PREDICTABLY EXPENSIVE: A CRITICAL LOOK AT PATENT LITIGATION IN THE EASTERN DISTRICT OF TEXAS

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ABSTRACT

In this Article, we compare U.S. patent litigation across districts and consider possible explanations for the Eastern District of Texas' popularity with patent plaintiffs. Rather than any one explanation, we conclude that what makes the Eastern District so attractive to patent plaintiffs is the accumulated effect of several marginal advantages—particularly with respect to the relative timing of discovery deadlines, transfer decisions, and claim construction—that make it predictably expensive for accused infringers to defend patent suits filed in East Texas. These findings tend to support ongoing efforts to pass patent reform legislation that would presumptively stay discovery in patent suits pending claim construction and motions to transfer or dismiss. However, we also observe that courts in the Eastern District of Texas have exercised their discretion in ways that dampen the effect of prior legislative and judicial reforms that were aimed (at least in part) at deterring abusive patent suits. Given courts' broad discretion to control how cases proceed, this additional finding suggests that restricting venue in patent cases may well be the single most effective reform available to Congress or the courts to limit patentees' ability to impose unnecessary and unwarranted costs on companies accused of patent infringement.

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I. INTRODUCTION

After two terms of serious congressional interest in patent reform, including the introduction of roughly twenty competing bills,[1] only one piece of prospective reform legislation still stands a reasonable chance of passage: the VENUE Act.[2] Introduced in March 2016 by Senators Flake, Gardner, and Lee, the bill would (with few exceptions) limit where patent suits can be filed to only those districts in which the accused infringer is incorporated or in which either party has a "regular and established physical facility" for research or production.[3] Many predict that, despite the eventual failures of the many bills that came before, this rather brief piece of legislation has a legitimate shot at passing through the 115th

1. For a summary of the various bills introduced in the House and Senate since 2013, see Comput. & Commc'ns Indus. Assoc., *Patent Progress' Guide to Federal Patent Reform Legislation*, PAT. PROGRESS (Nov. 17, 2016), http://www.patentprogress.org/patent-progress-legislation-guides/patent-progresss-guide-patent-reform-legislation [https://perma.cc/H9UH-KYTD].

2. Venue Equity and Non-Uniformity Elimination Act of 2016, S. 2733, 114th Cong. (2016), https://www.congress.gov/bill/114th-congress/senate-bill/2733/ [https://perma.cc/P82T-HKU5]. The VENUE Act has been referred to, for example, as a "last stand" or "last ditch effort" for patent reform supporters. *See* Holly Fechner et al., *Senators Introduce VENUE Act as Last Stand on Patent Legislation this Congress*, GLOBAL POL'Y WATCH BLOG (Mar. 22, 2016), https://www.globalpolicywatch.com/2016/03/senators-introduce-venue-act-as-last-stand-on-patent-legislation-this-congress [https://perma.cc/YMN2-NHPL]; Andrew Williams, *The VENUE Act—A Last-Ditch Attempt at Patent Reform*, PATENT DOCS BLOG (Mar. 28, 2016), http://www.patentdocs.org/2016/03/the-venue-act-a-last-ditch-attempt-at-patent-reform.html [https://perma.cc/VCB5-29VL].

3. S. 2733, *supra* note 2, § 2(a). This is not the first time Congress has considered venue reform for patent cases. Most recently, a patent-specific venue provision was included in the ultimately unsuccessful Patent Reform Act of 2006, S. 3818, 109th Cong. §8(a) (2006).

Congress.

The U.S. Court of Appeals for the Federal Circuit's current interpretation of 28 U.S.C. § 1400(b), which specifies where patent suits may be filed, is under attack in the courts as well. Just days before this Article's publication, the Supreme Court of the United States granted certiorari in *TC Heartland LLC v. Kraft Food Brands Group LLC*, a case that, if decided in petitioner's favor, could restrict venue in patent suits even further than the language proposed in the VENUE Act.[4] One way or another, it seems, venue rules for patent suits will be put under the microscope in 2017.

Though it neither is mentioned in the VENUE Act nor was the court of first instance for *TC Heartland*,[5] the target of Congress and TC Heartland's Supreme Court *amici* is crystal clear: the U.S. District Court for the Eastern District of Texas, a court made infamous as the location of choice for America's "patent trolls," companies formed solely for the purpose of monetizing patent rights through litigation, often using methods that seem to leverage the costs and burdens of litigation more so than the value of the patented technology.[6] Since the mid-2000s the Eastern District has established a reputation as a "renegade jurisdiction"[7] that actively cultivates, or at least tolerates,[8] an image as the go-to

4. If the Court agrees with petitioner's interpretation of § 1400(b), patent plaintiffs would be limited to filing suit in the state of the accused infringer's incorporation or "where the defendant has committed acts of infringement and has a regular and established place of business." *See* Petition for a Writ of Certiorari at 1, 13-15, TC Heartland LLC v. Kraft Foods (U.S. Sept. 12, 2016) (No. 16-341), 2016 WL 4983136. Compared to the VENUE Act, the most important difference is that the plaintiff's location would no longer be part of the calculus. Colleen Chien and Michael Risch find that, had the rule advanced in *TC Heartland* been in place in 2015, about 58% of patent suits would have been filed in a different district. *See* Colleen V. Chien & Michael Risch, *Recalibrating Patent Venue* 34-35 (Santa Clara Univ. Legal Studies Research Paper No. 10-1, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2834130 [https://perma.cc/C77T-HCWZ]. By contrast, if the VENUE Act had been in effect in 2015 instead, about 43% of patent suits would have moved to another district. *Id.*

5. In 2014, Kraft sued TC Heartland in the U.S. District Court for the District of Delaware, not the Eastern District of Texas. Kraft Foods Grp. Brands LLC v. TC Heartland, LLC, No. 14-28-LPS, 2015 WL 5613160 (D. Del. Sept. 24, 2015), *aff'd*, 821 F.3d 1338 (Fed. Cir. 2016), *cert. granted*, No. 16-341, 2016 WL 4944616 (U.S. Dec. 14, 2016). However, TC Heartland's petition for certiorari references the Eastern District of Texas, and all seven amicus briefs filed at the cert stage focus almost exclusively on the Eastern District of Texas. *See TC Heartland LLC v. Kraft Foods Group Brands LLC*, SCOTUSBLOG, http://www.scotusblog.com/case-files/cases/tc-heartland-llc-v-kraft-foods-group-brands-llc [https://perma.cc/BMK4-6QHA] (providing links to all documents filed with the Supreme Court in the case).

6. For a general overview of how non-practicing patent holders can impose asymmetric costs in patent litigation and thereby induce nuisance value settlements, see *Informational Hearing on Patent Assertion Entities Before the California Assembly Select Committee on High Technology*, (Oct 30, 2013) (statement of Brian J. Love, Assistant Professor of Law, Santa Clara University), http://papers.ssrn.com/sol3/papers.cfm.?abstract_id=2347138 [https://perma.cc/NTA6-WLZM].

7. As Justice Scalia once famously referred to the district. Transcript of Oral Argument at 10-11, eBay v. MercExchange, 547 U.S. 388 (2006) (No. 05-130), https://www.supremecourt.gov/oral_arguments/argument_transcripts/05-130.pdf [https://perma.cc/G62C-2BBU] ("[T]hat's a problem with Marshall, Texas, not with the patent

jurisdiction for patent litigation. In recent years, word of the Eastern District of Texas spread far enough that the rural court and its judges have garnered attention from the likes of the New York Times,[9] VICE,[10] NPR,[11] and HBO's John Oliver.[12]

In this Article, we take a close, up-to-date empirical look at how U.S. patent litigation plays out in districts across the nation and consider the extent to which the Eastern District of Texas' reputation is justified.[13] While the appeal of the Eastern District to patent plaintiffs is undeniable (almost forty-four percent of all patent cases in 2015 were filed in the district), a simple explanation for the district's popularity is surprisingly hard to articulate. Though we find evidence that the Eastern District of Texas is relatively plaintiff-friendly in certain respects,

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law . . . . I don't think we should . . . write our patent law because we have some renegade jurisdictions."). Others have been more direct in expressing their displeasure with the court. *Texas Monthly* once dubbed the Eastern District of Texas "[maybe] the worst thing that ever happened to intellectual property law." Loren Steffy, *Patently Unfair*, TEX. MONTHLY, Oct. 2014, http://www.texasmonthly.com/politics/patently-unfair [https://perma.cc/8P5C-WJAA]. The Eastern District of Texas was also ranked ninth on the American Tort Reform Foundation's 2015-2016 list of "Judicial Hellholes." *Judicial Hellholes: 2015/2016 Executive Summary*, AM. TORT REFORM FOUND. (Dec. 21, 2016), http://www.judicialhellholes.org/2015-2016/executive-summary [https://perma.cc/6SMX-Z6NW].

8. There is at least some evidence that the people of East Texas, if not also the judiciary, recognize and welcome the economic benefits that come from the local patent litigation boom. For example, Tyler4Tech, "a consortium of Tyler, Texas' local civic, education and private enterprise leaders, companies and organizations," touts on its website that the region has "plaintiff-friendly local rules, speedy dispositions, and principled jurors who understand the value of Intellectual Property." TYLER4TECH (Nov. 17, 2016), http://tyler4tech.com/index.html [https://perma.cc/8NZL-CMXM]. For a thorough examination of the phenomenon of "forum selling" in the Eastern District of Texas, including the indirect financial benefits of patent litigation for the local economy, see J. Jonas Anderson, *Court Competition for Patent Cases*, 163 U. PA. L. REV. 631 (2015); Daniel M. Klerman & Greg Reilly, *Forum Selling*, 89 S. CAL. L. REV. 241 (2016); Matthew Sag, *IP Litigation in United States District Courts: 1994 to 2014*, 101 IOWA L. REV. 1065, 1095-1104 (2016).

9. Julie Creswell, *So Small a Town, So Many Patent Suits*, N.Y. TIMES (Sept. 24, 2006), http://www.nytimes.com/2006/09/24/business/24ward.html [https://perma.cc/VM9P-XL5K]; Edgar Walters, *Tech Companies Fight Back Against Patent Lawsuits*, N.Y. TIMES (Jan. 23, 2014) https://www.nytimes.com/2014/01/24/us/tech-companies-fight-back-against-patent-lawsuits.html [https://perma.cc/JX8E-8NVH].

10. Kaleigh Rogers, *The Small Town Judge Who Sees a Quarter of the Nation's Patent Cases*, MOTHERBOARD (May 5, 2016), https://motherboard.vice.com/read/the-small-town-judge-who-sees-a-quarter-of-the-nations-patent-cases [https://perma.cc/VTS2-Y5YX].

11. *This American Life: When Patents Attack!*, NPR RADIO (Jul. 22, 2011), http://www.thisamericanlife.org/radio-archives/episode/441/when-patents-attack [https://perma.cc/96CC-B4UY].

12. *Last Week Tonight with John Oliver*, HBO TELEVISION (Apr. 19, 2015), https://www.youtube.com/watch?v=3bxcc3SM_KA&noredirect=1 [https://perma.cc/9KG6-R8XH].

13. For a summary of inter-district variation in patent litigation during prior years, see, e.g., John Allison et al., *Understanding the Realities of Modern Patent Litigation*, 92 TEX. L. REV. 1769 (2014); Jeanne C. Fromer, *Patentography*, 85 N.Y.U. L. REV. 1444 (2010); Kimberly A. Moore, *Forum Shopping in Patent Cases: Does Geographic Choice Affect Innovation?*, 79 N.C. L. REV. 889 (2001).

we also observe that allegedly defendant-friendly jurisdictions such as the Northern District of California[14] have characteristics that in many respects are quite similar.[15]

Rather than any one of the traditional narratives explaining the appeal of East Texas, we conclude that what makes the Eastern District so attractive to patent plaintiffs is the accumulated effect of several marginal advantages, particularly with respect to the timing and success rate of important pretrial events. To borrow a shopworn phrase, the devil is in the details—specifically the nitty gritty details of seemingly mundane procedural choices, like the relative timing of discovery deadlines, transfer decisions, and claim construction. This observation suggests to us that, among reforms like those included in the Innovation Act and other recent omnibus patent reform bills,[16] mandatory delays in discovery may be the most effective at protecting companies from abusive patent enforcement in East Texas and elsewhere.

However, we also find evidence that judges in the Eastern District of Texas have generally exercised their discretion in the past in ways that dampen the effect of prior patent reform measures and Supreme Court opinions that would otherwise have shifted leverage in patent suits away from "trolls" and toward accused infringers. This observation leads us to the conclusion that apart from venue reform, there may well be no simple fix that will end the Eastern District of Texas' popularity with patent plaintiffs. Because judges have broad, and largely unappealable, discretion to control when and how motions are heard and the way cases proceed in their courtrooms,[17] almost any other reforms may ultimately prove toothless if judges choose not to embrace them. As retired Magistrate Judge

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14. Letter to Congress from 28 Law Professors & Economists Urging Caution on the VENUE Act (Aug. 1, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2816062 [https://perma.cc/YN43-KTP7] (stating that the District of Delaware and the Northern District of California "are recognized as more friendly to defendants" than the Eastern District of Texas).

15. In fact, the Eastern District of Texas adopted its local patent rules from those already in place in the Northern District of California. For a comparison of the districts' respective local rules, see Jenner & Block LLP, Chart Comparing the Local Patent Rules (2016), https://jenner.com/system/assets/assets/6962/original/Local_20Patent_20Rules_20Chart.pdf [https://perma.cc/7FYT-Y5JA].

