

FORUM SELECTION IN PATENT LITIGATION: A Traffic Report for 2006

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1. Introduction

In patent infringement actions, venue statutes allow plaintiffs a good bit of freedom in forum selection.¹ That freedom has, in turn, lead plaintiffs to select certain preferred forums for patent infringement litigation. In her 2001 article on forum shopping in patent cases, then Professor and now Judge Kimberly A. Moore reported that for the 5 years from 1995 to 1999, patent infringement litigation was concentrated in 10 of the 94 United States judicial districts. Kimberly A. Moore, Forum Shopping in Patent Cases: Does Geographic Choice Affect Innovation?, 79 N.C. L. REV. 879, 903 (2001).

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Venue in Patent Cases. For patent infringement cases against a non-alien defendant, the venue requirements in 28 U. S. C. § 1400(b) apply. Fourco Glass Co. v. Transmirra Prods. Corp., 353 U.S. 222 (1957). That section reads:

Any 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. § 1400(b). For the purposes of this statute, a corporation is deemed to reside in any district in which it is subject to personal jurisdiction at the time the action is commenced. 28 U. S. C. § 1391(c); VE Holdings Corp. v. Johnson Gas Appliance Co., 917 F.2d 1574 (Fed. Cir. 1990). A defendant is deemed to have a regular and established place of business where it does business “through a permanent and continuous presence,” which need not be a fixed physical presence. Warner & Swasey Co. v. Salvagnini Transferica S.p.A., 806 F.2d 1045 Fed. Cir. 1986).

For any other cause of action involving a patent (such as a declaratory judgment) the general venue statute applies. 28 U. S. C. § 1391; VE Holdings Corp. v. Johnson Gas Appliance Co., 917 F.2d 1574 (Fed. Cir. 1990).

The Annual Report of the Director, Judicial Business of The United States Courts 2006, shows that this pattern has continued and may have become more concentrated. Here is a summary of the number of patent cases filed for the past 6 years in the top 10 districts for 2006:

Table No. 1: Top 10 Districts for Patent Filings in FY 2006

DISTRICT	FY 01	FY 02	FY 03	FY 04	FY 05	FY 06	Rank in FY 06
CA/C	254	217	359	332	267	281	1
TX/E	27	35	50	103	139	216	2
CA/N	150	198	197	187	202	161	3
NJ	101	115	125	136	98	142	4
DE	141	135	135	174	128	139	5
IL/N	151	163	170	155	161	138	6
NY/S	154	131	112	175	137	135	7
MA	66	70	69	78	74	80	8
GA/N	48	48	45	61	63	76	9
FL/S	52	53	72	55	67	68	10
Total Patent Case Filed	2496	2680	2768	3055	2596	2807	

Source: U.S. District Courts Civil Cases Commenced, By Nature of Suit and District, Judicial Business of the United States Courts, Table C.23, Special (Does not include cases where the United States is a party.) (I have attached as Exhibit A a table showing the number cases filed for all 94 districts for these years.)

These numbers tell two principal stories. First, as we all know, the **Eastern District of Texas** has become the patent litigation jurisdiction of choice. Second, the trend towards concentrating patent infringement litigation in a few districts continues and is increasing. For the past few years, we have seen that 50% of these cases were filed in 10 districts. Most recently, in

2006, the percentage rose to 57%. In 2001, Judge Moore reported that the top 5 districts were responsible for 25% of the dispositions of patent cases. In 2006, 33% of the cases were filed in the top 5 districts.

There are other individual stories in the attached Table A setting out these numbers for all 94 district courts. The so-called “Rocket Docket” in the **Eastern District of Virginia** continues to lag behind other districts in attracting patent cases. Other districts that put out the welcome mat, such as the **Western District of Pennsylvania**, got no traction this year. One district that did see an increase in filings is **New Jersey**. Although its overall patent filings fell in 2005, filings bounced back in New Jersey in 2006 -- this may be attributable to an increase in Hatch-Waxman cases.

