

Patent Office Litigation By the Numbers

How effective are the new procedures for resolving litigation? And how dangerous are the new procedures to your own patents?

Cooley

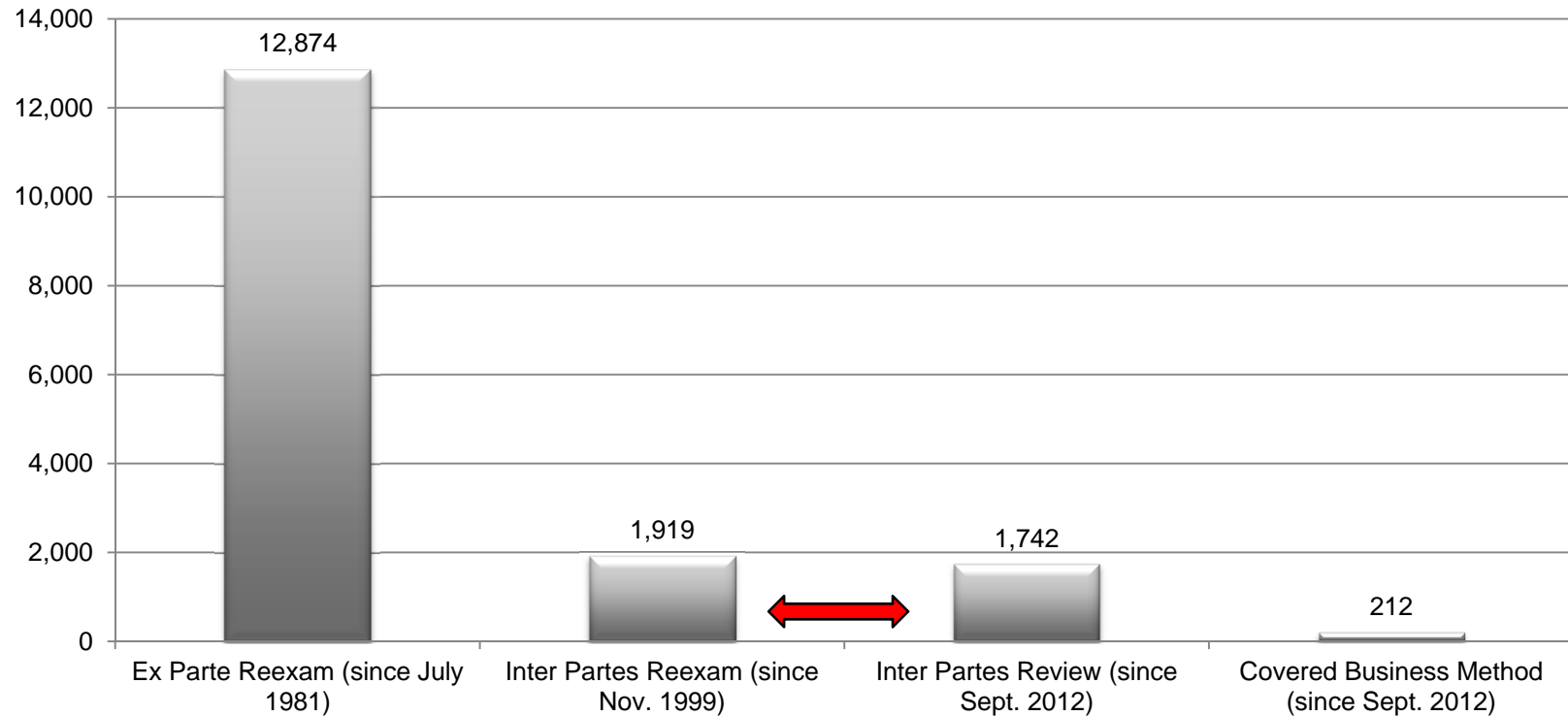


Post-Grant Proceeding Usage

The IPR process was adopted rapidly and is being used heavily

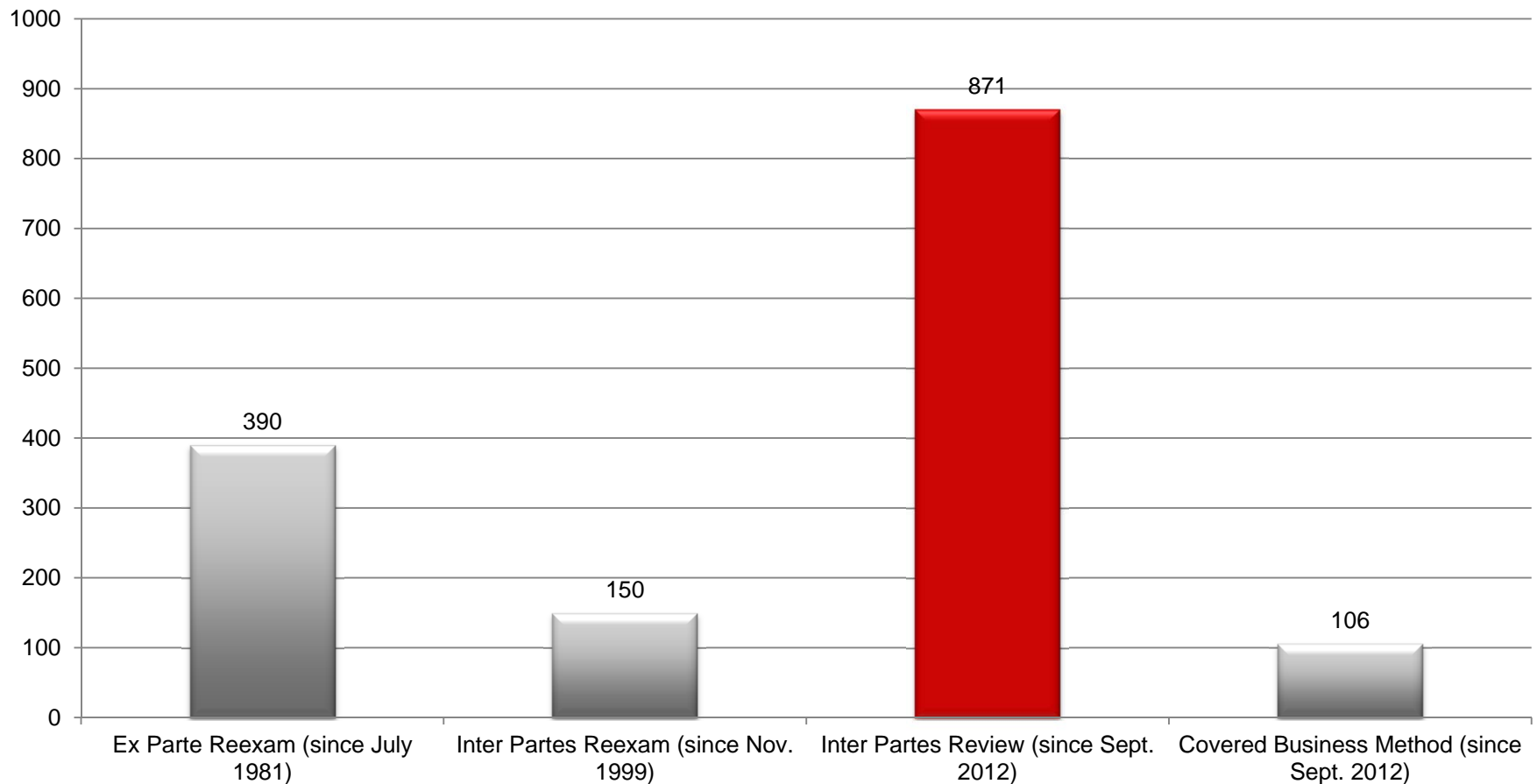
- ▶ 1,742 IPR petitions filed in 23 months

Petitions Filed in Post-Grant Proceedings



On an annualized basis, IPR filings exceed all other types of post-grant proceedings

Petitions Filed in Post-Grant Proceedings (Annualized)



During 2013, the Patent Office became the 3rd busiest litigation venue in the country

