
Improved Dispute Resolution in the U.S.

Randall R. Rader
Former Chief Judge,
Court of Appeals for the Federal Circuit

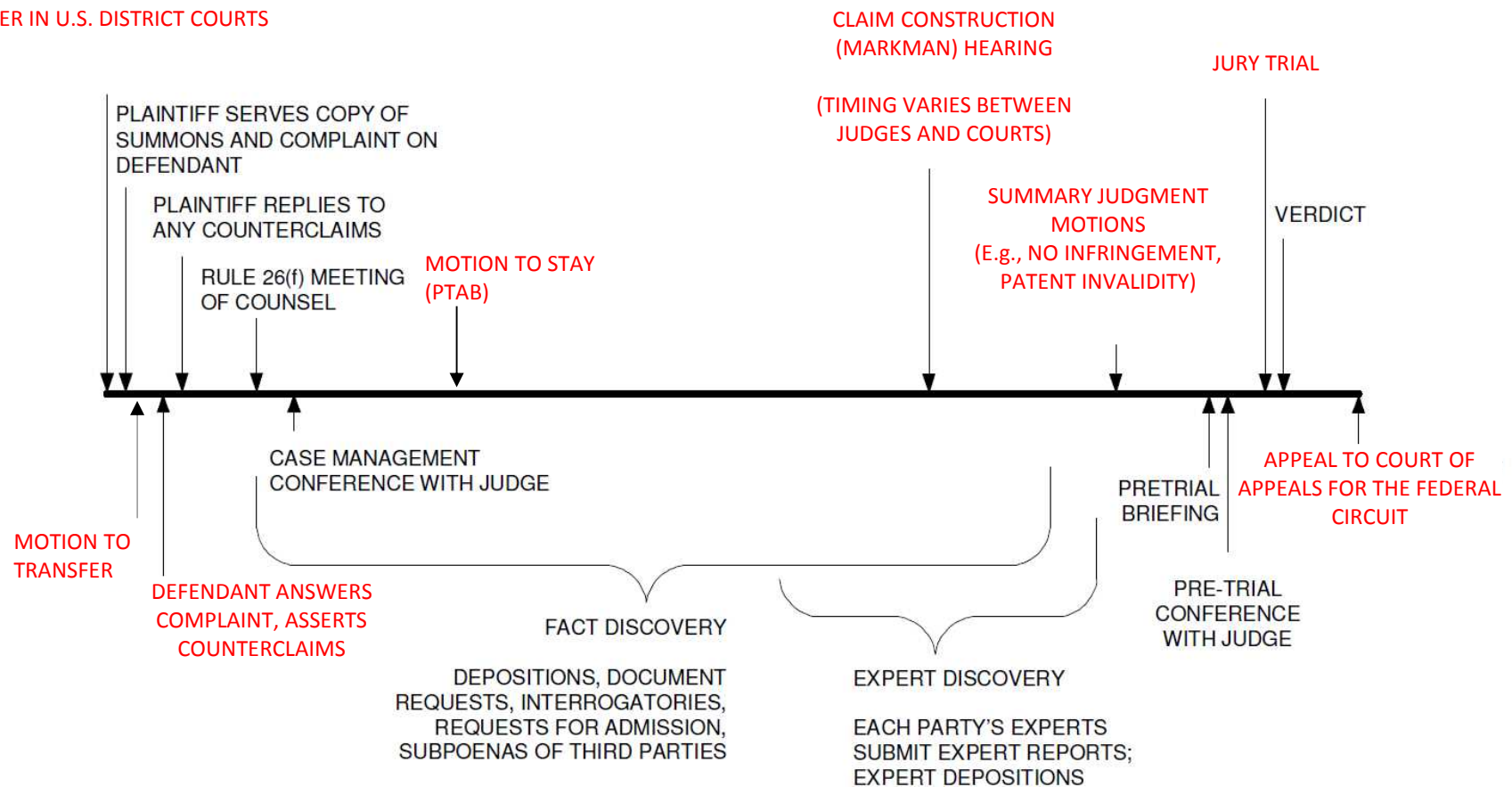
Limitations of Courts

1. Time and Expense often out-weigh the value of the dispute resolution
2. Courts can only deal with a few patents and claims
 - a. this limitation tends to favor NPE suits
 - b. Courts receive a disproportionate number of abusive lawsuits (as opposed to competitor lawsuits)
 - c. Courts have limited time to understand complex technology
3. Courts fashion doctrines to fit the “single patent” scenario
 - a. particularly applies to damages doctrines and valuation

Time and Expense limitation

Timeline of U.S. Patent Litigation

COMPLAINT FILED BY PATENT
OWNER IN U.S. DISTRICT COURTS



Costs of Patent Litigation in the U.S.

Median Cost of Patent Litigation

| Amount at risk | Through End of Discovery | Full Cost of Trial |
|------------------------------|--------------------------|----------------------|
| <i>Less than \$1 million</i> | <i>\$350,00</i> | <i>\$600,000</i> |
| <i>\$1-25 million</i> | <i>\$1.5million</i> | <i>\$2.5 million</i> |
| <i>Over \$25 million</i> | <i>\$3million</i> | <i>\$5million</i> |

