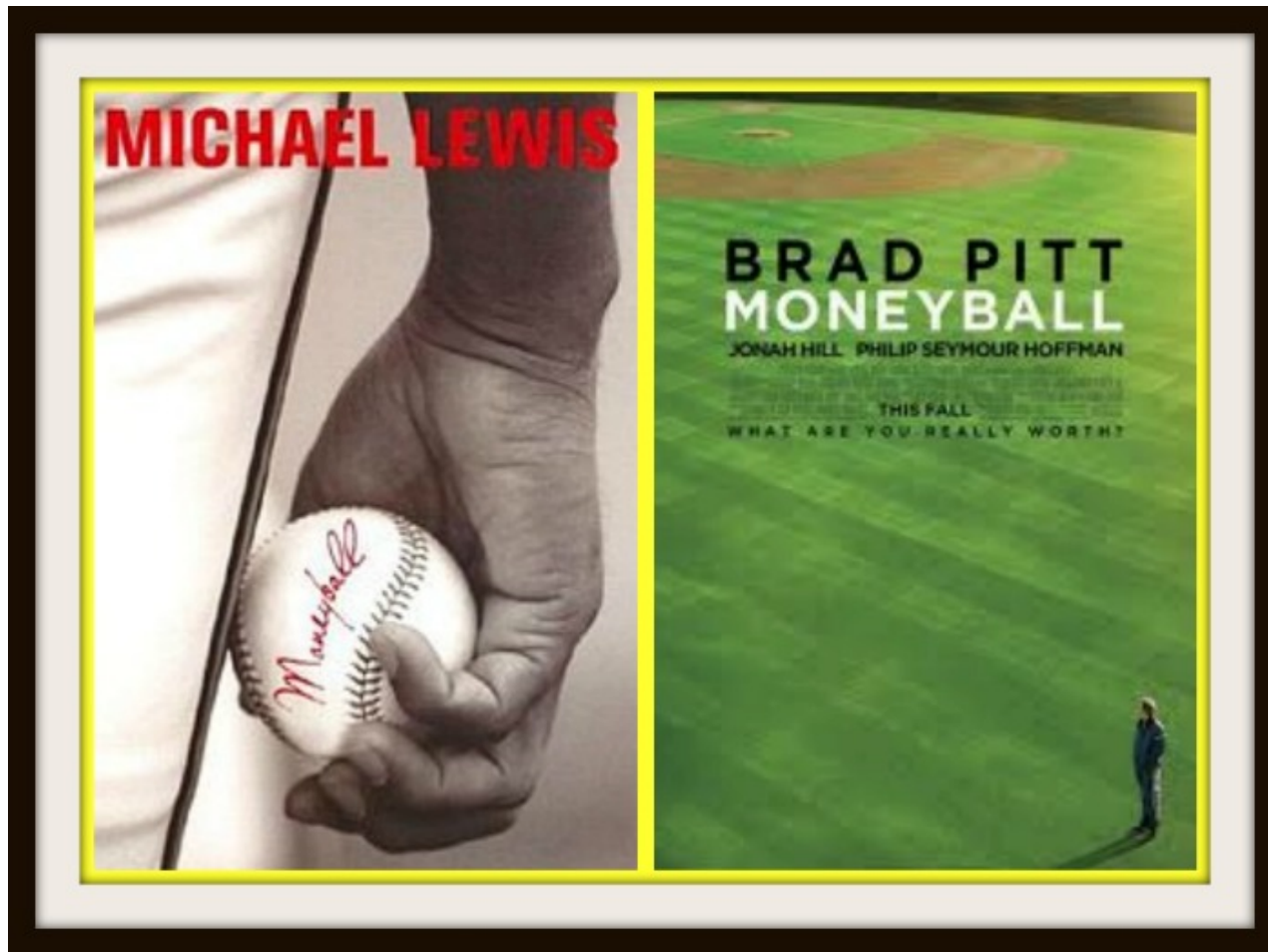


Moneyball Takes the Bench:
Using Statistical Analysis of Judges
and Courts to your Advantage

By Scott Young

What is Moneyball?



