

NPE Litigation: Costs by Key Events

March 2015

Introduction and High-level Findings

NPEs cost operating companies an estimated \$12.2 billion in both legal fees (and other legal costs) and settlement (or judgment) amounts in 2014. In an effort to clarify the drivers behind these considerable costs, RPX studied what impact, if any, reaching the typical events of a patent litigation has on its ultimate cost to a defendant. RPX's analysis confirms that legal costs do rise as a litigation persists and reaches certain key events. Less intuitively, the data also show that the same is true for settlements paid.

Historically, information about the legal costs that a company has incurred or about settlement amounts that it has paid has been so closely guarded that quantifying connections between costs and, for example, time in litigation has been difficult. Each company's understanding of this connection has been limited to the data generated by its own experience. Due to RPX's unique position in the patent marketplace, however, it has been able to analyze the costs associated with 955 completed NPE litigations involving 110 different defendant companies as part of this study.

A certain common sense has always linked *higher legal costs* both with reaching certain litigation events (e.g. a Markman hearing) and with the overall time spent in litigation. This study, however, substantiates those connections: higher legal costs do indeed follow from reaching certain litigation events and from longer litigations, as well as from litigating through more key events.

The study also finds that these same factors are associated with *higher settlement amounts*, the primary driver of overall costs attributed to NPE litigation. For example, litigations in which a claim construction order has issued resulted in, on average, four times the legal costs and *two and a half times the settlement amount* as those that did not. In addition, litigations that resolved one to two years after filing resulted in, on average, over four times the legal costs and *over two times the settlement amount* as compared to litigations that resolved in less than a year.

What follows is a summary of RPX's research on the correlations between the character and length of patent litigations and overall costs incurred, both in fees and settlements. For further details on the results of this research, please e-mail whitepaper@rpxcorp.com.

\$1.6M

AVERAGE SETTLEMENT AMOUNT FOR DEFENDANTS REGARDLESS OF EVENT REACHED

\$4.5M

AVERAGE TOTAL COST INCREASE FOR LITIGATIONS WITH VS. WITHOUT CLAIM CONSTRUCTION ORDER

\$8M

AVERAGE TOTAL COST INCREASE FOR LITIGATIONS LASTING MORE THAN 3 YEARS VS. LESS THAN 1

>20X

TOTAL COST INCREASE FOR LITIGATIONS HAVING OVER 20 EVENTS VS. THOSE UNDER 5

Results

Litigation Progression Leads to Higher Costs

The data collected for nearly 1,000 NPE litigations indicate that average and median legal and settlement costs tend to increase as a case reaches key events (complaint filed, complaint served, answer filed, Rule 26 scheduling conference, claim construction order, summary judgment order, and trial).

For example, litigations that ended after a claim construction order, on average, cost \$6.5M. That number is considerably higher than the \$3.5M average for litigations ending after a Rule 26 conference, the previous key event. As a baseline, defendants paid an average of \$2.6M in NPE litigation costs regardless of major event reached, while the median defendant paid \$407K.