Source: AIPLA study 2011

Choice of District Courts

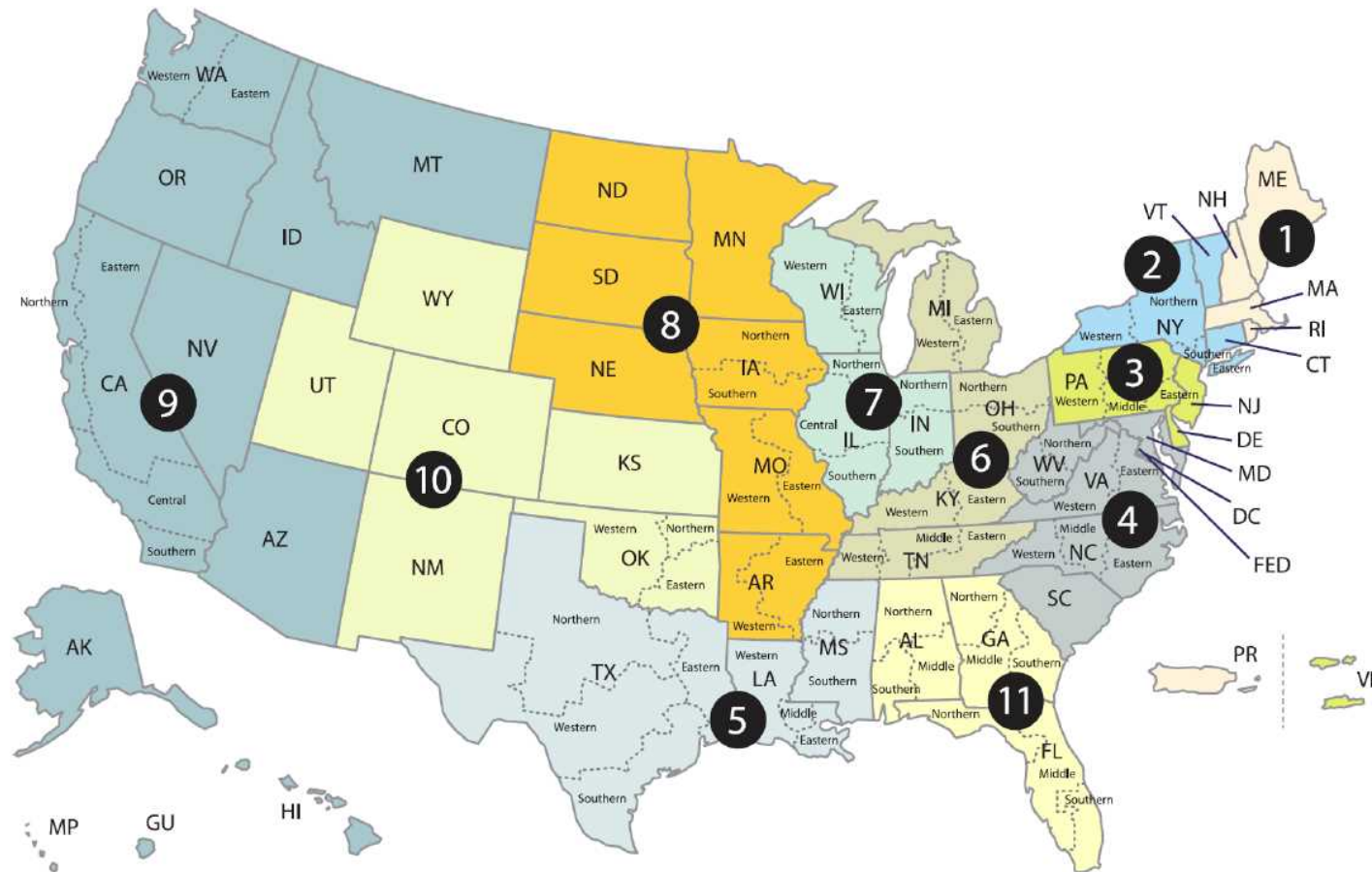
95 District Courts

10 have greatest Patent Law docket

- Plaintiff generally gets to choose
- Stream of commerce means you have to expect your product will reach that jurisdiction



District Courts of the U.S.



Source: www.uscourts.gov/images/CircuitMap.pdf

District Court Rankings

District court rankings: 1995–2013

| Overall rank | District | Median time-to-trial (in years) | Rank | Overall success rate | Rank | Median damages awarded | Rank |
|--------------|---|---------------------------------|------|----------------------|------|------------------------|------|
| 1 | Virginia Eastern | 0.97 | 1 | 32% | 6 | \$37,334,272 | 2 |
| 2 | Delaware | 1.97 | 4 | 41% | 4 | \$19,105,617 | 3 |
| 3 | Texas Eastern | 2.21 | 6 | 57% | 1 | \$9,101,683 | 5 |
| 4 | Wisconsin Western | 1.08 | 2 | 31% | 7 | \$4,901,798 | 9 |
| 5 | Florida Middle | 1.80 | 3 | 54% | 2 | \$322,927 | 15 |
| 6 | Texas Southern | 2.01 | 5 | 23% | 14 | \$57,046,837 | 1 |
| 7 | New Jersey | 2.71 | 12 | 34% | 5 | \$16,584,682 | 4 |
| 8 | Texas Northern | 2.42 | 8 | 46% | 3 | \$3,643,782 | 11 |
| 9 | California Central | 2.23 | 7 | 29% | 10 | \$3,139,412 | 12 |
| 10 | California Northern | 2.44 | 9 | 23% | 15 | \$8,425,257 | 6 |
| 11 | New York Southern | 2.88 | 13 | 28% | 11 | \$5,581,695 | 8 |
| 12 | Massachusetts | 3.58 | 14 | 31% | 8 | \$4,237,438 | 10 |
| 13 | Minnesota | 2.66 | 11 | 29% | 9 | \$1,648,192 | 13 |
| 14 | Illinois Northern | 3.67 | 15 | 26% | 12 | \$5,978,390 | 7 |
| 15 | Florida Southern | 2.50 | 10 | 25% | 13 | \$380,052 | 14 |
| | Overall (all decisions identified) | 2.31 | | 33% | | \$5,493,971 | |

Median damages are adjusted for inflation to 2013 US dollars. The rankings for these courts are based on their relative ranking for each of the three statistical measures, equally weighted.