The rapid rise in the number of cases filed in the **Eastern District of Texas** has a number of people reconsidering whether venue rules are too liberal and whether this market place for patent infringement forums is a good thing. Depending on your perspective, this criticism has been fueled by or aggravated by reports that plaintiff patent owners have a very high success rate in the district.

2. **Factors that Drive a Decision on Where to Sue**

As one might expect, and as Phil of LegalMetric confirms with his teaser e-mails, we can agree on a relatively short list of factors parties look to in deciding where to sue. In her Forum Shopping article, Judge Moore focused on three factors as determinative of where plaintiffs bring patent suits: 1) jurisdiction; 2) speed of adjudication; and 3) win rates for plaintiffs. In a paper presented at Loyola Law School a year or so ago, Robert Cote of Orrick looked at 1) jurisdiction; 2) home court advantage; 3) docket speed; 4) likelihood of a transfer; 5) patent owner win rate; 6) jury characteristics; 7) statistics on the rate at which judges in the court grant

preliminary injunctions; 8) statistics on the rate at which judges in the court grant a stay pending reexamination; 8) statistics on the probability of the court granting a summary judgment; and 9) indications that the district or judge will be receptive to a patent case.

The relative priority one gives to these factors will depend on the circumstances of a particular case. If you are looking for a preliminary injunction, Robert Cote reports with pre-eBay statistics that you want to go to **Oregon** (100% or 3 for 3) or the **Western District of Washington** (100% 1 for 1). Lower rates are in the **Eastern District of Texas** (50% or 2 for 4) and the **Central District of California** (63% or 10 for 16). The **Northern District of California, New Jersey, Massachusetts, and Delaware** were all less than 23%.

Here is a list of the factors generally at work in a decision on which court to pick. I have put the list in the order of priority that I find is reflected by the numbers in the Traffic Report for 2006:

1. Jurisdiction and Venue. The first consideration on where to file must be whether the defendant is subject to jurisdiction in the district. That is, in selecting a jurisdiction, the plaintiff must be comfortable that the judges in the district it selects will, if called on to decide, find the court has personal jurisdiction over the defendant and that venue is proper. This explains, in part, why **Delaware** is a popular jurisdiction, as plaintiffs can be comfortable that they can obtain jurisdiction over a defendant incorporated in Delaware (though they may face a motion to transfer). It also explains, in part, the decline of the **Eastern District of Virginia** as a favored forum, as one of the steps the judges took to turn off the flow of cases there was to dismiss certain cases for lack of jurisdiction. At this time, it looks like the judges in the **Eastern District of Texas** are not turning away too many cases for lack of jurisdiction.

2. Pro-Plaintiff. In December of 2005, Phil of LegalMetric reported that plaintiffs in the **Eastern District of Texas** had won 88% of all jury trials and 75% of all bench trials since 1994. Nationally, he reported that patent holders had won 68% of jury trials and 47% of bench trials for the same period. My sense is that these numbers are a principal driving force in the increase in filings in the **Eastern District of Texas**.

In her 2001 article, Judge Moore reported that patentees won 58% of all patent suits from 1983 to 1999. She reported the following win rates for the 1983 to 1999 period in the top 10 districts. It is instructive to look back now and see if that information on win rates had an effect on subsequent filing. It does not appear that it did.

Table 2: Top 10 Districts with Judge’s Moore’s report on win rates.

