

Patent Pilot Program: Status Update

Federal Judicial Center
December 2018

On January 4, 2011, President Obama signed into law legislation establishing a ten-year pilot program addressing the assignment of patent cases in certain U.S. district courts (Pub. L. No. 111-349, codified at 28 U.S.C. § 137, note). The legislation instructs the director of the Administrative Office of the U.S. Courts, in consultation with the chief judges of the district courts participating in the pilot program and the director of the Federal Judicial Center, to provide certain reports on the pilot program, including the Five-Year Report presented by the Federal Judicial Center (FJC) in 2016 and periodic reports such as this, to the Judiciary Committees of the House and the Senate.¹

The Patent Pilot Program (PPP) legislation instructed the Administrative Office director to designate no fewer than six district courts, representing at least three judicial circuits, in which the pilot program would be implemented. In his role as secretary to the Judicial Conference, the Administrative Office director asked the Judicial Conference Committee on Court Administration and Case Management (CACM) to have oversight of the project. CACM asked the FJC to conduct the study of the pilot program. The legislation also identified the ten-year duration of the pilot program and a set of specific questions to be addressed.

Since the creation of the PPP, the FJC has been monitoring the implementation of the pilot within each pilot district and collecting statutorily required information about case management and the processing of patent cases from pilot courts.² Additionally, the FJC has been in contact with the courts to monitor the implementation of the pilot and how that may differ across the courts. While the FJC periodically updates CACM on the progress of the pilot, it is too early in the life of the ten-year pilot project to draw any conclusions regarding the effect of the program on patent litigation. Presented below is preliminary information gathered for all patent cases filed on or after the individual PPP start date designated by each of the current pilot courts, through July 16, 2018.

Number of Pilot Districts and Judges

As of July 16, 2018, there were 57 judges serving as designated judges³ across the 13 pilot districts (see Table 1). As stated in past status updates, the number and identity of designated judges continue to fluctuate as individual judges join and leave the bench, or elect to opt into or out of the role of designated judge.

1. For more information on the implementation of the Patent Pilot Program, see the Five-Year Report and past Status Updates, available at <http://fjconline.fjc.dcn/content/patent-law-resources-0>.

2. There are currently 13 pilot districts: Central District of California (CAC), Northern District of California (CAN), Southern District of California (CAS), Northern District of Illinois (ILN), District of Maryland (MD), District of New Jersey (NJ), District of Nevada (NV), Eastern District of New York (NYE), Southern District of New York (NYS), Western District of Pennsylvania (PAW), Western District of Tennessee (TNW), Eastern District of Texas (TXE), and Northern District of Texas (TXN).

3. “Designated judges” are judges who have volunteered to receive patent cases transferred to them from non-designated judges within their districts. Designated judges also receive their own randomly assigned patent cases.

Table 1: Number of Designated Judges, by District, as of July 16, 2018⁴

District	Number of Designated Judges
CAC	6
CAN	3
CAS	5
ILN	8
MD	2
NJ	3
NV	3

District	Number of Designated Judges
NYE	8
NYS	6
PAW	4
TNW	2
TXE	4
TXN	3

Judicial Experience with Patent Cases

Designated judges have substantially more patent experience than their non-designated counterparts as measured both by the number of patent cases assigned and disposed of—which is not surprising, given the nature and structure of the program.

Number of Patent and Pilot Cases

From each court’s individual pilot start date through July 16, 2018, just over 18,700 patent cases were filed across the 13 current pilot courts. Of these cases, 14,136 fit the study’s definition of a “pilot case”⁵ (see Table 2). The Eastern District of Texas continues to dominate in the percentage of all patent cases filed in the pilot courts (50%) as well as in the percentage of patent cases that meet the study’s definition of a pilot case (66%). However, following the Supreme Court decision in *TC Heartland LLC v. Kraft Foods Group Brands LLC*,⁶ their share of the caseload is declining. See *Venue*, below, for more discussion.

4. The Western District of Tennessee had two designated judges as of July 16, 2018, only one of whom had patent cases assigned at the time of this analysis.

5. For a case to be considered a “pilot case,” one of three conditions needs to be met. First, the current judge assigned the case is a designated judge at the time of random assignment. Second, the current judge assigned the case is serving as a designated judge at the time of assignment, and receives the case by way of transfer within the time limit established by each court (generally, within 30 days from filing). Third, the current judge assigned the case is a designated judge at the time of assignment, and receives the case from another designated judge outside the transfer window. If the case has always been with a designated judge, regardless of the number of transfers, it is considered a pilot case as well. Conversely, patent cases that do not qualify as pilot cases are those that do not meet these requirements—most typically, patent cases assigned to non-designated judges who chose to retain them.

6. 137 S. Ct. 1514 (2017).