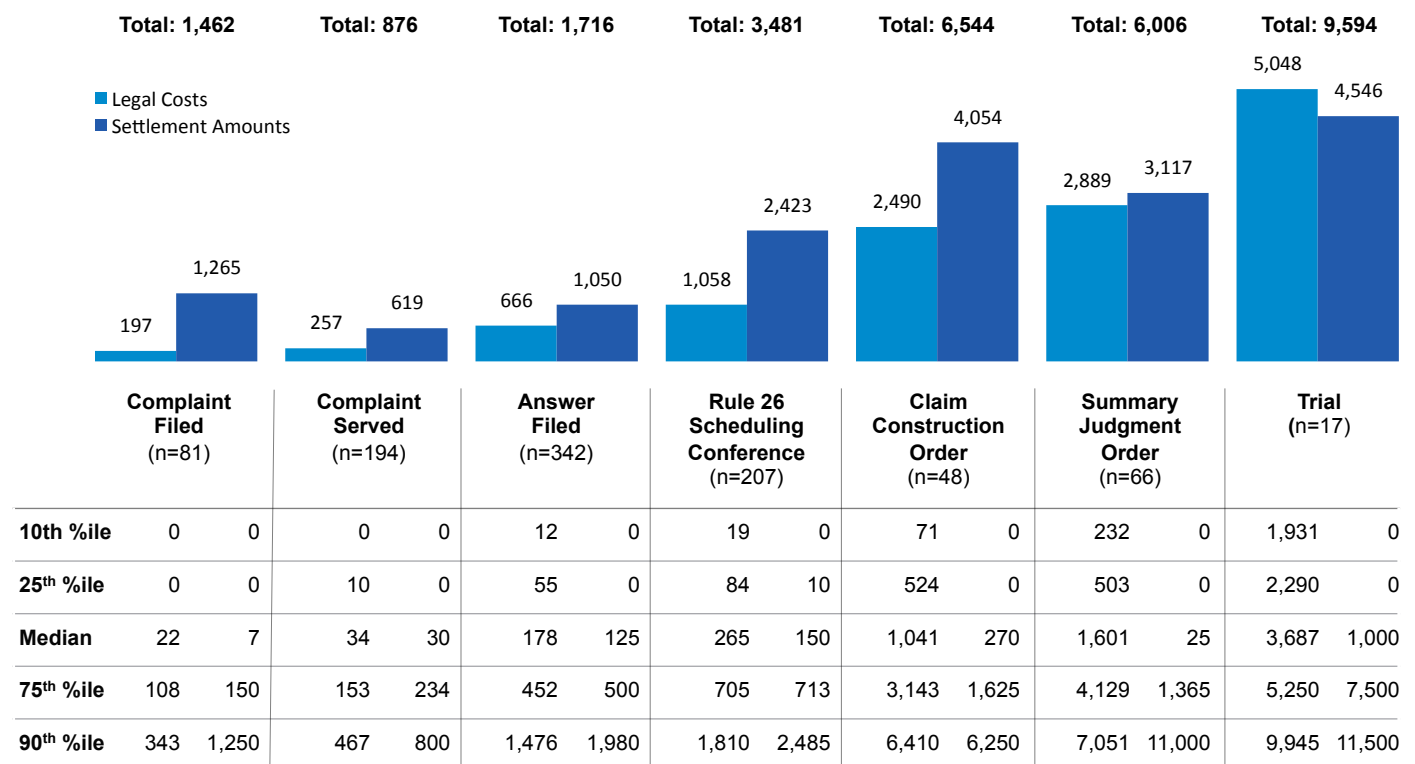
Average costs for litigations ending at summary judgment were *lower* than for those ending at claim construction, even though claim construction typically occurs first. A drop from around \$4M to roughly \$3M in average settlement amounts between those two events may suggest an explanation

for this apparent aberration: litigations within RPX's data that ended after claim construction involved higher quality patents than those that resolved after summary judgment.

This report also reveals that many litigations resolve with no money paid to the NPE at all. While the average settlement for litigations ending at complaint filed is \$1.3M, over 25% of those litigations ended with no settlement amount paid (and the median settlement was a mere \$7,000). However, even at such an early event, the 90th percentile overall litigation cost was still \$1.25M.

As defendants progress through litigation events, there is nevertheless a greater likelihood they will pay a settlement amount. Settlements were paid in only 51% of litigations ending after a complaint is filed, compared with 70% of litigations ending after an answer is filed, and 75% of litigations ending after a Rule 26 scheduling conference. The one exception occurs in litigations ending after a summary judgment, in which only 51% of litigations involved a settlement—perhaps reflecting the often dispositive nature of summary judgment.

Average Costs When Litigation Ends at a Given Event (\$000s)

