UNDERSTANDING THE REALITIES OF MODERN PATENT LITIGATION

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BACKGROUND

- Allison & Lemley studied patent validity in 1998
- We update that study (now based on cases over 20 years old)
- We also extend it
  - Include infringement and enforceability as well as validity
  - Include all district court and appellate decisions, not just reported decisions

OUR STUDY

- All patent cases filed in 2008-2009 in which there was a decision on the merits, whether SJ, trial, or appeal and whether grant or deny
- Each decision on a patent is the unit of observation
- Began with ~ 2,500 cases, then winnowed down to 949 observations—that is, merits decisions on each patent
- Lemley and Schwartz hand-coded outcomes; Allison hand-coded patents

OUR STUDY 2

- Coded for 30 different dependent variables, including various grounds of validity, infringement, and unenforceability as well as the procedural posture of the ruling

OUR INDEPENDENT VARIABLES

Foreign Origin of Invention-Residences of majority of inventors, assignee domicile as a tie breaker

Adjusted Number of Citations Received

Total Prior Art References

Number of Inventors

Time length of litigation from filing to termination

Age of Patent at Current Litigation Filing in Years

Number of Defendants

Number of Asserted Patents

Reissue Patent? (not yet used)

Federal Districts--Top 13 & All others

Primary Technology Areas and Industry Areas

One or More Secondary Technology Areas (Not yet used)

Declaratory Judgment

District	# of Observations
TXED	128
DED	122
CAND	81
CACD	56
CASD	51
NYSD	47
ILND	40
NJD	34
WIWD	30
VAED	30
MAD	27
TXSD	22
OHND	17
All Other Districts	392

TECHNOLOGY AREAS

- **Mechanical (272)**
- **Electronics (104)**
- **Chemistry (155)**
- **Biotech (52)**
- **Software (data processing) (339)**
  - **65 SW Business Methods (by any definition)**
- **Optics (37)**

INDUSTRY CATEGORIES (PART 1)

Computer & Other Electronics (130)
Semiconductor (28)
Pharmaceutical (110)
Medical devices, methods, & Other medical (98)
Chemical (2)
Biotech (32)
Communications (122)
Financial Services (6)
Transportation--Including Automotive (43)
Agriculture (5)

INDUSTRY AREAS PART 2

Construction (31)

Energy (21)

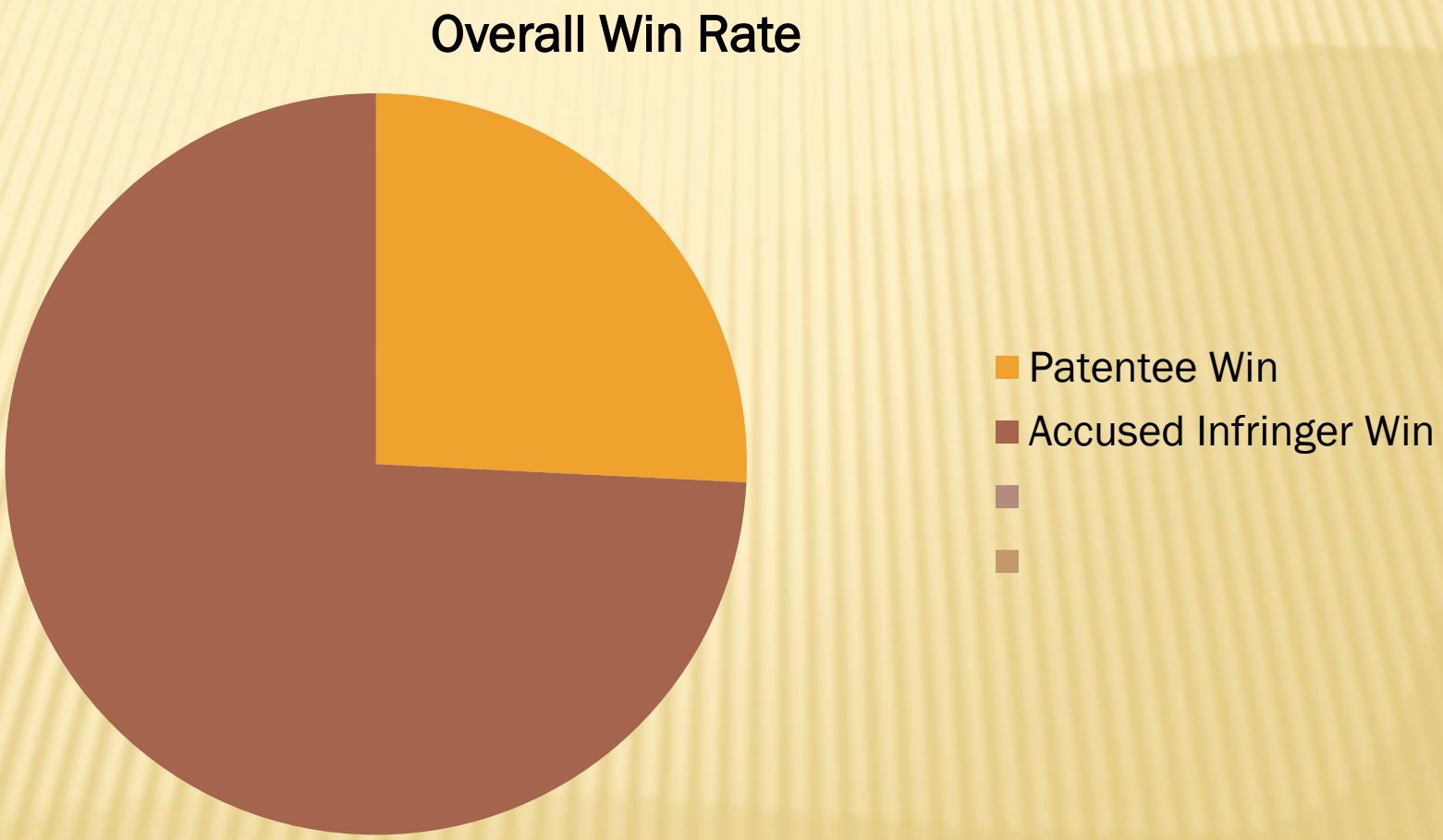
Plastics (8)

