourage people to come here who don’t belong here anyway.”\textsuperscript{327} The mistaken perception of western Wisconsin as friendly to patentees probably arises from an overemphasis on the importance of a “rocket docket,” as well as the self-interested efforts of local lawyers who portray the Western District of Wisconsin as more receptive to patent litigation than it actually is.\textsuperscript{328}

Ultimately, the Eastern District of Texas appears to have maintained its popularity because it alone has the motivation and willingness to continue to bend in a pro-patentee direction along a variety of dimensions – speed, summary judgment, discovery, transfer, etc. As

\begin{enumerate}
\item See Pauline M. Pelletier, \textit{The Impact of Local Patent Rules on Rate and Timing of Case Resolution Relative to Claim Construction: An Empirical Study of the Past Decade}, 8 J. BUS. & TECH. L. 451, 483 (2013). The same study shows a 38% win rate for patentees in the Eastern District of Texas and a 43% win rate in the District of Delaware. \textit{Id.}
\item John Allison et al., \textit{Understanding the Realities of Modern Patent Litigation}, 92 TEX. L. REV. 1769, 1787 (2014).
\item See Appendix 2.
\item See Appendix 2.
\item John Allison et al., \textit{Understanding the Realities of Modern Patent Litigation}, 92 TEX. L. REV. 1769, 1787 (2014).
\item See Appendix 2.
\item Eileen McDermott, \textit{The Birth of a Rocket Docket}, MANAGING IP at 20, 22 (Nov. 2008).
\item Eileen McDermott, \textit{The Birth of a Rocket Docket}, MANAGING IP at 20, 22 (Nov. 2008) (quoting Magistrate Judge Crocker as saying that the Western District’s favorability to patentees is “part of what local counsel are spreading”).
\end{enumerate}
a result, the district’s share of patent litigation continues to grow, up from 25% in 2013 to 28% so far in 2014.329

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 Courts330

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 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….

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. So, 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 pendant subject matter jurisdiction, which has been the subject of both Supreme Court cases and federal legislation, pendent personal jurisdiction has been analyzed in only a few lower court decisions. Even those decisions focus on situations where a plaintiff who brought one claim under a federal statute authorizing nationwide jurisdiction joined a related claim for which personal jurisdiction was lacking because it was be based on narrower venue or jurisdictional statutes. Only one appellate court has explicitly approved personal jurisdiction over claims by out-of-state plaintiffs based on the fact that in-state plaintiffs brought related claims.

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331 Scruggs’s comments are quoted slightly differently in different sources. The quote above is based on Civil Justice Forum No. 41 April 2003. A less complete, but possibly more accurate, quote can be found in Peter J. Boyer, The Bribe, The New Yorker (May 19, 2008).


333 Bristol-Myers Squibb v. Superior Court of San Francisco County, 2014 Westlaw 3817538 (Cal. App. June 30, 2014). That case involved a product liability lawsuit by California and non-California plaintiffs against a defendant not subject to general jurisdiction in California. The court held that specific jurisdiction existed because the claims asserted by the non-California
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.”334 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.335 In 2012, the court modified its procedures to curb reverse bifurcation and restrict consolidation. Soon thereafter, filings dropped by seventy percent.336

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

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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.337

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

future purchases of GM trucks.\textsuperscript{338} The Third Circuit also criticized the plaintiffs’ lawyers’ $9.5 million fee.\textsuperscript{339} 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 was approved.\textsuperscript{340}

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.\textsuperscript{341} In addition, while the Class Action Fairness Act curbs state court jurisdiction over class actions, it leaves untouched state court jurisdiction over mass torts brought as joined claims.\textsuperscript{342}

