

# Boston University Journal of Science & Technology Law

## Legal Update

### Markman v. Westview Instruments, Inc.<sup>†</sup>

#### 1. *Introduction*

On April 23, 1996, the Supreme Court of the United States held that the interpretation of language in a patent claim was an issue for the judge to decide, not the jury.<sup>1</sup> In so holding, the Court unanimously affirmed the ruling of the Court of Appeals for the Federal Circuit ("Federal Circuit") in *Markman v. Westview Instruments, Inc.*<sup>2</sup> [1]

#### 2. *Procedural History*

*Markman* originated in the District Court for the Eastern District of Pennsylvania. The dispute centered around a patented inventory control device for dry cleaning and laundry establishments.<sup>3</sup> The patentee, Markman, instituted an infringement action against Westview Instruments Inc. ("Westview"), alleging that Westview's invoice printer infringed on its product.<sup>4</sup> Despite the jury's finding of infringement, the district court for the Eastern District of Pennsylvania granted Westview's motion for a directed verdict, holding that claim construction was a

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<sup>1</sup> *Markman v. Westview Instruments, Inc.*, No. 95-26, 116 S.Ct. 40 (U.S., Sep. 27, 1995).

<sup>2</sup> 52 F.3d 967 (Fed. Cir. 1995) (*en banc*) (Newman, J, dissenting).

<sup>3</sup> United States Reissue Patent No. 33,054.

<sup>4</sup> *Markman*, 52 F.3d at 967.

matter of law for the court to decide.<sup>5</sup> In so granting the directed verdict, the district court rejected the claim interpretation of Markman's expert witness, who interpreted "report" to mean "invoice" and "inventory" to mean "cash or invoices."<sup>6</sup> Specifically, the district court determined that these interpretations by the plaintiff's expert were not only contrary to the customary meanings of the terms, but were also contrary to the patent specifications and its prosecution history.<sup>7</sup> [2]

### 3. *Federal Circuit's Analysis*

On review, the Federal Circuit determined that it was not error for the district court to take the issue of claim construction away from the jury.<sup>8</sup> Specifically, the Federal Circuit held that patent claims must be construed by the court as a matter of law, and, that the meaning of the claims is not a factual issue for jury determination.<sup>9</sup> In so holding, the court likened patent claim interpretation to statutory interpretation, and thus, stated that it was a matter of law that was exclusively for the court to resolve.<sup>10</sup> [3]

The opinion, authored by Chief Judge Archer, signaled the court's lack of confidence in a jury's ability to properly interpret a patent. Chief Judge Archer wrote that a judge, trained in the law, would be in the best position to analyze the text of the patent and its associated public record, apply established rules of construction, and determine the proper claim interpretation.<sup>11</sup> The court stated that

to treat the nature of the patented invention as a matter of fact, to be inquired of and determined by a jury, would at once deprive the inventor of the opportunity to obtain a permanent and universal definition of his rights under the patent. By confiding this duty to the court, however, its decision as to the nature of the patented invention becomes reviewable to the same extent as any other legal question.<sup>12</sup> [4]

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<sup>5</sup> 772 F. Supp. 1535 (E.D. PA, 1991).

<sup>6</sup> *Id.* at 1536-37. (stating that the "[p]laintiff's technical expert's testimony is based on an artificial interpretation of key words and phrases that runs counter to their ordinary meaning").

<sup>7</sup> *Id.* at 1537-38.

<sup>8</sup> 52 F.3d 967.

<sup>9</sup> *Id.* at 979.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 978-79.

<sup>12</sup> *Id.* at 979 (quoting ROBINSON ON PATENTS, § 733 (1890)).