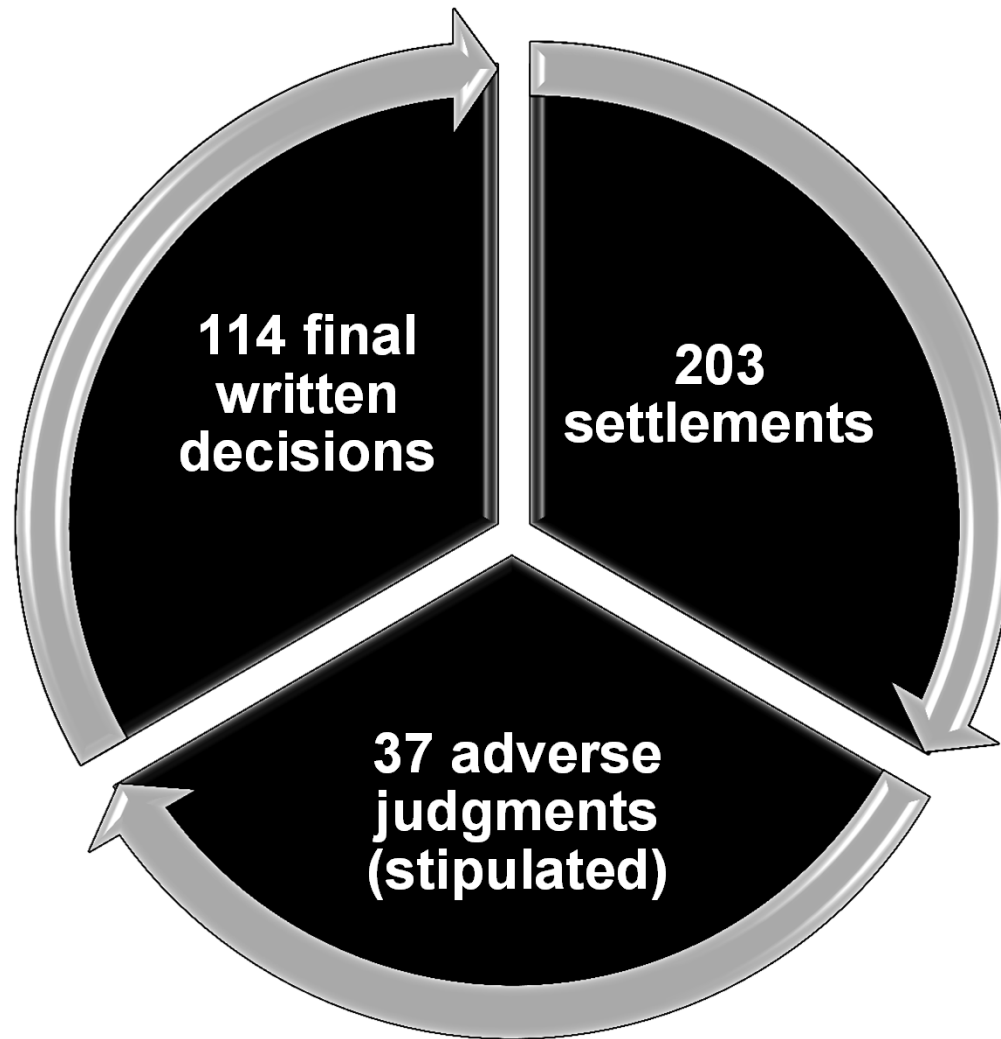


2013 Patent Case Filings – Top Five Venues	
EDTEX	1512
DDEL	1337
PTAB	562
CDCAL	408
NDCAL	247

The background features a complex geometric design. A red parallelogram is positioned in the upper right quadrant. A large, light gray halftone pattern is situated in the center-right area. The rest of the background is composed of various shades of gray and blue, with diagonal lines separating the different sections.

