STATEMENT OF

THE HONORABLE SUE L. ROBINSON

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

BEFORE THE

COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON BANKRUPTCY AND THE COURTS
UNITED STATES SENATE

"Federal Judgeship Act of 2013"

September 10, 2013

Good morning, Senator Coons, Ranking Member Sessions, and Members of the Committee.

On behalf of the United States District Court for the District of Delaware, I thank you for the opportunity to appear before the Committee today to share with you some information about the Court in relation to the Federal Judgeship Act of 2013.

Let me start my remarks with a bit of history written by the Honorable Jane R. Roth for the book *The Delaware Bar in the Twentieth Century*, published by The Delaware State Bar Association in 1994: "On September 30, 1789, President George Washington appointed Gunning Bedford, Jr., a signer of the constitution and Delaware's attorney general, as the first judge of the United States District Court for the District of Delaware. After the first case was tried in November of 1789, there was not another case until May of 1792. The main business of the court was admiralty cases."[1]

Clearly times have changed. Although we still hear admiralty cases from time to time, we no longer display a model ship above the bench when we do so, and admiralty cases comprise less than 1% of our civil docket. Today, the main business of the Court is patent litigation, with patent cases now comprising over 50% of our civil docket. And it is the exponential growth in the number of patent cases filed in the District of Delaware that has led to the recognition of our judgeship needs by the Judicial Conference.

Before I talk about how our patent caseload is affecting members of the Court

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[1] *The Delaware Bar in the Twentieth Century* (1994, The Delaware State Bar Association) at 505.

and the public it serves, let me step back if I may to better illustrate just how unique our docket is. The District of Delaware has had four judges since 1985. In the year 1991, when I first came on the bench, 37 patent cases were filed in the District of Delaware, about nine cases per judge. At that time, even nine cases was not an insignificant number of patent cases per judge. With the exception of one year, since 2000, the District of Delaware has been among the top five districts in the country in terms of number of patent cases filed, and has had more patent cases per judgeship than any other district. More specifically, as of August 31, 2013, there have been 1,394 patent cases filed in the District of Delaware so far in fiscal year 2013. The patent filings per authorized judgeship using completed fiscal year 2012 was 202 patent filings per judge. You can see how that number compares to the other high volume courts in the graphs that have been submitted with my statement. In terms of the statistic that the Judicial Conference of the United States uses to justify the authorization of an additional judgeship, the current national standard of weighted filings per judgeship is 500 cases. The District of Delaware has 1,812 weighted filings per judgeship, exceeding the national standard by several times.

But it is more than the sheer number of cases that makes our need for the fifth judgeship such a compelling one. Whether you characterize the magnitude of the caseload pre-AIA or post-AIA,[2] the complexity of the mechanics to resolve these cases is the same. In other words, whether you have ten defendants in one case, or ten cases each with a single defendant, the defendants often start the litigation by filing motions to dismiss - for lack of personal jurisdiction or for failure to state a claim - rather than an answer. Once these motions have been resolved and a scheduling order entered, the parties are supposed to exchange relevant information through discovery. This part of the process is subject to the most abuse by the bar, and requires the close supervision of the Court to balance the relevance of the information sought against the burden of production. Given the sheer volume of production, a discovery dispute may involve the court's review of thousands of pages of documents.

When the parties have completed fact and expert discovery, the next steps in a patent case typically include claim construction - a requirement unlike any found in other civil cases - and the submission of summary judgment motions. If there are issues left to be tried at the conclusion of the motion practice, you as a judge still have to decide motions in limine (or the equivalent thereof) and conduct the bench or jury trial with the evidentiary disputes that inevitably arise during trial. Your final responsibility is to review the dispute yet again post-trial through motions for a new trial or renewed motions for judgment as a matter of law. Just when you think you have fulfilled your responsibility as a trial judge, the case is appealed to the Federal Circuit, which may remand the case for further proceedings.

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[2]Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011) (to be codified at 35 U.S.C. §§ 311-319).

In Delaware, the judges go through this process over and over again, always with the overlay of technology inherent in patent litigation, whether you are dealing with chemical patents, software patents, or medical device patents. Clearly, the mechanics of a patent case are complex and burdensome, and the Court's resources to manage the case will never equal the resources of the parties to litigate the case.

I'd like to share just a few statistics to exemplify the work associated with ushering a patent case to trial, and the disproportionate resources available to the Court. In fiscal year 2012 in connection with its patent docket, the judges of the Court were required to resolve 318 motions to dismiss and 132 motions for summary judgment, and conducted 56 claim construction hearings and 22 patent trials. To date in fiscal year 2013, the judges of the Court have conducted 175 claim construction hearings and 19 patent trials. In just one of my patent cases tried in this fiscal year - with a single plaintiff, a single defendant, and ten patents at issue - the parties filed 13 motions accompanied by 782 pages of briefing, over 8,500 pages of appendices, eight boxes of trial exhibits, and with at least 46 lawyers involved in the litigation. And, of course, you also have your criminal cases and the remainder of your civil docket to handle. Consequently, in any given month, a judge in our Court can expect to have scores of motions filed with thousands of pages of accompanying briefing.

For a judge like me, who has been on the bench for decades, who has ushered over 800 patent cases to closure and presided over almost 100 patent trials, I can't really quantify for you the work load associated with the case load. I can tell you that I'm double- and even triple-booked for patent trials through 2015, that I have 327 patent cases on my personal docket with 141 pending motions. I have two law clerks who assist me with my patent docket. We cannot keep this level of work up indefinitely and do our jobs well. Indeed, the statistics are starting to demonstrate a downward trend in terms of our ability, as a Court, to resolve motions and get to trial timely.

I take my responsibilities as a trial judge seriously, as do my colleagues. We have taken an oath to give every party in our court due process, whether the party is a corporation competing in the marketplace or a non-practicing entity (otherwise known as a patent owner) such as an affiliate whose task it is to monetize the corporation's intellectual property. Ensuring due process means giving every party a fair and reasonable opportunity to demonstrate the merits of its allegations. So long as the Patent & Trademark Office continues to issue patents that have the potential for impacting the market, there will continue to be business disputes over the metes and bounds of the monopolies associated with the patents. It is both a privilege and a weighty responsibility to help the parties resolve these disputes, but the Court cannot do so without sufficient resources.

Due process, not the numbers, is what is driving our request for a fifth judge.

Thank you for your kind attention.