The Federal Circuit admitted that several of its prior opinions instructed that disputes over the meaning of patent claim language could raise factual questions that were appropriate for a jury to resolve.<sup>13</sup> Despite Markman's request that the panel continue to apply this type of ordinary contract interpretation, the court overruled its prior decisions, reasoning that they were premised on a wrongly determined holding in *McGill Inc. v. John Zink Co.*<sup>14</sup> Specifically, the Federal Circuit stated that *McGill's* determination of issues of patent claim interpretation triable to a jury had no "authoritative historical support."<sup>15</sup> [5]

Proceeding with its analysis, the court reasoned from a fundamental legal principle that "the construction of a written evidence is exclusively with the court."<sup>16</sup> With this premise, the court stated that because under patent law, a patent application must provide a written description that will enable one of ordinary skill in the art to make and use it, that a patent covering an invention is appropriate for having its meaning and scope determined entirely as a matter of law.<sup>17</sup> In addition, recognizing that judges generally are not sufficiently trained in the technologies underlying the patents to properly evaluate them, the Federal Circuit gave the trial courts with a generous discretion to admit helpful expert testimonies on the issue of claim interpretation.<sup>18</sup> In so doing, however, the Federal Circuit cautioned that such usage of experts was solely to help the trial court understand the patent, and could not be used for the "purpose of varying or contradicting the terms of the claims."<sup>19</sup> [6]

Judge Mayer began his concurring opinion by chastising the majority for "jettison[ing] more than two hundred years of jurisprudence and eviscerat[ing] the role of the jury preserved by the Seventh Amendment . . . mark[ing] a sea of change in the course of patent law that is nothing short of bizarre."<sup>20</sup> Concerned with the

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<sup>13</sup> *Markman*, 52 F.3d at 976.

<sup>14</sup> *Id.* at 976-79. See *McGill Inc. v. John Zink Co.*, 736 F.2d 666 (Fed. Cir.) *cert. denied*, 469 U.S. 1037, (1984). In *McGill*, the Federal Circuit held that a genuine evidentiary dispute over the meaning of a term in a patent raised a factual issue to be resolved by the jury. *McGill*, 736 F.2d at 668-70.

<sup>15</sup> *Markman*, 52 F.3d at 977.

<sup>16</sup> *Id.* at 987 (citing *Levy v. Gadsby*, 7 U.S. (3 Cranch) 180, 186 (1805)).

<sup>17</sup> *Markman*, 52 F.3d at 978.

<sup>18</sup> *Id.* at 980-81.

<sup>19</sup> *Id.* at 981.

<sup>20</sup> *Id.* at 989 (Mayer, J. concurring).

broad impact of the majority's decision, Judge Mayer decried the bench ruling as ejecting juries from infringement cases.<sup>21</sup> Judge Mayer stated that the bench has effectively "usurp[ed] a major part of the functions of both trial judge and jury in patent cases, obliterating the traditional, defined differences between the roles of judge and jury . . . ."<sup>22</sup> Judge Mayer undercut the majority's implicit declaration that judges are more qualified than juries to resolve complex technical issues presented in patent cases.<sup>23</sup> Judge Mayer faulted the majority for clothing factual issues as legal ones, in furtherance of its desire to become the sole arbiter of infringement issues, without the encumbrance of the jury.<sup>24</sup> [7]

Judge Mayer recognized the dichotomy of roles between the presiding trial judge and the jury, even though he did not find that the issue of claim interpretations presented any real factual question.<sup>25</sup> Despite his concurrence with

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21 *Id.*

22 *Id.* at 991.

23 *Id.* at 992.

24 *Id.* at 993. Judge Mayer stated that "the effect of this case is to make of the judicial process a charade, for notwithstanding any trial level activity, this court will do pretty much what it wants under its de novo retrial." *Id.* (citing *Connell v. Sears Roebuck & Co.*, 722 F.2d 1542, 1547 (2d Cir. 1983)).

25 *Id.* at 993. A recent concurring opinion echoed Judge Mayer's concern that "[a]fter *Markman*, apparently the meaning of a claim has very little to do with the parties' theories of the case and the record made in support, and everything to do with what at least two judges here prefer regardless of the record." *Id.* See *Exxon Chemical Patents Inc. v. Lubrizol Corp.*, 64 F.3d 1553 (Fed. Cir. 1995). This patent infringement lawsuit involved Exxon's patent (U.S. 4,867,890) on an oil additive, which sought to improve the resistance of oil components to oxidation by adding a small amount of copper. *Exxon Chemical*, 64 F.3d at 1555. The district court accepted Exxon's argument that its patent claimed a recipe of ingredients extending to any product made by using the ingredients, even if chemical "complexing" caused the resulting product to lack one of the claimed ingredients, which, in this case, was the ashless dispersant. The court rejected Lubrizol's argument that Exxon's patent extended only to the final products that include the claimed ingredients. *Exxon Chemical*, 64 F.3d at 1555.

