

Oppose HR 3309, the “Innovation Act”

H.R. 3309, the “Innovation Act” (Rep. Goodlatte), makes radical, unnecessary changes to the Patent Act that undermine the very purpose of the Patent System and will close the courthouse doors to small businesses, inventors and entrepreneurs. Most cutting-edge technological innovations come from small companies and inventors. Without the ability to enforce their rights these individual inventors and small startups would have no recourse when a powerful corporation takes their inventions without just compensation. Even with an “airtight” case, litigation can often be unpredictable and extremely costly with corporate defendants dragging out the case in order to wear down the plaintiff into accepting a low settlement offer. Few American inventors and small business owners can risk their retirement savings, children’s college tuition and even homes in the event of a loss. Additionally, working class Americans may not have the resources to pursue even the most meritorious patent infringement claims. This bill ultimately undermines the very protections and incentives for inventors that have helped make America the world’s great engine of innovation. This legislation would:

Require the loser to pay attorney fees and expenses – Loser pays policy prevents plaintiffs from receiving fair compensation and deters them from pursuing meritorious patent infringement claims. It creates a situation where experienced institutional defendants with enormous resources and expert legal talent can bully injured plaintiffs into unfair settlements due to the risks associated with losing even a potentially successful case. Patent litigation is already extremely risky and costly for plaintiffs and “loser pays” creates yet another disincentive for inventors and small businesses to defend their patent rights in court.

Eliminate notice pleading and Form 18 – Elimination of notice pleading forces courts to place form over substance. The stringent pleading requirements in this bill would require excessively detailed claim charts in the complaint and lead to additional litigation and challenges even before the case gets off the ground. Courts have recently held that the more stringent pleading requirements outlined in the *Iqbal* and *Twombly* decisions are not applicable to complaints alleging patent infringement and that Form 18 pleading is sufficient.¹

Shift fees in discovery – Inventors would bear the burden of additional costs for the discovery of documents that are deemed outside the scope of “core documentary evidence”. This would unfairly prejudice the plaintiff and add yet another unfair financial hardship on them when requesting additional discovery of evidence to assist in proving their claims and holding large corporations accountable.

Dramatic limits on discovery – The Federal Rules of Civil Procedure that govern discovery in patent cases would be replaced by limits so severe that many cases that could have been proven before will become completely unwinnable. Placing such severe limits on discovery would inhibit the inventor’s or small business’ ability to access vital documents and materials to prove their patent infringement claims. Ultimately, the plaintiff would be either forced to expend

¹ *In re Bill of Landing Transmission*, 681 F. 3d 1323(2012).

additional financial resources and attempt to compel additional discovery or abandon their patent infringement claim altogether.

Stays all cases until claim construction is complete – The courts should be left to determine how to manage their own dockets. Long experience has shown that claim construction is most helpful when conducted in the middle of the case, not at the beginning. Placing it at the outset unfairly advantages defendants, who (with full knowledge of their confidential information) craft their arguments to avoid infringement while depriving inventors of technical discovery.

The customer-suit exception – Gives fertile ground to major manufacturers to claim that they are in fact the “customer” of their suppliers, forcing inventors to proceed against smaller, usually foreign suppliers first – raising costs and reducing the likelihood that the inventor can collect a fair recovery.

Perverse incentives for declaratory judgment actions – Under the Declaratory Judgment Act, a party can file a patent suit to obtain a declaration that a patent is invalid and/or not infringed by the party. In such cases, the patentee is the party being sued. Courts have allowed such cases to proceed where the patentee has done little more than send a letter offering a license to a potentially infringing party. Under the Goodlatte bill, “loser pays” applies to these actions, creating unfair risk to patentees who never even file suit. In addition, the Goodlatte bill does not require any heightened pleading requirements for plaintiffs who file a declaratory judgment action for patent invalidity or non-infringement.

HR 3309 would do very little to foster innovation! In fact, it would likely have the opposite effect!

AAJ Urges Your Opposition to HR 3309!