

## THE COALITION FOR 21ST CENTURY PATENT REFORM

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### **H.R. 2639 (Jeffries/Farenthold)**

#### **Patent Pleading Specificity**

The heightened pleading requirements in proposed new section 281A in Jeffries/Farenthold are very similar to proposed section 281A in Cornyn. In the Coalition's view, more rigorous pleading specificity is not the fix some have made it out to be. In our experience, when required of other issues, such as inequitable conduct, heightened pleading requirements did little to deter the assertion of highly questionable positions. Moreover, overly technical pleading requirements may simply lead to more preliminary motion practice that will prolong and increase the expense of patent litigation. On the other hand, some increase in the information that a plaintiff should be required to include in an initial complaint may address the problem of "shotgun complaints" that give no indication even of what the infringing product might be. Any such heightened requirements must, however, recognize and balance the difficulties of obtaining the details of an infringer's product prior to filing suit.

In our view, the Federal Judicial Conference ("FJC"), the body responsible for the development of the Federal Rules of Civil Procedure, is in the best position to weigh the desirability of changed pleading requirements against that of other case management approaches, such as initial disclosure and robust early case management procedures. Accordingly, our Coalition would support a statement of the sense of Congress that the FJC should promptly take up this issue (including a revision to Form 18, as discussed below) to insure that sufficient specificity is required in a complaint, and that other rules are modified as needed to provide an overall remedy to the perception that current rules do not require complaints to provide fair notice to defendants of the nature of the claims being brought.

#### **Revision of Form for Patent Infringement**

Jeffries/Farenthold, similar to Goodlatte Discussion Draft I and identical to Cornyn, would require the Supreme Court to review and amend FRCP Form 18 for pleading patent infringement to be consistent with its proposed new Section 281A. As noted above, the 21C would support a recommendation to the Federal Judicial Conference to review the minimum pleading requirements for infringement complaints. Because this issue is part of a solution to more efficiently managing the wide variety of patent cases while maintaining the needed fairness for all involved parties, 21C does not believe that Congress should prescribe any particular format for the revision of Form 18, as that is only one piece of the more complex puzzle to be solved by the FJC.

## **Sanctions for Abusive Litigation**

Jeffries/Farenthold proposes the addition of a new section 300B that would mandate courts to make specific findings regarding compliance by each attorney and each party with each requirement of Rule 11(b). These requirements are:

- that every pleading has not been presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
- that the claims and defenses are warranted by existing law;
- that factual contentions have evidentiary support; and,
- that denials of factual contentions are warranted on the evidence.

New section 300B concludes by providing that a court “may impose sanctions” if a violation is found.

The 21C does not believe it wise to impose such a *sua sponte* obligation on courts to make such findings in each case. If a Rule 11 violation is alleged by a party, the court should consider the motion, but should not be required to make such findings in every case as a matter of course. If, as the result of a motion, a Rule 11 violation is found, courts are already authorized to impose sanctions, thus obviating the need for additional legislation on this issue. To deter abusive litigation practices, 21C believes that the better approach would be to revise Section 285 to more frequently authorize fee shifting when the circumstances of a case justify it.

## **Stay of Discovery**

Jeffries/Farenthold mandates that discovery shall be stayed until after a court has ruled on motions to dismiss or transfer venue or ruled on claim construction, and provides exceptions if needed to make such rulings. It further provides for sanctions for any willful failure by a party to preserve evidence during a stay.

As to motions to dismiss or transfer, the 21C notes that it is already a regular practice of many courts not to begin discovery unrelated to such motions until after they are decided. And while the 21C believes that patent discovery should be streamlined and unnecessary discovery avoided, we are concerned that a blanket stay of discovery pending claim construction, even with exceptions, could prolong patent cases and possibly deprive the court of information that could lead to better claim construction decisions.

Further, as noted with regard to Goodlatte Discussion Draft I, the federal courts are already addressing discovery in patent cases. The Model Order developed by the Advisory Council of the Federal Circuit sets forth a discovery process whereby the parties exchange core documentation concerning the patent, the accused product, the prior art, and financial information before seeking email production and it has announced revisions to the FRCP that would significantly alter the scope of the discovery. The Eastern District of Texas has adopted a form of the Model Order for all of its patent cases.

Accordingly, the 21C believes that the criteria for issuing stays of discovery subject to the courts' rulings on motions to stay or transfer, and other issues relating to the sequence and timing of discovery, are subjects that would best be explored by the Judicial Conference.

### **Customer Suit Exception (Stay)**

Proposed new section 300 in Jeffries/Farenthold mandates that courts shall grant motions to stay an action with respect to a "secondary party" (a customer/end user) if that party and the "primary party" (a manufacturer) consent and the secondary party agrees to be bound by any judgment. The right to stay customer/end user suits would curtail the practice of filing such suits to coerce settlements and would promote resolution of patent disputes between the parties in the best position to litigate the merits of the case: the patent owner and the manufacturer of the products accused of infringement.

The 21C believes this proposal is helpful in providing that the primary and secondary parties must agree in writing to the stay, as this provision addresses concerns that a statutory right to a stay might otherwise undo private indemnification and defense arrangements between customers and suppliers. This proposal also appropriately requires that the stay be conditioned on the secondary party agreeing to be bound by the outcome of the action against the primary party, to ensure that common issues will not need to be litigated twice. Finally, the 21C supports the concept that the secondary party should be treated as a non-party in the ongoing action between the primary party and the patentee, as the proposal suggests.

Unlike proposed new section 296 in Goodlatte Discussion Draft I, however, proposed section 300 in Jeffries/Farenthold does not expressly provide a right for a manufacturer to intervene in patent infringement actions brought against its customers or end users, or to proceed in a separate action against the patent owner. In addition to expressly providing such a right, the 21C believes that additional amendments are needed to ensure that the rights to intervene and to stay actions will not have the unintended consequences. Such consequences could include impacting contractual obligations that may exist between suppliers and purchasers and that may allocate the risks of infringement or the costs of defending against infringement allegations. Moreover, the definition of a secondary party entitled to stay an action needs clarification to ensure that it does not extend to entities who have designed the accused product, or who modify, combine or use it with other components or products in a manner that gives rise to the infringement allegation.

With such amendments and certain other clarifications, the 21C could support codification of a customer stay provision.

## Joinder of Interested Parties

The joinder provision in Jeffries/Farenthold is similar to, and a slight improvement of, the joinder provision in Cornyn. The provision would amend 35 USC 299 to mandate the grant of a motion by a defendant to join an “interested party” to a case, if the defendant shows that the plaintiff’s interest in the patent-in-suit is “limited primarily to asserting any such patent claim in litigation” (i.e., a patent assertion entity). An “interested party” is defined as a person who:

- (1) Owns or co-owns a patent-in-suit;
- (2) Is an assignee of a patent-in-suit;
- (3) Is an exclusive licensee of a patent-in-suit; or
- (4) Has a legal or financial right to enforce a patent.

While the language in Jeffries/Farenthold is better than that of the Cornyn proposal because it avoids the concern with Cornyn's joinder of a person with a "direct financial interest" in the outcome of the case, it is not clear what a "legal or financial right to enforce a patent" means. If this term could be adequately clarified and the provision amended to apply to all patent litigants and not just PAEs, the provision might be acceptable.

The Coalition has approximately 50 members from 18 diverse industry sectors and includes many of the nation’s leading manufacturers and researchers.

The Coalition’s Steering Committee includes 3M, Caterpillar, General Electric, Johnson & Johnson, Eli Lilly and Procter & Gamble.

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