



FINNEGAN

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IP Litigation in USA – Costs, Duration and Enforceability

David W. Hill

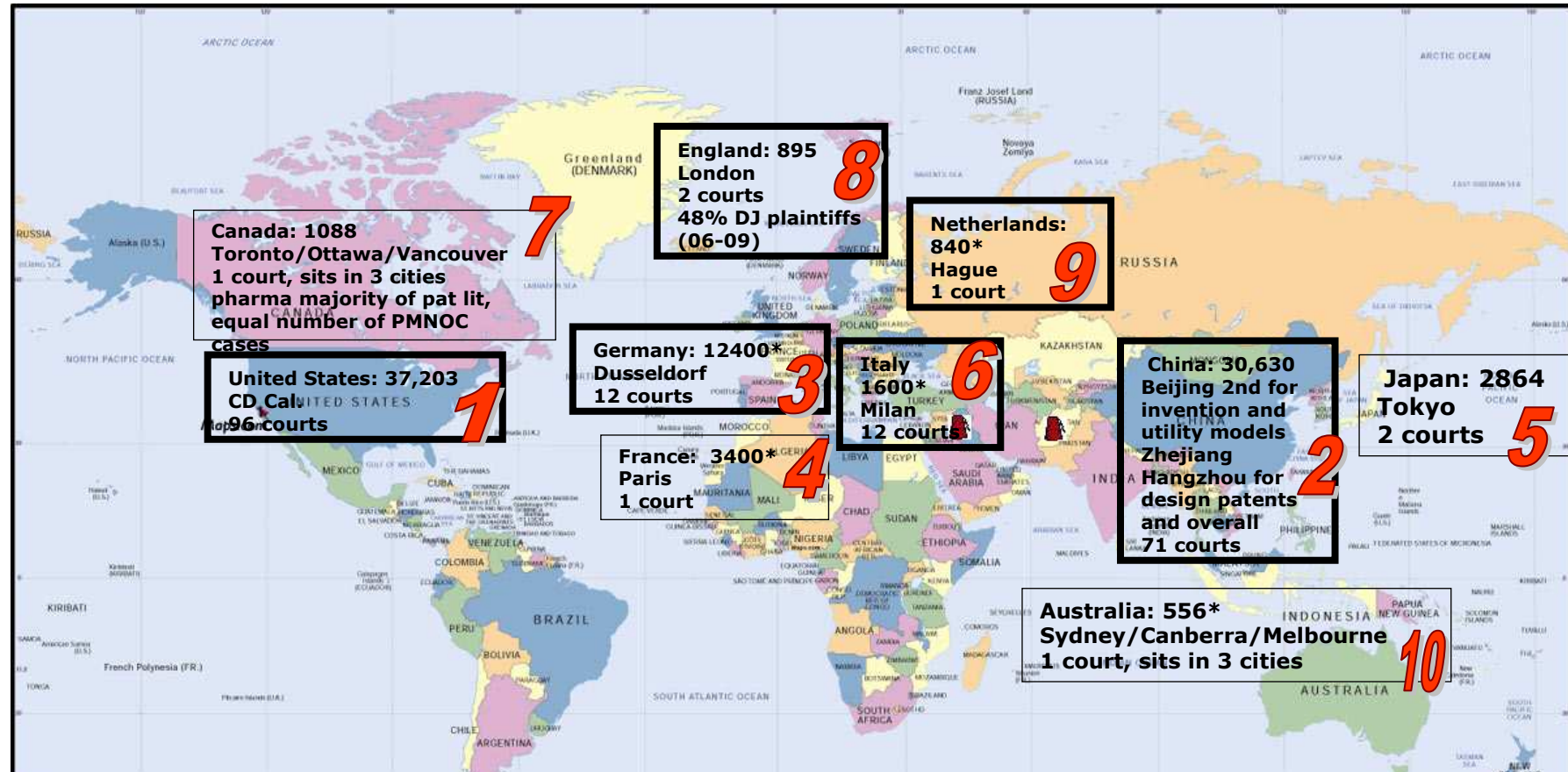
Partner

October 11, 2012



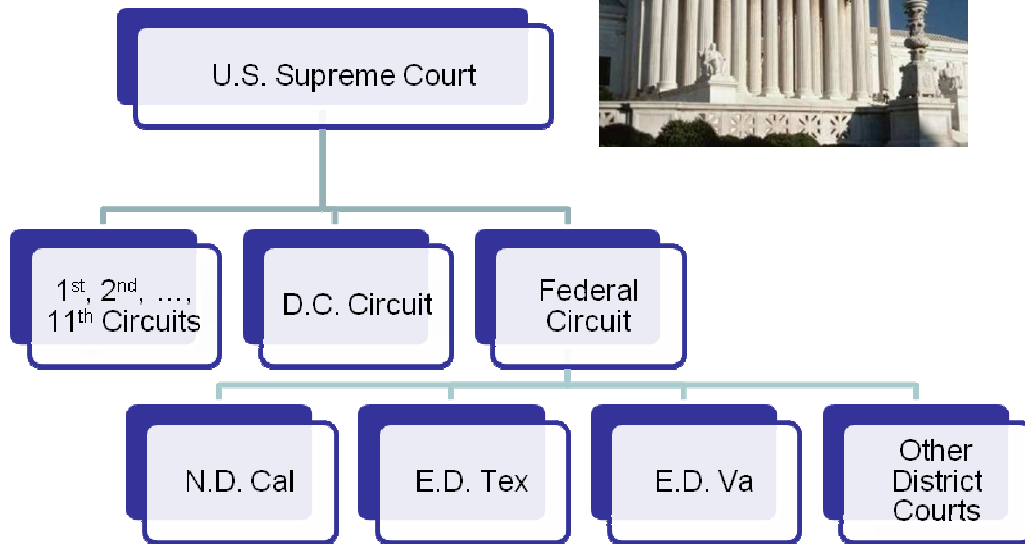
U.S. is the most IP-litigious Nation

10 Most Litigious Countries With # Of Patent Litigation Filings (1997-2010);
Most Active Court In Each Country*

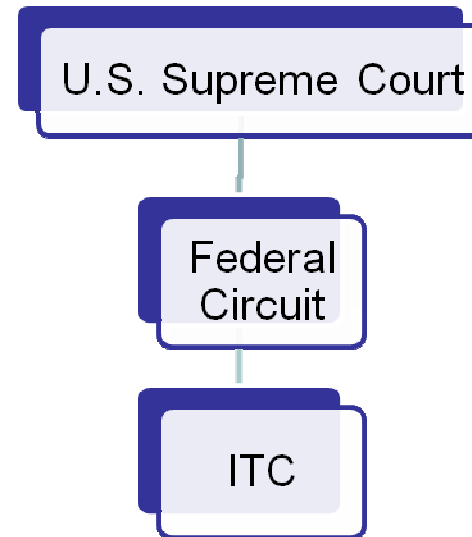


- Dual Forums for Patent Litigation in the U.S.
 - Federal District Court Patent Infringement Suits
 - International Trade Commission § 337 Investigations
 - Influence of PTO Invalidity Proceedings
- Enforceability in the Dual Forums
- Duration of Litigation
- Cost of Litigation

Dual Forums for Patent Litigation



The Federal Courts System



The ITC System

Comparison of the Dual Forum

Forum	ITC	District Court
Nature of Forum	Independent, non-partisan, quasi-judicial, federal agency	Federal judiciary
Jurisdiction	In rem	In personam
Decision maker	Administrative Law Judge	Judge or Jury
Remedies	Exclusion order, <u>no</u> monetary damages	Monetary damages, injunctions
Speed	15-16 months (to final decision)	8-30 months (to trial)
Discoveries	Very Broad Disputes heard by ALJ by phone	Broad (not as broad as ITC) Disputes handled by magistrate judge