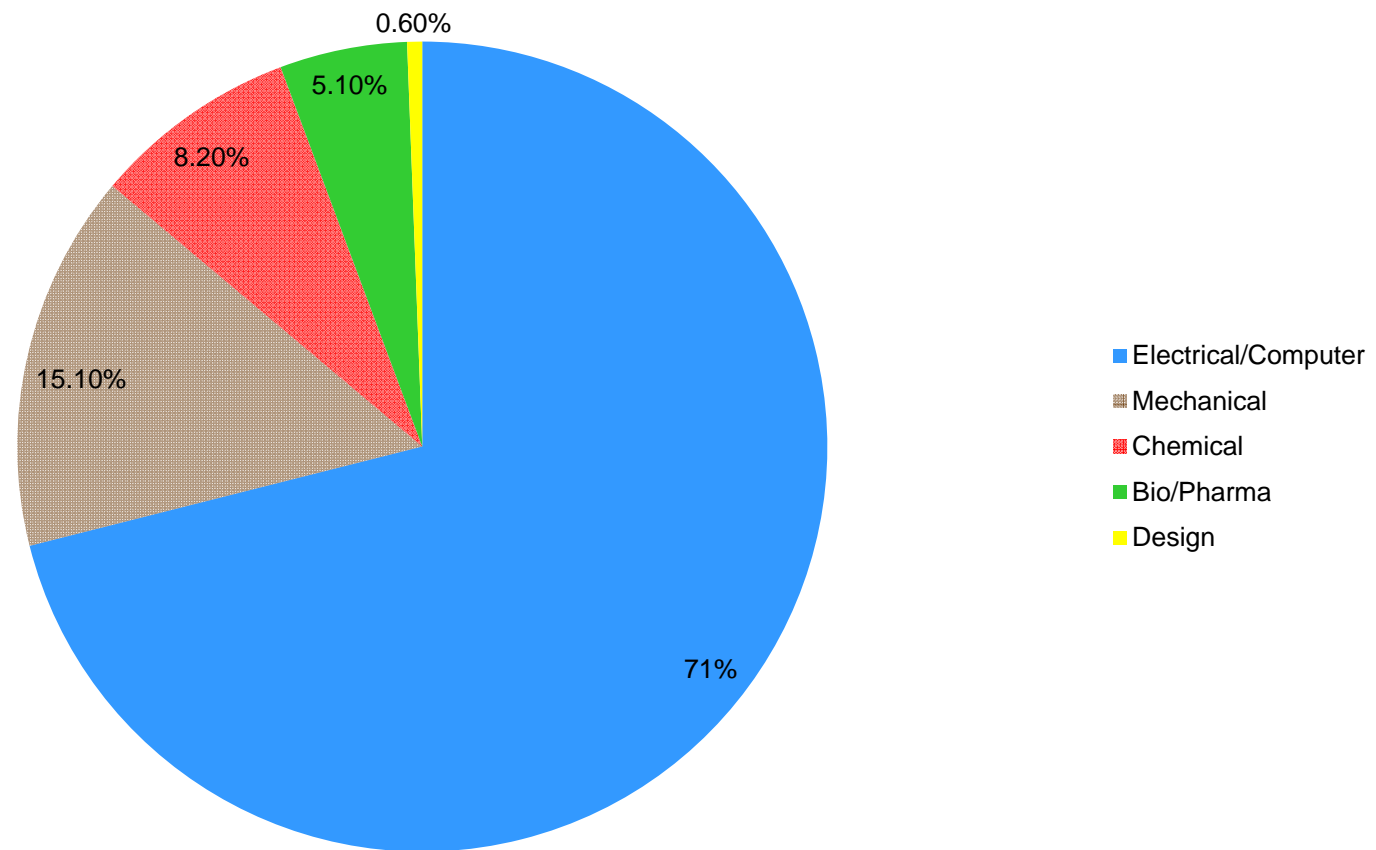
IPR Usage Data

IPR snapshot... as of September 11, 2014



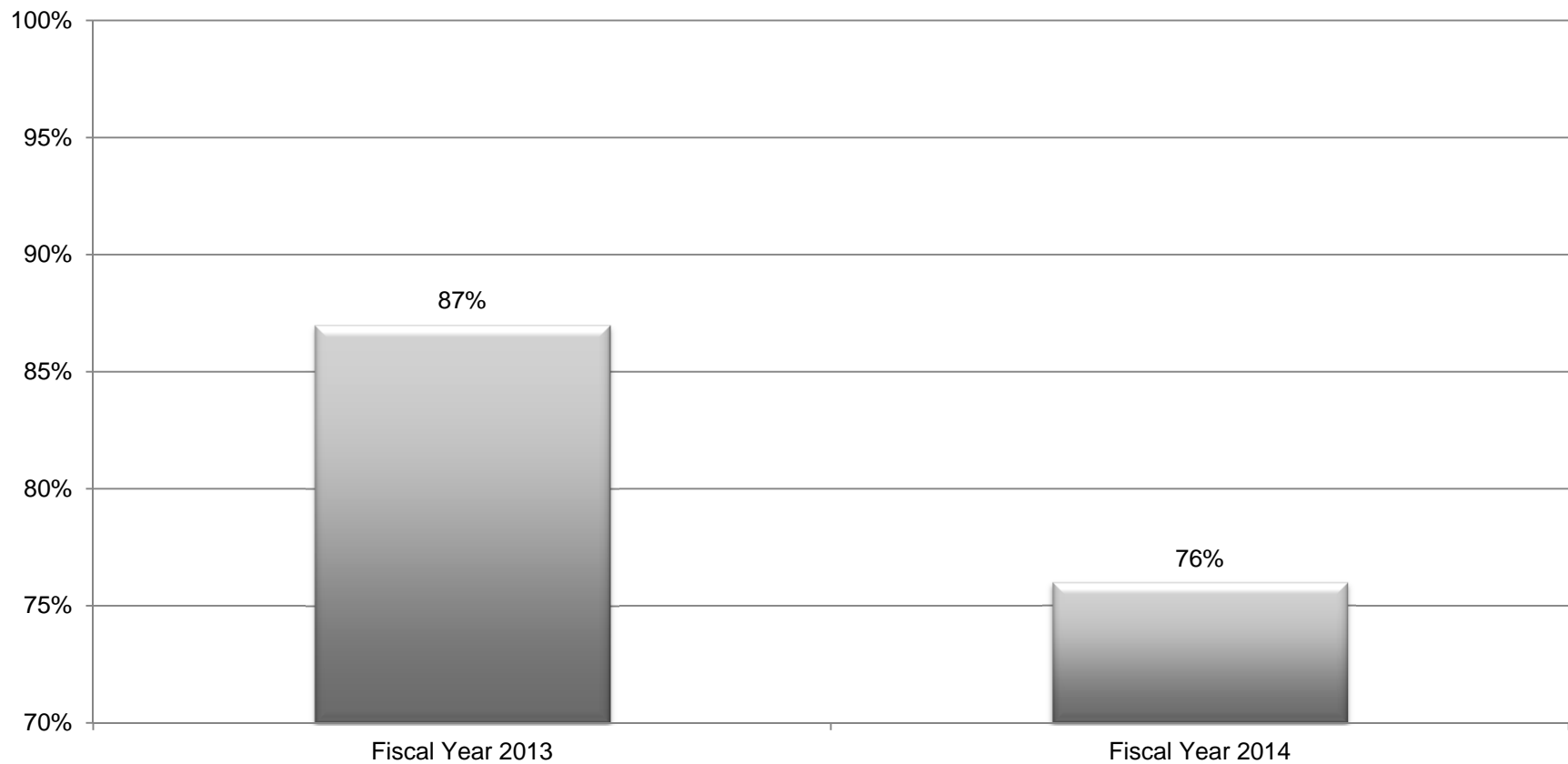
The majority of petitions (71%) focus on electrical and computer technologies

IPR Petitions by Technology Area



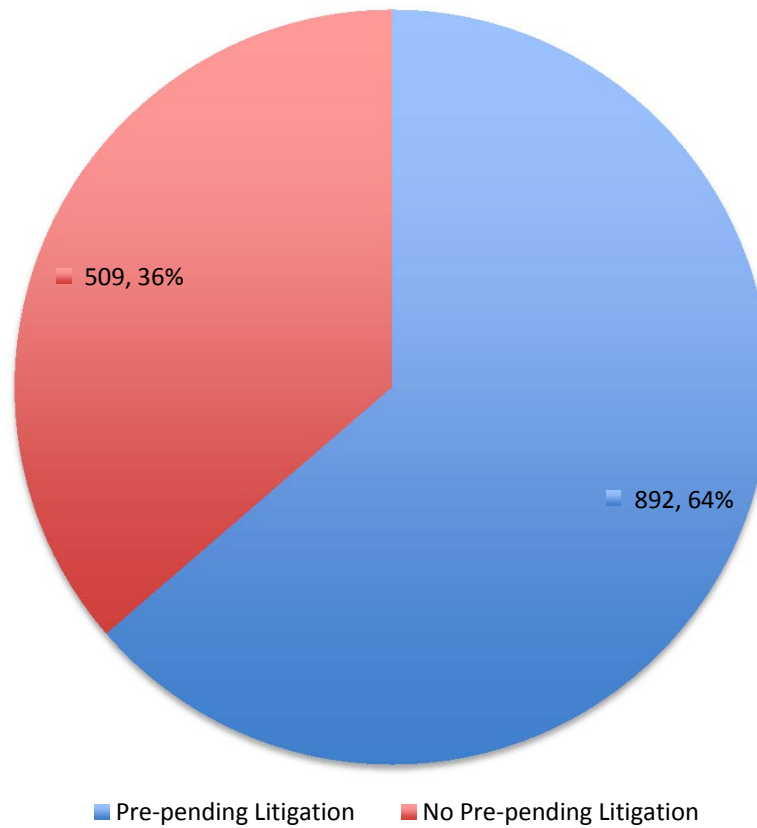
IPR institution rates declined from 87% last year to 76% so far this year

IPR Institution Rate by Year



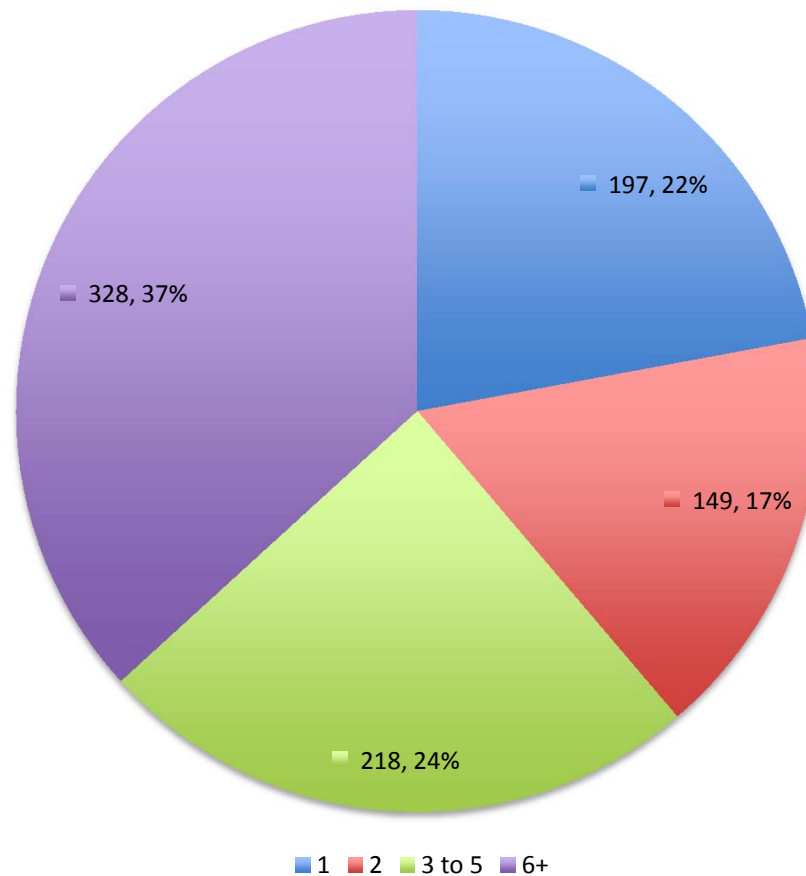
Two-thirds of IPRs arise out of pre-pending district court litigation