History and Tradition vs. Data

- “Baseball has so much history and tradition. You can respect it, or you can exploit it for profit.” Michael Lewis, Moneyball
- Similarly, courts are a bastion of history and tradition.
- We respect the Bench, but we can better understand patterns in judicial decisions to help our clients.

Old Way (from My Cousin Vinny)

- How do lawyers analyze judges?
 - Personal experiences (hearings, motions, etc.)
 - Hearsay (what they hear from other lawyers)
 - Reputation (liberal/conservative, “old school,” or where they went to school)
- Problems this poses
 - Personal experiences (limited number, perception bias, overvaluation of one decision)
 - Hearsay (we won’t let it in court because it is unreliable, so why would use it to evaluate judges)
 - Reputation (hearsay on hearsay)

New Way

- Statistical Analysis of a court's or individual judge's decisions to determine biases and trends → more informed strategic decisions for our clients

Why is this so important?

- Because litigation, not baseball, is the real Moneyball.
 - In 2014, MLB recorded approximately \$9 billion in gross revenues (Forbes, Major League Baseball Sees Record \$9 Billion in Revenues for 2014, 12.10.14)
 - Litigation costs approximately \$264 billion per year (Institute for Legal Reform, Lawsuit Abuse Impact, US Chamber of Commerce)
 - 30 times the amount baseball earns
 - “Litigation costs small businesses in America over \$100 billion per year.”
- Major League Baseball is, in comparison, the Minor Leagues.

Why is this so important? Cont.

- Because judges, not juries, make nearly every critical decision in a lawsuit.
 - “[O]ur federal courts actually tried fewer cases in 2002 than they did in 1962, despite a fivefold increase in the number of civil filings and more than a doubling of the criminal filings over the same time frame. In 1962, 11.5% of federal civil cases were disposed of by trial. By 2002, that figure had plummeted to 1.8%.” (ABA Litigation Online, Opening Statement: the Vanishing Trial, Patricia Lee Refo, Winter 2004).
 - “In the 22 states for which data is available, civil jury trials are down by 28 percent and, in 2002, represented 0.6 percent of the total civil dispositions.”

4 Case Studies

- Venue v. Venue
 - Patent infringement claims in NoCal and East Texas
- My Venue
 - Excessive force claims in Ferguson, Missouri
- My Judge
 - Constitutional claims before a federal district judge
- My Statute
 - Governmental immunity statute in state and federal court

Case Study #1 – Venue v. Venue

Patent Claims

- Widespread perception that the U.S. District Court for the District of Texas favors Plaintiffs in patent infringement cases compared with the Northern District of California
 - “Most importantly, defendants are very unlikely to win a case on summary judgment, as judges in the district are much more likely to find that it’s appropriate for juries to rule on patent issues. That dramatically raises the cost, and risk, for defendants.” (“Why East Texas Courts are Back on “Top” for Patent Lawsuits,” Joe Mullin, 1.16.2003)
- Is this true? Is the Eastern District of Texas more favorable to Plaintiffs?

What we looked at

- Patent Infringement Claims
- Motions for Summary Judgment
- Federal district court – Northern District of California v. Eastern District of Texas
- 2012-May of 2015

