


## The Impact of Local Patent Rules on Rate and Timing of Case Resolution Relative to Claim Construction: An Empirical Study of the Past Decade

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## The Impact of Local Patent Rules on Rate and Timing of Case Resolution Relative to Claim Construction: An Empirical Study of the Past Decade

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**INTRODUCTION**

AS RECOGNITION OF THE VALUE OF PATENTS HAS INCREASED DRAMATICALLY OVER the past decade, so too has the amount of litigation associated with patent enforcement and validity challenges before U.S. district courts, the U.S. International Trade Commission (USITC), and before the U.S. Patent & Trademark Office (USPTO).<sup>1</sup> In response to this ramp up, both in terms of volume and complexity, tribunals have come to recognize the substantive, procedural, and administrative challenges posed by patent litigation. These challenges include the scope of discovery implicated when, for example, multinational technology companies sue one another for patent infringement over a blockbuster product.<sup>2</sup> Another challenge is the technical nature of the subject matter, which can range from pharmaceuticals to semiconductors.<sup>3</sup> Yet another challenge includes the additional pressure of resolving disputes between two or more often highly

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1. PRICEWATERHOUSECOOPERS, 2012 PATENT LITIGATION STUDY 3, 6 (2012), available at [http://www.pwc.com/en\\_US/us/forensic-services/publications/assets/2012-patent-litigation-study.pdf](http://www.pwc.com/en_US/us/forensic-services/publications/assets/2012-patent-litigation-study.pdf) (explaining that “litigation continues to rise amid growing awareness of patent value”).

2. See, e.g., Nick Wingfield, *Jury Awards \$1 Billion to Apple in Samsung Patent Case*, N.Y. TIMES, Aug. 24, 2012, at A1 (highlighting the high stakes and complexities of an exemplary dispute involving dozens of cases being fought in multiple countries and before multiple tribunals); see also *Apple, Inc. v. Samsung Elecs. Co.*, No. 11-CV-01846-LHK, 2013 WL 412862 (N.D. Cal. Jan. 29, 2013).

3. See, e.g., Bronwyn H. Hall, *Exploring the Patent Explosion* (Nat’l Bureau of Econ. Research, Working Paper No. 10605, 2004), available at <http://www.nber.org/papers/w10605.pdf> (explaining motivation for patenting in technologically complex industries, including semiconductors and pharmaceuticals).

sophisticated competitors with seemingly bottomless war chests.<sup>4</sup> For the many district courts whose dockets are already overflowing,<sup>5</sup> the notion of bringing all resources to bear on a dramatically increasing class of complex, high stakes, and technically demanding disputes raises serious questions about judicial resource management.

These issues command an appreciation for what patent dispute resolution entails. First, patent litigation has a number of characteristics which make it amenable to streamlining.<sup>6</sup> That is, while the subject matter itself may appear inherently complicated, judgment often turns on a short but critical list of dispositive issues (e.g., is the claim valid, what is the scope of the claim, does the accused product infringe the claim).<sup>7</sup> For any practitioner or decision-maker it would be absurd to characterize these issues as simple; however, that does not necessarily mean they cannot be judicially addressed in a manner that is procedurally systematic, orderly, and subject to reasonable limitations.

Second, as this Article goes to press, at least twenty-four U.S. district courts have adopted “patent local rules” or “local patent rules” establishing procedures to handle litigation involving patent-related enforcement activities and declaratory judgment actions.<sup>8</sup> These rules typically establish timetables and disclosure

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4. See, e.g., Thomas H. Chia, *Fighting the Smartphone Patent War with RAND-Encumbered Patents*, 27 BERKELEY TECH. L.J. 209, 213–14 (2013) (describing a recent “smartphone patent war” that included multiple patent infringement disputes raging among competitors in an increasingly competitive industry); Larry Popelka, *Only Lawyers Win in Patent Wars*, BLOOMBERG BUSINESSWEEK (Apr. 24, 2012), <http://www.businessweek.com/printer/articles/21616-only-lawyers-win-in-patent-wars> (listing sophisticated competitors involved in patent wars including Oracle, Google, Microsoft, Yahoo!, and IBM, to name a few).

5. JOHN G. ROBERTS, 2010 YEAR-END REPORT ON THE FEDERAL JUDICIARY, APP: THE FEDERAL DISTRICT COURTS (2010), available at [http://www.uscourts.gov/news/TheThirdBranch/11-01-01/2010\\_Year-End\\_Report\\_on\\_the\\_Federal\\_Judiciary.aspx](http://www.uscourts.gov/news/TheThirdBranch/11-01-01/2010_Year-End_Report_on_the_Federal_Judiciary.aspx) (citing that in 2010 nearly all major areas of the federal judiciary had increasing caseloads, including a two percent increase in the civil docket, a two percent increase in federal question cases, a four percent increase in diversity cases, a two percent increase in criminal cases, a nine percent increase in immigration, and a twelve percent increase in fraud cases).

6. Randall R. Rader, Chief Justice, U.S. Court of Appeals for the Fed. Circuit, Remarks at the Eastern District of Texas Judicial Conference: The State of Patent Litigation 9 (Sept. 27, 2011), available at <http://www.patentlyo.com/files/raderstateofpatentlit.pdf> (indicating that “core documentation” targeted by the discovery process is primarily directed to the patent at issue, the accused products, and the prior art).

7. Cf. FEDERAL CIRCUIT ADVISORY COUNCIL: E-DISCOVERY COMMITTEE, AN E-DISCOVERY MODEL ORDER 2 (2011), available at [http://www.cafc.uscourts.gov/images/stories/announcements/Ediscovery\\_Model\\_Order.pdf](http://www.cafc.uscourts.gov/images/stories/announcements/Ediscovery_Model_Order.pdf) (explaining that most discovery in patent litigation is focused on the text of the patent at issue, operation of the accused product, and the prior art).

8. See *infra* Part I. As of January 12, 2013, the list includes: Northern District of California (Adopted 2000); District of Minnesota (Adopted 2005); Western District of Pennsylvania (Adopted 2005); Eastern District of Texas (Adopted 2005); Southern District of California (Adopted 2006); Northern District of Georgia (Adopted 2004); Eastern District of North Carolina (Adopted 2007); District of Massachusetts (Adopted 2008); Southern District of Texas (Adopted 2008); Northern District of Illinois (Adopted 2009); District of New Jersey (Adopted 2009); Northern District of Ohio (Adopted 2009); Western District of Washington (Adopted 2009); Southern District of Indiana (Adopted 2009); District of Idaho (Adopted 2009); Northern District of Texas

requirements for framing a patent dispute in terms of the infringement contentions, invalidity contentions, and proposed constructions of specific claim terms.<sup>9</sup>

This study seeks to analyze the impact of local patent rules on rates and timing of case resolution in patent litigation. What follows is a series of high level observations regarding: (1) whether local patent rules are associated with higher rates of case “resolution” — i.e., termination without a judgment on the merits (e.g., settlement, consent order, dismissal) — as opposed to case “determination” — i.e., a judgment in favor of one party or the other (e.g., plaintiff win, defendant win); (2) whether the presence of local patent rules is associated with higher rates of outcomes favoring a win for either a plaintiff or a defendant (i.e., suggesting a bias for either plaintiffs or defendants); and (3) whether there is any statistically significant difference between jurisdictions with local patent rules and those without local patent rules in terms of (i) the number of years it takes from the date of filing to issuance of a claim construction order; and (ii) the percentage of cases filed that even reached this critical milestone — i.e., claim construction.<sup>10</sup>

Third, the optimal timing of claim construction has been the subject of much debate over the past decade and is, not surprisingly, a central feature of local patent rules. Thus, a hypothesis to be tested is that the strict initial disclosure requirements and predictable scheduling of claim construction reflected in the majority of local patent rules yields efficient and *merits-motivated* case resolution — i.e., once claims are construed, parties know where they stand.<sup>11</sup> By extension this should lower the uncertainty associated with litigation and make it more predictable.

In this discussion, the reader may either accept or reject the premise that *the merits* in a patent case, whether with respect to infringement or validity, revolve around issues of claim construction. As Judge Moore of the Court of Appeals for the Federal Circuit noted in her dissent to denial of a petition for rehearing en banc in *Retractable Techs. v. Becton, Dickinson & Co.*: “[c]laim construction is the single most important event in the course of a patent litigation. It defines the scope of the property right being enforced, and is often the difference between infringement and

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(2009) (noting that procedures are not found in rules per se, but in Amended Miscellaneous Order No. 62); Southern District of Ohio (Adopted 2010); Eastern District of Washington (Adopted 2010); Eastern District of Missouri (Adopted 2011); Western District of North Carolina (Adopted 2011); District of Maryland (Adopted 2011); District of Nevada (Adopted 2011); District of New Hampshire (Adopted 2011); Western District of Tennessee (Adopted 2011); Northern District of New York (Adopted 2012); and Middle District of North Carolina (Adopted 2012). See *infra* Part I.

9. James Ware & Brian Davy, *The History, Content, Application and Influence of the Northern District of California’s Patent Local Rules*, 25 SANTA CLARA COMPUTER & HIGH TECH. L.J. 965, 965, 984 (2009) (providing an overview of the scope and focus of local patent rules, as exemplified by those of the U.S. District Court for the Northern District of California); see *infra* Part I.

10. See *infra* Part II.

11. See Mark Lemley, *Where to File Your Patent Case*, 38 AIPLA Q.J. 401, 405 & n.12 (2010) (analyzing results in districts that resolved twenty-five or more cases “on the merits” not including consent judgments and settlements).

non-infringement, or validity and invalidity.”<sup>12</sup> Thus, to briefly illustrate how this hypothesis may come into play, assume a patent owner argues for a claim construction which covers the accused product and assume an accused infringer argues for a claim construction where (a) the accused product does not infringe and/or (b) prior art reads on the claim. Assume a judge, after hearing such argument, then decides, as a matter of law, the “meaning” of the claims.<sup>13</sup> Such a decision, while not a final judgment, would no doubt make a profound impression on both parties, whether that impression removes any appetite for further expense and delay or instead inspires renewed commitment to get the case before a jury. To a practitioner this is painfully obvious to suggest, but surprisingly enough, such a characterization (as a real dynamic in litigation) appears largely unaccounted for in the vast body of scholarship on claim construction.

Data analyzed in this study reveals that a relatively small percentage of cases — only ten percent — proceed to a decision on claim construction and, of those that do, a majority are resolved within a year of that milestone.<sup>14</sup> Regarding the impact of local patent rules on claim construction, this study observes that, on average, more cases proceed to a decision on claim construction in jurisdictions *with local patent rules*, fourteen percent, than in jurisdictions without them, eight percent.<sup>15</sup> This difference, when analyzed using an unpaired t-test to compare the highest volume jurisdictions without local patent rules against the highest volume jurisdictions with local patent rules, has a two-tailed p-value of 0.0696, which is very close to satisfying conventional criteria for statistical significance — i.e., a p-value below 0.0500.<sup>16</sup>

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12. *Retractable Techs., Inc. v. Becton, Dickinson & Co.*, 659 F.3d 1369, 1370 (Fed. Cir. 2011) (en banc) (Moore, J., dissenting) (per curiam) (advocating en banc review on the amount of deference that should be given to the district court on issues of claim construction); *see also* *Lighting Ballast Control LLC v. Philips Elecs. N. Am. Corp.*, Nos. 2012-1014, 2012-1015, 2013 WL 1035092, at \*1 (Fed. Cir. Mar. 15, 2013) (per curiam) (granting petition for rehearing en banc on the issue of whether the Federal Circuit should afford any deference to district court rulings on claim construction and to reconsider the Federal Circuit’s ruling in *Cybor*); *Flo Healthcare v. Kappos & Rioux Vision*, 697 F.3d 1367, 1376 (Fed. Cir. 2012) (Plager, J., concurring) (arguing that Federal Circuit precedent about appellate review of USPTO claim construction is unclear); *Cybor Corp. v. FAS Techs., Inc.*, 138 F.3d 1448, 1451 (Fed. Cir. 1998) (en banc) (setting Federal Circuit precedent for de novo review of district court claim construction “as a purely legal issue”); *see infra* Part II.C (presenting a discussion of the claim construction milestone).

13. *Markman v. Westview Instruments*, 517 U.S. 370, 372 (1996) (“The question here is whether the interpretation of a so called patent claim, the portion of the patent document that defines the scope of the patentee’s rights, is a matter of law reserved entirely for the court, or subject to a Seventh Amendment guarantee that a jury will determine the *meaning* of any disputed term of art about which expert testimony is offered. We hold that the construction of a patent, including terms of art within its claim, is exclusively within the province of the court.” (emphasis added)); *see also infra* Part II.C.

14. *See infra* Part II.A.3.

15. *See infra* Table 1.A.

16. *See infra* Table 1.A.

Thus, if claim construction is “the single most important event in the course of a patent litigation,”<sup>17</sup> then it is interesting that there is a borderline statistically significant difference in this respect between the highest volume patent venues with local patent rules and those without local patent rules. Notably, more than twice the overall average reach a claim construction in the Eastern District of Texas, 23.7%, and the Northern District of California, 22.7%.<sup>18</sup> That is, courts in these jurisdictions decide issues of claim construction in a much higher percentage of cases than the average court. It is reasonable to infer that this dynamic is influenced (or reinforced) by the structure and enforcement of local patent rules in these jurisdictions. Thus, if an aim of local patent procedure is to deliver a decision on claim scope before, or in anticipation of, committing the parties to present evidence consistent with the court’s interpretation, then rules that operate similar to those of the Northern District of California’s appear to obtain that result.<sup>19</sup>

Tables 1 through 3 below summarize statistical analysis of the data collected in this study.<sup>20</sup>

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17. *Retractable Techs., Inc.*, 659 F.3d at 1370 (Moore, J., dissenting) (“Claim construction is the single most important event in the course of a patent litigation. It defines the scope of the property right being enforced, and is often the difference between infringement and non-infringement, or validity and invalidity.”).

18. See *infra* Table 1.A.

19. See *infra* Table 1.A; see also Ware & Davy, *supra* note 9, at 965 (explaining how the rules are tailored to address unique aspects of patent litigation, e.g., to specifically address pretrial discovery, to encourage detailed and early disclosure of infringement and invalidity theories, and to clarify claim construction early in the litigation); *infra* Part I (providing more detailed discussion of local patent rules across various jurisdictions).

20. This analysis is limited to jurisdictions where more than 500 patent cases have been filed between 2000 and 2010 and jurisdictions which adopted local patent rules no later than 2008. Cases filed in 2011, 2012, and 2013 were not analyzed as they were deemed unlikely to have reached a significant milestone when this data was viewed and analyzed in October of 2011 using the data service Lex Machina. Mark A. Lemley & Joshua H. Walker, *Intellectual Property Litigation Clearinghouse: Data Overview* (2007 Kauffman Symposium on Entrepreneurship and Innovation Data & Stanford Public Law, Working Paper No. 1024032, 2007), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1024032&download=yes](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1024032&download=yes) (providing a general description of the data service at its inception); see *infra* Part II (providing a complete description of the methodology employed in this study).



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**Table 1.A. Comparison of the Percentage of Cases to Reach Claim Construction Between High Volume Jurisdictions with and Without Local Patent Rules<sup>21</sup>**

	Local Patent Rules Percent to Reach Claim Construction		No Local Patent Rules Percent to Reach Claim Construction
Northern District of California	22.69%	Central District of California	7.98%
District of Minnesota	7.31%	District of Delaware	12.00%
Eastern District of Texas	23.70%	Southern District of New York	5.37%
Southern District of California	16.72%	Eastern District of Michigan	8.09%
Northern District of Georgia	5.98%	Southern District of Florida	7.39%
District of Massachusetts	8.01%	Eastern District of Pennsylvania	6.80%
		Middle District of Florida	6.83%
Group	Local Patent Rules		No Local Patent Rules
Mean	14.07		7.78
SD	8.02		2.07
SEM	3.28		0.78
N	6		7
	P value and statistical significance:		
	The two-tailed P value equals 0.0696		
	Difference is almost conventionally statistically significant.		

As an initial observation, the data indicates that there is no statistically significant difference between the average number of years to reach claim construction between high volume jurisdictions with and without local patent rules of the ten percent, on average, to reach that milestone.<sup>22</sup>

**Table 1.B. Comparison of Average Number of Years to Reach Claim Construction Between High Volume Jurisdictions with and Without Local Patent Rules<sup>23</sup>**

	Local Patent Rules Average Number of Years to Reach		No Local Patent Rules Average Number of Years to Reach
Northern District of California	1.79	Central District of California	1.67
District of Minnesota	1.77	District of Delaware	1.88
Eastern District of Texas	1.81	Southern District of New York	1.99
Southern District of California	1.51	Eastern District of Michigan	1.96
Northern District of Georgia	1.88	Southern District of Florida	1.59
District of Massachusetts	1.75	Eastern District of Pennsylvania	1.53
		Middle District of Florida	1.42
Group	Local Patent Rules		No Local Patent Rules
Mean	1.75		1.72
SD	0.13		0.22
SEM	0.05		0.08
N	6		7
	P value and statistical significance:		
	The two-tailed P value equals 0.7656		
	Difference is not statistically significant.		

21. Pauline M. Pelletier, Compendium of Exhibits Containing Original Collection and Analysis of Litigation Data, Exhibit A1, at 2 (Jan. 2013) [hereinafter "Compendium"] (unpublished data compilation and analysis using Lex Machina, also known as the Intellectual Property Litigation Clearinghouse (IPLC)) (on file with author).

22. See *infra* Table 1.B; *infra* Part II, Table 4; Compendium, *supra* note 21, Exhibit B3, at 87 (showing that overall on average ten percent of cases in high volume patent litigation jurisdictions reach the claim construction milestone, regardless whether or not the jurisdiction has formally adopted local patent rules).