Following a jury verdict for willful infringement, Exxon was awarded \$48 million in damages, which was doubled for willfulness, \$8.7 million in interest, and \$23.7 million in attorneys' fees, for a total of \$138.4 million. *Exxon Chemical Patents Inc. v. Lubrizol Corp.*, 26 U.S.P.Q.2d (BNA) 871 (S.D. Texas 1993). Lubrizol's subsequent post-trial motion for judgment as a matter of law or for a new trial was denied. On appeal, a Federal Circuit panel consisting of Judges Plager, Clevenger, and Nies reversed, ruling that the district court incorrectly construed the claims. *Exxon Chemical*, 64 F.3d 1553. According to Judge Clevenger, neither Exxon nor Lubrizol's claim construction was correct. In fact, the court stated that even though Lubrizol correctly argued that the claims read on a product and not simply a recipe, it incorrectly contended that they read on only the end product. Instead, Exxon's claims were to a composition that contains the specified ingredients at any time from the moment at which the ingredients were mixed together. Therefore, under the proper charge, the jury would not have been asked whether Exxon had proved that Lubrizol's products at some time contained each of the claimed recipe ingredients in the amounts specifically claimed. Consequently, the Federal Circuit issued a judgment as a matter of law in favor of Lubrizol, concluding that Exxon offered no evidence on the amounts of ashless dispersant present in Lubrizol's products. Judge Nies dissented, contending that it was unrealistic to require that evidence of proportions be measured "in the pot," and that the failure to

the majority that the ultimate issue of patent scope is a question of law, Judge Mayer disagreed with the majority's conclusion that the presiding judge is to decide every issue that arises during the course of claim construction.<sup>26</sup> In fact, Judge Mayer stated that even though not every dispute gives rise to a genuine issue of fact, occasionally the evidence results in a genuine dispute over the meaning of a term, in which case it falls within the scope of the fact-finder's determination.<sup>27</sup> Moreover, Judge Mayer emphasized that when a question of claim interpretation is at issue at the Federal Circuit, any facts determined during claim interpretation must be subject to the same standard of review mandated by the Federal Rules of Civil Procedure.<sup>28</sup> Only then, Judge Mayer stated, will the legal system properly recognize the jury's role in making factual determinations, and the role of the trial court as the primary decision-rendering body in bench trials.<sup>29</sup> [8]

Judge Rader filed the second concurring opinion.<sup>30</sup> In his view, the majority did not need to address fact-law distinction,<sup>31</sup> because in his view the record lacked substantial evidence to support a finding for Markman's asserted claim interpretation (making any further analysis unnecessary).<sup>32</sup> In fact, Judge Rader did

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remand deprived Exxon of an opportunity to present evidence on "an unasserted and untried theory." Exxon's subsequent request for rehearing was denied and its suggestion for an en banc hearing was also declined.

An interesting aspect of this case is the dissenting opinion filed by Judge Newman. She criticized the panel's decision as incorrect as a matter of law, as a matter of chemistry, and as a matter of patent practice. Judge Newman explained that under the panel's erroneous rule of claim construction, a claim to a chemical formulation composition could not be infringed if there was interaction between any of the ingredients after they were added to the composition, such that the chemical form or ratio of any ingredient was changed from that listed. Extending her reasoning further, Judge Newman explained that the panel's rule would inevitably cast a cloud of doubt upon many thousands of existing patents. This concern stemmed from the long standing policy of entitlement value for the public in avoiding infringement. See *Cinopco, Inc. v. May Department Stores Co.*, 46 F.3d 1556, 1562 (Fed. Cir. 1994), *cert denied*, 115 S. Ct. 1724 (1995).

<sup>26</sup> *Markman*, 52 F.3d at 989.

<sup>27</sup> *Id.* at 991.

<sup>28</sup> Appellate courts review trial court decisions either for clear error in facts determined by trial courts or for substantial evidence to support the jury's verdict. FED. R. CIV. PROC. 52(a).