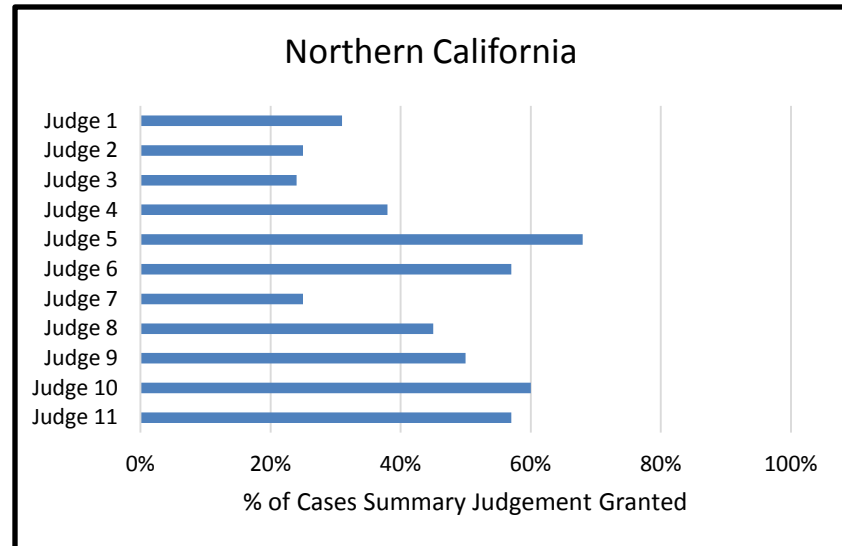
Results

- NoCal – 47% of the time summary judgment is granted (64 of 136)
- East Texas – 20% of the time summary judgment is granted (14 of 72)
- So, in the aggregate, the data supports the conclusion that East Texas is a more favorable venue for Plaintiffs facing a motion for summary judgment.
- But ...

What about individual judges?

- In breaking the data down further by judge, we found a very wide disparity.
- In NoCal, we reviewed judges who had issued at least 5 summary judgment opinions between 2012-May of 2015 and found a very wide (and important) disparity:

Judge 1	31%
Judge2	25%
Judge 3	24%
Judge 4	38%
Judge 5	68%
Judge 6	57%
Judge 7	25%
Judge 8	45%
Judge 9	50%
Judge 10	60%
Judge 11	57%

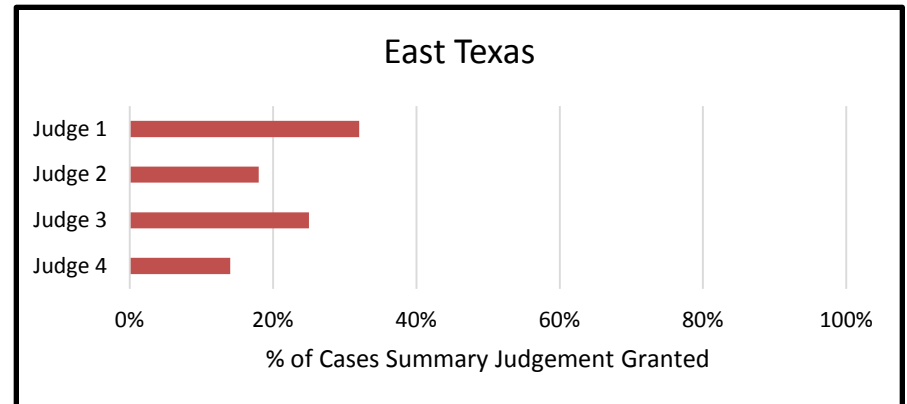


- Based on what judge you draw, the range of success goes from 24% to 68%.
- 3 judges grant summary judgment in patent infringement cases 25% of the time or less, while 4 judges grant summary judgment 55% of the time or more.
- This is a huge disparity with significant implications for litigation strategy.

How does East Texas compare?