23. Compendium, *supra* note 21, Exhibit A1, at 3.

The data also indicates that there is not a statistically significant difference between jurisdictions with and without local patent rules with respect to yielding a “resolution” without judgment on the merits versus a determination in clear favor of one party or the other.<sup>24</sup>

**Table 2.A. Comparison of Rates of Determination (i.e., Win Result) Between High Volume Jurisdictions with and Without Local Patent Rules<sup>25</sup>**

	Local Patent Rules Percent "Win" Result		No Local Patent Rules Percent "Win" Result
District of Massachusetts	18.3%	Central District of California	14.7%
Eastern District of Texas	11.4%	District of Delaware	14.2%
Southern District of California	13.8%	Southern District of New York	13.1%
Northern District of Georgia	14.5%	Eastern District of Michigan	13.8%
District of Minnesota	13.2%	Southern District of Florida	18.6%
Northern District of California	14.9%	Eastern District of Pennsylvania	11.3%
		Middle District of Florida	13.3%
<b>Group</b>	<b>Local Patent Rules</b>		<b>No Local Patent Rules</b>
Mean	14.35		14.14
SD	2.29		2.24
SEM	0.94		0.85
N	6		7
	P value and statistical significance:		
	The two-tailed P value equals 0.8724		
	<i>Difference is not statistically significant.</i>		

**Table 2.B. Comparison of Rates of Resolution (i.e., Settlement/Consent/Procedural) Between High Volume Jurisdictions with and Without Local Patent Rules<sup>26</sup>**

	Local Patent Rules Percent "Resolve" Result		No Local Patent Rules Percent "Resolve" Result
District of Massachusetts	81.7%	Central District of California	85.3%
Eastern District of Texas	88.6%	District of Delaware	85.8%
Southern District of California	86.2%	Southern District of New York	86.9%
Northern District of Georgia	85.5%	Eastern District of Michigan	86.2%
District of Minnesota	86.8%	Southern District of Florida	81.4%
Northern District of California	85.1%	Eastern District of Pennsylvania	88.7%
		Middle District of Florida	86.7%
<b>Group</b>	<b>Local Patent Rules</b>		<b>No Local Patent Rules</b>
Mean	85.65		85.86
SD	2.29		2.24
SEM	0.94		0.85
N	6		7
	P value and statistical significance:		
	The two-tailed P value equals 0.8724		
	<i>Difference is not statistically significant.</i>		

24. Lemley, *supra* note 11, at 405 & n.12 (clarifying that Lex Machina distinguishes outcome data between cases decided “on the merits” and those resolved through consent judgments or settlements, and that “resolution” not on the merits includes both consent judgments and outright settlements). For purposes of this study, cases not decided on the merits encompass those resolved through settlement, consent judgment, and/or through procedural dismissal. The dichotomy goes to whether or not substantive issues related to enforcement of the patent right have been decided by the court.

25. Compendium, *supra* note 21, Exhibit A1, at 4.

26. Compendium, *supra* note 21, Exhibit A1, at 5.

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Lastly, the data also indicates that there is not a statistically significant difference between jurisdictions with and without local patent rules with respect to yielding outcomes in favor of either plaintiffs or defendants.<sup>27</sup> Thus, the data does not support the contention that local patent rules result in outcomes that favor one party or the other.<sup>28</sup>

**Table 3.A. Comparison of Rates of Claimant Win Outcomes Between High Volume Jurisdictions with and Without Local Patent Rules<sup>29</sup>**

	Local Patent Rules Percent of Claimant Wins		No Local Patent Rules Percent of Claimant Wins
Northern District of California	4.3%	Central District of California	5.1%
District of Minnesota	4.5%	District of Delaware	6.1%
Eastern District of Texas	4.3%	Southern District of New York	4.6%
Southern District of California	3.7%	Eastern District of Michigan	3.9%
Northern District of Georgia	3.3%	Southern District of Florida	6.2%
District of Massachusetts	6.5%	Eastern District of Pennsylvania	3.0%
		Middle District of Florida	6.7%
Group	Local Patent Rules		No Local Patent Rules
Mean	4.43		5.09
SD	1.11		1.35
SEM	0.45		0.51
N	6		7
	P value and statistical significance:		
	The two-tailed P value equals 0.3658		
	Difference is not statistically significant.		

27. See *infra* Tables 3.A–B (showing a two tailed p-value of substantially greater than 0.05 in unpaired t-tests comparing whether or not jurisdictions with and without local patents rules have demonstrated statistically significant differences in rates of claimant/defendant wins).

28. See, e.g., Sam Williams, *A Haven for Patent Pirates*, MIT TECH. REV. (Feb. 3, 2006), <http://www.technologyreview.com/news/405259/a-haven-for-patent-pirates/> (“In one federal court in East Texas, plaintiffs have such an easy time winning patent-infringement lawsuits against big-tech companies that defendants often choose to settle rather than fight.”); Julie Creswell, *So Small a Town, So Many Patent Suits*, N.Y. TIMES, Sept. 24, 2006, § 3, at 1 (stating that the EDTX’s “mushrooming” patent docket with “hungry plaintiffs’ lawyers, speedy judges and plaintiff-friendly juries” is “encouraging an excess of expensive litigation that is actually stifling innovation”); see also *infra* Part II.B.

29. Compendium, *supra* note 21, Exhibit A1, at 6.

Table 3.B. Comparison of Rates of Defendant Win Outcomes Between High Volume Jurisdictions with and Without Local Patent Rules<sup>30</sup>

	Local Patent Rules Percent of Claim Defendant Wins		No Local Patent Rules Percent of Claim Defendant Wins
Northern District of California	10.7%	Central District of California	9.6%
District of Minnesota	8.7%	District of Delaware	8.2%
Eastern District of Texas	7.1%	Southern District of New York	8.5%
Southern District of California	10.2%	Eastern District of Michigan	10.0%
Northern District of Georgia	11.2%	Southern District of Florida	12.4%
District of Massachusetts	11.8%	Eastern District of Pennsylvania	8.3%
		Middle District of Florida	6.5%
Group	Local Patent Rules		No Local Patent Rules
Mean	9.95		9.07
SD	1.75		1.85
SEM	0.71		0.70
N	6		7
	P value and statistical significance:		
	The two-tailed P value equals 0.4001		
	Difference is not statistically significant.		

Thus, all the points of comparison referred to in this section — with the exception of the percentage of cases to reach claim construction — fail to show a statistically significant difference between jurisdictions with and without local patent rules.<sup>31</sup> However, one positive way to state this conclusion is that local patent rules are notably *not* associated with an outcome bias, either with respect to producing resolution without judgment on the merits or with respect to favoring either plaintiffs or defendants. The lack of a statistically significant difference suggests neutrality.<sup>32</sup> From a policy perspective, confirmation of neutrality should alleviate suspicion that local patent rules create an imbalance between the relative positions of parties. This observation should be weighed in the dialogue on forum shopping which, in recent years, has taken on an increasingly hostile tenor even as the number of jurisdictions adopting local patent rules continues to rise.<sup>33</sup>

30. Compendium, *supra* note 21, Exhibit A1, at 7.

31. To briefly summarize the criteria considered in this analysis of the data: (1) a comparison of the percentage of cases to reach a claim construction ruling between high volume jurisdictions with and without local patent rules revealed a border-line statistically significant difference; (2) the average number of years to reach such a claim construction ruling, as between high volume jurisdictions with and without local patent rules, did not differ to a statistically significant degree; (3) moreover, rates of cases determined “on the merits” versus “resolved” through settlement, consent judgment, or procedural dismissal, as between high volume jurisdictions with and without local patent rules, were not found to differ to a statistically significant degree; and (4) perhaps most importantly, no statistically significant differences in claimant or defendant win rates were detected as between high volume jurisdictions with and without local patent rules.

32. To clarify, the term “neutrality” does *not* refer to impartiality as traditionally conceived in the context of judicial administration. Rather, the term as used here is intended to convey the relationship between win rates and the presence or absence of criteria such as local patent rules. As will be discussed below in Part II.B, various factors may affect choice of forum as well as outcome. The choices of litigants no doubt shape the data. However, taken at face value, this analysis suggests that overall, all other factors assumed to be equal, there is not a statistically significant difference in win rates (i.e., for claimants or defendants) between *the group* of high volume jurisdictions with local patent rules and *the group* of high volume jurisdictions without them.

33. See *infra* Part II.B.

What follows is an overview of the origins and policies embodied in local patent rules, a discussion of the data collected and analyzed in this study, and a commentary on the impact of local patent rules which the reader will find relevant to the ongoing dialogue on forum shopping and the centrality of claim construction in patent dispute resolution.

## I. LOCAL PATENT RULES

Chief Judge Rader of the Court of Appeals for the Federal Circuit has stated that one of the greatest challenges in patent law is “the expense and delay of the litigation system.”<sup>34</sup> Indeed, discovery drives the cost of patent litigation to levels widely acknowledged as disproportionately high,<sup>35</sup> given that judgment often turns on a short but critical list of issues — e.g., the text and file history of the patent, how the accused products operate, what prior art discloses, and damages.<sup>36</sup>

The potential harm resulting from abuse of the discovery process and tactical subversion of the burden it places on litigants threatens an already complex and expensive process for enforcing and challenging patent rights.<sup>37</sup> For example, parties may consent to unfavorable terms if threatened with suit or settle early to escape costs associated with electronic discovery and protracted litigation.<sup>38</sup> Indeed, most agree that litigation costs should not unduly interfere with the availability of courts to resolve such disputes on the merits because enforcement and declaratory relief are vital to our system of intellectual property.<sup>39</sup>

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34. Randall R. Rader, *Transcript: The Honorable Judge Randall R. Rader, Chief Judge of the Court of Appeals for the Federal Circuit Court of Appeals: The Most Pressing Issues in IP Law Today*, 2 CYBARIS 1, 1 (2011).

35. EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., LITIGATION COSTS IN CIVIL CASES: MULTIVARIATE ANALYSIS 8 (2010), available at [http://www.fjc.gov/public/pdf.nsf/lookup/costciv1.pdf/\\$file/costciv1.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/costciv1.pdf/$file/costciv1.pdf) (noting that intellectual property cases demonstrate costs almost sixty-two percent higher than the baseline categories, all other factors being equal); THOMAS E. WILLGING ET AL., FED. JUDICIAL CTR., DISCOVERY AND DISCLOSURE PRACTICE, PROBLEMS, AND PROPOSALS FOR CHANGE: A CASE-BASED NATIONAL SURVEY OF COUNSEL IN CLOSED FEDERAL CIVIL CASES 39 (1997), available at [http://www.fjc.gov/public/pdf.nsf/lookup/discovery.pdf/\\$file/discovery.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/discovery.pdf/$file/discovery.pdf) (noting intellectual property cases were among the most remarkable for high costs associated with discovery).

36. FEDERAL CIRCUIT ADVISORY COUNCIL: E-DISCOVERY COMMITTEE, *supra* note 7, at 2 (explaining that a large proportion of discovery in patent litigation is focused on the text of the patent at issue, operation of the accused product, and the prior art).

37. Rader, *supra* note 34, at 1–3.

38. Rader, *supra* note 6, at 20 (explaining the threat of expense as driving parties to settlement when unjustified and noting that successful dispute resolution centers on settlement that occurs on “fair, neutral, and justified economic terms, not as the result of stratagems, threats, or fears”).

39. See Jay P. Kesan & Gwendolyn G. Ball, *How Are Patent Cases Resolved? An Empirical Examination of the Adjudication and Settlement of Patent Disputes*, 84 WASH. U. L. REV. 237, 243 (2006); Ranganath Sudarshan, *Nuisance-Value Patent Suits: An Economic Model and Proposal*, 25 SANTA CLARA COMPUTER & HIGH TECH. L.J. 159, 160, 169 (2009).

Perhaps out of similar concerns for efficiency and quality, several district courts have undertaken initiatives over the past decade to institute practices or adopt formal rules to manage and streamline patent litigation.<sup>40</sup> These local patent rules often set schedules for discovery, order early submission of infringement and invalidity contentions, direct claim construction proceedings, and create opportunities before trial for parties to negotiate settlement.<sup>41</sup> Among the benefits of patent rules include: (a) relatively standard case management within jurisdictions, (b) predictable timing with respect to claim construction and trial, and (c) increased efficiency and quality given the specialized nature of the subject matter.<sup>42</sup> To a similar end, Congress enacted Pub. L. No. 111–349 in 2011, instituting a ten-year pilot program intended to enhance the patent expertise of selected federal judges serving among the fifteen most patent-active district courts in 2010, as well as to courts adopting or certifying their intention to adopt local patent rules.<sup>43</sup>

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40. See generally Grace Pak, *Balkanization of the Local Patent Rules and a Proposal to Balance Uniformity and Local Experimentation*, AM. U. INTELL. PROP. BRIEF, Spring 2011, at 44 (describing use of local patent rules to “regulate many crucial issues in patent litigation” and thus “manage the complexity of patent cases” and “provide a standard structure and promote consistency and certainty”).

41. John E. Schneider, *Local Patent Rules: The Devil is in the Details*, AIPLA SPRING MEETING, 2, 5–8, 13, 18 (May 6, 2010), [http://www.aipla.org/learningcenter/library/papers/SM/2010-Spring-Meeting-Speaker-Materials/Documents/ED\\_2010\\_SM\\_Schneider\\_PPR.pdf](http://www.aipla.org/learningcenter/library/papers/SM/2010-Spring-Meeting-Speaker-Materials/Documents/ED_2010_SM_Schneider_PPR.pdf) (outlining why the milestones addressed by local patent rules are significant to the parties and how the rules further judicial economy).

42. See Pak, *supra* note 40, at 54 (“The local patent rules have brought many benefits to the patent system. Within a particular forum, the local patent rules permit litigants and the courts to predict the procedural progression of a case with some certainty. The local patent rules also reduce inefficiencies within one forum because they eliminate the need to readdress procedural issues that frequently recur in each case.”); *O2 Micro Int’l Ltd. v. Monolithic Power Sys.*, 467 F.3d 1355, 1363 (Fed. Cir. 2006) (“[T]he [local patent] rules are essentially a series of case management orders . . .”); D. MINN. LR 2005 Patent Advisory Committee’s Preface at xvi (2013), available at [http://www.mnd.uscourts.gov/local\\_rules/Local-Rules-Master.pdf](http://www.mnd.uscourts.gov/local_rules/Local-Rules-Master.pdf) (listing the motivating factors considered in adopting local patent rules, among them the opportunity to “ease, simplify, and reduce the cost of patent practice” and “streamline the pre-trial and claim construction processes”). See generally Ware & Davy, *supra* note 9, at 965.

43. Patent Pilot Program, Pub. L. No. 111–349, 124 Stat. 3674 (2011) (stating purpose as to enhance “expertise in patent cases among district court judges”); see also Press Release, U.S. Courts, *District Courts Selected for Patent Pilot Program* (June 2011), available at [http://www.uscourts.gov/News/NewsView/11-06-07/District\\_Courts\\_Selected\\_for\\_Patent\\_Pilot\\_Program.aspx](http://www.uscourts.gov/News/NewsView/11-06-07/District_Courts_Selected_for_Patent_Pilot_Program.aspx). Participants were chosen in June of 2011, including: Eastern District of New York, Southern District of New York, Western District of Pennsylvania, District of New Jersey, District of Maryland, Northern District of Illinois, Southern District of Florida, District of Nevada, Eastern District of Texas, Northern District of Texas, Western District of Tennessee, Central District of California, Northern District of California, and Southern District of California. Patent Pilot Program, Pub. L. No. 111–349, 124 Stat. 3674 (2011); see also Press Release, U.S. COURTS, *Pilot Program to Enhance Expertise in Patent Cases* (Feb. 2011), available at [http://www.uscourts.gov/News/TheThirdBranch/11-02-01/Pilot\\_Program\\_to\\_Enhance\\_Expertise\\_in\\_Patent\\_Cases.aspx](http://www.uscourts.gov/News/TheThirdBranch/11-02-01/Pilot_Program_to_Enhance_Expertise_in_Patent_Cases.aspx) (explaining that the law grew out of a hearing during the 109th Congress directed to improving federal court adjudication of patent cases in response to high rates of reversal). But see Jeff Becker, *On Creating Specialized Patent District Courts: Why H.R. 34 Does Not Go Far Enough to Address Reversal Rates in District Courts*, 61 SMU L. REV. 1607, 1608 (2008) (arguing that similar legislation proposed in 2007 inadequately addressed claim construction reversal rates).

## THE IMPACT OF LOCAL PATENT RULES

One issue to be considered by the pilot will likely include the fact that local procedures vary widely among the at least twenty-four district courts currently having formally adopted patent rules since the Northern District of California became the first in 2000.<sup>44</sup> The increasing number of jurisdictions adopting local patent rules demonstrates widespread and growing acceptance; however, incremental growth also raises concerns about the potential for balkanization<sup>45</sup> and forum shopping, as noted by several commentators.<sup>46</sup>

### *A. Local Patent Rules Embody a Policy of Promoting Early Crystallization of Theories with Serious Consequences for Failing to Make Initial Disclosures when Required*

Despite the unitary Court of Appeals for the Federal Circuit (Federal Circuit) having exclusive jurisdiction over patent appeals from all 94 U.S. district courts,<sup>47</sup> some observe that the disunity inevitably resulting from isolated and uncoordinated efforts to institute local patent rule regimes may yield legal clutter, undue complexity, and unfairness.<sup>48</sup> On the other hand, the variety of rules has also produced innovations in, among other things, case management, claim

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44. As of January 12, 2013, the list included: Northern District of California (Adopted 2000); District of Minnesota (Adopted 2005); Western District of Pennsylvania (Adopted 2005); Eastern District of Texas (Adopted 2005); Southern District of California (Adopted 2006); Northern District of Georgia (Adopted 2004); Eastern District of North Carolina (Adopted 2007); District of Massachusetts (Adopted 2008); Southern District of Texas (Adopted 2008); Northern District of Illinois (Adopted 2009); District of New Jersey (Adopted 2009); Northern District of Ohio (Adopted 2009); Western District of Washington (Adopted 2009); Southern District of Indiana (Adopted 2009); District of Idaho (Adopted 2009); Northern District of Texas (2009) (noting that Texas' procedures are provided not by rules but by Amended Miscellaneous Order No. 62, available at [http://www.txnd.uscourts.gov/pdf/misc\\_orders/misc62\\_11-17-09.pdf](http://www.txnd.uscourts.gov/pdf/misc_orders/misc62_11-17-09.pdf)); Southern District of Ohio (Adopted 2010); Eastern District of Washington (Adopted 2010); Eastern District of Missouri (Adopted 2011); Western District of North Carolina (Adopted 2011); District of Maryland (Adopted 2011); District of Nevada (Adopted 2011); District of New Hampshire (Adopted 2011); Western District of Tennessee (Adopted 2011); Northern District of New York (Adopted 2012); and Middle District of North Carolina (Adopted 2012).

45. Pak, *supra* note 40, at 44 (noting that local patent rules tend to vary widely among jurisdictions, arguing that such "balkanization" may produce negative effects, and suggesting a balance between experimentation and standardization).

46. See, e.g., Lemley, *supra* note 11, at 405 (noting that "forum shopping is alive and well in patent law"); 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, 193 (2007) (arguing that the Eastern District of Texas has become a haven for patentee plaintiffs and alleging that "in recent years, there has been an increase in forum shopping by patentee plaintiffs"); Kimberly A. Moore, *Forum Shopping in Patent Cases: Does Geographic Choice Affect Innovation?* 83 J. PAT. & TRADEMARK OFF. SOC'Y 558, 558 (2001) (detailing empirical evidence that forum shopping plays a "critical role in the outcome of patent litigation" while noting jurisdictional differences in the administration of patent cases and pointing out the negative connotations of forum shopping as associated with bias towards one party); Alisha Kay Taylor, *What Does Forum Shopping in the Eastern District of Texas Mean for Patent Reform?*, 6 J. MARSHALL REV. INTELL. PROP. L. 570, 582 (2007).

47. See 28 U.S.C. §§ 1295(a)(1), 1338(a) (2006) (giving power to exercise exclusive jurisdiction over patent appeals from final decisions issued by a U.S. district court to the Court of Appeals for the Federal Circuit).