Many patent owners file in both district court and ITC

Influence of PTO Invalidity Proceedings

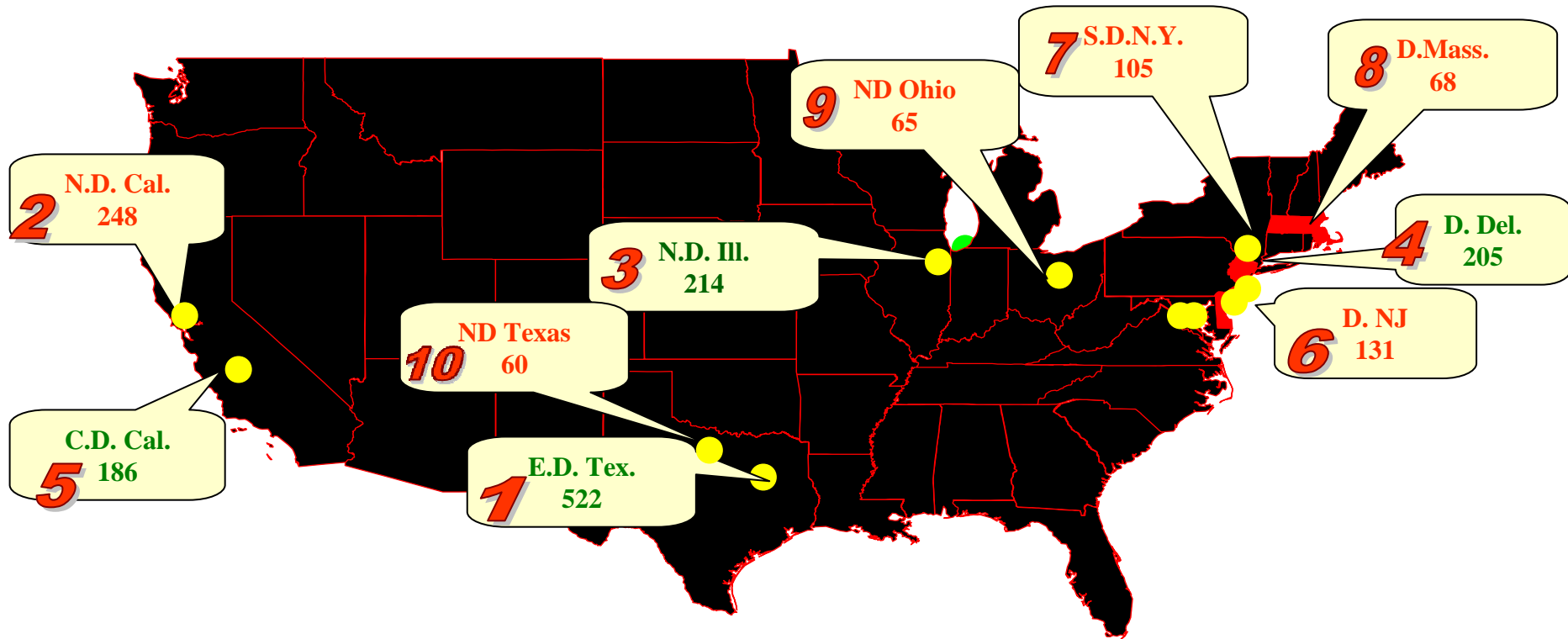
New Post-Grant Proceedings under AIA

	Post Grant Review	Inter Party Review	Transitional PGR
When	March 16, 2013	September 16, 2012	September 16, 2012
What	Any patent issued from an application filed on or after March 16, 2013	Any patent	Any covered business method where petitioner charged with infringement
Time Limits	Within nine months of issuance	Within 12 months of being sued for infringement	Sunset after eight years (September 16, 2020)
Scope	Any invalidity ground under 35 USC 282	Limited to patents and printed publications	Any invalidity ground under 35 USC 282

- Procedural Advantages
 - Lower burden of proof: preponderance of evidence
 - Broadest reasonable claim constructed
 - Lower cost and shorter duration
 - May stay the case in a district court

Enforceability – U.S. District Courts

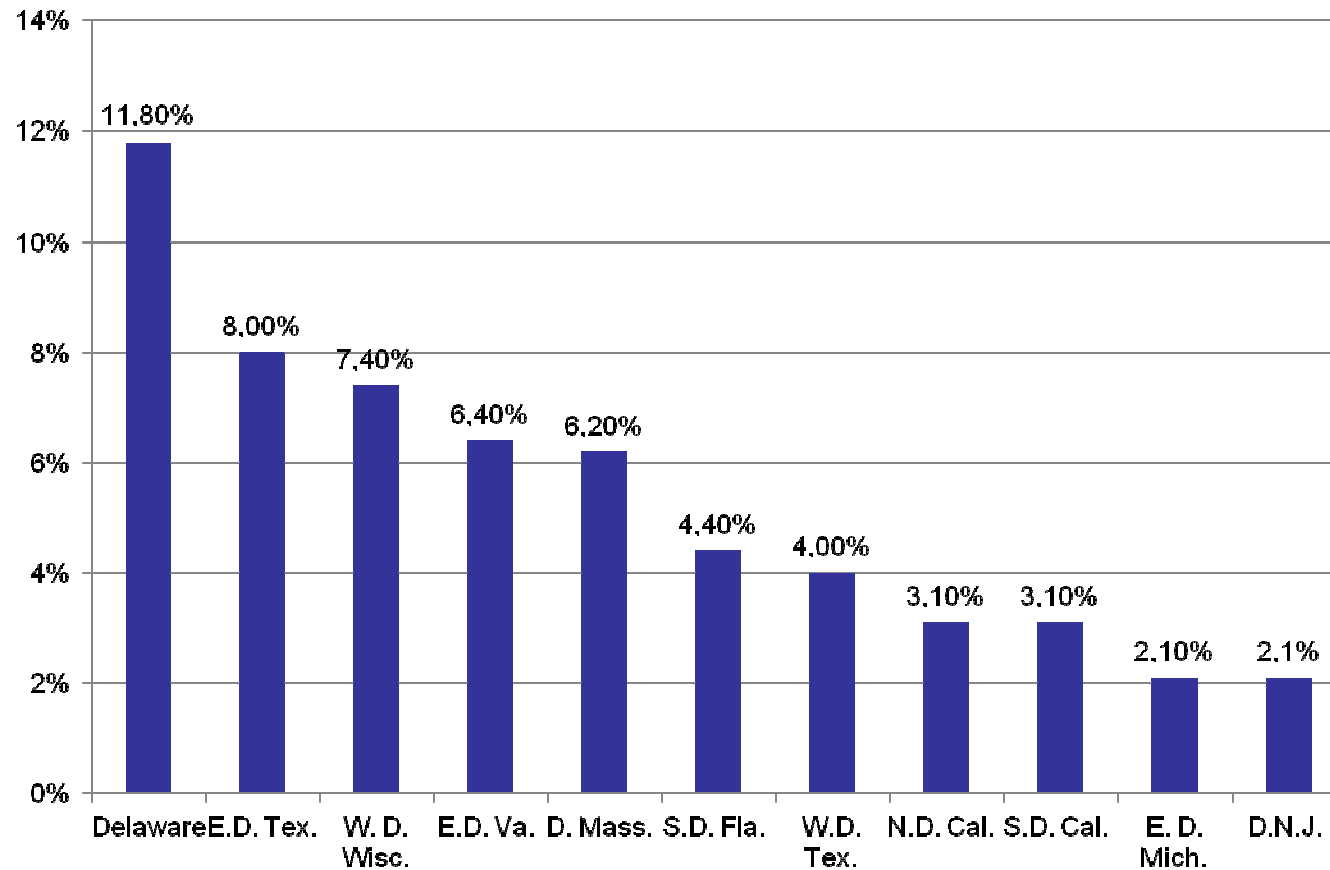
2010 Top 10 U.S. Patent Infringement Courts (# of Filings)



