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What would happen to patent cases if they couldn't all be filed in Texas?

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What would happen to patent cases if they couldn't all be filed in Texas?





Work-In-Progress

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3/4/16 version

A patent reform we can all agree on

A   0  Save for Later  Reading List

By Colleen V. Chien and Michael Risch November 20, 2015



“[The Federal Circuit’s] holding in *VE Holding* no longer applies” and therefore plaintiffs shouldn’t be able to sue wherever there is personal jurisdiction over the defendant.

Petition for Writ of Mandamus, *In re TC Heartland, LLC*, No. 16-105, Dkt. 2 (Fed. Cir. Oct. 23, 2015).

Oral Argument scheduled for March 11, 2016

Venue Reform in Congress

VENUE FOR ACTION RELATING TO PATENTS.—Notwithstanding subsections (b) and (c) of section 1391 of this title, any civil action for patent infringement or any action for a declaratory judgment that a patent is invalid or not infringed may be brought only in a judicial district—

“(1) where the defendant has its principal place of business or is incorporated;

“(2) where the defendant has committed an act of infringement of a patent in suit and has a regular and established physical facility that gives rise to the act of infringement;

“(3) where the defendant has agreed or consented to be sued in the instant action;

“(4) where an inventor named on the patent in suit conducted research or development that led to the application for the patent in suit;

“(5) where a party has a regular and established physical facility that such party controls and operates, not primarily for the purpose of creating venue, and has—

“(A) engaged in management of significant research and development of an invention claimed in a patent in suit prior to the effective filing date of the patent;

“(B) manufactured a tangible product that is alleged to embody an invention claimed in a patent in suit; or

“(C) implemented a manufacturing process for a tangible good in which the process is alleged to embody an invention claimed in a patent in suit; or

“(6) for foreign defendants that do not meet the requirements of paragraphs (1) or (2), according to section 1391(d) of this title.”

What Would Happen to patent cases if venue were restricted - hypotheses

- 1) They would leave Texas
- 2) They would all move to Delaware
- 3) Forum shopping would be curbed
- 4) Cases would redistribute, and the impacts across defendant classes would not be experienced uniformly

Basic Query – TC Heartland Analysis

Where would patentees likely have filed their 2015 cases if, in accordance with 28 U.S.C. § 1400(b), they could only bring cases:

- 1) where the defendant resides (*place of business (PPB) or incorporation (POI)*), or
- 2) where the defendant has a regular and established place of business and infringement (*facility*).

Approach

Step 1: Determine where D could be sued under a more restrictive interpretation of 28 U.S.C. § 1400(b) (PPB / POI / facilities)

Step 2: Determine where P would likely sue based on where P personally, and other Ps of its type, have sued in the past

Step 3: Compare results of 1. & 2. and determine % of cases with:

a) exact match – P could have filed as is

b) plausible match – P could have filed in “Ps preferred venue” – any venue P filed in in 2014-2015

c) no match – but P could have filed in the P class’ preferred venue – one of the top 5 venues of OpCos or NPEs

d) no match – none of the above

Limitations


- Outside of “exact” matches, it’s hard to tell with certainty where P’s would chose to file:
 - We consider certain matches “plausible” because we assume that P plausibly would file where they have before, due to greater familiarity with the court, but other factors may trump. Some Ps have only filed in a few venues, creating fewer match opportunities.
 - We consider certain matches “preferred” because we assume that P would prefer to file where others in the P’s class has filed in the past, but this may not be the deciding factor in many cases regarding where to file.
- We relied on complaints for primary place of business (PPB) and state of incorporation (POI) which, though it may be wrong, is what P would use to file initial venue under the well-pled complaint rule.
- We used internet/ReferenceUSA for locations but this information may be incomplete or not reliable.
- The current sample of cases is small (500 2015 cases, ~665 defendants, 2014-2015 plaintiffs) – we are in the process of extending our analysis
- This analysis does not currently include consideration of Congressional proposals.