48. Pak, *supra* note 40, at 44.

construction briefing, and limited but effective discovery.<sup>49</sup> Here, it is worth considering the policies underlying local patent rule adoption as the foundation for their particular restrictions on timing, disclosure, and claim construction. Once these policies have been examined, it can be determined whether or not local rules should yield to this purported need for greater uniformity.

The U.S. District Court for the Northern District of California's Patent Local Rules here serve as the acknowledged model for the structure and focus of several others that follow their example.<sup>50</sup> First, the rules set forth general provisions addressing issues important in most patent cases — e.g., confidentiality and protective orders, certification of pleadings and claim charts, claim construction proceedings, and the identification of testifying experts.<sup>51</sup> These provisions also state the relationship between the Federal Rules of Civil Procedure and local patent rules.<sup>52</sup>

Second, the Patent Local Rules for the Northern District of California require initial disclosure of plaintiffs' infringement contentions and defendants' invalidity contentions.<sup>53</sup> Infringement contentions are served by the plaintiff shortly after the case management conference and must include all the asserted claims and applicable subsections of 35 U.S.C. § 271 under which infringement is alleged.<sup>54</sup> They must list, relative to each claim, the accused instrumentality attributable to the defendant — e.g., apparatus, product, device, process, method, or act. Plaintiff must further state whether alleged infringement is literal or by doctrine of equivalents, the basis for any allegation of willfulness, and any theory relating to indirect infringement including description of the role of each accused party.<sup>55</sup> The accused infringer must serve invalidity contentions within forty-five days of being served with the plaintiff's infringement contentions.<sup>56</sup> Invalidity contentions generally must include each item of prior art that allegedly anticipates each asserted claim or renders it obvious; the identification of any combinations of prior art showing obviousness; an explanation of why the combination renders the claim

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49. *Id.* at 44.

50. *See, e.g.*, D.N.J. L. PAT. R. Committee Explanatory Notes at 32 (2008) (explicitly adopting rules based on the rules adopted in the Northern District of California). *See generally* Ware & Davy, *supra* note 9, at 965 (providing an overview of the scope and focus of local patent rules, as exemplified by those of the N.D. Cal.).

51. *E.g.*, N.D. CAL. PATENT L.R. 2-1 to 2-5, 4-1 to 4-7 (2010).

52. *E.g.*, N.D. CAL. PATENT L.R. 2-5 (2010) (providing that federal rules supersede North Dakota Patent Local Rules in the event of conflict).

53. *E.g.*, N.D. CAL. PATENT L.R. 3-1 (2010) (requiring parties to identify "as specific as possible," the grounds of their claims and defenses); N.D. CAL. P.R. 3-3 (2010) (reviewing the standard for invalidity contentions).

54. N.D. CAL. PATENT L.R. 3-1 (2010); 35 U.S.C. § 271 (2006) (containing the infringement provisions of the patent code).

55. *E.g.*, N.D. CAL. PATENT L.R. 3-1 (2010).

56. *See, e.g.*, N.D. CAL. PATENT L.R. 3-3 (2010) (requiring submission not later than forty-five days after service upon it of the plaintiff's "Disclosure of Asserted Claims and Infringement Contentions").



obvious; and any grounds of invalidity based on 35 U.S.C. § 101, indefiniteness under 35 U.S.C. § 112(2), or enablement or written description under 35 U.S.C. § 112(1).<sup>57</sup> Both sets of contentions require corresponding document production and service of detailed claim charts.<sup>58</sup>

As a practical matter, the degree of specificity required to satisfy the initial disclosure requirements of most local patent rules is dramatically higher than standard pleading.<sup>59</sup> While all local patent rules currently provide mechanisms for amendment,<sup>60</sup> the policy of initial disclosure is for *early submission* of detailed theories regarding both infringement claims and invalidity defenses.<sup>61</sup> As articulated in *Atmel Corp. v. Information Storage Devices, Inc.*, this framework by design requires parties to “crystallize their theories of the case early in the litigation” so as to “prevent the ‘shifting sands’ approach to claim construction.”<sup>62</sup> Rules restricting subsequent amendment of the initial disclosures similarly advance this purpose.<sup>63</sup> The Federal Circuit has appropriated this articulation many times in upholding the validity and application of such provisions.<sup>64</sup> In fact, the Federal Circuit appears to regard local rules favorably as a means “to balance the right to develop new information in discovery with the need for certainty as to the legal theories.”<sup>65</sup> Not surprisingly, the focus of Federal Circuit case law upholding the validity of local patent rules has coalesced around denials by the trial courts to permit amendment

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57. *Id.*; 35 U.S.C. § 101 (2006) (governing patent eligible subject matter); § 102 (governing the novelty requirement); § 103 (governing the non-obviousness requirement); § 112 (governing written description, enablement, and definiteness requirements).

58. See, e.g., N.D. CAL. PATENT L.R. 3-4 (2010).

59. Ware & Davy, *supra* note 9, at 984.

60. See *O2 Micro Int'l Ltd. v. Monolithic Power Sys.*, 467 F.3d 1355, 1359–60, 1363 (Fed. Cir. 2006) (explaining that “[t]he ability of parties to amend those contentions is restricted. Apart from amendments designed to take account of the district court’s claim construction, amendments are permitted only for ‘good cause’ even though the period allowed for discovery typically will not have expired”).

61. Schneider, *supra* note 41, at 5; see also Pak, *supra* note 40, at 47–48 (comparing various local patent rule provisions between jurisdictions and their respective requirements for initial disclosures).

62. No. 95-1987 FMS, 1998 WL 775115, at \*2–3 (N.D. Cal. 1998) (explaining that unlike the liberal pleading standard, California’s patent local rules require litigants to “put all their cards on the table up front”).

63. See N.D. CAL. PATENT L.R. 3-6 (2010).

64. See, e.g., *O2 Micro*, 467 F.3d at 1366 (“If the parties were not required to amend their contentions promptly after discovering new information, the contentions requirement would be virtually meaningless as a mechanism for shaping the conduct for discovery and trial preparation.”); *Safeclick, LLC v. Visa Int’l Serv. Ass’n*, 208 F. App’x 829, 834, 836 (Fed. Cir. 2006) (citing *Genentech v. Amgen*, 289 F.3d 761, 773–74 (Fed. Cir. 2002)); *Genentech*, 289 F.3d at 773–74 (Fed. Cir. 2002) (stating that the philosophy behind claim charts is to “prevent the ‘shifting sands’ approach to claim construction” (citing *Atmel Corp. v. Info. Storage Devices, Inc.*, 1998 WL 775115, at \*2 (N.D. Cal. 1998))).

65. *O2 Micro*, 467 F.3d at 1366 (affirming summary judgment of non-infringement because plaintiff failed to provide any evidence for its “theory” of infringement).

of contentions established early in the litigation, in effect restricting amendment.<sup>66</sup> This case law illustrates the serious consequences of failing to adequately disclose theories when dictated by the scheduling order or local rules.<sup>67</sup> On the one hand, these rules are not unfamiliar features of civil procedure. On the other, they suggest an underlying tension between form and substance in local patent rules.<sup>68</sup>

Lastly, local patent rules generally govern the timing and proceeding of claim construction as the milestone resulting in issuance of the court's *Markman* order(s).<sup>69</sup> The claim construction hearing and *Markman* order — so called after the seminal case on claim construction, *Markman v. Westview Instruments, Inc.*<sup>70</sup> — define the disputed claim terms from the perspective of one skilled in the art, in light of the patent document, prosecution history, and extrinsic evidence.<sup>71</sup> Claim construction itself arises out of the requirement in *Markman* that the district court resolve the meaning of patent claim terms as a matter of law. This requirement has resulted in a controversially high reversal rate for district courts upon *de novo* review by the Federal Circuit.<sup>72</sup> In theory, claim construction can occur at any point in the case — prior to discovery, on motions for summary judgment, or even at trial.<sup>73</sup> However, the timing of the *Markman* order significantly impacts discovery

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66. See, e.g., *id.* at 1362, 1366 (upholding the district court ruling denying O2 Micro permission to add an additional infringement theory because it “unreasonably delayed” in moving to amend its contentions); *Genentech*, 289 F.3d at 774 (upholding the district court ruling precluding Genentech from proceeding on a theory of infringement under the doctrine of equivalents because Genentech did not expressly include that theory in a claim chart as strictly required under the local rules).

67. See, e.g., *Safeclick*, 208 F. App'x at 834–36 (upholding, on the basis of deviation from local rules, refusal by the trial court to consider a new theory raised for the first time in a summary judgment motion); *SanDisk Corp. v. Memorex Prods., Inc.*, 415 F.3d 1278, 1292 (Fed. Cir. 2005) (finding no abuse of discretion in refusing to entertain untimely claim construction and infringement arguments made after the relevant cut-off dates under the local rules and the trial court's scheduling order).

68. See *infra* Part I.C.

69. N.D. CAL. PATENT L.R. 4-1 to 4-6 (2010). See generally *Markman v. Westview Instruments*, 517 U.S. 370, 372 (1996) (holding that claim construction is completely under the purview of the court, not the jury).

70. 517 U.S. 370 (1996).

71. *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312–15 (Fed. Cir. 2005) (en banc).

72. Becker, *supra* note 43, at 1608 n.3 (suggesting the reversal rate is commonly recognized to be fifty percent (citing Hon. Kathleen M. O'Malley et al., *A Panel Discussion: Claim Construction From the Perspective of The District Judge*, 54 CASE W. RES. L. REV. 671, 680 (2004) (suggesting a reversal rate as high as seventy percent))); Paul M. Schoenard, *Reversing the Reversal Rate: Using Real Property Principles to Guide Federal Circuit Patent Jurisprudence*, 17 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 299, 303–04 (2007).

73. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 33.223 (2004) (discussing timing of the *Markman* hearing); John F. Anderson et al., 901 *The Markman Hearings in Perspective*, ACCA'S 2002 ANNUAL MEETING, 5 (2002), <http://www.acc.com/vl/public/ProgramMaterial/loader.cfm?csModule=security/getfile&pageid=20581> (discussing case law indicating that timing of a *Markman* hearing is within the discretion of the district court and that nothing binds the court to construe claims at either an early or later stage in the case, but also noting considerations based on stage of discovery and timing relative to summary judgment).

and, often enough, the appetite of litigants to proceed to trial.<sup>74</sup> For this reason, early *Markmans* are generally preferred, as reflected by the structure of most local patent rules.<sup>75</sup> This often takes the form of requiring the parties to limit the number of disputed claim terms to ten or less.<sup>76</sup> Moreover, the parties are then required to propose claim constructions to each other and submit a “joint claim construction” to the court, usually within two months of invalidity contentions being served.<sup>77</sup> Discovery closes shortly thereafter.<sup>78</sup> As stated by the Northern District of California, the primary purpose of case management leading up to this significant milestone aims “to place the parties on an orderly pretrial track which will produce a ruling on claim construction approximately a year after the complaint is filed.”<sup>79</sup>

*B. District of Maryland Is the Nineteenth Jurisdiction to Adopt Local Patent Rules and Was Chosen for a Pilot Program to Enhance Judicial Patent Expertise*

In 2011, the U.S. District Court for the District of Maryland became the nineteenth jurisdiction to formally adopt local patent rules.<sup>80</sup> In pledging its intention to adopt local rules, the District of Maryland became eligible to participate in the patent pilot program, intended to enhance expertise and efficiency in presiding over patent litigation.<sup>81</sup> The district was selected by the Director of the Administrative Office of the United States Courts as one of fourteen federal judicial districts to become part

74. See Anderson et al., *supra* note 73, at 9; see also MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 73, § 33.223 at 609; PETER MENELL ET AL., FED. JUDICIAL CTR., PATENT CASE MANAGEMENT JUDICIAL GUIDE 2–18 (2012) (noting that since claim construction may facilitate settlement, early claim construction for disputed and potentially dispositive claim terms is beneficial if followed by a settlement conference).

75. Integrated Circuit Sys., Inc. v. Realtek Semiconductor Co., 308 F. Supp. 2d 1106, 1107 (N.D. Cal. 2004); see MANUAL FOR COMPLEX LITIGATION (FOURTH) *supra* note 73, § 33.223 at 607–09; MENELL ET AL., *supra* note 74, at 5–5. But see Anderson et al., *supra* note 73, at 5 (discussing case law indicating that timing of *Markman* is within the discretion of the district court and nothing binds it to construe claims at either an early or later stage in the case).

76. N.D. CAL. PATENT L.R. 4-1(b) (2010) (requiring that the parties to jointly identify ten terms as the most significant, thereby limiting claim construction briefing to those which are likely dispositive).

77. N.D. CAL. PATENT L.R. 4-3 (2010) (requiring submission sixty days after the service of invalidity contentions).

78. N.D. CAL. PATENT L.R. 4-4 (2010) (closing discovery relating to claim construction thirty days after submission).

79. *Integrated Circuit*, 308 F. Supp. 2d at 1107. This appears to be an attainable goal. While issuing a claim construction order within a year of filing occurs in only twenty-two percent of the 209 cases documented as reaching this milestone in the Northern District of California over the past decade, another fifty-two percent receive a claim construction order within one to two years despite high volume and congestion. See *infra* Part II.A.3.a, Chart 6.

80. Standing Order 2011-03, *In Re* Pilot Program for Patent Cases, Misc. No. 1:00-MC-00308 (D. Md. Sept. 7, 2011), ECF No. 35, available at <http://www.mdd.uscourts.gov/Misc/2011-03.pdf>; Office of the Clerk for the U.S. District Court District of Maryland, *Announcement of Pilot Program for Patent Cases*, U.S. DISTRICT COURT D. MD. (2011), available at <http://www.mdd.uscourts.gov/publications/forms/PilotPatentProgram.pdf>.

81. Patent Cases Pilot Program, Pub. L. No. 111–349, 124 Stat. 3674 (2011).

of the pilot.<sup>82</sup> The new District of Maryland Local Rules provide an opportunity to examine the basic structure of local patent rules and analyze the choices made by rulemakers relative to other jurisdictions.<sup>83</sup>

The new District of Maryland Local Rules combine many features of the Northern District of California model, as endorsed by the Federal Circuit, with several notable exceptions and unique provisions.<sup>84</sup> First, the District of Maryland Local Rules instruct the plaintiff to orchestrate scheduling of the case management conference within seven days of an answer or the docketing of a transfer.<sup>85</sup> Notably, the same rule allows for “reasonable adjustments” of deadlines set by the rules when “(1) all parties agree to the adjustments; (2) a case involves particularly complex technologies or a large number of patents; (3) the parties include non-U.S. entities or individuals; or (4) a substantial portion of the testimonial or documentary evidence will require translation to English.”<sup>86</sup> This flexibility brings the District of Maryland Local Rules into a middle ground between set schedules — e.g., Northern District of California<sup>87</sup> and Eastern District of Texas<sup>88</sup> — and those with open dates to be established in a scheduling order at the discretion of the trial judge — e.g., Southern District of Texas.<sup>89</sup> The District of Maryland Local Rules display the format of stating a number of days in which filings become due — e.g., “(30) days from the date of the Scheduling Order, any party claiming patent infringement shall serve . . .” — but these deadlines may apparently be adjusted under Rule 802 when both parties consent to modification.<sup>90</sup>

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82. Press Release, U.S. Courts, District Courts Selected for Patent Pilot Program (June 7, 2011), *available at* [http://www.uscourts.gov/News/NewsView/11-06-07/District\\_Courts\\_Selected\\_for\\_Patent\\_Pilot\\_Program.aspx](http://www.uscourts.gov/News/NewsView/11-06-07/District_Courts_Selected_for_Patent_Pilot_Program.aspx); Press Release, U.S. Courts, Pilot Program to Enhance Expertise in Patent Cases (Feb. 2011), *available at* [http://www.uscourts.gov/News/TheThirdBranch/11-02-01/Pilot\\_Program\\_to\\_Enhance\\_Expertise\\_in\\_Patent\\_Cases.aspx](http://www.uscourts.gov/News/TheThirdBranch/11-02-01/Pilot_Program_to_Enhance_Expertise_in_Patent_Cases.aspx).

83. Compare N.D. CAL. PATENT L.R. 1-2 (2010), with D. MD. L.R. 801 (2011) (both referring to the scope and intent of local patent rules). See generally D. MD. L.R. 801–07 (2011).

84. Compare D. MD. L.R. 805.1(g)–(h) (2011) (adopting simultaneous exchange of claim construction briefs), with N.D. CAL. PATENT L.R. 4-5 (2010) (providing for sequential or responsive claim construction briefing). The manner of orchestrating the claim construction briefing process has been noticeably variable between jurisdictions. Pak, *supra* note 40, at 51–52.

85. D. MD. L.R. 802 (2011).

86. *Id.*

87. N.D. CAL. PATENT L.R. 2-1(a)(1) (2010) (requiring any proposed modification to obligations or deadlines set forth in the rules to be raised during the initial case conference).

88. E.D. TEX. P. R. 2-1(a)(1) (2013) (requiring any proposed modification to obligations or deadlines set forth in the rules to be raised during the initial case conference).

89. S.D. TEX. P. R. 1-2(b) (2012) (stating that the presiding judge may “accelerate, extend, eliminate, or modify the obligations or deadlines established in these Patent Rules based on the circumstances”).

90. D. MD. L.R. 804.1(a) (2011); see also D. MD. L.R. 802 (2011).

First, infringement contentions come due thirty days after the date of the scheduling order<sup>91</sup> and invalidity contentions come due thirty days after that, or as the rules state, sixty days from the date of the scheduling order.<sup>92</sup> Notably, the District of Maryland Local Rules do not use the phraseology “not later than” for deadlines.<sup>93</sup> In fact, the rules for submission of these initial disclosures state “(60) days *from the date of the Scheduling Order*, each party opposing a claim of patent infringement, shall serve on all parties its Invalidity Contentions . . . .”<sup>94</sup> The form is unlike, for example, Local Rule 3-3 in the Eastern District of Texas which states “[n]ot later than 45 days after service upon it of the ‘Disclosure of Asserted Claims and Infringement Contentions,’ each party opposing a claim of patent infringement, shall serve on all parties its ‘Invalidity Contentions’ . . . .”<sup>95</sup> The distinction could theoretically matter where a plaintiff serves infringement contentions early to reduce the overall time defendants have to prepare invalidity contentions.<sup>96</sup> In reality, such a tactic would have only a very marginal effect, if any, in the Eastern District of Texas because invalidity contentions come due ten days before the case management conference, which is close to filing.<sup>97</sup> Regardless, in the District of Maryland defendants receive a full two-month period following issuance of the scheduling order during which to review prior art, and a month to develop responses to infringement contentions after those are served.<sup>98</sup> This appears generous compared to other jurisdictions that make invalidity contentions due anywhere from fourteen to forty-five days from service of infringement contentions.<sup>99</sup>

Second, the rules set forth the standard for amendment of contentions as “upon written consent of all parties or, for good cause shown, upon leave of the Court.”<sup>100</sup>

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91. D. MD. L.R. 804.1(a) (2011).

92. D. MD. L.R. 804.1(c) (2011).

93. *But see* E.D. TEX. P. R. 3-3 (2013).

