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Patent Insurance – It's Not Just for Defendants Anymore

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When purchasing insurance, an insurance-buyer generally seeks to protect him or herself against potential liabilities or risks of loss. For example, many companies will purchase patent liability insurance to offset the costs of defending against an infringement claim. While such “defensive” patent liability insurance is fairly common, a lesser known type of “offensive” insurance is available to patent owners to help offset the costs of enforcing a patent against an alleged infringer.

So-called “patent enforcement” insurance is designed to cover litigation costs (up to a specified amount) for enforcement actions where the patent holder institutes a lawsuit based on specific, scheduled patents (both U.S. and foreign).

Patent enforcement insurance is often seen as a blended risk policy, meaning the policy has characteristics of both conventional insurance and a bond. This means that the policy is true insurance in, for example, the event that the plaintiff patent owner loses the lawsuit, since the policy covers costs relating to the action. If the policy holder wins the underlying lawsuit, however, the policy acts as a bond insofar as the patentee has received what is known as an “economic benefit,” which will likely be subject to an economic benefit payback provision. If the company that owns the patent receives any monetary settlement or award, it reimburses the insurer for its pre-defined pro-rata share of those expenses up to the amount contributed. The patent owner retains any additional recovery. Once the patent holder repays the economic benefit, the policy limits are reset and those funds are then available to pursue other infringers.

Even where the prevailing patent holder does not receive a monetary award, repaying the economic benefit may be mandated. For example, in an action where the patentee fails to prove infringement but benefits from an order upholding the validity of its patent, the patentee has received a benefit. The patent has a stronger presumption of validity going forward and thus is more valuable than before it was litigated. Thus the insurer may request reimbursement of a portion of the litigation expenses it had previously paid that relate to efforts to uphold the patent’s validity. In this sense, the enforcement policy contains provisions that are a hybrid of both traditional insurance coverage and a bond.

The cost of the patent enforcement insurance is relatively high compared to more traditional defensive insurance. Coverage is usually available in the range of \$250,000 to \$10 million. Premiums are calculated based on the number of patents insured under the policy and their relative risk, with premiums ranging from between 1-5% of the insured amount. Policies may also contain deductibles and co-pays that must be covered by the insured.

Before issuing a patent enforcement policy, underwriters normally engage in a due diligence risk analysis of factors such as the subject matter and number of patents insured, any products and/or services covered, the potential litigation profile and other risk factors which have bearing on the premium to be assessed.

Any company contemplating enforcement insurance should weigh the costs of the insurance against the risk of engaging in costly litigation trying to enforce a patent without coverage. While typically more expensive than a defensive policy, enforcement insurance may make sense for a patent holder needing funds up-front to support a strong legal position at the beginning of negotiations or litigation.