Consumer Products & Services--Not in other (131)

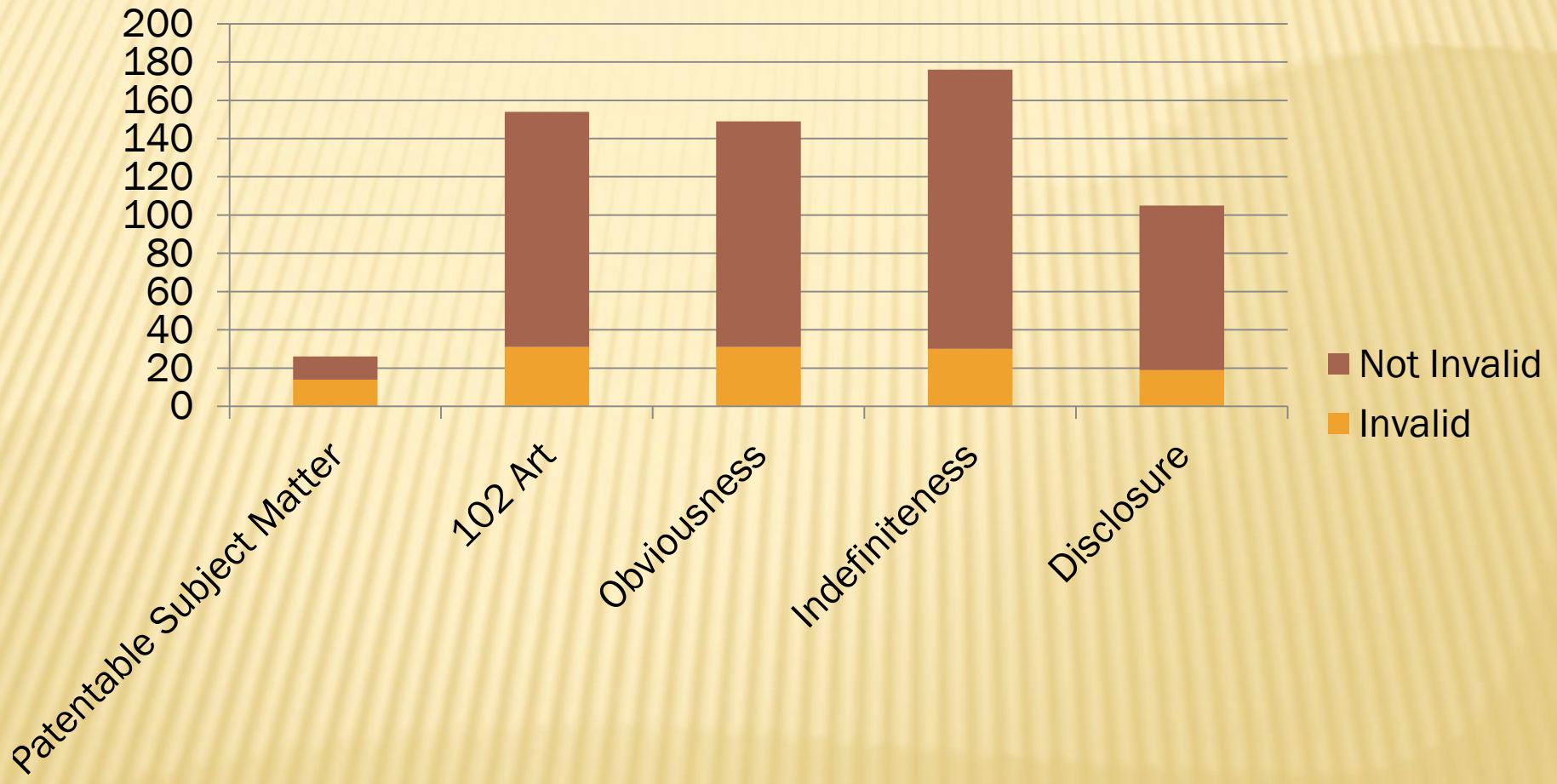
Goods & Services for Industrial & Business Uses (177)