16. In 2013, the Innovation Act, H.R. 3309, 113th Cong. (2013), passed the House but ultimately stalled in the Senate. It was introduced again in the next session, H.R. 9, 114th Cong. (2015), but again failed to gain traction. The Innovation Act included, among other reforms: a presumption that attorney's fees be awarded to prevailing parties in patent cases, mandatory discovery stays pending motions to transfer or dismiss, and codification of an expanded customer suit exception. H.R. 9, 114th Cong. (2015).

17. *See* Amado v. Microsoft Corp., 517 F.3d 1353, 1358 (Fed. Cir. 2008) ("District courts . . . are afforded broad discretion to control and manage their dockets, including the authority to decide the order in which they hear and decide issues pending before them."). Intermediate, discretionary rulings like these are not immediately appealable, 28 U.S.C. § 1291 (limiting appellate jurisdiction to "final decisions of the district courts"), and, when appealed, are reviewed under a permissive "abuse of discretion" standard. Highmark, Inc. v. Allcare Health Mgmt. System, Inc., 134 S. Ct. 1744, 1748 ("[D]ecisions on 'matters of discretion' are 'reviewable for abuse of discretion.'") (quoting Pierce v. Underwood, 487 U.S. 552, 558 (1988)).

Judith Guthrie of Tyler, Texas once cautioned: "[a]nybody who applies to be a judge in the Eastern District knows what the deal is . . . . It's like an unspoken job description. It will continue until the bar decides to file elsewhere or until Congress changes the law."[18] Accordingly, restricting patentees' ability to file suit in East Texas in the first place may be the single most effective reform available to Congress and the courts to limit the use of forum selection as a weapon to impose increased legal costs on companies sued for patent infringement.

II. THE EASTERN DISTRICT OF TEXAS' POPULARITY

Looking first at patent caseloads nationwide, we reconfirm what has long been known: that the Eastern District of Texas is wildly popular with patent plaintiffs, particularly those whose core business is enforcing "high tech" patents.[19] As shown below in Table 1, more than a third of patent suits filed since 2014 were brought in the Eastern District.[20] In fact, one judge—Judge Rodney Gilstrap of Marshall, Texas—saw almost one quarter of all patent case filings nationwide during the same timeframe, more than all the federal judges in California, New York, and Florida combined.[21]

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18. Steffy, *supra* note 7.

19. For more on the Eastern District of Texas' rise to prominence in patent litigation, see Andrei Iancu & Jay Chung, *Real Reasons the Eastern District of Texas Draws Patent Cases: Beyond Lore and Anecdote*, 14 SMU SCI. & TECH. L. REV. 299 (2011) (presenting statistics on patent litigation in the Eastern District of Texas for the period 1991 to 2010); Yan Leychkis, *Of Fire Ants and Claim Construction: An Empirical Study of the Meteoric Rise of the Eastern District of Texas as a Preeminent Forum for Patent Litigation*, 9 YALE J. L. & TECH. 193 (2007); Xuan-Thao Nguyen, *Justice Scalia's "Renegade Jurisdiction": Lessons for Patent Law Review*, 83 TULANE L. REV. 111 (2008) (presenting statistics on patent litigation in the Eastern District of Texas for the period 1996 to 2006).

20. 28 U.S.C. § 1400(b) provides that "[a]ny civil action for patent infringement may 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." 28 U.S.C. § 1391(d) states that, for venue purposes, a corporate defendant "shall be deemed to reside in any district . . . within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate State." As currently interpreted by the Federal Circuit, these statutory rules make jurisdiction for patent suits proper in any federal district in which the accused product is sold. *In re* TC Heartland, LLC, 821 F.3d 1338, 1344 (Fed. Cir. 2016) (stating that jurisdiction exists "where a nonresident defendant purposefully shipped accused products into the forum through an established distribution channel and the cause of action for patent infringement was alleged to arise out of those activities"), *cert. granted*, No. 16-341, 2016 WL 4944616 (U.S. Dec. 14, 2016). As a result, a patentee contemplating suit against a national retailer, or the producer of any of its products, can essentially file suit in the district of its choice. As mentioned *supra*, this rule will be revisited by the Supreme Court in *TC Heartland*.

21. We obtained this statistic, as well as many others referenced below, using Lex Machina. Lex Machina is a SaaS product that allows users to search documents filed in IP suits and generate a wide variety of analytics derived from those documents. *See About Us*, LEX MACHINA (2015), https://lexmachina.com/about/ [https://perma.cc/J8N9-RDW5]; *How it Works*, LEX MACHINA (2015), https://lexmachina.com/what-we-do/how-it-works/ [https://perma.cc/Y3TP-94EF]. According to Lex Machina, between 2014 and mid-2016 Judge Gilstrap saw 3,166 new patent suits, more than the combined total of all district courts in California, Florida, and New York: 2,656. Judge Gilstrap's popularity is attributable, at least in

What makes this level of concentration even more remarkable is where it takes place. East Texas saw more patent suits since 2014 than the districts that contain California's Silicon Valley, Massachusetts' Route 128, Detroit's Automation Alley, Illinois' Golden Corridor, and North Carolina's Research Triangle.[22] In contrast to the Northern District of California, which is home to a population of over 6.2 million residents, the Eastern District of Texas' population is (despite spanning three times as many counties) under 3.9 million.[23] Marshall, Texas, where almost a third of all patent suits are filed today,[24] has a population just shy of 25,000.[25] In short, rather than being a jurisdiction of convenience for America's tech industry, the Eastern District has attracted the majority of all patent suits in the U.S. despite lacking its own technology hub.[26]

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part, to the fact that he is currently assigned ninety-five percent of all civil cases filed in the Marshall Division. U.S. District Court for the Eastern District of Texas General Order No. 16-7 (July 15, 2016), http://www.txed.uscourts.gov/cgi-bin2/view_document.cgi?document=25551 [https://perma.cc/SQ6N-L75N]. In most other districts, new cases are assigned randomly across all judges in the district (or across all judges in the district who are participating in the Patent Pilot Program). Because the Eastern District of Texas does not follow this convention, patentees that file suit in East Texas have the unique ability to select which judge will hear their case (with a high degree of probability) by filing suit in a division that assigns a large percentage of its civil docket to a particular judge. Prior standing orders on civil case assignment in the Eastern District likely also contributed to the outsized popularity of several former East Texas judges who attracted large patent dockets during their time on the bench. *See* Klerman & Reilly, *supra* note 8, at 252-56 (noting, for example, that "at the outset of the Eastern District's popularity in 2006, patentees filing in the Marshall division were told they had a 70% chance of being assigned to Judge Ward, those filing in Tyler a 60% chance of Judge Davis, . . . and those filing in Texarkana a 90% chance of Judge Folsom").

22. According to Lex Machina, between 2014 and mid-2016, 4,736 patent suits were filed in the Eastern District of Texas, while the Northern District of California saw 595 patent suits, the District of Massachusetts saw 154, the Eastern District of Michigan saw 159, the Northern District of Illinois saw 448, and the Middle and Eastern Districts of North Carolina collectively saw 79.

23. A list of counties included in each judicial district can be found, for example, via the U.S. Marshals Service, https://www.usmarshals.gov/district [https://perma.cc/V7XX-YFM4]. Population estimates for Texas and California counties can be found, for example, at *Population Estimates of Texas Counties, 2010-2015*, TEX. ST. LIBR. & ARCHIVES COMMISSION (Nov. 17, 2016) https://www.tsl.texas.gov/ref/abouttx/popcnty2010-11.html [https://perma.cc/84BW-MSXQ]; *California Counties by Population*, CAL. DEMOGRAPHICS (Nov. 17, 2016) http://www.california-demographics.com/counties_by_population [https://perma.cc/JRV6-FDVX].

24. According to Lex Machina, Judges Gilstrap and Schroeder of the Marshall Division were assigned over 93% of all patent cases filed in the Eastern District of Texas during the period of our study.

25. *Population: Marshall, Texas*, https://www.google.com/publicdata/explore?ds=kf7tgg1uo9ude_&hl=en#!ctype=l&strail=false&bcs=d&nselm=h&met_y=population&scale_y=lin&ind_y=false&rdim=place&idim=place:4846776&ifdim=place:state:48000&hl=en_US&dl=en_US&ind=false (displaying population data over time for Marshall, Texas collected from the U.S. Census Bureau).

26. Klerman & Reilly, *supra* note 8, at 243 ("[The Eastern District of Texas] is home to no major cities or technology firms."). In fact, though the Eastern District's Sherman Division includes a portion of the Dallas-Fort Worth Metroplex—perhaps most notably several suburbs of Dallas located in Collin and Denton Counties—very few patent cases are filed in the Sherman Division. According to Lex Machina, Judges Crone, Mazzant, and Schell of the Sherman

TABLE 1: PATENT CASE FILINGS BY DISTRICT (JAN. 2014-JUNE 2016)[27]

	Num. Dist. Judgeships[28]	2014	2015	2016 (to 7/1)	Total	Total per Judgeship
E.D. Tex.	8 (1.2%)	1427 (28.1%)	2541 (43.6%)	768 (34.3%)	4,736 (36.0%)	592
D. Del.	4 (0.6)	946 (18.6)	545 (9.4)	201 (9.0)	1,692 (12.9)	423
C.D. Cal.	28 (4.1)	335 (6.6)	300 (5.2)	153 (6.8)	788 (6.0)	28.1
N.D. Cal.	14 (2.0)	259 (5.1)	229 (3.9)	107 (4.8)	595 (4.5)	42.5
D.N.J.	17 (2.5)	286 (5.6)	272 (4.7)	110 (4.9)	668 (5.1)	39.3
N.D. Ill.	22 (3.2)	157 (3.1)	163 (2.8)	128 (5.7)	448 (3.4)	20.4
S.D.N.Y.	28 (4.1)	120 (2.4)	155 (2.7)	59 (2.6)	334 (2.5)	11.9
S.D. Fl.	18 (2.6)	111 (2.2)	131 (2.2)	85 (3.8)	327 (2.5)	18.2
S.D. Cal.	13 (1.9)	75 (1.5)	80 (1.4)	62 (2.8)	217 (1.6)	16.7
All Other Districts	535 (77.9)	1,371 (27.0)	1,409 (24.2)	568 (25.3)	3,348 (25.5)	6.3
J. Gilstrap	1 (0.4)	988 (19.4)	1686 (28.9)	492 (22.0)	3,166 (24.1)	3,166
All Except E.D. Tex.	679 (98.8)	3,660 (71.9)	3,284 (56.4)	1,473 (65.7)	8,417 (64.0)	12.4
Total	687 (100)	5,087 (100)	5,825 (100)	2,241 (100)	13,153 (100)	19.1

In addition to its sheer size, the population of cases in East Texas is also noteworthy for its composition. Table 2 shows that, far from a random assortment of cases, the Eastern District of Texas' caseload skews heavily toward computing and telecommunications technology, and is almost entirely made up of cases filed by "trolls," known less colloquially as patent assertion entities (PAEs)—companies that exist to monetize patents, rather than commercialize the technology they cover.[29] While cases involving pharmaceutical and medical patents are primarily located in close proximity to where those industries are most concentrated—in California and New Jersey[30]—the same is not true for patents

Division presided over just 44 of the 4,736 patent cases filed in the Eastern District during the period of our study.

27. *All Court Case Filings by Year: All Patent Cases Filed by Year*, LEX MACHINA (Sept. 12, 2016), https://law.lexmachina.com/court/table#Patent-tab.

28. These are counts of the total number of congressionally authorized judgeships in each district. *Chronological History of Authorized Judgeships-District Courts*, U.S. COURTS (Dec. 21, 2016) http://www.uscourts.gov/judges-judgeships/authorized-judgeships/chronological-history-authorized-judgeships-district-courts [https://perma.cc/E9MB-KDS8]. The total count includes district judgeships on territorial courts. *Id.* Note that not all judgeships were filled during the entire period of this study. *Id.*

29. The term "patent assertion entity" is typically defined to encompass all non-practicing patent enforcers, except universities, early stage startups, and IP holding subsidiaries of operating technology companies. *See* Love, *supra* note 6, at 2-3.

30. Of the top ten pharmaceutical companies ranked by revenue earned in the U.S. in 2014, five are based in California and two in New Jersey. PMGROUP, *Top 15 Pharma*

that cover computing technology. None of the U.S. computer industry's most prolific patent applicants has so much as a single office in East Texas.[31]

TABLE 2: TECHNOLOGY, PLAINTIFF, AND CLAIM TYPES BY DISTRICT (JAN. 2014-JUNE 2016)[32]

	Technology at Issue in Case			**PAE Cases**[33]	**Declar. Judg. Actions**
	Computing & Telecomm	Pharmaceutical & Medical	Other		
E.D. Tex.	91.8%	2.9%	5.3%	93.9%	0.3%
D. Del.	57.4	33.7	9.0	59.0	3.2
C.D. Cal.	39.5	8.2	52.3	44.9	8.1
N.D. Cal.	81.4	5.1	13.4	62.4	10.7
D.N.J.	20.5	68.7	10.8	18.3	4.0
N.D. Ill.	57.6	9.6	32.8	51.9	7.2
S.D.N.Y.	48.9	14.7	36.4	41.7	6.6
S.D. Fl.	65.9	9.1	25.0	66.5	6.1
S.D. Cal.	53.7	7.9	38.3	43.3	5.5
All Other Districts	38.6	12.7	48.7	38.0	7.8
All Except E.D. Tex.	47.1	20.1	32.8	45.3	6.6
Total	63.5	13.8	22.7	62.9	4.3

To shed light on patent suits' geographic connection (or lack thereof) to the

Companies in the US, PMLIVE (2016) http://www.pmlive.com/top_pharma_list/us_revenues [https://perma.cc/8DTZ-CVKH]. The other three are based in Europe. *Id.*

31. For a list of companies with the top ten largest U.S. patent portfolios (all of which are computing and electronics companies), see Joff Wild, *The Biggest US Patent Portfolio Is Not Owned by IBM, but by Samsung Electronics*, INTELL. ASSET MGMT. BLOG (Apr. 11, 2016), http://www.iam-media.com/blog/detail.aspx?g=b174a267-c73b-4f99-aa9b-dd4b21f3e217 [https://perma.cc/4KL3-PHQ9]. According to Lex Machina, between January 1, 2014 and June 30, 2016 only one of these ten companies filed a patent infringement case in the Eastern District of Texas, and that company filed just one suit. Hitachi Maxwell, Ltd. v. Top Victory Elecs. (Taiwan) Co., No. 2:14-cv-01121 (E.D. Tex. 2014).

