

FORUM SELLING

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FOR CURRENT DRAFT**

Abstract

Forum shopping—plaintiffs’ selection of the most favorable possible jurisdiction—is well-recognized and often criticized. To date, analysis has focused on the buyer’s side of the forum-choice market: how and why plaintiffs choose between jurisdictions. Little attention has been paid to the seller’s side. Do judges and courts try to attract cases? If so, why and how?

Judges and jurisdictions are sometimes active participants in the forum-choice market, a phenomenon we call “forum selling.” For example, the desire to attract patent cases has led districts to adopt specialized local rules and enhance judicial specialization. Forum selling, however, is not limited to just efficiency and expertise. Because ordinarily the plaintiff chooses the forum, a court that wants to attract more cases may offer plaintiff-favoring procedures, procedures that are often shielded from appellate review by deferential standards of review and the final judgment rule.

The Eastern District of Texas vividly illustrates forum selling. Seeking more interesting work, prestige, and economic benefits for the community and perhaps themselves, judges in the Eastern District have adopted a variety of pro-plaintiff procedures that depart from mainstream doctrine in areas such as summary judgment, transfer, stays pending reexamination, joinder, and case assignment. Other districts, like Delaware and the Western District of Wisconsin, may also be forum selling in patent cases. Non-patent examples of forum selling range from class actions to ICANN domain name arbitration to common law judging in pre-modern England.

Forum shopping and its corollary, forum selling, are possible only when jurisdictional and venue principles give plaintiffs broad choice of forum. Forum selling thus provides a new rationale for constitutional restrictions on personal jurisdiction. By tilting the law in a pro-plaintiff direction, forum selling undermines adjudicatory fairness, a key concern of the Due Process Clause. Restrictions on personal jurisdiction reduce plaintiff’s jurisdictional choices and thus reduce the incentive of judges to distort the law to attract cases.

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