Gaming (6)

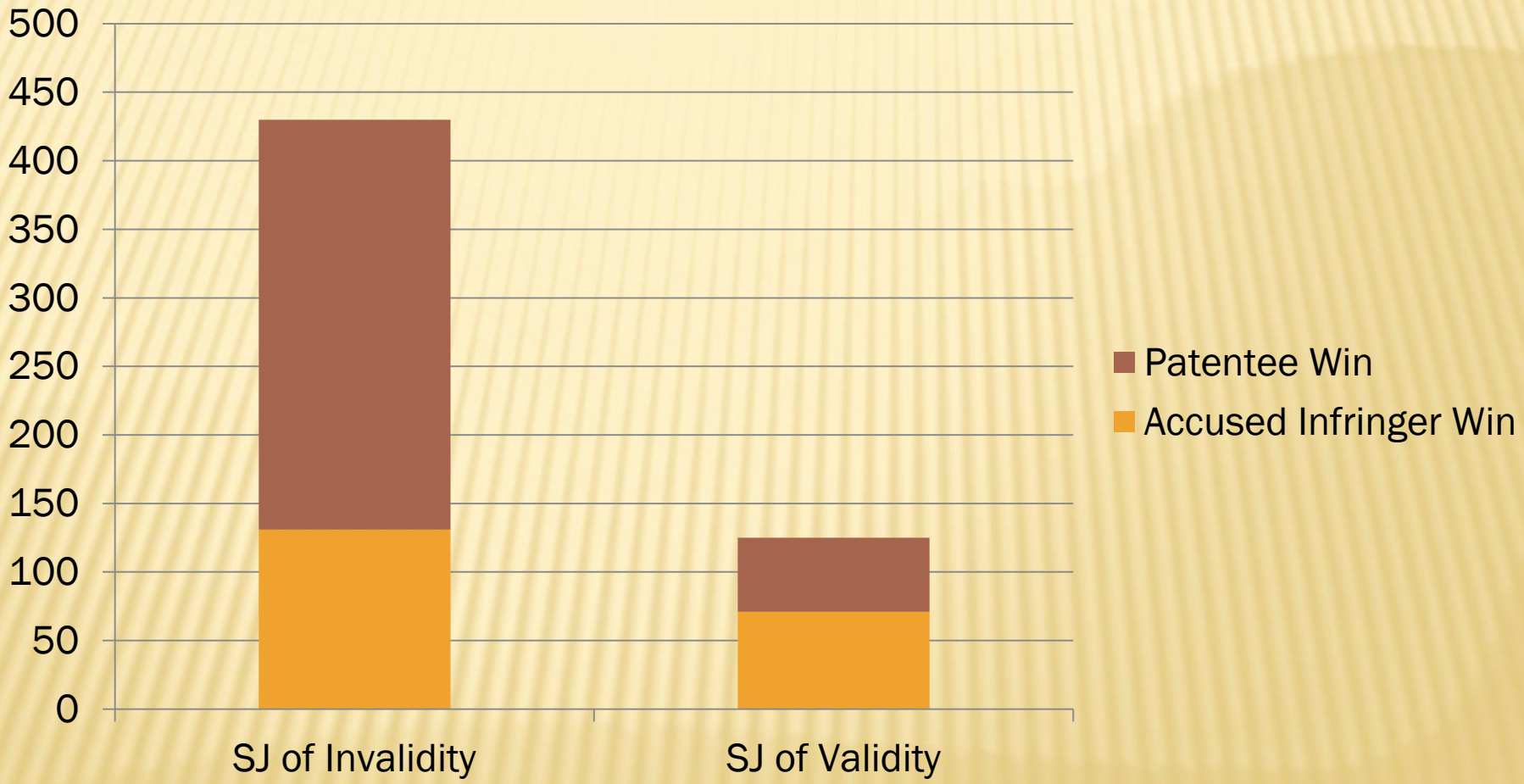
OUTCOMES



SUMMARY JUDGMENT OF INVALIDITY

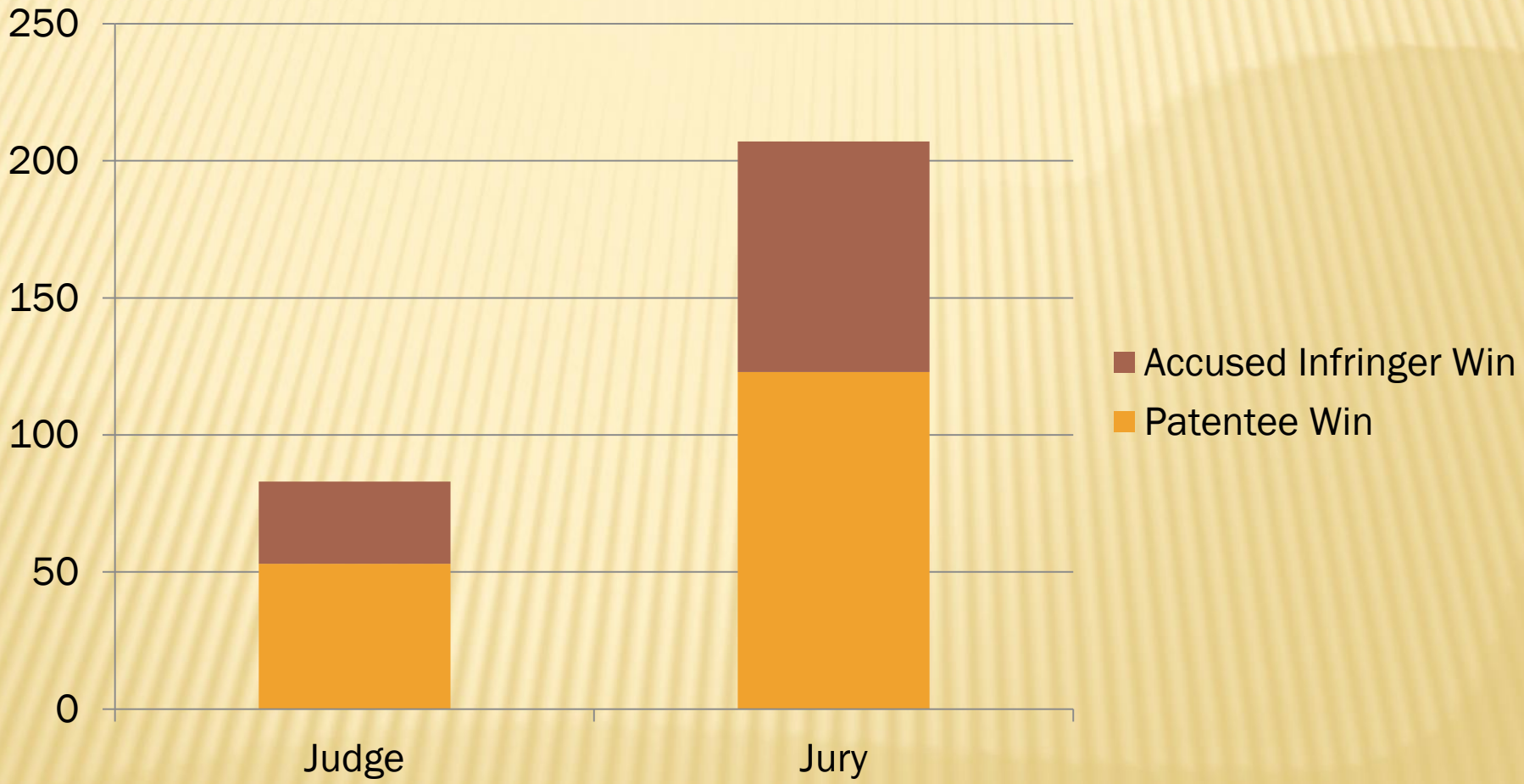


SJ OF VALIDITY AND INVALIDITY

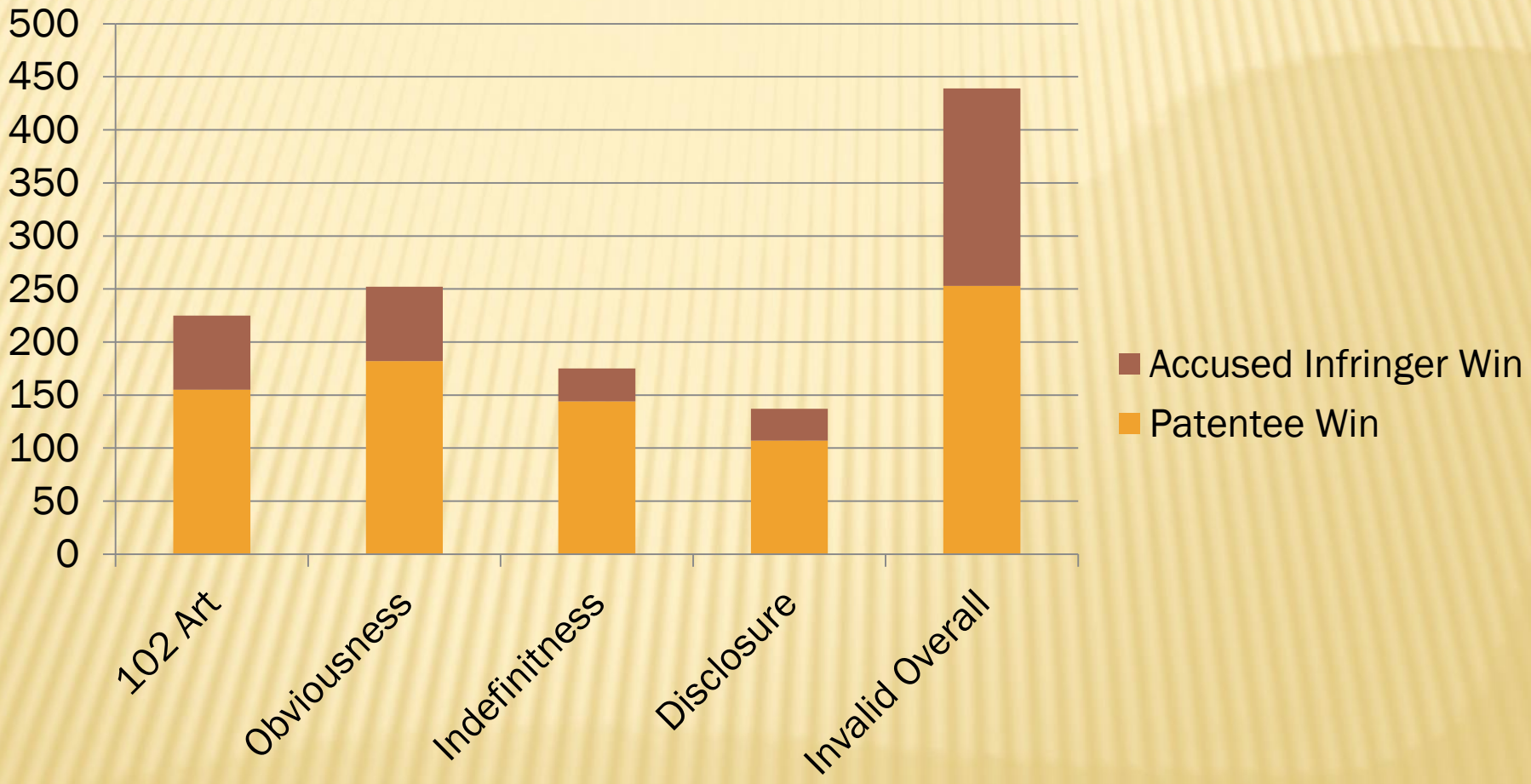


SJ OF INFRINGEMENT AND INEQUITABLE CONDUCT

TRIAL OUTCOMES



INVALIDITY RESULTS OVERALL



INTERESTING FINDINGS FROM MULTIPLE REGRESSIONS 1

- Definitive patent owner win rate—significant predictors of patentee win
  - Foreign origin of invention: $p < .001$
  - Number of asserted patents per case: $p < .001$
- SJ of invalidity—all grounds—Significant predictors
  - Foreign origin of invention: $p < .001$ Negative (i.e., SJ of invalidity much less likely)
  - Age of patent at this litigation filing: $p < .01$
- SJ of Invalidity—sec. 112 Inadequate disclosure
  - Age of patent at this litigation filing: $p < .05$
- No significant predictors of SJ's of non-infringement