94. D. MD. L.R. 804.1(c) (2011) (emphasis added).

95. E.D. TEX. P. R. 3-3 (2013) (emphasis added).

96. Plaintiffs have the advantage of knowing when they plan to file suit and can prepare substantial portions of their infringement contentions in advance. Defendants on the other hand, often taken by surprise, must develop invalidity arguments without the benefit of foresight. Local rules set contracted due dates.

97. *Compare* D. MD. L.R. 804(1)(a) (2011) (making infringement contentions due thirty days after the date of the scheduling order), *with* E.D. TEX. P. R. 3-1 (2013) (making infringement contentions due ten days before the case management conference).

98. D. MD. L.R. 804.1 (2011).

99. N.D. ILL. LPR 2.3 (2012) (allowing fourteen days to submit invalidity contentions); N.D. CAL. PATENT L.R. 3-3 (2010) (allowing forty-five days); *see also* SCHNEIDER, *supra* note 61, at 8 (noting the burden on defendants to locate and develop prior art within a specified time period after being served with infringement contentions).

100. D. MD. L.R. 804.6 (2011); D. MD. L.R. 805.1(e) (2011) (setting a modified standard for amendment of a claim chart or responsive claim chart, which requires stipulation of all parties or court order upon a showing of “excusable subsequent discovery of new information or extraordinary good cause”).

This standard is by comparison stricter than jurisdictions that treat contentions as roughly equivalent to interrogatory responses, where parties are obliged to amend or supplement freely up until some cutoff — e.g., the claim construction hearing.<sup>101</sup> By contrast, the District of Maryland falls into the category of jurisdictions adopting a “good cause” standard.<sup>102</sup> Absent definition, “good cause” is likely subject to interpretation by case law. An interpretation endorsed by the Federal Circuit in upholding the validity of the Northern District of California Rules states that “good cause” may exist where a party shows it learned of the infringement or invalidity issue following service of the contentions despite diligence.<sup>103</sup> By this interpretation, a court is likely within its authority to require a proper investigation beforehand and can deny requests that it suspects are motivated by gamesmanship or intended to frustrate expectations and introduce surprise.<sup>104</sup> It is not clear if the District of Maryland Rule 804(6) will include the now common exception for instances where a claim construction ruling materially affects contentions.<sup>105</sup> Moreover, it does not appear that the District of Maryland Local Rules adopt a framework of preliminary and final contentions that allow parties to freely amend contentions within a specified period of time before claim construction.<sup>106</sup>

Third, the District of Maryland Local Rules set forth claim construction proposal and briefing procedures. The adopted framework is of the simultaneous exchange

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101. See, e.g., N.D. GA. PATENT L.R. 4.5(a) (2009) (“Disclosures and Responses shall have such binding effect on a party as a response to an interrogatory under Rule 33 of the Federal Rules of Civil Procedure.”); D. MASS. LR APP. E LR 16.6(A)(2) SUPP. (2012) (“Such disclosures may be amended and supplemented up to \_\_\_\_ [30] days before the date of the *Markman* Hearing.”).

102. See also N.D. CAL. PATENT L.R. 3-6 (2010); S.D. TEX. P. R. 3-7(a) to (b) (2012) (defining the standard for good cause). It does not appear that “good cause” is defined within the District of Maryland local rules and good cause will thus likely be governed by case law. See *infra* Part I.C.

103. O2 Micro Int’l Ltd. v. Monolithic Power Sys., 467 F.3d 1355, 1366 (Fed. Cir. 2006) (affirming district court’s requirement under Northern District of California Patent Local Rule 3-6 that a party show diligence for “good cause”).

104. See, e.g., Finisar Corp. v. The DirecTV Grp. Inc., 424 F. Supp. 2d 896, 901–02 (E.D. Tex. 2006) (“[O]ne of the goals of the Federal Rules of Procedure and the Local Patent Rules is to speed up the litigation process and make it less expensive. A party simply can not [sic] wait until shortly before trial to prepare its case. Invalidity is an affirmative defense, and the party which does not properly investigate applicable prior art early enough to timely meet disclosure requirements risks exclusion of that evidence.”); MASS Engineered Design, Inc. v. Ergotron, Inc. 250 F.R.D. 284, 286 (E.D. Tex. 2008) (“While invalidity arguments may prove to be a costly endeavor, this Court’s rules oblige MASS to assert such a defense early in the litigation if it is going to assert the defense at all. MASS, as the original plaintiff, chose this forum and thus chose this forum’s rules. It cannot pick and choose which rules and orders to follow and which to ignore.”).

105. See, e.g., E.D. TEX. P.R. 3-6(a)(1) to (2) (2013); S.D. TEX. P. R. 3-6(b) to (c) (2012). Both sets of rules state that if a party believes in good faith that the court’s claim construction ruling so requires, then that party may serve amended contentions without leave of the court.

106. See, e.g., S.D. OHIO PAT.L.R. 103.7 (2009) (stating that amendments are permissible without leave until sixty days after the court’s claim construction but only upon a showing of good cause); N.D. OHIO L. P. R. 3.10 (2009) (stating that disclosures may be amended or supplemented without leave of the court until after final contentions come due).

variety where the parties serve each other with proposed claim constructions.<sup>107</sup> That is, sixty days from the date of the scheduling order both parties simultaneously exchange proposed claim constructions.<sup>108</sup> Notably, this is at the same due date for defendant's invalidity contentions. Thirty days after that, or ninety days from the date of the scheduling order, the parties simultaneously exchange responsive claim constructions.<sup>109</sup> Notably, the standard for amending proposed claim constructions is higher than contentions generally and is articulated as "only on stipulation of all parties or by Order of the Court, which shall be entered only upon a showing of excusable subsequent discovery of new information or *extraordinary good cause*."<sup>110</sup> Thirty days after that, or one hundred twenty days from the date of the scheduling order, the parties file a Joint Claim Construction Statement after a meet and confer.<sup>111</sup> On that same date, the parties simultaneously file and serve opening claim construction briefs and supporting evidence, including a list of witnesses for any proposed claim construction hearing.<sup>112</sup> Thirty days after that, or one hundred fifty days from the date of the scheduling order, the parties simultaneously file and serve responsive claim construction briefs including rebuttals to the evidence or opposing the witness list.<sup>113</sup> The District of Maryland Local Rules calls for simultaneous exchanging of claim construction briefs.<sup>114</sup> The rules do not suggest a particular format for the claim construction hearing itself or address its scheduling.

The rules also address issues related to patent reexamination before the United States Patent and Trademark Office (USPTO).<sup>115</sup> Specifically, Rule 807 states that no motion for a stay pending reexamination of a patent shall be considered unless accompanied by a copy of (1) the Reexamination Order and (2) the First Office

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107. D. MD. L.R. 805.1(g)–(h) (2011) (providing that within 120 days of the Scheduling Order, the parties must file and serve opening briefs related to claim construction and then, within 150 days of the Scheduling Order, must file and serve any responsive briefs); *see also* N.D. CAL. PATENT L.R. 4-2(a) (2010); E.D. TEX. P. R. 4-2(a) to (b) (2013).

108. *Compare* N.D. CAL. PATENT L.R. 4-5 (2010) (requiring the party claiming infringement to first serve and file an opening claim construction brief on the opposing party, followed within fourteen days by opposing party's response), *with* N.D. GA. PATENT L.R. 6.5 (2009) (providing that not later than thirty days after serving and filing the Joint Claim Construction, each party serves and files an opening brief and then, twenty days after service of opening briefs, each party serves and files responsive briefs).

109. D. MD. L.R. 805.1(c)–(d).

110. D. MD. L.R. 805.1(e) (emphasis added).

111. D. MD. L.R. 805.1(f).

112. D. MD. L.R. 805.1(g).

113. D. MD. L.R. 805.1(h).

114. D. MD. L.R. 805.1(g)–(h) (providing that 120 days from the date of the Scheduling Order the parties are required to file and serve opening briefs related to claim construction and then, 150 days from the date of the Scheduling Order, the parties are required to file and serve any responsive briefs).

115. N.D. ILL. LPR 3.5 (2012) (explicitly providing that absent "exceptional circumstances," no stay pending reexamination will be granted after the parties serve their final contentions).



Action issued by the Central Reexamination Unit of the USPTO.<sup>116</sup> A now common situation in patent litigation is for the defendant — i.e., an accused infringer — to file of a request for reexamination<sup>117</sup> against the patent-in-suit while the case is pending before the district court.<sup>118</sup> The defendant will motion for a stay pending reexamination of the patent urging that the USPTO is in a better position to assess the validity of the claims and that the result of reexamination will also narrow issues before the district court. However, the average pendency for *ex parte* and *inter partes* reexamination is 25.4 to 36.1 months respectively.<sup>119</sup> The District of Maryland Rule 807 advises that the court will not even consider a motion to stay until the USPTO grants<sup>120</sup> any such request for reexamination and there is a first office action on the merits<sup>121</sup> available for inspection by the judge.

The Leahy-Smith America Invents Act (AIA) eliminated the availability of *inter partes* reexaminations on September 16, 2012, which have been replaced by the post-grant proceeding called *inter partes* review.<sup>122</sup> However, the existing docket of pending *inter partes* reexaminations instituted before the cutoff, not to mention the continuing availability of *ex parte* reexamination, make these provisions of local patent rules relevant for the foreseeable future. Indeed, in the case of *inter partes* reexamination, the USPTO received a spike of several hundred requests for *inter partes* reexamination in the days leading up to the September 16, 2012 cutoff.<sup>123</sup> As sixty-seven percent of *inter partes* reexaminations are currently associated with

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116. D. MD. L.R. 807 (2011).

117. See generally 35 U.S.C. § 302 (2006) (setting forth certain requirements for requesting reexamination of an issued patent).

118. See generally Robert G. Sterne et al., *Reexamination Practice with Concurrent District Court Litigation or Section 337 USITC Investigations*, 10 SEDONA CONFERENCE J. 115 (2010) (discussing “the interplay between patent litigation before the Federal Courts . . . and co-pending reexamination proceedings involving the patent-in-suit before the United States Patent and Trademark Office”).

119. U.S. PATENT AND TRADEMARK OFFICE, *EX PARTE* REEXAMINATION FILING DATA — June 30, 2012, (2012); U.S. PATENT AND TRADEMARK OFFICE, *INTER PARTES* REEXAMINATION FILING DATA — June 30, 2012 (2012).

120. See generally MANUAL OF PATENT EXAMINING PROCEDURE (MPEP) § 2247.01 (8th ed. Rev. 7, Sept. 2008) (explaining decisions to grant or to deny reexamination based on a request).

121. See *id.* § 2260, § 2262 (explaining that once a request for reexamination is granted, the examiner “shall make a thorough study thereof and shall make a thorough investigation of the available prior art relating to the subject matter of the claimed invention” and then issue a first office action that “will be a statement of the examiner’s position”).

122. Changes To Implement Post-Grant Review Proceedings, 77 Fed. Reg. 7,075 (proposed Feb. 10, 2012) (explaining that “*inter partes* reexamination practice will be eliminated, except for requests filed before the effective date of September 16, 2012.” (citing Leahy-Smith America Invents Act of 2011, Pub. L. No. 112-29, § 6(c)(3)(C), 125 Stat. 283, 305 (2011))); see *infra* Part II.D (discussing the new *inter partes* review proceedings).

123. Dennis Crouch, *A Rush to File at the End of Inter Partes Reexaminations*, PATENTLY-O BLOG (Sept. 20, 2012), <http://www.patentlyo.com/patent/2012/09/my-entry.html> (documenting the filing of “several hundred” requests for *inter partes* reexamination in the days leading up to September 16, 2012).



concurrent litigation, district courts will still continue to face procedural issues related to stays pending reexamination.<sup>124</sup>

*C. The Validity of Patent Rules Depends Upon Their Accordance with U.S. Patent Law as Reviewed by the Federal Circuit, Unlike Local Rules of General Application*

*[A] procedural issue that is not itself a substantive patent law issue is nonetheless governed by Federal Circuit law if the issue pertains to patent law, if it bears an essential relationship to matters committed to our exclusive control by statute, or if it clearly implicates the jurisprudential responsibilities of this court in a field within its exclusive jurisdiction.*<sup>125</sup>

The authority to promulgate local rules derives from Rule 83 of the Federal Rules of Civil Procedure,<sup>126</sup> giving district courts wide discretion to adopt and amend rules governing local practice.<sup>127</sup> However, the Court of Appeals for the Federal Circuit has exclusive authority to interpret and or invalidate local rules related to patent law.<sup>128</sup> The Federal Circuit endorses various local rules, both on a case by case basis and through a policy of deference.<sup>129</sup> This deference also seems to recognize a policy

124. U.S. PATENT AND TRADEMARK OFFICE, INTER PARTES REEXAMINATION FILING DATA *supra* note 119.

125. *Midwest Indus., Inc. v. Karavan Trailers, Inc.*, 175 F.3d 1356, 1359 (Fed. Cir. 1999) (en banc) (citation omitted) (internal quotation marks omitted).

126. FED. R. CIV. P. 83(a) ("After giving public notice and an opportunity for comment, a district court, acting by a majority of its district judges, may make and amend rules governing its practice.").

127. FED. R. CIV. P. 83(b) ("A judge may regulate practice in any manner consistent with federal law, rules adopted under 28 U.S.C. §§ 2072 and 2075, and district's local rules."). A line of inquiry not explored in this Article is the extent to which local rules, perhaps not limited to those directed to substantive issues of patent law, have been viewed as in tension with FED. R. CIV. P. 83(a)(2), which states that "[a] local rule imposing a requirement of form must not be enforced in a way that causes a party to lose rights because of a nonwillful failure to comply."

128. *O2 Micro Int'l Ltd. v. Monolithic Power Sys.*, 467 F.3d 1355, 1364–65 (Fed. Cir. 2006) (asserting the court's authority to refuse enforcement of local rules, for example, that unduly limit discovery, and concluding that issues concerning the validity and interpretation of local patent rules that are "intimately involved in the substance of enforcement of the patent right" and/or pertain to or are unique to patent law must be governed by the law of the Federal Circuit (quoting *Sulzer Textil A.G. v. Picanol N.V.*, 358 F.3d 1356, 1363 (Fed. Cir. 2004))); *Advanced Cardiovascular Sys., v. Medtronic, Inc.*, 265 F.3d 1294, 1303 (Fed. Cir. 2001) (finding that determining sufficiency of notice under the patent statutes "clearly implicates the [Federal Circuit's] jurisprudential responsibilities").

129. *O2 Micro*, 467 F.3d at 1366 (stating that "we see nothing in the Federal Rules that is inconsistent with local rules requiring the early disclosure of infringement and invalidity contentions . . ."); *SafeClick, LLC v. Visa Int'l Serv. Ass'n*, 208 F. App'x 829, 834 (Fed. Cir. 2006) (explaining in an unpublished decision that the standard of review is "very deferential" with respect to application of local patent rules); *SanDisk Corp. v. Memorex Prods., Inc.*, 415 F.3d 1278, 1292 (Fed. Cir. 2005) (elaborating that the Federal Circuit gives "broad deference" by an abuse of discretion standard to the trial court's application of local procedural rules given the trial court's imperative to control the parties and flow of litigation); *Genentech, Inc. v. Amgen, Inc.*, 289 F.3d 761, 774 (Fed. Cir. 2002) (upholding enforcement of local patent rules precluding plaintiff from asserting

emanating from Rule 16, encouraging trial courts to adopt local rules to promote judicial efficiency.<sup>130</sup> Local rules must be consistent with acts of Congress and the Federal Rules of Civil Procedure and cannot otherwise frustrate the purpose or spirit of the Federal Rules — e.g., broad scope of discovery. A unique aspect of *patent* local rules, however, is the extent to which their review or interpretation is “intimately involved in the substance of enforcement of the patent right.”<sup>131</sup> That is, where the rule is particularly related to patent law the Federal Circuit claims exclusive jurisdiction.

In what appears to be deference, the Federal Circuit has recognized — in cases such as *Genentech v. Amgen* — that enforcement of local rules, in most circumstances, is reviewed only for abuse of discretion.<sup>132</sup> In a more recent case, *O2 Micro International Ltd. v. Monolithic Power Systems*, however, the Federal Circuit approached the issue in deciding whether Federal Circuit law or Ninth Circuit law would govern interpretation and review of the Northern District of California’s Local Patent Rules.<sup>133</sup> In *O2 Micro*, the court noted that there is an “important distinction between local rules of general applicability, which by definition are not unique to patent law . . . , and local rules that only apply to patent cases.”<sup>134</sup> Here the court noted that the rule in question — i.e., the “good cause” standard<sup>135</sup> for amending infringement contentions outside of a specified 30-day window — was not only unique to patent cases, and thus particularly within its jurisdiction, but also “likely to directly affect the substantive patent law theories that may be presented at trial.”<sup>136</sup>

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infringement under the doctrine of equivalents when plaintiff failed to include that theory in its claim chart and stating that the Federal Circuit defers to the district court when interpreting and enforcing local rules “so as not to frustrate local attempts to manage patent cases according to prescribed guidelines”).

130. FED. R. CIV. P. 16 advisory committee’s note (commenting that the Federal Rules permit each district court to promulgate local rules under Rule 83 that exempt “certain categories of cases” in which the burdens of scheduling orders exceed the administrative efficiencies gained).

131. *Sulzer Textil A.G.*, 358 F.3d at 1362–63 (stating that the Federal Circuit will apply its own law to both substantive and procedural issues that are “intimately involved in the substance of enforcement of the patent right” (quoting *Viam Corp. v. Iowa Exp.-Imp. Trading Co.*, 84 F.3d 424, 428 (Fed. Cir. 1996))).

132. *Genentech*, 289 F.3d at 774 (holding the Federal Circuit defers to the district court when interpreting and enforcing local patent rules “so as not to frustrate local attempts to manage patent cases according to prescribed guidelines”); *see also O2 Micro*, 467 F.3d at 1366–69 (deciding that decisions enforcing local rules patent cases will be affirmed unless the court finds an abuse of discretion); *In re Cambridge Biotech Corp.*, 186 F.3d 1356, 1369 (Fed. Cir. 1999) (establishing criteria for reviewing a district court’s exercise of discretion as whether “(1) the decision was clearly unreasonable, arbitrary, or fanciful; (2) the decision was based on an erroneous conclusion of law; (3) the court’s findings were clearly erroneous; or (4) the record contains no evidence upon which the court rationally could have based its decision”).

133. *O2 Micro*, 467 F.3d at 1363–66.

134. *O2 Micro*, 467 F.3d at 1364.

135. N.D. CAL. PATENT L.R. 3-6 (2010) (“Amendment of the Infringement Contentions or the Invalidity Contentions may be made only by order of the Court upon a timely showing of good cause.”).

136. *O2 Micro*, 467 F.3d at 1364 (Fed. Cir. 2006).

