

Litigating Against Non-Practicing Entities

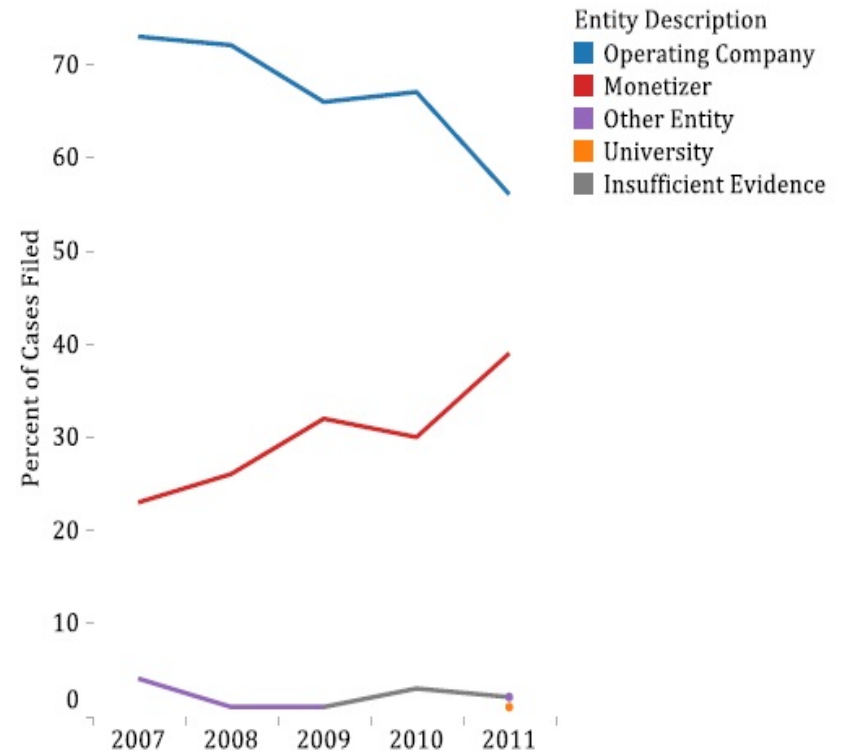
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January 24, 2013

NPE Suits

- The number of patent infringement actions filed annually in the U.S. has increased nearly 300% over the last two decades
- Patent infringement cases from 2007-2011: Filings by NPEs rose from 22% to nearly 40%

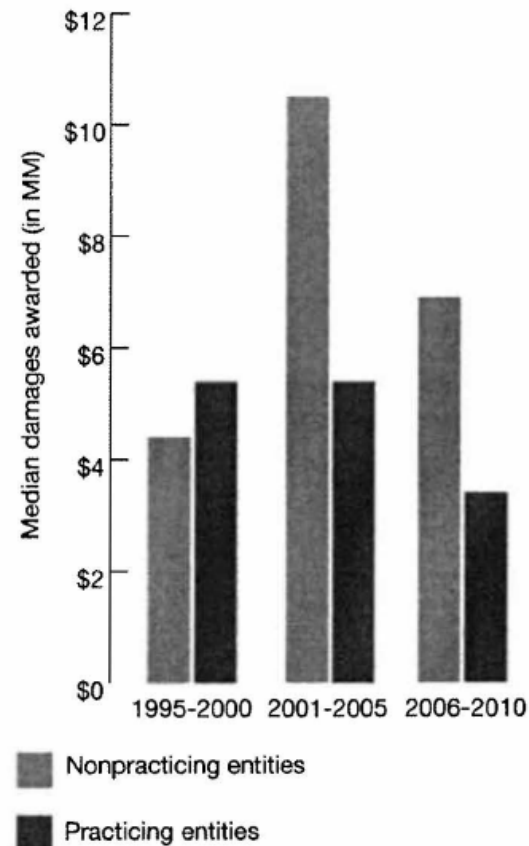


Sara Heruss, Robin Feldman and Joshua Walker, The America Invents Act 500: Effects of Patent Monetization Entities on US Litigation, Duke Law & Tech. R., Vol. 11, No. 2 (2012).

NPE Suits

- Estimated that the average patent suit involving NPEs results in \$122 million in lost wealth for the defendant
- Median damages amount in NPE suits exceeded that in PE suits

