Boom or bust for patent trolls?

With House of Representatives passing the Innovation Act in December, and now heading for the Senate, does 2014 hold the answer to the patent troll question? **Andrew Mizner** reports

In 2013, the dockets of courts in jurisdictions as diverse as East Texas, Delaware and South Florida were inundated with patent cases filed by non-practicing entities – or, as they are more commonly known, patent trolls.

The mixed fortunes of those – largely big manufacturers – defending such actions are encapsulated by **Apple**. Having lost an attempt in October to defend its third-party developers from Texan troll **Lodsys**, the Californian electronics giant a few weeks later won a case against **WiLan**, a Canadian NPE.

Robert Gunther, an IP partner at **WilmerHale** in New York, says the market for law firms' services in such cases was strong last year. Gunther and his colleagues "continue to see a very significant number" of troll-related disputes, he adds.

The failure of the America Invents Act of 2011 to deter troll activity has led to calls for further legislation to combat frivolous lawsuits, and the introduction to Congress late last year of the Innovation Act.

Kevin Meek of **Baker Botts** says that in 2013 "the problem of trolls changed from an economic and judicial reality into a front page story", drawing legislators into an issue far more complicated than they realised. He explains: "How do you define a non-practicing entity, and what do you do if you have one? And are the new rules going to apply to both sides of the docket?"

Meek, who leads the firm's IP department in Austin, Texas, has reservations about the rush to legislate. "It really is a zero sum game. If you make it more difficult to enforce a patent, you lessen its value," he says. "People who hold legitimate patents, who are actually protecting legitimate markets, will also be taxed."

Legislating for trolls

The Innovation Act's main proposal requires a seismic shift in the US approach to litigation: requiring the loser to pay legal fees. Meek doubts whether there is an appetite for such a *volte face*. "It's a wholesale societal change, and a completely different philosophy [to the current approach]. You're making your courts much more difficult to get into." He believes businesses and lawyers alike will baulk at the prospect.

Gunther, on the other hand, says an introduction of a 'loser pays' rule "has the potential for actually changing the dynamic". He accepts that it will face serious opposition in the Senate, however, saying "it's [seen as] a very unusual type of provision" in the US. Still, Gunther believes it would embolden defendants to resist settling. "There is a good chance that it is going to be enacted into law," he says.

> "I know that Congress is desperate to get something done, and I know that as usual they spoke before they knew what they were talking about"
>
> 
> **Kevin Meek**
> **Baker Botts**

Meek remains less sanguine about passing an effective piece of legislation to deal with the patent troll question. "I don't know what will survive," he says. "I know that Congress is desperate to get something done, and I know that as usual they spoke before they knew what they were talking about, which the Presidency did, too. It's classic Washington, DC."

Gunther has more faith, given that there is currently no other high-profile legislation on the table to distract legislators. "Right now it feels like the whole thing is on a fast track," he says. "Within the next year, we're going to see some additional reforms enacted into law."

Legislation aside, both men expect a similarly heavy workload in 2014. "The basic non-practicing entity marketplace hasn't changed; it's still cruising along," says Meek. For his part, Gunther noted an increase last year in decisions favouring defendants in East Texas, as well as a shift towards Delaware as the forum of choice for litigants.

He expects the latter trend to continue in 2014. "Delaware is a hard court in which to get summary judgment for the defence, so the likelihood of a trial is fairly high," he says. "More people are opting for Delaware as they see that results are getting a little less predictable in East Texas." He adds: "I think 2014 is going to be a 'business as usual' year. But if I'm right, something is going to get enacted into law sometime in the latter part of next year, meaning 2015 could be a little different for us." ■

Assessing the Supremes

Partners in the Supreme Court practices of US law firms pick the most important commercial cases heard in 2013 and plot the court's course over the next 12 months. **Andrew Mizner** reports

Amir Tayrani, a partner in the Washington, DC office of Los Angeles-headquartered **Gibson, Dunn & Crutcher**, says that in *Standard Fire Co v Knowles*, the court in March held that a class action should be heard in a federal court, even though the class was seeking less than the threshold amount for federal jurisdiction.

