

# Update on Patent Reform Legislation

Christian E. Mammen

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Hogan Lovells LimeGreen IP

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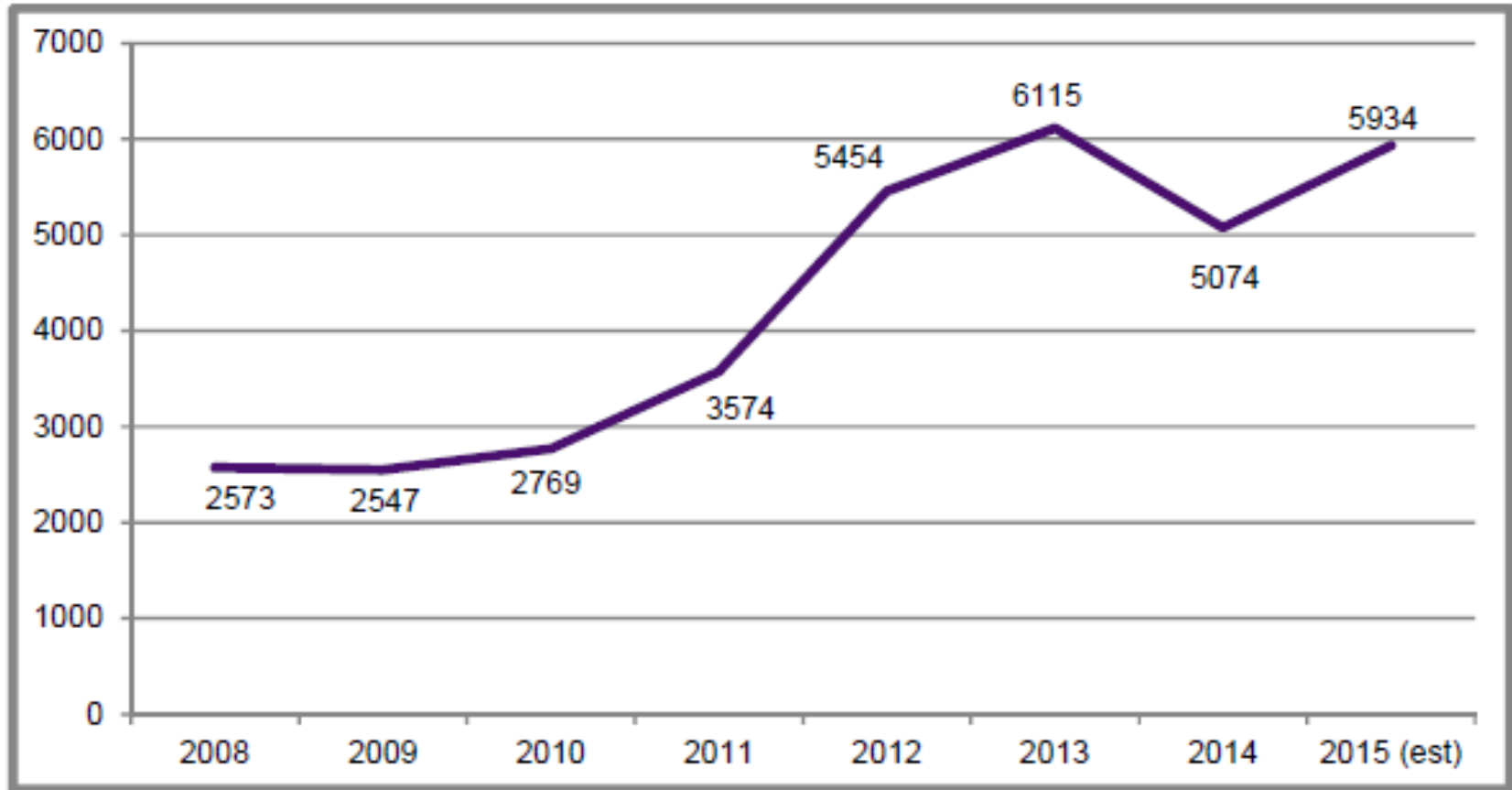
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# Patent Litigation Trends