IPRs With Pre-pending Litigation



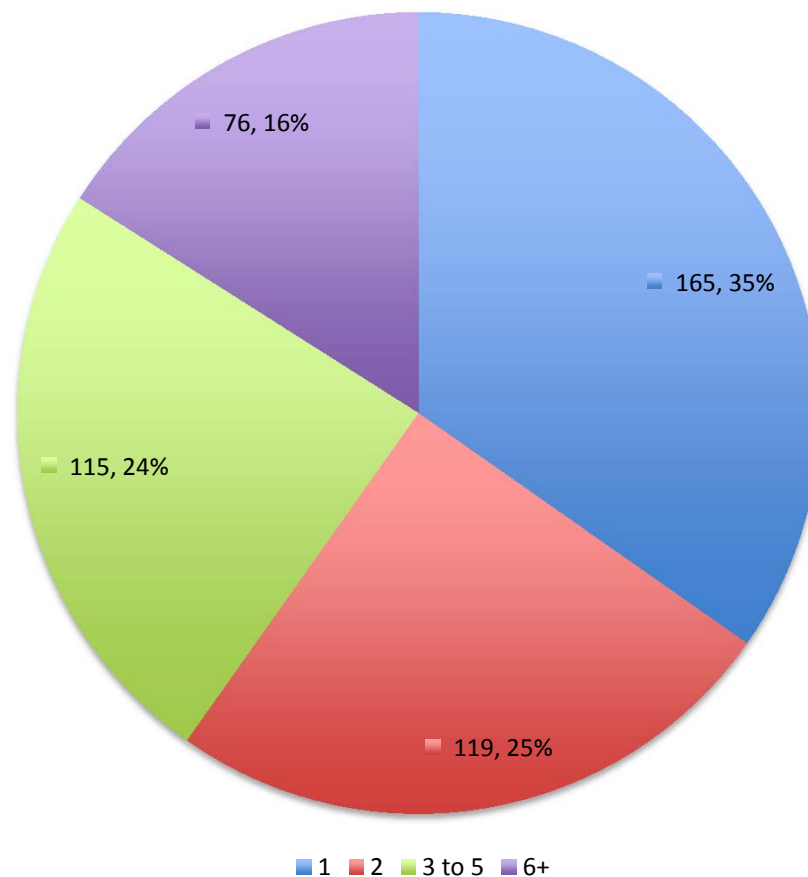
IPRs are being filed in many cases where multiple patents are asserted

of Patents At Issue



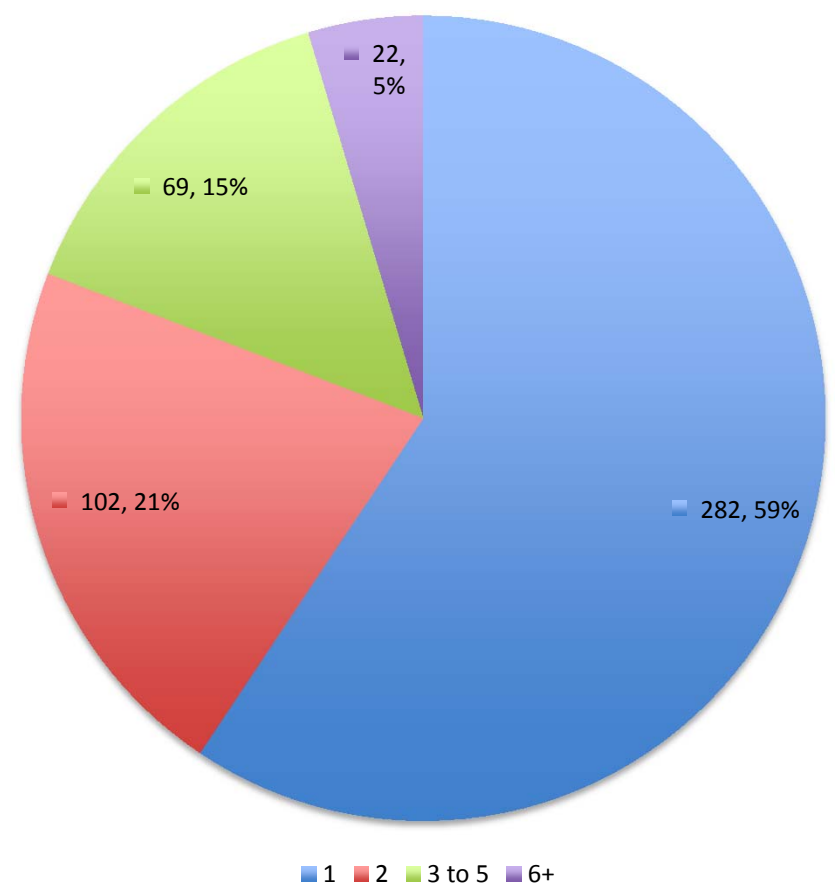
Filing multiple IPRs is often necessary after a lawsuit is filed – because of the number of patents asserted

Number of IPRs Filed within 365 Days of District Court Litigation Service



Filing more than one IPR per patent (by a company or group) is done in one-third of cases

Max # of IPRs Filed Within 365 days post-District Court Service *Per Patent*



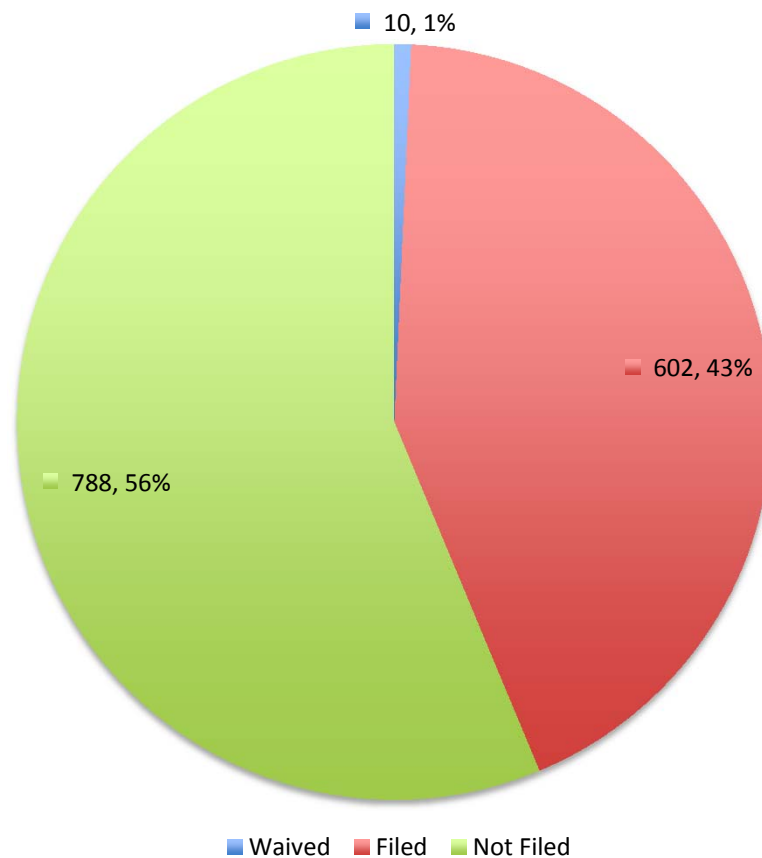
Most petitions are filed about 9 months after a petitioner is sued for infringement

All IPRs

	<u>Mean</u>	<u>Median</u>	<u>Mode</u>
Filing Times (Measured Post Lit. Service)	249	282	364

Less than half of patent owners file preliminary responses, and the number has been falling

Overall Preliminary Responses



Patent owner preliminary responses don't have much of an impact on institution rates



