Protect your business from the heavy toll of

Abusive patent litigation

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A company's business plan usually focuses on manufacturing and labor costs, product sales, growth, revenue and other success factors. Frustratingly, there has been a rise of companies that exist only to threaten and initiate lawsuits for patent infringement, which are often referred to as "Patent Assertion Entities" ("PAEs") or, less favorably in some circles, "patent trolls." According to a recent Federal Trade Commission report, PAEs focus only "on purchasing and asserting [pre-existing] patents against manufacturers already using the technology, rather than developing and transferring [new] technology."

The number of patent infringement lawsuits by PAE's has shot up from about 500 cases in 2006 to over 1500 in 2011. While not every PAE who sues to enforce its patents does so abusively, there is a certain ilk who, having obtained their patents second- or third-hand from the original owner, seek only to bring value to (or "monetize") the patent via litigation and threats of litigation. In some cases, the strategy involves very broadly identifying companies suspected of practicing the patented technology; using a mass letter campaign aimed at target businesses; and providing very limited time for each recipient to agree to pay a license fee or face a patent infringement claim. Some PAE's that price their settlement demand high enough to make a profit, but lower than the target's anticipated litigation defense costs. Consequently, the target has a difficult decision: pay now or defend in court later.

Virtually any company selling products or services is a potential target for PAE litigation. Accordingly, there are five things that a company should consider, if it receives such a letter.

First, do not ignore it. Hire qualified patent counsel to compare the patent(s) at issue to the subject products or services. If the letter has merit, consider an early settlement, even prior to the filing of a lawsuit if feasible.

Second, there is strength in numbers. Inquire of relevant trade associations whether other industry members have received a similar notice letter. In some cases, joint sharing of information, coordination of defenses, and division of some expenses amongst a group of targets is mutually beneficial.

Third, determine whether a claim for indemnity exists under a contract, or a prior license that might prevent the PAE from suing on its patent. If a third party is obligated to defend the infringement claim, notify it as soon as possible to preserve indemnity rights.

Fourth, determine whether a general liability insurance policy covers the allegations of infringement. Insurance policy exclusions often exempt such coverage, but coverage may turn on how the notice letter or complaint is worded.

Fifth, make informed decisions. Get as much information as possible and as expeditiously as possible to determine whether to settle or defend. Always remain flexible to changing circumstances in the dispute.

Until Congress acts or there is a significant landscape change through court decisions, manufacturers and service providers must remain alert and equipped to respond to these infringement claims.

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