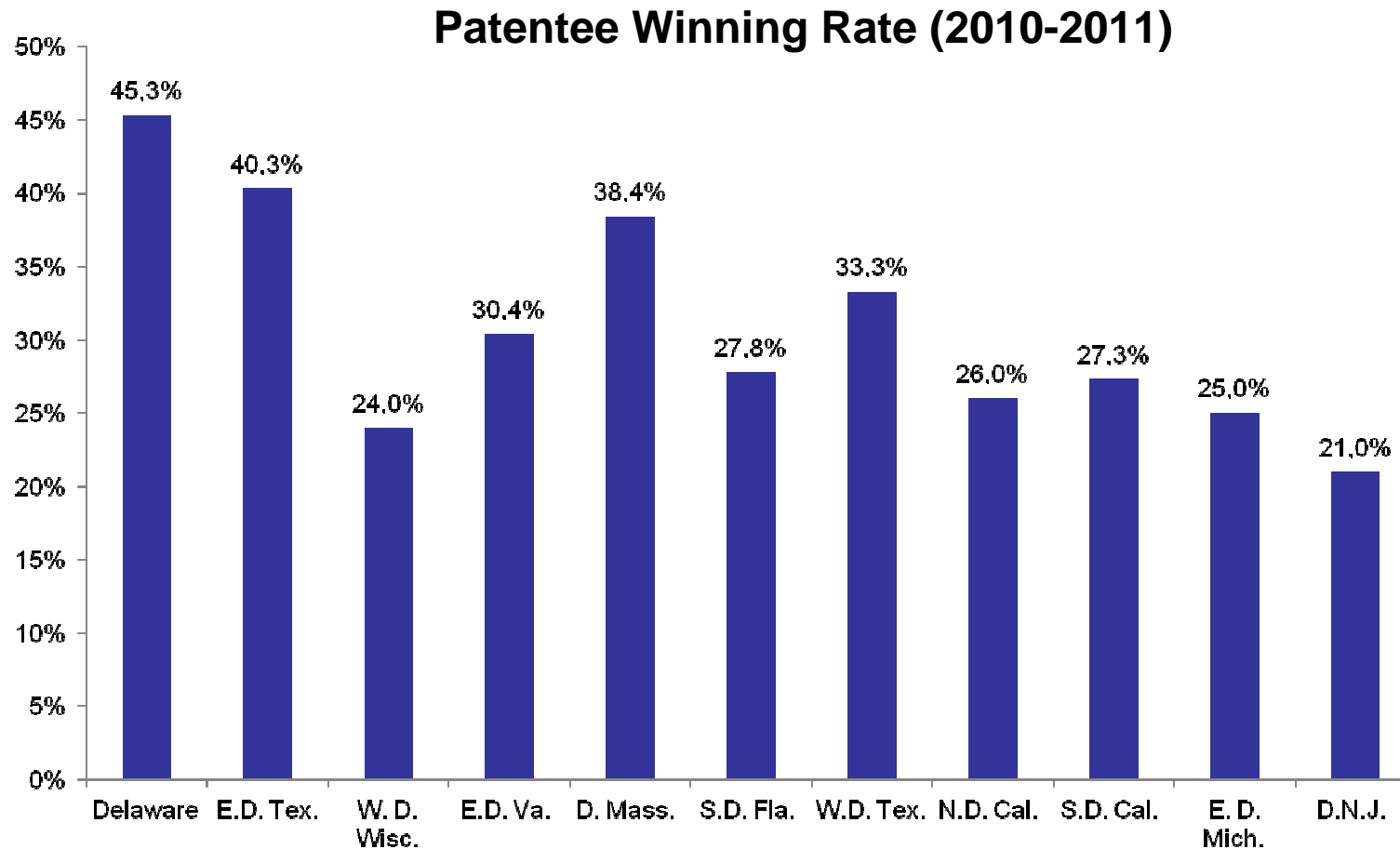
- Litigation hotbeds: E.D. Tex., N.D. Cal., N.D. Ill., D. Del.

Enforceability – U.S. District Courts

Case to Trial Rate (2010-2011)