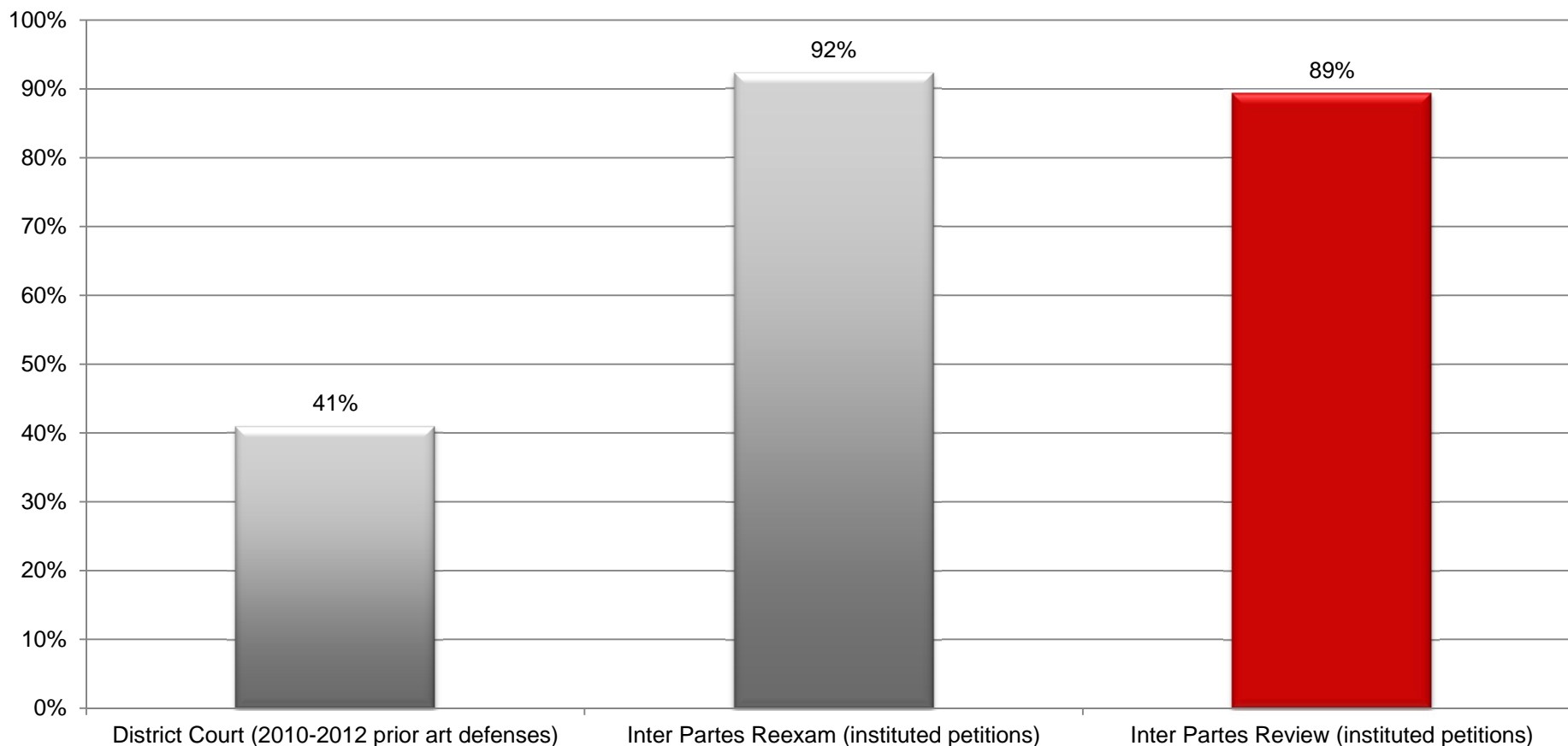
	<u>Baseline</u> <u>(All IPRs)</u>	<u>With Preliminary Response</u>	<u>Preliminary Response</u> <u>Waived</u>	<u>Without Preliminary</u> <u>Response</u>
Avg. Claim Institution Rate (# claims instituted / # claims challenged)	76.35%	74.93%	85.94%	79.31%



Preliminary IPR Win Rates

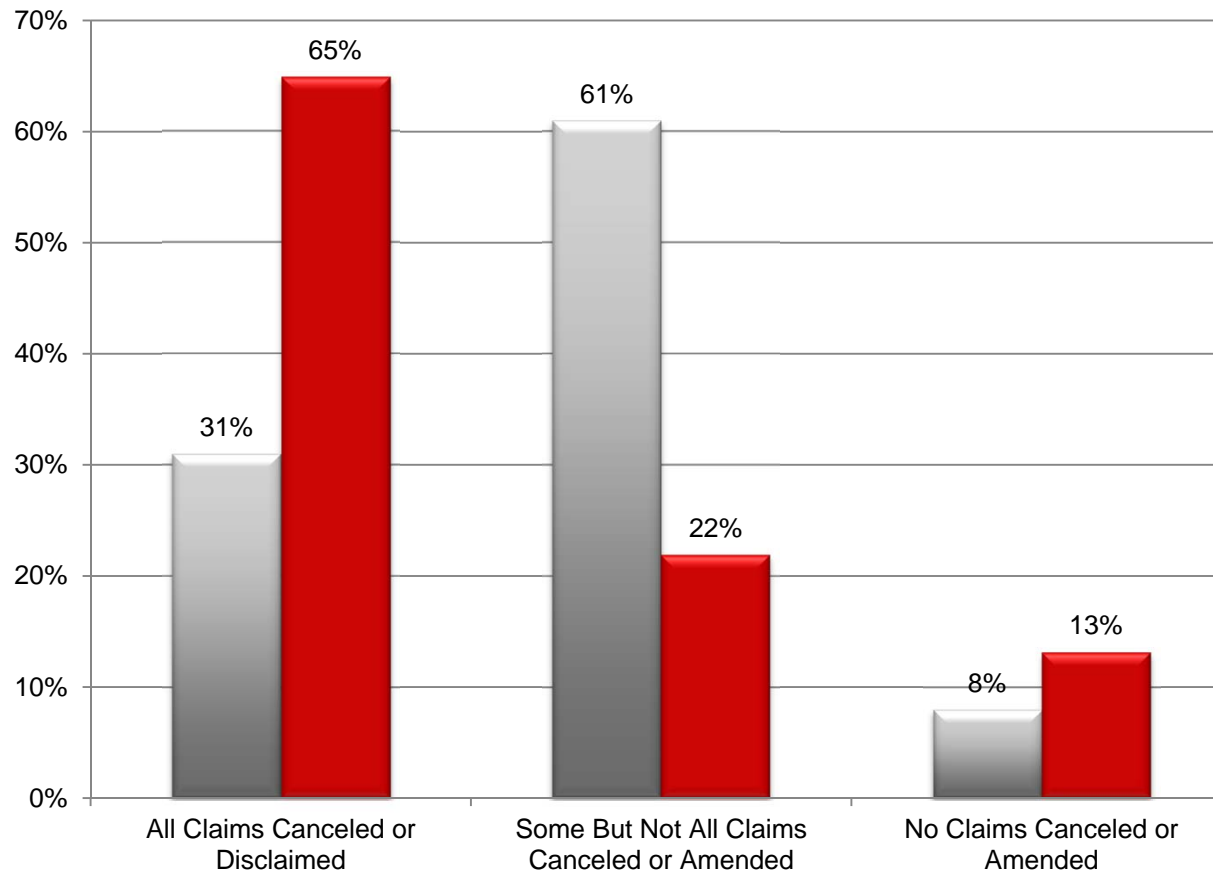
At the highest level of abstraction, IPR appears to be about as effective as *inter partes* reexam

