



WHY IS INTELLECTUAL PROPERTY RISK EVERYBODY'S PROBLEM?

So What Is the Problem?

What do Medtronic, a small business software company, a privately held manufacturing company, a big box retailer, and a medical device company all have in common? Intellectual property risk.

What Do You Mean by Intellectual Property?

“Intangible” versus “tangible” assets (“IA”) include intellectual property (“IP”), which covers a diverse range of legally-protected rights such as patents, copyrights, trademarks, trade secrets, and designs, and other forms of intangibles such as human capital, contract rights and good will. In our increasingly knowledge-based economy, intangible assets have economic and strategic importance just like tangible assets such as real estate and product inventory. In fact, there is a silent war between “intangible” assets and “tangible” assets, and many would say that intangible assets are winning.

What Do You Mean by Intellectual Property Risk?

From the traditional risk management perspective, IP risk can be categorized as both a first and third party risk.

From the first party IP ownership perspective, the risks include:

- The legal costs of protecting and enforcing IP rights;
- The loss or diminished value of IP as an asset, or diminished licensing or product revenues, as a result of legal findings of invalidity, unenforceability, or noninfringement, or challenges to title or ownership.

From the third party IP infringement liability perspective, the risks include:

- The legal costs to defend against an IP infringement or theft suit;
- Any resulting settlement or damages costs;
- Design-around costs; harm to customer relationships; and negative impact on company share price.

To illustrate several of these IP risks, let's look at the example of a generic pharmaceutical company challenging a name brand pharmaceutical company's patent-protected drug through a paragraph IV ANDA (Abbreviated New Drug Application) and a

lawsuit against the name brand pharmaceutical company's patent on that drug. The risk to the name brand pharma company is that the generic drug company will be successful in invalidating its patent by proving that the US Patent and Trademark Office should not have issued the patent to the name brand drug company in the first place. If this happens, then the name brand pharma company can keep selling its drug, but it can't prevent the generic drug company from selling a drug based on the same compound at a much lower price. And, the patent asset's value goes to zero. The risk to the generic drug company is if it cannot prove that either the name brand drug company's patent is invalid or that its drug does not infringe on the name brand drug company's patent. If found to infringe, then the generic drug company must pay damages for any past sales of its infringing product and it must pull its infringing drug off the market or develop another, non-infringing compound on which to base the drug. Oh yes, and both sides will incur several million dollars in litigation costs in this process.

How Do You Fix the Problem?

There's no quick fix, but the disciplined, integrated use of sound risk management practices will minimize IP risk. This requires a coordinated approach by risk management, legal, financial, product development, and marketing to identify the risk, analyze it, and manage it. Who within a company should be responsible for managing intellectual property risk--Legal? Risk management? Product development? Marketing? Finance? Accounting? All of the above.

Is Insurance the Answer?

Insurance is not the only IP risk management strategy, but it can be a key IP risk management tool. The IP insurance market is continuing to mature, despite some stops and starts. The global IP market is on the increase, with some national patent offices creating and supporting IP enforcement programs for their nationals. As underwriting processes and methodologies and policy forms are improved and actuarial data becomes more widely available, IP insurance is expected to grow into a large, mainstream line of coverage, much like what has happened with D&O, E&O and product liability coverage.



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INTELLECTUAL PROPERTY (Cont.)

Focusing specifically on infringement liability policies, the scope of coverage varies. For example, some markets require that the applicant obtain a freedom to operate opinion from an attorney and then the cover is built around the terms of the opinion. Others undertake their own due diligence and provide full coverage for products, processes or services sold or used by the applicant. More recent policies cover indemnities given to suppliers and licensees, a very valuable extension for the technology community. Territorial coverage can be arranged worldwide, and policy terms are typically one year.

Such policies may or may not be duty to defend policies but most will include hammer clauses. Because insurers recognize that IP litigation, particularly patent litigation, requires special training and experience, policy holders are frequently allowed to use their own IP counsel in the event of a claim. However, most IP infringement liability policies have a self-insured retention (“SIR”) or deductible that must first be satisfied and a co-insurance percentage, which insurers may increase if an insured uses its own counsel that does not satisfy the insurer's criteria or is not on the insurer's list of approved counsel. The SIR can vary from zero to several million dollars.

How Can Insurance Help?

IP insurance can be used for balance sheet protection, contractual liability protection and deal facilitation. For example, a software company with less than \$2 million in annual revenue purchased IP infringement liability coverage not only for itself, but also to cover its larger licensees/customers. The annual premium was only \$35,000.

Generally speaking, types of specialty line, stand-alone intellectual property insurance include: infringement liability; enforcement or abatement costs; reps and warranties, and first party loss or impaired value. Lloyd's of London has been underwriting IP risk for non-North American companies since the early 1980s and some of its member syndicates are the most experienced global risk insurers.