INTERESTING FINDINGS FROM MULTIPLE REGRESSIONS 2

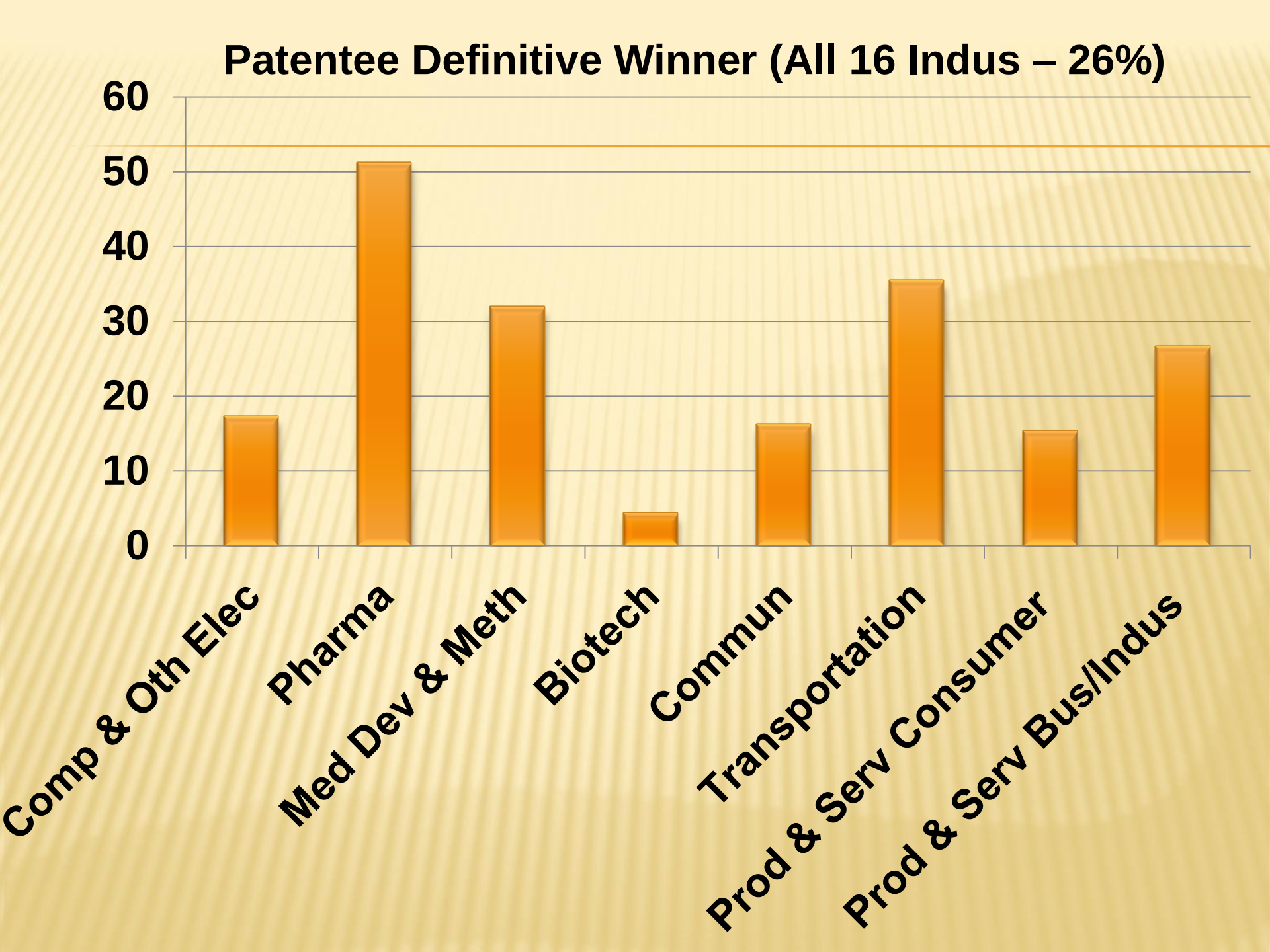
- ED Tex, D Del are significantly more likely to rule for the patentee; so is SDNY
- Only CD Cal is significantly less likely to rule for patentee
- Note that these are after factoring in all other differences in the cases
- DJ plaintiffs prevail more than other accused infringers, especially on invalidity

VARIATIONS ACROSS FEDERAL DISTRICTS (%)