Composite (Partial + Complete) Invalidity Win Rate



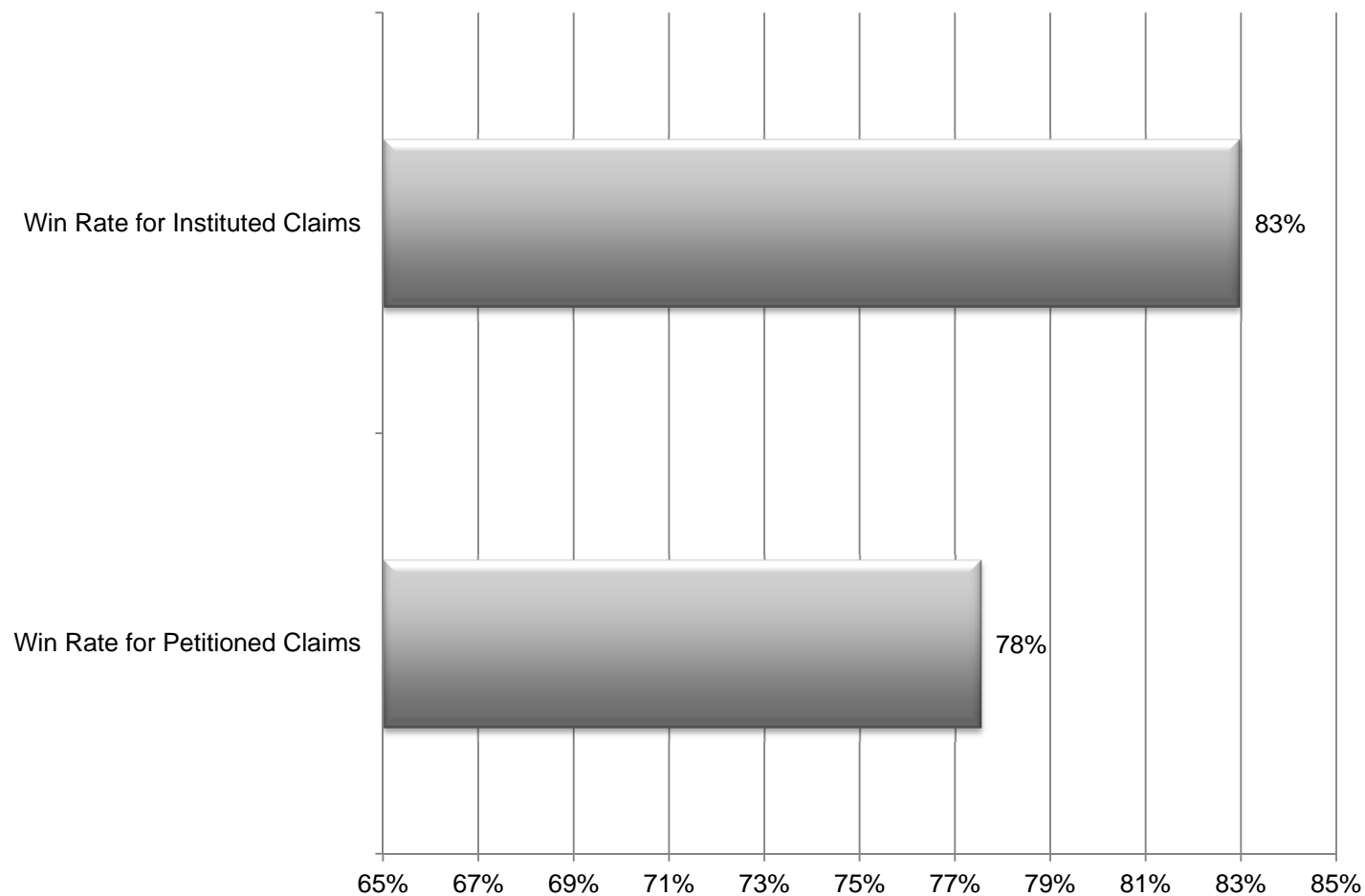
But a closer look reveals that IPRs have a much higher complete invalidation rate than *inter partes* reexamination

Inter Partes Reexam vs. Inter Partes Review (Excludes denials of petitions)



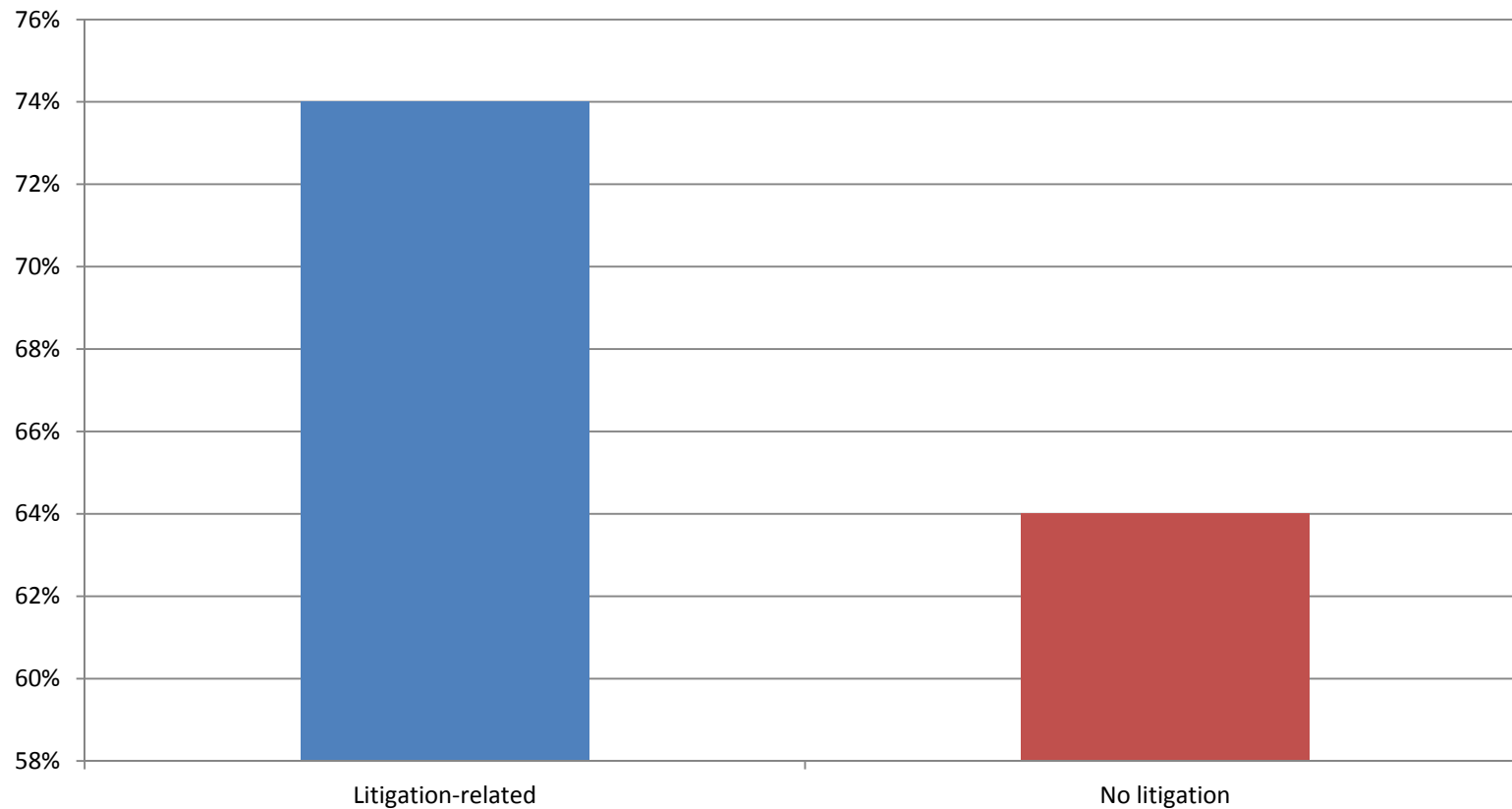
The average claim-based win rate for IPRs is 78% overall and 83% for instituted claims

Average IPR Petitioner Win Rates
(Only petitions with at least one claim instituted)



Win rate for litigation-related petitions is higher than petitions outside of litigation

Invalidation Rates: Lit. v. Non-litigation
(# invalidated / # challenged)





Strategies for Using Post-Grant Proceedings to Resolve Litigation

Techniques for handling three common categories of cases

- ▶ Case 1 – Simple Case
 - ▶ Strong invalidity arguments on all asserted claims
 - ▶ Limited number of asserted patents/claims

- ▶ Case 2 – Large Case
 - ▶ Strong invalidity arguments on all asserted claims
 - ▶ Large number of asserted patents/claims

- ▶ Case 3 – Complex Litigation
 - ▶ Strong invalidity arguments covering only a portion of asserted claims
 - ▶ Large number of asserted patents/claims

IPR Strategies for Case 1

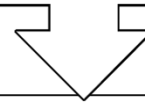
Simple Case – Limited Claims

Strong invalidity arguments on all asserted claims

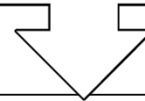
Limited number of asserted patents/claims

If you are going to file, position yourself for success by taking action early

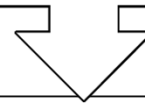
Immediately search for prior art and retain an expert