<sup>29</sup> *Markman*, 52 F.3d at 993-98.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

not view Markman's appeal as raising the issue of whether or not claim construction can involve subsidiary fact issues.<sup>33</sup> [9]

Of the panel of eleven judges, only Judge Newman dissented from the majority's ruling.<sup>34</sup> Her twenty-eight page dissent is premised on the notion that the majority, in erroneously characterizing disputes arising from interpretation of technological words and terms of art that define patented inventions, eroded the Seventh Amendment guarantee of a jury trial.<sup>35</sup> Judge Newman expressed her firm belief that the trial process is superior to appellate judicial review as a truth-determining adjudicatory procedure.<sup>36</sup> Judge Newman stated that *de novo* appellate review probably is the least reliable means of accurate determination, especially when complex technological issues are involved.<sup>37</sup> Despite her agreement with the majority's conclusion that patent claim construction is a matter of law, she observed that in patent litigation, there often exists "classic" factual disputes as to the meaning and scope of the technical words or terms of art as they are used in the particular patented invention.<sup>38</sup> She stated that such disputes mandate a finding of fact based upon assessing the specification, prior art, prosecution history, and expert testimonies.<sup>39</sup> Judge Newman vehemently stated that "these factual findings do not become rules of law because they relate to a document whose legal effect follows from the found facts."<sup>40</sup> [10]

Judge Newman wrote that by simply redesignating fact as law (and thereby eliminating the role of the jury), the majority's decision eroded the nationwide uniformity in patent cases and trivialized the right to a jury trial in patent infringement cases.<sup>41</sup> She stated that the Federal Circuit has

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33 *Id.*

34 *Id.* at 999. Circuit Judge Bryson, who joined the Federal Circuit on October 7, 1994, did not participate in the disposition of this appeal.

35 *Id.*

36 *Id.*

37 *Id.*

38 *Id.* at 999-1001.

39 *Id.* at 1000, 1002-06.

40 *Id.* at 1000.

41 *Id.* at 1025.

striven to assure that unnecessary burdens are not placed upon district courts of the nation by virtue of the separate path of appellate review of patent cases. We acted to assure that the same procedures would apply in the trial of jury patent cases as in other civil actions . . . . Thus, the litigation process that served other civil disputes also served in patent litigation. Today's ruling, with its departure from the rules of evidence, its changed standards of deference and review, its conflicts with the established jury and bench procedures, challenges the principle on which this comity was based.<sup>42</sup> [11]

Expressing similar concerns as Judge Mayer, Judge Newman argued that regardless of whether the Federal Circuit considered itself a better fact finder with respect to technological facts than a jury, under the procedural scheme established in the federal court system, such fact finding is inappropriate for appellate courts to conduct.<sup>43</sup> [12]

#### 4. *Supreme Court's Review*

On September 27, 1995, the Supreme Court granted Markman's petition for certiorari, agreeing to decide the question of whether in a patent infringement action for damages, the Seventh Amendment guarantees the right to a jury trial of genuine factual disputes about the meaning of a patent.<sup>44</sup> Fourteen Amicus Curiae briefs were filed to the Supreme Court, but only three of these were filed in support of Markman.<sup>45</sup> The remaining eleven briefs supported Westview, urging affirmance of the Federal Circuit's decision.<sup>46</sup> [13]

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 1008 (stating that "whether or not this court believes that it is a superior finder of technologic facts, that is not our place in the judicial structure").

<sup>44</sup> *Markman v. Westview Instruments, Inc.*, No. 95-26, 116 S.Ct. 40 (U.S., Sep. 27, 1995).

<sup>45</sup> The briefs supporting Markman were submitted by (1) The Association of Trial Lawyers of America, (2) Litton Systems, Inc, a high-tech firm, and (3) Exxon Corporation, Exxon Chemical Patents, Inc., and Exxon Research And Engineering Company who jointly filed.