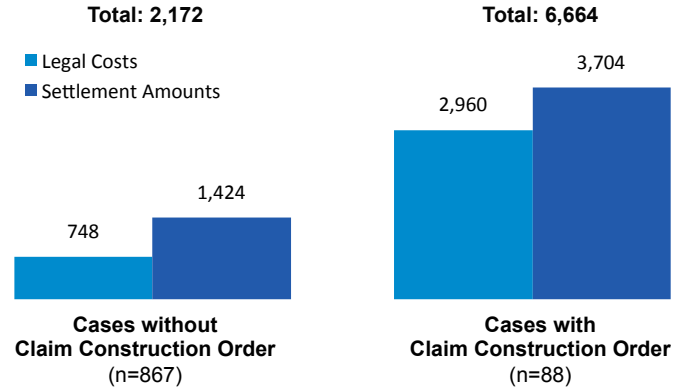


Average Costs Rise as New Events Are Reached

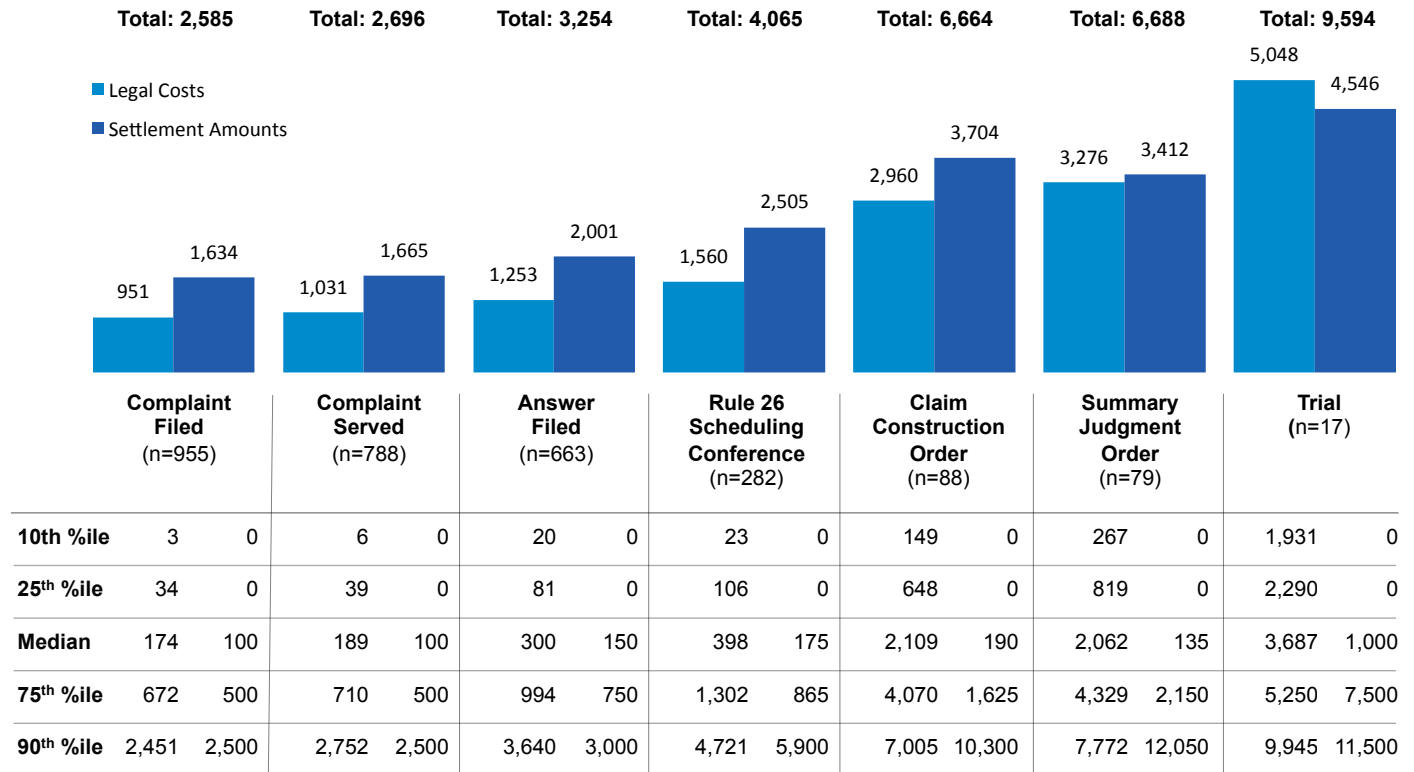
The average cost of a litigation reaching a particular event also rises as a litigation progresses. For example, litigations with a claim construction order cost an average of \$6.7M as compared to an average of \$3.3M for litigations with an answer filed. This analysis should be of particular interest to a defendant that has reached an event but does not know when a litigation might resolve. That defendant can look to this data for guidance about average future costs based on what past defendants have incurred.

Consistent with the analysis on the previous page, reaching a claim construction order markedly increased average cost when compared to litigations that did not reach a claim construction order. Costs were nearly three times as much in litigations with claim construction orders (\$6.7M vs. \$2.2M).

