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Contingency Fees Make Patent Enforcement Accessible

By **Eric Evain** (February 12, 2018, 12:43 PM EST)


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For many small entities, startup companies and universities, patent litigation is simply too expensive to pursue. In fact, it can be cost prohibitive just to get an opinion from outside counsel to assess whether patent litigation is warranted. For those who can afford to litigate their patent rights, the pressure on law firms for billable hours and increased profits can sometimes have clients questioning who is the real enemy. Contingency fee patent litigation eliminates these concerns by providing patent holders the ability to assess and enforce their rights and to ensure that their cases are handled skillfully by attorneys whose interests are fully aligned with theirs.

An Attractive Alternative

Unquestionably, patent owners have a constitutional right to exclude others from infringing their invention and to enforce that right in federal court.[1] As a practical matter, however, patent litigation is prohibitively expensive to all but the well-healed.

The most recent survey by PricewaterhouseCoopers reported that only about 10 percent of the patent cases filed by nonpracticing entities come from universities and nonprofit organizations, the remainder is filed by companies (60 percent) or individuals (30 percent). Yet, these same universities and nonprofit organizations obtain 25 percent higher awards and enjoy almost twice the success rate as other NPEs.[2]

The relatively low representation of universities, nonprofits and startup companies that are involved in patent litigation is understandable given the specter of an expensive multiyear battle against a deep-pocketed defendant in an area of the law that is full of landmines. It is not surprising that many rely on licensees or on litigation funding arrangements to enforce their patent rights. But there is another alternative — contingent fee patent litigation — which in our view is a better way for patent owners to enforce their rights. And to be very clear, we are referring to targeted patent cases that are brought against specific defendants with every intention of being taken through trial, not cases filed en bloc to be settled for nuisance value.

Contingency Fee Versus Litigation Funding

A lot has been written recently about litigation funding. Contingency fee patent litigation is not a litigation funding arrangement. Litigation funding entities (LFEs) either engage law firms to litigate a case

or they provide the funds for a patent holder to hire their own litigators. Regardless, both the litigating law firm and the LFE must be compensated. Contingency fee litigation removes the LFE as middle man.

Litigation funding arrangements are growing in popularity and acceptance.[3] And we strongly believe that under the right set of circumstances and with the right LFE, a litigation funding arrangement can be very beneficial to a patent owner. That is particularly true when a contingency fee arrangement with a law firm is not available.

Advantages to the Patent Owner

Contingency fee patent litigation offers the patent holder advantages that go beyond cash flow, champerty or disclosures concerns. The patent owner can be assured that the attorneys handling the case have a winning track record because only successful law firms can litigate patent cases on contingency and the law firm's acceptance of a contingent engagement is an endorsement of the merits of a case.

Moreover, contingency fee patent cases have to be litigated efficiently. Anyone with experience in litigation is familiar with the type of attorney that the late Irving Younger described as the "litigating lawyer":

sublimely confident that no lawsuit handled by that lawyer will ever go to trial ... discovery is the objective ... virtually in a mindless manner taking depositions of everybody on the landscape simply for the sake of taking those depositions, serving interrogatories, conducting discovery and inspection. Every once in a while, simply for a change of pace, making a motion or two.[4]

Given the growing pressure on law firms to increase billable hours and improve profitability, it is not surprising that patent litigation is particularly susceptible to this phenomenon.

Contingency fee arrangements ensure both quality and efficiency. There is no daylight between the interest of the patent owner and that of the litigator. Both are incentivized to settle a case when it makes sense to do so, or to pursue it through trial and appeal. There is no benefit to unnecessarily increasing billable hours or sacrificing the quality of the legal service.

Selecting a Firm and Presenting Your Case

A law firm must be highly selective with the patent cases that it agrees to take on a contingency fee basis. The cost and risk associated with these litigations means that only a small number of firms accept patent cases on contingency, and even fewer do so exclusively. Nevertheless, it is worth the effort to try and locate a firm that you feel comfortable with and who will take your case on contingency. Avoid firms that seem only interested in the amount of damages and the possibility of a quick settlement. A legitimate patent litigation firm will carefully assess your case by looking at, among other things: the strength of the patent; the ability to prove infringement; whether the infringement is direct or indirect; the identity of the infringer and its litigating history; what venues are available to file a lawsuit and will local counsel be needed;[5] whether there are any §101 issues (patents directed to an abstract idea); and whether there are any challenges associated with establishing damages in complex multicomponent systems. The more information you can provide the better. Be prepared to discuss:

- Any prior litigation, licensing, negotiations and disclosures;
- Whether there a clean chain of title and have all assignments been executed;

- The relationship with the inventor(s) and their availability;
- The locations and availability of relevant documents;
- Identify the specific products or services that potentially infringe (not just generalized suspicions); and
- The potential damages and whether there are established royalty rates in the field.

The law firm will certainly review the prosecution history of the patent, but they will also need to know if there was anything out of the ordinary regarding the invention or the prosecution. And regardless of whatever the fee arrangement might be, the importance of the relationship between the law firm and the patent owner cannot be overstated. Candor and communication, both ways, are critical.

Conclusion

Not every patent case is suited for a contingency fee arrangement. But when the fit is correct, the patent owner knows that its case is being handled skillfully, efficiently, and without having to pay attorney fees or split the proceeds with a litigation funding entity.

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[1] U.S. Const. art. 1, § 8, cl. 8.

[2] Chris Barry et al, 2017 Patent Litigation Study, Change of the horizon? PricewaterhouseCoopers (May 2017); https://www.pwc.com/us/en/forensic-services/publications/patent-litigation-study.html.

[3] Natalie Rodriguez, Going Mainstream: Has Litigation Finance Shed Its Stigma? Law360 In-Depth, Dec. 12, 2017; Christina Violante, What Your Colleagues Think of Litigation Finance, Law360 In-Depth, Dec. 11, 2017.

[4] Irving Younger, Irving Younger Collection: Wisdom and Wit from the Master of Trial Advocacy, p. 5 (ABA Book Publishing) (2010).

[5] TC Heartland LLC v. Kraft Food Group Brands, LLC., 137 S.Ct. 1514 (2017)