Sources/Thanks to



Complaints,
case info

Schmooch/WIPO (industry codings)

 UnifiedPatents
Entity Status
(PAE, other NPE
[university], OpCo)

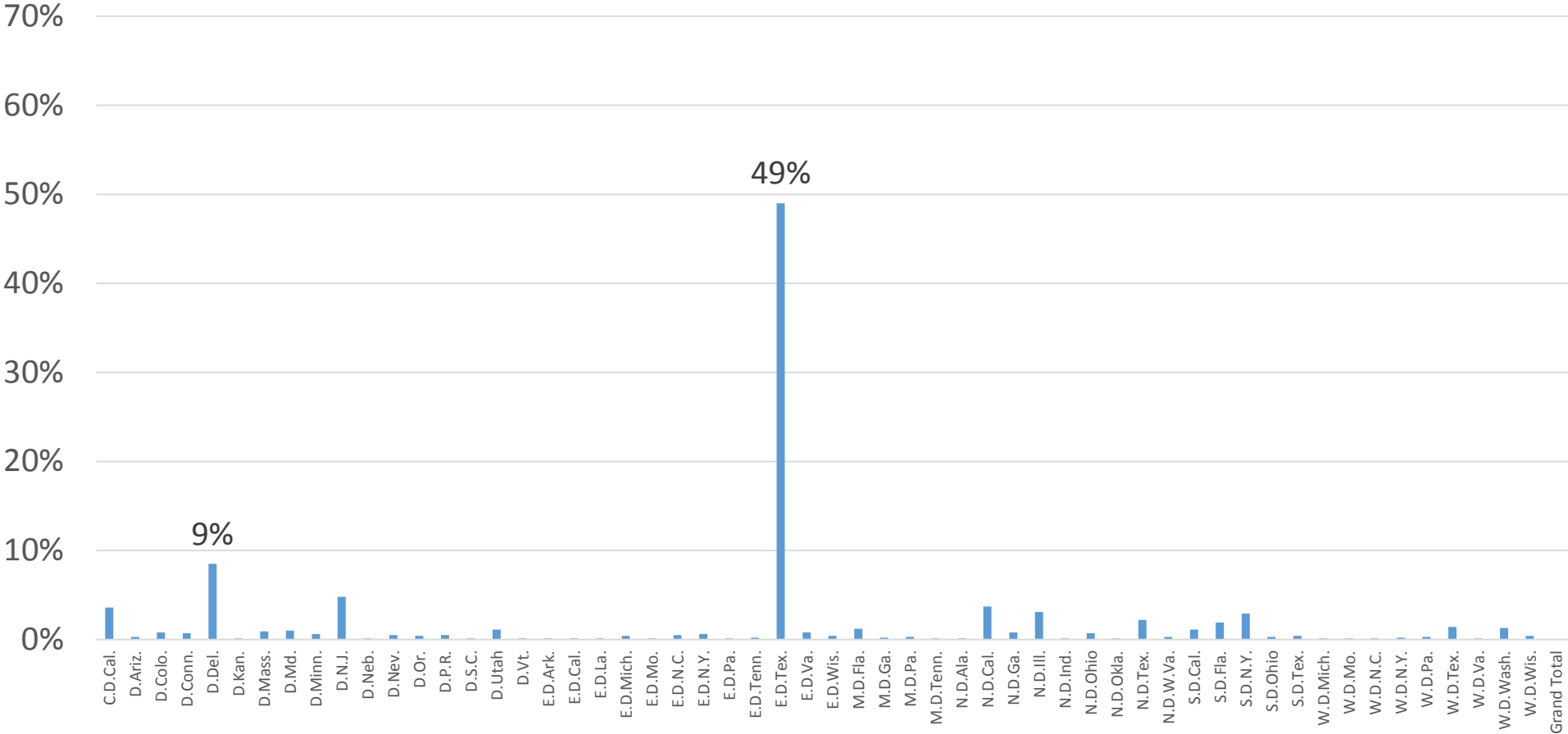
*Reference*USASM
A division of *info*USA
+ internet for
company locations



Our awesome
Research
Assistants

Starting Point: Where Have Patent Cases Been filed?