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

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\textsuperscript{338} \textit{In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation,} 55 F. 3d 768 (3\textsuperscript{rd} Cir. 1995)
\textsuperscript{339} Id at 819-22
\textsuperscript{340} \textit{White v. General Motors,} 718 So. 2d 480 (recounting procedural history, but reversing and remanding approval of settlement); \textit{White v General Motors,} 775 So. 2d 492 (Ct. App. La. 2000) (describing approval of settlement on remand, but adjudicating some objections by GM as to implementation of settlement); \textit{White v. General Motors,} 782 So. 2d 9 (Ct. App. La. 2001) (resolving some additional objections as to implementation of settlement); \textit{White v. General Motors,} 835 So. 2d 892 (Ct. App. La 2002) (resolving additional objections as to implementation of settlement).
\textsuperscript{341} Plaintiffs do seem to be forum shopping among federal courts post-CAFA. According to one commentator, “class action plaintiffs have flocked to favored districts, perhaps most notably the Central and Northern districts of California, and all but fled from others.” David L. Balser et. al., “Interlocutory Appeal of Class Certification Decisions Under Rule 23(f): An Untapped Resource,” 83 U.S. Law. Week 703, 704 (November 11, 2014). Nevertheless, there is no evidence that Central and Northern districts of California are actively trying to attract cases. \textsuperscript{342} 28 U.S.C. 1369 allows removal of some joined cases, but only when the dispute “arises from a single accident, where at least 75 natural persons have died in the accident at a discrete location.” 28 USC 1369(a). It thus applies to transportation accidents, but not to product liability cases.
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malpractice rather than class actions or mass torts. 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 fairly, a small number of judges in a handful of districts has been able to exercise disproportionate influence by twisting the law to favor plaintiffs who have the power to choose their courts and thus bestow benefits on the judges, the local bar, and nearby economy more generally.

B. Bankruptcy

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

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.

Delaware’s success sucked the most lucrative part of the bankruptcy business out of the rest of the country. Bankruptcy lawyers in other cities pressured their courts to do whatever was necessary to keep cases at home. Many of the courts responded by copying the practices that had produced the Delaware disaster, thus producing mini-disasters of their own….

[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.344

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 cases assignment procedures that allowed parties to shop for judges.345 Like the Eastern District of Texas, Delaware bankruptcy judges fiercely resisted venue transfers,346 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.347 In addition, the motives to attract cases were remarkably similar: increased status and power for the judges and more business for local lawyers.348 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.”349 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.”350 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.351 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.

344 Lynn LoPucki, Courting Failure, 254-56 (2005)
345 Id. at 81-82.
346 Id at 92-94.
347 Id at 67
348 Id at 20-21, 95.
349 Id at 17.
350 28 USC 1408.
351 LoPucki, Courting Failure, 31-33.
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.”

The reappointment process for bankruptcy judges, like the fact that state court judges in “magic jurisdictions” are elected, gives bankruptcy judges an additional reason to attract cases and thus keep the bar happy.

The wide range of decisions made by bankruptcy judges also gives them an extremely broad set of tools with which to attract cases, including awarding high fees to bankruptcy lawyers, paying lawyers every thirty days rather than according to the 120-day default set by the Bankruptcy Code, allowing managers to retain their jobs by not appointing bankruptcy trustees to run companies, paying retention bonuses to corporate executives, releasing executives from personal liability, making it more difficult for corporations and their shareholders to sue executives for fraud, extending the period in which management has the exclusive right to propose a reorganization plan, exempting the company’s going-out-of-business sales from state and local taxes, confirming reorganization plans “without serious examination or scrutiny,” and approving asset sales without proper auction procedures in order to facilitate purchase by insiders at low prices.

Delaware adopted such practices first. 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). 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. 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. Nevertheless, the fact that two courts now dominate

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352 Id at 21.
353 Id at 140-43.
354 Id at 126, 142.
355 Id at 143-45.
356 Id at 151-57.
357 Id at 133, 143-51, 180.
358 Id.
359 Id at 40, 69.
360 Id at 21.
361 Id at 103-7, 157-63.
362 Id at 167-80.
363 Id at 124-32.
364 Id at 133-34.
365 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”).
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. In the 1990s, when Delaware starting attracting big bankruptcy cases, there was only a single bankruptcy judge in the district. Even when a second bankruptcy judge was appointed, there was too much work for just two judges to handle themselves. Nevertheless, 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.\(^{366}\) 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.\(^{367}\)

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 1991-96, when most large corporations filed for bankruptcy in Delaware, fifty-four percent of firms that reorganized in Delaware failed within five years, compared to thirty-one percent in New York and only fourteen percent in other courts.\(^{368}\) 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.”\(^{369}\)

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.”\(^{370}\)

Others, however, went further in defending Delaware. Robert Rasmussen, although acknowledging the existence of competition,\(^{371}\) questioned the empirical basis of LoPucki’s claim that Delaware’s practices led reorganized firms to fail more often. He argued that one

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\(^{366}\) Id at 93-96.
\(^{367}\) Id at 95
\(^{368}\) Id at 112-17.
\(^{369}\) Id at 122.
\(^{370}\) Id at 17
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.\(^{372}\)

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.”\(^{373}\) That is, firms that are more likely to
fail, are more likely to choose Delaware. They would have failed at roughly the same rate had
they filed elsewhere, so Delaware bankruptcy judges are not the cause of the high failure rates. 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.\(^{374}\)

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.\(^{375}\)

\(\textbf{C. Domain Name Dispute Resolution}^{376}\)

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).
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.

