Likelihood of Stay Pending IPR in W.D. Texas vs. Delaware

Emily S. DiBenedetto, Feb. 23, 2022 Courts / DED IP / Patent IPR Stay

Today, we analyze the District of Delaware's propensity to grant stays pending IPR decisions, as compared to the Western District of Texas. Here are the big takeaways:

- Prior to IPR institution, motions to stay are almost always denied in D. Del.;
- Judge Albright of W.D. Tex. has denied 40% of motions (i.e. two motions) to stay pending instituted IPRs, but there is not much data available yet;
- D. Del. has denied about 28% of motions (i.e. 16 out of 58) to stay pending instituted IPRs in the last four years;
- D. Del. receives far more motions to stay pending IPR than W.D. Tex., and grants them just over half the time (~60% in the last 4 years, including both pre- and post-institution motions).

Differences Among Big Patent Jurisdictions

Patent case filings in the District of Delaware have been approximately constant, even while filings in the Eastern District of Texas peaked (and overtook Delaware's filings) around 2012-2017, then sunk below Delaware's numbers after *TC Heartland*.

Between 2019 and 2022, the W.D. Tex. patent filings shot up, overtaking D. Del. filings just slightly in the last two years.

The popularity of filing in W.D. Tex. is likely due, in part, to the many tech companies located in Austin, TX ("Silicon Hills") and Judge Albright. Specifically, Judge Alright has expressed his affinity for patent cases, and plaintiffs gain predictability in the W.D. Tex. with case assignment practice that ensures that Judge Albright will be assigned the case, a fast-track scheduling order, and Judge Albright's propensity to keep the case in place by tending to deny venue transfer decisions and motions to stay litigation (although the Federal Circuit sometimes disagrees).

W.D. Texas Hasn't Had Many Stay Orders or Opinions—Yet

So far, it looks like Judge Albright has granted only three out of eight opposed motions to stay pending IPR. That count increased slightly since his estimation at the AIPLA's 2021 virtual spring meeting, where he said that—at the time—he had only put "one or two" cases on hold so that PTAB can review the patent.

All told, Judge Albright granted three motions to stay based on instituted IPRs, denied three pre-institution motions, and denied two post-institution motions. Judge Yeakel of W.D. Tex. also denied two motions and granted four motions within the same period.

Right now, W.D. Texas has many active patent cases, nearly rivaling the number we have in D. Del., but it seems to have a disproportionately low number of motions to stay that we can find.

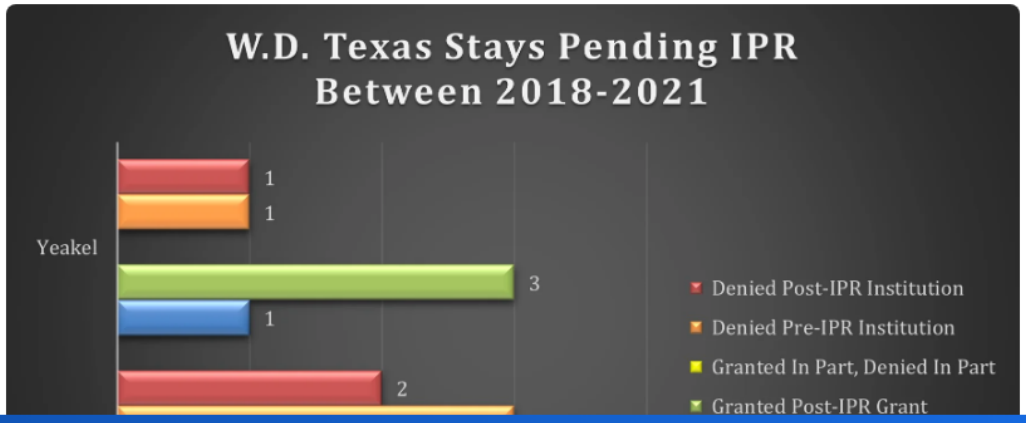

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Exhibit 2006
Boe v. Samsung
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Ex. 2006-001