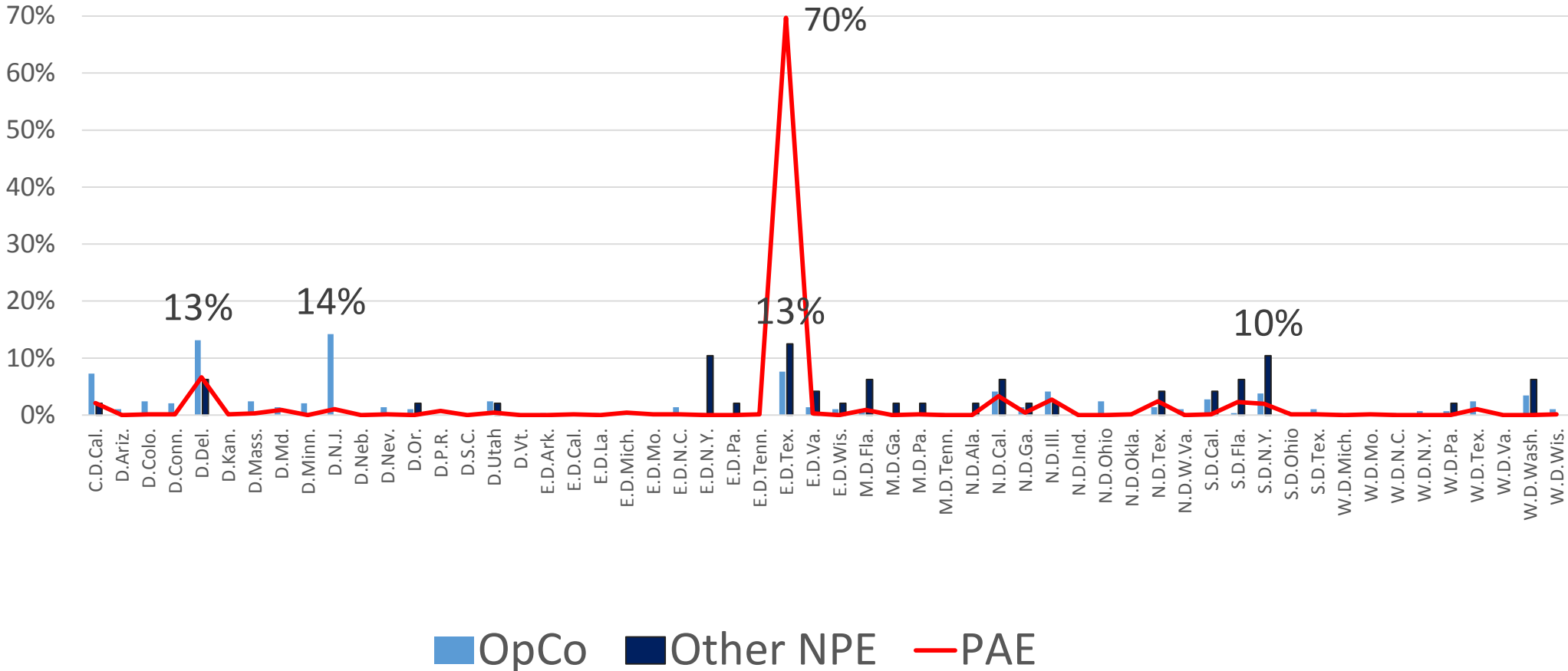
Distribution of Patent Cases 2015
(N=1000 sample)



Based on a sample of 1000 cases. N OpCo = 289 ; N other NPE (University, Individual) 48=; N PAE = 663.
Entity status codings from Unified Patents.

Starting Point: Where Have Patent Cases Been filed?

Distribution of 2015 Cases
Entity Breakdown (N=1000)

