

INSURANCE AND HURRICANES

June marks the beginning of Hurricane Season and should serve as a reminder to review your personal and business property insurance coverage. The effect of recent Hurricanes on the Gulf Coast generally and Louisiana specifically have been significant with respect to both damages and the insurance covering those damages.

The one year anniversaries of the 2008 Hurricanes are rapidly approaching and disputes with insurers covering the 2008 losses which have not been resolved may be prejudiced if lawsuits are not filed before the one year anniversary of the losses.

The losses caused by the 2008 Hurricanes in South Louisiana will make property insurance renewals more difficult and expensive. Coverage provided by many property carriers is expected to be narrowed and subjected to higher named storm deductibles. Beginning the renewal process on property coverage at least 120 days in advance of the renewal date is advised to ensure a fair opportunity to negotiate acceptable terms and to avoid unpleasant surprises such as excessive rate increases and non-renewals.

When purchasing property insurance an insured should also remember that Business Interruption Insurance is usually included in property insurance coverage. Business Interruption Insurance comes in many forms and must be specifically purchased in most cases as an additional coverage under a property policy. Understanding the different type of business interruption coverage is important and may be the difference between a company surviving or not surviving a catastrophic loss.

A comprehensive review of your insurance programs including your property insurance is recommended on a regular basis and the attorneys at Kean Miller can assist you in reviewing your insurance programs.

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THE CONTINUING IMPORTANCE OF PATENT INFRINGEMENT OPINIONS

Recent court decisions show that patent infringement opinions are still important for any person or entity that becomes aware of a United States patent that is similar to their products, methods or processes.

Under federal patent law, anyone who either makes, uses, offers to sell, or sells any patented invention in the United States or actively induces another to do so is liable for patent infringement.¹ In addition to regular damages, courts may award up to three times the damages for willful infringement.² Under the 1983 *Underwater Devices Inc. v. Morrison-Knudsen Co.* opinion, if a party had actual notice of another person's patent rights, then that party had an affirmative duty to exercise due care to determine whether that party was infringing those patent rights.³ This affirmative duty included the duty to obtain patent infringement opinions prior to engaging in any potentially infringing activities.⁴

In 2007, the United States Court of Appeals for the Federal Circuit readdressed the duty of care required for willful infringement and expressly overruled its *Underwater* decision.⁵ In *Seagate*, the Federal Circuit stated that there is no affirmative duty of care in determining willfulness for direct infringement.⁶ Direct infringement only encompasses the making, using, offering for sale, or selling the patented invention, not inducement. The new standard for willfulness for direct infringement is more akin to negligence in that the patent owner must show that the infringer acted despite an objectively high likelihood that its actions constituted patent infringement and

that the infringer either knew or should have known of that risk.⁷ Therefore there is no longer an affirmative duty for parties who are accused of directly infringing a patent to obtain a patent infringement opinion.⁸

However, in 2008, the Federal Circuit found that patent infringement opinions can be used as evidence of intent, or the lack thereof, for claims of inducing patent infringement.⁹ To be liable for inducing patent infringement, the patent holder must show that the alleged infringer knew or should have known that their actions would induce direct patent infringement.¹⁰ The fact that the alleged infringer fails to produce or obtain a patent infringement opinion may be used as evidence that the alleged infringer knew or should have known that their actions would induce direct patent infringement.¹¹

To reduce the risk of an adverse judgment awarding a patent owner triple damages, any party that is aware of a patent that is similar to a product, method, or process which they utilize should consider obtaining a patent infringement opinion from a competent patent attorney.



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1 35 U.S.C. § 271.

2 35 U.S.C. §284.

3 717 F.2d 1380, 1389-90 (Fed. Cir. 1983).

4 *Id.*

5 *In re Seagate*, 497 F.3d 1360 (Fed. Cir. 2007).

6 *Id.* at 1371.

7 *Id.* at 1371.

8 *Id.* at 1371.

9 *Broadcom Corporation v. Qualcomm Incorporated*, 543 F.3d 683 (Fed. Cir. 2008).

10 *Id.* at 698, quoting, *DSU Medical Corporation v. JMS Company*, 471 F.3d 1293, 1306 (Fed. Cir. 2006).

11 *Id.*