To support the initial determination that it had exclusive jurisdiction to decide the issue, the court cited *Advanced Cardiovascular Systems, v. Medtronic, Inc.*, a case in which the court reviewed the district court's refusal to allow a party to amend the pleadings under Federal Circuit law.<sup>137</sup> The court then went on to defend the Northern District of California's justification for restricting ongoing amendment of infringement and invalidity contentions by analogizing the objective to that of the Federal Rules in notifying parties of their opponent's theories of liability and to crystallize issues.<sup>138</sup> The court explained that the "good cause" standard was not in tension with either the Federal Rules' pleading standard or the broad scope of discovery because parties were permitted to file amended contentions.<sup>139</sup> The Federal Circuit found "nothing in the Federal Rules that is inconsistent with local rules requiring the early disclosure of infringement and invalidity contentions and requiring amendments to contentions to be filed with diligence."<sup>140</sup>

In conclusion, while the Federal Circuit appears deferential to local rulemaking, it retains substantial authority to intervene and apply its patent jurisprudence to discipline a trial court's discretion when employing procedural mechanisms in furtherance of improving the "economy of time and effort for itself, for counsel and for litigants."<sup>141</sup> To this end, the court has stated "we do not doubt our power in the appropriate circumstance to refuse to enforce a local rule that unduly limits discovery in patent cases" — a statement which is less an assertion than a concession by all local rules to yield in the event of any conflict with the Federal Rules.<sup>142</sup>

It remains to be seen, however, whether *all* local patent rules will *always* be subject to the exclusive jurisdiction of the Federal Circuit as likely "to directly affect the substantive patent law theories that may be presented at trial."<sup>143</sup> To the extent a rule relates to patent law — as distinct from a rule of general application — Federal Circuit law would appear to govern its interpretation.

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137. *Id.* at 1364; see *Advanced Cardiovascular Sys., v. Medtronic, Inc.*, 265 F.3d 1294, 1303 (Fed. Cir. 2001) (restating that decisions concerning amendment of pleadings are reviewed under the abuse of discretion standard (citing *E.W. Bliss Co. v. United States*, 77 F.3d 445, 450 (Fed. Cir. 1996))).

138. *O2 Micro*, 467 F.3d at 1364–66.

139. *Id.* at 1366.

140. *Id.*

141. *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936) (stating that district courts have inherent power to control their dockets in furtherance of gaining "economy of time and effort for itself, for counsel, and for litigants").

142. *O2 Micro*, 467 F.3d at 1365 n.11.

143. *Id.* at 1363; see *Sulzer Textil A.G. v. Picanol N.V.*, 358 F.3d 1356, 1363 (Fed. Cir. 2004) (citing *Winner Int'l Royalty Corp. v. Wang*, 202 F.3d 1340, 1345 (Fed. Cir. 2000)) (asserting that where a district court rules, as a matter of patent law, that a party is precluded from introducing evidence, then the Federal Circuit applies Federal Circuit law and reviews the district court's ruling de novo).

## II. RATES AND TIMING

This data set is comprised of all patent cases that were opened and closed between 2000 and 2010, reviewed using Lex Machina.<sup>144</sup> Lex Machina provides a filter in its advanced search setting to limit results to cases that reach a variety of milestones — e.g., claim construction, trial, appeal.<sup>145</sup> First, cases filed in each jurisdiction from 2000 to 2010 were indexed. Second, cases in each jurisdiction reaching a claim construction milestone in each year from 2000 to 2010 were indexed. The totals were analyzed to determine that the ratio reaching the claim construction milestone was on average ten percent among all ninety-four U.S. district courts. That is, of the total of 28,377 patent cases filed in U.S. district courts over the past decade, 2,871 reached claim construction. The approximate duration of time from filing to claim construction among these 2,871 cases was determined to be, on average, 1.8 years.

These results were then analyzed to compare jurisdictions with and without local patent rules. Of the fourteen jurisdictions with over 500 cases filed between 2000 and 2010, those with local patent rules adopted by 2008 reached a decision on claim construction on average fourteen percent of the time.<sup>146</sup> Those without local patent rules reached a decision on claim construction on average eight percent of the time.<sup>147</sup> Jurisdictions with the highest percentages of cases to reach claim construction were the Eastern District of Texas (23.7%), Northern District of California (22.7%), and Southern District of California (16.7%).<sup>148</sup> Each have had local patent rules in effect for at least five years.<sup>149</sup> Jurisdictions with the lowest were the District of New Jersey (4.1%) which adopted rules in 2009, Southern District of New York (5.4%), and the Northern District of Georgia (6.0%), which adopted rules in 2006.<sup>150</sup>

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144. The data service Lex Machina, also known as the Intellectual Property Litigation Clearinghouse (IPLC), was created by the Stanford Program in Law, Science and Technology in collaboration with the Stanford Department of Computer Science. Lex Machina tracks lawsuits filed in U.S. District Courts based information obtained from sources such as Public Access to Court Electronic Records (PACER). *About, LEX MACHINA*, <https://lexmachina.com/> (last visited May 2, 2013). A one year subscription was generously granted to the author from 2011 to 2012 for purposes of academic research in connection with this Article. The data presented in this Article is original analysis of data reviewed using Lex Machina as a tool for browsing and searching court records.

145. See LEX MACHINA, <https://lexmachina.com/> (last visited May 2, 2013).

146. See Compendium, *supra* note 21, Exhibit A1, at 2; *infra* Part II, Table 4, Table 5.B. The results also include average pendency to claim construction. See Compendium, *supra* note 21, Exhibit A, at 3; *infra* Part II, Table 4, Table 5.C. An unpaired t-test reveals, however, that there is no statistically significant difference between the two groups with respect to pendency from filing to claim construction based on analysis of this data.

147. See Compendium, *supra* note 21, Exhibit A1, at 2; *infra* Part II, Table 4, Table 5.B.

148. See Compendium, *supra* note 21, Exhibit A1, at 2; *infra* Part II, Table 4, Table 5.B.

149. Compendium, *supra* note 21, Exhibits B1–B2, at 86–87; *supra* note 8.

150. See Compendium, *supra* note 21, Exhibit A1, at 2; *infra* Part II, Table 4, Table 5.B.

This search was then restricted to the cases returned as reaching the claim construction milestone — i.e., the ten percent.<sup>151</sup> Within these results, each case in the Northern District of California, the District of Delaware, and the Eastern District of Texas was manually reviewed to determine the filing date, termination date, and the date(s) claim construction order(s) were issued.<sup>152</sup> It was not always possible to determine the precise date the court construed the claims, and a number of initial results were excluded from the final pendency sample for this reason.<sup>153</sup> For purposes of calculating total pendency relative to claim construction, the last claim construction order issued in a series of claim constructions was used as the anchor date. The results of the survey of these cases are available in Part II.C of this Article. The particular jurisdictions reviewed were chosen for comparison because (a) the Northern District of California is the acknowledged model and pioneer of local patent rules, having adopted its first version in 2000; (b) the Eastern District of Texas is a high volume patent litigation venue that adopted local patent rules in 2005, allowing for comparison of pre-and-post adoption data; and (c) the District of Delaware is a high volume patent litigation venue that has not yet adopted local patent rules.<sup>154</sup>

This study specifically does not discriminate between cases reaching trial and those that settle before, during, or after. The justification for this approach is that trials represent “a small and uncharacteristic subset of filed patent suits.”<sup>155</sup> Because a clear majority of patent cases settle or are dismissed on procedural grounds, this study simply measures pendency to resolution relative to claim construction, regardless of the outcome.<sup>156</sup>

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151. See Compendium, *supra* note 21, Exhibit B1, at 8-86, Exhibit B3, at 87; *infra* Part II, Table 4.

152. A relational database was developed using Microsoft Access to index the cases analyzed. Results were generated and analyzed in various spreadsheets currently on file with the author and available upon request. Compendium, *supra* note 21, Exhibits B1-B3, at 8-87.

153. The final sample represents at least sixty percent of the total returned from IPLC's filter for the relevant time period. Compendium, *supra* note 21, Exhibits B1-3, at 8-87.

154. See generally Pak, *supra* note 40, at 51 (noting that the Northern District of California was the only court with local patent rules in the United States for three years, from December 2000-2004); Schneider, *supra* note 41, at 1 & n.3.

155. James Bessen & Michael Meurer, *Lessons for Patent Policy from Empirical Research on Patent Litigation*, 9 LEWIS & CLARK L. REV. 1, 4 (2005); see also Joel Waldfoegel, *Reconciling Asymmetric Information and Divergent Expectations Theories of Litigation*, 41 J.L. & ECON. 451, 474 (1998) (recognizing that only a highly limited sample of patent suits make it to trial).

156. Because settlement is largely confidential, and thus difficult or impossible to confirm using publicly available information, the terms “likely settlement” and “resolutions” are used almost interchangeably to mean consent judgment, settlement, or any other resolution not resulting in a final decision on the merits in favor of either the defendant or claimant by a judge or jury. Information reviewed using Lex Machina, and confirmed where possible, was relied upon for such determinations. Compendium, *supra* note 21, Exhibits B4-5, at 88-90, Exhibits C1-4, at 93-101.

Lex Machina also provides summary data on claimant and defendant “win-rates” — i.e., cases resolved on the merits in favor of one party either, for example, on summary judgment or by trial — which have been analyzed for purposes of comparing jurisdictions with and without local patent rules.<sup>157</sup> Based on the summary data made available by Lex Machina, an unpaired t-test performed on these numbers fails to show a statistically significant difference between win rates, for either the claimant or defendant, and either the presence or absence of local patent rules.<sup>158</sup> Similarly, there does not appear to be a clear tendency for matters to be “resolved” — i.e., on procedural grounds, likely settlement, consent judgment — more frequently in jurisdictions with local patent rules.<sup>159</sup>

Following the analysis discussed above, presented in various charts, graphs, and tables, available in Part II.A, this study concludes with a discussion of the implications. First, a growing body of literature focuses on forum shopping in patent litigation.<sup>160</sup> The impact of local rules on speed and outcome is not statistically based on the analysis performed in this study. As noted by other authors, such data often plays less of a role in forum choice than the *perception* by litigants that a case will proceed swiftly to trial and come before a sympathetic jury — and perception is hard to gauge. Second, the centrality of claim construction to patent litigation makes it a critical discussion point for rulemakers considering either adoption of local patent rules or the proposal of Federal Rules of Patent Procedure.<sup>161</sup>

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157. See *infra* Table 6. The IPLC general statistics were accessed on October 17, 2011. See also Compendium, *supra* note 21, Exhibits B4–5, at 88–89, Exhibits C1–4, at 93–101.

158. See Compendium, *supra* note 21, Exhibit A1, at 6–7; *infra* Tables 7C–D; *supra* Introduction.

159. See Compendium, *supra* note 21, Exhibit A1, at 4–5; *infra* Tables 7A–B; *supra* Introduction.

160. See *infra* Part II.B.

161. See *infra* Part II.C.

# THE IMPACT OF LOCAL PATENT RULES

Table 4. Percentage in High Volume Jurisdictions to Reach Claim Construction<sup>162</sup>

Count Type	Local Patent Rules	Jurisdiction	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	Totals	Percent to Reach Claim Construction Over Average Time to Reach Milestone
Filed		Central District of California	245	223	210	360	260	239	261	319	192	268	220	2806	8.0%
Milestone		Central District of California		10	17	16	33	15	17	32	38	23	23	224	1.67 Years on Avg.
Filed	2006	Eastern District of Texas	25	35	31	52	104	151	261	360	290	235	287	1831	23.7%
Milestone	2006	Eastern District of Texas		1	9	9	11	30	46	71	88	83	83	434	1.81 Years on Avg.
Filed	2001	Northern District of California	155	148	135	168	178	181	147	133	164	167	180	1816	22.7%
Milestone	2001	Northern District of California		3	27	41	48	48	53	58	30	28	28	412	1.79 Years on Avg.
Filed	2001	Northern District of California	97	143	116	139	144	112	132	157	166	230	256	1692	12.0%
Milestone	2001	Northern District of California		4	9	16	14	16	19	5	13	12	12	121	1.81 Years on Avg.
Filed	2009	District of Delaware	1	7	21	26	21	23	27	18	19	20	20	203	1.88 Years on Avg.
Milestone	2009	District of Delaware		1	2	2	7	4	5	7	4	12	12	58	2.19 Years on Avg.
Filed	2009	District of New Jersey	69	104	96	133	106	102	140	197	162	145	154	1408	4.1%
Milestone	2009	District of New Jersey		4	1	2	7	4	5	7	4	12	12	58	2.19 Years on Avg.
Filed	2009	Northern District of Illinois	111	145	98	129	146	130	107	100	107	109	103	1285	5.4%
Milestone	2009	Northern District of Illinois		2	6	5	10	7	15	10	6	4	4	69	1.99 Years on Avg.
Filed	2008	District of Massachusetts	79	71	67	66	75	71	70	55	49	62	72	737	8.0%
Milestone	2008	District of Massachusetts		2	6	11	7	1	5	9	6	6	6	59	1.75 Years on Avg.
Filed	2005	District of Minnesota	75	68	80	74	81	75	63	52	47	47	63	725	7.3%
Milestone	2005	District of Minnesota		3	8	2	7	9	5	13	2	2	2	53	1.77 Years on Avg.
Filed	2006	Southern District of California	54	68	80	54	55	60	51	61	69	72	58	682	16.7%
Milestone	2006	Southern District of California		2	4	19	15	11	16	14	13	10	10	114	1.51 Years on Avg.
Filed		Eastern District of Michigan	69	59	71	63	61	48	54	53	61	48	56	643	8.1%
Milestone		Eastern District of Michigan		4	6	8	7	5	2	2	12	3	3	52	1.96 Years on Avg.
Filed		Southern District of Florida	43	46	54	73	46	66	61	64	33	43	66	595	7.4%
Milestone		Southern District of Florida		3	2	6	6	5	7	5	4	3	3	44	1.59 Years on Avg.
Filed	2006	Northern District of Georgia	38	47	48	39	60	57	74	56	60	40	50	569	6.0%
Milestone	2006	Northern District of Georgia		2	4	3	3	3	8	9	5	2	2	34	1.88 Years on Avg.
Filed		Eastern District of Pennsylvania	47	47	53	68	106	43	41	46	36	32	40	559	6.8%
Milestone		Eastern District of Pennsylvania		4	2	2	6	4	2	5	9	3	3	38	1.53 Years on Avg.
Filed		Middle District of Florida	40	56	38	51	59	49	52	60	43	45	63	556	6.8%
Milestone		Middle District of Florida		2	2	2	6	4	5	3	12	1	1	38	1.42 Years on Avg.
Filed		Northern District of Texas	54	48	42	54	56	53	40	42	41	38	41	509	10.4%
Milestone		Northern District of Texas		4	4		7	9	7	6	6	5	5	53	1.81 Years on Avg.

162. Compendium, *supra* note 21, Exhibit B3, at 87. This chart lists sixteen high volume jurisdictions, where over 500 cases were filed between 2000 and 2010. Under “total filed” appears the total number of cases to reach the claim construction milestone. The percentage of the total is displayed in the far right column, above the average approximated time to reach the milestone from the filing date.

Table 5.A. High Volume Jurisdictions with and Without Local Patent Rules<sup>163</sup>

Local Patent Rules	Jurisdiction	Total Cases Filed Between 2000-2010	Total Cases to Reach Claim Construction	Average Number of Years to Reach Milestone*	Percent to Reach Claim Construction
2001	Northern District of California	1816	412	1.79	22.69%
2005	District of Minnesota	725	53	1.77	7.31%
2006	Eastern District of Texas	1831	434	1.81	23.70%
2006	Southern District of California	682	114	1.51	16.72%
2006	Northern District of Georgia	569	34	1.88	5.98%
2008	District of Massachusetts	737	59	1.75	8.01%
	Central District of California	2806	224	1.67	7.98%
	District of Delaware	1692	203	1.88	12.00%
	Southern District of New York	1285	69	1.99	5.37%
	Eastern District of Michigan	643	52	1.96	8.09%
	Southern District of Florida	595	44	1.59	7.39%
	Eastern District of Pennsylvania	559	38	1.53	6.80%
	Middle District of Florida	556	38	1.42	6.83%

Table 5.B. Unpaired T-Test — Percentage of Cases to Reach Claim Construction<sup>164</sup>

	Local Patent Rules Percent to Reach Claim Construction		No Local Patent Rules Percent to Reach Claim Construction
Northern District of California	22.69%	Central District of California	7.98%
District of Minnesota	7.31%	District of Delaware	12.00%
Eastern District of Texas	23.70%	Southern District of New York	5.37%
Southern District of California	16.72%	Eastern District of Michigan	8.09%
Northern District of Georgia	5.98%	Southern District of Florida	7.39%
District of Massachusetts	8.01%	Eastern District of Pennsylvania	6.80%
		Middle District of Florida	6.83%
Group	Local Patent Rules		No Local Patent Rules
Mean	14.07		7.78
SD	8.02		2.07
SEM	3.28		0.78
N	6		7
	P value and statistical significance:		
	The two-tailed P value equals 0.0696		
	Difference is almost conventionally statistically significant.		

163. Compendium, *supra* note 21, Exhibit B6, at 90. The sample of jurisdictions used for statistical analysis excludes data from the Southern District of Texas, Eastern District of North Carolina, and Western District of Pennsylvania (with less than 500 cases) and any district court which adopted local patent rules after 2008. Statistical analysis was performed using the R programming language for running unpaired t-tests to compare the two samples (jurisdictions with local patent rules and jurisdictions without local patent rules) against each other for statistical significance. *See* Compendium, *supra* note 21, Exhibits B1–3, at 8–87 (providing records of collected data, data inputs provided to analysis program, and statistical output of unpaired t-tests); *supra* Introduction.

164. Compendium, *supra* note 21, Exhibit B6, at 91; *see also supra* Introduction.



## THE IMPACT OF LOCAL PATENT RULES

Table 5.C. Unpaired T-Test — Average Years to Reach Claim Construction<sup>165</sup>

	Local Patent Rules Average Number of Years to Reach		No Local Patent Rules Average Number of Years to Reach
Northern District of California	1.79	Central District of California	1.67
District of Minnesota	1.77	District of Delaware	1.88
Eastern District of Texas	1.81	Southern District of New York	1.99
Southern District of California	1.51	Eastern District of Michigan	1.96
Northern District of Georgia	1.88	Southern District of Florida	1.59
District of Massachusetts	1.75	Eastern District of Pennsylvania	1.53
		Middle District of Florida	1.42
Group	Local Patent Rules		No Local Patent Rules
Mean	1.75		1.72
SD	0.13		0.22
SEM	0.05		0.08
N	6		7
	P value and statistical significance:		
	The two-tailed P value equals 0.7656		
	Difference is not statistically significant.		

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165. Compendium, *supra* note 21, Exhibit B6, at 92; see also *supra* Introduction.