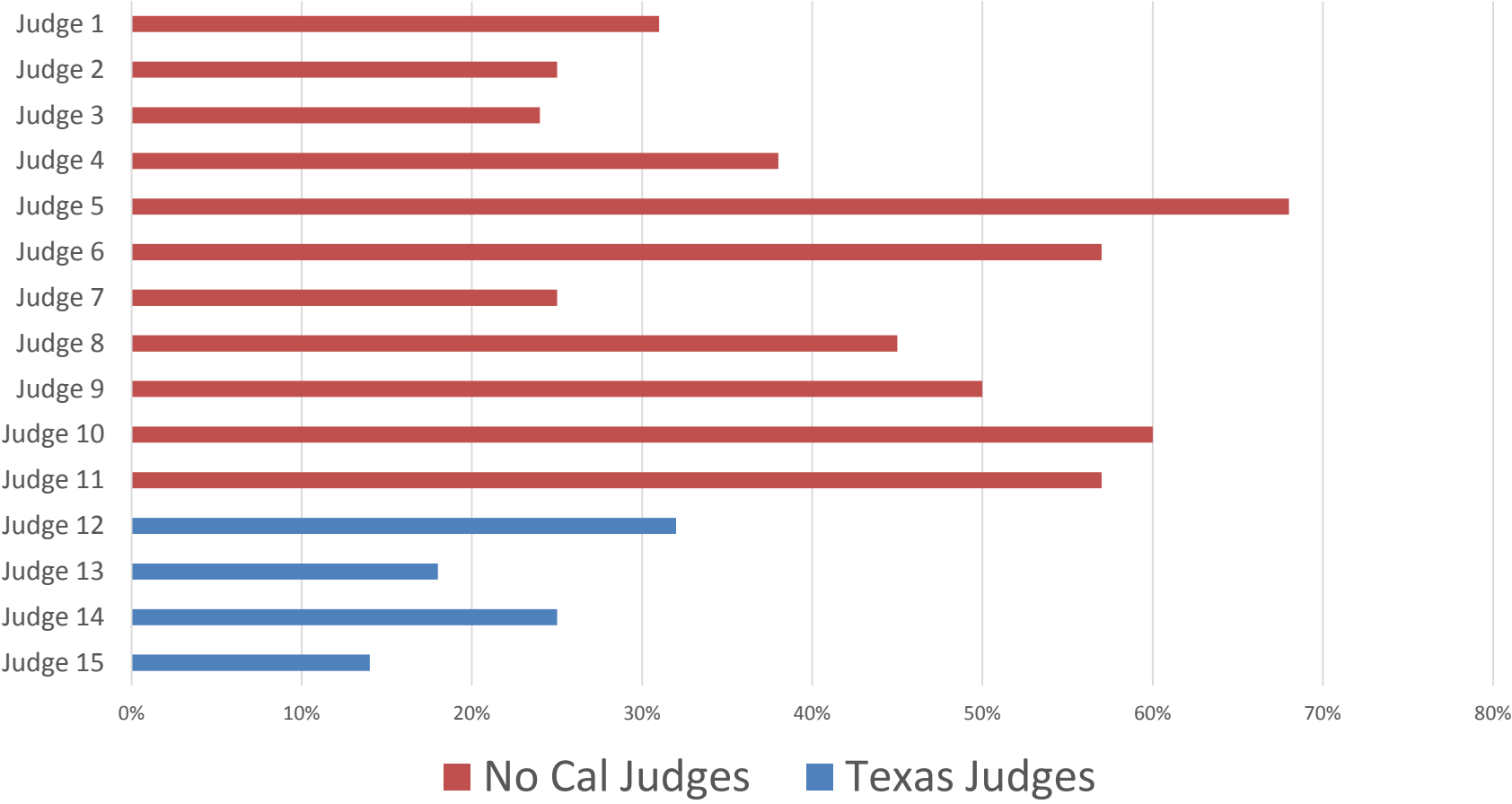
- Only 4 judges with 5 or more opinions issued on patent infringement summary judgment motions.

Judge 1	32%
Judge2	18%
Judge 3	25%
Judge 4	14%



- Of those 4 judges, none granted summary judgment more than 1/3 of the time.
- Summary judgment granted much less often than in NoCal.

Comparison of No. California and East Texas Judges



How does this influence strategy?

- Take steps to make sure your client is in the most favorable venue.
 - Pre-Emptive Claims
 - Race to the court
- Impact on resolution strategy once a case is filed and venue is settled
 - Change in settlement discussion dynamic, time frame

Conclusion

- Mark Twain once said, “Figures often beguile me, particularly when I have the arranging of them myself; in which case the remark attributed to Disraeli would often apply with justice and force: “There are three kinds of lies: lies, damned lies and statistics.”

- Mark Twain's Own Autobiography: The Chapters from the North American Review

- But Mark Twain wasn't representing clients in multi-million dollar litigation.
- I think it is clear that statistical analysis of your judge can provide valuable data about the critical decisionmaker, and this can shape strategy – should we file a motion to dismiss, an offer of judgment, should we mediate, should we remove, etc.

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