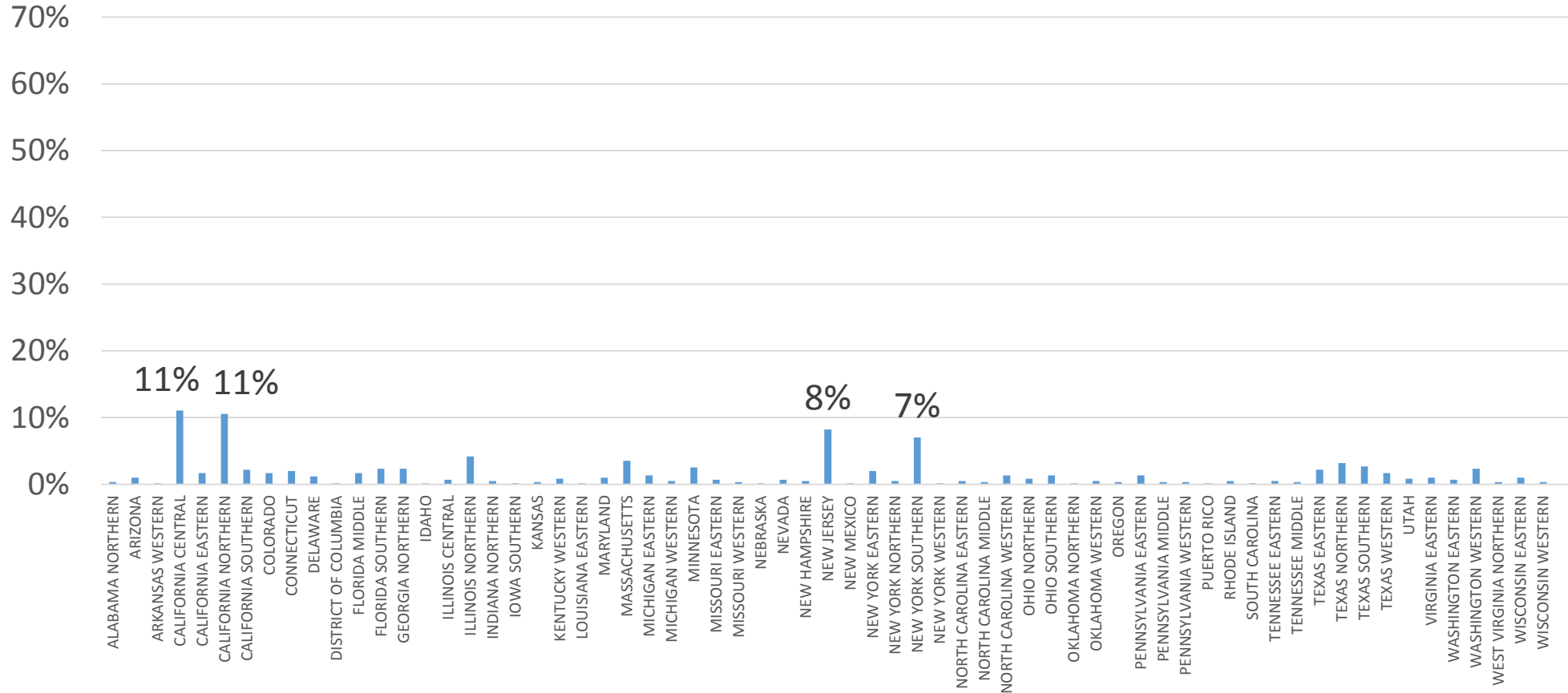


Based on a sample of 1000 cases. N OpCo = 289 ; N other NPE (University, Individual) = 48; N PAE = 663.
Entity status codings from Unified Patents.

Step 1: Where could plaintiffs have filed? (PPB)

