

CLIENT ALERT

Congressional Efforts to Curb NPE Suits Intensify

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Congress may be poised to take action in the near future to limit patent litigation brought by non-practicing entities (NPEs), derisively called "patent trolls." Following several months of enhanced attention in Washington, including President Obama advocating for stricter laws to limit frivolous NPE lawsuits, House Judiciary Committee Chairman Bob Goodlatte, R-Va., and Senate Judiciary Committee Chairman Patrick Leahy, D-Vt., have circulated sweeping draft legislation to begin debate on comprehensive measures to address abusive NPE litigation tactics, as well as the patent system in general.

The discussion draft "aims to correct the current asymmetries surrounding abusive patent litigation" by, among other things, reducing the cost of litigating NPE cases. Specific provisions of the discussion draft include a process to encourage settlement and reduce protracted litigation. Other provisions require heightened pleading standards for patent infringement lawsuits, limit discovery obligations of the parties, and require patentees to record ownership information at the U.S. Patent and Trademark Office. Currently, recording ownership information is voluntary.

The draft comes on the heels of and seeks to harmonize individual bills directed at NPE litigation recently introduced in Congress, such as the SHIELD Act introduced by Reps. Peter DeFazio, D-Ore., and Jason Chaffetz, R-Utah, in late February. Another sweeping individual bill, the Patent Abuse Act, was introduced by Sen. John Cornyn, R-Texas, and seeks to address industry complaints about NPEs. Similar to the SHIELD Act, the Patent Abuse Act would create a "loser pays" system where the prevailing party is entitled to costs and expenses, including attorney fees, absent exceptional circumstances. Unlike the SHIELD Act, which applied the cost-shifting only to NPEs, however, the Patent Abuse Act awards costs and fees to prevailing parties in all patent infringement lawsuits.

Another section of the Patent Abuse Act would amend the model patent infringement complaint in the Federal Rules to set forth a heightened pleading requirement for all patent infringement complaints, including more than ten separate pieces of information not currently required. A final section of the bill requires cost-shifting to the party requesting additional and non-essential discovery, absent special circumstances.

Another individual bill, the End Anonymous Patents Act, H.R. 2024, was introduced by Rep. Ted Deutch, D-Fla., and would require all patentees to record ownership information at the U.S. Patent and Trademark Office. Supporters have praised that bill, which was referred to the House Judiciary Committee, arguing that it would finally prevent NPEs from exploiting loopholes in the law to use shell companies to hide the real party in interest.

A fourth individual bill, the Patent Quality Improvement Act, S.866, was introduced by Sen. Charles Schumer, D-N.Y., and would expand a patent litigation defendant's ability to challenge the validity of an asserted business method patent. While the two-sentence bill does not mention NPEs, Sen. Schumer said in a statement that the bill "will finally crack down on patent trolls that are preying on our nation's technology companies." Critics, however, have said that they doubt the broad impact on NPEs hoped by Sen. Schumer. Likewise, the Patent Quality Improvement Act has been referred to the Senate Judiciary Committee.

All of this activity suggests that some reform is coming. However, several members of Congress appear reluctant to pass any legislation affecting patent infringement litigation, including the specific bills discussed above. Instead, those lawmakers suggest waiting until the Government Accountability Office submits its planned report on patent litigation to Congress, to determine whether there is an abusive litigation problem, and whether it warrants a legislative response. These developments should be closely watched by intellectual property practitioners.

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