Average Cost without vs. with Claim Construction Order (\$000s)



Average Costs When Litigation Reaches a Given Event (\$000s)



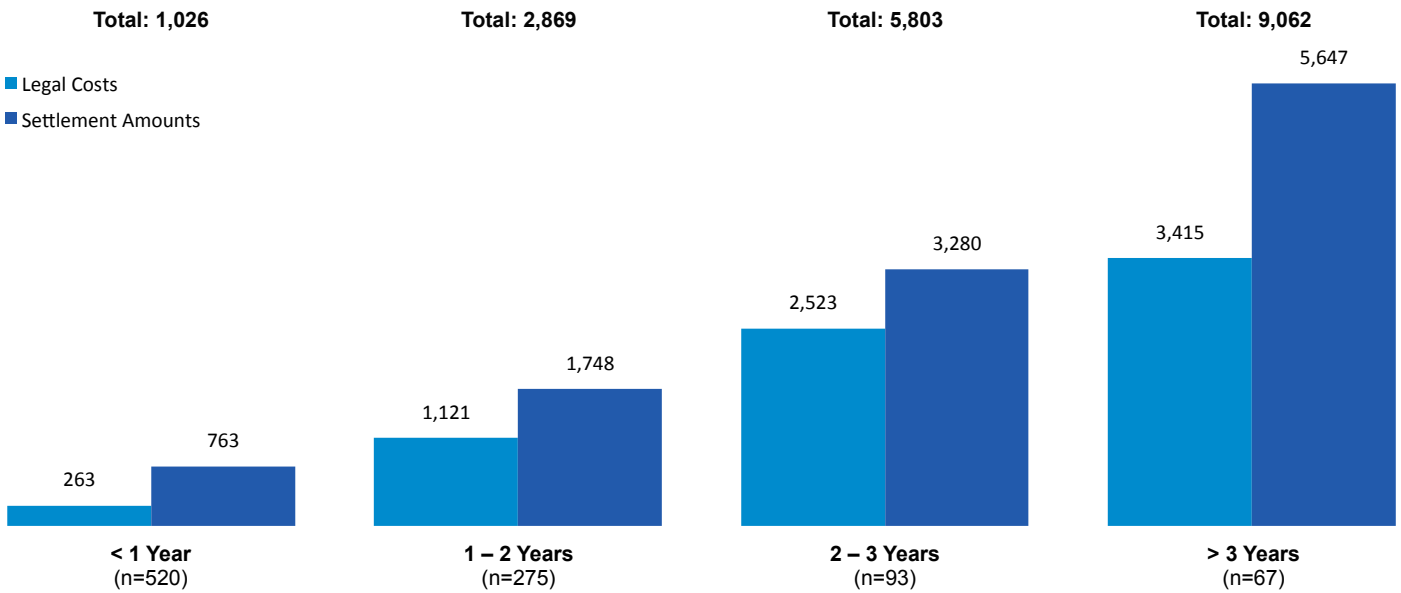
Time in Litigation Corresponds with Higher Cost

As might be expected, time in litigation also corresponds with the cost of it. Legal costs were over four times higher for litigations that lasted between one and two years than for litigations that lasted less than a year. In turn, litigations that lasted between two and three years were 2.25 times more expensive than litigations that lasted only one to two. Overall, legal costs increased on average more than tenfold for litigations that resolved in less than a year to litigations that took more than three years to resolve.

These results are unsurprising given that many of the events that are associated with higher costs happen after a significant amount of time has passed in litigation. For example, none of the litigations in the data set reached a claim construction order in less than a year, while 20 reached it in one to two years, 15 in two to three years, and 13 after more than three years of litigation.

Perhaps less intuitively, settlement amounts also increased significantly over time, albeit less dramatically than did legal costs. Settlement amounts were over two and a quarter times higher in litigations that lasted between one and two years compared to litigations that completed in less than a year. Similarly, settlements were nearly two times higher for litigations that lasted between two and three years versus litigations that lasted from one to two. RPX also saw that settlements in litigations that lasted more than three years were over six times higher than those observed in litigations that completed in less than a year.

Average Costs by Time in Litigation (\$000s)



Number of Litigation Events Increases Cost

A higher number of litigation events is also associated with higher costs. On average, litigations with over 20 events in RPX's data set cost \$19.1M in total, while litigations with fewer than five events cost only \$903K.

