Judicial Competition for Case Filings in Civil Litigation

Author : Allan Erbsen

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Scholars have extensively explored how outcomes in civil litigation can hinge on an adjudicator's identity, institutional affiliation, and location. Judges bring varying perspectives and experiences to the bench that may color their assessment of factual contentions and legal arguments. Jurisdictions have idiosyncratic rules and customs. Geography often imposes burdensome participation costs, unique local norms, and distinct jury pools. Different courts therefore might reach inconsistent conclusions in otherwise identical cases. Lawyers pay close attention to these differences and try to exploit them using tactics that are often derisively described as "forum shopping."

Although lawyers are active shoppers, observers are loath to think of judges as active sellers. We expect zealous lawyers in an adversarial system to exploit available advantages. But we take comfort in conceiving of those advantages as arising from inevitable variations among courts rather than through deliberate competition among judges. From this perspective, judges should be agnostic about where cases are filed (assuming filings comply with applicable laws), even as they operate within a system in which forum choice matters to litigants. If judges are agnostic, then the term "forum shopping" would be misleading given the absence of a market. Lawyers would be shopping for courts only in the sense that birds shop for trees in which to build nests. Trees might benefit from hosting birds and may be well-adapted to attract them, but a tree's allure is not a product of conscious choices amenable to criticism and reconsideration.

But if lawyers react to incentives that judges deliberately provide, then the shopping metaphor would be more potent and the judicial competition potentially more unseemly. The existence of judicial sellers enticing party buyers would raise at least two difficult questions. First, what is the normative justification for allowing a judge's desire to increase local filings to influence judicial decisionmaking? Second, what corrective measures are necessary to prevent or mitigate abuse? These are among the many questions that Daniel Klerman and Greg Reilly explore in their thoughtful new manuscript *Forum Selling*.

Klerman and Reilly analyze competition for civil case filings through four case studies of judicial behavior (as well as other examples of non-judicial behavior). The examples run the gamut from state to federal, domestic to foreign, and modern to historical. Each has received prior academic scrutiny, but linking them illuminates broader patterns. The case studies explore: (1) local procedural rules and practices that have helped attract approximately 28% of this country's recent patent suits to the U.S. District Court for the Eastern District of Texas; (2) state courts that were "magnets" for a large volume of class action and mass tort litigation despite being ill-equipped to handle such complex cases and allegedly disinclined to do so fairly; (3) the District of Delaware's effort to lure bankruptcy filings by adopting practices favorable to debtors; and (4) drawing from Klerman's prior work, the competition for filings among England's three common law courts in the seventeenth and eighteenth centuries, which may have inspired judges to make the common law friendlier to plaintiffs. The article focuses primarily on patent litigation, but uses the other examples to highlight common causes, features, and consequences of "forum selling."

Viewing the case studies as manifestations of a common phenomenon leads Klerman and Reilly to several insights. First, they suggest that forum selling exists, even if it operates subtly and masquerades as innocent procedural experimentation or implementation of ambiguous texts. Courts can manipulate forum choice in their favor through ostensibly innocuous means, such as by controlling the discovery schedule, minimizing opportunities for pre-trial merits determinations, and interpreting procedural rules either strictly (e.g., to limit transfer out of the forum) or loosely (e.g., to facilitate class certification). Appellate courts could in theory police this maneuvering, but in practice these non-final non-merits rulings tend to evade appellate review, especially if they induce a settlement.

Second, the authors suggest that forum selling is attractive to judges for several recurring reasons. For example, judges may want to enhance their own or their court's prestige by presiding over high status cases, augment their court's budget (and resources) due to a higher caseload, or support the local bar by attracting business. Case filings can also strengthen economies in rural areas when visiting litigants eat, shop, work, and sleep locally. (The authors report that a Fairfield Inn near an East Texas patent forum catered to the influx of lawyers by subscribing to Pacer.)

Third, the case studies indicate that competition for filings leads courts to skew rules and customs in favor of plaintiffs because plaintiffs usually decide where to file (absent a contractually specified forum). Thus, while competition could in theory inspire courts to make themselves more attractive to all parties, Klerman and Reilly contend that in practice competitive courts focus on the parties that they can directly influence.

Fourth, a common feature of each example is that forum selection rules tolerate litigating a particular suit in multiple courts. For example, constitutional constraints on personal jurisdiction and statutory criteria for venue often give plaintiffs choices about where to sue limited only by malleable standards. This flexibility enables forum shopping, which in turn enables forum selling. The authors suggest tightening limits on jurisdiction and venue—or facilitating transfer and removal—to immunize defendants from entrepreneurial fora.

The article's unsettling examples of courts appearing to offer plaintiff-friendly (and thus defendant-hostile) rules might tempt readers into thinking that all choices that could be characterized as forum selling are inherently undesirable. But Klerman and Reilly are careful to avoid sweeping normative conclusions based on limited empirical evidence.

Instead, their analysis of forum selling raises a fascinating question for further study: how should commentators decide whether particular competitive strategies are appropriate? That question is difficult because courts routinely must make discretionary choices about how best to administer justice. Some choices—even if made for unassailable reasons—will render particular courts more attractive to certain litigants. The fact that one forum is more enticing than another is therefore not by itself evidence of any questionable decisionmaking by courts. Forum selling may spur forum shopping, but forum shopping can occur even without a dubious sales pitch.

Commentators could adopt at least two approaches to challenging judicial behavior that incentivizes forum shopping. First, judicially driven forum shopping might be suspect when the court intentionally seeks to attract filings. This skepticism is plausible because judicial self-aggrandizement seems indecorous and may intrude on the prerogatives of coordinate branches of government to establish and implement regulatory priorities. Yet the prospect of courts benefitting by improving their performance is not necessarily undesirable, depending on what the courts are doing. For example, if courts attract plaintiffs by improving their expertise and striving for neutrality and fairness, then the benefit to a court from increased filings seems ancillary to the legitimate benefits to litigants. (Even the losing party benefits by receiving a more meaningful day in court compared to what it would have received in a less

expert or less fair forum.) Second, commentators might question forum selling when the underlying choices either exceed the scope of judicial authority or produce suboptimal results. For example, courts might render themselves attractive for unsavory reasons (such as bias), make choices that are better left to the legislature, or distort filing incentives to the point of undermining the legitimate interests of competing fora.

This final, context-sensitive approach to assessing forum selling is attractive, but raises several questions. Commentators must know how to define the proper judicial role before deciding that forum selling exceeds it. They also need a theory of what counts as a legitimate benefit of a procedural rule, and what counts as a troubling cost, to determine if choices that make the forum more attractive produce acceptable outcomes for the parties. And they need a theory about the proper allocation of jurisdiction among coordinate fora in a federal system to decide if fora that lose filings have a legitimate grievance against fora that attract filings.

Forum selling thus implicates fundamental questions about federalism and civil procedure that scholars have been studying for centuries. Klerman and Reilly's careful and thoughtful analysis adds a helpful dimension to these questions that is grist for further study.

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