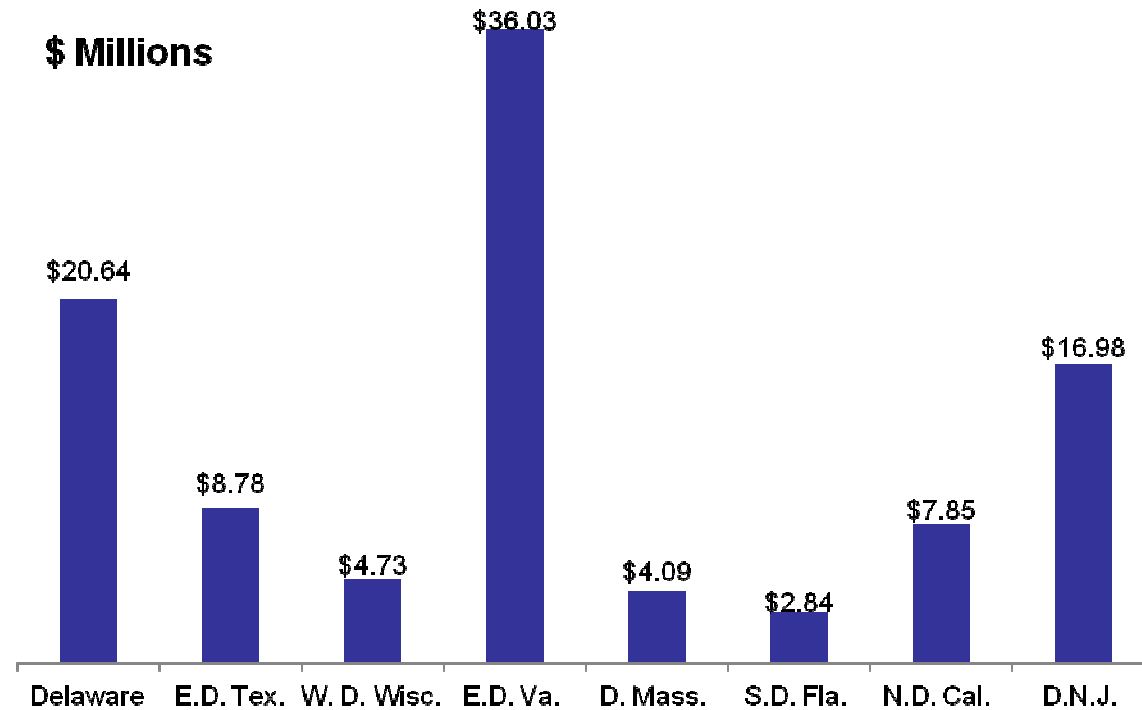


Enforceability – U.S. District Courts



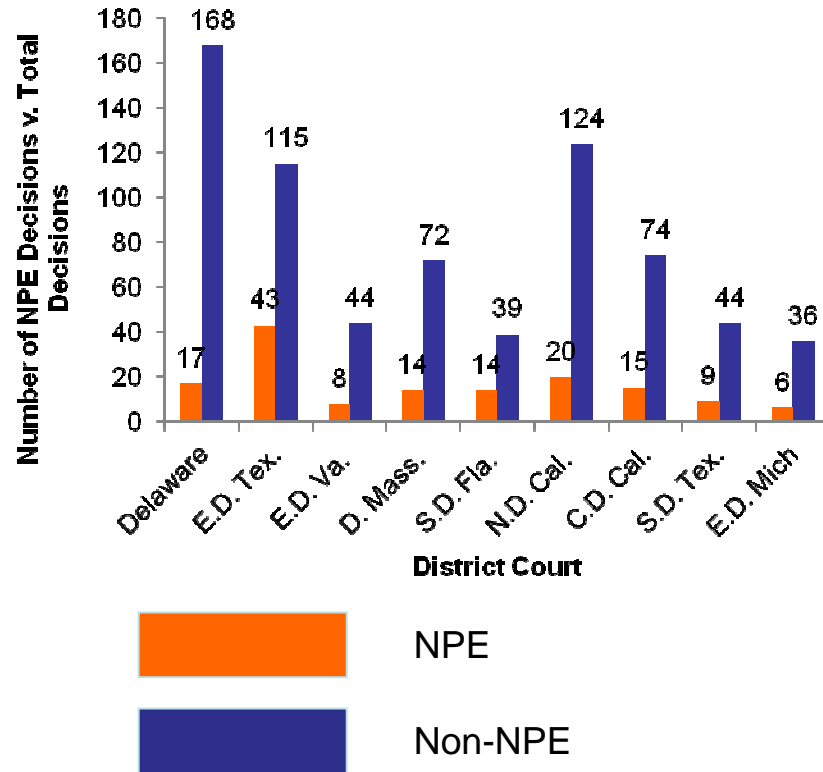
Enforceability – U.S. District Courts

Average Damage Awarded (1995-2011)



Enforceability – U.S. District Courts

Non-Practicing Entity Filings (1995-2011)

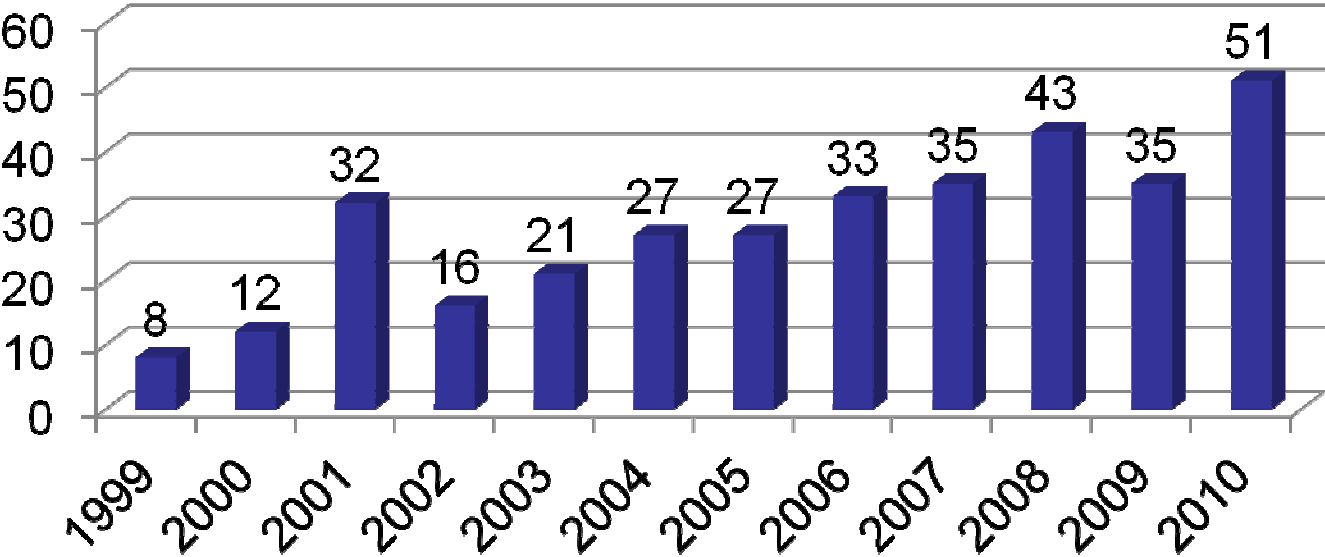


Damage Awards to NPE v. Non- NPE (1995-2011)