32. We are grateful to Unified Patents for making this data available to us. We adopted the three technology classes used by Unified Patents. *See 2015 Patent Dispute Report*, UNIFIED PATENTS (Dec. 31, 2015), https://www.unifiedpatents.com/news/2016/5/30/2015-patent-dispute-report [https://perma.cc/3GKW-DDCF] ("High-tech = Technologies relating to Software, Hardware, and Networking. Medical = Technologies relating to Pharmaceuticals, Medical Devices, Health Related Technologies. Other = Technologies relating to Mechanical, Packaged Goods, Sporting Equipment and any other area outside of high-tech and medical patents.").

33. Our definition of PAE excludes universities, IP holding subsidiaries of operating companies, and start-ups working toward commercialization of the patented technology. *See supra* note 29.

districts in which they were brought, we collected data on the locations of asserted patents' inventors and original assignees, as well as the locations of parties accused of infringement, for the entire population of patent suits filed in the Northern District of California and for a sample of 600 patent suits filed in the Eastern District of Texas during the period of our study. As shown below in Table 3, we found that less than 2% of patent suits brought in the Eastern District were filed to enforce patented technology invented in East Texas, and that less than 8% were filed against defendants with a corporate office located in the district. By contrast, across all patent cases filed in the Northern District of California during the same period, we found that 42% enforced a patent invented in Northern California and that almost two-thirds were filed against defendants with a branch location in Northern California. Altogether, close to 90% of cases filed in the Northern District of California involved either a patent invented in the district or an accused infringer with an office in the district. In the Eastern District of Texas, less than 15% of cases involved a patent invented in the district or an accused infringer operating an office in the district.

TABLE 3: LOCATION OF INVENTION AND ALLEGED INFRINGERS IN PATENT SUITS FILED IN E.D. TEX. AND N.D. CAL. (JAN. 2014-JUNE 2016)

	E.D.Tex.[34]	N.D. Cal.
% of cases with at least one patent-in-suit that has:		
At least one inventor listed on face of patent as residing in the district.	1.7%	40.7%
At least one inventor listed on face of patent as residing in the district *or* at least one original assignee listed on face of patent as located in the district.	8.5	42.0
% of cases with a first-named defendant that has:		
Its U.S. headquarters in the district.	3.2%	47.4%
At least a branch office in the district.	7.7	65.0
% of cases with:		
At least one inventor listed on face of patent as residing in the district *or* at least one original assignee listed on face of patent as located in the district *or* a first-named defendant that has its U.S. headquarters in the district.	10.5%	75.1%
At least one inventor listed on face of patent as residing in the district *or* at least one original assignee listed on face of patent as located in the district *or* a first-named defendant that has a branch office in the district.	14.8	87.6

The gulf between the locus of original innovation and of later patent assertion is likely explained in part by the fact that so few cases filed in East Texas are filed by companies that actually produce and sell technology. Instead, cases in the Eastern District of Texas are overwhelmingly filed by PAEs, entities created

34. The statistics presented in this column are for a random sample of 600 patent suits filed in the Eastern District of Texas between January 1, 2014 and June 30, 2016. This sample size results in a confidence interval below 3.5% (at a 95% confidence level) for the statistics reported.

expressly for the purpose of litigating patent suits. No other district even comes close. Because these parties generally lack a principal place of business—or, for that matter, assets other than the patents in suit—they have the flexibility to form LLCs and file suit wherever they deem most advantageous for litigation purposes.[35]

Finally, it is worth noting that the Eastern District of Texas' popularity is almost entirely driven by the preferences of patent enforcers, not those of accused infringers. Though it has been suggested by some that the Eastern District may be popular due to a general preference for efficiency and judicial expertise among all patent litigants,[36] case filing statistics do not bear this out. As shown above in Table 2, the Eastern District of Texas sees declaratory judgment filings at a rate well below the national average. In other words, when accused infringers are given the opportunity to select the venue for litigation, they disproportionately choose a different court.

Viewed together, these findings give us pause. While the Eastern District's popularity alone may not be cause for serious concern,[37] we find that the court's appeal is not shared by all kinds of litigants. Since 2014, more than 90% of patent suits filed in East Texas were filed by PAEs enforcing high tech patents. Accused infringers, by contrast, chose to file suit in East Texas at a rate less than one tenth that seen in other districts. Moreover, there appears to be nothing special about the East Texas economy that explains this dichotomy. Rather, cases litigated in the Eastern District of Texas overwhelmingly involve patents covering inventions made elsewhere, asserted against parties located elsewhere, and by plaintiffs with

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35. Many have noted the proliferation of empty offices in East Texas leased by patent-holding LLCs for purposes of manufacturing an apparent connection to the Eastern District. *See, e.g.*, Allan Pusey, *Marshall Law: Patent Lawyers Flock to East Texas Court for its Expertise and 'Rocket Docket'*, DALL. MORNING NEWS, Mar. 26, 2006, at 1D ("Office suites housing nothing but banker's boxes and patent paperwork are not uncommon in Marshall."); Timothy B. Lee, *These Empty Offices Are Costing the US Economy Billions*, VOX (June 8, 2016), http://www.vox.com/2016/6/8/11886080/patent-trolls-eastern-texas [https://perma.cc/4K6T-B6S7] (describing and linking to a video of software developer Austin Meyer's attempt to visit the East Texas offices of several PAEs); *When Patents Attack!*, *supra* note 11 (noting that one patentee filing lawsuits in the Eastern District "has no researchers, no employees of any kind that we can find, and its only place of business seems to be an empty office in a corridor of empty offices in a small town in Texas").

36. *See* Samuel F. Baxter, *Eastern District of Texas: Fair and Just Patent Outcomes for Plaintiffs and Defendants*, METROPOLITAN CORP. COUNSEL (Sept. 1, 2007), http://www.metrocorpcounsel.com/articles/8817/eastern-district-texas-fair-and-just-patent-outcomes-plaintiffs-and-defendants [https://perma.cc/3SLR-V76S]; Christopher P. Gerardi, *Inside the Busiest Patent Court in America: A Discussion with Chief Judge Leonard Davis*, FTI J. (Feb. 2014), http://ftijournal.com/article/inside-the-busiest-patent-court-in-america [https://perma.cc/63R2-RVSQ].

37. In theory, at least. In practice, we question whether it is ever possible for a single judge or small group of judges to effectively oversee many thousands of lawsuits at once, regardless of the causes of action alleged. For example, if even 10% of the 1,686 patent cases assigned to Judge Gilstrap in 2015 eventually go to trial, he would need to preside over at least three patent trials per week every week for an entire year to avoid creating a backlog.

little or no connection to the region prior to filing a complaint.[38]

III. WHY IS THE EASTERN DISTRICT OF TEXAS SO POPULAR?

While the Eastern District's popularity with patent enforcers has been well-documented for years, there is less certainty on the reasons why this district has become the venue of choice for patent monetization. Reviewing the evidence, we find a number of plausible answers. However, we ultimately conclude that the answer is likely more complex than traditional narratives suggest.

A. *Is the Eastern District of Texas a "Rocket Docket"?*

One common explanation for the Eastern District of Texas' popularity is its reputation as a fast docket—i.e., a jurisdiction where cases proceed to trial quickly, which in turn allows plaintiffs to recover damages faster while placing greater pressure on defendants to settle.[39] Many current and former East Texas judges have reinforced this reputation by publicly expressing a preference for getting cases to trial, and quickly.[40] We find support for this hypothesis, but less than many might expect.

First, we do find that patent litigation generally moves quickly in the Eastern District of Texas. Eastern Texas patent cases tend to settle early (and at high rates), and when cases do not settle, they generally make it to trial faster than patent suits litigated in other courts. As shown below in Table 4, patent cases in

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38. Klerman & Reilly, *supra* note 8, at 255-56 ("[P]atent cases generally have a tenuous connection to the Eastern District based on the sale of a few allegedly infringing products somewhere in the district.").

39. *See, e.g.*, Jeff Bounds, *New Patent Infringement Lawsuits in East Texas Shatter Records*, DALL. MORNING NEWS (Aug. 18, 2015), http://www.dallasnews.com/business/business/2015/08/18/new-patent-infringement-lawsuits-in-east-texas-shatter-records [https://perma.cc/8UBG-JTBG] ("The Eastern District of Texas became popular with patent lawyers a decade ago when the federal judges there created a so-called rocket docket, allowing patent holders to move through the pretrial process more quickly and get to trial sooner."); Creswell, *supra* note 9 ("What's behind the rush to file patent lawsuit here [in the Eastern District of Texas]? A combination of quick trials and plaintiff-friendly juries, many lawyers say."); Rogers, *supra* note 10 (attributing the Eastern District of Texas' early popularity with patent plaintiffs to the district's lack of a criminal docket and, thus, relative speed in civil matters).

40. *See* Symposium, *The History and Development of the EDTX as a Court with Patent Expertise: From TI Filing, to the First Markman Hearing, to the Present*, 14 SMU SCI. & TECH. L. REV. 253, 263 (2011) ("We believe in trial by jury, the no-nonsense expectations of lawyers to act in a professional way, getting cases to trial quickly, firm trial settings, and not deviating from them." (quoting Judge Leonard Davis, retired)); John R. Bone & David A. Haas, *Interview with Former Chief Judge David Folsom of the U.S. District Court for the Eastern District of Texas*, STOUT RISIUS ROSS (Spring 2013), http://www.srr.com/article/interview-former-chief-judge-david-folsom-us-district-court-eastern-district-texas [https://perma.cc/K9JX-3353] ("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 . . . . I think we should always give thought to how to move the docket; do it quickly.").

the Eastern District that go to trial tend to make it to a jury in less than two years, about five months faster than the nationwide median. Among districts that saw at least fifteen patent trials in the last two and a half years, the Eastern District has a median time-to-trial that is over two months faster than the next fastest court.

TABLE 4: PATENT CASE TERMINATIONS, SETTLEMENTS, AND TRIALS BY DISTRICT (JAN. 2014-JUNE 2016)[41]

	Terminations		**Settlements**			**Trials**	
	Num.	Median Days to Term.	Num. (as % of all terms.)	Median Days to Settle.	% of Cases Settled w/in 1 Year	Num.	Median Days to Trial
E.D. Tex.	4,963	188	4,341 (87.5%)	174	81.50%	43	717
D. Del.	2,493	400	1,961 (78.7)	355	50.6	68	819
C.D. Cal.	982	251	640 (65.2)	240	64.1	15	795
N.D. Cal.	687	262	491 (71.5)	227	65.4	25	867
D.N.J.	591	266	307 (51.9)	182	67.8	23	801
N.D. Ill.	536	239	386 (72.0)	191	67.6	8	1482
S.D.N.Y.	378	227	269 (71.2)	157	74	17	868
S.D. Fl.[42]	337	120	228 (67.6)	99	93	3	454
S.D. Cal.	303	263	238 (78.5)	243	65.5	3	581
All Other Districts	3,779	259	2,726 (72.1)	237	66.5	101	1125
All Except E.D. Tex.	10,086	274	7,246 (71.8)	246	63.1	263	899
Total	15,049	237	11,587 (77.0)	210	70.0	306	861

We also observe that cases filed in the Eastern District of Texas tend to reach a faster conclusion regardless of the manner in which they are terminated. Among all cases terminated during the period we study, those in the Eastern District conclude about six months faster than those in the District of Delaware and close to two months faster than the national median.

Looking just at those cases that settle, we again see a similar pattern. Among

41. We collected these statistics using Lex Machina. The medians reported are the median days to termination, settlement, or trial for all cases in the listed populations that were terminated, settled, or tried between January 1, 2014 and June 30, 2016.

42. Statistics for the Southern District of Florida are skewed heavily by the actions of one patentee, Shipping and Transit, LLC (FKA ArrivalStar), which filed 110 suits in the district during the period of our study. These suits also terminated exceptionally quickly, settling after a median of just sixty-five days. For background on Shipping and Transit LLC's litigation tactics, see, e.g., Jacqueline Bell, *Notorious IP Plaintiff ArrivalStar Back on the Hunt*, LAW360 (Mar. 5, 2015), http://www.law360.com/articles/628275/notorious-ip-plaintiff-arrivalstar-back-on-the-hunt [https://perma.cc/3QFB-G2JX].

all cases settled between 2014 and mid-2016, those in the Eastern District settled about four months faster than in the next most popular venue, the District of Delaware, and over two months faster than the national median. Looking closer still to cases that settled relatively quickly—within one year of filing—we also see a disproportionate number in the Eastern District of Texas. While about 70% of patent cases nationwide settled in their first year, the Eastern District saw more than 80% of its cases end within a year after filing. In the District of Delaware, by comparison, only half of patent cases settled within one year. In fact, with the exception of the Southern District of Florida, which saw less than one-tenth as many terminations and trials in patent suits during the same period of time, the Eastern District of Texas is the fastest venue among the top ten most popular to settlement, to trial, and to overall termination.