<sup>46</sup> The eleven Amicus Briefs in support of Westview Instruments were filed by (1) a patent lawyer; (2) the Dallas-Fort Worth Intellectual Property Law Association; (3) two intellectual property lawyers and a law professor, (4) Intellectual Property Owners, (5) Matsushita Electric Corporation of America and Matsushita Electric Industrial Co., U.S. subsidiaries of a Japanese company which hold over 5,900 U.S. patents; (6) United States Surgical Corporation, a plaintiff in a patent infringement suit in which the trial court submitted the issue of claim construction for the jury to decide with the aid of a copy of Webster's New World Dictionary in the jury room (*United States Surgical Corp. v. Ethicon Inc.*, No. 94-2081, *cert. granted* 1996 U.S. Lexis 2812 (April 29, 1996) (vacating judgment and remanding to Federal Circuit for further consideration in light of *Markman*)); (7) Honeywell Inc., a U.S. corporation that is currently engaged in a patent litigation (*Litton Systems, Inc. v. Honeywell, Inc.*, Nos 95-1242, 95-

In contending that the Federal Circuit's holding eliminated, or at least sharply curtailed, the role of the jury in determining infringement,<sup>47</sup> Markman argued that neither policy preferences nor today's perceptions that judges could better determine the underlying factual inquiries that determine the interpretation of patent claims could abrogate the Seventh Amendment right to a jury trial.<sup>48</sup> The Supreme Court, however, disagreed. On April 23, 1996, Justice Souter, writing for the unanimous Court, stated that the interpretation of the word in a patent claim was an issue for the judge, not the jury, and held that "the construction of a patent, including terms of art within its claims, [was] exclusively within the province of the court."<sup>49</sup> [14]

Justice Souter briefly outlined the traditional two-part historical test to determine whether a right to a jury trial existed with respect to the specific issue arising out of the underlying cause of action under the Seventh Amendment.<sup>50</sup> Unable to find an exact antecedent, Justice Souter turned to comparison of the modern practice to the known historical allocation of issues as between a judge and a jury.<sup>51</sup> After a brief review of the evolution of patent practice, Justice Souter determined that even the closest 18th century analogy to modern claim construction did not convincingly demonstrate that patent claim construction should go to the jury.<sup>52</sup> In so finding, and thereby dismissing Markman's contention that it was within the jury's province to define the terms of art in a patent specification, Justice Souter stated that early patent cases emerging from both England and the United States revealed that judges, and not juries, construed "specification terms."<sup>53</sup> [15]

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1311) pending at the Federal Circuit that raised similar issues as those raised to the Supreme Court; (8) The Federal Circuit Bar Association; (9) Airtouch Communications, Inc., a San Francisco-based wireless telecommunication service provider; (10) the American Intellectual Property Law Association; and finally (11) the American Automobile Manufacturers Association, a non-profit national trade association whose membership includes Chrysler Corporation, Ford Motor Company, and General Motors Corporation.

<sup>47</sup> Petitioners' Brief at 15.

<sup>48</sup> *Id.* at 16.

<sup>49</sup> *Id.* at 2.

<sup>50</sup> *Id.* at 4. The historical test was framed as whether the underlying cause of action was historically tried at law or was sufficiently similar to be treated as one that was. If the nature of the underlying cause of action met the first prong, the second part of the test asked whether any issue arising from that cause of action must be determined by a jury "in order to preserve the substance of the common law right as it existed in 1791." *Id.* See also *supra* notes 25-26, 28-30, and 33-36 and accompanying text.

<sup>51</sup> *Markman*, 1996 WL 190818, at 5.

<sup>52</sup> *Id.* at 6.

<sup>53</sup> *Id.*

Having dismissed Markman's arguments, the Supreme Court proceeded to determine the appropriate allocation between court and jury with respect to issues arising out of patent infringement suits, namely, interpretation of patent claims.<sup>54</sup> Justice Souter addressed three aspects of a trial that merit a finding that the court is better suited to interpret patent claims: (1) the traditional issue allocation between the court and the jury, (2) functional considerations, and (3) uniformity.<sup>55</sup> With respect to the original allocation of interpretive issues, Justice Souter found convincing Justice Curtis's allocation, whereby patent construction was characterized as a question of law for the court, and infringement determination was considered a question of fact to be submitted to the jury.<sup>56</sup> The Court stated that

