

CHAPTER 197
SB 303-FN – FINAL VERSION

03/13/14 0878s
05/08/14 1754EBA

2014 SESSION

14-2747
05/01

SENATE BILL ***303-FN***

AN ACT relative to bad faith assertions of patent infringement.

SPONSORS: Sen. Carson, Dist 14; Rep. Rowe, Hills 22; Rep. G. Hopper, Hills 2

COMMITTEE: Judiciary

ANALYSIS

 This bill prohibits a person from making bad faith assertions of patent infringement. The bill establishes a private right of action for violations of the chapter and provides for enforcement by the attorney general.

Explanation: Matter added to current law appears in ***bold italics***.
 Matter removed from current law appears ~~[in brackets and struck through]~~
 Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

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STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Fourteen

AN ACT relative to bad faith assertions of patent infringement.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 197:1 Statement of Purpose.

2 I. The general court recognizes that the state of New Hampshire is striving to build an
3 entrepreneurial and knowledge-based economy. Attracting Internet technology (IT) and other
4 knowledge-based companies is an important part of this effort.

5 II. Patents are essential to encouraging innovation, especially in the IT and knowledge-
6 based fields. The protections offered by the federal patent system create an incentive to invest in
7 research and innovation, which spurs economic growth. Patent holders have the right to enforce
8 their patents when they are infringed upon and patent enforcement litigation is necessary to protect
9 intellectual property.

10 III. The general court recognizes that New Hampshire is preempted from passing any law
11 that conflicts with federal patent law.

12 IV. The state of New Hampshire wishes to help its businesses avoid costly litigation by
13 encouraging the most efficient resolution of patent infringement claims without conflicting with
14 federal law.

15 V. Abusive patent litigation, especially the assertion of bad faith infringement claims, can
16 harm New Hampshire's businesses. A business that receives a letter asserting such claims faces the
17 threat of expensive and protracted litigation and may feel that it has no choice but to settle and pay
18 a licensing fee, even if the claim is meritless. Bad faith patent infringement claims impose a
19 significant burden. Funds used to avoid the threat of bad faith litigation are no longer available for
20 a business to expand or hire new employees.

21 VI. Therefore, the general court hereby seeks to facilitate the efficient and prompt resolution
22 of patent infringement claims by protecting New Hampshire's businesses from abusive and bad faith
23 assertions of patent infringement, while at the same time respecting federal law and not interfering
24 with legitimate patent enforcement actions.

25 197:2 New Chapter; Bad Faith Assertions of Patent Infringement. Amend RSA by inserting
26 after chapter 359-L the following new chapter:

CHAPTER 359-M

BAD FAITH ASSERTIONS OF PATENT INFRINGEMENT

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1 359-M:1 Definitions. In this chapter:

2 I. “Demand letter” means a letter, email, or other communication asserting or claiming that
3 the target has engaged in patent infringement.

4 II. “Target” means a New Hampshire person or business:

5 (a) Who has received a demand letter or against whom an assertion or allegation of
6 patent infringement has been made;

7 (b) Who has been threatened with litigation or against whom a lawsuit has been filed
8 alleging patent infringement; or

9 (c) Whose customers have received a demand letter asserting that the person’s or
10 business’s product, service, or technology has infringed upon a patent.

11 359-M:2 Bad Faith Assertions of Patent Infringement.

12 I. A person shall not make a bad faith assertion of patent infringement.

13 II. A court may consider the following factors as evidence that a person has made a bad faith
14 assertion of patent infringement:

15 (a) The demand letter does not contain the following information:

16 (1) The patent number.

17 (2) The name and address of the patent owner or owners and assignee or assignees,
18 if any.

19 (3) Factual allegations concerning the specific areas in which the target’s products,
20 services, and technology infringe the patent or are covered by the claims in the patent.

21 (b) Prior to sending the demand letter, the person fails to conduct an analysis comparing
22 the claims in the patent to the target’s products, services, and technology, or such an analysis was
23 done but does not identify specific areas in which the products, services, and technology are covered
24 by the claims in the patent.

25 (c) The demand letter lacks the information described in subparagraph II(a), the target
26 requests the information, and the person fails to provide the information within a reasonable period
27 of time.

28 (d) The demand letter demands payment of a license fee or response within an
29 unreasonably short period of time.

30 (e) The person offers to license the patent for an amount that is not based on a
31 reasonable estimate of the value of the license.

32 (f) The claim or assertion of patent infringement is meritless, and the person knew or
33 should have known that the claim or assertion is meritless.

34 (g) The claim or assertion of patent infringement is deceptive.

35 (h) The person or its subsidiaries or affiliates have previously filed or threatened to file
36 one or more lawsuits based on the same or a similar claim of patent infringement; and

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(1) Those threats or lawsuits lacked the information described in subparagraph II(a);
or

(2) The person attempted to enforce the claim of patent infringement in litigation
and a court found the claim to be meritless.

(i) Any other factor the court finds relevant.

III. A court may consider the following factors as evidence that a person has not made a bad
faith assertion of patent infringement:

(a) The demand letter contains the information described in subparagraph II(a).

(b) Where the demand letter lacks the information described in subparagraph II(a) and
the target requests the information, the person provides the information within a reasonable period
of time.

(c) The person engages in a good faith effort to establish that the target has infringed the
patent and to negotiate an appropriate remedy.

(d) The person makes a substantial investment in the use of the patent or in the
production or sale of a product or item covered by the patent.

(e) The person is:

(1) The inventor or joint inventor of the patent or, in the case of a patent filed by and
awarded to an assignee of the original inventor or joint inventor, is the original assignee; or

(2) An institution of higher education or a technology transfer organization owned or
affiliated with an institution of higher education.

(f) The person has:

(1) Demonstrated good faith business practices in previous efforts to enforce the
patent, or a substantially similar patent; or

(2) Successfully enforced the patent, or a substantially similar patent through
litigation.

(g) Any other factor the court finds relevant.

359-M:3 Bond. Upon motion by a target and a finding by the court that a target has established
a reasonable likelihood that a person has made a bad faith assertion of patent infringement in
violation of this chapter, the court shall require the person to post a bond in an amount equal to a
good faith estimate of the target's cost to litigate the claim and amounts reasonably likely to be
recovered under this chapter, conditioned upon payment of any amounts finally determined to be due
to the target. A hearing shall be held if either party so requests. A bond ordered pursuant to this
section shall not exceed \$250,000. The court may waive the bond requirement if it finds the person
has available assets equal to the amount of the proposed bond or for other good cause shown.

359-M:4 Enforcement; Remedies; Damages.

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1 I. The attorney general may bring an action in superior court for appropriate relief,
2 including a temporary or permanent injunction, to enforce the provisions of this chapter.

3 II. A target of conduct involving assertions of patent infringement, or a person aggrieved by
4 a violation of this chapter may bring an action in superior court. A court may award the following
5 remedies to a plaintiff who prevails in an action brought pursuant to this section:

6 (a) Equitable relief.

7 (b) Damages.

8 (c) Costs and fees, including reasonable attorney's fees.

9 III. This chapter shall not be construed to limit any remedies available to the state of
10 New Hampshire or to any person under any other law and shall not restrict the attorney general
11 with regard to conduct involving assertions of patent infringement.

12 359-M:5 Exemption. A demand letter or assertion of patent infringement that includes a claim
13 for relief arising under 35 U.S.C. section 271(e)(2) or 42 U.S.C. section 262 shall not be subject to the
14 provisions of this chapter.

15 197:3 Effective Date. This act shall take effect upon its passage.

16
17 Approved: July 11, 2014

18 Effective Date: July 11, 2014