District Courts with most identified decisions with NPE as patent holder

. District courts with most identified decisions with NPE as patent holder: 1995–2013

| District | Decisions involving NPEs | Total identified decisions | NPE % of total decisions | NPE success rate |
|---------------------------------|-----------------------------|-------------------------------|-----------------------------|------------------|
| Texas Eastern | 50 | 136 | 37% | 46% |
| Illinois Northern | 33 | 136 | 24% | 15% |
| New York Southern | 31 | 132 | 23% | 13% |
| California Northern | 28 | 149 | 19% | 14% |
| Delaware | 23 | 196 | 12% | 35% |
| California Central | 15 | 84 | 18% | 33% |
| Massachusetts | 14 | 77 | 18% | 36% |
| Florida Southern | 13 | 40 | 33% | 15% |
| Pennsylvania Eastern | 11 | 35 | 31% | 18% |
| Minnesota | 10 | 48 | 21% | 40% |
| Texas Southern | 10 | 47 | 21% | 10% |
| DC | 10 | 23 | 43% | 0% |
| Texas Northern | 9 | 35 | 26% | 56% |
| US Court of Federal Claims | 8 | 20 | 40% | 13% |
| Virginia Eastern | 8 | 47 | 17% | 25% |
| Florida Middle | 8 | 35 | 23% | 63% |
| Colorado | 7 | 24 | 29% | 43% |
| Pennsylvania Western | 6 | 17 | 35% | 67% |
| Maryland | 6 | 17 | 35% | 0% |
| Michigan Eastern | 6 | 39 | 15% | 0% |
| New Jersey | 6 | 87 | 7% | 17% |
| All identified decisions | 403 | 1,985 | 20% | 25% |

Includes districts with more than 5 identified decisions involving an NPE as the patent holder.

Statistics by judge for top ten most active judges

Top ten most active district court judges: 1995–2013

| Rank | Judge last name | Judge first name | District court | Identified decisions | Identified trial decisions | Median damages | Overall success rate | Time to trial | Percent of decisions that are SJs |
|------|-----------------|------------------|---------------------|----------------------|----------------------------|----------------|----------------------|---------------|-----------------------------------|
| 1 | Robinson | Sue | Delaware | 65 | 41 | \$21,555,613 | 38% | 1.88 | 37% |
| 2 | Sleet | Gregory | Delaware | 29 | 25 | \$21,284,375 | 55% | 1.88 | 10% |
| 3 | Davis | Leonard | Texas Eastern | 27 | 20 | \$9,752,865 | 63% | 2.29 | 26% |
| 4 | Stark | Leonard | Delaware | 17 | 7 | \$13,083,385 | 41% | 2.12 | 41% |
| 5 | Wilken | Claudia | California Northern | 16 | 7 | \$9,675,832 | 38% | 2.20 | 56% |
| 6 | Clark | Ron | Texas Eastern | 15 | 13 | \$6,841,200 | 73% | 1.79 | 13% |
| 7 | Huff | Marilyn | California Southern | 11 | 6 | \$25,419,854 | 36% | 2.07 | 45% |
| 8 | Young | William | Massachusetts | 11 | 4 | \$233,159 | 18% | 1.72 | 64% |
| 9 | Darrah | John | Illinois Northern | 11 | 3 | \$10,139,484 | 9% | 3.50 | 73% |
| 10 | Alsup | William | California Northern | 10 | 4 | \$18,807,241 | 10% | 1.61 | 60% |

Plaintiff Friendly Jurisdictions

- Plaintiffs usually get to choose their forum. Why do they feel some district court are “patent friendly?” Are the most popular patent jurisdictions actually plaintiff friendly?
- What makes a district a plaintiff friendly jurisdiction?
- Speedy trials? ROCKET DOCKETS
- Judges with knowledge of complex patent law?
- Unwillingness to dismiss cases under Rule 12 or summary judgment (so case goes to jury)?
- Pro-plaintiff juries?