That said, the Eastern District is only marginally faster than many other districts, and it is not the fastest overall. Among the most popular districts for patent suits, that distinction goes to the Southern District of Florida, and nationwide to the Eastern District of Virginia, the original "rocket docket," where patent cases make it to trial more than twice as fast as those in the Eastern District of Texas.[43] Moreover, the Eastern District of Texas' popularity with patentees has continued to grow over time despite the district's rising caseload and consequent drop in speed.[44] If speed were patentees' primary criteria for venue selection, we would expect to see cases filed across a larger number of districts in a manner that achieves a more natural equilibrium.

B. *Are East Texas Judges and Juries Patentee-Friendly?*

Yet another common explanation for East Texas' dominant position in patent litigation is a belief that the district is home to judges and jurors who are unusually sympathetic to plaintiffs.[45] Indeed, the district was a popular venue for

43. *See, e.g.*, Robert M. Tata, *Virginia's 'Rocket Docket' Continues to Roar*, LAW360 (Apr. 17, 2015), http://www.law360.com/articles/644064/virginia-s-rocket-docket-continues-to-roar [https://perma.cc/Y7W6-F483] ("[T]he Eastern District of Virginia—known nationally as the "Rocket Docket"—had the fastest trial docket in the country in 2014 . . . for the seventh year in a row.").

44. Leychkis, *supra* note 19, at 210 ("[The Eastern District of Texas] patent docket has been slowing in recent years as the judges are inundated with more and more new cases."). Indeed, many have predicted (incorrectly so far) over the years that the Eastern District's popularity would eventually shift to other districts with faster dockets. *See, e.g.*, Tresa Baldas, *Texas IP Rocket Docket Headed for Burnout?*, NAT'L L.J. (Dec. 28, 2004), http://www.nationallawjournal.com/id=900005541644/Texas-IP-Rocket-Docket-Headed-for-Burnout [https://perma.cc/W3JZ-VLTN]; Fromer, *supra* note 13, at 1483 ("[T]he Eastern District of Texas might be on the decline as an artificial cluster [of patent litigation], while the Western District of Wisconsin is an up-and-comer."); Pusey, *supra* note 35, at 1D ("There is . . . trouble on the horizon [for the Eastern District of Texas]. Patent cases that used to take eight to 12 months to resolve are now taking 20 to 24 months. And districts in Pennsylvania and Wisconsin are promoting their own rocket dockets to bring intellectual property cases their way.").

45. *See* Bounds, *supra* note 39 ("'While the Eastern District of Texas may not be the rocket docket it once was, and even though the size of jury verdicts has generally declined in

mass tort cases before the rise of patent suits and many lawyers and judges in the area cut their teeth litigating these cases.[46] We also find statistical support for this hypothesis, but again less than conventional wisdom might suggest.

First, as shown below in Table 5, we find that judges in the Eastern District are less likely than their counterparts in other parts of the nation to grant motions to transfer. In fact, the Federal Circuit has taken the extraordinary step of issuing a writ of mandamus ordering the Eastern District to transfer a patent case four times since 2014, something it has otherwise done just once during the same period across all cases litigated in the other ninety-three districts.[47] In addition, we observe that when East Texas judges do transfer cases, they do so much later in the pre-trial process. Cases transferred out of the Eastern District of Texas are over twice as old as those transferred out of the Northern and Central Districts of California. Compared to the national average, the Eastern District of Texas takes more than 100 days longer to grant motions to transfer venue.

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recent years, the Eastern District of Texas still boasts an environment that is very friendly towards plaintiffs . . . .'" (quoting Tyler T. VanHoutan, Partner, Winston & Strawn)); Lee Cheng, *Patent Troll Venue Abuse Must Stop in the Eastern District of Texas*, TRIBTALK (Oct. 28, 2015), https://www.tribtalk.org/2015/10/28/patent-troll-venue-abuse-must-stop-in-the-eastern-district-of-texas [https://perma.cc/MB3V-MBWC] ("What makes trolls like [the Eastern District of Texas]? . . . . [T]he perception, and reality, that the district is favorable to plaintiffs. Historically, Eastern District patent cases have been propelled quickly toward high win rates and large damage awards favoring plaintiffs."); *When Patents Attack!*, *supra* note 11 ("Many people say that it has to do with juries in Marshall, they're famously plaintiff-friendly, friendly to patent owners trying to get a large verdict.").

46. *See* Klerman & Reilly, *supra* note 8, at 272 ("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."). In fact, many attribute the rise of patent litigation in East Texas at least in part to the impact that tort reform had on the local tort docket. *See* Creswell, *supra* note 9 ("In Marshall, an oft-told joke is that the passage of tort reform was when many local lawyers . . . moved out of personal injury and into intellectual property."); Ronen Avraham & John M. Golden, *From PI to IP: Yet Another Unexpected Effect of Tort Reform*, (U. of Tex. Law, Law & Econ. Research Paper No. 211, 2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1878966 [https://perma.cc/WMG9-926S].

47. We obtained this statistic, as well as others referenced below, using Docket Navigator. Like Lex Machina, Docket Navigator is a SaaS provider that allows users to search documents filed in patent infringement suits and generate related analytics. *See Docket Navigator Research Database*, DOCKET NAVIGATOR (2015), http://home.docketnavigator.com/overview/docket-navigator/ [https://perma.cc/3L38-2492]; *Docket Navigator Analytics*, DOCKET NAVIGATOR (2015), http://home.docketnavigator.com/overview/analytics/ [https://perma.cc/7SA5-5DD4]. We calculated this statistic by searching Docket Navigator for Federal Circuit rulings that address requests for writs of mandamus. *See also* Paul R. Gugliuzza, *The New Federal Circuit Mandamus*, 45 IND. L. REV. 343, 346 (2012) ("Before December 2008 . . . the Federal Circuit had never granted a mandamus petition to overturn a transfer decision, denying each one of the twenty-two petitions it had decided on that issue. It is therefore surprising that the Federal Circuit has, on ten occasions since December 2008, granted mandamus to order the U.S. District Court for the Eastern District of Texas to transfer a patent case.").

TABLE 5: PATENT CASE MOTIONS TO TRANSFER BY DISTRICT (JAN. 2014-JUNE 2016)

	Num.[48]	Grant	Deny	Other	Median Days to Transfer[49]
E.D. Tex.	346	164 (47.4%)	154 (44.5%)	28 (8.1%)	340
D. Del.	92	48 (52.2)	33 (35.9)	11 (11.9)	286
C.D. Cal.	46	20 (43.5)	24 (52.2)	2 (4.3)	165
N.D. Cal.	26	13 (50)	11 (42.3)	2 (7.7)	137
D.N.J.	25	17 (68)	5 (20)	3 (12)	290
N.D. Ill.	34	22 (64.7)	8 (23.6)	4 (11.8)	136
S.D.N.Y.	8	5 (62.5)	3 (37.5)	0 (0)	308
S.D. Fl.	31	23 (74.2)	8 (25.8)	0 (0)	161
S.D. Cal.	9	5 (55.5)	3 (33.3)	1 (11.1)	188
All Other Districts	289	145 (50.2)	135 (46.7)	9 (3.1)	279
All Except E.D. Tex.	560	298 (53.2)	230 (41.1)	32 (5.7)	189
Total	906	462 (51.0)	384 (42.4)	60 (6.6)	232

We also see that East Texas judges are disproportionately unlikely to grant motions for summary judgment of non-infringement or invalidity. As shown below in Table 6, judges in the Eastern District of Texas grant summary judgment in defendants' favor at a rate of about half the national average. A motion for summary judgment filed by an accused infringer litigating in a court outside the Eastern District is over twenty percentage points more likely to be granted at least in part than one filed in the Eastern District of Texas. As with motions to transfer, we also see that the Eastern District of Texas takes an unusually long time to grant summary judgment. Compared to the Northern and Central Districts of California, the gap exceeds a year in duration. Even relative to the national median, the Eastern District is more than 100 days slower.

48. We calculated these statistics by searching Docket Navigator for motions to transfer filed between January 1, 2014 and June 30, 2016. Here and throughout, we adopt Docket Navigator's conventions for determining whether a motion was granted and/or denied: "Granted Includes orders (i) granting a motion, and (ii) recommending that a motion be granted. Denied Includes orders (i) denying a motion, (ii) denying a motion as moot, (iii) denying a motion without prejudice, (iv) striking a motion, (v) striking a motion without prejudice, (vi) vacating a motion, (vii) recommending that a motion be denied, and (viii) recommending that a motion be denied as moot. Partial Includes orders (i) denying or granting a motion in part, or (ii) recommending that a motion be denied and granted in part. Other Includes orders which were not included in Granted, Denied or Partial." *Case Management*, DOCKET NAVIGATOR, https://www.docketnavigator.com/stats.

49. We collected this statistic from Lex Machina. The medians reported are the median days to termination for cases in the listed populations that were terminated due to inter-district transfers between January 1, 2014 and June 30, 2016.

TABLE 6: DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT IN PATENT CASES BY DISTRICT (JAN. 2014-JUNE 2016)

	Num.[50]	Grant	Deny	Partial	Other	Median Days to SJ[51]
E.D. Tex.	227	40 (17.6%)	135 (59.5%)	19 (8.4%)	33 (14.5%)	1053
D. Del.	243	78 (32.1)	94 (38.7)	44 (18.1)	27 (11.1)	969
C.D. Cal.	149	53 (35.6)	56 (37.6)	20 (13.4)	20 (13.4)	552
N.D. Cal.	163	55 (33.7)	72 (44.2)	25 (15.3)	11 (6.7)	694
D.N.J.	45	15 (33.3)	26 (57.8)	3 (6.7)	1 (2.2)	1273
N.D. Ill.	73	26 (35.6)	32 (43.8)	10 (13.7)	5 (6.8)	1180
S.D.N.Y.	58	25 (43.1)	25 (43.1)	6 (10.3)	2 (3.4)	1153
S.D. Fl.	26	12 (46.1)	13 (50)	1 (3.8)	0 (0)	662
S.D. Cal.	46	10 (21.7)	33 (71.7)	3 (6.5)	0 (0)	925
All Other Districts	607	204 (33.6)	305 (50.2)	62 (10.2)	36 (5.9)	944
All Except E.D. Tex.	1,410	478 (33.9)	656 (46.5)	174 (12.3)	102 (7.2)	909
Total	1,637	518 (31.6)	791 (48.3)	193 (11.8)	135 (8.2)	911

Next, because East Texas patent cases are both unlikely to be transferred out of the district and unlikely to be completely resolved by summary judgement, they are (unless settled first) disproportionately likely to go to trial. As shown below in Table 7, cases tried in the Eastern District are relatively likely to be tried to a jury, and East Texas juries are in turn disproportionately likely to side with patentees. That said, Eastern District jury verdicts are far from the most plaintiff-friendly in the country, and East Texas juries find for the patentee only slightly more often than the national average. Moreover, while damages awarded by East Texas juries exceed the national average by a large margin, median jury awards in East Texas are actually quite modest—a fact suggesting that, while large awards are certainly possible in East Texas patent trials, they are relatively rare.[52]

50. We calculated these statistics by searching Docket Navigator for motions for summary judgement filed by accused infringers in cases in the listed populations between January 1, 2014 and June 30, 2016.

51. We collected this statistic from Lex Machina. The medians reported are the median days to termination in cases resolved by summary judgment (in favor of either party) between January 1, 2014 and June 30, 2016.

52. Patentees' ability to win large damages awards in the Eastern District of Texas is also supported by the fact that East Texas juries are responsible for six of the thirteen largest jury verdicts awarded in patent cases since 1995. *See* PWC, 2014 Patent Litigation Study 7, https://www.pwc.com/us/en/forensic-services/publications/assets/2014-patent-litigation-study.pdf [https://perma.cc/YVB6-MJFG]; Masimo Corp. v. Philips Elec. N. Am. Corp., No. 09-cv-00080 (D. Del. Oct. 1, 2014), ECF No. 913 (awarding $466,774,783 in damages); Smartflash LLC v. Apple Inc., No. 13-cv-00447 (E.D. Tex. Feb. 24, 2015), ECF No. 503

TABLE 7: TRIALS AND DAMAGES AWARDS IN PATENT CASES BY DISTRICT (JAN. 2014-JUNE 2016)

	Trials			**Damages Awards**			
	Num.[53]	% Jury Trials[54]	% Won by Patentee	Num.[55]	Median	Mean	Num. in Top 10 (2014-16)
E.D. Tex.	43	81.8%	60.0%	19	$6,970,381	$76,741,070	2
D. Del.	68	54.9	74.1	12	$15,500,000	$83,233,792	2
C.D. Cal.	15	45.5	20.0	3	$13,488,765	$48,372,672	1
N.D. Cal.	25	82.9	46.2	14	$8,320,000	$45,475,067	3
D.N.J.	23	0.0	54.5	0	—	—	0
N.D. Ill.	8	50.0	50.0	1	$15,884,106	$15,884,106	0
S.D.N.Y.	17	26.7	50.0	4	$3,494,518	$9,634,759	0
S.D. Fl.	3	75.0	50.0	2	$10,673,289	$10,673,289	0
S.D. Cal.	3	100.0	100.0	3	$2,166,654	$95,160,551	1
All Other Districts	101	61.5	55.3	33	$7,800,000	$18,419,845	1
All Except E.D. Tex.	263	56.2	57.9	72	$8,376,351	$38,190,010	8
Total	306	60.0	58.3	91	$8,099,943.00	$46,239,132.36	10

Finally, the district's high reversal rate on appeal tends to support the belief that the district is too friendly to patent plaintiffs.[56] As shown below in Table 8, appeals from the Eastern District of Texas are disproportionately likely to be successful. Since 2014, the Federal Circuit has reversed the Eastern District of Texas, at least in part, in about 45% of appeals. Many other popular districts, by contrast, have affirmance rates that are twenty or more percentage points higher

(awarding $532,900,000 in damages); VirnetX v. Apple, No. 12-cv-00855 (E.D. Tex. Feb. 3, 2016), ECF No. 425 (awarding $625,633,841 in damages).