Where Ds PPBs are

Preliminary Data

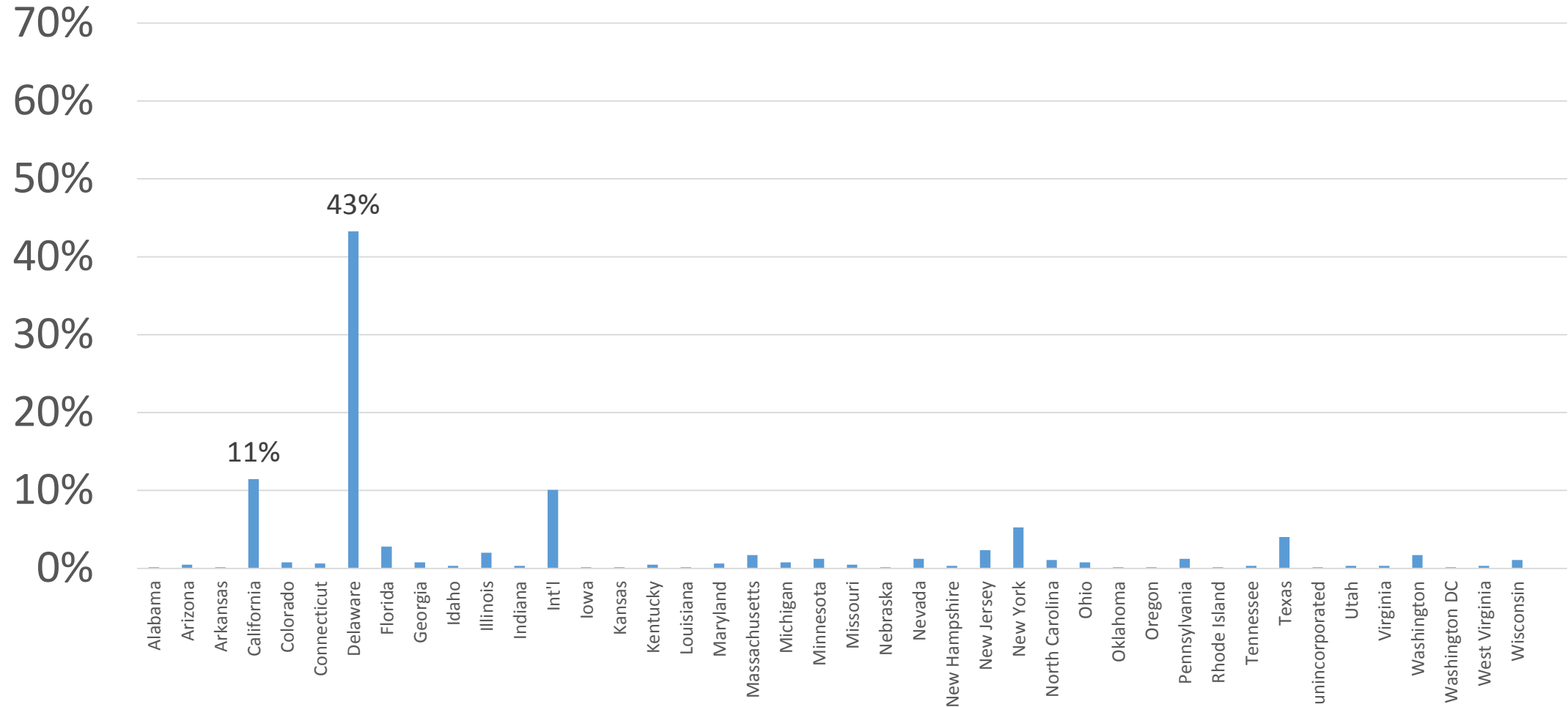


Based on sample of ~500 randomly selected 2015 cases corresponding to ~665 defendants

Step 1: Where could plaintiffs have filed? (POI)