Table 6. Jurisdictions Sorted by Volume with Outcomes — Wins Versus Resolutions<sup>166</sup>

Local Rules Adopted	Jurisdictions Ranked by Volume 100 or More Cases Filed and	Terminated by 10/17/11	(a) Claimant Win	(b) Defendant Win	(c) Procedural Grounds	(d) Likely Settlement	(e) Consent Judgment	(f) Percent "Win" Result	(g) Percent "Resolve" Result
	Central District of California	2816	144	270	256	1774	372	14.7%	85.3%
(2001)	Northern District of California	1734	74	185	171	1218	86	14.9%	85.1%
(2006)	Eastern District of Texas	1610	69	114	285	1084	58	11.4%	88.6%
(2009)	Northern District of Illinois	1561	52	134	156	1111	108	11.9%	88.1%
	District of Delaware	1467	89	120	224	955	79	14.2%	85.8%
(2009)	District of New Jersey	1356	48	134	268	806	100	13.4%	86.6%
	Southern District of New York	1236	57	105	125	816	133	13.1%	86.9%
(2008)	District of Massachusetts	711	46	84	53	480	48	18.3%	81.7%
(2005)	District of Minnesota	705	32	61	40	515	57	13.2%	86.8%
(2006)	Southern District of California	630	23	64	35	467	41	13.8%	86.2%
	Eastern District of Michigan	621	24	62	45	459	31	13.8%	86.2%
	Southern District of Florida	598	37	74	86	363	38	18.6%	81.4%
(2006)	Northern District of Georgia	552	18	62	90	312	70	14.5%	85.5%
	Eastern District of Pennsylvania	531	16	44	68	367	36	11.3%	88.7%
	Middle District of Florida	520	35	34	68	327	56	13.3%	86.7%
(2009)	Northern District of Texas	492	34	28	70	329	31	12.6%	87.4%
	Eastern District of Virginia	485	17	42	90	302	34	12.2%	87.8%
(2009)	Western District of Washington	457	13	55	64	286	39	14.9%	85.1%
(2009)	Northern District of Ohio	448	18	40	28	342	20	12.9%	87.1%
	District of Colorado	445	11	30	35	348	21	9.2%	90.8%
	District of Utah	435	17	42	38	316	22	13.6%	86.4%
(2008)	Southern District of Texas	425	19	55	65	265	21	17.4%	82.6%
	Eastern District of New York	416	8	44	48	276	40	12.5%	87.5%
	District of Connecticut	337	5	22	32	244	34	8.0%	92.0%
(2011)	Eastern District of Missouri	335	17	26	29	198	65	12.8%	87.2%
	Western District of Wisconsin	322	17	51	43	190	21	21.1%	78.9%
	District of Arizona	304	12	29	29	211	23	13.5%	86.5%
	District of Oregon	285	23	25	12	183	42	16.8%	83.2%
	Eastern District of Wisconsin	284	9	40	24	193	18	17.3%	82.7%
(2011)	District of Maryland	283	7	27	45	189	15	12.0%	88.0%
(2010)	Southern District of Ohio	257	11	27	28	174	17	14.8%	85.2%
	Western District of Texas	247	11	21	28	177	10	13.0%	87.0%
(2011)	District of Nevada	240	33	30	18	144	15	26.3%	73.8%
(2005)	Western District of Pennsylvania	220	8	22	24	150	16	13.6%	86.4%
(2009)	Southern District of Indiana	206	10	12	30	143	11	10.7%	89.3%
	District of Columbia	183	14	34	53	78	4	26.2%	73.8%
	Western District of Michigan	179	10	18	11	123	17	15.6%	84.4%
	Western District of New York	176	6	11	19	129	11	9.7%	90.3%
(2011)	Western District of North Carolina	170	6	11	10	125	18	10.0%	90.0%
(2012)	Middle District of North Carolina	159	7	11	6	112	23	11.3%	88.7%
	District of South Carolina	147	6	18	12	99	12	16.3%	83.7%
	Northern District of Indiana	128	1	11	9	93	14	9.4%	90.6%
(2012)	Northern District of New York	119	5	7	8	90	9	10.1%	89.9%
	Eastern District of California	119	9	18	8	76	8	22.7%	77.3%
	Western District of Missouri	112	5	13	3	82	9	16.1%	83.9%
	Eastern District of Louisiana	101	4	2	22	59	14	5.9%	94.1%
	District of Kansas	101	3	6	9	74	9	8.9%	91.1%

166. Compendium, *supra* note 21, Exhibit C4, at 101. This represents a survey of all 27,096 cases in the Lex Machina database terminated at the district court level by October 17, 2011, when this data was collected and analyzed. The above table lists only jurisdictions where 100 or more cases terminated and available for review in the Lex Machina database in order to focus on the most active patent districts. The remaining of the ninety-four U.S. district courts can be found in Appendix A. *See supra* note 242. Summary of the data reviewed using Lex Machina is on file with the author and available upon request. The reviewed data has been analyzed as follows. The outcome columns are labeled similarly to how outcomes are classified in Lex Machina with some modifications to clarify the value in the context of this study. These outcome labels are otherwise self-explanatory: (a) claimant win; (b) claim defendant win; (c) resolved on procedural grounds; (d) likely settlement; and (e) consent judgment. Column (f) combines (a) and (b) to provide a percentage of cases with a "win" result. Column (g) combines (c), (d), and (e) to provide a percentage of cases with a "resolved" result, meaning generally that the case was not decided in favor of one party or the other "on the merits." *See, e.g., Lemley, supra* note 11, at 405 n.12, 406, 411 (explaining the reasoning for characterizing cases in this manner when analyzing litigation outcomes).

## THE IMPACT OF LOCAL PATENT RULES

Table 7.A. Comparison of Outcomes (Win Result and *Not* Resolution)<sup>167</sup>

	Local Patent Rules Percent "Win" Result		No Local Patent Rules Percent "Win" Result
District of Massachusetts	18.3%	Central District of California	14.7%
Eastern District of Texas	11.4%	District of Delaware	14.2%
Southern District of California	13.8%	Southern District of New York	13.1%
Northern District of Georgia	14.5%	Eastern District of Michigan	13.8%
District of Minnesota	13.2%	Southern District of Florida	18.6%
Northern District of California	14.9%	Eastern District of Pennsylvania	11.3%
		Middle District of Florida	13.3%
Group	Local Patent Rules		No Local Patent Rules
Mean	14.35		14.14
SD	2.29		2.24
SEM	0.94		0.85
N	6.00		7.00
	P value and statistical significance:		
	The two-tailed P value equals 0.8724		
	<i>Difference is not statistically significant.</i>		

Table 7.B. Comparison of Resolution (Settlement/Consent/Procedural)<sup>168</sup>

	Local Patent Rules Percent "Resolve" Result		No Local Patent Rules Percent "Resolve" Result
District of Massachusetts	81.7%	Central District of California	85.3%
Eastern District of Texas	88.6%	District of Delaware	85.8%
Southern District of California	86.2%	Southern District of New York	86.9%
Northern District of Georgia	85.5%	Eastern District of Michigan	86.2%
District of Minnesota	86.8%	Southern District of Florida	81.4%
Northern District of California	85.1%	Eastern District of Pennsylvania	88.7%
		Middle District of Florida	86.7%
Group	Local Patent Rules		No Local Patent Rules
Mean	85.65		85.86
SD	2.29		2.24
SEM	0.94		0.85
N	6		7
	P value and statistical significance:		
	The two-tailed P value equals 0.8724		
	<i>Difference is not statistically significant.</i>		

Table 7.C. Comparison of Claimant Win Outcomes (Claimant Wins)<sup>169</sup>

	Local Patent Rules Percent of Claimant Wins		No Local Patent Rules Percent of Claimant Wins
Northern District of California	4.3%	Central District of California	5.1%
District of Minnesota	4.5%	District of Delaware	6.1%
Eastern District of Texas	4.3%	Southern District of New York	4.6%
Southern District of California	3.7%	Eastern District of Michigan	3.9%
Northern District of Georgia	3.3%	Southern District of Florida	6.2%
District of Massachusetts	6.5%	Eastern District of Pennsylvania	3.0%
		Middle District of Florida	6.7%
Group	Local Patent Rules		No Local Patent Rules
Mean	4.43		5.09
SD	1.11		1.35
SEM	0.45		0.51
N	6		7
	P value and statistical significance:		
	The two-tailed P value equals 0.3658		
	<i>Difference is not statistically significant.</i>		

167. Compendium, *supra* note 21, Exhibit D1, at 102; *see also supra* Introduction.

168. Compendium, *supra* note 21, Exhibit D1, at 103; *see also supra* Introduction.

169. Compendium, *supra* note 21, Exhibit D1, at 104; *see also supra* Introduction.

Table 7.D. Comparison of Defendant Win Outcomes (Defendant Wins)<sup>170</sup>

	Local Patent Rules Percent of Claim Defendant Wins		No Local Patent Rules Percent of Claim Defendant Wins
Northern District of California	10.7%	Central District of California	9.6%
District of Minnesota	8.7%	District of Delaware	8.2%
Eastern District of Texas	7.1%	Southern District of New York	8.5%
Southern District of California	10.2%	Eastern District of Michigan	10.0%
Northern District of Georgia	11.2%	Southern District of Florida	12.4%
District of Massachusetts	11.8%	Eastern District of Pennsylvania	8.3%
		Middle District of Florida	6.5%
Group	Local Patent Rules		No Local Patent Rules
Mean	9.95		9.07
SD	1.75		1.85
SEM	0.71		0.70
N	6		7
	P value and statistical significance:		
	The two-tailed P value equals 0.4001		
	Difference is not statistically significant.		

A. Comparing Local Patent Rules and Predicting Effects on Timing of Resolution Likely to Result from Scheduling, Initial Disclosures, and Claim Construction

1. Comparison of Local Patent Rules

Chart 1. Northern District of California Versus Eastern District of Texas<sup>171</sup>

Northern District of California, Local Patent Rules (2000)			Eastern District of Texas, Local Patent Rules (2005)		
Case Management Conference	Infringement Contentions	Invalidity Contentions	Case Management Conference	Infringement Contentions	Invalidity Contentions
Rule 26(f) addresses claim construction issues. L.R. 2-1(a)(2)-(4); Rule 16 as well.	Due ≤ 14 Days after Case Management Conference L.R. 3-1; produce documents.	Due ≤ 45 Days after Inf. Cont. received by Def. L.R. 3-3; and produce documents.	Rule 26(f) addresses claim construction issues. L.R. 2-1(a)(1)-(5); Rule 16 as well.	Due 10 Days before Case Management Conference L.R. 3-1; produce documents.	Due ≤ 45 Days after Inf. Cont. received by Def. L.R. 3-3; and produce documents.
Proposed Terms of Claim Construction	Preliminary Claim Constructions	Joint Claim Constructions	Proposed Terms of Claim Construction	Preliminary Claim Constructions	Joint Claim Constructions
Due ≤ 14 after Inv. Cont.; exchanged by the parties L.R. 4-1; list of top 10 terms.	Due ≤ 21 after terms; exchanged by the parties L.R. 4-2; with extrinsic evidence.	Due ≤ 60 after Inv. Cont. served L.R. 4-3; identifying claim const. witnesses.	Due ≤ 10 after Inv. Cont.; exchanged by the parties L.R. 4-1; § 112 contentions.	Due ≤ 20 after terms; exchanged by the parties L.R. 4-2; with extrinsic evidence.	Due ≤ 60 after Inv. Cont. served L.R. 4-3; identifying claim const. witnesses.
Claim Construction Discovery Closed	Claim Construction Briefing Period	Claim Construction Hearing Scheduled	Claim Construction Discovery Closed	Claim Construction Briefing Period	Claim Construction Hearing Scheduled
Must be completed ≤ 30 after joint claim const. filed L.R. 4-4. L.R. 4-5 for Briefing.	P's Brief Due ≤ 45 from Joint Const.; D's Resp. Due ≤ 14; P's Reply Due ≤ 7.	Subject to Court's calendar but ~ 14 days after reply brief in L.R. 4-5 is filed.	Must be completed ≤ 30 after joint claim const. filed L.R. 4-4. L.R. 4-5 for Briefing.	P's Brief Due ≤ 45 from Joint Const.; D's Resp. Due ≤ 14; P's Reply Due ≤ 7.	Subject to Court's calendar but ~ 14 days after reply brief in L.R. 4-5 is filed.

Comparing the Northern District of California's local patent rules side-by-side with those of the Eastern District of Texas emphasizes their similarity as discussed previously in Part I.A.

Charts included in Part II.A.2(a) through (c) on the following page illustrate that patent cases — whether litigated in districts with or without local patent rules — proceed along roughly the same timeline. More than half (fifty-two percent, sixty-

170. Compendium, *supra* note 21, Exhibit D1, at 105; *see also supra* Introduction.

171. Compendium, *supra* note 21, Exhibit E1, at 106; *see also supra* Part I.A.

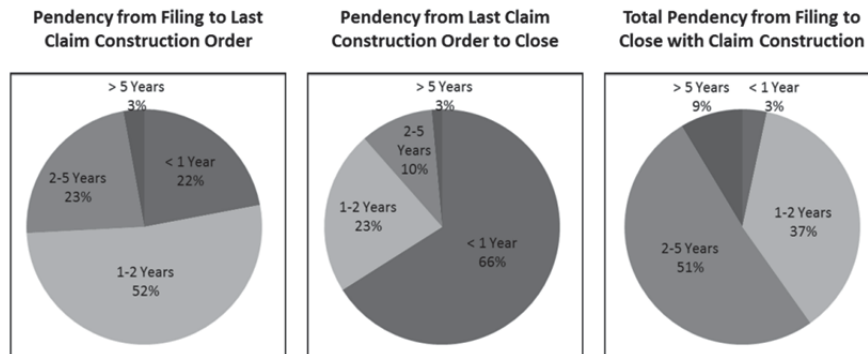
## THE IMPACT OF LOCAL PATENT RULES

three percent, seventy-one percent) in the Northern District of California, the District of Delaware, and the Eastern District of Texas respectively, take one to two years to reach claim construction.<sup>172</sup> After that, a majority (sixty-six percent, sixty-two percent, eighty-two percent) in the Northern District of California, the District of Delaware, and the Eastern District of Texas respectively, will close *within a year* of the claim construction.<sup>173</sup>

Despite the notable similarity of their rules, more cases reached claim construction in less than a year in the Northern District of California, twenty-two percent, than in the Eastern District of Texas, six percent, and significantly more cases closed within a year of claim construction in the Eastern District of Texas, eighty-two percent.<sup>174</sup> The variation may reflect the impact of case management on pendency.

### 2. Overview of Pendency by Percentage

Chart 2. Overview of Pendency — Northern District of California<sup>175</sup>



172. See Compendium, *supra* note 21, Exhibits F1-2, at 107-11, Exhibits G1-2, at 112-15, Exhibits H1-4, at 116-26; *infra* Charts 2-4.

173. See Compendium, *supra* note 21, Exhibits F1-2, at 107-11, Exhibits G1-2, at 112-15, Exhibits H1-4, at 116-26; *infra* Charts 2-4.

174. See Compendium, *supra* note 21, Exhibits F1-2, at 107-11, Exhibits G1-2, at 112-15, Exhibits H1-4, at 116-26; *infra* Charts 2-4.

175. Compendium, *supra* note 21, Exhibit F2, at 111.

Chart 3. Overview of Pendency — District of Delaware<sup>176</sup>

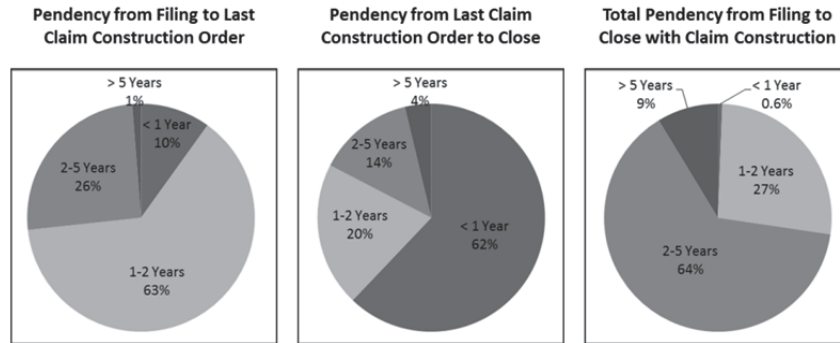
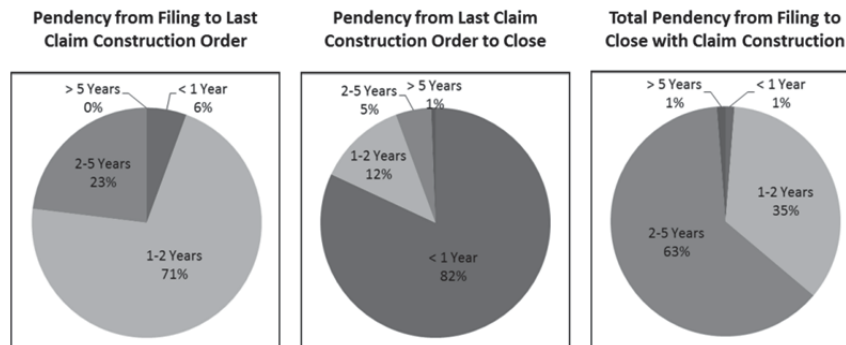


Chart 4. Overview of Pendency — Eastern District of Texas<sup>177</sup>



176. Compendium, *supra* note 21, Exhibit G2, at 115.

177. Compendium, *supra* note 21, Exhibit H4, at 126.

## THE IMPACT OF LOCAL PATENT RULES

### 3. Ten Year Filing Trends and Pendency by Percentage

#### a. Northern District of California

Chart 5. Northern District of California — Ten Year Filing Trends<sup>178</sup>

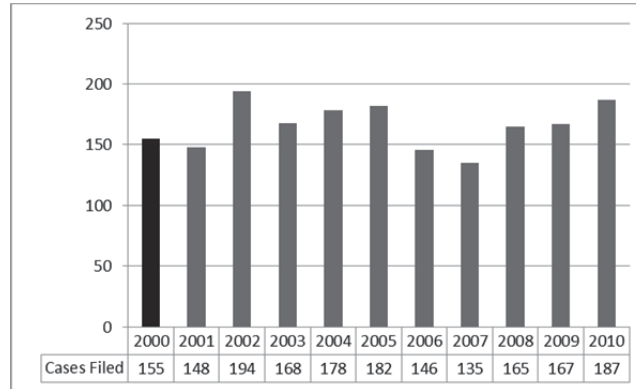


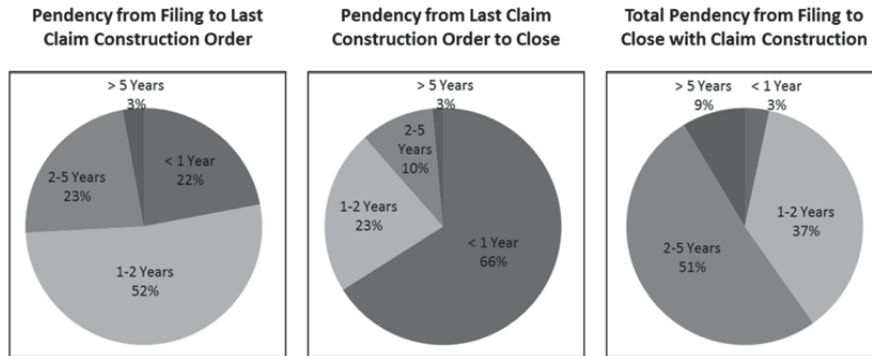
Table 8. Northern District of California — Timing Relative to Claim Construction<sup>179</sup>