53. We collected the number of trials and win rate from Lex Machina, looking at all trials conducted between January 1, 2014 and June 30, 2016.

54. We collected the percentage of jury trials by searching Docket Navigator for verdicts and findings of fact issued in cases in the listed populations between January 1, 2014 and June 30, 2016. Thus, this statistic does not include any trials that settled or otherwise ended prematurely before a verdict was issued.

55. We collected data on damages awards by searching Docket Navigator for awards issued in cases in the listed populations between January 1, 2014 and June 30, 2016. These statistics exclude any amounts awarded in default judgments.

56. Interestingly, early on, many pointed to the Eastern District of Texas' low rate of reversal as evidence of a lack of bias in favor of patentees. *See* Pusey, *supra* note 35, at 1D ("Judge [T. John] Ward . . . says [complaints about plaintiff-friendly bias are] overstated, and appellate statistics support his view. Only once has he been overruled in a patent matter, and even then, only partially.").

than the Eastern District's.[57]

TABLE 8: PATENT APPELLATE OUTCOMES BY DISTRICT (JAN. 2014-JUNE 2016)[58]

	Num. Fed. Cir. Rulings	Affirmed	Reversed	Mixed	Other
E.D. Tex.	55	29 (52.7%)	17 (30.9%)	8 (14.5%)	1 (1.8%)
D. Del.	89	68 (76.4)	15 (16.9)	5 (5.6)	1 (1.1)
C.D. Cal.	52	41 (78.8)	5 (9.6)	5 (9.6)	1 (1.9)
N.D. Cal.	51	37 (72.5)	6 (11.8)	8 (15.7)	0 (0)
D.N.J.	30	23 (76.7)	3 (10)	4 (13.3)	0 (0)
N.D. Ill.	16	10 (62.5)	4 (25)	2 (12.5)	0 (0)
S.D.N.Y.	45	26 (57.8)	5 (11.1)	13 (28.9)	1 (2.2)
S.D. Fl.	16	9 (56.3)	5 (31.3)	1 (6.3)	1 (6.3)
S.D. Cal.	18	10 (55.5)	3 (16.7)	5 (27.8)	0 (0)
All Other Districts	207	126 (60.9)	41 (19.8)	31 (15.0)	9 (4.3)
All Except E.D. Tex.	524	350 (66.8)	87 (16.6)	74 (14.1)	13 (2.5)
Total	579	379 (65.5)	104 (18.0)	82 (14.2)	14 (2.4)

Overall, we find that while the Eastern District of Texas is generally patentee-friendly, outcomes in the Eastern District are comparable in many respects to other districts that see far fewer filings. And in some respects, cases filed in East Texas actually have worse outcomes for patentees. Perhaps most notably, both the District of Delaware and that Northern District of California saw higher median and mean jury awards during our period of study, and both districts held almost as many trials as the Eastern District, despite seeing far fewer filings. Together, these findings once again make us skeptical that a marginal tendency to favor patent enforcers in substantive decision-making is the driving force behind the Eastern District's popularity. Though relative advantages on the merits likely play some role in the district's dominance of filings, they do not strike us as sufficiently stark on net to account for such a great disparity in filings.

57. *See also* Teresa Lii, *Shopping for Reversals: How Accuracy Differs Across Patent Litigation Forums*, 12 CHI.-KENT J. INTELL. PROP. 31, 43-45 (2013) (finding that the Eastern District of Texas' reversal rate on appeal between 2009 and March 2012 was significantly higher than the overall mean); Ryan Davis, *EDTX Judges' Love of Patent Trials Fuels High Reversal Rate*, LAW360 (Mar. 8, 2016), http://www.law360.com/articles/767955/edtx-judges-love-of-patent-trials-fuels-high-reversal-rate [https://perma.cc/USW9-DCFY] ("The Federal Circuit affirmed decisions coming out of the patent hotbed of the Eastern District of Texas only 39 percent of the time in 2015, while the rate for other patent-heavy districts was around 70 percent . . .").

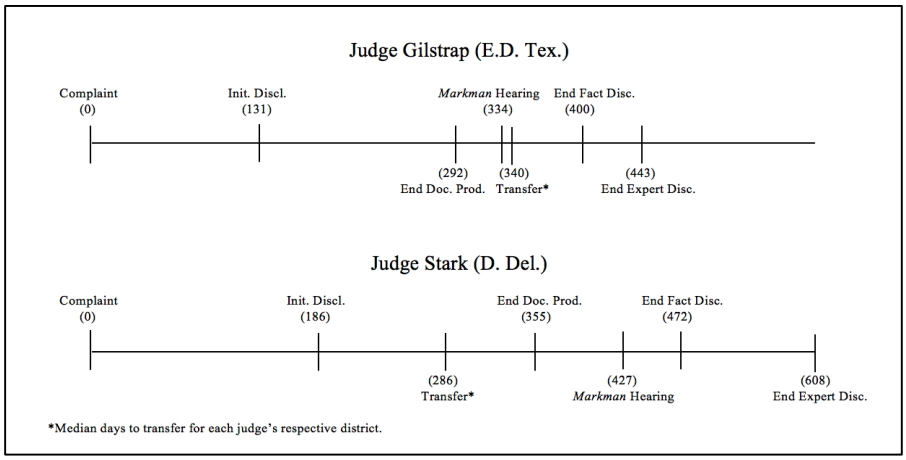
58. We collected the data in this table by searching Docket Navigator for Federal Circuit decisions issued between January 1, 2014 and June 30, 2016.

C. *Discovery Deadlines and Pretrial Motions Practice*

Ultimately, we find neither traditional explanation for the Eastern District's popularity particularly satisfying when viewed in isolation. Rather, we conclude that the true appeal of East Texas is more subtle and stems from the combined effect of a number of marginal procedural advantages, including the relative timing of discovery, rulings on procedural motions, and judicial scrutiny of infringement claims.

Figure 1 below shows a timeline of discovery and other pretrial deadlines taken from a sample of recent scheduling orders issued by Judge Gilstrap in patent cases litigated in the Eastern District of Texas and by Judge Leonard Stark, who has the largest patent docket in the District of Delaware.[59] The numbers shown in parentheses represent the median number of days from the complaint to each of the deadlines set in our sample of scheduling orders. In addition, we have added to each timeline the median number of days from filing to a ruling on motions to transfer for each judge's respective district.[60]

Figure 1: Comparison of Median Number of Days from Filing to Various Pretrial Deadlines and Dates



As Figure 1 shows, discovery both begins and ends earlier in cases litigated before Judge Gilstrap. Every discovery deadline occurs earlier on Judge Gilstrap's

59. Using Lex Machina, we identified the last ten scheduling orders issued by each judge prior to June 30, 2016. These orders are largely uniform across cases because both judges encourage litigants to refer to model scheduling orders. Sample Docket Control Order for Patent Cases Assigned to Judge Rodney Gilstrap and Judge Roy Payne, http://www.txed.uscourts.gov/cgi-bin/view_document.cgi?document=22244 [https://perma.cc/LD4P-4SB3]; Revised Patent Form Scheduling Order, http://www.ded.uscourts.gov/sites/default/files/Chambers/LPS/PatentProcs/LPS-PatentSchedOrder-Non-ANDA.pdf [https://perma.cc/6NZP-KQBC].

60. *See supra* Table 5.

scheduling order, generally by 50 to 100 days. In fact, these figures probably understate the differential in practice because, in our experience, Judge Gilstrap is less likely than most judges to allow parties to later extend these deadlines.[61] As a result, parties sued for infringement in the Eastern District begin to incur discovery costs—the single largest expense in patent litigation[62]—faster than similarly situated defendants litigating elsewhere in the country.

1. *Discovery, Transfer, and Markman Dates*

At the same time, the districts also differ with respect to the timing of two other important pretrial events: rulings on motions to transfer and the date of claim construction, or *Markman*,[63] hearings. Compared to their colleagues in the District of Delware, judges in the Eastern District of Texas take a relatively long time to rule on motions to transfer venue. By the time cases erroneously filed in East Texas are transferred to a new venue, most are a year old. By contrast, judges in the District of Delaware generally transfer cases about two months faster.

Moreover, the size of this gap alone understates the true impact that this dichotomy has on accused infringers. Because Judge Gilstrap also orders that document production be complete within about ten months of filing, the relative delay in transfers means that any defendant sued in the Eastern District (even those with no real connection to the venue) must generally complete document production according to the rules of that District, which (in addition to starting early) are unusually broad in scope. Judge Gilstrap's sample discovery order, for example, requires production or inspection of "all documents . . . that are relevant to the pleaded claims or defenses," a requirement written to be so broad that it "obviate[s] the need for requests for production."[64] Local Rule 26(a) also makes clear that when it comes to discovery in the Eastern District of Texas there are "No Excuses"—responses are required regardless of any "pending motions to

61. This was also true of other former Eastern District judges who were popular with patent case filers during their time on the bench. *See* Gerardi, *supra* note 36 ("We have firm trial settings. I seldom grant a motion for continuance, thus one will get a fairly quick trial." (quoting Judge Leonard Davis, retired)).

62. According to a survey of IP litigators, the median cost to defend a mid-sized patent suit (i.e., a suit with between $10 and $25 million at stake) through the end of discovery is $1.9 million, while the total cost through the end of trial is $3.1 million. AM. INTELL. PROP. L. ASSOC., 2015 REPORT OF THE ECONOMIC SURVEY I-111, http://www.aipla.org/learningcenter/library/books/econsurvey/2015EconomicSurvey/Pages/default.aspx.

63. Named after *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 372 (1996) (holding that claim construction is a question of law to be resolved by the court).

64. Sample Discovery Order for Patent Cases Assigned to Judge Rodney Gilstrap and Judge Roy Payne, http://www.txed.uscourts.gov/cgi-bin/view_document.cgi?document=22243 [https://perma.cc/C96U-ZEAG]. The phrase "relevant to any party's claim or defense" is also broadly defined in the district's Local Rules. E.D. Tex R. CV-26(d) (May 24, 2016), www.txed.uscourts.gov/cgi-bin/view_document.cgi?document=1164 [https://perma.cc/X4VB-BARK].

dismiss, to remand, or to change venue."[65]

In addition, the relatively early deadlines for the completion of all other forms of discovery also weigh against accused infringers. In a median patent case litigated before Judge Gilstrap in the Eastern District of Texas, fact discovery will end 66 days sooner, and expert discovery 157 days sooner, than in a typical patent case assigned to Judge Stark in the District of Delaware. As a result, otherwise similarly situated defendants litigating in East Texas will be required to incur the high costs of discovery more quickly than their counterparts litigating elsewhere. Once again, the duration of this gap alone understates the impact on accused infringers. As shown in Figure 1, both districts also differ with respect to the relative timing of discovery cutoffs and the *Markman* hearing. As a result, even though Judge Gilstrap generally schedules *Markman* hearings two to three months earlier than Judge Stark, litigants in Delaware nonetheless have three months longer to conduct discovery post-*Markman*. In our experience, accused infringers (but not plaintiffs looking for a quick settlement) strongly prefer to conduct the bulk of their own discovery only after the court has ruled on the scope of the asserted claims. Due to the inherent indeterminacy of patent claim scope, it is often unclear how a case will be litigated on the merits until after claim construction takes place.[66] As a result, Judge Gilstrap's scheduling practices often force defendants to decide whether to cram the most crucial aspects of their own discovery into the short window following claim construction or, instead, to shoot in the dark before important terms have been defined.

2. *Predictably Expensive*

It is the combined effect of the procedural shifts described above that we believe actually explains the bulk of the Eastern District's popularity and its case composition. In combination, East Texas' tendency to impose relatively fast and firm discovery deadlines and to issue substantive rulings relatively late in cases facilitates precisely the kind of high volume, low value patent litigation that the district has become infamous for.[67] This is because the relative timing of

65. *See* E.D. Tex. R. CV-26(a).

66. On the difficulty inherent in determining claim scope, see, e.g., Dan L. Burk & Mark A. Lemley, *Quantum Patent Mechanics*, 9 LEWIS & CLARK L. REV. 29 (2005); Mark A. Lemley, *The Changing Meaning of Patent Claim Terms*, 104 MICH. L. REV. 101(2005).