DISTRICT	FY 01	FY 02	1983-1999 patentee win rate as reported in 2001[avg 58%]	FY 03	FY 04	FY 05	FY 06	Rank in FY 06
CA/C	254	217	63%	359	332	267	281	1
TX/E	27	35	-	50	103	139	216	2
CA/N	150	198	68%	197	187	202	161	3
NJ	101	115	61%	125	136	98	142	4
DE	141	135	46%	135	174	128	139	5
IL/N	151	163	48%	170	155	161	138	6
NY/S	154	131	63%	112	175	137	135	7
MA	66	70	30%	69	78	74	80	8
GA/N	48	48	-	45	61	63	76	9
FL/S	52	53	63%	72	55	67	68	10

3. Speed. Speed to trial can be a significant factor in attracting plaintiffs. However, the number of patent cases that speed attracts can overwhelm the judges of a rocket docket. We saw this with the **Eastern District of Virginia**. We are beginning to see signs of this in the **Eastern District of Texas**. Lawyers report a nine month delay in getting to a scheduling conference. The following table statistically shows that the average time to trial there is creeping up.

Table 3: Length of Time to Trial by District

DISTRICT	FY 06 patent cases filed	Rank in FY 06	Time to Trial in months FY 04	Time to Trial in months FY 05	Time to Trial in months FY 06
CA/C	281	1	17.8	20.5	21.3
TX/E	216	2	15.4	15.9	17.7
CA/N	161	3	22.5	28	25
NJ	142	4	33.4	36.7	33
DE	139	5	26	23.5	26
IL/N	138	6	28.4	27	26.4
NY/S	135	7	26.8	22	25.7
MA	80	8	31.7	31	28
GA/N	76	9	22	27	31
FL/S	68	10	18	16.7	16.3

Source: U.S. District Courts Civil Cases Commenced, By Nature of Suit and District, Judicial Business of the United States Courts, Table C-10.,

This table offers one suggestion on why the **Central District of California** and the **Southern District of Florida** are popular. They have relatively short times to trial. Note that the Southern District is getting faster, while the Central District and the **Eastern District of Texas** are starting to slow down. And these numbers may explain one reason why **New Jersey** and **Delaware** are popular jurisdictions for ANDA litigation.

Another number that speaks to the relative speed of the docket is the backlog of pending cases.

Table 3: Pending Patent Cases in the Top Ten Districts.

DISTRICT	FY 06 patent cases filed	Rank in FY 06 by number of cases filed per district	total number of patent cases pending at the end of FY 05	total number of patent cases pending at the end of FY 06
CA/C	281	1	283	289
TX/E	216	2	182	280
CA/N	161	3	291	279
NJ	142	4	166	212
DE	139	5	244	228
IL/N	138	6	173	169
NY/S	135	7	211	206
MA	80	8	107	121
GA/N	76	9	63	74
FL/S	68	10	63	58

Source: U.S. District Courts Civil Cases Commenced, By Nature of Suit and District, Judicial Business of the United States Courts, Table S-23.

This table shows that the judges in the **Eastern District Texas** are beginning to fall behind, as are the judges in **New Jersey**, the **Southern District of New York** and **Massachusetts**. The judges in **Delaware** and the **Northern District of California** are cutting in to backlogs, and the judges in the **Southern District of Florida** are keeping ahead of their caseload.

4. Patent Friendly. Certain courts have hung out a welcome sign for patent cases, by expressing interest in the cases, forming advisory committees, or adopting local rules. I expect this has been a factor that attracts filings to **Delaware**, the **Northern District of California** and the **Northern District of Georgia**. But it is not, in itself, a determinative factor. For example, the **Western District of Pennsylvania** adopted Local Patent Rules, but the number of patent filings remained flat.

One element at work here is the sense that plaintiffs file cases where judges are familiar and comfortable with patent cases. The more cases the judge has and has had, the more familiar he or she will be with how patent cases are litigated and the more comfortable the judge may be with the technology. Here is how the top 10 districts rank by patent cases pending per judge.