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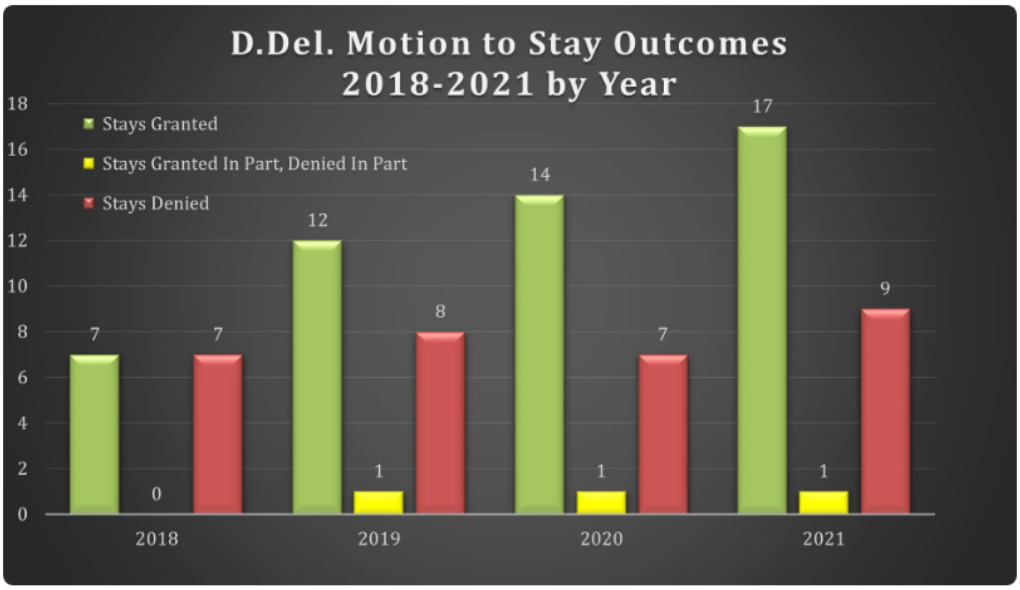
Delaware Sees Many More Motions to Stay, But Grants Them at About the Same Rate

The District of Delaware receives far more motions to stay pending IPR than W.D. Tex., and grants them just over half the time (~60% in the last 4 years). Jointly stipulated stays have been excluded from the analyses below. Stays granted or extended pending appeal of a completed IPR decision were also excluded.



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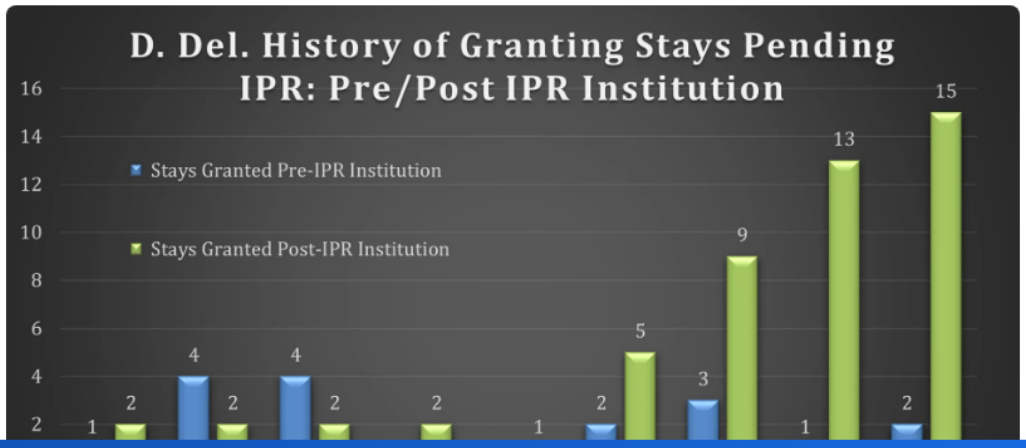
Last year, Judge Andrews observed that "it has become fairly routine to stay cases after IPRs have been instituted." In 2014, Judge Andrews said, "[he] usually like[s] to see whether PTAB will grant review before taking any action, but [he thought] it [wa]s advisable to act [prior to IPR institution]" in *Miics & Partners America Inc. v. Toshiba Corp.*, C.A. 14-803, D.I. 82 (D. Del. Aug. 11, 2015). When a case includes multiple patents but only some IPRs, are instituted, the decision to stay can be a tough call.