67. As then-Chief Judge Leonard Davis once aptly put it: "If I could sum it up [i.e. why the Eastern District is so popular] in one word, I would say predictability." Gerardi, *supra* note 36. As mentioned *supra* in note 21, this predictability includes patentees' ability to select (with a very high degree of probability) which Eastern District judge will be assigned to their cases, something that is not possible elsewhere in the country. *See* Symposium, *supra* note 40, at 257-58 (explaining that one reason the Eastern District of Texas is more popular than other districts with similar local patent rules is "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" (statement of Mike McKool, Partner, McKool Smith)). Accordingly, patentees who wish to take advantage of Judge Gilstrap's standard docket control and discovery orders can do so today with 95% certainty by filing suit in Marshall. *See supra* note 21 and accompanying text.

discovery, transfer, and *Markman* ensures that, by virtue of being sued in the Eastern District, an accused infringer will be forced to incur large discovery costs, regardless of the case's connection to East Texas or the merits of its noninfringement contentions.

The result is an opportunity for patentees to file large numbers of cases and offer to settle them for amounts few defendants will find it rational to decline. And, indeed, that is what we see in the data discussed above: the Eastern District is uniquely attractive to plaintiffs that (i) do not sell products of their own, and thus have few documents of their own to produce, (ii) enforce high tech patents that can be asserted broadly against many accused infringers, and (iii) generally settle quickly. As shown below in Table 9, five of the ten patentees that filed the most suits during the period of our study filed exclusively in the Eastern District of Texas and another two filed the majority or plurality of their suits in East Texas.[68] Law firms have also specialized to meet the needs of high-volume litigants like these. The Tadlock Law Firm, for example, has represented patentees in over one thousand cases filed in the Eastern District of Texas since 2012. Those cases have a median time-to-termination of just 172 days, and only three have gone to trial.[69]

Though we lack data on settlement amounts, it is our personal experience that many cases in the Eastern District of Texas settle for between $30,000 and $100,000, amounts that reflect more than anything a fraction of the defendants' anticipated cost of defense.[70] A report recently published by the Federal Trade Commission supports our anecdotal experience. In a study of confidential business information subpoenaed from twenty-two PAEs, the FTC found that patentees monetizing their rights through litigation licensed their patents about 30% of the time for less than $50,000 and almost 80% of the time for less than $300,000,[71] an amount the report "approximates [to be] the lower bound of early-stage litigation costs of defending a patent infringement suit."[72] We think it likely

68. *See also* John R. Allison et al., *Patent Quality and Settlement Among Repeat Patent Litigants*, 99 GEO. L.J. 677, 677 (2011) (finding that patent plaintiffs that sued eight or more times were more likely than other patent enforcers to settle and also much more likely to lose on the merits of their cases if pushed to a trial or judgment).

69. We collected this information from Lex Machina by searching for firms that have served as counsel in the largest number of patent suits.

70. For additional anecdotal support consider, for example, the litigation practices of Lodsys and Innovatio. *See* David Ruddock, *Patent Trolls: What Is Lodsys Actually Asking App Developers to Pay? You Might Be Surprised*, ANDROID POLICE (Nov. 2, 2011), http://www.androidpolice.com/2011/11/02/patent-trolls-what-is-lodsys-actually-asking-app-developers-to-pay-you-might-be-surprised [https://perma.cc/QS3S-984Z]; Gregory Thomas, *Innovatio's Infringement Suit Rampage Expands to Corporate Hotels*, PAT. EXAMINER (Sept. 30, 2011), http://patentexaminer.org/2011/09/innovatios-infringement-suit-rampage-expands-to-corporate-hotels [https://perma.cc/E8RZ-NKJX].

71. FED. TRADE COMM'N, PATENT ASSERTION ENTITY ACTIVITY 88-90 (2016), https://www.ftc.gov/system/files/documents/reports/patent-assertion-entity-activity-ftc-study/p131203_patent_assertion_entity_activity_an_ftc_study_0.pdf [https://perma.cc/LP3K-SJCE].

72. *Id.* at 4.

that the tendency toward large numbers of small settlements also explains, at least in part, the relatively low level of damage awards that we see in most East Texas trials. Because cases are litigated in this fashion, by the time many patents are tried to a jury (if ever) in the Eastern District of Texas, those patents have been licensed numerous times for small amounts. If entered into evidence, these prior licenses make it hard for the patentee to credibly ask the jury to award a large sum of damages.

Conversely, the success of this litigation strategy also makes the Eastern District of Texas predictably inexpensive for patentees that pursue it. Because they can routinely negotiate settlements within a few months of filing a complaint, plaintiffs can very likely avoid hiring expert witnesses, as well as reviewing their own or their opponents' documents and other disclosures, before negotiating a settlement.

TABLE 9: MOST FREQUENT PATENT SUIT FILERS (JAN. 2014-JUNE 2016)[73]

Party	Cases	% Filed in E.D. Tex.	% Terminated	Median Days to Term.	Trials
eDekka, LLC	231	100%	100%	162	0
Uniloc USA, Inc.	111	100	26	320	0
Shipping and Transit, LLC	160	0	84	65	0
Hawk Tech. Systems, LLC	149	8	88	107	0
Olivistar, LLC	103	99	98	182	0
Data Carriers, LLC	99	86	97	189	0
Eclipse IP, LLC	90	48	98	91	0
Blackbird Tech, LLC	72	0	53	336	0
Cryptopeak Solutions, LLC	66	100	73	131	0
Logitraq, LLC	59	100	100	130	0
Total	1,126	63	85	130	0

IV. WHY HAVEN'T RECENT REFORMS AND APPELLATE OPINIONS REDUCED THE EASTERN DISTRICT'S POPULARITY?

This conclusion, however, raises the question of why reforms enacted in recent years—reforms targeted at PAEs and overbroad high tech patents—have not already put an end to East Texas' dominance. In this Part, we review evidence that judges in the Eastern District of Texas have generally ruled in ways that have minimized the effect of patent reform measures passed by Congress and changes

73. The data in this table relies on a combination of information obtained from Unified Patents and Lex Machina. We obtained the names of the top 10 filers from Unified and collected case level information by searching Lex Machina for each party's name.

in the law articulated by higher courts. We find that East Texas judges are disproportionately unlikely to stay cases pending post-grant challenges, to require that patentees litigate individual cases against individual defendants, to grant early motions to dismiss on patentable subject matter grounds, and to award attorney's fees to prevailing parties.

A. *The America Invents Act*

In 2011, Congress passed the America Invents Act (AIA), the largest set of reforms to U.S. patent law since 1952.[74] Among the reforms enacted in the AIA were two specifically designed to curb the practice of filing patent suits in order to extract settlements that reflect defendants' desire to avoid the high cost of defense, rather than the strength and value of the asserted claims.

One such reform was the expansion of administrative procedures for challenging the validity of issued patents. Such procedures are designed to allow the public to eliminate patents they believe are invalid using patent office procedures that are faster, less expensive, and more broadly available than litigation in federal district court.[75] So far, the new procedures created by the AIA—particularly inter partes review and covered business method review—have proven very potent and, today, it is common for defendants to seek to invalidate patents asserted against them in court.[76] Concurrent with such challenges, defendants regularly file motions to stay patent suits for the roughly eighteen-month duration of the challenge.[77] In conjunction with litigation stays, post grant challenges allow an accused infringer to invalidate weak patent rights without first incurring the high cost of discovery.

However, as shown below in Table 10, judges in the Eastern District of Texas are less likely than their counterparts in other parts of the country to stay lawsuits pending patent office challenges of the patent-in-suit. Judges in the District of

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74. Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011) (codified in scattered sections of 35 U.S.C.) [hereinafter AIA].

75. *See* 145 CONG. REC. H6944 (daily ed. Aug. 3, 1999) (statement of Rep. Rohrabacher) ("This title was an attempt . . . to further encourage potential litigants to use the PTO as a [sic] avenue to resolve patentability issues without expanding the process into one resembling courtroom proceedings."); *Protecting Small Businesses and Promoting Innovation by Limiting Patent Troll Abuse: Hearing on S. 23 Before the U.S. Senate Judiciary Committee*, 113th Cong. 186-213, 193 (2013) (statement of Q. Todd Dickinson, Executive Director of the American Intellectual Property Law Association) (recounting the debate leading up to the AIA and referring to "the assertion of allegedly invalid or overbroad patents" as "the very abuse for which AIA post-grant procedures were created") [hereinafter 2013 Patent Troll Abuse Hearing].

76. Roughly 10% of patents litigated between 2012 and 2014 were also challenged in a post-grant proceeding. Brian J. Love, Presentation to the State Bar of California I.P. Law Section: New Developments, New IPR Strategies Before PTAB 12 (Mar. 23, 2016), http://digitalcommons.law.scu.edu/facpubs/925 [https://perma.cc/TV9F-ZEA5] (reporting statistics compiled by Unified Patents). Of patents challenged in post-grant proceedings between 2012 and 2014, about 80% were also asserted in court. *Id.*

77. Between January 1, 2014 and June 30, 2016, litigants filed almost 1,000 motions to stay litigation pending an inter partes or covered business method review. *See infra* Table 10.

Delaware and Northern District of California grant motions to stay, at least in part, over 70% of the time. By contrast, the grant rate in the Eastern District of Texas is less than 58%. As a result, defendants sued in East Texas are more likely to continue to rack up litigation costs early in cases, regardless of the asserted patent's validity.

TABLE 10: MOTIONS TO STAY PENDING PTAB PROCEEDINGS BY DISTRICT (JAN. 2014-JUNE 2016)[78]

	Motions to Stay Pending Inter Partes Review					**Motions to Stay Pending Covered Bus. Method Review**				
	Num.	Grant	Deny	Partial	Other	Num.	Grant	Deny	Partial	Other
E.D. Tex.	88	46 (52.3%)	36 (40.9%)	4 (4.5%)	2 (2.3%)	43	21 (48.8%)	18 (41.9%)	1 (2.3%)	3 (7.0%)
D. Del.	95	59 (62.1)	28 (29.5)	5 (5.3)	3 (3.1)	6	2 (33.3)	2 (33.3)	2 (33.3)	0 (0)
C.D. Cal.	53	29 (54.7)	15 (28.3)	4 (7.5)	5 (9.4)	8	4 (50)	4 (50)	0 (0)	0 (0)
N.D. Cal.	112	68 (60.7)	23 (20.5)	15 (13.4)	6 (5.3)	10	7 (70)	2 (20)	1 (10)	0 (0)
D.N.J.	10	6 (60)	4 (40)	0 (0)	0 (0)	0	0 (0)	0 (0)	0 (0)	0 (0)
N.D. Ill.	36	27 (75)	6 (16.7)	2 (5.5)	1 (2.8)	11	6 (54.5)	3 (27.3)	2 (18.2)	0 (0)
S.D.N.Y.	24	16 (66.7)	4 (16.7)	0 (0)	4 (16.7)	7	5 (71.4)	1 (14.3)	0 (0)	1 (14.3)
S.D. Fl.	11	8 (72.7)	2 (18.2)	0 (0)	1 (9.1)	3	3 (100)	0 (0)	0 (0)	0 (0)
S.D. Cal.	21	9 (42.9)	6 (28.6)	4 (19.0)	2 (9.5)	7	6 (85.7)	1 (14.3)	0 (0)	0 (0)
All Other Districts	362	215 (59.4)	97 (26.8)	26 (7.2)	24 (6.6)	48	31 (64.6)	10 (20.8)	3 (6.3)	4 (8.3)
All Except E.D. Tex.	724	437 (60.3)	185 (25.5)	56 (7.7)	46 (6.3)	100	64 (64)	23 (23)	8 (8)	5 (5)
Total	812	483 (59.5)	221 (27.2)	60 (7.4)	48 (5.9)	143	85 (59.4)	41 (28.7)	9 (6.3)	8 (5.6)

The AIA also sought to limit the ability of patentees to accuse a large number of parties of infringement in a single suit. Pre-AIA it was common for litigious patentees to sue many—sometimes dozens of—unrelated parties in a single suit.[79] This practice, while efficient for the patentee, often disadvantaged defendants sued en masse.[80] Suing large numbers of parties in a single case, for example, allowed patentees to leverage one defendant's local ties to help keep litigation against many others in East Texas. In addition, patentees also benefited from rules

78. All figures in this table were collected by searching Docket Navigator for motions to stay that were decided between January 1, 2014 and June 30, 2016.

79. *See, e.g.*, John S. Pratt & Bonnie M. Grant, *Beware the Trolls: Explorers or Buccaneers?*, 207 PAT. WORLD 18, 18 (Nov. 2008), http://www.kilpatricktownsend.com/~/media/Files/articles/BewaretheTrolls.ashx [https://perma.cc/4TE9-GXFZ] (reporting that patentee Clear with Computers, LLC once sued forty-seven defendants in a single suit).

80. *See* Klerman & Reilly, *supra* note 8, at 257-60 (summarizing the Eastern District of Texas' liberal stance on joinder and the negative effects it can have on accused infringers sued in multi-defendant cases).

restricting all co-defendants to a single brief or allotment of time for argument or trial. In the AIA, Congress sought to limit plaintiffs' ability to file these suits by changing the rules for joinder in patent cases.[81] As the law reads today, joinder of multiple accused infringers is no longer permissible "based solely on allegations that they each have infringed the patent or patents in suit."[82]

However, as shown below in Table 11, it has become common in the Eastern District of Texas for individual patent cases filed by the same plaintiff to be consolidated post-filing back into what is effectively a single suit for pre-trial purposes. Though grant rates are relatively high for these motions nationwide, judges in the Eastern District of Texas grant them virtually every time. In addition, while these motions are relatively rare in most other districts, they are common in East Texas. On a per case basis, the Eastern District of Texas issues three times more consolidation orders than the District of Delaware and Northern District of California, and compared to most other popular districts, the Eastern District of Texas is about twice as likely to consolidate cases that share a common patent-in-suit.[83] In absolute terms, the Eastern District of Texas issues more consolidation orders than all other districts combined. In fact, these statistics arguably understate the gap between districts' willingness to consolidate patent cases because it is common for judges in the Eastern District to consolidate cases sua sponte, without a motion ever being filed.[84]

81. *See* Tracie L. Bryant, Note, *The America Invents Act: Slaying Trolls, Limiting Joinder*, 25 HARV. J.L. & TECH. 687, 687-88 (2012) (noting that on the day before the AIA's new joinder rules went into effect, NPEs filed "over fifty patent infringement cases . . . against more than 800 defendants.").

