
LITIGATORS CORNER:

I'm From the Government, and I'm Here to Help



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Ronald Reagan once said that the most terrifying words in the English language were, "I'm from the government, and I'm here to help." Well, the gov-

ernment is here to help some of us now. *The Wall Street Journal* reported on October 29 that GMAC Financial Services Inc. was back at the trough. It and the Treasury are in talks about lending (giving) GMAC another \$2,800,000,000 to \$5,600,000,000. That is on top of the \$12,500,000,000 that GMAC has already been given since December, 2008. \$18,000,000,000 over three hundred days is about \$54,000,000 every day.

On November 2, *The Journal* reported that \$2,300,000,000 "invested" in CIT Group Inc. would be unrecoverable. In another article on the same day, a representative from the Government Accountability Office was quoted as saying that much of the government's (meaning you, me and the rest of us taxpayers/milk cows) investment of \$50,000,000,000 in GM and Chrysler will never be recovered.

Congratulations. You just made the same kind of loan — a very bad one — that caused the recession in the first place. I like to use the zeros because, now that we are hearing about trillions, a "billion" doesn't seem like much. Senator Everett Dirksen, the Wizard of Ooze, once joked,

"A billion here, a billion there, and pretty soon you are talking about real money." These sums, about \$68,000,000,000, add up to over \$200 for each man, woman and child in America. Imagine that you opened your wallet or purse and handed \$200 to a stranger who walked up to you on the street one day, asking for a loan. Normally, you'd say, "Forget it." And imagine what you'd say if you knew the person was bankrupt. But in the land of Government, bigness, stupidity and bankruptcy become reasons to give away billions.

Others aren't so lucky. There's a nice restaurant, Corrigan's, on 111th Street in Mount Greenwood, on the southwest side of Chicago. It isn't fancy. You can go there and have an inexpensive dinner or sandwich, and a beer or glass of wine. But the neighborhood newspaper, *The Beverly Review*, reports that Corrigan's is closing. According to the story, the owners, Chris Caraher and Bill Corrigan, said:

Over the past two years we have struggled to stay open and wait out the economy. Unfortunately we must give up the fight. The rising cost of doing business and shrinking margins have taken a toll on us both financially and emotionally. . . . Everything's gone up. Utilities have gone up. We've got 10.25 percent taxes. We can't raise our prices to adjust for the increased overhead

because people don't have the money to spend.

So, the help you get depends in large part on who, and how big, you are.

So go the Patent Office and patent law, too. Its new director, David Kappos, hails from IBM, a corporation that blasts those who license their patents — while, at the same time, IBM licenses its own patents, including the ones it does not practice. According to a recent report, IBM and others “have declared war on indiscriminate patent infringement suits filed by so-called patent trolls, which seek to profit from patent disputes rather than manufacture products using their patents.”¹

IBM is crusading for changes in patent law, too. Its spokesman says:

“Technology and the nature of innovation have changed dramatically over the last half-century, but our patent laws have not been significantly updated,” said IBM spokesman Robert Weber. “We congratulate Secretary Locke and the [Obama] Administration for their leadership in supporting [the Act] and we urge swift enactment of the patent reform legislation.

Weber explained that patent reform is likely to reduce “unproductive” litigation and “better harmonize” the US patent system with those of other countries.

The debate over patent reform has been both lengthy and constructive, but now it is time to act. Chairman Leahy and other senators have crafted a compromise that enjoys broad support and deserves prompt passage,” added Weber.²

The Patent Office has jumped on the bandwagon. Mr. Kappos says that we need post-grant reviews as a substitute for litigation:

Please bear in mind that we already have a post-grant review process — it's called litigation. It is expensive and it is time-consuming and if your patent is challenged in court, you know what that means for your ability to secure capital and bring your product to market.

The advantage of the post-grant review process being advanced in the legislation is that it is designed to be an alternative to litigation. Nobody likes post-grant challenges to their inventions — but you should take some comfort in the fact that a short post-grant review process will give

you a rock solid blue-ribbon patent that will be very difficult to challenge in court.

