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District Court Trial Dates Tend to Slip After PTAB Discretionary Denials

By Scott McKeown on July 24, 2020

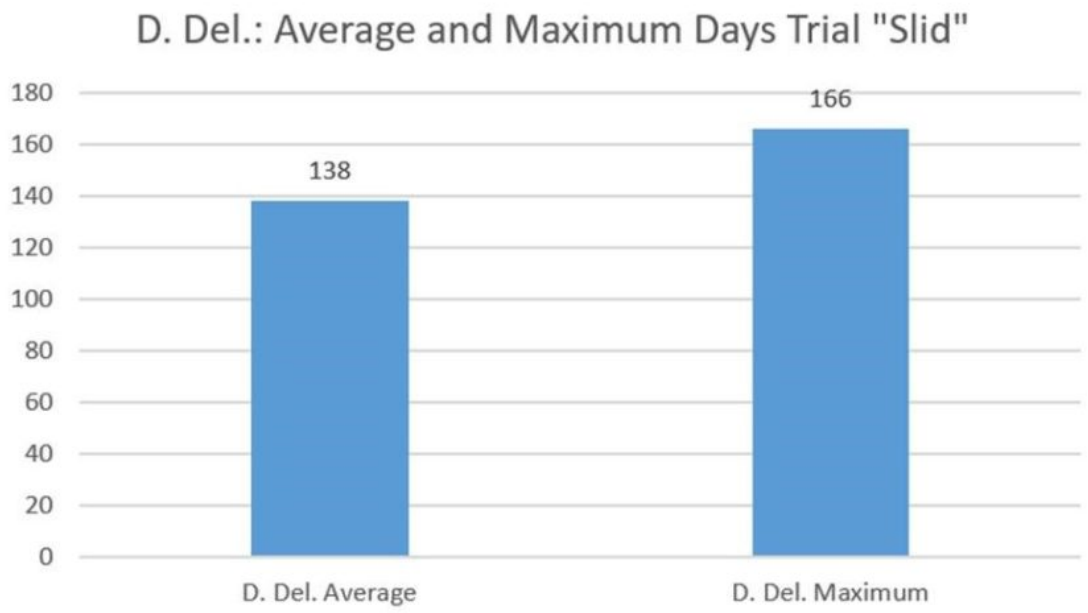
Delaware Cases Slipping 4-6 Months

The practice of denying AIA trial petitions in view of competing district court trial dates has brought **some negative attention to the Patent Trial & Appeal Board (PTAB) over the past few months**. At the same time, patent litigation has increased over the first two quarters of the year by 20%. This surge has been greatly aided by the **exploding popularity of the Western District of Texas (WDTX) with non-practicing entities** — a district that the PTAB is increasingly deferring to in its discretionary denials based upon competing trial dates.

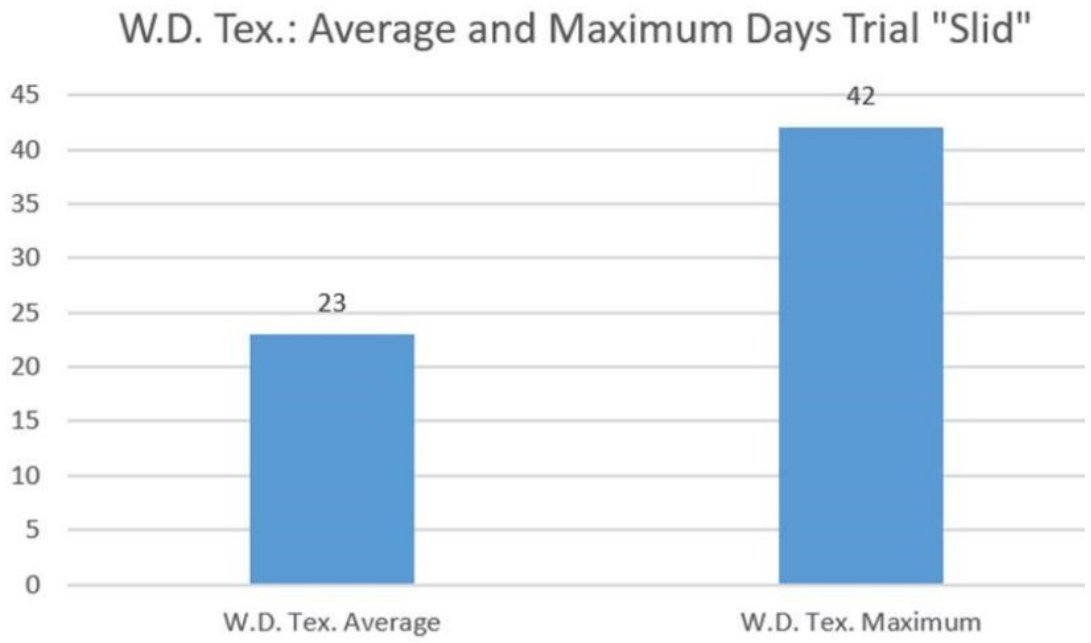
While Patent Owners are quick to point to a looming district court trial date as being set in stone, in reality, these dates are often reset once the PTAB hurdle is cleared.

While still a small data set, cases that are denied by the PTAB based upon a looming trial date have seen significant delays in some districts.

For example, in the patent suit heavy District of Delaware, 100% of the cases denied by the PTAB for an earlier trial date have been rescheduled — anywhere from 4-6 months. This is a significant delay that may militate in favor of institution given the relative speed of an 8-month PTAB trial schedule:



In the WDTX, 70% of trial dates initially relied upon by the PTAB to deny petitions have slid. While WDTX shows a lower average delay, this is likely a due to that court's preference to push out dates on a recurring basis rather than more significant schedule remodels.



Taking all districts into account the average trial delay is 3 months, with a maximum of 7 months. That said, with COVID-19 delaying trials scheduled for the last 4-5 months, delays will certainly increase further as the courts work through their growing backlog.

In the meantime, as one PTAB panel explained it, **the PTAB has been firing on all cylinders**.

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