Stanford IP Litigation Clearinghouse Statistics

- Of the patent cases that went to trial over the past nine years, plaintiffs had the following win rates:
 - **District of Delaware: 50/111 = 45%**
 - Central District of California: 96/269 = 36%
 - Southern District of New York: 39/113 = 35%
 - **Eastern District of Texas: 29/82 = 35%**
 - Northern District of Illinois: 42/125 = 34%
 - District of Massachusetts: 28/91 = 31%
 - Northern District of California: 49/161 = 30%
 - Southern District of Florida: 21/74 = 28%
 - District of New Jersey: 19/114 = 17%
- <http://lexmachina.stanford.edu/>

Court cases: few patents and claims

Summary Judgment

Key to reduce issues (and expense)

43% of SJ motions granted in 2009

- ED Tex 28%
- CD Cal 55%

Usually based on claim construction

Pretrial Motions — “Narrow issues”

Motions in Limine (exclude evidence)

- Key basis: irrelevant or prejudicial or jury confusion
 - preclude undisclosed prior art (found new prior art)
 - preclude expert from testifying beyond scope of report (contentions change and expert wants to expand)
 - preclude evidence of infringers' own patents (confuse jury)

Trial Procedures

Time limits

- Judge usually limits each side to specific hours; e.g. 20 hours per side
- results in a trial of two weeks
- few trials get 2 weeks

Governed by rules of civil procedure

- Each judge will have particular preferences
- standard practice to “narrow issues”



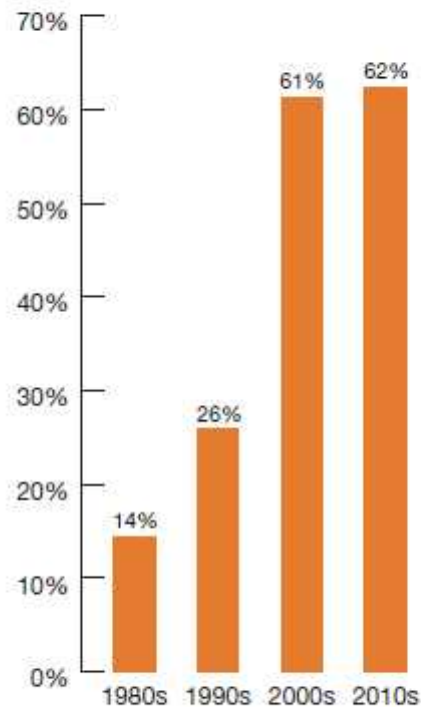
Statistics for Patent Cases

| Year | Total number of Patent Cases Filed | Non-Jury | Jury | % that Reach Trial |
|------|------------------------------------|----------|------|--------------------|
| 2014 | 6,043 | 63 | 69 | 2.2 |
| 2013 | 4,961 | 43 | 75 | 2.4 |
| 2012 | 3,986 | 71 | 68 | 3.5 |
| 2011 | 3,337 | 51 | 57 | 3.2 |
| 2010 | 2,766 | 30 | 56 | 3.1 |
| 2009 | 2,929 | 39 | 86 | 4.3 |
| 2008 | 2,809 | 40 | 67 | 3.8 |