82. AIA, *supra* note 74, sec. 19(d), § 299, 125 Stat. 284, 332-33 (2011).

83. Consider, for example, the forty-four cases filed by Eclipse IP LLC to enforce U.S. Pat. No. 7,876,239 during the period of our study. Of those cases, twenty-nine were filed in the Eastern District of Texas, thirteen in the District of New Jersey, and two in the Northern District of Illinois. In addition, another seven declaratory judgment actions targeting the same patent were filed against Eclipse IP in the Central District of California. The Eastern District of Texas, which issued three orders consolidating fifteen of its twenty-nine cases, was the only district of these four to combine Eclipse cases for pretrial purposes.

84. We collected data on consolidation orders by searching Docket Navigator for motions to consolidate decided between January 1, 2014 and June 30, 2016. During the first six months of 2016, judges in the Eastern District of Texas issued 121 sua sponte consolidation orders. During the same period of time, all other districts issued just twenty-four.

TABLE 11: CONSOLIDATION OF PATENT CASES BY DISTRICT (JAN. 2014-JUNE 2016)

	Num. Cases with Patent-in-Suit in Common with Another Case Filed in Same District . . .[85]		Consolidation Orders[86]				
	Anytime Jan. 2014-June 2016.	Within Same 6 Month Period.	Num.	Grant	Deny	Partial	Other
E.D. Tex.	4486	4407	552	542 (98.2%)	7 (1.3%)	3 (0.5%)	0 (0%)
D. Del.	1388	1297	68	62 (91.2)	5 (7.3)	1 (1.5)	0 (0)
C.D. Cal.	479	442	38	25 (65.8)	4 (10.5)	6 (15.8)	3 (7.9)
N.D. Cal.	369	343	24	21 (87.5)	3 (12.5)	0 (0)	0 (0)
D.N.J.	503	466	116	108 (93.1)	7 (6.0)	0 (0)	1 (0.9)
N.D. Ill.	280	266	13	11 (84.6)	1 (7.7)	1 (7.7)	0 (0)
S.D.N.Y.	189	161	13	8 (61.5)	4 (30.8)	0 (0)	1 (7.7)
S.D. Fl.	235	231	20	10 (50)	6 (30)	0 (0)	4 (20)
S.D. Cal.	137	123	16	14 (87.5)	2 (12.5)	0 (0)	0 (0)
All Other Districts	1416	1262	156	119 (76.3)	27 (17.3)	8 (5.1)	2 (1.3)
All Except E.D. Tex.	4996	4591	464	378 (81.5)	59 (12.7)	16 (3.4)	11 (2.4)
Total	9482	8998	1016	920 (90.5)	66 (6.5)	19 (1.9)	11 (1.1)

In short, though one might have expected ex ante that the AIA would shrink the Eastern District of Texas' caseload, it appears to have done precisely the opposite. Since 2012, the Eastern District of Texas' share of patent litigation has only grown.[87] While other districts generally embraced the new reforms, judges in East Texas were more reluctant to break with tradition and, as a result, the Eastern District retained and attracted cases filed by patentees who also preferred the old way.

85. We are grateful to Unified Patents for sharing data on asserted patents. Using that data, we were able to construct a list of unique patent-case pairs and identify cases sharing a patent-in-suit.

86. We collected data on consolidation orders by searching Docket Navigator for motions to consolidate decided between January 1, 2014 and June 30, 2016.

87. Patent suits in the Eastern District of Texas have increased since 2012, both in absolute terms and as a share of all patent litigation nationwide. According to Lex Machina, 1,251 new patent cases were filed in the Eastern District of Texas in 2012 compared to a national total of 5,461 patent cases. In 2015, the Eastern District saw 2,541 new patent cases, compared to 5,821 nationally. *Patent Cases Filed by Year*, LEX MACHINA (Sept. 12, 2016), https://law.lexmachina.com/court/table#Patent-tab.

B. *Recent Supreme Court Opinions*

In addition to congressional action, the Supreme Court has also recently modified several patent law doctrines in ways that tend to favor accused infringers. In these areas as well, we observe that the Eastern District of Texas has been reluctant embrace change.

First, in *Alice v. CLS Bank* the Supreme Court tackled the patentability of software, a topic that had deeply divided the Federal Circuit for years.[88] As interpreted by lower courts, *Alice* all but precludes the patentability of business methods, including those implemented in software.[89] Another result of the case was that, soon thereafter, many courts began disposing of cases asserting business method patents on the pleadings, without need for discovery or other pretrial proceedings. In our experience, this type of quick adjudication generally allows for business method cases to be defended for five figures in costs, far more efficiently even than filing an inter partes or covered business method review.[90] However, as shown below in Table 12, judges in the Eastern District of Texas have been reluctant to embrace this new practice. On a per case basis, defendants in the Eastern District of Texas filed three to four times fewer motions to dismiss than those sued in other popular districts. We do not believe this lack of motions to reflect a lack of merit in potential arguments, but rather an understanding that such motions would not be viewed favorably by the court. For one, for a period of time Judge Gilstrap took the exceptional step of requiring parties to request permission in writing to file an early motion to dismiss based on *Alice*.[91] More importantly, as Table 12 shows, hundreds of cases enforcing business method patents were filed in East Texas during the period covered by our study. Between January 2014 and June 2016, the Eastern District of Texas saw 30% of all cases enforcing patents examined by PTO Technology Center 3600,[92] the tech center

88. Alice Corp. Pty. Ltd. v. CLS Bank Int'l, 134 S. Ct. 2347 (2014).

89. *See, e.g.*, Robert R. Sachs, *Two Years After Alice: A Survey of the Impact of a "Minor Case" (Part 1)*, BILSKI BLOG (June 16, 2016) http://www.bilskiblog.com/blog/2016/06/two-years-after-alice-a-survey-of-the-impact-of-a-minor-case.html [https://perma.cc/KZ6P-TPJC] (showing the impact of *Alice* on patent litigation, particularly with respect to asserted "software" and "business method" patents); Robert R. Sachs, *Two Years After Alice: A Survey of the Impact of a "Minor Case" (Part 2)*, BILSKI BLOG (June 20, 2016) http://www.bilskiblog.com/blog/2016/06/two-years-after-alice-a-survey-of-the-impact-of-a-minor-case-part-2.html [https://perma.cc/D4YF-MS3C] (showing the impact of *Alice* on patent prosecution, particularly with respect to the rate of patentable subject matter rejections in Tech Center 3600, "Business Methods, Construction, Transportation").

90. Inter partes review, for example, generally costs well over a quarter million dollars. AM. INTELL. PROP. L. ASSOC., 2015 REPORT OF THE ECONOMIC SURVEY I-141 (reporting a median cost of $275,000 to pursue an inter partes review through a hearing before the Patent Trial and Appeal Board).

91. *See, e.g.*, Kevin Penton, *Judge Gilstrap Rewrites Rules For Alice Motions In Texas*, LAW360 (Nov. 12, 2015) http://www.law360.com/articles/726270/judge-gilstrap-rewrites-rules-for-alice-motions-in-texas [https://perma.cc/BF32-52WJ].

92. U.S. patent examiners are divided into nine "technology centers," each subdivided into a number of "work units" that, in turn, are further subdivided into "art units." *See Patent Technology Centers*, U.S. PAT. & TRADEMARK OFF.,

with the highest rate of patentable subject matter rejections post-*Alice*,[93] and about 45% of all cases enforcing patents examined by TC3600 art units responsible for examining e-commerce patent applications,[94] the art units with the highest rate of patentable subject matter rejections post-*Alice*.[95] Nonetheless, during the same period of time, the Eastern District of Texas issued just 12% of all dismissals on patentable subject matter grounds.

In addition to seeing a relatively small number of early *Alice* motions, judges in the Eastern District also granted these motions at a relatively low rate—ten percentage points below the national average. Moreover, if we are right about litigants' reluctance to file these motions in the first place, those motions filed in East Texas likely represent among the strongest motions that might otherwise have been filed and, thus, the figures reported here likely understate the true gap among districts' grant rates.

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https://www.uspto.gov/about/contacts/phone_directory/pat_tech [https://perma.cc/TE8R-UYVW]. Though titled "Transportation, Construction, Electronic Commerce, Agriculture, National Security and License & Review," Technology Center 3600 is the primary tech center for applications covering business methods. *See Patent Business Methods*, U.S. PAT. & TRADEMARK OFF., https://www.uspto.gov/patents-getting-started/patent-basics/types-patent-applications/utility-patent/patent-business [https://perma.cc/U6CP-FAPQ].

93. Robert R. Sachs, *Two Years after Alice: A Survey of the Impact of a "Minor Case" (Part 2)*, BILKSI BLOG (June 20, 2016), http://www.bilskiblog.com/blog/2016/06/two-years-after-alice-a-survey-of-the-impact-of-a-minor-case-part-2.html [https://perma.cc/D4YF-MS3C] (reporting that applications examined by TC 3600 have been rejected on patentable subject matter grounds more often than those examined by any other technology center).

94. Within TC 3600, work units 3620, 3680, and 3690 specialize in business method patents related to "electronic commerce" and include art units devoted to "coupons," "e-shopping," "accounting," "insurance," and "finance and banking." *Patent Technology Centers*, *supra* note 92.

95. *Id.* (reporting that, within TC 3600, patent applications examined by art units in the "E-commerce related work groups" have seen exceptionally high patentable subject matter rejection rates and exceptionally low overall allowance rates). *See also* James Cosgrove, *Are Business Method Patents Dead? It Depends on Who's Applying for Them*, IPWATCHDOG (Aug. 4, 2015), http://www.ipwatchdog.com/2015/08/04/are-business-method-patents-dead-it-depends-on-whos-applying-for-them/id=60077 ("The 3600s are also home to art units that concern 'e-commerce' . . . found in the 3620s, 3680s, and 3690s[, which] . . . . [p]atent professionals have been watching . . . closely in the wake of last year's Supreme Court decision in *Alice* . . . ."); Kate Gaudry, *Post-Alice, Allowances Are a Rare Sighting in Business-Method Art Units*, IPWATCHDOG (Dec. 16, 2014), http://www.ipwatchdog.com/2014/12/16/post-alice-allowances-rare-in-business-method/id=52675/; Austin Underhill, *These Are the 20 Hardest and Easiest Art Units*, IPWATCHDOG (May 21, 2015), http://www.ipwatchdog.com/2015/05/21/hardest-easiest-art-units/id=57864/ (reporting that business method art units make up eight of the fourteen art units with the lowest allowance rates).

TABLE 12: IMPACT OF *ALICE V. CLS BANK* BY DISTRICT (JAN. 2014-JUNE 2016)

	Num. Cases with Patents-in-suit Assigned to Art Units in the Following Ranges:[96]		Motions to Dismiss Citing *Alice v. CLS Bank*[97]				
	3600-95	3621-29, 3681-89, or 3691-95	Num.	Grant	Deny	Partial	Other
E.D. Tex.	685	292	20	8 (40%)	10 (50%)	1 (5%)	1 (5%)
D. Del.	260	92	27	11 (40.7)	8 (29.6)	8 (29.6)	0 (0)
C.D. Cal.	186	26	9	5 (55.5)	3 (33.3)	1 (11.1)	0 (0)
N.D. Cal.	140	40	7	4 (57.1)	2 (28.6)	1 (14.3)	0 (0)
D.N.J.	104	19	5	1 (20)	4 (80)	0 (0)	0 (0)
N.D. Ill.	75	21	9	6 (66.7)	3 (33.3)	0 (0)	0 (0)
S.D.N.Y.	63	24	2	0 (0)	1 (50)	1 (50)	0 (0)
S.D. Fl.	161	26	0	0 (0)	0 (0)	0 (0)	0 (0)
S.D. Cal.	34	9	2	1 (50)	1 (50)	0 (0)	0 (0)
All Other Districts	598	95	42	26 (61.9)	10 (23.8)	5 (11.9)	1 (2.4)
All Except E.D. Tex.	1621	352	103	54 (52.4)	32 (31.1)	16 (15.5)	1 (1.0)
Total	2306	644	123	62 (50.4)	42 (34.1)	17 (13.8)	2 (1.6)

The Supreme Court again made waves in the patent world in *Octane Fitness v. ICON Health & Fitness* when it lowered the bar for awarding attorney fees to prevailing parties in patent suits.[98] The decision came at a time when Congress was considering the Innovation Act, which would have made fee awards all but mandatory in patent suits, and the Court may well have been influenced by congressional interest in deterring abusive patent assertion.[99] Since that time, fee awards in patent suits have become both more common and more substantial in size.[100]

96. We used the USPTO's PatEx database to determine the art unit that examined each litigated utility patent. Due to limitations of the PatEx database, we were unable to determine the tech class of 367 of the 8,527 unique utility patents that we identified as asserted at least once between 2014 and mid-2016. These 367 patents account for just 683 of the 26,459 unique utility patent-case pairs in the data we analyzed.

97. Figures in these columns were collected by searching Docket Navigator for motions to dismiss decided between January 1, 2014 and June 30, 2016 that cite to *Alice v. CLS Bank* (i.e., included the text "Alice" within six words of the text "CLS").