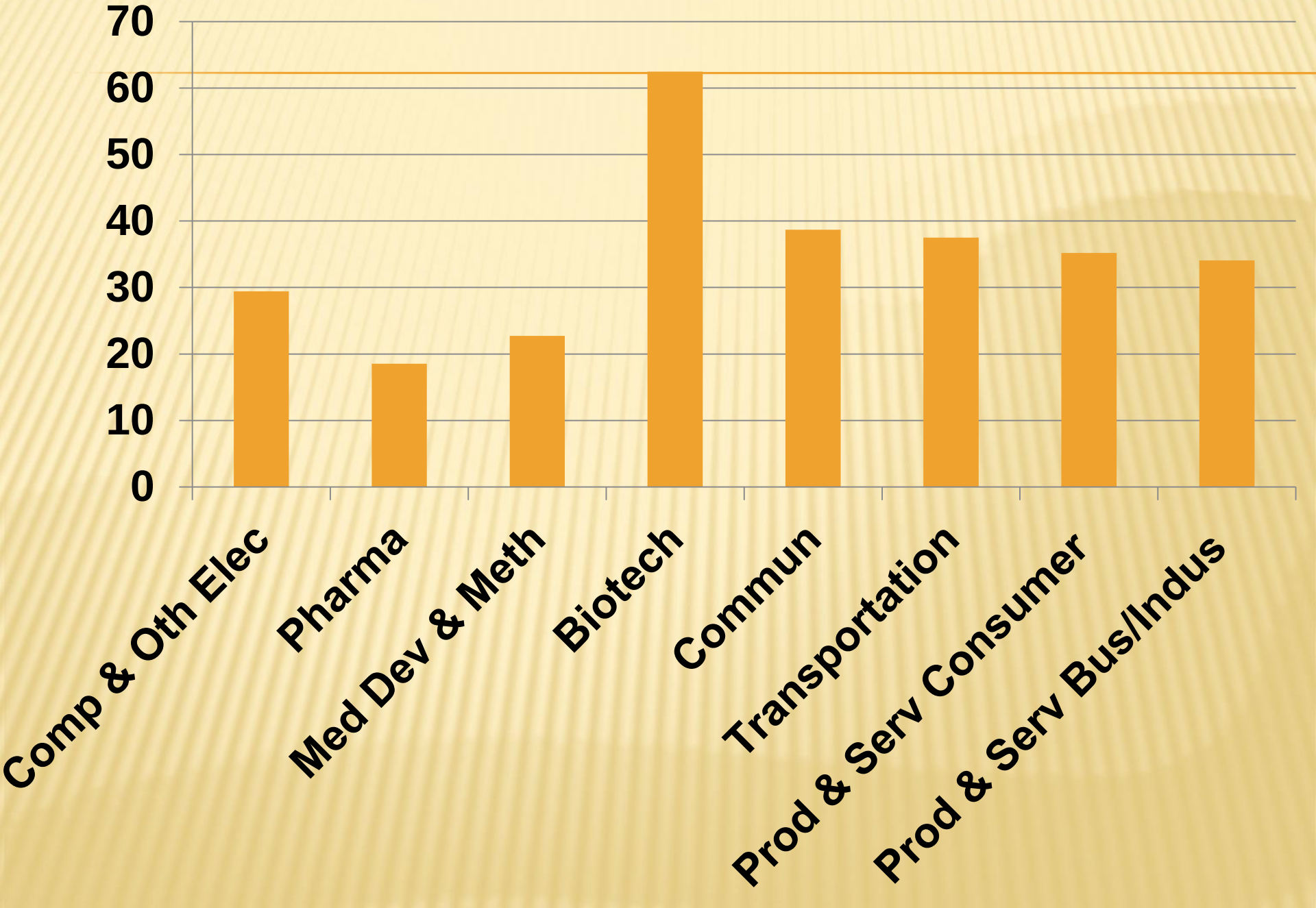
	TX ED	DE D	CA ND	CA CD	CA SD	NY SD	IL ND	WI WD	NJ D	MA D	VA ED	OH ND	TX SD	All Others
	Rate %													
Patent Owner Definitive Winner	45	33	15	5	20	54	5	32	17	0	19	25	33	19
SJ Invalidity	18	22	44	59	18	31	56	17	39	13	19	0	11	40
SJ Invalidity–Sec. 102 Prior Art	0	12	25	43	17	0	50	0	0	17	11	0	20	30
SJ Invalidity–Sec. 103	17	8	31	50	50	0	20	40	0	25	0	0	0	29
SJ Invalidity–Indef.	15	20	40	67	14	0	25	0	0	25	0	8	28	17
SJ Invalidity–Inadeq Disclos	0	33	20	50	0	100	40	0	57	0	0	0	0	12
SJ Noninfr. + stip. jgmt of noninfr.	41	62	64	63	52	62	41	75	56	53	57	0	91	50