Contributed by Samian Underwriting Agencies Limited, a Lloyd's of London authorized agency

CLIMATE CHANGE LITIGATION: IT IS COMING AND INSURANCE SHOULD RESPOND

Introduction

A regular glance at headlines of major newspapers reveals a somewhat startling trend: global warming litigation increasingly is commonplace. Given this spike in legal activity, the most pressing question for companies concerned with global warming litigation is not whether suits will come, but how to respond to them. To that end, the issue of insurance coverage should be foremost in their planning.

There primarily are four major areas of global warming litigation: (i) Clean Air Act (“CAA”) litigation; (ii) compliance suits under the National Environmental Protection Act (“NEPA”); (iii) suits seeking damages or claiming nuisance; and (iv) suits attempting to regulate emissions at the state level. In the absence of regulation by the federal government, advocates of emissions' regulation appear to be advancing their cause in many courts through a variety of legal theories.

Clean Air Act Litigation

In what some experts have called the most significant environmental law decision of the past decade, the U.S. Supreme Court held in *Massachusetts v. EPA* that: (i) the EPA had authority to regulate greenhouse gas emissions (“GHGs”); and (ii) Massachusetts and other states had standing to bring suit for injuries resulting from global warming. The holding on standing in particular, that states have “special solitude” to bring suit, and that they can redress their injuries resulting from climate change is far more significant, because it opens federal courts to a host of global warming suits by states and possibly large landholders against corporate emitters.

Compliance Suits Under NEPA/State Statutes

In addition, states are beginning to require consideration of climate change under state legislation similar to NEPA. California Attorney General Jerry Brown recently sued San Bernardino County, the nation's largest in terms of land area, for failing to account for greenhouse gases when updating its 25-year plan for growth. The lawsuit alleged that the California Environmental Quality Act requires regulation of GHGs like any other pollutant, and that counties must account for such emissions for any major development project. (The two parties recently reached settlement.) Massachusetts Gov. Deval Patrick, meanwhile, has ordered state regulators to require developers to calculate GHG emissions before initiating major projects.

Suits Claiming Nuisance Or Seeking Damages

Plaintiffs have initiated ambitious suits against some of the largest emitters of GHGs in the US, essentially in an effort to “regulate through litigation.” In 2007, a federal judge in the Northern District of California threw out perhaps the most aggressive litigation brought against corporate emitters of GHGs. California's suit against six major motor vehicle manufacturers sought billions of dollars in damages to compensate the state for its losses resulting from global warming. The state cited several injuries including loss of snow pack and coastline, and increased flooding and wild fires resulting from climate change, as well as costs to prevent further harm. However, the suit was dismissed as a “non-justiciable political question.” The court explained that upholding the plaintiff's theory that the automakers unreasonably “interfered with a right common to the general public” would require a policy determination of the costs to society of CO₂ emission compared to the economic benefit of industrial development, and the courts are not suited to make such a determination.

State Regulation Of Emissions

Shortly before the decision in favor of the automakers in the Northern District of California, a Vermont federal judge provided a major victory for those seeking increased CO₂ regulation. Along with 11 other states, Vermont had adopted GHG emission limits for cars and light trucks. The regulations, originally conceived and adopted by California, would require automakers to cut GHG emissions by up to 37 percent by 2016. Thus, the automakers argued that the regulations were technologically impossible to meet, and that the federal government preempted state efforts to regulate emissions.

The court ruled, however, that the industry surely would be able to adapt to this regulation, as it has to those imposed previously. Moreover, because the EPA had the power to grant California and other states a waiver on federal governance of this issue, the states were not technically preempted from devising their own emissions regulations. In late 2005, California filed a waiver with the EPA regarding the emissions standards. Because of the government's failure to rule on the request, however, California brought suit in November, seeking to force the EPA to take action. At least 12 states have joined the suit.

Insurance Coverage Implications for Global Warming Suits

Commercial General Liability Policies

Commercial General Liability (“CGL”) policies reasonably should provide coverage for many of the classes of global warming suits described in this article, because such liabilities will result from policyholders' normal business operations. Moreover, corporate emitters are unlikely to have considered CO₂ to be environmental pollution at the time of emission, as the EPA has not labeled it a pollutant, Congress has merely instructed federal agencies to study the issue, and the only references in the Clean Air Act to CO₂ are in non-regulatory provisions. Accordingly, policyholders should be able to avoid coverage denials even in the face of an insurance company's argument that they “expected or intended” the global warming-related accident or occurrence.

In addition, in response to claims for coverage under CGL policies, insurance companies will most likely argue against coverage based on exclusions for liabilities resulting from environmental pollution. However, both the 1973 and 1986 Pollution Exclusions can likely be overcome by policyholders in global warming coverage disputes.

The 1973 Pollution Exclusion blocks coverage for bodily injury or property damage resulting from the release of irritants, contaminants, or pollutants into the environment, except if the release was “sudden and accidental.” Policyholders in global warming coverage disputes could defeat this exclusion with three main arguments: (i) by the doctrine of regulatory estoppel, pursuant to which insurance companies should be held to their representation that the 1973 Exclusion is a mere clarification of previous coverage; (ii) by application of the *contra proferentum* doctrine, which would result in construing the inherent ambiguity of the term “sudden and accidental” strictly against

the insurance company that issued the policy; and (iii) by resort to the reasonable expectations doctrine, which applies in roughly 40 states and basically requires courts to uphold policyholders' reasonable expectations for coverage, irrespective of the exact wordings of their policies.