Enforceability - ITC

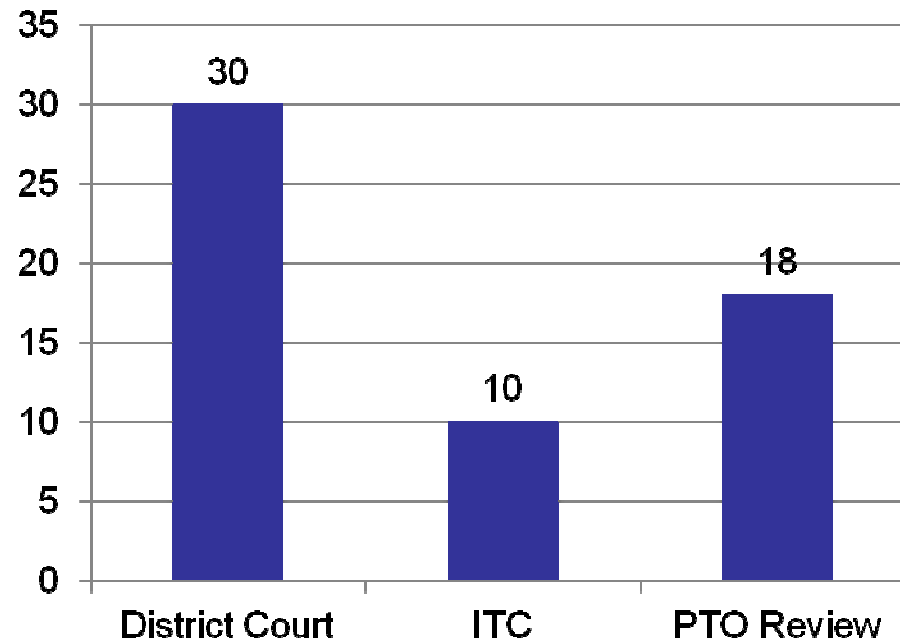
Number of Section 337 Investigations Instituted (ITC Fiscal Year)



	Resulted in Violation	Found Infringement	Patent Invalid
2009	40%	39%	15%
2010	41%	36%	21%

