

10 Ways Congress Tried To Address NPE Litigation In 2013

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The year 2013 saw a steady and increasing drum beat for legislation addressing perceived problems with patent litigations started by nonpracticing entities. While none of these legislative efforts has yet become law, progress is being made and 2014 is likely to be a year of legislative action on this issue.



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Throughout 2013, there were at least 10 bills introduced in Congress that target issues directly related to NPE patent litigation. Each of the bills discussed below address one or more of the perceived issues with NPE patent litigation, including: shifting of costs and fees; heightening pleading standards; modifying discovery costs and timing, allowing manufacturers to protect end-users, expanding the covered business method review program, and increasing transparency related to the real parties at interest.

In the House of Representatives, most of the bills introduced in early 2013 were rolled up into the Innovation Act, which recently passed the House of Representatives on a bipartisan 325-91 vote. This bill addresses the vast majority of the perceived issues with NPE litigation. In the Senate, instead of an omnibus type bill, there are several smaller bills making their way through committee, each addressing only a small handful of the perceived issues with NPE litigation.

While midterm elections are next year and this Congress has been noted for the markedly small number of bills passed in this partisan era, legislation aimed at addressing perceived problems with NPE patent litigation appears to enjoy a consistent and growing block of bipartisan support.

The Saving High-Tech Innovators from Egregious Legal Disputes (SHIELD) Act

The Saving High-Tech Innovators from Egregious Legal Disputes (SHIELD) Act (H.R. 845) was introduced in the House of Representatives on Feb. 26, 2013, and is not currently being considered by the House Judiciary Committee in light of the recently passed Innovation Act. The bill attempted to put more risk on an NPE by requiring the NPE to post a bond to cover a defendant's legal fees and costs in defending the case.

The Patent Quality Improvement Act

The Patent Quality Improvement Act (S.866) was introduced in the Senate on May 5, 2013, and is currently referred to the Committee on the Judiciary. This bill would maintain the covered business method review program and expand it to all industries instead of just the financial industry.

The End Anonymous Patents Act

The End Anonymous Patents Act (H.R. 2024) was introduced in the House of Representatives on May 15, 2013, and is not currently being considered by the House Judiciary Committee in light of the recently passed Innovation Act. The bill addressed transparency by requiring an NPE to identify the real parties in interest.

The Patent Abuse Reduction Act

The Patent Abuse Reduction Act (S.1013) was introduced in the Senate on May 21, 2013, and is currently referred to the Committee on the Judiciary. The bill heightens the pleading requirements for claims of patent infringement requiring the plaintiff to identify the patent claims being asserted, details of the asserted infringement, the principal business of the plaintiff, and the real parties in interest.

This bill also attempts to decrease the lopsided discovery burdens in NPE litigation by having the producing party pay for “core documentary evidence” but shifting the cost to produce additional discovery to the requesting party. Moreover, the bill stays most discovery efforts until after claim construction. Finally, the bill further puts an NPE plaintiff at risk by including a cost and fee-shifting provision, unless the loser’s positions were “objectively reasonable and substantially justified.”

The Patent Litigation and Innovation Act

The Patent Litigation and Innovation Act (H.R. 2639) was introduced in the House of Representatives on July 9, 2013, and is not being currently considered by the House Judiciary Committee in light of the recently passed Innovation Act. The bill has similar language to the Senate’s Patent Abuse Reduction Act with respect to pleading standards and discovery provisions. Additionally, the bill allows suits between an NPE and an end-

user to be stayed pending resolution of a suit between the NPE and the manufacturer. Finally, the bill provides a court with greater latitude in issuing sanctions for frivolous filings.

The Stopping the Offensive Use of Patents (STOP) Act

The Stopping the Offensive Use of Patents (STOP) Act (H.R. 2766) was introduced in the House of Representatives on July 21, 2013, and is currently referred to the Subcommittee on Courts, Intellectual Property and the Internet. This bill is similar to the Senate's Patent Quality Improvement Act with respect to expanding the covered business method review program.

The Innovation Act

The Innovation Act (H.R. 3309) was introduced in the House of Representatives on Oct. 22, 2013, and passed on Dec. 5, 2013, by a 325-91 vote. This bill addresses almost every area of reform raised in the previous bills. For example, bill adopts similar language to the Senate's Patent Abuse Reduction Act and the House's Patent Litigation and Innovation Act with respect to pleading standards, discovery costs, delaying discovery until after claim construction, and cost and fee shifting.

As with the Patent Litigation and Innovation Act, the bill allows suits between an NPE and an end-user to be stayed pending resolution of a suit between the NPE and the manufacturer. The Innovation Act originally maintained the current scope of the covered business method review program, but that provision was recently removed by amendment.

The Patent Litigation Integrity Act

The Patent Litigation Integrity Act (S. 1612) was introduced in the Senate on Oct. 29, 2013, and is currently referred to the Committee on the Judiciary. The bill has a fee and cost-shifting provision similar to the Patent Abuse and Reduction Act but like the House's SHIELD Act, it requires a patent owner to post a bond against the fees.

The Patent Transparency and Improvements Act

The Patent Transparency and Improvements Act (S. 1720) was introduced in the Senate on Nov. 17, 2013, and is currently referred to the Committee on the Judiciary. This bill provides

end-user protection by a manufacturer similar to the House's Innovation Act, has various transparency provisions similar to the Innovation Act and has a provision allowing the [Federal Trade Commission](#) to take action against demand letters sent in bad faith.

The Demand Letter Transparency Act

Finally, the Demand Letter Transparency Act (H.R. 3540) was introduced in the House of Representatives on Nov. 18, 2013, and is currently referred to both the Committee on the Judiciary and the Committee on Energy and Commerce. This bill requires demand letters sent on behalf of NPEs to over 20 companies to have certain minimum content requirements and be maintained in a national database.

Out of all 10 of these introduced in this Congress, only the Innovation Act has made it through committee and been passed by the House of Representatives. None of the bills introduced in the Senate has yet passed. It is likely that a number of these bills will be addressed in the first half of 2014. As both the House of Representatives and the Senate appear to be adopting very similar solutions to many of the perceived problems with NPE patent litigation, it is further likely that 2014 will see at least some of these bills forwarded on for the president's signature.

—By Jason J. Keener, [Foley & Lardner LLP](#)

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