



MEMORANDUM

TO: Members of the Assembly Commerce Committee
FROM: Alida Kass, Chief Counsel
SUBJECT: Assembly Bill 2462
DATE: October 2, 2014

The New Jersey Civil Justice Institute is a statewide, bipartisan coalition of the state's largest employers, small businesses, and leading trade associations advocating for a fair and predictable civil justice system in New Jersey. On behalf of our members, **we respectfully oppose A-2462.**

As proponents of an equitable and predictable civil justice system we appreciate sponsors' concern over meritless litigation and recognition of the significant costs it imposes on all New Jersey businesses. And we share the sponsors' concern over "patent trolls" who are taking advantage of the proliferation of patents, especially in the IT realm, to make meritless demands and threaten frivolous litigation.

However, it is important to recognize that these "patent trolls" are not the source of the problem. As is true throughout New Jersey's civil justice system, the high cost of litigation and the ability to recover excessive damages enables patent holders to threaten frivolous litigation and bargain for excessive settlements. The "patent troll" phenomenon is largely a symptom of fundamental issues in the litigation system that have been amplified by specific issues in the patent system.

To the extent there are patent-specific issues exacerbating that general problem, the proposed legislation would not fix those problems. Because patents are exclusively a federally created and enforced property right, it is not possible to address the underlying problems at the state level. Recent developments at the federal level, including expanded availability for defendants of meritless claims to recover fees from plaintiffs who bring meritless claims and strengthened pleading requirements for filing patent litigation, actually have the potential to shift incentives on bad actors and discourage meritless claims. We would also support additional legislation currently under consideration at the federal level.

Creating a new cause of action in state court, on the other hand, might actually create more problems.

The proposed legislation would affect much more than just the bottom-feeders sending out meritless shake-down demand letters. Granted, legislatively defining the "patent troll" is a challenge. But the list of factors in this bill for the court to consider is really just a collection of characteristics that correlate with bad actors. The bill does not effectively define who is being

targeted by this legislation and as a result it would have potentially wide-ranging and unpredictable application.

The lack of clarity and predictability in the legislation is especially dangerous when combined with the other penalties and enforcement mechanisms in the bill. The one-way fee-shifting and treble damages has the potential to distort the process by which property rights in patents are enforced – not just with respect to “trolls” but to patent holders generally. The bonding requirement in the legislation would also impose a particular burden on small companies and individuals who lack the resources to post a bond in order to defend their property interest.

Again, we appreciate the concern over the impact of frivolous litigation and we would welcome the opportunity to improve the incentive structure in the civil litigation system where appropriate at the state level. Unfortunately, patent litigation is the one area where the remedy is best left to the legislative and judicial bodies with the constitutional capacity to address the underlying problems.

We respectfully ask that you hold the bill.

Additional resources: The New Jersey Civil Justice Institute recently hosted a teleforum on the topic with Professor Adam Mossoff, a leading authority in intellectual property at George Mason University Law School.

<http://youtu.be/HSUtYkoUYy8>