Total Cases Opened and Closed: 1734 Claim Construction Milestone: 209	
Sample Size <b>209</b> , excluding cases without date of court's claim construction order(s)	
Average Time from Filing to Claim Construction: <b>1.72 years</b>	
Number and Percentage < 1 Year:	46, 22%
Number and Percentage 1-2 Years:	109, 52%
Number and Percentage 2-5 Years:	48, 23%
Number and Percentage > 5 Years:	6, 3%
Average Time from Claim Construction to Resolution: <b>0.96 years</b>	
Number and Percentage < 1 Year:	138, 66%
Number and Percentage 1-2 Years:	47, 23%
Number and Percentage 2-5 Years:	21, 10%
Number and Percentage > 5 Years:	3, 1%
Average Overall Pendency with Claim Construction: <b>2.7 years</b>	
Number and Percentage < 1 Year:	7, 3%
Number and Percentage 1-2 Years:	77, 37%
Number and Percentage 2-5 Years:	107, 51%
Number and Percentage > 5 Years:	18, 9%

178. Compendium, *supra* note 21, Exhibit F2, at 111.

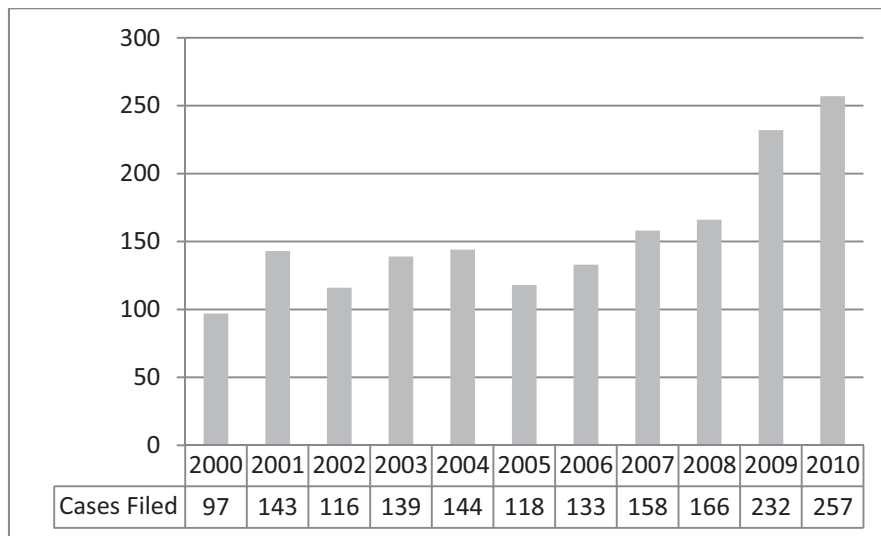
179. *Id.*

Chart 6. Northern District of California — Overview of Pendency by Percentage<sup>180</sup>



b. District of Delaware

Chart 7. District of Delaware — Ten Year Filing Trends<sup>181</sup>



180. *Id.*

181. Compendium, *supra* note 21, Exhibit G2, at 115.

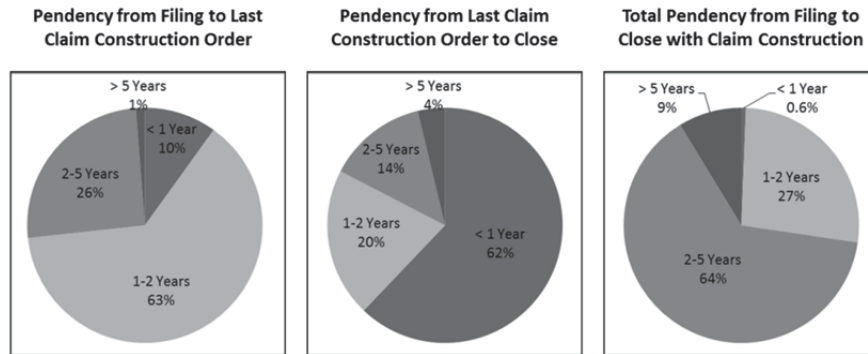


## THE IMPACT OF LOCAL PATENT RULES

Table 9. District of Delaware — Timing Relative to Claim Construction<sup>182</sup>

Total Cases Opened and Closed: <b>1467</b> Claim Construction Milestone: 257	
Sample Size <b>161</b> , excluding cases without date of court's claim construction order(s)	
Average Time from Filing to Claim Construction: <b>1.76 years</b>	
Number and Percentage < 1 Year:	16, 10%
Number and Percentage 1-2 Years:	102, 63%
Number and Percentage 2-5 Years:	41, 26%
Number and Percentage > 5 Years:	2, 1%
Average Time from Claim Construction to Resolution: <b>1.2 years</b>	
Number and Percentage < 1 Year:	100, 62%
Number and Percentage 1-2 Years:	33, 21%
Number and Percentage 2-5 Years:	22, 14%
Number and Percentage > 5 Years:	6, 4%
Average Overall Pendancy with Claim Construction: <b>3.0 years</b>	
Number and Percentage < 1 Year:	1, 0.6%
Number and Percentage 1-2 Years:	43, 27%
Number and Percentage 2-5 Years:	103, 64 %
Number and Percentage > 5 Years:	14, 9%

Chart 10. District of Delaware — Overview of Pendancy by Percentage<sup>183</sup>



182. *Id.*

183. *Id.*

c. Eastern District of Texas

Chart 11. Eastern District of Texas — Ten Year Filing Trends<sup>184</sup>

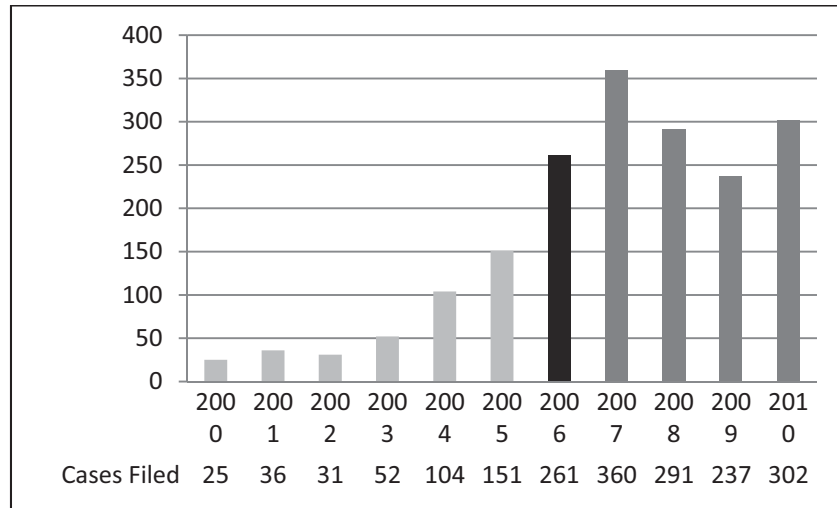


Table 10. Eastern District of Texas — Timing Relative to Claim Construction<sup>185</sup>

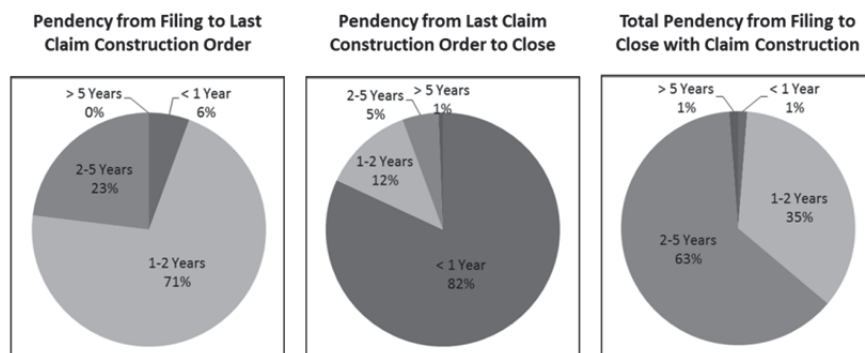
Total Cases Opened and Closed: <b>1610</b> Claim Construction Milestone: 443			
Average Timing and Pendency	Pre-2005 <b>61</b> cases	Post-2005 <b>260</b> cases	Overall Sample <b>321</b>
Filing to Claim Construction	Pre-2005 <b>1.5 Years</b>	Post-2005 <b>1.8 Years</b>	Overall <b>1.7 Years</b>
Number and Percent < 1 Year:	3, 5%	15, 6%	18, 6%
Number and Percent 1-2 Years:	51, 84%	178, 68%	229, 71%
Number and Percent 2-5 Years:	7, 11%	67, 26%	74, 23%
Number and Percent > 5 Years:	0, N/A	0, N/A	0, N/A
Claim Construction to Resolution	Pre-2005 <b>1.0 Years</b>	Post-2005 <b>0.6 Years</b>	Overall <b>0.7 Years</b>
Number and Percent < 1 Year:	40, 66%	223, 86%	263, 82%
Number and Percent 1-2 Years:	15, 25%	25, 10%	40, 12%
Number and Percent 2-5 Years:	4, 7%	12, 5%	16, 5%
Number and Percent > 5 Years:	2, 3%	0, N/A	2, 0.6%
Overall Pendency with Markman	Pre-2005 <b>2.6 Years</b>	Post-2005 <b>2.4 Years</b>	Overall <b>2.4 Years</b>
Number and Percent < 1 Year:	1, 2%	3, 1%	4, 1%
Number and Percent 1-2 Years:	21, 34%	91, 35%	132, 41%
Number and Percent 2-5 Years:	36, 59%	165, 63%	201, 63%
Number and Percent > 5 Years:	3, 5%	1, 0.4%	4, 1%

184. Compendium, *supra* note 21, Exhibit H4, at 126.

185. *Id.*

## THE IMPACT OF LOCAL PATENT RULES

Chart 12. Eastern District of Texas — Overview of Pendency by Percentage<sup>186</sup>



*B. Litigants Often Select Venue Based on the Speed with Which They Perceive a Case Will Proceed to Trial, but Ninety Percent Do Not Reach Markman and Seventy-Five Percent Are Resolved*

The increasing number of jurisdictions adopting local patent rules reflects their growing acceptance and acclaim.<sup>187</sup> However, perhaps an unintentional and inevitable consequence of the resulting procedural variation is that it sets the ideal climate for forum shopping.<sup>188</sup> A growing body of commentary has focused on the speed of dockets as driving the probability of reaching differential outcomes in these so-called “rocket-dockets.”<sup>189</sup> As a strategic matter, litigants often select venue based on the probability that, and speed with which, their case will likely proceed to trial.<sup>190</sup> Indeed, many commentators note that local trends not only have the potential to influence such forum choices but in fact reflect the belief of litigants

186. *Id.*

187. See Pak, *supra* note 40, at 44 n.1 (listing the districts to adopt local patent rules following the Northern District of California).

188. See Lemley, *supra* note 11, at 419 (noting that certain districts are more desirable than others); Leychkis, *supra* note 46, at 204 (finding an increased concentration of patent litigation in certain districts); Moore, *supra* note 46, at 561 (mentioning that different procedures and potential outcomes creates an environment for forum shopping); Carter G. Phillips, *Lewis F. Powell Lecture*, 66 WASH. & LEE L. REV. 1467, 1472 (2009) (declaring forum shopping a “serious problem” in patent litigation); Taylor, *supra* note 46, at 583 (discussing possible solutions to the forum shopping problem).

189. See generally Leychkis, *supra* note 46; George F. Pappas & Robert G. Sterne, *Patent Litigation in the Eastern District of Virginia*, 35 IDEA 36 (1995).

190. See Lemley, *supra* note 11, at 413 (discussing benefits of speedy trials); Leychkis, *supra* note 46, at 204 (noting the concentration of patent litigation); Moore, *supra* note 46, at 568 (stating that speed of trial is one of the main factors considered when forum shopping); Phillips, *supra* note 188, at 1472 (finding that inconsistent decisions by district courts contributes to forum shopping); Taylor, *supra* note 46, at 583 (noting that patent rules may be the reason for increased patent litigation in the Eastern District of Texas).

that such trends have the potential to determine outcomes.<sup>191</sup> Convenient stereotypes for the litigious patent-owner plaintiff and risk- or trial-averse defendant act out the forum shopping hypothesis.<sup>192</sup> Patent owners will seek out sympathetic juries in jurisdictions where patent claims reach trial as quickly as possible — e.g., to obtain injunctive relief, leave less time for defendants to design around, avoid wasting patent term, and get a quick settlement to stock their war chest.<sup>193</sup> For the same reasons, defendants often prefer jurisdictions reputed to grant summary judgment and docket trial far in the future — e.g., to stave off a jury trial and leave time to settle claims more favorably.<sup>194</sup> To the extent local patent rules dictate a contracted schedule and move swiftly towards trial, the result follows that patent owners would flock there to collect their winnings following a speedy jury verdict.

Obviously this forum shopping hypothesis assumes plaintiffs get everything they expect with some degree of predictability and choose the forum based on their perception that win rates and speed will work to their advantage. A recent empirical analysis by Professor Mark Lemley, however, underscores the fact that forum choices do not appear to be driven by outcome data.<sup>195</sup> Compare the claimant win rate in the Northern District of Texas (55.1%) with that of the Northern District of Georgia (11.5%), noting that both jurisdictions docketed 405 and 457 cases respectively in the past decade, with forty-nine and sixty-one cases disposed in clear favor of either claimant or defendant, ten and eight of those reaching trial, with cases resolved on average within 0.97 and 1.02 years from the date of filing.<sup>196</sup> While roughly comparable, the dramatic variation between these two underscores how little “win” statistics may factor into the calculus of forum choice, at least in the abstract.

By contrast, the more tangible metric of “speed to trial” draws out districts renowned for high stakes patent litigation that “seem more reflective of the conventional wisdom among patent plaintiffs.”<sup>197</sup> The Western District of

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191. See Travis M. Jensen, Patent Local Rules, 997 PLI/Pat 959, 981 (2010); Lemley, *supra* note 11, at 413 (noting that statistics from study support conventional wisdom for forum shopping among plaintiffs); Lechkis, *supra* note 46, at 204 (finding an increased concentration of patent litigation in certain districts); Moore, *supra* note 46, at 561 (finding that data suggest patent holders are forum shopping); Phillips, *supra* note 188, at 1472 (suggesting that inconsistency in patent decisions leads to forum shopping); Taylor, *supra* note 46, at 583 (implying that an increase in patent litigation in the Eastern District of Texas directly resulted from patent rules being adopted by that court).

192. See Lemley, *supra* note 11, at 1–3 (describing the general concerns of patent plaintiffs and defendants).

193. *Id.* at 413.

194. *Id.* at 403 (describing what a patent defendant generally desires in its forum).

195. *Id.* at 410 (stating that the data may not support the conclusion that litigants shop by win rates: “if patentees or accused infringers are to pick a forum only by win rate, both sides should probably be picking different districts than they currently do”).

196. See *id.* at 407–10 (chart concerning win rate for districts with 25 or more outcomes).

197. *Id.* at 413.

Wisconsin and the Eastern District of Virginia complete the average patent trial in less than a year and resolve the average case in just over 6 months after suit is filed.<sup>198</sup> Ironically, the Eastern District of Texas and the Northern District of California have become among the slowest, largely as a result of congestion.<sup>199</sup> Nothing in the local rules of the Eastern District of Texas guarantees a final decision within any specified period of time or even requires a determination “at the earliest practicable time,”<sup>200</sup> let alone a favorable outcome.

Despite the valuable insight this data provides on outcomes and pendency, the metrics are not a formula for winning patent disputes.<sup>201</sup> As in most areas of civil litigation, about 75% of patent cases settle.<sup>202</sup> This study seeks to analyze the flip side of the coin by reviewing data on rates and timing of case resolution relative to claim construction.<sup>203</sup> Instead of viewing rules as designed to hurl litigants towards trial, this review seeks to inform the proposition that: (a) a clear majority of patent cases are resolved rather than decided on the merits;<sup>204</sup> (b) when cases are resolved affects the cost and delay associated with discovery;<sup>205</sup> (c) only ten percent of cases on average ever reach claim construction;<sup>206</sup> and (d) of those examined in the Northern District of California and the Eastern District of Texas, most conclude within a year.<sup>207</sup> This study suggests that local patent rules do not impact either the speed or the outcome of patent cases. But to the extent they create structure and predictability, the data indicates that fourteen percent as compared with eight percent of cases reach a decision on claim construction in jurisdictions with local patent rules.<sup>208</sup> Those with the highest percentage of cases to reach a decision on claim construction are the Eastern District of Texas (23.7%) and Northern District of California (22.7%).<sup>209</sup>

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198. *Id.* at 414–15.

199. *Id.* at 415.

200. Compare E.D. Tex. P. R. 4-6 (2013) (reserving discretion to schedule the claim construction hearings), with 19 U.S.C. § 1337(b)(1) (1994) (stating the administrative law judge in a proceeding before the USITC is required to make a determination “at the earliest practicable time,” generally between twelve to eighteen months from initiation of the action).

201. See Lemley, *supra* note 11, at 19 (disclaiming that “no district court stands out as the best” and that parties must make tradeoffs and carefully consider the merits).

202. See Kesan & Ball, *supra* note 39, at 259 (finding that approximately eighty percent of patent cases settle); Lemley, *supra* note 11, at 405 (finding that seventy-five percent of patent cases settle).

203. See *supra* Part II.A.

204. See *supra* Table 6; Compendium, *supra* note 21, Exhibits C1–4, at 93–101.

205. Rader, *supra* note 34, at 1–3.

206. See *supra* Table 4; Compendium, *supra* note 21, Exhibits B1–3, at 8–87, Exhibit B6, at 90.

207. See Compendium, *supra* note 21, Exhibits F1–2, at 107–11, Exhibits G1–2, at 112–15, Exhibits H1–4, at 116–26; *supra* Charts 2–4.

208. See *supra* Part II, Table 1.

209. See Compendium, *supra* note 21, Exhibit A1, at 2–3, Exhibits B1–3, at 8–87, Exhibit B6, at 90–91; *supra* Tables 4, 5.B.

*C. Claim Construction Defines the Scope of Claims and “Is Often the Difference Between Infringement and Non-Infringement, or Validity and Invalidity”*<sup>210</sup>

As Judge Moore noted in her dissent to the denial of a petition for rehearing en banc in *Retractable Technologies v. Becton Dickinson*, “[c]laim construction is the single most important event in the course of a patent litigation. It defines the scope of the property right being enforced, and is often the difference between infringement and non-infringement, or validity and invalidity.”<sup>211</sup> It should not be surprising then that, of the ten percent subset of all cases filed that ever reached a claim construction decision that were examined in this study, on average seventy percent were resolved within a year after the *Markman* order.<sup>212</sup>

Many authoritative sources echo this fundamental observation.<sup>213</sup> Indeed jurists, scholars, and practitioners alike ponder the effects of *Markman v. Westview*,<sup>214</sup> now a recognized feature of both the trial and appeal process in patent litigation.<sup>215</sup> Judge Moore’s dissent in *Retractable Technologies* — with whom Chief Judge Rader joined — articulated the importance of revisiting Federal Circuit case law addressing, among other things, whether deference should be given to the district court on issues of claim construction.<sup>216</sup> Indeed, the process by which courts interpret claims

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210. *Retractable Techs., Inc. v. Becton, Dickinson & Co.*, 659 F.3d 1369, 1370 (Fed. Cir. 2011) (Moore, J., dissenting) (expressing importance of addressing the role of the specification in construing claims and whether deference should be given to the district court in the claim construction process).

