

# NEWEST FORMS OF ATTACK AGAINST PATENT NPEs

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A great deal has been written concerning patent non-practising entities (NPEs), also commonly referred to as patent assertion entities (PAEs) and by the pejorative label ‘patent trolls’. The percentage of US patent infringement litigation initiated by NPEs has now risen to levels exceeding half of all patent litigation initiated in the US. This has fuelled outrage and expressions of despair from newer quarters, in addition to the traditional outspoken segments of the business community. New fronts are opening in the war against NPEs.

In a first of its kind, one of the latest parties to launch an attack on NPEs is the State of Vermont. The state’s attorney general, Bill Sorrell, announced the May 8, 2013 initiation of a lawsuit by the state against MPHJ Technology Investments LLC, alleging that the defendant had violated the Vermont Consumer Protection Act by sending misleading letters to small businesses demanding compensation for alleged patent infringement of US Patents Nos. 7,986,426 and 6,771,381.

The ’426 patent, which names Laurence C. Klein of Silver Spring, Maryland as the inventor, is entitled ‘Distributed Computer Architecture and Process for Document Management’, and was granted on July 26, 2011. The ’381 patent, granted on August 3, 2004, also names Klein as the inventor, and is entitled ‘Distributed Computer Architecture and Process for Virtual Copying’.

Vermont’s lawsuit alleges that MPHJ’s conduct amounts to an unfair and deceptive practice, and is equivalent to MPHJ engaging in a form of extortion. MPHJ has been accused of sending letters to hundreds of businesses, including not-for-profits, urging them to pay \$1,000 per employee. These letters are alleged to contain false statements, such as a threat of immediate litigation which, as of May 22, has not occurred.

As observed by author Bill Donahue in his May 22, 2013 article in *Law360*, attorney general Sorrell’s office has stated that “patent trolling is a national problem” and that “... a recent study has found that the issue cost the US economy \$29 billion in 2011”. Sorrell asserts that no court has ever reached judgment regarding the validity of the ’426 and ’381 patents in suit. The prayer for relief in the Vermont lawsuit seeks injunctive relief, barring MPHJ from sending further threats, as well as damages which incorporate a \$10,000 fine for each violation, under the state’s consumer protection laws.

The governor of Vermont, Peter Shumlin, has also signed into law a provision that allows Vermont courts to evaluate whether a patent infringement claim is deceptive. This will permit Vermont companies which are targets of NPE actions to seek damages if civil investigations produce evidence that they have been wrongly pressured into paying licence fees. Observers of these

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aggressive actions against NPEs will be surprised to learn that, according to the president of the state’s chamber of commerce, Betsy Bishop, Vermont has the distinction of being one of the top generators of patents per capita. As reported in *CNN Money*, Bishop claims: “Vermont is forging ahead in technology innovation, biotech and bioscience. ... This law will help protect our industries and new business.”

It is not at all clear that the state of Vermont has the legal authority to regulate patent-related activities such as patent infringement threats and lawsuits. Under federal pre-emption doctrines, the US district courts have exclusive jurisdiction to hear and rule upon patent infringement and validity—states are not entitled to enact their own patent laws.

This Vermont law may very well fall within the purview of this limitation. If an allegation is made that an NPE is asserting an invalid patent against an alleged Vermont infringer, for example, a federal district court would necessarily need first to determine the validity of the patent in suit in order for the Vermont action to be sustainable. Furthermore, a state-by-state approach with all of the inherent inconsistencies that it would yield is far from desirable and would result in highly inconsistent and conflicting results.

Other attacks upon NPEs include actions by the US Federal Trade Commission, Congress and the President. The FTC has initiated a probe of NPEs, seeking to shed light upon how secretive companies operate. The FTC’s chair, Edith Ramirez, has called for it to use its subpoena power to gather facts and information about trends. While the FTC may be limited in what it is able to do about problems it uncovers, its action may very well spur other branches of government into action.

Several bills have been introduced in Congress, seeking to limit the activities of NPEs. And President Barack Obama himself has entered the fray by unveiling proposals of his own. NPEs are in for a bumpy ride. ■

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