98. Octane Fitness, LLC v. ICON Health & Fitness, Inc., 134 S. Ct. 1749 (2014) (rejecting the Federal Circuit's rigid, two-part test for determining whether a patent suit was "exceptional" for purposes of awarding attorney's fees under 35 U.S.C. § 285).

99. At the time of the opinion, the Innovation Act, H.R. 3309, 113th Cong. (2013), was pending in Congress.

100. *See* Hannah Jiam, Note, *Fee-Shifting and Octane Fitness: An Empirical Approach*

However, as shown below in Table 13, this shift has not been uniform across districts. Compared to the national average, the Eastern District of Texas has seen fewer motions (per case filed and per case terminated on the merits), granted motions at a lower rate, and awarded smaller amounts for those that were granted. Perhaps most remarkable is the dichotomy with respect to the size of awards given. Among the most popular districts for patent litigation, the Eastern District is the only to have both median and mean awards fall below $100,000.

TABLE 13: ATTORNEY FEE MOTIONS AND AWARDS IN PATENT CASES BY DISTRICT (JAN. 2014-JUNE 2016)

	Num. Cases Term. on Merits[101]	Motions for Fees[102]					Fee Awards		
		Num.	Grant	Deny	Partial	Other	Num.	Median	Mean
E.D. Tex.	81	36	5 (13.9%)	26 (72.2%)	0 (0%)	5 (13.9%)	26	$14,849	$76,053
D. Del.	140	46	9 (19.6)	30 (65.2)	4 (8.7)	3 (6.5)	8	$1,197,757	$2,275,452
C.D. Cal.	68	48	15 (31.3)	29 (60.4)	3 (6.3)	1 (2.1)	8	$494,481	$995,934
N.D. Cal.	89	38	5 (13.1)	22 (57.9)	6 (15.8)	5 (13.1)	8	$1,004,708	$1,940,818
D.N.J.	35	12	4 (33.3)	7 (58.3)	0 (0)	1 (8.3)	2	$2,995,842	$2,995,842
N.D. Ill.	44	16	2 (12.5)	7 (43.7)	6 (37.5)	1 (6.3)	23	$7,500	$437,177
S.D.N.Y.	35	19	5 (26.3)	10 (52.6)	3 (15.8)	1 (5.3)	5	$739,743	$1,023,830
S.D. Fl.	22	18	4 (22.2)	13 (72.2)	0 (0)	1 (5.5)	5	$337,553	$1,345,895
S.D. Cal.	25	13	7 (53.8)	5 (38.5)	0 (0)	1 (7.7)	2	$208,357	$208,357
All Other Districts	349	227	39 (17.2)	136 (59.9)	15 (6.6)	37 (16.3)	36	$315,734	$1,119,034
All Except E.D. Tex.	807	437	90 (20.6)	259 (59.3)	37 (8.5)	51 (11.7)	97	$288,857	$1,137,061
Total	888	473	95 (20.1)	285 (60.3)	37 (7.8)	56 (11.8)	123	$88,902	$912,783

In short, while both Congress and the Supreme Court have modified patent law and procedure in ways that tend to benefit accused infringers, the manner in which cases are conducted in the Eastern District of Texas has dulled

Toward Understanding "Exceptional", 30 BERKELEY TECH. L.J. 611 (2015); Federal Circuit Bar Association, A Comparison of Pre Octane and Post Octane District Court Decisions on Motions for Attorneys' Fees Under Section 285 (Apr. 13, 2015), http://www.thenalfa.org/files/FCBA-Fee-Shifting-Paper.pdf [https://perma.cc/83YS-PHRC] (attached to a letter from Edgar Huang, President Elect of the FCBA, to the Senate Judiciary Committee dated Apr. 13, 2015).

101. These figures were collected by searching Lex Machina for patent cases terminated between January 1, 2014 and June 30, 2016 due to judgment on the pleadings, summary judgment, trial, judgment as a matter of law, or a contested order of dismissal.

102. All fee-related figures in this table were collected by searching Docket Navigator for motions for attorney's fees filed between January 1, 2014 and June 30, 2016.

the effects of these modifications. While some have asserted that the Eastern District of Texas has developed practices designed to protect the local market for patent litigation,[103] our data is insufficient to support such an assertion. Nevertheless, it is a fact that the Eastern District of Texas' popularity has only grown in the years since the AIA's passage.

V. ANALYSIS

Viewed as a whole, our findings suggest to us that Congress and the courts should consider placing new limits on discovery and venue in patent suits. Though patent litigation in the Eastern District of Texas tends to favor patentees in several respects, our observations lead us to conclude that the driving force behind the jurisdiction's popularity is the combination of plaintiffs' ability to impose early, broad discovery obligations on accused infringers and defendants' inability to obtain an early procedural or substantive victory through motion practice. Together, these facts make the jurisdiction attractive to PAEs with a high-volume, low-rate patent monetization strategy. Simply by filing a complaint in the Eastern District, these plaintiffs can predictably and consistently impose large costs on their opponents and leverage those costs to extract settlements that primarily reflect a percentage of a defendant's expected litigation costs from virtually any infringer, no matter where they are located in the U.S.

One way to counteract this leverage—and in turn to shift the focus of patent suits from an accounting of discovery costs to an assessment of the merits of the claim—would be to place strict limits on discovery early in patent suits. Reforms like those found in various iterations of the Innovation Act strike us as particularly promising examples. As passed by the House in 2013, section 3(d) of the bill would have strictly limited discovery in patent suits prior to claim construction.[104] As reintroduced in 2015, a modified version of this section would have stayed discovery altogether pending resolution of pretrial motions, including motions to transfer and motions to dismiss on the pleadings.[105] Both reforms would have a significant impact on pretrial practice in the Eastern District of Texas. Today in the Eastern District of Texas defendants are generally required to complete document production—a task that alone can cost six or even seven figures[106]—well before the court has held a claim construction hearing, let alone

103. For a discussion of whether the judges of the Eastern District of Texas engage in intentional "forum selling" in order to attract patent litigation for the benefit of the local economy, themselves, and their families, see Klerman & Reilly, *supra* note 8.

104. Innovation Act, H.R. 3309, 113th Cong. § 3(d) (2013) (stating that "if the court determines that a ruling relating to the construction of terms used in a patent claim asserted in the complaint is required, discovery shall be limited, until such ruling is issued, to information necessary for the court to determine the meaning of the terms used in the patent claim . . . .").

105. Innovation Act, H.R. 9, 114th Cong. § 3(d) (2015) (stating that "discovery shall be stayed if . . . the defendant moves to . . . transfer the action . . . or . . . dismiss the action pursuant to Federal Rule of Civil Procedure 12(b) . . . .").

106. For example, a study conducted by the RAND Institute for Civil Justice of forty-five federal civil cases found a median document production cost (i.e., the total cost of collection,

made a ruling, and about fifty days before the court might grant a motion to transfer. Recent experience with rule changes in the District of Delaware also tends to suggest that reforms shifting the relative timing of substantive decisions and discovery can be quite effective. In 2014, Judges Stark and Robinson of the District of Delaware both modified their scheduling practices for patent cases to allow early claim construction decisions.[107] In response, case filings in Delaware fell precipitously, with most plaintiffs shifting new case filings to East Texas.[108]

While demonstrating just how effective pretrial modifications can be, patentees' reaction to Delaware's rule change also reveals how permissive venue rules can easily scuttle otherwise effective reforms. If judges have discretion to implement the rules in ways that tend to dull their effectiveness, plaintiffs can and likely will flock to jurisdictions that fail to fully embrace reforms. The end result may well be a "race to the bottom" that exacerbates, rather than eases, the flow of cases to plaintiff-friendly jurisdictions. In the wake of the AIA and scheduling changes in the District of Delaware, this appears to be precisely what we see today in Marshall, Texas.

This fact, in turn, suggests to us that restricting venue rules applicable in patent suits may be the single most effective reform available to policymakers and courts. Procedural reforms, by their very nature, are hard to implement and even harder to police. Indeed, the discovery reforms found in both versions of the Innovation Act, though nominally mandatory, are each followed by a list of discretionary exceptions.[109] Though reasonable on their face, exceptions like these nonetheless leave the door open for individual districts to exercise their discretion in a manner that reduces the impact of reforms and reinforces plaintiffs' desire to litigate there. One way to prevent a race to the bottom is to cancel the

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processing and privilege review) of $1.8 million. NICHOLAS M. PACE & LAURA ZAKARAS, RAND, WHERE THE MONEY GOES: UNDERSTANDING LITIGANT EXPENDITURES FOR PRODUCING ELECTRONIC DISCOVERY 17-18 (2012), http://www.rand.org/content/dam/rand/pubs/monographs/2012/RAND_MG1208.pdf [https://perma.cc/765V-N3CE].

107. *See, e.g.*, Barnes & Thornburg, LLP, *"The Times They Are A-Changin'"–Delaware's Judge Stark Outlines New Patent Case Management Practices*, NAT'L L. REV. (May 16, 2014), http://www.natlawreview.com/article/times-they-are-changin-delaware-s-judge-stark-outlines-new-patent-case-management-pr [https://perma.cc/GLA3-JD4E].

108. *See* Jennifer J. Jedra, *New Patent Suits in Eastern District of Texas Shatter Records*, MYERS WOLIN, http://www.myerswolin.com/general/new-patent-suits-in-eastern-district-of-texas-shatter-records [https://perma.cc/ZD9H-MFBB] (reporting that "only 101 new patent cases were filed in the District of Delaware in the second quarter [of 2014]" including "[j]ust six . . . from high-volume plaintiffs . . . because plaintiffs . . . see the court's early Markman hearings as a negative in getting defendants to settle cases there . . . in contrast to the Eastern District of Texas, which generally holds claim construction hearings after a great deal of pretrial discovery has been done"); Brian J. Love, Pesentation at the Corporate Intellectual Property Strategy Conference: 2015 Patent Litigation Update 10 (Nov. 17, 2015), http://digitalcommons.law.scu.edu/facpubs/911 [https://perma.cc/C6QB-3RCB] (showing that the growth of patent cases filed in the Eastern District of Texas between 2014 and 2015 came at the expense of case filings in the District of Delaware).

109. H.R. 3309, 113th Cong. § 3(d), *supra* note 104; H.R. 9, 114th Cong. § 3(d), *supra* note 105.

race altogether. Passing legislation like the VENUE Act or adopting the interpretation of existing patent venue rules advanced in *TC Heartland* would be a significant step in the right direction.[110]

VI. CONCLUSION

Using recent data on patent litigation across the U.S., we examined the Eastern District of Texas' status as an outlier. While the district stands out clearly for its large patent caseload, a simple explanation for its popularity is harder to identify. Though the Eastern District is relatively fast and relatively friendly to patentees on the merits of their claims, other popular districts often have comparable statistics and occasionally even surpass the Eastern District, for example with respect to speed, number of trials, and size of jury verdicts.

Rejecting these traditional explanations as overly simplistic, we then examined the relative timing of pretrial litigation events. Here, we found that the patentees suing in East Texas benefit from the district's combination of early, broad discovery deadlines with late action on motions to transfer, motions for summary judgment, and claim construction. Though our analysis is purely descriptive, we believe that the evidence points to this combination as the primary driving force behind the Eastern District's popularity. A virtual guarantee that accused infringers will be forced to incur large discovery costs well before they are given a shot to move or win cases opens the door for patentees to profitably pursue high volume, low value litigation, and this is precisely the phenomenon that appears to drive the popularity of East Texas.

Consistent with our theory, case filings in East Texas are dominated by a relatively small number of frequent filers that virtually always settle quickly and, anecdotally, for relatively small sums. It should come as no surprise then that docket speed and merits decisions do not stand out in our study. These patentees care little about the timing of trial because they have little intention of ever making it that far. Likewise, they care little about the rate of success on summary judgment and size of jury verdicts because they price their settlements at levels that primarily reflect expected litigation costs, not damages.

On the one hand, our conclusions are discouraging. Today, patentees can and often do seek out districts that offer procedural and substantive advantages, and are able to leverage these advantages to extract larger settlements from accused infringers. As a result, reforms that apply only in individual courts or that leave individual courts broad discretion to decide how general reforms will be implemented may (despite reformers' best of intentions) ultimately serve to further exacerbate the accumulation of cases in plaintiff-friendly courts, as scheduling changes in Delaware and some portions of the AIA appear to have

110. *See* Chien & Risch, *supra* note 4, at *34-35 (estimating that if the VENUE Act were to pass or if the Supreme Court were to side with the petitioner in *TC Heartland*, more than half of cases filed by non-practicing entities would shift to other districts, including more than two-thirds of NPE cases currently filed in the Eastern District of Texas).

done for the Eastern District of Texas. In light of these considerations, venue reform stands out as an appealing solution that bypasses both plaintiffs' ability to "shop" for friendly venues and courts' ability to "market" their jurisdiction to a particular type of litigant. Alternatively, our findings suggest that, in order to be effective, reforms should be mandatory and crafted to limit courts' ability to modify or otherwise undermine them. Mandatory discovery delays like those included in the Innovation Act may be particularly effective.

At the same time, our findings are also encouraging. If problematic patent litigation largely stems from a small number of repeat litigants, then it may be possible to craft a simple, targeted solution. Relatively small shifts in the economics of patent litigation, provided they are unavoidable, could have outsized impact on the prevalence of cost-fueled patent suits. We believe that venue reform and mandatory discovery delays are two that Congress and the courts should give very serious consideration.