

THE COALITION FOR 21ST CENTURY PATENT REFORM

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PLEADING REQUIREMENTS IN S. 1013 (CORNYN)

Proposed § 281A in the Patent Abuse Reduction Act of 2013 (S. 1013) would require any pleading alleging patent infringement to include the following: an identification of each patent and each claim allegedly infringed; an identification of each accused instrumentality, including its name or model number; an explanation of all theories of infringement; an identification of the right of the party alleging infringement to assert the patent(s)-in-suit; a description of the principal business of the party alleging infringement; a list of prior litigation involving the patent(s)-in-suit; disclosure of whether the patent(s)-in-suit have been declared essential in a standard-setting body; disclosure of the identity of any person other than the party alleging infringement who owns, co-owns, or is an exclusive licensee of any asserted patent; disclosure of the identity of any other person that the party alleging infringement knows to have a legal right to enforce an asserted patent or to have a license under such patent; disclosure of the identity of any person with a direct financial interest in the outcome of the action; and a description of any legal basis for a financial interest of another in an asserted patent.

Unlike H.R. 3309 as passed by the House, the Cornyn bill does not 1) except allegations of infringement in Hatch Waxman cases from these requirements, 2) provide any flexibility where the required information is not readily accessible, or 3) provide for a court, for good cause shown, to allow information determined to be confidential to be filed under seal.

S.1720 is silent with respect to pleading requirements, appropriately relying on the courts and Judicial Conference to react to and appropriately adjust pleading requirements to reign-in abusive litigation practices.

If proposed § 281A is to be further considered, the Coalition for 21st Century Patent Reform (21C) believes that amendments are necessary for it to be acceptable. Although the 21C does not believe that additional pleading specificity is the most direct or effective way to address abusive patent litigation practices, we believe that some additional specificity beyond what is currently required by Federal Rule of Civil Procedure Form 18, the model complaint for patent infringement, for pleading claims of patent infringement would be appropriate. The 21C has supported, for example, revisions to Form 18 to provide an identification of the accused product(s) and the basis for the alleged infringement. When sufficient information is available, it would be fair to expect that patent infringement complaints provide notice of, and an explanation of the bases for, allegations demonstrating how at least one claim is alleged to be infringed by at least one accused product or process. The 21C is mindful of the fact that patent owners will sometimes lack sufficient information to provide complete specificity with respect to all of their claims and all of the defendant's products, which is why an explanation of how the patent owner believes that one or more of the claims is infringed by at least one accused product should suffice to put the defendant on fair notice of the basis for the action, without imposing undue burden on the patent owner to plead all details of its case before any discovery has commenced.

The pleading requirements in proposed § 281A of S. 1013 go well beyond this concept of fair notice of the basis for the allegation of infringement and well beyond the requirements of Rule 11 of the Federal Rules of Civil Procedure. We do not see the benefit of requiring that all of the information specified in proposed § 281A be included in the complaint. The additional information required may not be readily available to the patent owner at the time of filing the complaint; and in any event, it is typically exchanged as part of the routine discovery between the parties. On the other hand, the harm of requiring such pleading specificity is readily apparent. Legislating pleading requirements with this degree of specificity will simply engender disputes at the outset of cases about the sufficiency of the pleadings, even in cases where the

parties fully understand the basis for the allegation of infringement. The new pleading requirements in proposed § 281A of S. 1013 will add to the costs, burdens and time it takes to identify and narrow the issues in dispute and to resolve patent infringement actions.

The 21C does not object to a more robust exchange of information underlying the allegations in initial pleadings at the outset of patent infringement actions, but we believe that infringement defendants should likewise be required to plead the basis for the denials and defenses in their answers, and any allegations in their counterclaims, with corresponding specificity. A more fulsome exchange of information at the outset of infringement actions by plaintiffs and defendants alike will advance their efficient resolution.

As a practical matter, however, the 21C believes that the judiciary is in the best position to determine what additional pleading specificity will in fact best advance the efficient resolution of patent cases. We believe that Congress should call upon the Judicial Conference to propose revisions to Form 18, and the Supreme Court to adopt a revised Form 18, to ensure that a complaint for patent infringement includes sufficient information to ensure that the defendant has adequate notice of the basis for the allegation of infringement, without requiring so much specificity that every complaint spawns needless and burdensome battles about the adequacy of what has been pled. The judiciary, drawing upon its experience in the litigation of patent disputes, is best positioned to strike this balance in a revised Form 18.

The 21C does not believe that specifically enumerating pleading requirements in the patent statute or in a specific mandatory instruction to the Judicial Conference is necessary or desirable. If it is determined to be necessary to legislatively address pleading requirements, however, asking the Supreme Court to consider revisions to Form 18 as provided in H.R. 3309 is certainly preferable to the onerous and unnecessary pleading requirements set forth in proposed § 281A of S. 1013.

The Coalition has approximately 50 members from 18 diverse industry sectors and includes many of the nation's leading manufacturers and researchers.

The coalition's steering committee includes 3M, Caterpillar, General Electric, Johnson & Johnson, Eli Lilly and Procter & Gamble.

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