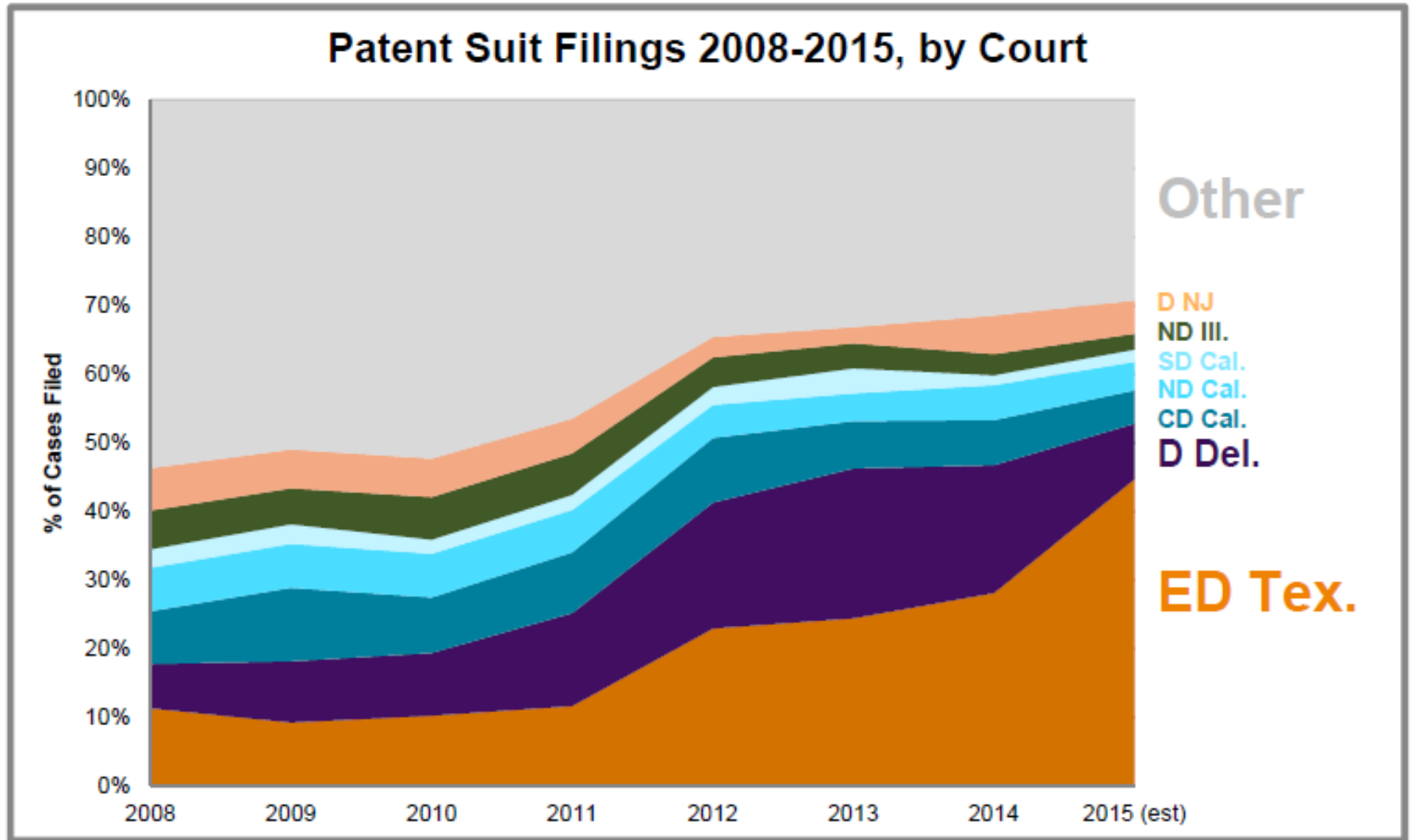


# Numbers of Cases Filed

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# Where Cases are Filed



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# **Patent Reform Legislation (and Rule Changes Concerning Pleading Standards)**