The 1986 Pollution Exclusion is broader and was adopted by insurance companies to prevent coverage for liabilities resulting from the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”). At least one federal appellate circuit (the District of Columbia) has stated that this exclusion applies to industrial pollution. Policyholders should be able to defeat this exclusion by arguing that: (i) global warming is not the CERCLA-type pollution to which this exclusion applies, as CERCLA was adopted to address contamination at specific sites, as opposed to the planetary phenomenon of global warming; (ii) the myriad interpretations of this exclusion adopted by U.S. courts evidences that it is inherently ambiguous and thus should be construed strictly against insurance companies under the doctrine of *contra proferentum*; and (iii) the reasonable policyholder would not have expected this exclusion to apply to global warming liabilities, given that Congress and the Executive Branch have chosen not to regulate CO₂, nor have they characterized it as a pollutant.

D&O Policies

Directors and officers generally should have coverage for global warming-related lawsuits that could be brought against them, such as: (i) shareholder derivative suits resulting from any failure by corporate leadership to show adequate care in avoiding or mitigating global warming liabilities; or (ii) for violation of SEC regulations requiring disclosure of “known uncertainties” that could materially affect their bottom line due to a failure to disclose vulnerability to global warming suits. Coverage A in D&O policies indemnifies directors and officers for the costs of defending suits, and settlement or damages payments, resulting from their “wrongful acts.” Although many D&O policies contain exclusions for liabilities resulting from environmental pollution, such exclusions generally apply based on the degree to which the allegations of the underlying lawsuits arise from acts of environmental pollution actions incidental to pollution, such as misleading statements made in response to a decline in share price resulting from environmental pollution, are less likely to trigger the exclusion.

Conclusion

Climate change is a fact of life for U.S. companies and their insurers. Following the recent trends in global warming decisions, GHG emitting companies could face unprecedented liability in a number of ways. However, because traditional pollution exclusions are unlikely to apply to GHG emissions, and based on the reasonable expectations of a policyholder doctrine, policyholders should receive coverage for most claims related to global warming.

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NEW FORM I-9, EMPLOYMENT VERIFICATION, ISSUED

On November 7, 2007, the U.S. Citizenship and Immigration Service (USCIS) issued a revised Form I-9, Employment Eligibility Verifications, and M-274, *Handbook for Employers, Instructions for Completing the Form I-9*. The Immigration Reform and Control Act of 1986 (IRCA) requires that, for each employee hired after November 6, 1986, employers in the United States must document on the Form I-9 that the employee is eligible to work in the United States and verify that the employee's identity matches the documents provided to substantiate their employment authorization.

Revised List of Acceptable Documents

The most significant changes to the Form I-9 are updates to the List of Acceptable Documents to reflect earlier legislation and rules. Five documents *have been eliminated* from List A of the List of Acceptable Documents. Employers can *no longer accept* the following:

- Certificate of Naturalization (Form N-550 or N-570),
- Alien Registration Receipt Card (Form I-151),
- Unexpired Reentry Permit (Form I-327), or
- Unexpired Refugee Travel Document (Form I-571)

Added to the List of Acceptable Documents is the most recent version of the Employment Authorization Document (Form I-766).

The revised list of acceptable documents under List A now includes:

- A U.S. Passport (expired or unexpired),
- A Permanent Resident Card (I-551)
- An unexpired foreign passport with a temporary I-551 stamp,
- An unexpired Employment Authorization Document with a photograph (I-766, I-688, I-688A, or I-688B) or
- An unexpired foreign passport with Form I-94 for a nonimmigrant alien authorized to work for a specific employer.

The acceptable documents under List B and List C have not changed.

Social Security Number

The revised instructions state that the employee is not required to provide his or her Social Security Number in Section I of the Form I-9, except where the employer is in the Electronic Employment Verification Program (E-Verify).

Spanish Version

The revised Form I-9 is available in both English and Spanish. Only employers in Puerto Rico may use the Spanish version for their records. Other employers may use the Spanish version to translate for Spanish-speaking employees, but must actually complete the English version for their records. Employees may request that a translator assist in completing the form.

Requirement to Use the New Form

Employers are encouraged to start using the revised Form I-9 immediately. Once notice is published in the Federal Register, employers may be subject to fines and penalties for failing to use the revised form. Employers are not required to complete the new forms for existing employees for whom the employer has a completed Form I-9. If, however, the employer is required to re-verify existing employees, the revised form and the updated list of acceptable documents must be used to re-verify.

The revised Form I-9 (both English and Spanish versions) can be downloaded from: <http://www.uscis.gov/i-9>

The updated employer handbook is available from: <http://www.uscis.gov/files/nativedocuments/m-274.pdf>

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