

Comment from Consultative Group Member Jeffrey Sears  
on *U.S. Patent Small Claims Court Study*  
August 4, 2022

I really enjoyed yesterday's discussion – I am thrilled to be part of the consultative group! Having now reflected on the discussion, I would like to offer the below additional comments.

- In my view, the goal of a small claims patent court is to eliminate abuses of the Article III court system by “Goliaths” (which may be either practicing entities (PEs) or non-practicing entities (NPEs)) against small businesses (as the term is defined by the US SBA).
- Given the current status of Article III litigation, Goliaths/PEs can rip off small businesses with impunity, and small businesses are powerless to stop it. Making effective use of Article III courts requires having (a) the access to tremendous legal resources and (b) the ability to survive as a business for years while infringement continues unabated and until an executable final judgment arrives. Small businesses don't have (a) *unless* they give up a huge percentage of the upside (typically, 40%+), via either litigation financing or contingency-fee engagements, neither of which is commercially realistic. Small businesses don't have (b) *ab initio*. A small claims patent court could remedy this status by giving small businesses access to a streamlined, discovery-lite forum. Certainly, this access should come with some sort of tradeoff, perhaps in terms of damages that can be recovered (e.g., limiting jurisdiction to claims of \$10M or less). Presumably, since the forum is streamlined and friendly to small business, small businesses will get to the courthouse quicker, so the accrued damages will be smaller rather than larger, and the \$10M threshold would be adequate to level the playing field against Goliath/PEs.
- I see the real challenge here as being how to create a forum that solves the “Goliaths/PEs against small business” problem while not creating the reverse problem – emboldening Goliaths/NPEs against small businesses. My understanding is that Goliath/NPEs typically do not sue small businesses for small judgments in Article III courts because the cost of pursuing an Article III litigation is simply too high – the NPE's goal is to extract money, not force a company into bankruptcy because they can't pay the legal fees to defend the action. Giving Goliath/NPEs access to a streamlined small claims patent court might change the dynamic entirely to the detriment of small businesses. But I admit my understanding of the phenomenon is limited.
- Based on the above, I would suggest considering a jurisdiction based on both entity status and damages size – if you are a small business as defined by US SBA and the amount in dispute is \$10M or less, you can have access to the forum. This would solve the Goliath/PE problem while not creating the Goliath/NPE problem. But I do not know whether such a “lopsided” forum would pass legal muster.

I look forward to the next meeting!

Thanks  
Jeff