\(^{372}\) Id at 227-30.
\(^{373}\) Kenneth Ayotte and David A Skeel, Jr., “An Efficiency-Based Explanation for Current
\(^{374}\) Id at 444-49, 452.
\(^{375}\) Id at 462-7.
\(^{376}\) This section is based primarily on Michael Geist, \textit{Fair.com?: An Examination of the Allegations of
Justice: A Statistical Assessment of ICANN’s Uniform Dispute Resolution Policy}, 17 INFORMATION SOC’Y
151 (2001).
Although ICANN has certified seven dispute resolution providers, two swiftly came to dominate the market, NAF and WIPO. Not surprisingly, according to first researchers to analyze the system, Milton Mueller and Mark Geist, these two dispute resolution providers had reputations for decisions that favored the trademark owners who had the power to choose which provider would resolve their case. In contrast, the dispute resolution provider with the reputation for more even-handed decisionmaking, eResolution, left the market after less than two years. The dominant position of NAF and WIPO seems to have emerged after statistics were published showing that trademark owners won about eighty percent of their cases before these providers, but only about 60% of the time before eResolution.

The incentive to tilt law in favor of complainants is patent. 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. 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.377

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 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.

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.378 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 England

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, Kings 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.

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. 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).

E. Generalizing from the Case Studies

Is it possible to generalize from the five case studies: patents, class actions and mass torts, bankruptcy, domain name dispute resolution, and common law judging in early modern England? All involve situations in which the party initiating suit could choose to sue in multiple places. In the patent context, broad interpretations of the venue statute meant that sophisticated plaintiffs could sue in practically any federal court. Similarly, broad interpretations of the bankruptcy venue statute meant that sophisticated debtors could file for bankruptcy in any district. In the class action and mass tort context, pendent personal jurisdiction and related doctrines meant that cases could be brought where there was jurisdiction over the one plaintiff’s claim. In cases involving nationally-distributed products or services, there were plaintiffs with constitutionally sufficient contacts with every state, so all the plaintiff’s lawyer needed to do was

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ensure that at least one of them was joined or named as class representative. In the domain name dispute resolution context, the rules explicitly allow the party bringing the claim, the trademark owner, to choose the dispute resolution provider. Similarly, in pre-modern England, for most cases, the plaintiff could sue in any of the three major common law courts.

In the three American examples – patent litigation, class actions and mass torts, and bankruptcy – jurisdictional choice arises out of the fact that defendants’ actions had national impact. Jurisdiction over the entire, nationwide problem was then based on effects in the forum, even if those effects were 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 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.).

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 court 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.

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.381 Similarly, in the bankruptcy context, first-day orders, decisions on how often to pay professionals, and other techniques Delaware used to attract cases are usually effectively unreviewable. In early modern England, the judges of King’s Bench often used “legal fictions” to attract cases, because fictions made the record on appeal seem legally correct, and appellate courts were severely restricted in their ability to question facts in the record.382

The most successful competitors seem to share some common characteristics. The Eastern District of Texas and Delaware are both districts that do 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. This local pressure also means that judges can credibly commit to maintain their favorable practices, so case placers can be confident that things 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

381 In fact, a decision to deny summary judgment is almost completely immune from appellate review for two reasons. First, as explained by Edward Cooper, “a judgment on a jury verdict or a judge’s finding based on a sufficient trial record … will not be reversed on the grounds that judgment as a matter of law would have been required on the summary-judgment record.” Edward H. Cooper, 18 Lewis & Clark L. Rev 591, 600 (2014). That is, even if summary judgment was erroneously denied and the case was eventually decided in favor the party who opposed summary judgment, the appellate court would not reverse unless the trial judgment was also erroneous. Second, many courts, including the Fifth and Federal Circuits, 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; Advisory Comm. On Rules of Civil Procedure, Agenda Book Apr. 7-8, 2008, at 89, 90, 98-99, available at http://www.uscourts.gov. One way the denial of summary judgment might be subject to appellate review is through an extraordinary writ, such as mandamus. Nevertheless, it is not clear whether denial of summary judgment has ever been successfully challenged by mandamus. Major Michael J. Davidson, “A Modest Proposal: Permit Interlocutory Appeals of Summary Judgment Denials,” 147 Mil. L. Rev. 145, 201 (1995). Denial of summary judgment could be appealed under 28 U.S.C. § 1292 if the district court judge (and appellate court) allowed such an appeal, but it is unlikely that the Eastern District of Texas or any other forum selling jurisdiction would do so. The collateral order doctrine is very narrow and available only for very special issues not generally relevant to the types of cases discussed in this article. Id at 202-5. gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2008-04.pdf.