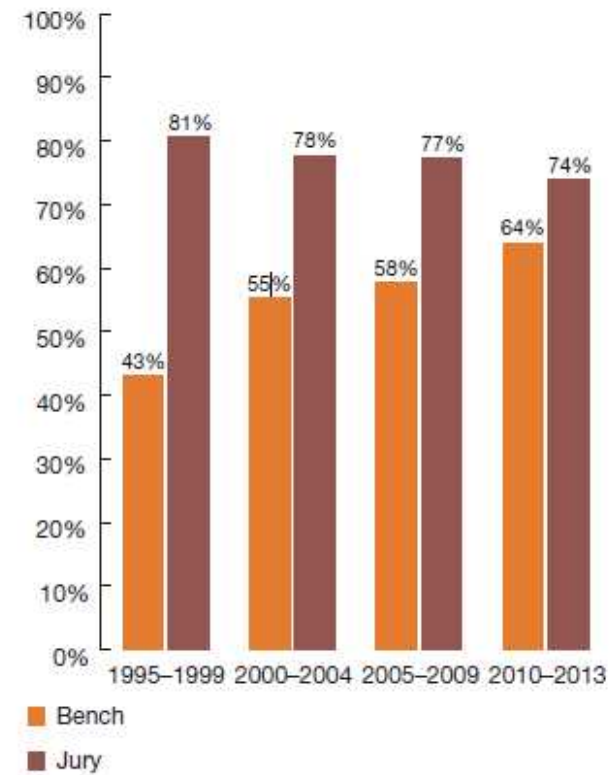
Data compiled from statistics from Director's Annual Report www.uscourts.gov