Table 4: Number of Cases Filed Per Judge by District in FY 2006

DISTRICT	FY 06 patent cases filed	Rank in FY 06 by number of cases filed per district	Number of active judges in the district	number of cases filed on FY 06 per active judge	Rank by Number of cases per judge
CA/C	281	1	24	11.7	3
TX/E	216	2	9	24	2
CA/N	161	3	14	11.5	4
NJ	142	4	17	8.4	5
DE	139	5	4	34.8	1
IL/N	138	6	21	6.6	7
NY/S	135	7	27	5	9
MA	80	8	13	6.2	8
GA/N	76	9	11	6.9	6
FL/S	68	10	18	3.8	10

One other statistic relevant to this decision is whether the judges are open to trying patent cases. That is, certain districts have a culture of moving cases to a trial. Others may have a culture that forces settlement. Here is a summary of information on the number of civil trials held each year in these districts:

DISTRICT	FY 06 patent cases filed	Rank in FY 06 by number of cases filed per district	Number of active judges in the district	Number of civil jury trials in district in FY 06	Number of civil nonjury trials in district in FY 06	Total Number of civil trials in district in FY 06	Number of civil trials per judge in district in FY 06
CA/C	281	1	24	65	70	135	5.6
TX/E	216	2	9	42	8	50	5.5
CA/N	161	3	14	31	25	56	4.0
NJ	142	4	17	32	29	61	3.6
DE	139	5	4	14	13	27	7.0
IL/N	138	6	21	59	32	91	4.5
NY/S	135	7	27	76	67	143	5.3
MA	80	8	13	51	29	80	6.1
GA/N	76	9	11	31	18	49	4.4
FL/S	68	10	18	55	44	99	5.5

A few comments on these numbers. First, in FY 2004 and 2005 the number of civil trials in the **Eastern District of Texas** was 57. The drop in 2006 to 50 may be another indication of congestion. Second, the numbers for **Massachusetts** and **Delaware** confirm that the culture in these districts is to try cases.

5. Home Court. My sense is that a perception of a home court advantage is a significant factor in a plaintiff’s decision on where to file a patent infringement suit. After the client takes into consideration the top 4 factors, if the client decides not to file in the **Eastern District of Texas**, and if the balance of other two factors is relatively equal, this will be the factor that determines where a plaintiff files. The one qualifier here is that plaintiffs who may decide for one reason or another not to file in their home tend to look to **Delaware** as a neutral alternative.

4. Bills Before Congress

Two proposals relating to this venue issue have substantial support and are making some progress on the Hill. The first proposal is incorporated in what had been Senate Bill 3818. It would amend § 1400(b) to limit the jurisdictions in which patent actions, with the exception of declaratory judgment actions or Patent Trial and Appeal Board reviews, may be brought.

28 U.S.C. § 1400 (b)	Senate Bill 3818
1) Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or	1) in the judicial district where <u>either party resides</u> ; or
2) or where the defendant has committed acts of infringement and has a regular and established place of business.	2) the district where the defendant has committed acts of infringement and has a regular and established place of business.
For the purposes of this statute, a corporation is deemed to reside in any district in which it is subject to personal jurisdiction at the time the action is commenced,. 28 U. S. C. § 1391(c) and <u>VE Holdings Corp. v. Johnson Gas Appliance Co.</u> , 917 F.2d 1574 (Fed. Cir. 1990).. And a defendant is deemed to have a regular and established place of business where it does business “through a permanent and continuous presence” which need not be a fixed physical presence. Warner & Swasey Co. v. Salvagnini Transferica S.p.A., 806 F.2d 1045 Fec. Cir. 1986)	a corporation shall be deemed to reside in the judicial district in which it <u>has its principal place of business or the state in which it is incorporated.</u>

This bill appears to be directed at the **Eastern District of Texas**. It could certainly have an impact in lowering the number of patent infringement cases filed in the Eastern District, and increasing the number of plaintiffs who incorporate in Texas or make it their principal place of business. It will also increase the number of cases filed in **Delaware**. It is not clear that it would have a substantial impact on the concentration of patent litigation in a limited number of districts.

A second proposal recently passed the House. Representative Issa's H.R. 34 would put in place a plan to allow judges to opt out from hearing patent cases. The impact of that bill would be that as judges who are not interested in these cases opt out from hearing them, the probability of drawing a judge who is interested and open to hearing the matter would increase. This bill should lead to more districts becoming attractive forums for patent cases.