Where Ds are Incorporated

Preliminary Data

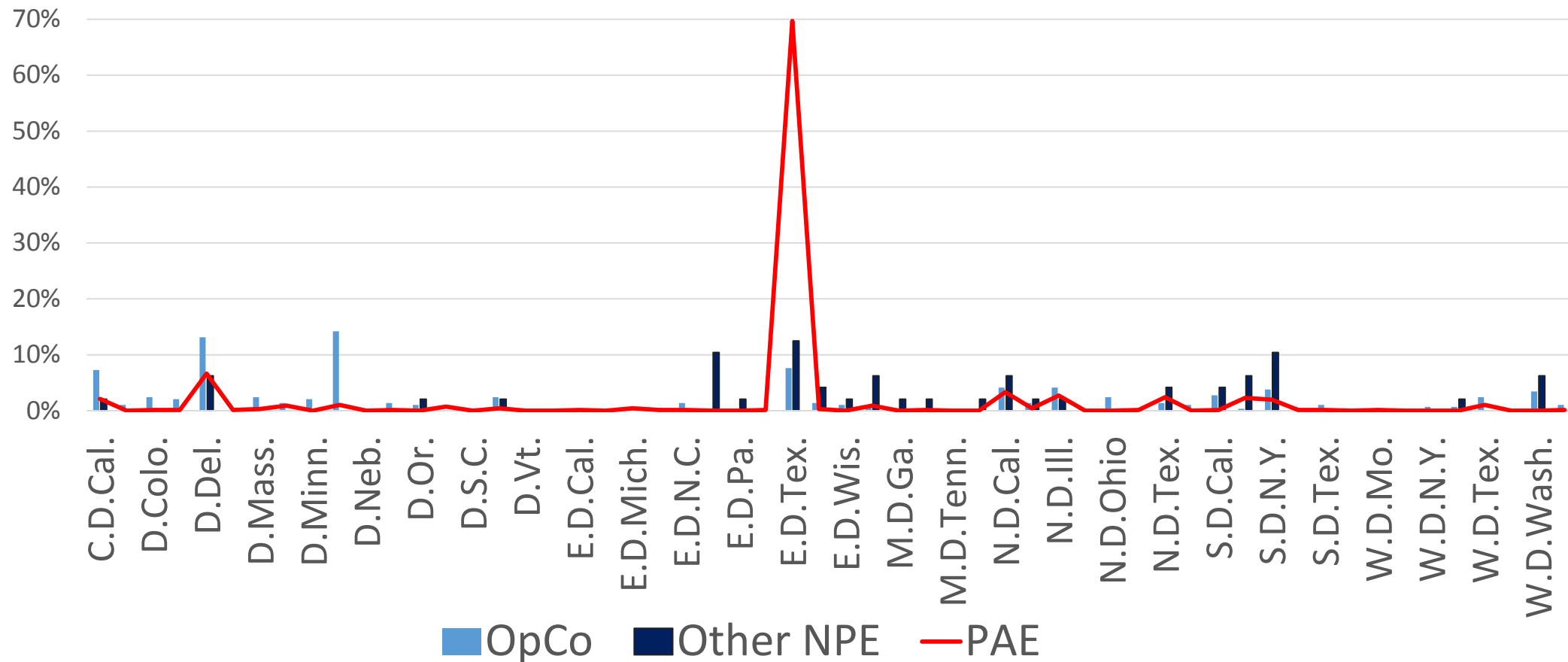


Based on sample of ~500 randomly selected 2015 cases corresponding to ~665 defendants

Step 2: Where would plaintiffs have sued?

Where Patent Cases were filed in 2015

(N=1000)



N OpCo = 289 ; N other NPE (University, Individual) 48; N PAE = 663. Entity status codings from Unified Patents.

Step 2: Where would plaintiffs have sued?

Preliminary Data

Top 5 Districts and Share of 2015 Cases in the Top 5 (by Plaintiff Type)

<u>Individual</u>	<u>PAE</u>	<u>OpCo</u>
E.D.N.Y. (14%)	E.D.Tex. (70%)	C.D.Cal. (14%)
S.D.N.Y.	D.Del.	D.Ariz.
E.D.Tex.	N.D.Cal.	D.Colo.
E.D.Va.	N.D.Ill.	D.Conn.
S.D.Fla.	N.D.Tex.	D.Del.
54%	85%	46%

*Share in
the top 5
districts*

Based on sample of ~1,000 randomly selected 2015 cases, entity coding provided by Unified Patents, University and small company NPE cases represent less than 5% of the total

Step 3: What share of cases would have been impacted by a narrower reading of the rule?

Exact or Plausible Match: Match in same district or a district P has filed in before.