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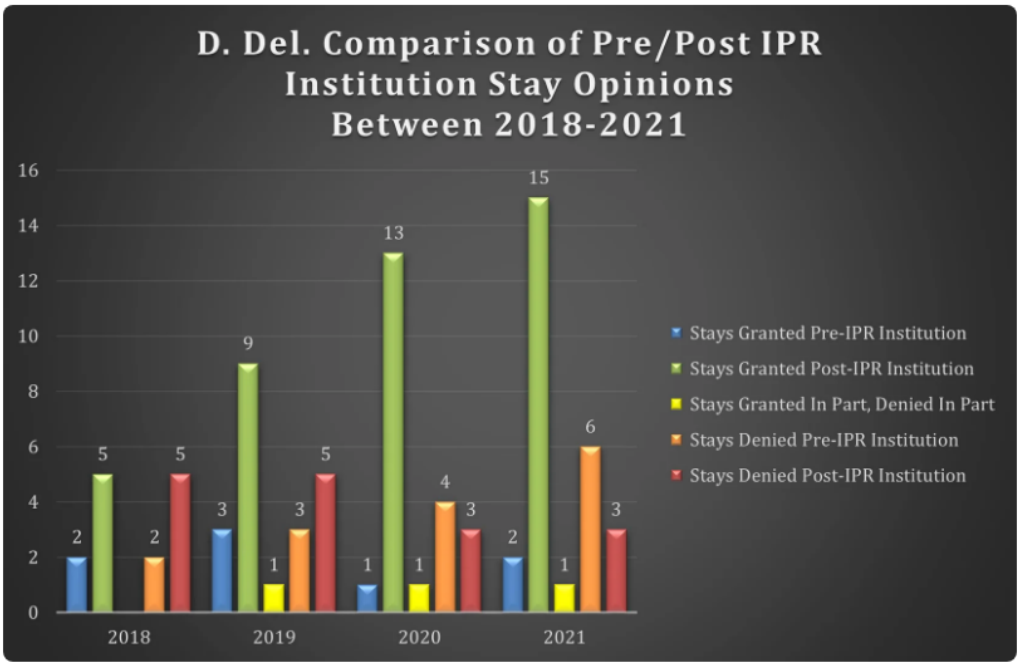
In the last four years, we can see that once the PTAB institutes an IPR, the District of Delaware is more likely to grant the stay than deny it. For post-IPR instituted cases, D. Del.'s number of granted stays has increased steadily (green) while denials has remained constant over the same period (red).



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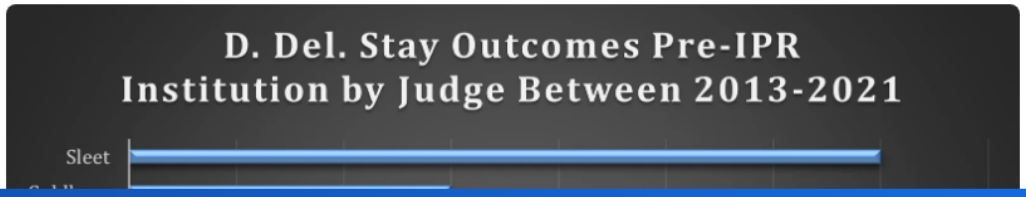
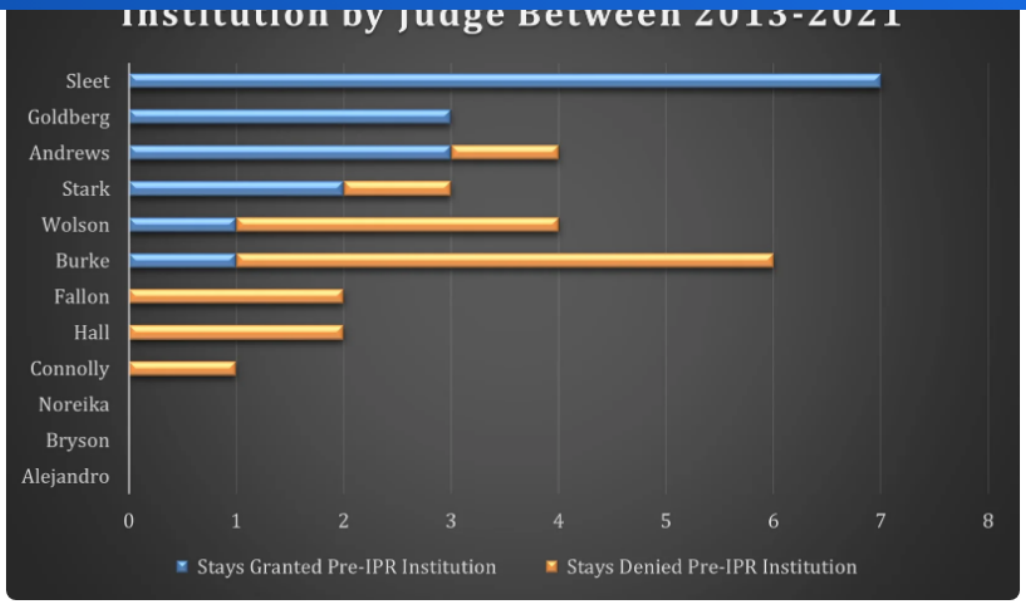
However, prior to IPR institution, motions to stay are almost always denied—except if the case is before visiting Judge Goldberg from the E.D. Pa. In each of three opinions on this issue between 2018 and 2021, Judge Goldberg granted pre-institution stays.