[t]he duty of interpreting letters-patent has been committed to the courts. A patent is a legal instrument, to be construed, like other legal instruments, according to its tenor. . . . Where technical terms are used, or where the qualities of substances or operations mentioned or any similar data necessary to the comprehension of the language of the patent are unknown to the judge, the testimony of witnesses may be received upon these subjects, and any other means of information be employed. But in the actual interpretation of the patent the court proceeds upon its own responsibility, as an arbiter of the law, giving to the patent its true and final character and force.<sup>57</sup> [16]

Second, Justice Souter stated that functional considerations also favor having judges define patent terms of art.<sup>58</sup> Given the training and discipline, Justice Souter stated, a judge is more likely to give proper interpretation to highly technical patents than a jury, and, in addition, is in a better position to ascertain whether an expert's proposed definition fully comports with the instrument as a whole.<sup>59</sup> With respect to the credibility of such expert witnesses, the Court stated that any such determinations would be "subsumed within the necessarily sophisticated analysis of the whole document, required by the standard rule that a term can be defined only

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<sup>54</sup> *Id.* at 8.

<sup>55</sup> *Id.* at 8-11.

<sup>56</sup> *Id.* at 8 (citing 1 A MEMOIR OF BENJAMIN ROBBINS CURTIS, L L.D., 84 (B. Curtis ed. 1879)).

<sup>57</sup> *Id.* at 10, (quoting 2 W. ROBINSON, LAW OF PATENTS §§ 732, 481-83 (1890)).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

in a way that comports with the instrument as a whole.”<sup>60</sup> Lastly, noting fundamental patent law policies such as certainty, notice, and public reliance as exemplifying the need for pursuing uniformity with respect to laws governing patent, Justice Souter argued that those goals were fully supported by the allocation of patent claim construction to the court.<sup>61</sup> [17]

## 5. Conclusion

With the court as the interpretive arbiter for patent claim language, parties might now turn more frequently to summary judgment motions to determine patent claim scope, and therefore, ultimately, patent infringement. Therefore, more patent infringement suits, generally known for their technical complexity and high expense, may be decided even before the actual trial.<sup>62</sup> It is plausible that *Markman* could propel litigants, as well as trial courts, to follow the trend set by the Eastern District of Virginia. Known for the expedient disposition of its docket through an apt usage of summary judgment motions and strict enforcement of procedural rules, the Eastern District of Virginia has been recognized as having successfully injected time and cost efficiency in the federal court system.<sup>63</sup> Unwittingly, the Supreme Court’s decision in *Markman* may nudge more districts to follow the lead of the Eastern District of Virginia. [18]

- Seongkun Oh

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<sup>60</sup> *Id.* To further support his position, Justice Souter explained that the “decisionmaker vested with the task of construing the patent is in the better position to ascertain whether an expert’s proposed definition fully comports with the specification and claims and so will preserve the patent’s internal coherence.” *Id.* This rationale, however, seems illogical and circular, because if the expert’s testimony is to be used to determine the precise meaning of the patent claims, it is conclusory to state that the presiding judge is more able to determine whether the expert’s interpretation comports with the specification and claims, let alone preserves the internal coherence, as this would necessarily assume that the judge has a clear understanding of the patent specification and claims. Given that, it seems that expert testimonies would be unnecessary.

<sup>61</sup> *Id.* at 11.

<sup>62</sup> George F. Pappas & Robert G. Sterne, *Patent Litigation in the Eastern District of Virginia*, 35 IDEA: J.L. & Tech. 361 (1995).

<sup>63</sup> Pappas & Sterne, *supra* note 62, at 363 (concluding from their empirical study that the average time from filing of the complaint to disposition of the case in the Eastern District of Virginia was only four months, as compared to the national average of eight months, and that the average time from filing of an answer to the trial was seven months, in contrast to the national average of eighteen months). The authors further note that even the most complex cases before the courts in the Eastern District of Virginia are generally only given five to ten days for trial. *See id.* at 369; *see also* P. Barret, “Rocket Docket”: *Federal Courts in Virginia Dispense Speedy Justice*, WALL. ST. J., Dec. 3, 1987, at 33.