Table 2: Number of Patent and Pilot Cases, by District, from Each Court’s Pilot Start Date to July 16, 2018 (Cases with District Judge Participation Only)

District	Number of Patent Cases Filed	Number of Pilot Cases	Percent of Patent Cases That Are Pilot Cases
CAC	2,313	1,208	52%
CAN	1,338	278	21%
CAS	760	581	76%
ILN	1,342	746	56%
MD	171	98	57%
NJ	1,400	655	47%
NV	225	141	63%
NYE	249	178	71%
NYS	813	341	42%
PAW	132	123	93%
TNW	67	65	97%
TXE	9,385	9,279	99%
TXN	510	443	87%
All Pilot Courts	18,705	14,136	76%

Case Transfers

Patent cases become pilot cases either through random assignment to a designated judge or through transfer to a designated judge. These transfers can occur within the court’s transfer window (the most common method of transfer) or from one designated judge to another designated judge outside the transfer window. Overall, there has been a substantial amount of transfer activity in the pilot districts (see Table 3). From the start of the pilot to July 16, 2018, 5,378 patent cases were transferred from one district judge to another (29% of all patent cases in the study). Of those transferred cases, 72% were transferred for purposes of the pilot program (i.e., to a designated judge within the transfer window established by the district). The number of transfers of a single patent case, thus far, ranges from zero to seven. However, most patent cases stay with the originally assigned judge. Of those cases that were transferred, the most common number of transfers was one.

Table 3: Patent Cases and Pilot Cases Transferred, by District

District	Number of Patent Cases with at Least One Transfer	Number of Pilot Cases with at Least One Transfer	Percentage of Transferred Cases That Are Pilot Cases ⁷
CAC	1,365	890	65%
CAN	446	58	13%
CAS	648	542	84%
ILN	424	300	71%
MD	63	50	79%
NJ	311	198	64%
NV	110	77	70%
NYE	160	130	81%
NYS	190	120	63%
PAW	80	77	96%
TNW	22	20	91%
TXE	1,169	1,064	91%
TXN	360	322	89%
All Pilot Courts	5,348	3,848	72%

Cases Terminated

Of all patent cases filed in the pilot districts, 91% have terminated. The percentage of cases terminated has grown over the course of the pilot, not a surprising finding given that cases filed early in the life of the pilot have had more time to reach termination. An average of 77% of terminated cases are pilot cases, meaning terminated cases are more likely to be pilot cases than non-pilot cases. Therefore any conclusions about terminated cases are driven by pilot cases.

Case Disposition Methods

Table 4 reports the disposition method of pilot and non-pilot patent cases in general categories.⁸ Most cases terminated by dismissal, either through a voluntary dismissal, settlement, or “other”

7. This does not include patent cases randomly assigned to a designated judge and never transferred.

8. As part of routine reporting, courts indicate a disposition method for each case, using standardized codes. Definitions of those codes can be found in the Civil Statistical Reporting Guide March 30, 2010, found at <http://jnet.ao.dcn/civil-statistical-reporting-guide>.

dismissal (which includes a number of settlements). As a percentage, more non-pilot cases terminated through dismissal than pilot cases, but the difference is statistically significant only for some of the specific methods of termination within the broad category of dismissal. The biggest difference between pilot and non-pilot cases is in the “other” category, which includes statistical closings.⁹ These cases will likely eventually be reopened and given a final disposition, replacing the statistical closing. Future analyses will report the results of those terminations.

Table 4: Disposition Method, All Cases and Pilot Cases, as of July 16, 2018¹⁰

Disposition Method	All Pilot Case Terminations		All Non-Pilot Case Terminations		All Terminations	
	Frequency	Percent	Frequency	Percent	Frequency	Percent
Transferred	695	5%	213	6%	908	5%
Dismissed	10,117	77%	2,956	77%	13,073	77%
Judgment	745	6%	517	13%	1,262	7%
Other	1,523	12%	177	5%	1,700	10%

Case Duration

Table 5 shows information about the number of days from filing to termination for pilot and non-pilot cases. Both pilot and non-pilot cases terminated most often between 31 and 180 days after filing.

9. A statistical closing is a docket control method used by courts in which a pending case is administratively closed without final adjudication and without prejudice to the rights of the parties to apply to reopen the case.

10. Columns may sum to more than 100% as a result of rounding. Codes for disposition method are from the Civil Statistical Reporting Guide March 30, 2010, found at <http://jnet.ao.dcn/civil-statistical-reporting-guide>. Transferred cases include interdistrict transfers and those marked for participation in multidistrict litigation. Dismissed cases include those voluntarily dismissed or settled, among other categories. Judgment includes cases disposed of on pretrial motion, as well as those going to trial. Other disposition is a mix of statistical closings and cases stayed pending bankruptcy proceedings. A small number of cases have a termination date but no disposition code as of the date of this analysis.