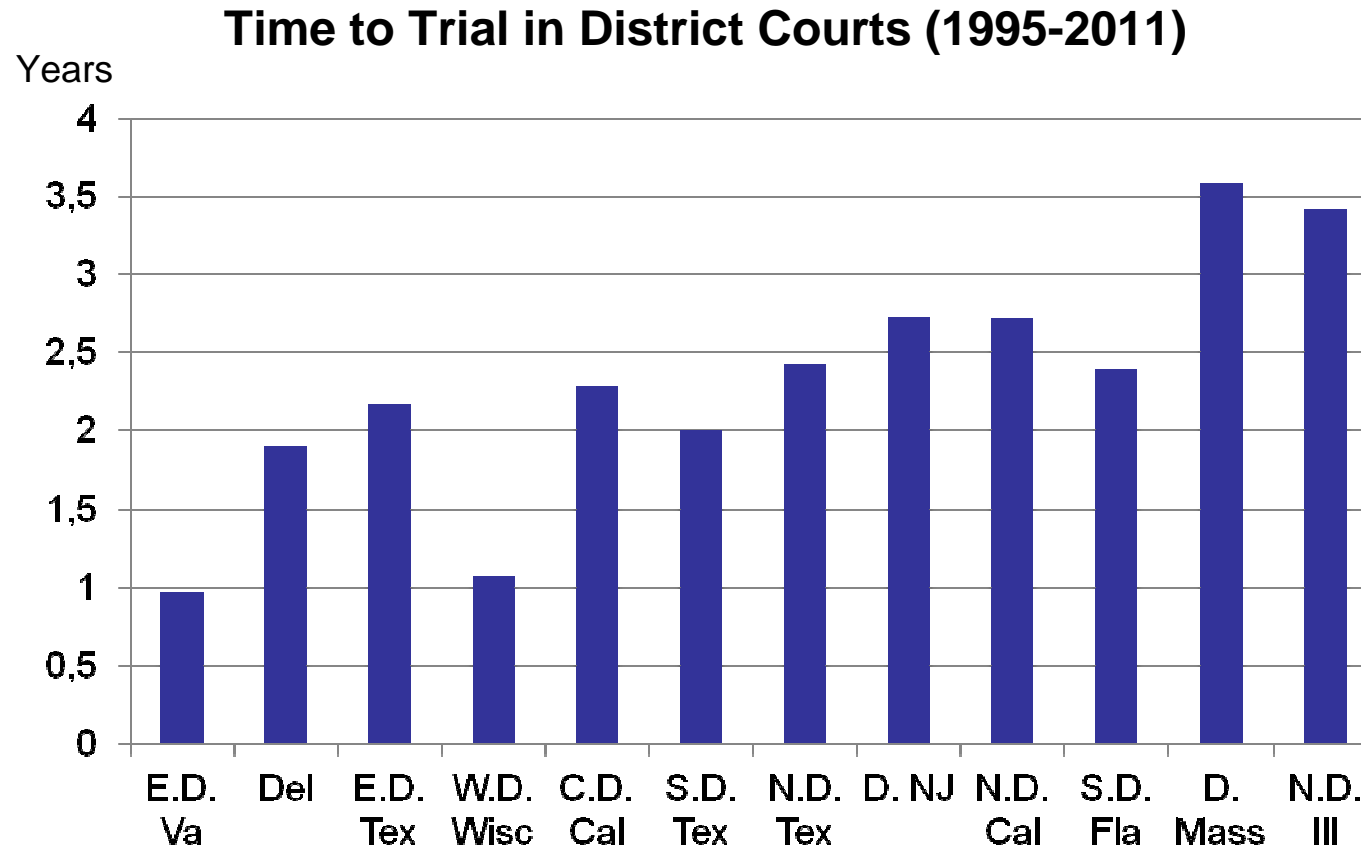
Duration

**Time to Trial (months)
3 Forums**



- ITC investigation is much faster-paced than district court proceedings
- PTO proceedings might take longer under AIA