Statistics for Patent Cases

Use of jury trials by decade

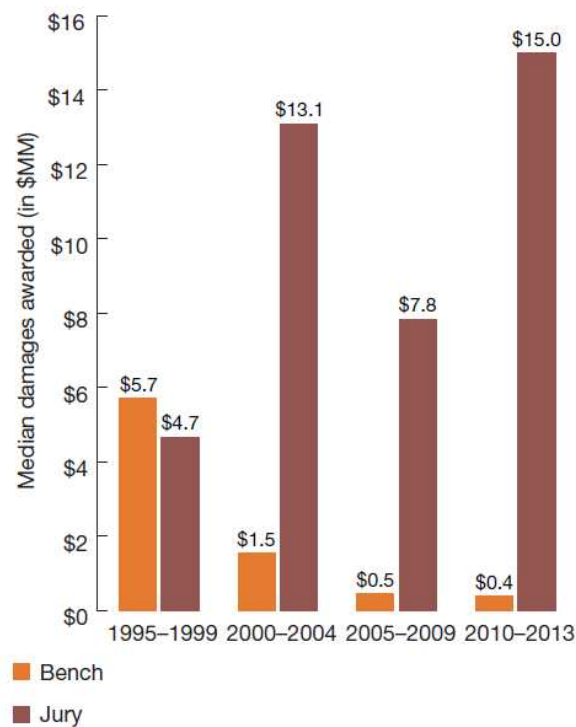


Trial success rates: bench vs. jury



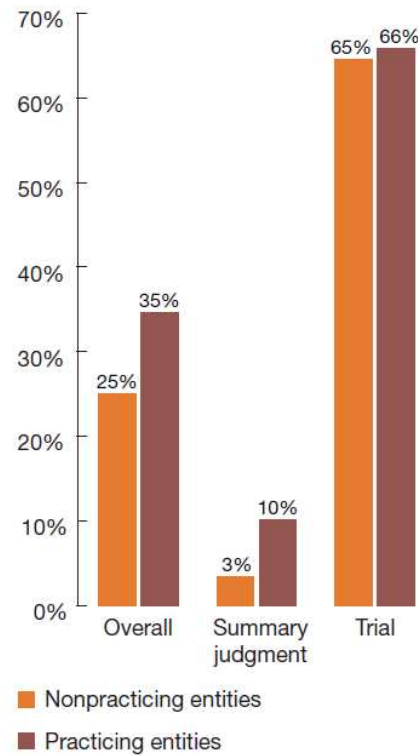
Statistics for Patent Cases

Median damages awarded:
bench vs. jury trials



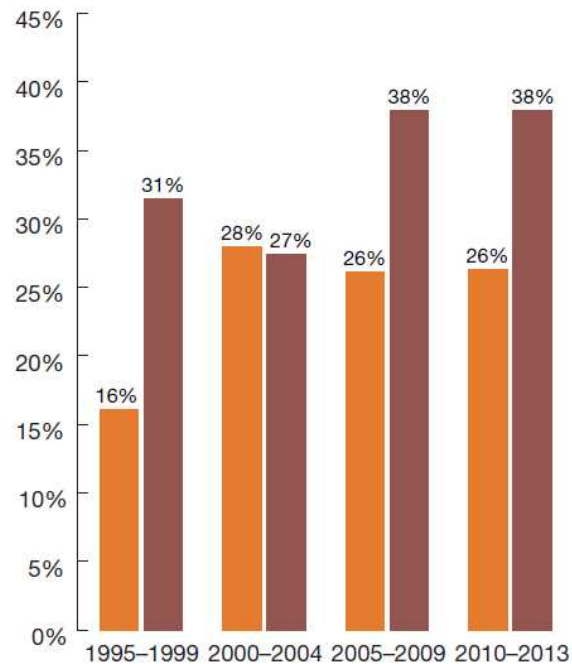
Median damages are adjusted for inflation to 2013 US dollars.

Patent holder success rates:
1995-2013



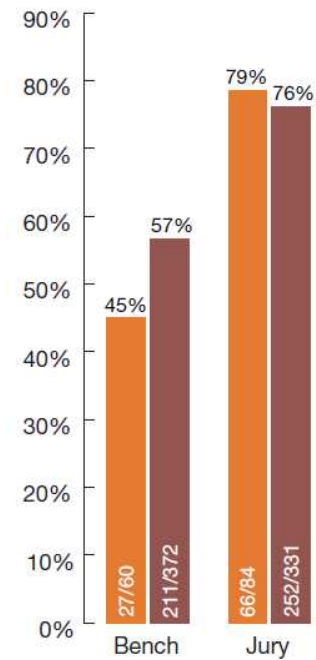
Statistics for Patent Cases

Patent holder overall success rates



Nonpracticing entities
Practicing entities

Patent holder success rates at trial: 1995-2013



Nonpracticing entities

Practicing entities

The number of cases is indicated within the respective column.

Court doctrines:
fashioned to
match “single
patent” case

Damages:

Royalty Rate cases

Lucent Techs., Inc. v. Gateway, Inc., 580 F.3d 1301 (Fed. Cir. 2009).

ResQNet.com, Inc. v. Lansa, Inc., 594 F.3d 860 (Fed. Cir. 2010).

Royalty Base cases

IP Innovation L.L.C. v. Red Hat, Inc., No. 07-447, 2010 WL 986620 (E.D. Tex. Mar. 2, 2010).

Cornell Univ. v. Hewlett-Packard Co., 609 F. Supp. 2d 279 (N.D.N.Y. 2009).

“Rule of Thumb”

Uniloc USA, Inc. v. Microsoft Corp., Nos. 2010-1035, 2010-1055, 2011 WL 9738 (Fed. Cir. 2011).

Smallest Saleable Patent Practicing Unit

Laserdynamics, Inc. v. Quanta Computer, Inc. 694 F.3d 51 (Fed. Cir. 2012)

VirnetX, Inc. v. Cisco Sys., Inc. 767 F.3d 1308 (Fed. Cir. 2014)

Competitor suits

1. Generally present more issues than a single patent
 - a. usually pit one “portfolio” against another with the objective of controlling a market share or product
2. Courts must narrow issues to a few “representative” patents

Standards Litigation

1.a single minor standard feature usually implicates hundreds of patents

a. courts cannot evaluate that many patents

b. courts have tended to give hundreds of patents an identical value (because unable to evaluate hundreds of patents separately)

Improved Dispute Resolution

1. Preferred course: SETTLEMENT

- a. parties better understand the technology and market issues
- b. mediation assistance

2. Arbitration

- a. “Judge” has more time and can evaluate entire portfolios
- b. much less time and expense
- c. decision tailored to market (not single patent limitation)