Former Judge Sleet, who assumed senior status in 2017, granted the most pre-institution stays pending IPR. To explain his reasoning, he opined in a footnote that he "d[id] not consider the fact that the Patent Trial and Appeal Board ("PTAB") has not yet decided to institute review of [the] petition to be of great moment" because—at that time, at least—"[s]tatistics show the PTAB elects to institute review in the majority of cases." *Message Notification Technologies LLC v. Microsoft Corp.*, C.A. 13-1881-GMS, D.I. 38 at 4 (D. Del. Feb. 24, 2015).

Even with the current judges, though, pre-institution stays are not impossible. Current Judges Andrews, Burke, and Stark have all granted at least one pre-institution stay. *See, e.g., Arch Chemicals, Inc. v. Sherwin-Williams Company*, C.A. 18-2037-LPS, D.I. 48 (D. Del. Nov. 5, 2019) (Stark, J.) (oral order) (staying pre-institution, and noting "recent changes in the law: namely, institution must be on all or none of the claims on which IPR is sought" and finding that the stay would likely be short, given that PTAB's decision was due two months after the oral order).





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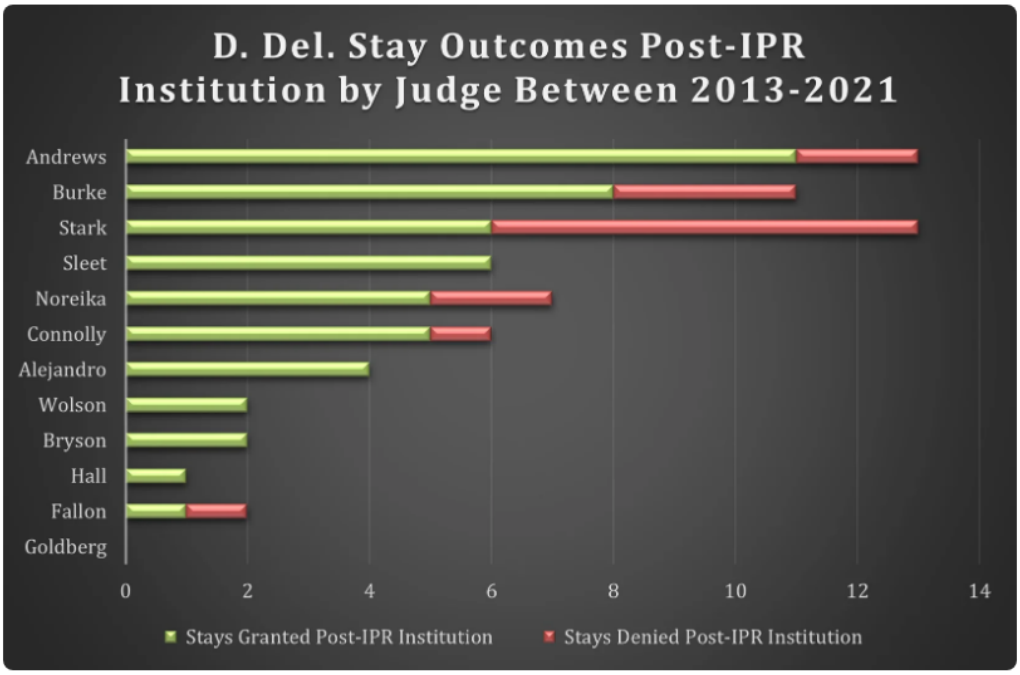
We see that Judge Stark also has the most experience in denying stays after the PTAB instituted IPR, though most D. Del. judges have denied at least one post-institution stay.