He explains: "There appears to be a concern shared to varying degrees by all members of the court that the class action procedure has been abused by plaintiffs' lawyers – at the expense of both class members and class action defendants – to secure windfall settlements that primarily benefit class counsel and that bear no relation to whether the class claims are actually meritorious."

The court also showed a desire to clamp down on joining claims in a single case unless class-wide damage could be proved. Tayrani highlights the case of *Comcast Corp v Behrend*, where it ruled in March that two million subscribers to **Comcast's** television service could not pursue an antitrust class action "because they could not prove damages on a class-wide basis".

Ben Cooper from the Phoenix office of **Steptoe & Johnson** elaborates, saying that "to be a class action it really does have to be a class action and not an aggregation of individual claims". He adds: "There's almost a hobby of painting the Supreme Court in broad brush terms, characterising it as either pro-business or anti-business, based on these decisions." Rather, the debate should be about "returning to the original conception of what is a class action".

Cooper highlights a case in favour of class actions, *Oxford Health Plans v Sutter*, in which the court in June upheld an interpretation of an agreement allowing class-wide arbitration where the agreement did not specifically provide for it, but the arbitrator had been granted power to decide.

Not being individually able to afford to bring a case "is not a sufficient reason for overriding the arbitration agreement that the parties consented to", explains **Aaron Streett**, a Supreme Court specialist at **Baker Botts** in Houston. "The court has continuously said that it will enforce arbitration agreements to the letter," he says. "There is a strong federal policy in favour of arbitration, even if it makes life difficult for one of the parties. The court is going to hold the parties to their bargain."

Dancing in the Streett

The court will soon hear *Erica P John Fund v Halliburton*, what **Jon Cohn** of **Sidley Austin** in Washington, DC says is possibly "the most significant securities case in decades". It challenges the presumption, from 1988's *Basic v Levinson*, that all class members in a federal securities action relied on the allegedly fraudulent securities information by purchasing their shares at a market price which was affected by misrepresentations.

Halliburton, represented by Streett, argues that this presumption of reliance is "in significant tension" with the decisions in *Comcast* and 2009's *Wal-Mart v Dukes*, which held that plaintiffs have to prove their common issues.

If successful, it would severely limit the ability of investors to launch securities class actions. "Each individual investor would have to prove that he or she actually read the misrepresentation and relied on it," says Streett, and "a lot of class actions that are certified now would not be certified". Cohn agrees that some class members never even hear about the misrepresentation.

Tayrani similarly says it would become "substantially more difficult" to certify securities class actions, while critics claim that plaintiffs will find it harder to exercise their rights if Streett emerges victorious. He points to the ruling in *American Express* in which the court held that many federal statutes pre-date class action procedures, so access to a class is not considered essential to exercising those rights.

Jurisdiction matters

Chris Handman, a partner at **Hogan Lovells** in Washington, DC who specialises in appellate and Supreme Court litigation, highlights another key case heard by the bench this year: the liability of corporations for human rights violations overseas.

In *Kiobel v Royal Dutch Petroleum*, the court in April 2013 considered the scope of the Alien Tort Statute, which has been used to sue businesses in the US corporations

for overseas international law violations. Often these cases involved "nothing more than doing business in a region where it was known that human rights violations were taking place", Handman says.

The court in *Kiobel* ruled the Act did not apply extra-territorially, precluding "foreign cubed cases" where a foreign plaintiff sues a foreign defendant over foreign events. "Those simply are too far afield, and Congress never wanted to reach them," he explains.

"US courts have no business adjudicating grievances brought by foreign plaintiffs involving foreign conduct by foreign companies," he adds, although it remains to be seen whether the ruling will affect US companies abroad.

A similar question will be decided in *Daimler v Bauman*. In that case, in which the court is expected to issue a judgment by June, it will consider whether the existence of an American subsidiary requires a foreign parent corporation to litigate in the US.

"The decision is going to be critical for companies in trying to determine where they can be subject to jurisdiction when it's not even their own conduct," says Steptoe's Cooper.

Index of firms & contributors