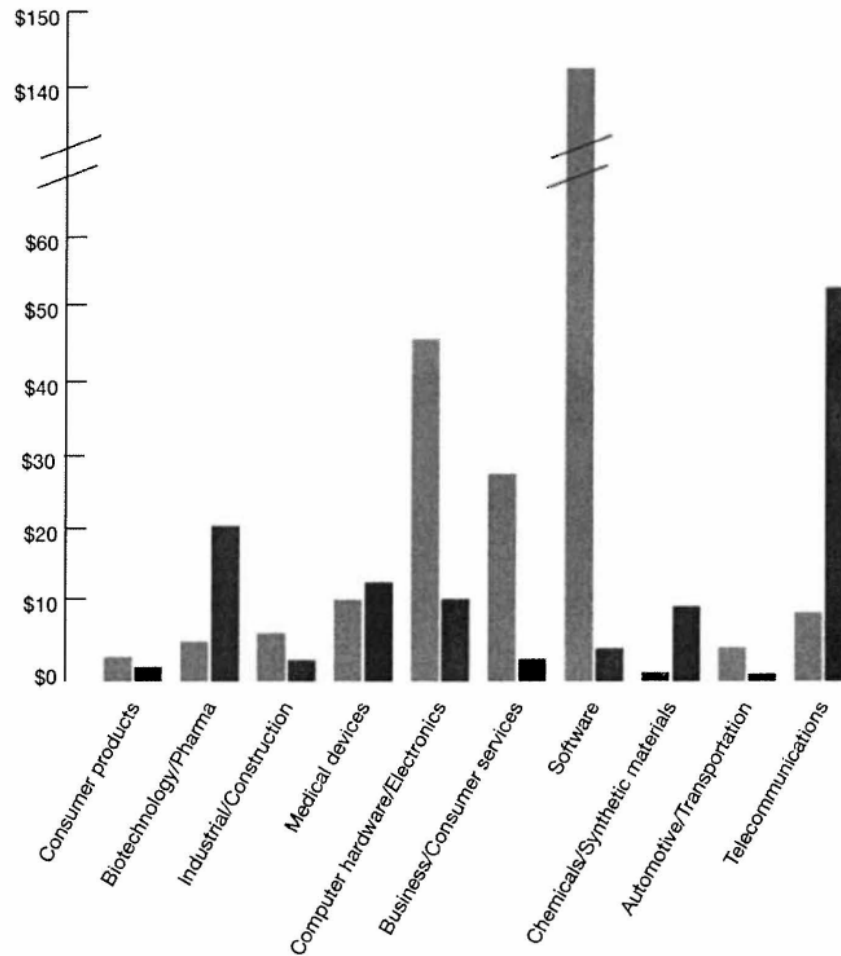
Chart 2b. Patent holder median damages awarded: Nonpracticing entities vs. practicing entities



PWC 2011 Patent Litigation Study

NPE Suits

Chart 6d. Patent holder median damages awarded: Top ten industries, 1995 to 2010



■ Nonpracticing entities
■ Practicing entities

PWC 2011 Patent Litigation Study

NPE Suits

- Increasing legal, technical and financial sophistication of NPEs
- Advent of defensive purchasing groups

NPE Suits: Practical Tips

- Figure out what your up against – research the NPE, its counsel and patent litigation history
- Pursue an early settlement
- Conduct an early case assessment with focus on potential exposure

NPE Suits: Practical Tips

- Join/create a joint defense group
 - › Benefits in cost sharing, cooperation among the parties, division of labor, sharing of theories and coordination of strategy
 - › JDA ensures that all communications among the group are privileged and defines activities

NPE Suits: Practical Tips

- Manage the joint defense group
 - › Participants in weekly group calls/meetings
 - › Coordinate offensive and defensive discovery
 - › Specific cost savings from cooperation with JDG include prior art searches and review, development of invalidity contentions, review of plaintiff's documents, pursuing discovery and motions, depositions of plaintiff and experts
 - › Division of responsibilities among defendants, especially at hearings
 - › Consider your JDG strategy and that of others

NPE Suits: Practical Tips

- Take control of electronic discovery to manage cost
 - › C.J. Rader Model Order
- Post-AIA, NPEs are filing separate actions against separate defendants
 - › Misjoinder less common
 - › “Coordination” of discovery and pre-trial
 - › Separate trials

NPE Suits: Practical Tips

- Maintain a focus on damages
 - › Consider recent caselaw developments on damages and willfulness
 - › Retain and involve damages expert early and throughout case
 - › Develop damages case in discovery
- Interview and consider retaining former employees
 - › Wealth of information
 - › Ethical concerns

NPE Suits: Practical Tips

- Pare the case down at every turn to position it for trial or settlement
 - › Reduce number of patents
 - › Reduce number of claims
 - › Reduce number of accused products -- eliminate classes of accused products through partial summary judgment

NPE Suits: Practical Tips

- Reduce number of sales subject to damages
 - › Foreign sales
 - › Gov't sales
 - › Consider patent marking issues
 - › Consider apportionment/developing evidence to rebut EMVR

NPE Suits: Practical Tips

- Plan for your next NPE case
 - › Maintain document productions and privilege logs
 - › Develop overarching damages theory
 - › Create foreign distribution network for overseas sales

Summary

- Research NPE and client's potential exposure
- Participate in a high functioning JDG
- Manage costs through JDG cooperation and limiting scope of electronic discovery
- Maintain a focus on damages
- Reduce the case/exposure to manageable size to facilitate settlement or trial
- Plan for your next case