One complication with this bill is the proposed criteria for selecting pilot districts to test this approach. The pilot districts would receive additional funding, including funding for special patent law clerks. The pilot districts would be selected from among the top 15 districts in patent filings that have 10 judges or more. While the 10 judge minimum may make some sense, it gives the bill the appearance of being (again) directed at the **Eastern District of Texas** in the sense that it would deny the district the additional funding. And it has the unfortunate effect of also disqualifying **Delaware, Minnesota and Colorado**, meaning that the judges and litigants in these districts would not be entitled to the increased funding for patent cases. Being disqualified may not otherwise be that significant, as the judges in those districts could voluntarily adopt their own opt out plan. The probable effect of H.R. 34 would be a continuing increase in concentration of patent cases in the top 15 districts.

5. What Will the Numbers for 2007 Show?

In 2007 I expect we will see the following:

1. **Congress.** If either of the two bills pass, neither would have much of an impact on the 2007 filings, because they would come too late in the year to influence many decisions on where to file.

2. **Plaintiff's Forum.** The numbers coming out of the **Eastern District of Texas** suggest that it is the place to be if you are a plaintiff. That is similar to what we saw in **Delaware** in the early 90s, when at one point it was reported that the district had 17 plaintiffs' verdicts in a row. That changed. By 2001, Judge Moore reported that Delaware was a defendant's forum. See Moore, supra at 916. I expect that in 2007 we may see more balance in the Texas verdicts, as defendants with weaker cases settle out and plaintiffs with weaker cases go to trial betting on the higher probabilities of success.

3. **Congestion.** The numbers suggest that the **Eastern District of Texas** is beginning to feel the effects of congestion. This is similar to what we saw in the race to the rocket docket in the **Eastern District of Virginia** in the 90s. It suggests that the District may not have the resources to meet demand. We may see some creative use of resources (such as special masters). More likely we will see two things, a stretching out of the time in the Eastern District from complaint to trial, and a market place response to these delays with plaintiffs shifting to alternative forums, perhaps to the **Southern District of Florida**.

4. **MedImmune.** The Supreme Court's decision in MedImmune, Inc. v. Genentech, Inc., 127 S. Ct. 764 (2007), has done away with the reasonable apprehension of suit test. That suggests we will see more declaratory judgment actions by alleged infringers (especially those who want to avoid the **Eastern District of Texas**). Those suits will probably be filed in the top 10 districts. (It could be that for unique cases these plaintiffs will turn to the rocket dockets as a favored forum.)

5. **The Mix of the Top 10.** If we look at forum selection in patent litigation as a market place, we can see that districts that are in the top 10 attract different types of customers. I suspect a large part of the draw for each district is the home court advantage. That looks to be the case for filings in the **Central and Northern Districts of California, New Jersey and Illinois. Delaware**, on the other hand, probably attracts cases where for one reason or another a plaintiff cannot sue in its home court and is looking for a neutral forum. This suggests that the current top 10 have a substantial base of potential plaintiffs and a track record of experience and predictability that will continue to draw the majority of plaintiffs.

Exhibit A: Patent Cases filed by District in FY 2006.

DISTRICT	FY 01	FY 02	FY 03	FY 04	FY 05	FY 06	
CA/C	254	217	359	332	267	281	1
TX/E	27	35	50	103	139	216	2
CA/N	150	198	197	187	202	161	3
NJ	101	115	125	136	98	142	4
DE	141	135	135	174	128	139	5
IL/N	151	163	170	155	161	138	6
NY/S	154	131	112	175	137	135	7
MA	66	70	69	78	74	80	8
GA/N	48	48	45	61	63	76	9
FL/S	52	53	72	55	67	68	10
MN	76	79	80	87	86	67	11
PA/E	52	61	70	117	56	65	12
MI/E	55	76	74	60	58	60	13
TX/N	52	44	54	56	56	58	14
FL/M	39	59	40	68	56	51	15
CO	46	47	45	53	40	51	16
CA/S	57	91	65	59	59	50	17
UT	32	53	47	45	42	49	18
OH/N	38	41	35	38	37	42	19
CT	44	34	41	31	27	41	20
OR	36	28	21	30	34	40	21
MO/E	30	38	39	43	26	40	22
WI/E	41	29	23	36	25	40	23