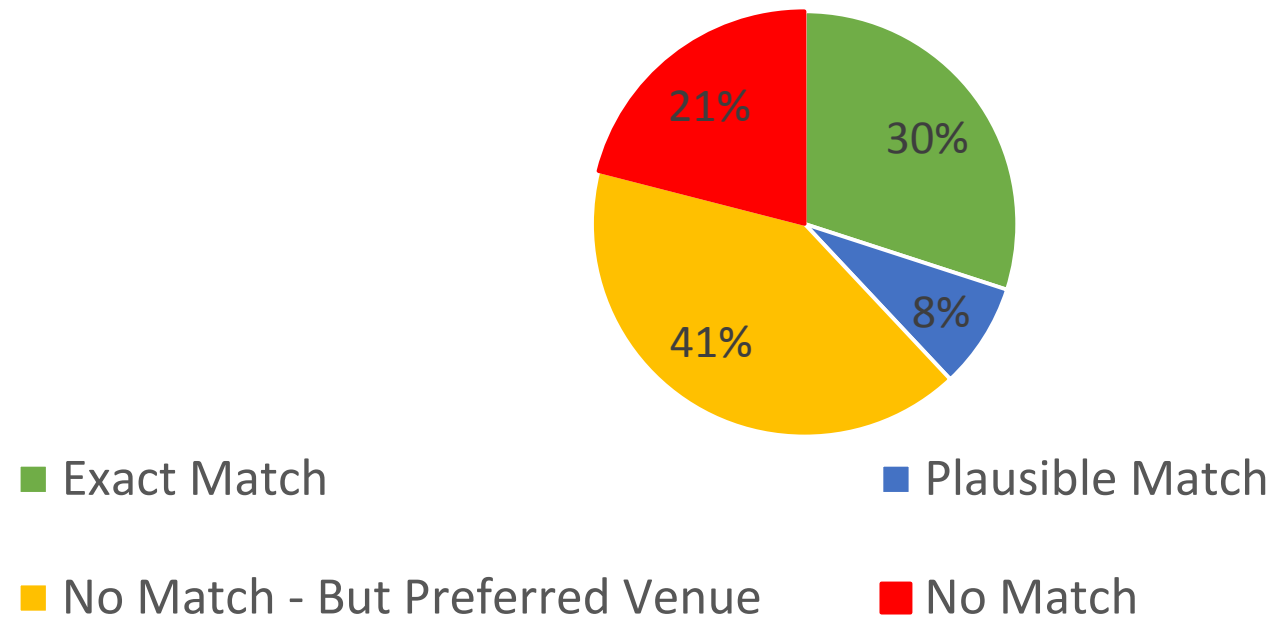
No Match

- But, match within one of P class' preferred venues (top 5 in the past 2 years among, e.g. OpCos)
- Outside of preferred match: none of the above

Step 3: What share of cases would have been impacted?

Preliminary Data

Impact on Filing Venues
(N=665 Plaintiff Defendant Pairs)

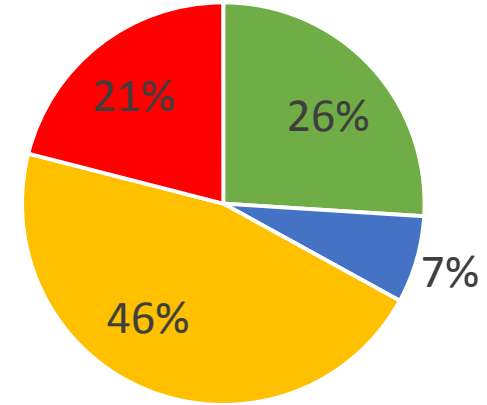
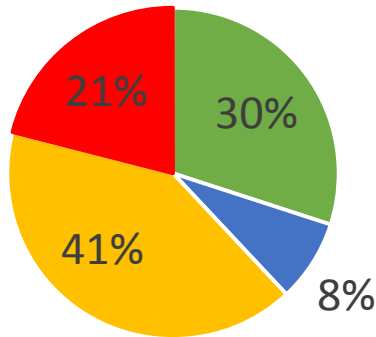


Based on sample of ~500 randomly selected 2015 cases corresponding to ~665 plaintiff-defendant pairs

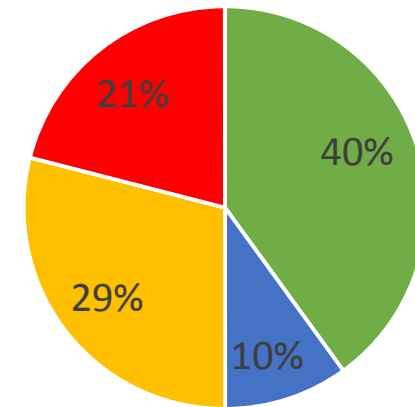
Based on past patterns, the rule change would have a greater impact on NPE choice of venue (26% would have been able to file in the same district vs. 40% of OpCos), but many OpCos would also have to file outside of their past venues

Preliminary Data

Impact on Filing Venues (N=665 plaintiff defendant pairs)