Judge Albright's rate of stay denials post-IPR institution is about 40% (2/5) based on the limited data we found from W.D. Tex. D. Del.'s overall rate of post-IPR institution denial is lower, at about 28% (16/58) in the last four years, but D. Del. has about eight-times as many examples of post-IPR denials than W.D. Tex. does.



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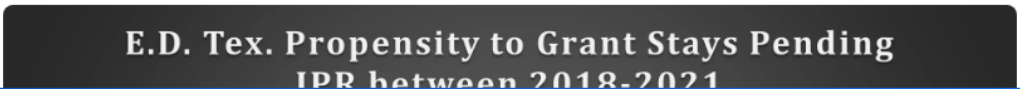
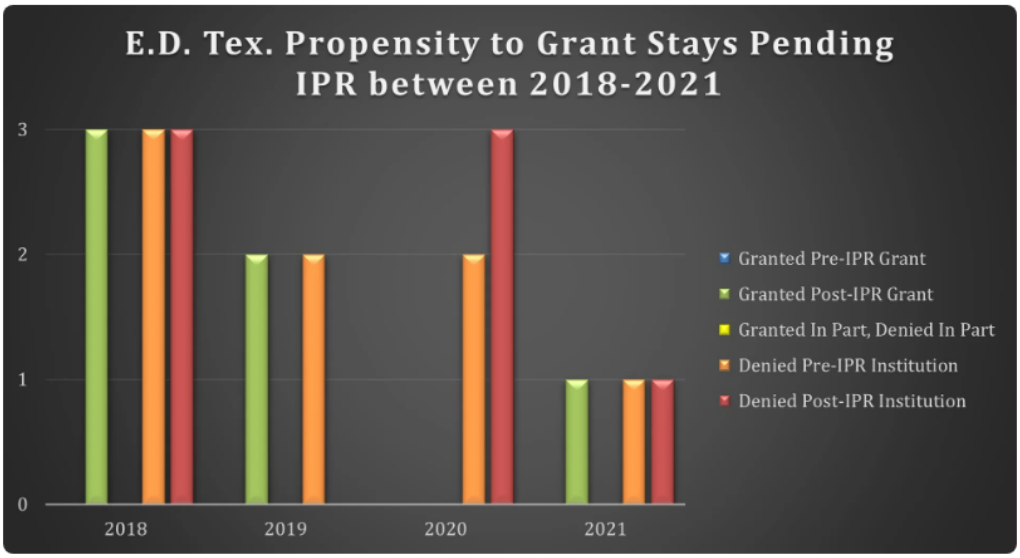
E.D. Tex. Recent Results

For good measure, we also browsed the E.D. Tex. decisions and found, predictably, not as much data since 2017. However, what data does exist indicates a fairly even coin toss regarding whether a stay is granted or denied there.





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Which District Is Most Likely to Stay?

In sum, there are many differences to consider between District of Delaware and Western District of Texas, but both districts are similar in their propensity to deny motions to stay pending IPR before institution. They are different in that—so far—W.D. Texas appears slightly more likely (40% of the time) to deny a stay pending an instituted IPR as compared to D. Del. (28% of the time). But the small sample size in W.D. Texas means that these numbers could easily change going forward.

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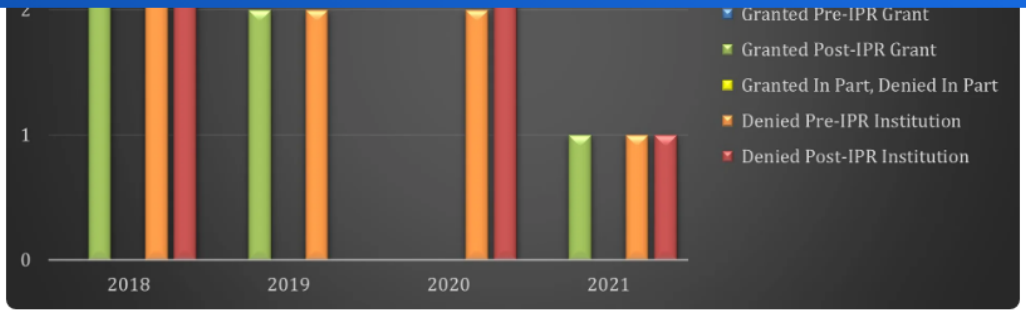

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