VARIATIONS ACROSS TECHNOLOGY AREAS

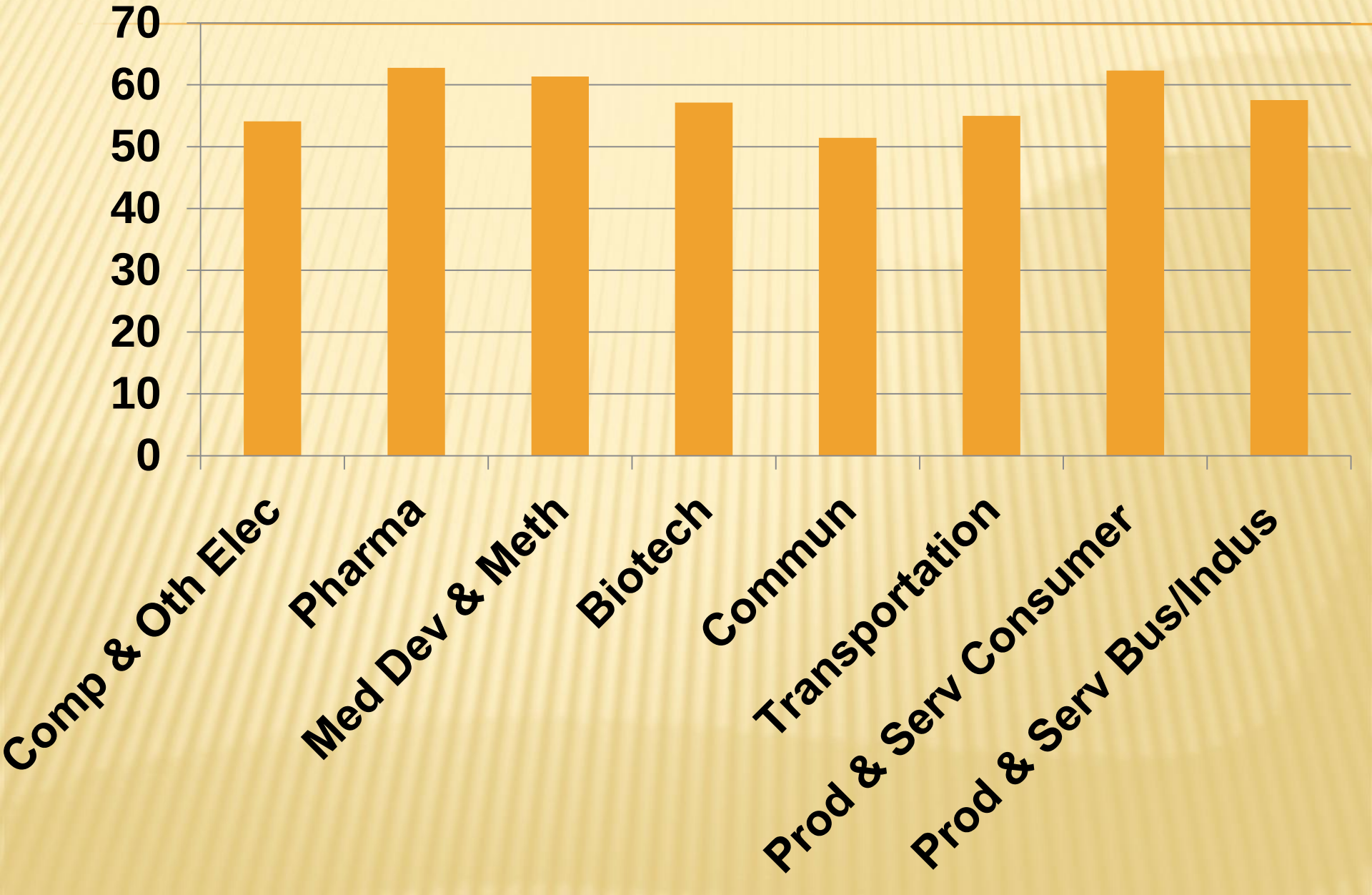
Technology Area	Mechanical	Electronics	Chemistry	Biotech	Software	Optic
			Rate %			
Patent Owner Definitive Winner	26	31	52	8	13	17
SJ Invalidity--All Grounds	29	29	19	50	36	14
SJ Invalidity--Sec. 102 Prior Art	16	15	29	20	28	20
SJ Invalidity--Sec. 103	26	26	None	None	26	Non
SJ Invalidity--Indefiniteness	5	29	3	None	23	11
SJ Invalidity--Inadequate Disclosure	21	8	50	8	13	14
SJ Noninfringement + stipulated judgment of non-infringement	52	56	58	63	54	41
Trial winner--Patent Owner	54	47	74	95	60	22
Trial winner-Accused Infr-Noninfr	18	29	34	0	19	10


Patentee Definitive Winner (All 16 Indus – 26%)
60
50
40
30
20
10
0
Comp & Oth Elec
Pharma
Med Dev & Meth
Biotech
Commun
Transportation
Prod & Serv Consumer
Prod & Serv Bus/Indus

SJ Invalidity-All (All 16 Indus – 31%)



SJ Non-Infringement + Stipulated Judgment of Non-Infringement (All 16 Indus – 57%)



CONCLUSIONS

Reality #1: The nature of validity challenges is changing (the growth of definiteness and PSM)

Reality #2: Individual validity challenges lose

Reality #3: Overall, challengers win

Reality #4: District matters a lot

Reality #5: Diversification works

Reality #6: Foreign inventors do just fine

Reality #7: It's good to go first

Reality #8: Pharma patents are strong, software and biotech are weak

Reality #9: Patent characteristics don't seem to matter much