Identify likely asserted claims



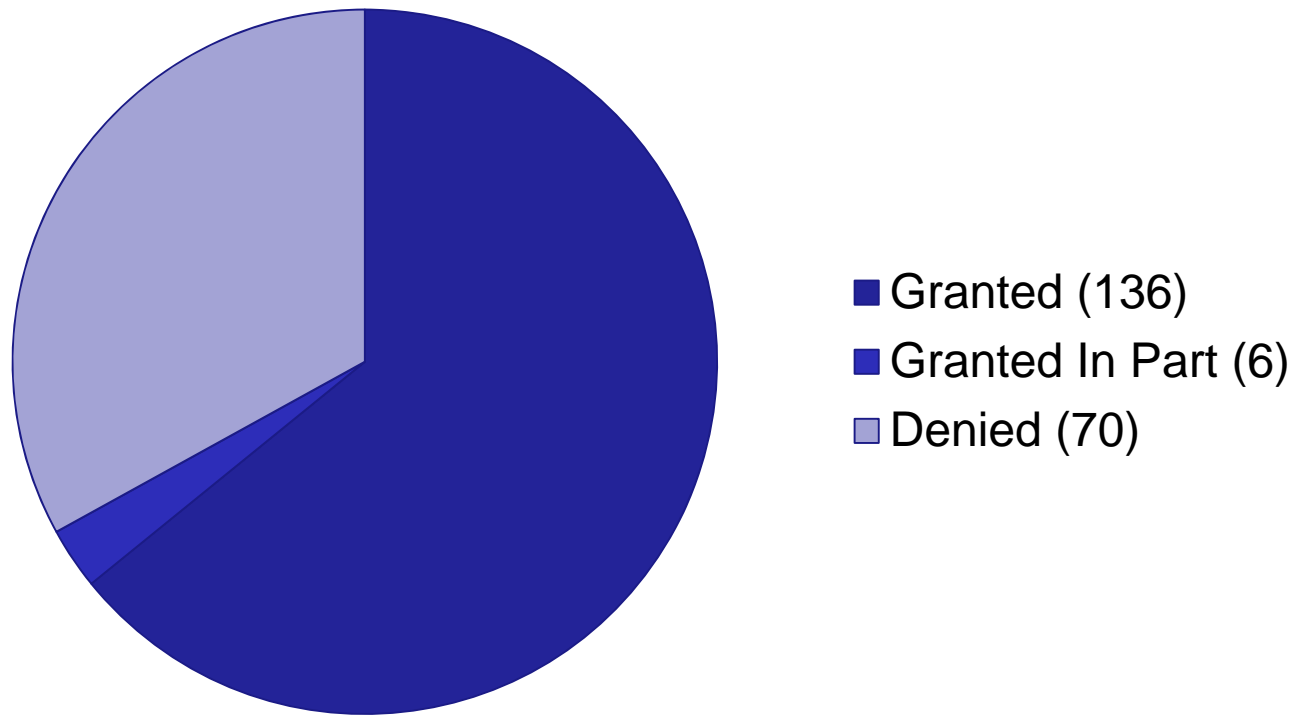
File petition for *inter partes* review



File immediate motion to stay litigation

A stay pending IPR is not guaranteed

Contested Stay Motions (2012-2014)



Overall Win Rate = 65.6%

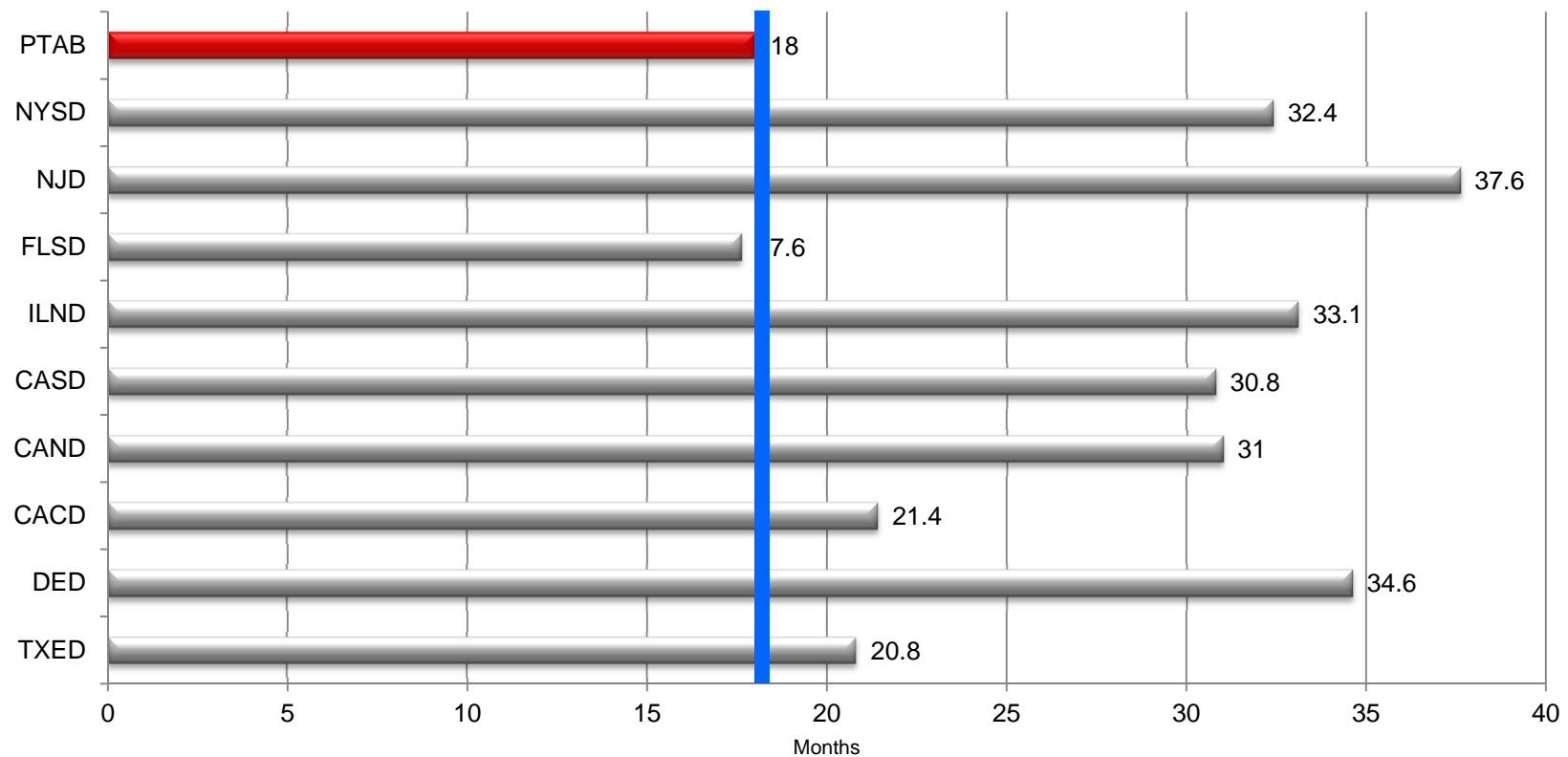
Some top patent jurisdictions appear to disfavor a stay pending IPR



- ▶ **E.D.Tex.** – 20.8% grant rate for contested stay motions (12 motions)
- ▶ **M.D.Fla.** – 33.3% grant rate for contested stay motions (6 motions)
- ▶ **D.Mass.** – 37.5% grant rate for contested stay motions (8 motions)
- ▶ **D.Conn.** – 50.0% grant rate for contested stay motions (2 motions)
- ▶ **S.D.Cal.** – 58.3% grant rate for contested stay motions (12 motions)