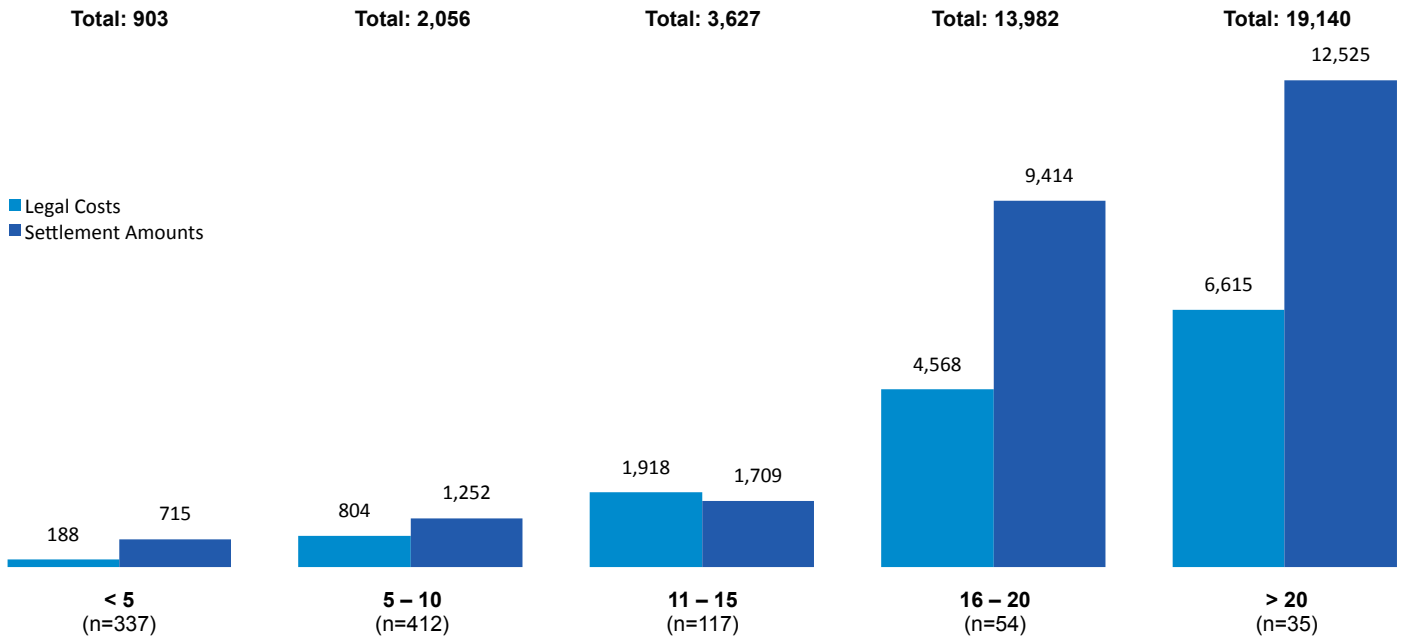
This association is not surprising given that the number of litigation events is correlated to time in litigation and type of events that occur.

- For litigations that lasted less than one year, 63% had fewer than five events, while 98% had fewer than ten. But, more than 70% of litigations with over 20 events lasted more than three years.
- A claim construction order issued in roughly 25% of litigations with over 20 events, but in only 4% of litigations with under 20.

Both legal costs and settlement amounts increased with the number of events. Legal costs were over four times higher for litigations with 5–10 events than for litigations with fewer than five. In turn, legal costs increased nearly two and a half times from 5–10 to 11–15 to 16–20 events. Overall, legal costs increased more than thirty times for litigations that resolved with fewer than five events to those with more than 20.

Settlement amounts also increased significantly with the number of events. For example, settlements were 16 times higher for litigations with more than 20 events than for those with fewer than five events. That overall increase occurred in steps: average settlement amounts were over five times higher for litigations with 16–20 events than for those with 11–15 events, which themselves had average settlements that were over 35% higher than for those with 5–10 events, etc.

Average Costs by Number of Litigation Events (\$000s)



Methodology

Since 2012, RPX has invited companies to participate in a survey of NPE litigation costs. This study relies on the information submitted by participants for which RPX could identify specific litigation events. In all, this white paper is based on data from 110 different defendant companies and encompasses reported costs for 955 completed NPE litigations. Participants in the study include both RPX members and non-members.

For more details regarding the RPX Cost Study, please see the high-level findings on RPX's website, or contact RPX at reports@rpxcorp.com.

A high-level description of the methodology and definitions employed in this study is set forth below.

Definitions and Methodology

Use of Completed NPE Litigations: This study is limited to cost information for resolved litigations (i.e. litigations that are no longer pending). The study also excludes litigations with indemnification or litigations in which RPX secured a dismissal, to ensure that reported costs reflect the full costs of each completed litigation.

Definition of NPE: For the purposes of this report the following are considered NPEs:

1. Patent assertion entities (PAEs): entities believed to earn revenue predominantly through asserting patents
2. Individual inventors
3. Universities and research institutions
4. Non-competing entities (NCEs): operating companies asserting patents outside their areas of products or services

This broad definition covers the class of asserting entities from which operating companies have asymmetrical risk (i.e. the asserting company is generally immune to counter claims). The vast majority of reported costs resulted from litigations involving PAEs.

