



MEMORANDUM

TO: Members of the Assembly Commerce Committee
FROM: Alida Kass, Chief Counsel
SUBJECT: Assembly Bill 310
DATE: February 22, 2016

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-310.**

As proponents of an equitable and predictable civil justice system, we appreciate sponsors' concern over meritless litigation and their recognition of the significant costs it imposes on all New Jersey businesses.

As is true throughout the civil justice system, the high cost of litigation enables patent holders to threaten frivolous litigation and bargain for excessive settlements.

However, to the extent there are patent-specific issues exacerbating that general problem, the proposed legislation would not solve them. Because patents are exclusively a federally created and enforced property right, it is not possible to address underlying problems at the state level.

Recent developments in federal court, however, have already begun to deter frivolous patent litigation.

Federal rules have eliminated the permissive notice pleading that had allowed plaintiffs to file low-cost bare bones complaints that shifted the more significant litigation costs onto patent users. Heightened pleading requirements for patent infringement claims now require a more significant investment at the outset, reducing the incentives for frivolous claims.

A pair of U.S. Supreme Court cases has also expanded the availability of fee-shifting for frivolous patent infringement claims. *Highmark* and *Octane Fitness* have already prompted a dramatic increase in fee awards – reducing the burden on patent users and further deterring bad actors from filing shake-down complaints in the first place.

Creating a new cause of action in state court, on the other hand, would actually create more problems. State court judges typically lack any experience with patent law. But they would be empowered to award one-way fee-shifting and treble damages upon a determination of “bad

faith” – based on a grab-bag list of characteristics that do not go the merits of the underlying claim.

The proposed legislation would affect much more than just the bottom-feeders sending out meritless shake-down demand letters. It 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.

Patents are property rights. Whereas tangible property rights can be protected by actual possession, intellectual property rights can be enforced only through litigation. To the extent we burden the enforcement of those rights we are weakening those property rights, and dampening incentives for innovation and the creation of new intellectual property.

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 the committee hold the bill.