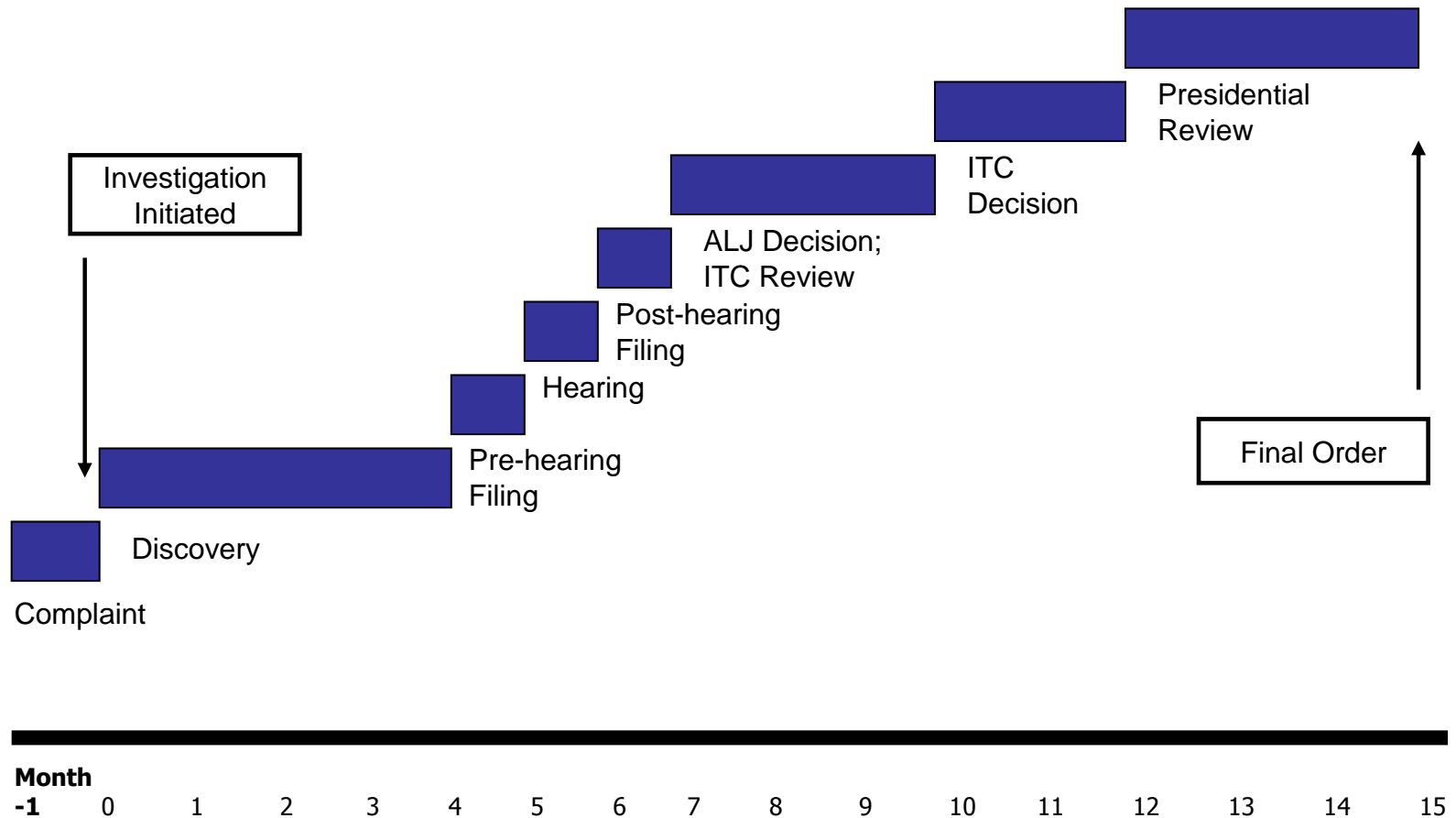
Duration – U.S. District Court



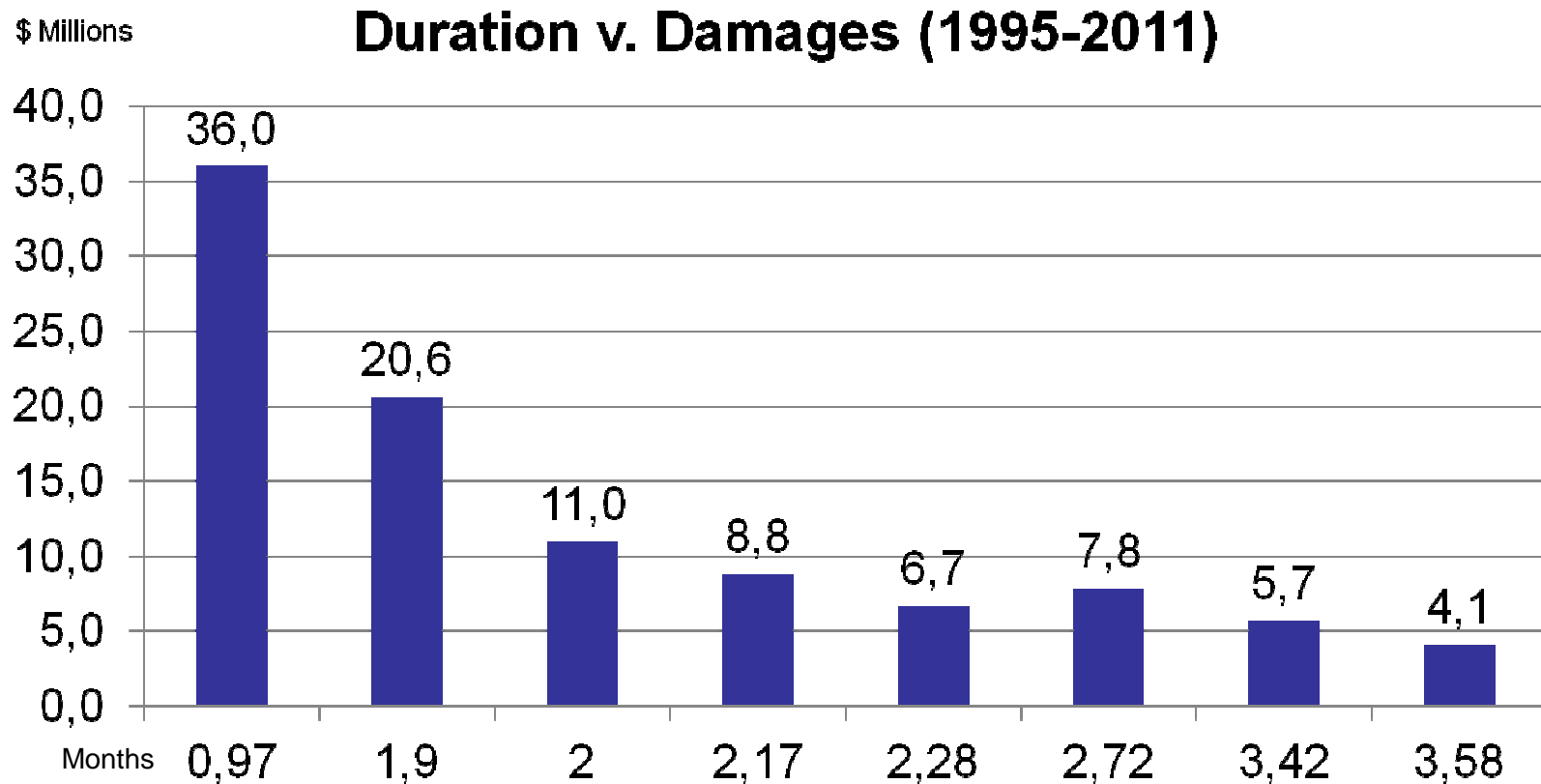
- Only the “Rocket Dockets” district courts (E.D. Va, W. Wisc) are comparable with ITC
- Some slower courts still take years to get a case to trial

Duration – ITC Timeline

Timeline for ITC Section 337 Investigation (12-month case)



Duration v. Damages



Damage seems to be lower when the litigation lasts longer

Cost of Litigation

Average Cost at District Court or ITC

\$ at Risk	<1 Million	1-25 Million	>25 Millions
Discovery Cost	\$350,000	\$1,500,000	\$3,000,000
Cost to Trial	\$600,000	\$2,500,000	\$5,000,000

Cost of PTO Proceedings

	Filing Fee	Institution Fee	Min. Fee
IPR	\$9,000 + \$200 per claim in excess of 20	\$14,000 + \$400 for each claim in excess of 15	\$23,000
PGR/TPGR	\$12,000 + \$250 or each claim in excess of 20	\$18,000 + \$550 for each claim in excess of 15	\$30,000
<i>Ex Parte</i> Reexam	\$2,520 (proposed to increase to \$15,000)	N/A	N/A

Sources

- Mark A. Lemley, Where to File Your Patent Case, 38 AIPLA Q. J. 1, 13–14 (2010).
- PriceWaterhouseCoopers, 2012 Patent Litigation Study (2012).
- America Intellectual Property Law Association, Report of the Economic Survey, 35-39 (2011).
- A review of 2010's Patent Ligation Trends at the United States International Trade Commission, Intellectual Property and Technology News (2011).

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Thank You

Questions?