Cost Characterization: In this report, all direct costs of resolving NPE disputes are referred to as "costs". RPX recognizes that license fees to NPEs may be characterized as "transfers", particularly when examined from a public policy perspective. But, companies managing risk tend to view both NPE-induced legal fees and settlements as the costs of NPEs for their business. For this reason, and for the sake of simplicity, the "cost" label is used in this report.

Cost Statistics: To preserve anonymity, statistics were collected and presented in ways that avoided identifying specific companies or plaintiffs.

Time in Litigation: RPX defines time in litigation as the length of time that a defendant is active in a litigation.

Litigations Ending at a Given Event: RPX defines a litigation as ending at a given event if the litigation does not reach a subsequent event. For the purposes of this analysis, RPX considered only a subset of events and considered those events in the order that a litigation generally (although not always) progresses: complaint filed, complaint served, answer filed, Rule 26 scheduling conference, claim construction order, summary judgment order, and trial. For example, a litigation that reaches a Rule 26 scheduling conference but that does not reach a claim construction order, summary judgment order, or trial, is counted as ending at a Rule 26 scheduling conference.

Litigations Reaching a Given Event: RPX defines a litigation as reaching a given event if the given event has occurred, regardless of what other events have also occurred. For example, a litigation that reached a Rule 26 scheduling conference, claim construction order, and summary judgment orders counts as having reached each of those events.

Appendix

Study Data Diversified Across Industries, Sectors

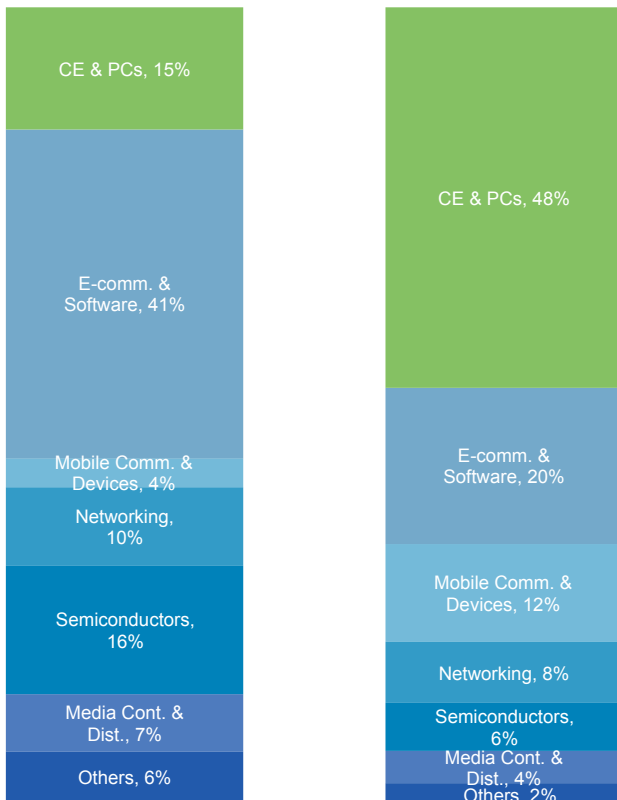
The cost study data set is mostly concentrated in mid-sized E-commerce and Software companies by company, and in large Consumer Electronics and PCs companies by data point. Though just 15% of the data set by company, Consumer Electronics and PCs companies have more than double the litigation data points than any other sector and represent nearly half of the data by data point. E-commerce and Software, Networking, Semiconductors, and Media Content and Distribution companies represent a smaller proportion of the data by data point than by company.

A similar relationship exists when breaking down the data set by revenue. Companies under \$10B represent 83% of the data set by company but provide only 39% of data points,

implying that small companies reporting cost data have far fewer litigation data points than larger companies. In particular, companies over \$50B in annual revenue represent only 5% of the data by company but provide nearly 40% of data points.

In addition, ten companies provide nearly 60% of the cost data points. There exists a long tail of small private companies (78) that have provided five or fewer data points. This distribution is consistent with the overall litigation defendant population, where a small subset of companies experience large litigation volume and a long tail of companies experience few litigations.

