



June 6, 2016

The Honorable Nikki R. Haley
Governor, State of South Carolina
State House, First Floor
West Wing, 1205 Pendleton Street
Columbia, SC 29201

Re: H3682 – Bad Faith Assertion of Patent Infringement

Dear Governor Haley,

We, the below trade associations, write to you in support of H3682, a ratified bill that prohibits the abusive actions of entities commonly known as “patent trolls.” Due to the significant negative impact these entities have on our businesses and many others, we ask that you sign H3682 into law.

H3682 addresses the aggressive litigation and threats patent trolls use, without specific evidence of infringement, in an attempt to extort money from businesses, many of which are members of our associations. These entities use patents they’ve purchased at a discount to target businesses and their commonly used devices such as ATMs, office copiers/scanners and hotel and restaurant Wi-Fi, claiming that the legitimate use of these devices purchased “off-the-shelf” violates a patent – a patent that the entity did not create but simply bought from another. The entity then demands from the business that it can continue to use its copier or ATM if it pays a license fee to the entity.

The problem is that the assertion is often in bad faith as the entity knows that the patent is unenforceable but also knows that the small business cannot afford to investigate and litigate the enforceability of the patent. Thus, the targeted business is then left to choose between paying exorbitant license fees in order to continue to use these normal, everyday items or to pay more than \$500,000 in legal fees defending an “off the shelf” purchase. A 2011 Boston University School of Law study found that these abusive tactics cost businesses more than \$29 billion.

To combat this problem, H3682 creates a state law cause of action - Bad Faith Assertion of Patent Infringement – within the Unfair Trade Practices Act, with all the remedies provided in that Act. With this cause of action, a targeted business could bring an action in South Carolina state court alleging that the entity has knowingly asserted the patent in bad faith – at a significantly lower cost than challenging the patent in federal court in another state. What makes this cause of action unique is that it does not involve litigation of the patent but, instead, the manner in which it was asserted – fraudulently or in bad faith. As such, the cause of action is more of a consumer protection action the business can take to stop the abusive behavior.

Our associations worked the last two years with many groups such as intellectual property and manufacturing interests to fashion a bill, modeled after the bills enacted in all other states, that contains numerous features to insure that this cause of action targets the “bad guys.” Important features of the bill include:

- Intentionally addressing only the manner of assertion of the patent and not the patent itself;
- Limiting the availability of the cause of action to only “end users” of the product;
- Creating explicit exemptions for manufacturing, higher education institutions and technology transfer companies; and
- Creating a legal safe harbor for businesses asserting legitimate patents.

Although H3682 follows the model bills enacted throughout the states, our associations particularly studied the bills from Tennessee and North Carolina and much of H3682’s language is from these two states’ enacted bills. Both Tennessee and North Carolina have similar business climates to South Carolina and in those states the issue was extensively researched and discussed, leading to the protections and best practices that we incorporated into H3682. Nationally, thirty states since 2013 have acted to protect their states’ businesses by enacting bills like H3682 to create a Bad Faith Assertion of Patent Infringement cause of action. These states include all of our neighboring states of Alabama, Florida, Georgia, Mississippi, North Carolina, Tennessee and Virginia.

Patent trolls have been a national problem for small businesses for years and H3682 is designed to protect South Carolina’s businesses from these abusive threats that are intended to only to extort high license fees from innocent small businesses. Our hope is that through enacting this bill we will show these entities that South Carolina’s small businesses now have the tools to protect themselves in their own state. Should anyone wish to discuss this important bill, please have them contact me. We respectfully ask you for your signature.

With kind regards,



A. O’Neil Rashley, Jr.
Senior Vice President and Counsel
South Carolina Bankers Association

Submitted also on behalf of:

Carolinas Credit Union League

South Carolina Association of Realtors

South Carolina Retail Association

Homebuilders Association of South Carolina

South Carolina Association of Convenience Stores

South Carolina Restaurant and Lodging Association