

ANY GIVEN FORUM: A PROPOSED SOLUTION TO THE INEQUITABLE ECONOMIC ADVANTAGE THAT ARISES WHEN NON-PRACTICING PATENT HOLDING ORGANIZATIONS PREDETERMINE FORUM

ADAM D. KLINE*

I. INTRODUCTION

File a patent infringement suit in Marshall, Texas, and your chances of winning at trial average eighty-eight percent;¹ file in New York, and your chances are cut to less than half.² The spoils of victory are greater in Marshall, as well, where juries are known for handing out “Texas-sized” awards.³ This kind of statistical variance among fora has long motivated sophisticated plaintiffs’ attorneys to carefully plan the selection of forum before filing a case,⁴ but

* Adam D. Kline received his J.D. from Temple University in May of 2007 and has been admitted to practice in Pennsylvania and New Jersey. He would like to thank Professor David G. Post for his guidance throughout this process; Mr. Steven Rocci for proposing the initial framework upon which this paper is erected; and his wife, Katherine, for more than can ever be written.

¹ Sam Williams, *A Haven for Patent Pirates*, MIT TECH. REV., Feb. 03, 2006, para. 11, <http://www.technologyreview.com/article/16546/>; see also Julie Creswell, *So Small a Town, So Many Patent Suits*, N.Y. TIMES, Sept. 24, 2006, para. 9, available at <http://www.nytimes.com/2006/09/24/business/24ward.html> (citing a plaintiff success rate at trial of 78%).

² Creswell, *supra* note 1, para. 42. The national average success rate at trial for plaintiffs in a patent infringement suit is 59%. *Id.* para. 9; see also Williams, *supra* note 1, para. 11 (citing the national average success rate at trial for plaintiffs in a patent infringement case at 68%).

³ Creswell, *supra* note 1, para. 10.

⁴ This practice, known as “forum-selection,” or more pejoratively as “forum shopping,” is considered something of an unwanted but unavoidable byproduct of our jurisprudential system. Gita F. Rothschild, *The Big Picture: Forum Shopping*, 24 NO. 3 LITIG. 40, 40 (1998). Forum shopping is a broad term describing a number of different means of determining the