211. *Id.*

212. *See supra* Part II.A.2.

213. *See* MENELL ET AL., *supra* note 74 (citing *Althletic Alternatives, Inc. v. Prince Mfg., Inc.*, 73 F.3d 1573, 1578 (Fed. Cir. 1996)).

214. 517 U.S. 370 (1996) (holding that claim construction is a matter for the court and beyond the province of the jury, signifying in Federal Circuit case law that the standard of review on claim construction is *de novo*).

215. Edward Brunel, *Markman Hearings, Summary Judgment, and Judicial Discretion*, 9 LEWIS & CLARK L. REV. 93 (2005) (concluding that criticisms of the *Markman* process are overblown and the flexibility that comes from *Markman* in terms of hearings and timings for claim construction is useful); William F. Lee & Anita K. Krug, *Still Adjusting to Markman: A Prescription for the Timing of Claim Construction Hearings*, 13 HARV. J.L. & TECH. 55 (1999) (finding that *Markman* changed patent litigation by way of claim construction hearings that should be timed after all discovery has been completed when the court considers all of the parties’ summary judgment motions); Andrew T. Zidel, *Patent Claim Construction in the Trial Courts: A Study Showing the Need for Clear Guidance from the Federal Circuit*, 33 SETON HALL L. REV. 711 (2003) (commenting on the role trial judges play in claim construction after *Markman* and the need for federal courts to be more proactive in providing guidance to trial judges because the reversal rate is still around forty percent for patent claim construction cases); Anderson et al., *supra* note 73, at 10 (commenting on the timing and complexity of *Markman* hearings at the trial level and the issues that ensue on the appellate level including the high reversal rate of the trial judges).

216. *Retractable Techs., Inc. v. Becton, Dickinson & Co.*, 659 F.3d 1369, 1370 (Fed. Cir. 2011) (Moore, J., dissenting).

as a question of law and or fact under *Markman* remains an ongoing source of tension.<sup>217</sup>

In theory, claim construction may occur at any point in the case — e.g., prior to discovery, on motions for summary judgment, even at trial — however, early claim construction is generally regarded as preferable. First, holding *Markman* prior to trial allows the court to narrow the issues and provide a focus for discovery, as reflected by the structure of most local patent rules — e.g., in limiting the number of disputed terms to ten or less.<sup>218</sup> As mentioned, early clarification of the claim terms avoids the shifting sands approach to claim interpretation. Importantly, early claim construction eliminates the need to propose alternative claim constructions to a jury.<sup>219</sup> Within this general consensus, however, there is considerable difference of opinion regarding timing relative to close of discovery — e.g., hold the hearing before discovery,<sup>220</sup> after expert discovery but before the conclusion of fact discovery,<sup>221</sup> or after the close of all discovery.<sup>222</sup> In many cases, “optimal” timing will often depend on the case and the court’s ad hoc assessment of the specific circumstances.

Where claim construction is conducted before trial, the milestone has become the object of much focus and attention by litigants, jurists, and scholars as well. As

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217. *Id.* (“We have waited five years for that ever-elusive perfect vehicle to review the issue of deference to the district court’s claim construction.”). In his dissent, Judge Moore referred to an opportunity the Court had to revisit precedent for de novo review of district court claim construction as a legal issue. *Cybor Corp. v. FAS Techs.*, 138 F.3d 1448, 1451 (Fed. Cir. 1998) (en banc). Recently, the Court decided to re-examine this issue. *Lighting Ballast Control v. Philips Elecs. N. Am. Corp.*, Nos. 2012-1014, -1015, 2013 WL 1035092, at 2 (Fed. Cir. Mar. 15, 2013) (granting petition for rehearing en banc on the issue of whether the Federal Circuit should afford any deference to district court rulings on claim construction and to reconsider the Federal Circuit’s ruling in *Cybor*); see also *Flo Healthcare Solutions v. Kappos*, 697 F.3d 1367, 1376 (Fed. Cir. 2012) (Plager, J., concurring) (Newman, J., concurring) (presenting additional views regarding the appropriate standard for appellate review of USPTO claim construction and arguing that Federal Circuit precedent is unclear). The concurring opinions in *Flo Healthcare* raise counterpart concerns about the standard of review when claims are construed by the USPTO. This standard becomes particularly relevant in the context of new trial-like review proceedings now available under the America Invents Act (AIA). See *infra* Part II.D (discussing the role of claim construction before the Patent Trial and Appeal Board in the new *inter partes* review and covered business method review proceedings available under the AIA).

218. See, e.g., N.D. CAL. PATENT L.R. 4-1(b) (2000) (“The parties shall also jointly identify the 10 terms likely to be most significant to resolving the parties’ dispute, including those terms for which construction may be case or claim dispositive.”).

219. MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 73, §33.223 at 608 (discussing timing of the *Markman* hearing and listing as a specific disadvantage of deciding claim construction late in litigation as “requiring the jury to disregard evidence and testimony relating to alternative claim interpretations”).

220. Anderson et al., *supra* note 73 (discussing case law indicating that timing of *Markman* is within the discretion of the district court and that nothing binds it to construe claims at either an early or later stage in the case but noting there are considerations based on stage of discovery and timing relative to summary judgment).

221. *Id.*

222. *Id.*

the centerpiece of pretrial activities, the question of timing inevitably arises. As the *Patent Case Management Judicial Guide* for federal judges notes, “the most important case-management decision relating to the *Markman* process is its timing.”<sup>223</sup> If the substantive issues were not confounding enough, according to the *Manual for Complex Litigation* (MCL), “[t]iming is one of the more problematic issues” for courts in addressing issues of claim construction.<sup>224</sup> Many sources attribute this lack of any consistent approach dictated to, or applied by, courts both with respect to its boundaries and procedure, since *Markman* did not establish when or even how claims were to be construed.<sup>225</sup>

As a result, courts have employed various formulations ranging from ad hoc scheduling to stated goals of producing a claim construction ruling within one year.<sup>226</sup> The variation breeds much uncertainty. Thus, for purposes of analyzing the interaction between local patent rules and rates and timing of resolution, timing of the *Markman* ruling represents a significant landmark — especially when local rules describe specific procedures with respect to briefing and limiting the number of terms. That on average more cases proceed to claim construction in jurisdictions with local patent rules, fourteen percent, than in jurisdictions without them, eight percent, can be interpreted in a number of ways.<sup>227</sup> That more than twice the average proceed to claim construction in the Eastern District of Texas, 23.7%, and Northern District of California, 22.7%, may help focus the inquiry.<sup>228</sup>

If an underlying policy of *Markman* is to administratively promote claim construction — to promote reaching core issues of infringement and validity, to bring the parties closer to what the claims at issue cover and whether or not accused products infringe — then local patent rules that operate similar to those of the Northern District of California’s serve this policy well in the administrative reality of complex patent litigation before the U.S. district courts.<sup>229</sup> One position is that this is a healthy result, that the parties are obtaining an early decision touching the merits of the case rather than being subjected to the financial burdens and inconveniences of discovery and often being induced to settle before knowing where they stand in the eyes of the court. The other position is that, for the same reason, claim construction is an ultimate issue and it is both natural and preferable

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223. MENELL ET AL., *supra* note 74.

224. MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 73, § 33.223.

225. This inconsistency is notable in the range of scheduling formats, or lack thereof, between jurisdictions. Compare, e.g., N.D. CAL. PATENT L.R. 4-6 (stating two weeks after submission of the reply claim construction brief the court *shall* conduct a Claim Construction Hearing), with, e.g., N.D. GA. PATENT L.R. 6-6 (stating that the court will conduct a Claim Construction Hearing only if the court believes a hearing is necessary).

226. Integrated Circuit Sys., Inc. v. Realtek Semiconductor Co., 308 F. Supp. 2d 1106, 1107 (N.D. Cal. 2004).

227. See Compendium, *supra* note 21, Exhibit A1, at 1–2, Exhibits B1–3, at 8–87; *supra* Tables 4, 5.A–B.

228. Compendium, *supra* note 21, Exhibit A1, at 1–2, Exhibits B1–3, at 8–87.

229. See *supra* Part I.A.



that such a decision be held off until the parties are fully committed to the dispute, the evidence and expert testimony has been fully developed, and the jury is ready to hear it. This debate makes assumptions about the policies underlying *Markman*. Determining whether those policies are served will require a more complete understanding of what those policies are.

*D. The U.S. Patent & Trademark Office Has Demonstrated a Willingness to Construe Disputed Claim Terms in Decisions Instituting New Trial-Like Review Proceedings*

As a brief sidebar to the discussion regarding the new review proceedings before the U.S. Patent & Trademark Office, as discussed above in Part I.B., the Leahy-Smith America Invents Act, signed into law on September 16, 2011, provides for new trial-like proceedings available to petitioners with standing to challenge the validity of issued patents before the U.S. Patent and Trademark Office (USPTO) Patent Trial and Appeal Board (PTAB), formerly known as the Board of Patent Appeals and Interferences (BPAI).<sup>230</sup> One of these proceedings is *inter partes* review, an administrative proceeding which, once initiated, is to be concluded within one year, extendable by six months for good cause.<sup>231</sup> It has been remarked that *inter partes* review and its companion proceedings, covered business method review (CBM) and post-grant review (PGR) proceedings, will more closely resemble administrative adjudication and litigation than the examination proceedings associated with its predecessor, *inter partes* reexamination.<sup>232</sup>

According to the Final Rules promulgated by the USPTO governing these proceedings, a petition for *inter partes* review *must* include a proposed claim construction.<sup>233</sup> The patent owner in turn (whose patent has become the subject of a

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230. See General Administrative Trial Final Rules, 77 Fed. Reg. 48612 (Aug. 14, 2012) (to be codified at 37 C.F.R. pt. 42); Inter Partes, Post Grant, and Covered Business Method Review Final Rules, 77 Fed. Reg. 48680 (Aug. 14, 2012) (37 C.F.R. pt. 42); Trial Practice Guide, 77 Fed. Reg. 48756 (Aug. 14, 2012) (to be codified at 37 C.F.R. pt. 42).

231. 37 C.F.R. § 42.100(c) (2012).

232. Jake Holdreith & Cy Morton, *Patent Office Trials—A Good Way To Deal With Bad Patents?*, INSIDE COUNSEL (Feb. 26, 2013), available at <http://www.insidecounsel.com/2013/02/26/ip-patent-office-trials-a-good-way-to-deal-with-bad> (“Through the creation of a new breed of trial-like proceeding in the U.S. Patent and Trademark Office (PTO), companies now have a relatively quick way to challenge questionable patents before a technically savvy decision maker and at a much lower cost than district court litigation.”); Jon E. Wright & Jason D. Eisenberg, *The Good, the Bad and the Ugly of Discovery in PTO Contested Cases*, INSIDE COUNSEL (Dec. 18, 2012), available at <http://www.insidecounsel.com/2012/12/04/ip-navigating-a-contested-case-trial-in-front-of-t>.

233. 37 C.F.R. § 42.104(b)(3) (2012) (“The statement must identify . . . [h]ow the challenged claim is to be construed.”); see also STERNE, KESSLER, GOLDSTEIN & FOX P.L.L.C., PATENT OFFICE LITIGATION §16:27, at 175–76 (2012) (discussing differences between claim construction before the USPTO and the district courts); Jon E. Wright & Jason D. Eisenberg, *Navigating a Contested Case Trial in Front of the New PTAB*, INSIDE COUNSEL (Dec. 18, 2012), available at <http://www.insidecounsel.com/2012/12/04/ip-navigating-a-contested-case-trial-in-front-of-t>.

petition for *inter partes* review) may then file a preliminary response to the petition. The patent owner's preliminary response may include opposing constructions.<sup>234</sup> The PTAB then determines whether or not to institute *inter partes* review and notifies the parties of its decision.<sup>235</sup> Interestingly, during the rulemaking period, in response to a comment suggesting that the PTAB include "a statement of the claim construction applied by the Board in making the decision," the USPTO remarked "the Office will provide a written determination of whether to institute a trial when deciding a petition. Where claim construction is in dispute, *the Office envisions that the Board will provide an initial claim construction for the trial.*"<sup>236</sup>

In what appears to have been the first decision on a petition for *inter partes* review in the matter of *Microsoft Corp. v. Proxyconn, Inc.*, issued on December 21, 2012, the PTAB provided over four pages of carefully considered claim construction.<sup>237</sup> As such decisions continue to issue in a fast growing number of petitions decided by the PTAB since *inter partes* review became available on September 16, 2012, it will be interesting to observe whether or not the PTAB claim construction takes on the same dimensions as claim construction before the U.S. district courts. However, it is important to note that such trials before the USPTO are governed by rules and regulations which, *inter alia*, set page limits, circumscribe the scope of discovery, and impose time constraints consistent with the mandate of concluding each proceeding in eighteen months or, in most cases, one year or less.<sup>238</sup> Nevertheless, in recognizing the central importance of construing claim terms at the outset, the USPTO has been quick to absorb the lessons of the U.S. district courts in avoiding the shifting sands approach to claim interpretation. Regardless, these new proceedings begin a new and exciting chapter in patent dispute resolution.

## CONCLUSION

A subject of much debate is the optimal timing of claim construction in patent litigation, a central concern of local patent rules. Data from the jurisdictions analyzed in this study suggests that the vast majority of cases, on average ninety percent, do not reach a decision on claim construction.<sup>239</sup> Nevertheless, a comparison of jurisdictions with and without local patent rules shows that a decision on claim construction is reached more frequently in jurisdictions with local patent rules, on average fourteen percent of the time, than those without local patent rules, on average eight percent of the time.<sup>240</sup> Moreover, based on available

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234. 37 C.F.R. § 42.107 (2012).

235. 37 C.F.R. § 42.108 (2012).

236. Response to Comment 17, 77 Fed. Reg. 147, 48,627 (Aug. 14, 2012) (emphasis added).

237. *Microsoft Corp. v. Proxyconn, Inc.*, No. IPR2012-00026 (P.T.A.B. Dec. 21, 2012).

238. See, e.g., 37 C.F.R. §§ 42.100–42.123 (2012).

239. See *supra* Part II.

240. See *supra* Introduction; *supra* Tables 4, 5.B.

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data it does not appear that such rules yield a bias with respect to the outcome of patent cases.<sup>241</sup>

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241. See *supra* Introduction; *supra* Tables 6, 7.A–D.

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APPENDIX A<sup>242</sup>

Local Rules Adopted	Jurisdiction Ranked by Volume With Less than 100 Cases Filed	Terminated by 10/17/11	Claimant Win	Defendant Win	Procedural Grounds	Likely Settlement	Consent Judgment	Percent "Win" Result	Percent "Resolve" Result
	Southern District of Iowa	96	7	8	6	64	11	15.6%	84.4%
(2007)	Eastern District of North Carolina	90	3	9	6	60	12	13.3%	86.7%
	District of Nebraska	87	4	10	3	64	6	16.1%	83.9%
(2011)	District of New Hampshire	79	6	11	6	50	6	21.5%	78.5%
(2011)	Middle District of Tennessee	74	6	9	9	48	2	20.3%	79.7%
	Western District of Tennessee	73	5	4	11	39	14	12.3%	87.7%
	Western District of Oklahoma	67	4	14	5	39	5	26.9%	73.1%
	Central District of Illinois	65	7	4	3	43	8	16.9%	83.1%
	District of Rhode Island	64	5	7	5	43	4	18.8%	81.3%
	Middle District of Pennsylvania	64	6	3	7	40	8	14.1%	85.9%
	Eastern District of Tennessee	64	6	6	6	41	5	18.8%	81.3%
	Western District of Virginia	61	2	8	5	43	3	16.4%	83.6%
	Western District of Louisiana	61	2	6	4	46	3	13.1%	86.9%
(2010)	Eastern District of Washington	61	0	12	4	38	7	19.7%	80.3%
	Western District of Kentucky	59	2	4	2	48	3	10.2%	89.8%
	Northern District of Alabama	59	2	4	9	34	10	10.2%	89.8%
	Northern District of Oklahoma	52	2	3	4	41	2	9.6%	90.4%
(2009)	District of Idaho	50	6	4	0	37	3	20.0%	80.0%
	Eastern District of Kentucky	47	2	5	6	31	3	14.9%	85.1%
	Northern District of West Virginia	43	2	1	9	27	4	7.0%	93.0%
	Western District of Arkansas	37	2	2	3	26	4	10.8%	89.2%
	District of Hawaii	37	4	3	1	20	9	18.9%	81.1%
	Southern District of Illinois	36	1	3	6	18	8	11.1%	88.9%
	Eastern District of Arkansas	36	4	4	1	17	10	22.2%	77.8%
	Northern District of Florida	35	1	1	4	25	4	5.7%	94.3%
	District of Maine	33	0	6	3	22	2	18.2%	81.8%
	District of Vermont	30	1	1	3	24	1	6.7%	93.3%
	Northern District of Iowa	30	2	2	3	22	1	13.3%	86.7%
	Middle District of Georgia	29	3	1	6	18	1	13.8%	86.2%
	District of New Mexico	25	2	3	3	16	1	20.0%	80.0%
	District of North Dakota	24	1	3	5	13	2	16.7%	83.3%
	District of Montana	19	2	3	2	11	1	26.3%	73.7%
	District of Wyoming	19	0	3	0	15	1	15.8%	84.2%
	Middle District of Louisiana	18	0	0	4	14	0	0.0%	100.0%
	Southern District of Mississippi	16	0	5	4	5	2	31.3%	68.8%
	District of South Dakota	15	0	0	0	13	2	0.0%	100.0%
	Southern District of Alabama	14	1	2	2	9	0	21.4%	78.6%
	District of Puerto Rico	13	0	2	4	6	1	15.4%	84.6%
	Northern District of Mississippi	13	2	1	3	6	1	23.1%	76.9%
	Southern District of Georgia	13	1	1	2	8	1	15.4%	84.6%
	Southern District of West Virginia	8	0	2	1	5	0	25.0%	75.0%
	Middle District of Alabama	8	0	1	0	7	0	12.5%	87.5%
	Eastern District of Oklahoma	4	0	1	2	1	0	25.0%	75.0%
	District of Virgin Islands	1	0	0	0	1	0	0.0%	100.0%
	District of Guam	1	0	0	0	1	0	0.0%	100.0%
	District of Alaska	1	0	0	0	1	0	0.0%	100.0%
	District of Northern Mariana Islands	0	0	0	0	0	0	N/A	N/A

242. Compendium, *supra* note 21, Exhibits C1–4, at 93–101.