# Pleading Standards

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- Form 18 has provided bare-bones pleading standard since the 1940's (FRCP 84 endorses the Appendix of Forms)
- *Twombly* and *Iqbal* have generally increased level of factual detail required – sufficient facts to show that claim is “plausible”
- But Form 18 trumps *Twombly*
- Form 18 has been held to apply only to direct infringement, not to induced or contributory infringement
- Judicial Council has slated FRCP 84 and entire Appendix of Forms to be abolished, effective December 1, 2015

# Pending Patent Reform Legislation

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- H.R. 9: **Innovation Act** (introduced by Rep. Goodlatte) (identical to H.R. 3309 in previous session of Congress)
- S. 632: Support Technology and Research for Our Nation's Growth (**STRONG**) **Patents Act** of 2015 (introduced by Sen. Coons)
- H.R. 2045: Targeting Rogue and Opaque Letters (**TROL**) **Act** of 2015 (introduced by Rep. Burgess); reported out of committee on April 30, 2015
- S.1137: Protecting American Talent and Entrepreneurship (**PATENT**) **Act** of 2015 (introduced by Sens. Grassley, Leahy, Cornyn, Schumer, Lee, Hatch and Klobuchar)

# Topics Covered by Patent Reform Bills

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- **Litigation reform** → make it harder for NPEs to exploit litigation costs to extract settlements on poor-quality claims
- **Demand letters** → establish and enforce standards regulating the content of pre-suit demand letters
- **PTAB proceedings** → harmonize proceedings with district court litigation and reduce odds that PTAB proceedings are “death squads” for patents
- **Miscellaneous** → studies, technical amendments and small business outreach



# Litigation Reform

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- Pleading Standards
  - Eliminate Form 18 (Federal Rules of Civil Procedure)
    - Already slated for elimination on December 1, 2015
  - Detailed Pleading Requirements
    - Asserted patents, claims
    - Accused products
    - Infringement claim charts
    - Authority to sue
    - Beneficial owners
    - Litigation history of patent
    - Whether SEP, whether FRAND obligation
- Customer Suits
  - Stay suits against customers if manufacturer willing to step in and defend
- Venue Reform

# Litigation Reform

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- Discovery Limits
  - Stay of Discovery
    - Until claim construction
    - While certain pre-answer motions are pending
  - “Core Documentary Evidence”
    - 9 specified categories (invention, prior art, profits, notice, licenses)
    - Judicial Council to define
  - Limits on e-mail
  - Limits on source code
  - Cost-shifting (requester must post bond for costs and attorneys’ fees for non- “core” discovery)
- Case Management Procedures
  - Identify case-dispositive issues for early resolution

# Litigation Reform

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- Transparency of Ownership
  - Increased reporting requirements to PTO and parties when patents assigned
- Attorneys' Fees to Prevailing Party
  - Current rule: fees awarded in exceptional cases
  - Proposal:
    - Fees awarded to prevailing party unless non-prevailing party's position "substantially justified"
    - Fees awarded only if "position" and "conduct" of non-prevailing party was not "objectively reasonable"
  - Mechanisms to collect fee awards from interested parties if non-prevailing plaintiff is an NPE/unable to pay
- Drug patent cases (§ 271(e)) exempt from many changes
  - Pleading standard, customer stay, discovery limits, fee shifting

# Regulating Demand Letters

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- Inadequate Demand Letters
  - Don't contain enough detail about the alleged infringement
  - Remedies
    - No enhanced damages for willful infringement
    - Extra time to respond to Complaint
- Bad Faith/Abusive Demand Letters
  - Misleading and intimidating
  - Remedies:
    - Unfair business practice
    - FTC enforcement
  - Federal preemption

# Modifying PTAB Proceedings

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- Align with District Court Standards
  - Claim construction
    - Use POSITA standard instead of BRI
  - Presumption of validity
  - Petitioners must have Article III standing (i.e., have been sued for, or accused of, infringement)
- Patentee May Amend Claims
- Discovery of Petitioner's Real Party in Interest
- Judges
  - Judge who instituted review cannot sit on 3-judge merits panel

# Miscellaneous

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- Eliminate PTO fee diversion
- Additional protections for universities and tech transfer offices
- Support small businesses
- Protection of IP rights in bankruptcy
- Other miscellaneous studies

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# Questions?



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