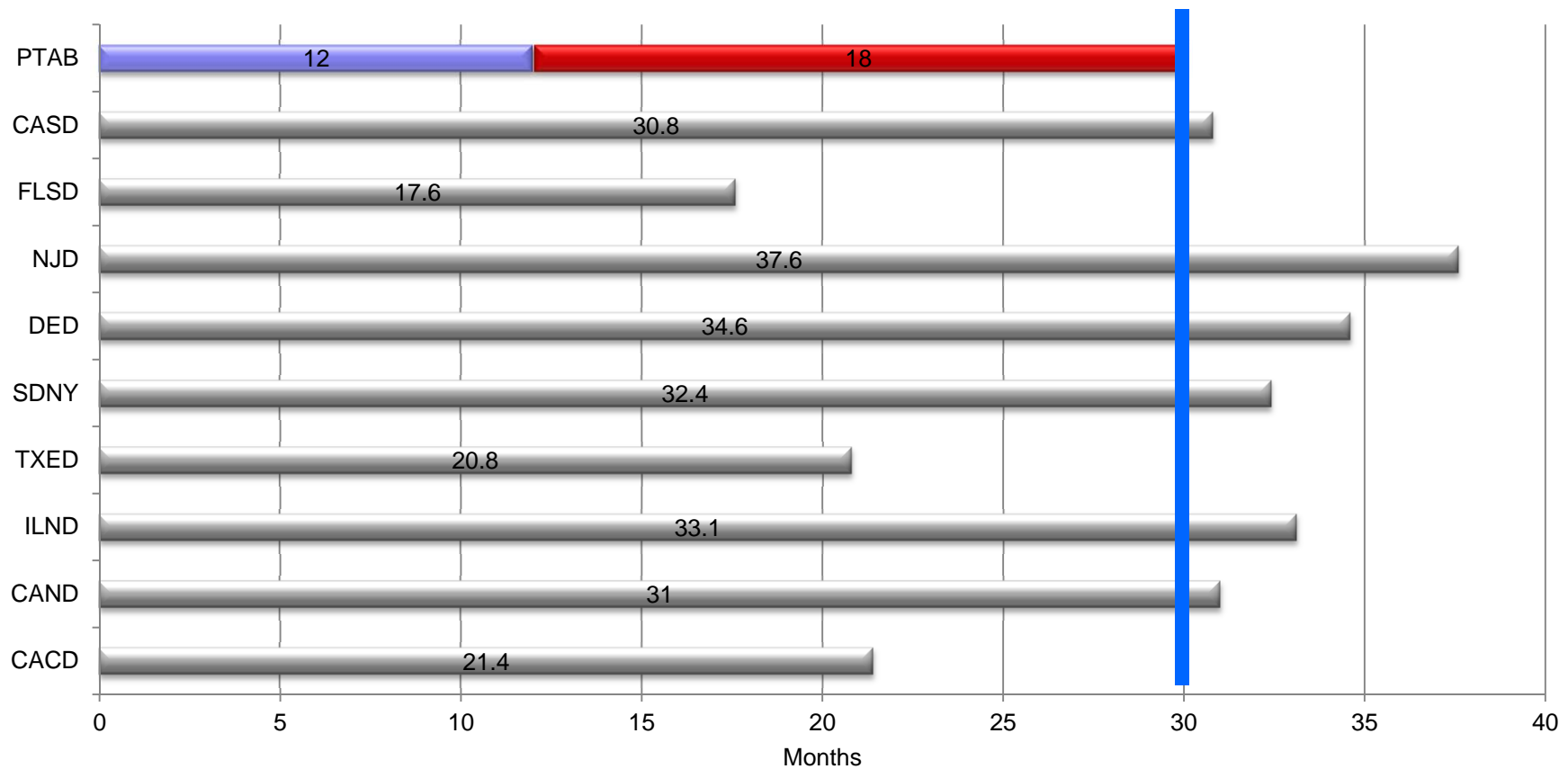
Results from early-filed IPRs are usable at trial in almost all venues—if necessary

Median Time to Trial Top Ten Patent Venues



IPR filing delay can cost you a stay and render results typically unusable in expert reports or at trial

Median Time to Trial
Top Ten Venues



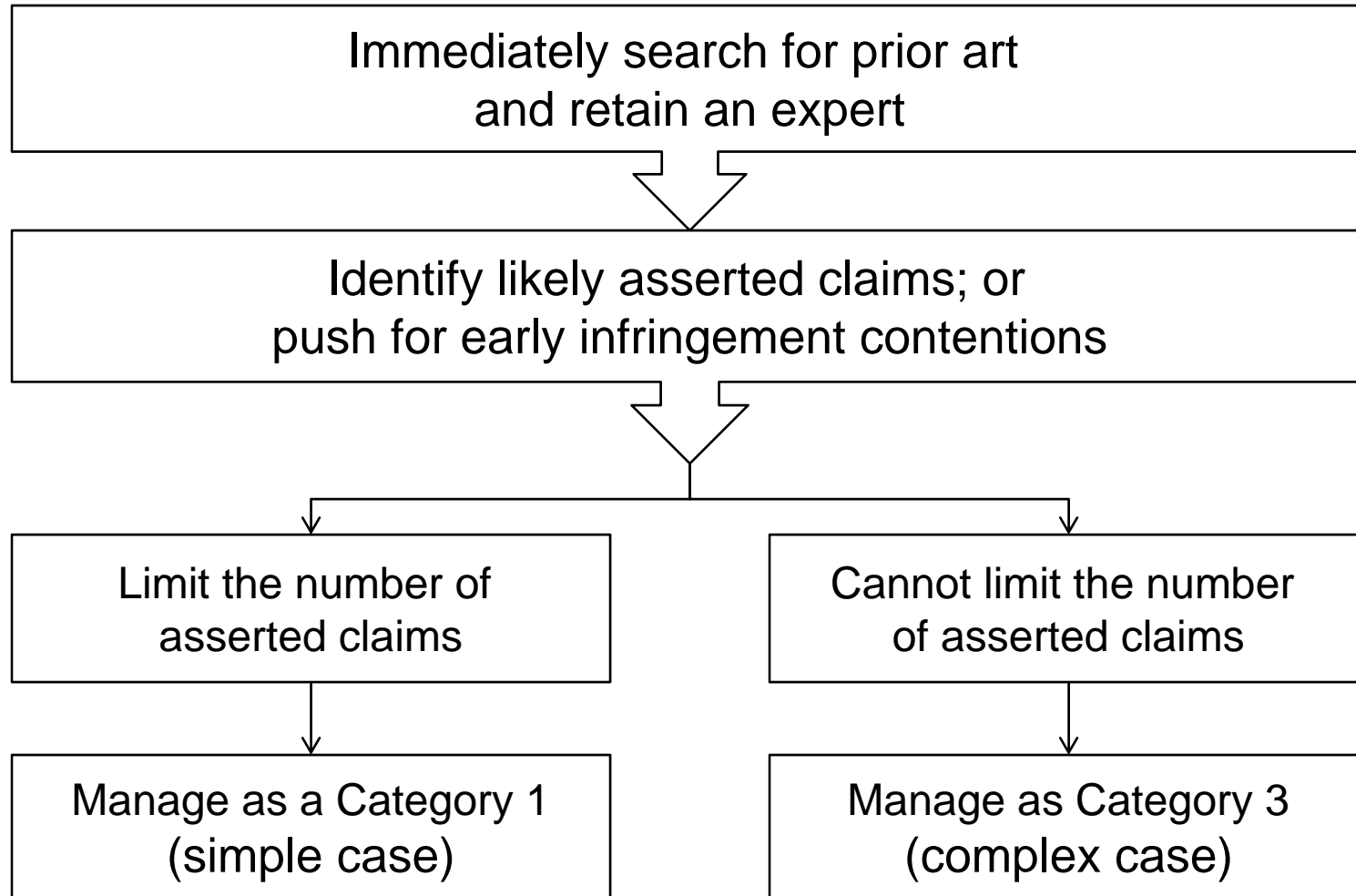
IPR Strategies for Case 2

Large Case

Strong invalidity arguments on all claims

Large number of asserted patents/claims

Defining the case is critical to determine IPR strategy in large cases



IPR Strategies for Case 3

Complex Case

Strong invalidity arguments covering only a portion of asserted claims

IPRs can be successful even when some asserted claims survive

Minimize damages

- Invalidate broadest claims
- Focus damages on dependent claim

Protect alternate design

- Invalidate broadest claims
- Design product around remaining claims

Set up further invalidity case for trial

- Estoppel prohibits most invalidity arguments from being used at trial
- But some arguments remain