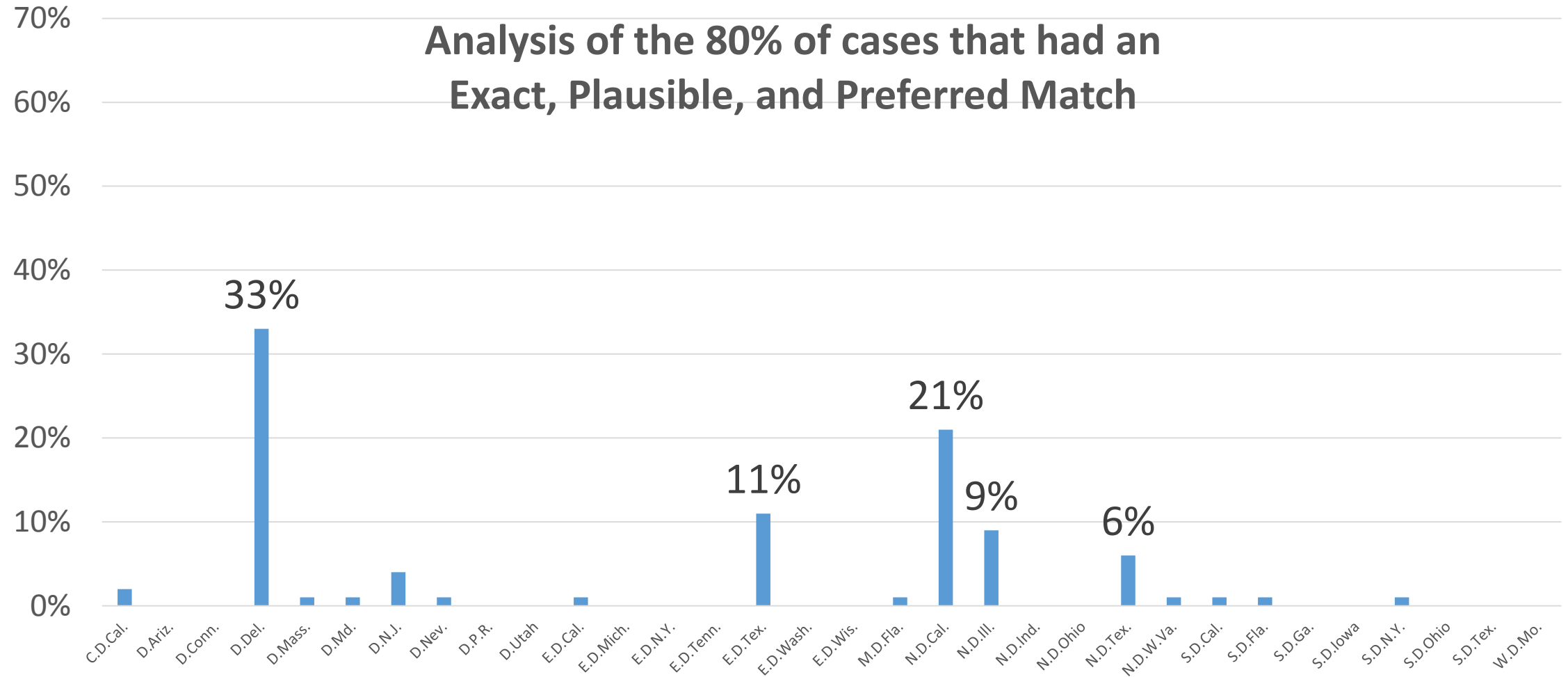
OpCos



- Exact Match
- Plausible Match
- No Match - But Preferred Venue
- No Match

Based on sample of ~500 randomly selected 2015 cases corresponding to ~665 plaintiff defendant pairs

How would the cases, potentially, be redistributed?*



*subject to caveats on the "Limitations" slide

What Would Happen to Patent Cases – Hypotheses

1) They would leave Texas

Fewer cases would be able to stay there but ED Texas it appears, would still be in the top 3.

2) They would all move to Delaware

Delaware could take the top spot – but it's not clear.

3) Forum shopping would be curbed

NPEs would have to move most of their cases, but so would OpCos.

4) Cases would redistribute, and the impacts across defendant classes would not be experienced uniformly

Yes, but how exactly is unknown, except that NPEs would be impacted more than OpCos. Industry analysis TBD.