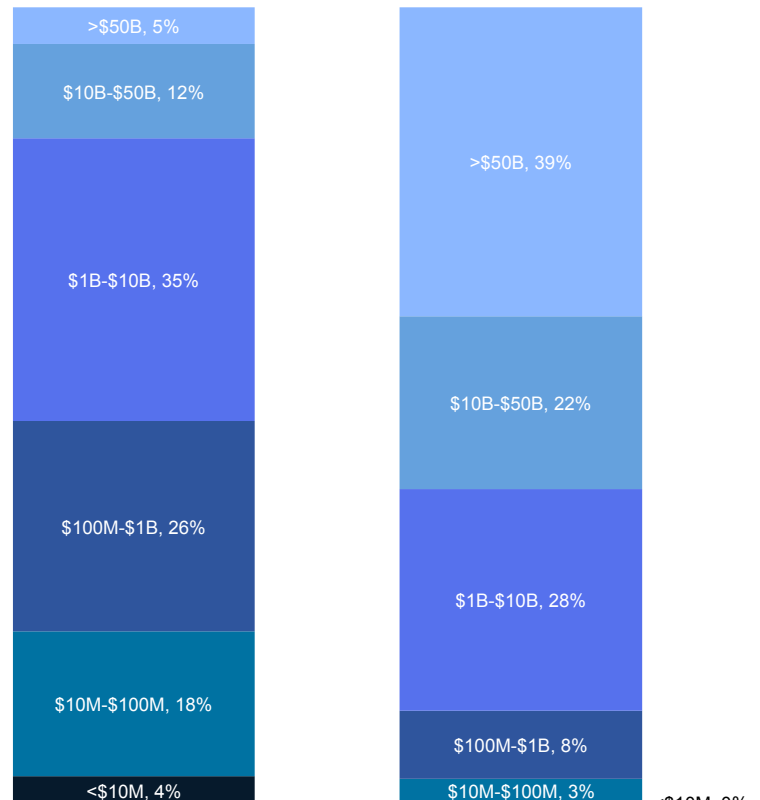
Data Breakdown by Sector



By Company (N=110)

By Data Point (N=955)

Data Breakdown by Revenue



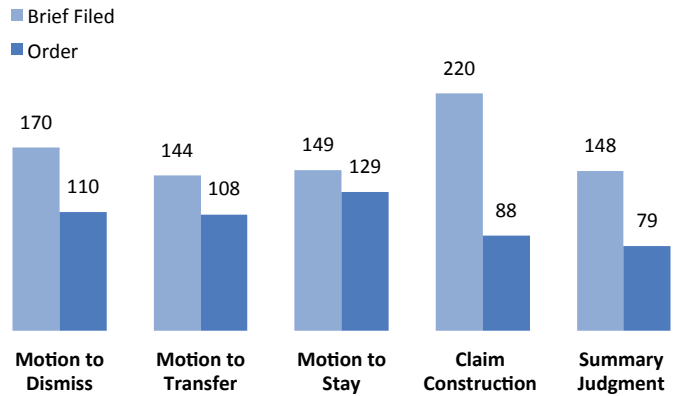
By Company (N=110)

By Data Point (N=955)