Table 5: Case Duration for Cases Terminated as of July 16, 2018¹¹

Case Duration	Pilot Cases Only		Non-Pilot Cases Only	
	Frequency	Percent	Frequency	Percent
1 day	12	<1%	6	<1%
2–7 days	49	<1%	27	1%
8–30 days	472	4%	142	4%
31–180 days	5,824	45%	1,556	40%
181–365 days	3,760	29%	975	25%
More than 365 days	2,970	23%	1,163	30%
Number of Cases	13,087		3,869	

Table 6 shows the average number of days from filing to termination, as well as the average duration of pending cases, for patent cases assigned to designated and non-designated judges. On average, the time from filing to termination is shorter for patent cases before designated judges than those before non-designated judges, though pilot participation is not the only factor affecting case duration (see below). Case durations for pending cases, however, are not statistically shorter for patent cases before designated judges compared to those before non-designated judges. All duration measures include the days, if applicable, before an assigned case is transferred from a non-designated to a designated judge.

Table 6: Average Case Duration in Days, Non-Designated and Designated Judges

Case Status	Average Case Duration	
	Non-Designated Judges	Designated Judges
Pending Cases Only	440 days	438 days
Terminated Cases Only	309 days	268 days
All Cases	323 days	283 days

We found that, across all patent cases in the pilot districts, a number of case events are associated with longer disposition times, including the presence of a transfer, a stay for review by the Patent and Trademark Office or International Trade Commission, a claim construction hearing, the appointment of a special master or technical advisor, the presence of a summary judgment order, and the lack of a serial filer.¹² A separate analysis that accounted for a number of case factors (i.e.,

11. Columns may sum to more than 100% as a result of rounding.

12. It is important to keep in mind that the associations between case events and longer duration times do not imply that the presence of the event caused the case to remain open longer. For example, a special master or technical advisor may be appointed *because* a case has been pending a significant amount of time.

case’s pilot status, number of transfers, and a measure of judicial patent experience) found that pilot cases are disposed of 8% faster than non-pilot cases.

Appeals

We found that while pilot cases make up over 76% of patent cases in the pilot districts, they represent only 59% of appeals. In fact, as a percentage of all terminated cases, pilot cases are less likely to be involved in an appeal than non-pilot cases, though this varies by district court (see Table 7).

Table 7: Appeals by District (All Cases and Pilot Cases)

District	Cases with at Least One Appeal	Percentage of All Cases with at Least One Appeal	Pilot Cases with at Least One Appeal	Percentage of Pilot Cases with at Least One Appeal
CAC	146	6%	74	6%
CAN	153	11%	20	7%
CAS	51	7%	43	7%
ILN	74	6%	53	7%
MD	14	8%	11	11%
NJ	126	9%	60	9%
NV	13	6%	5	4%
NYE	8	3%	6	3%
NYS	58	7%	25	7%
PAW	8	6%	8	7%
TNW	2	3%	2	3%
TXE	211	2%	201	2%
TXN	19	4%	12	3%
All Pilot Courts	883	5%	520	4%

A stated purpose of the PPP is to “encourage enhancement of expertise in patent cases among district judges” and one indication of enhanced expertise may be the rate at which decisions by pilot judges are affirmed by the court of appeals. Examining the outcome of appeals is a bit more complicated than reporting the outcome of district court cases. Many district court cases may be included in a single appellate case. Likewise, a single district court case may be associated with multiple appeals. In one analysis, we considered the outcome of the district court case given the

appeal.¹³ Between January 2012 and July 2018 there were 883 district court cases associated with at least one appeal, 189 (102 pilot and 87 non-pilot cases) of which had the appeal still pending at the time of this analysis. While there have been slightly more substantive decisions (decisions other than “dismissed”) in non-pilot cases than pilot cases, the substantive outcomes are not significantly different in terms of affirmances and reversals.

The overwhelming affirmance of district court decisions suggests that further investigation of appellate court decisions in pilot cases is unlikely to produce fruitful results. Nonetheless, we will continue to monitor appeals of PPP cases to determine if these trends continue.

Venue

Although the Eastern District of Texas continues to manage the bulk of patent cases included in the study, their share of the caseload is declining. This trend began before the Supreme Court’s decision in *TC Heartland LLC v. Kraft Foods Group Brands LLC*, and the pattern has continued. The district is on pace to see approximately 500 patent filings this year—60% of its filings last year. Other PPP districts, such as the Central District of California, the Northern District of California, and the District of New Jersey, saw patent filings rise in more recent years, but the largest increase in patent filings is outside the PPP in the District of Delaware. We will continue to monitor changes in the filing of patent cases in the wake of the decision in *TC Heartland*.

Future Analysis and Reports

Future analysis will continue to report on the topics discussed in this status update. Incorporating information from the FJC project team, CACM will collaborate with the Administrative Office director, in consultation with the chief judge of each pilot district and the director of the FJC, to produce additional periodic updates and the Ten-Year Report to the Judiciary Committees of the House and the Senate required by the program’s implementing legislation. CACM will actively monitor and address any issues that have the potential to affect the operation of the pilot program within the pilot courts.

13. This analysis of appeals differs somewhat from that in the Five-Year Report, which presented the outcome of individual appeals rather than the outcome of the district court ruling. Here we report the outcome of the district court case after the appeal.