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Congress Conducts Hearings on Section 337 Litigation at the International Trade Commission

On April 16, 2013, the House Committee on the Judiciary, Subcommittee on Courts, Intellectual Property, and the Internet, held a hearing on "Abusive Patent Litigation: The Issues Impacting American Competitiveness and Job Creation at the International Trade Commission and Beyond." The purpose of this hearing was to discuss alleged abusive litigation practices at the International Trade Commission (ITC). The hearing featured six private sector witnesses. Although the International Trade Commission was not represented at the hearing, former ITC Chairwoman Deanna Okun appeared as a witness.

In his opening remarks, Subcommittee Chairman Coble (R-NC) expressed concerns that patent assertion entities (PAEs) have increasingly used the ITC to drive litigation settlements. Committee Chairman Goodlatte (R-VA) expressed similar concerns in his written statement for the record, noting that, "PAEs have used the Commission as a forum to assert weak or poorly-issued patents against American businesses… Nowhere is the disharmony between patent law and Article III court precedent more on display than the application of exclusion orders in technology cases at the ITC." Goodlatte suggested that the ITC consider taking the following steps to deal with the issue: (1) return to a pre-2010 domestic-industry standard that does not allow legal and certain other expenses to satisfy the domestic industry requirement; (2) apply the public interest test and economic prong of the domestic industry test at the beginning of a Section 337 investigation for purposes of determining claim consideration as well as the issuance of exclusion orders; and (3) using the public interest and domestic industry tests, articulate standards that clarify which patent disputes should be adjudicated by the ITC and which are more properly addressed by U.S. district courts.

While Subcommittee Ranking Member Watt (D-NC) recognized these concerns in his opening remarks, he stressed the following points: (1) there is currently no satisfactory definition of what constitutes a patent troll; (2) the ITC's core task is protect U.S. industries from unfair trade practices; it would be wrong to dismantle it, even at the margins, or to unhinge the ITC's foundational underpinnings to address a perceived problem; (3) it is impossible for the "numbers" to accurately reflect whether extortion [abusive/frivolous litigation] is taking place; and (4) the SHIELD Act (H.R. 845) could have the unintended consequence of sending more cases to the

ITC. Committee Ranking Member Conyers (D-MI) also expressed skepticism about whether the recent increase in Section 337 investigations was really due to abusive behavior by PAEs.

After the Members' opening statements, each of the witnesses was invited to make a short opening statement, which highlighted key points from their written testimony. Kevin Rhodes, Vice President and Chief Intellectual Property Counsel for 3M Innovations Properties Company, stated that any legislative reforms should focus on abusive practices, rather than the type of patent owner. To address abusive practices, Rhodes highlighted three areas of focus: (1) more frequent fee-shifting in favor of prevailing parties in patent cases; (2) more rational, proportional and uniform discovery in patent cases; and (3) codification of the right to stay patent suits against customers and end users. With respect to potential ITC reform legislation, Rhodes cautioned against such action and noted that the ITC "is in the process of developing its jurisprudence and practice to respond to concerns expressed regarding PAEs seeking unwarranted Exclusion Orders and to improve its management of patent infringement investigations." These sentiments were echoed by former ITC Chairwoman Okun in her testimony, who noted that, "the Commission is tailoring its remedial orders to reflect economic and practical realities, and public interest concerns are being carefully addressed. The ITC's recent decisions and administrative actions have sent a clear message that this is not the forum for patent holders who do not make the investments in the U.S. economy mandated by Congress." In contrast to Okun's testimony, Prof. Colleen Chien argued that "[b]y our count, over 90 percent of [section] 337 patent cases [that] were filed in 2012 had a counterpart in the district court. This implies that the ITC is not being used for its original intended purpose – to reach litigants that district court can't. Just as with district court, PAEs are also using the ITC – by our count more than a quarter of patent investigations and nearly half of PAE defendants are there due to a PAE."

During the ensuing Q&A with Subcommittee members, the witnesses were asked what steps, if any, should be taken to address alleged abusive behavior. With respect to the domestic industry requirement, Deanna Okun stated that the standard already represents a "very tough test" for questionable PAEs and mentioned the ITC's new procedural mechanism for determining domestic industry. She also noted that the ITC has recently adopted new rules limiting interrogatories and depositions, which serve as a clear message of the Commission's focusing on reducing parties' litigation expenses. Other witnesses identified a number of areas that should be examined as Congress seeks to deter abusive practices. Former PTO Director Dudas suggested examining Rule 11 provisions regarding attorney's fees, and Russell Binns and Kevin Rhodes highlighted "abusive discovery practices." David Foster mentioned imposing fees on abusive discovery practices. Subcommittee Members also asked the witnesses whether a disproportionate number of 337 cases were being brought by PAEs/NPEs. Deanna Okun stated that neither PAE/NPE filings, nor success rates, are disproportionate.

It is unlikely that the subcommittee's hearing will have immediate consequences for Section 337 investigations at the ITC, as the House Judiciary Committee does not have jurisdiction over the ITC. Nevertheless, it has jurisdiction over patent litigation in the district courts, and some believe that any reform of patent litigation in the district courts will result in similar reforms to Section 337 proceedings at the ITC. Click **here** for a link to the House Judiciary Committee website, which has a video webcast of the hearing, opening remarks, and links to the written testimony of the witnesses.

On the same day as the House subcommittee hearing, the Senate Judiciary Committee, Subcommittee On Antitrust, Competition Policy, And Consumer Rights, conducted a hearing on "Oversight of the Enforcement of the Antitrust Laws" The hearing featured witness testimony from Assistant Attorney General Lanny Bruer and FTC Chairwoman Edith Ramirez. During the hearing, Subcommittee Chairwoman Klobuchar (D-MN) asked FTC Chairwoman

Ramirez about the potential negative effects of ITC exclusion orders issued with respect to standard essential patents (SEPs) might have on competition and consumer welfare. Ramirez responded that the FTC is concerned that, with respect to SEP-related injunctive relief at the ITC and in district courts, the patent holder could have the ability to deter innovation, competition and investment in standard-compliant products. According to Ramirez, the SEP-holder has made a voluntary commitment to license its SEPs on reasonable and non-discriminatory ("RAND" or "FRAND") terms, and any effort to renege on that commitment raises risks to the competitive process. Therefore, the FTC has advocated for District Courts and the ITC to take into account the existence of a RAND/FRAND commitment before issuing exclusion orders or injunctions.

Klobuchar then turned to the issue of frivolous patent litigation. She noted that a recent study found that 56 percent of patent lawsuits are filed by "so called NPEs, or as known to critics, patent trolls." Klobuchar cited critics' concerns that the suits are largely unfounded, but that companies must pay large sums in legal fees to defend these suits. Klobuchar stated that it would seem to her that the practice could potentially have a negative effect on competition and consumer welfare, but she was also aware of concerns that efforts to deal with bad actors could have unintended consequences. She asked Ramirez whether something should be done to address the issue. Ramirez responded that FTC and DOJ have been engaged on this issue and cited the joint workshop held in December 2012. She noted that the comment period for the workshop has closed and that the FTC and DOJ are reviewing the comments. She stated that the "area warrants additional study" and looked forward to working with DOJ and other stakeholders moving forward.

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