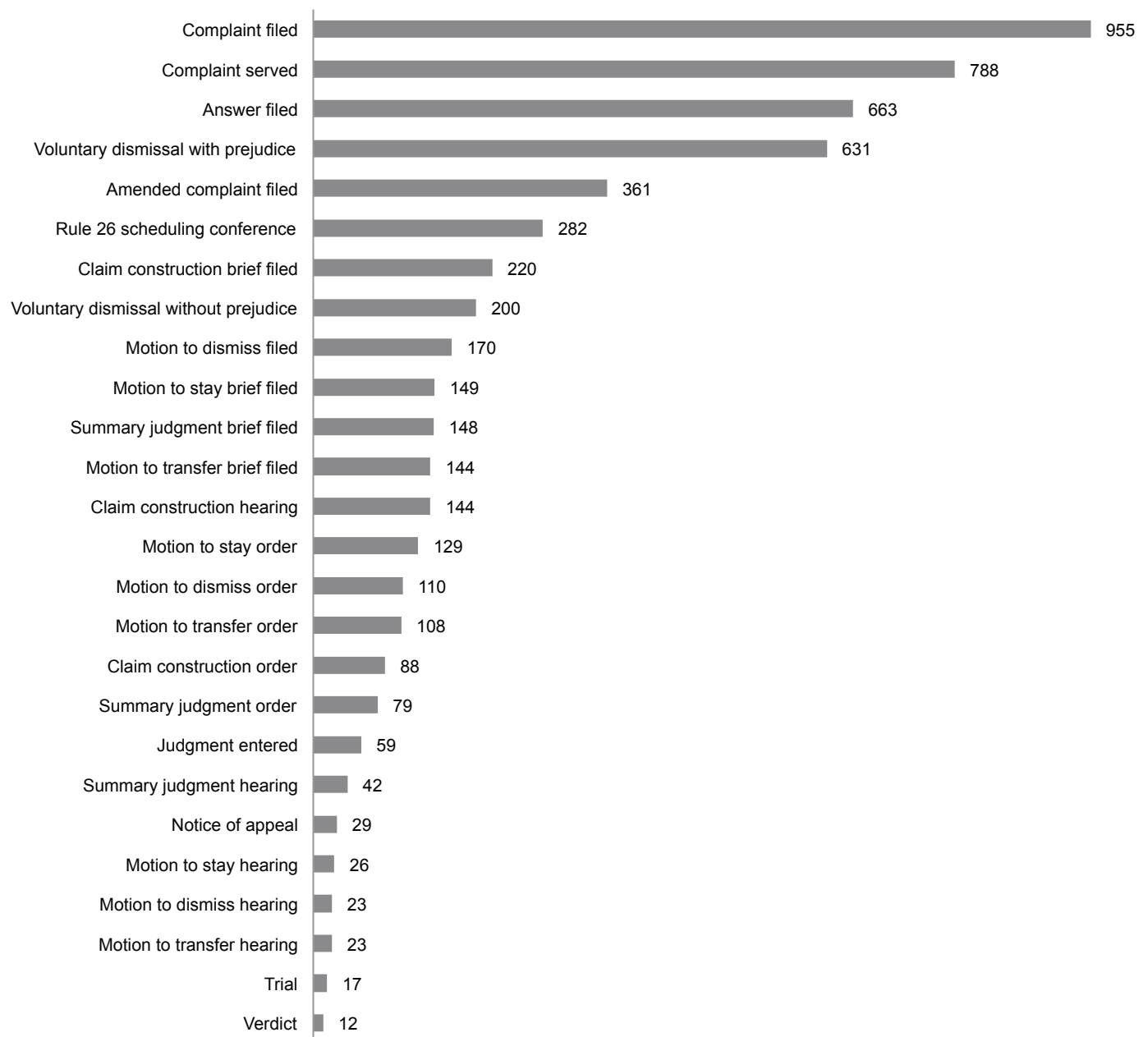
RPX identified 26 litigation events that were tagged for 955 cases across 110 companies. The chart below shows the number of litigations that reached each event. Most litigations resolved with relatively few events and never reached major events such as Rule 26 scheduling conference, claim construction order, or summary judgment order. Even fewer made it to trial (<2%) and reached a verdict (~1%).

Although this paper primarily focuses on orders (e.g. claim construction orders), there are many litigations that made it to briefing of a particular event but resolved before an order. For example, only 40% of litigations with claim construction briefing made it to an order. In contrast, over 85% of litigations with briefing on a motion to stay made it to an order.

Number of Briefs Filed vs. Order



Litigation Events



About RPX

RPX Corporation (NASDAQ: RPXC) helps operating companies reduce the cost and risk associated with NPE (non-practicing entity) patent litigation. Members of the RPX client network pay an annual fee that reflects their particular NPE risk. We then use this aggregated capital to acquire potentially problematic patents and rights in the open market and out of active litigations before they can become a costly problem for our clients. RPX promises never to litigate or assert the patents it purchases.

In addition to our core defensive patent acquisition service, RPX also negotiates syndicates to purchase and clear significant portfolios from the market on behalf of our clients. We offer unique NPE liability insurance, written on A-rated paper and backed by a Lloyd's syndicate, which provides comprehensive coverage against the costs of patent assertion. We also provide members of our network with in-depth industry data, market intelligence, and patent advisory services.

To date RPX has invested nearly \$1 billion to acquire 10,000+ US and international patents and rights, achieved more than 675 litigation dismissals, and prevented thousands of NPE litigations from occurring. Since our founding in 2008, we have saved our clients more than \$2.5 billion in avoided NPE legal and settlement costs.

The RPX network comprises more than 200 clients in sectors including automotive, consumer electronics and personal computing, E-commerce and software, financial services, media content and distribution, mobile communications, networking and semiconductors.

Contacts

If you have questions about this study, please email whitepaper@rpxcorp.com or contact your Client Relations or Client Development professional at RPX.



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