So hopefully the new process will keep you out of the courts and prevent lengthy and costly litigation, while actually increasing the value and enforceability of your patents.³

With due respect, that is rubbish.

In my October, 2009 column, “Reexamination Tactics,” I described the abuses of the reexamination process. It has become a Stalingrad defense in litigation. A party can provoke multiple reexaminations. Two related corporations having essentially the same interests can each file a request for reexamination, at the same time or at different times. The same art can be reconsidered by the Patent Office, even if an examiner looked at it before.

Senate Bill 515, the current proposal, will do much the same.

The Bill cannot be a substitute for litigation. It does not provide any relief to the patent owner, other than survival. It does not stop infringement. It does not repair damage done to the patent owner. It exposes the patent owner to wasted time, expense, and the burden of discovery.

The Bill does not expose the party requesting post-grant relief to any disadvantage at all. The limitations are a joke. Section 335 says that the cancellation petitioner can pursue a later reexamination, only if it is “based on any ground that the cancellation petitioner raised during the post-grant review proceeding.” All a reexamination requestor has to do is cite a different reference than what was used in the post-grant review. And, if the reference is raised by the patent owner, too bad. It wasn't raised by the petitioner, and therefore can be used in a later reexamination.

Nor is there any limitation in the post-grant review concerning subsequent actions of parties related in some way to the petitioner, such as a related corporation or friendly co-defendant. Section 334 says that a final decision in a civil action against a party that asserted invalidity precludes that “party or the privies of that party” from raising in a post-grant proceeding an issue that it “raised or could have raised” in the litigation. But there is no comparable limitation concerning privies in Section 335; only the actual petitioner for cancellation is barred from seeking a later reexamination. Suppose that a lawsuit for infringement names two related corporations, formed after one of them decided to set up a subsidiary or a joint venture of some kind.

Suppose further, that the original corporation sought post-grant review, and was unsuccessful. Now assume that an infringement lawsuit names both corporations. The second corporation would be free to seek reexamination. That's a loophole you can drive an M1 Abrams through.


The next section, 336, allows anyone to appeal, too. An appeal goes to the Patent Trial and Appeal Board. Has anyone in Congress looked at the pendency of matters before the Board? I guess not. Like ostriches, they don't want to know that the Patent Office doesn't have the money. Mr. Kappos says so:

Let's start with fees.

We all know that the economy is struggling and I know many of you are worried about fee hikes. I'm not going to promise you that fees aren't going to go up.

The USPTO is entirely funded by the fees it collects and with the recession has come a significant decline in revenue. We're currently facing a 200 million dollar shortfall which means we've had to freeze hiring—which means our workforce is actually declining in size.⁴

One could reasonably hope that Senate Bill 515 might do something about money, especially since our representatives in DC are tossing so much of it around. But there is nothing in the bill to insure that the money paid to the Patent Office actually gets used by the Patent Office. In fact, Mr. Kappos says it is going to get worse — that there will be more delays in the Patent Office, and in reexaminations and post-grant proceedings, and in appeals — unless, of course, the people in the PTO can clone themselves. What a dream come true for infringers. They will be like fleeing bank robbers who know that the police car chasing them cannot go faster than forty-five miles per hour, because the police department cannot afford the extra gasoline.

We are not looking for hand-outs, just a Patent Office that has the funds to do the jobs it already has. Apparently the small inventor — like Corrigan's — just doesn't have the clout that GMAC, IBM, AIG, or CIT Group has. 

ENDNOTES

1. See http://english.chosun.com/site/data/html_dir/2009/11/02/2009110200186.html
2. See “IBM Moves to Eliminate Patent Trolls, <http://www.tgdaily.com/content/view/full/44249/118/>
3. See <http://www.uspto.gov/news/speeches/2009/2009nov5.jsp>
4. See <http://www.uspto.gov/news/speeches/2009/2009nov5.jsp>