382 Daniel Klerman, “Legal Fictions as Strategic Instruments” (Unpublished draft)
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.

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 don’t 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, in Chicago with respect to bankruptcy cases, and in patent cases in the Eastern District of Virginia.

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. This is puzzling. 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.”383 While it is true that the Federal Circuit makes it difficult for district courts to compete by offering better substantive law, this does not mean that the inability to offer better substantive law made competition more likely. The opposite is more likely. Instead, the fact that competition is so intense in bankruptcy and patent reflects the unusually loose jurisdiction and venue provisions governing these areas. These loose rules mean that patent owners and case placers can choose to sue or file in nearly any district, which is not true for plaintiffs in most areas of law.

IV. SOLUTIONS

Since a necessary prerequisite for forum selling is jurisdictional choice, the easiest way to restrain forum selling is to narrow the plaintiff’s (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. 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.” This article’s emphasis on 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. The district which includes the largest market for the defendant’s products is likely to be more neutral between patentee and alleged infringer, and adding a single additional potential venue is unlikely to stimulate destructive competition among courts.

Restricting jurisdictional choice is likely to be more effective than the solution advocated by Jonas Anderson. He argues that districts should be required to randomly assign cases to judges. 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 Wisconsin, have always used random assignment. So requiring random assignment would have no effect on them. 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, and the Western District of Wisconsin has only two. The Eastern District of Texas is somewhat larger, with eight judgeships.

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385 Id. at 1492.
386 For a discussion of the effect of jurisdictional rules on forum bias, see Daniel Klerman, “Rethinking Personal Jurisdiction,” Journal of Legal Analysis (2014). 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, “Patentography,” p. 1491.
387 Jonas Anderson, Court Competition for Patent Cases (forthcoming U. Penn. L. Rev.), at __.
388 See supra __.
Since a majority of the judges on these courts seem to support pro-patentee policies, requiring random assigning would only slightly increase the possibility that a case would be assigned to a judge not interested in attracting cases through pro-plaintiff decisions.

Similarly, in bankruptcy, Lynn LoPucki has argued 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. For example, a firm might be required to state in its bylaws where it would file for bankruptcy if it got into trouble. 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.

Interestingly, bankruptcy venue provisions are formally narrow. As discussed above, they restrict suit primarily to the debtor’s principal place of business and place of incorporation. Nevertheless, as LoPucki points out, in practice, these criteria do not constrict where a large company can file for bankruptcy, because companies can also choose to file where an affiliate has previously filed. Since large companies have (or can create) affiliates residing or incorporated in any state, large companies can effectively choose to file for bankruptcy anywhere, simply by having the appropriate affiliate file there first. In addition, both incorporation and principal place of business are completely under the control of the case placer (debtor), which can determine or change its place of incorporation or headquarters. This makes bankruptcy very different from other areas of law, where jurisdiction and venue is based on the defendant’s characteristics and actions, not the plaintiff’s (or case placer’s). Thus, even though the bankruptcy venue statute is formally narrow, in practice it gives case placers wide choice of forum. 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.

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

As noted above, in federal court, the Multidistrict Litigation Panel has the power to assign related cases filed in different places to any district for pretrial processing. This suggests possible reforms for patent and bankruptcy litigation as well. Patent and bankruptcy cases could also be assigned to districts by a centralized process. Thus, for example, Jonas Anderson has suggested that patent infringement cases be randomly assigned to judges who have indicated an
interest in hearing patent cases. 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. So far, that danger does not seem to have 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.

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. 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 they wish.

V. CONCLUSION

Although forum shopping is usually analyzed as a problem created by strategic plaintiffs, this article suggests that sometimes courts are a key part of the problem. While judges usually want to hear fewer cases and are motivated to apply the law fairly, in some circumstances a few judges seek to hear more cases in order to bring prestige to themselves and business to local

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389 Jonas Anderson, Court Competition for Patent Cases (forthcoming U. Penn. L. Rev.), 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. See supra __.