DISTRICT	FY 01	FY 02	FY 03	FY 04	FY 05	FY 06	
NY/E	34	58	55	38	50	37	24
NV	15	23	21	26	28	37	25
AZ	42	40	38	35	27	37	26
VA/E	42	45	27	49	49	36	27
WA/W	48	43	38	59	47	35	28
TX/S	53	47	50	50	58	32	29
NC/W	11	20	15	21	10	32	30
OH/S	25	27	22	38	28	29	31
WI/W	15	19	22	27	29	27	32
MD	28	21	45	42	26	26	33
TX/W	30	12	24	40	43	22	34
PA/W	20	38	23	23	22	22	35
NC/M	12	18	25	27	25	21	36
NY/W	30	21	26	19	18	19	37
IN/S	28	32	34	35	25	16	38
IN/N	7	19	12	20	7	16	39
MO/W	15	5	16	10	13	15	40
DC	22	14	27	24	18	14	41
SC	7	18	25	19	18	14	42
CA/E	18	16	15	19	15	12	43
NH	4	12	13	8	3	12	44
MI/W	24	31	16	24	20	11	45
NY/N	14	17	11	11	13	11	46
TN/W	10	15	5	3	9	11	47

DISTRICT	FY 01	FY 02	FY 03	FY 04	FY 05	FY 06	
NE	8	9	6	3	7	11	48
TN/M	6	7	10	12	9	9	49
KS	7	11	9	16	7	9	50
PA/M	7	7	9	7	3	9	51
OK/W	9	10	8	3	3	9	52
IA/S	15	11	5	16	10	8	53
VA/W	5	2	2	5	5	8	54
IL/C	10	5	6	5	5	8	55
LA/W	5	6	7	7	5	6	56
TN/E	4	4	10	11	4	6	57
HI	1		5	10	3	6	58
RI	7	11	9	6	5	5	59
AL/S	1		3			5	60
LA/E	10	20	13	13	11	4	61
ND		1	6	2	5	4	62
NC/E	11	13	7	5	4	4	63
AR/E	2	12	3	2	4	4	64
ME	10	2	2	3	3	4	65
IL/S	1	1	4	3	3	4	66
FL/N	5	7	3	3	3	4	67
SD	2		1	4	1	4	68
GA/M	3	5	4	1	1	4	69
IA/N	5	4	2	3	6	3	70
OK/N	6	2	3	3	6	3	71

DISTRICT	FY 01	FY 02	FY 03	FY 04	FY 05	FY 06	
AR/W		4	3	2	6	3	72
KY/W	6	9	6	6	4	3	73
MT	2	7	1	1	3	3	74
WV/N	4	4	6	7	1	3	75
GA/S	1	1		1	1	3	76
AL/N	6	5	7	7	8	2	77
NM	2	1	4	3	3	2	78
VT	5	7	3	1	3	2	79
WY	2		2		3	2	80
LA/M	5	3	1	2	2	2	81
KYE	4	6	3	9	8	1	82
WA/E	7	13	10	12	3	1	83
MS/S	2	3	1	1	3	1	84
ID	4	5	6	13		1	85
GUAM						1	86
VI					2	-	87
PR	3	2	1	1	1	-	88
WV/S	3	2	2			-	89
MS/N	3		2			-	90
AK							91
NMI						-	92
OK/E						-	93
AL/M	1	2					94

Source: U.S. District Courts Civil Cases Commenced, By Nature of Suit and District, Judicial Business of the United States Courts, Table C.3, Special (Does not include United States cases.)