391 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.
lawyers and the neighboring 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 jurisdiction 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 if thought 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.

<table>
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<tr>
<th>District</th>
<th>Time to Term. 00-07</th>
<th># Trials 00-07)</th>
<th>Time to Trial (00-07 Tried)</th>
<th>Time to Term. 00-07</th>
<th># Trials 00-07</th>
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<th># Trials 08-13</th>
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Notes. Unless otherwise stated, data were obtained from Lex Machina, [www.lexmachina.com](http://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/](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 was 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 12-31-13. 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.
APPENDIX 2: SUMMARY JUDGMENT & TRANSFER RATES IN TOP 25 PATENT DISTRICTS & W.D. PA.

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Notes. The 25 busiest patent districts are based on data from the last 10 years collected by Lex Machina. Data is based on all of the information in Lex Machina as of September 22, 2014, which would cover the period 1-1-00 through 9-21-14. Outcome information is generated by visiting Lex Machina’s homepage for each district and then clicking on the “Patent Case Outcomes” tab. Outcomes on this page reflect the most recent result in the case, called “determinative outcome” by Lex Machina. See [https://law.lexmachina.com/help/understanding-data](https://law.lexmachina.com/help/understanding-data). Lex Machina provides information on outcomes broken down by “Claimant Win”; “Claim Defendant Win”; “Likely Settlement”; “Procedural”. Total Outcomes 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 is based on the “interdistrict transfer” subcategory of “Procedural.” Rates were calculated by dividing the number by total outcomes.
APPENDIX 3: Median Time to Trial in Eastern District of Texas (Months)

<table>
<thead>
<tr>
<th>Time Period</th>
<th>All Civil Cases</th>
<th>Patent Cases</th>
</tr>
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<tbody>
<tr>
<td>10/1/01 – 9/30/02</td>
<td>14.0</td>
<td>23.9 (n=1)</td>
</tr>
<tr>
<td>10/1/02 – 9/30/03</td>
<td>17.0</td>
<td>22.1 (n=4)</td>
</tr>
<tr>
<td>10/1/03 – 9/30/04</td>
<td>15.4</td>
<td>21.5 (n=3)</td>
</tr>
<tr>
<td>10/1/04 – 9/30/05</td>
<td>15.9</td>
<td>17.2 (n=3)</td>
</tr>
<tr>
<td>10/1/05 – 9/30/06</td>
<td>17.7</td>
<td>25.2 (n=10)</td>
</tr>
<tr>
<td>10/1/06 – 9/30/07</td>
<td>18.0</td>
<td>21.3 (n=8)</td>
</tr>
<tr>
<td><strong>10/1/01 – 9/30/07 (Avg. of Medians)</strong></td>
<td><strong>16.3</strong></td>
<td><strong>21.9</strong></td>
</tr>
<tr>
<td>10/1/07 – 9/30/08</td>
<td>18.5</td>
<td>23.9</td>
</tr>
<tr>
<td>10/1/08 – 9/30/09</td>
<td>25.0</td>
<td>27.7</td>
</tr>
<tr>
<td>10/1/09 – 9/30/10</td>
<td>21.7</td>
<td>30.6</td>
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<td>10/1/10 – 9/30/11</td>
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<td>25.1</td>
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<td>10/1/11 – 9/30/12</td>
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<tr>
<td><strong>10/1/07 – 9/30/13 (Avg. of Medians)</strong></td>
<td><strong>22.4</strong></td>
<td><strong>27.0</strong></td>
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</table>

Notes. Data for all civil cases is obtained from the Administrative Office of the U.S. Courts at [http://www.uscourts.gov/Statistics/FederalCourtManagementStatistics.aspx](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 is 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)

<table>
<thead>
<tr>
<th></th>
<th>E.D. Tex.</th>
<th>National Total</th>
<th>Percentage of Filings in the E.D. Tex.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Patent</td>
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<td>5579</td>
<td>24.2%</td>
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<tr>
<td>All Civil</td>
<td>3744</td>
<td>271,950</td>
<td>1.4%</td>
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</tbody>
</table>

Percentage of Civil Cases that Were Patent Cases

36.0% 2.1%

Notes. Patent data is obtained through Lex Machina by clicking on the “Cases” tab and restricting to the date range. Eastern District patent data is 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.
v.FS32DK