

ABATEMENT INSURANCE

Frequently Asked Questions

Intellectual Property Insurance Services Corp.

About:

The Abatement (enforcement) policy reimburses the Litigation Expenses to enforce Intellectual Property (IP) against alleged infringers.

Questions & Answers:

Q: What makes the Abatement policy unique?

A: The Abatement policy is plaintiff's policy designed to help enforce the Insured's IP rights. This is a blended coverage which has elements of pure insurance (unexpected risk) and a bond (people made/moral risk).

1. In the event the Insured loses the IP lawsuit, the Abatement policy responds as a pure insurance policy.
2. In the event the Insured wins the IP lawsuit and/or obtains an Economic Benefit, the policy then acts as blended coverage [An Economic Benefit can be, but is not limited to a Monetary Settlement, an Award of Damages, a Gain or Retention of Market Share, a Licensing Agreement, an Injunction or a Settlement Agreement to stop the infringing activity]:
 - a. The Insured reimburses only the money paid out by the carrier, and will retain any additional recoveries.
 - b. The policy includes an endorsement providing relief from the Economic Benefit repayment of the first \$100,000.
 - c. Repayment of Economic Benefit reinstates policy limits; those funds are then available to pursue other infringers.

Q: Can coverage be obtained if there is a known infringement at the time insurance is sought?

A: Yes. However, the infringing activity will be excluded from coverage under the policy.

1. Pre-Existing circumstances are excluded from coverage if the Commercial Activity that led to the infringement began before the first policy period. The test is objective; it does not matter if the activity was known or unknown at the time of purchase of the Abatement Policy.

Remedy: The pre-existing exclusion may be avoided by insuring early in the application process of the patent.

Q: Are Invalidation Counterclaims covered under the policy?

A: Yes, they are automatically covered by the policy.

Q: Are Declaratory Judgments covered under the policy?

A: Declaratory Judgments brought by the insured are **not** covered under the Abatement policy. However, if a party brings a declaratory judgment for invalidity or non-infringement against the Insured, the Abatement policy will respond if it is possible for the Insured to assert infringement against the party seeking to invalidate the intellectual property.

Q: Are Anti-Trust counterclaims covered under the policy?

A: No.

Q: What costs and fees associated with the Authorized Litigation are covered by the policy?

A: Costs include, but are not limited to, legal expenses, court costs, costs of depositions, transcripts, and fees and expenses of expert witnesses but only to the extent that they arise out of Authorized Litigation.

Q: What happens when an infringer is discovered by the Insured?

A: The Insured:

1. Must submit a favorable opinion from independent counsel opining that, more likely than not, the Insured IP would be found to be infringed by the accused product.
2. Submit a claim form outlining the nature of the claim, the IP involved, actions/results expected by the Insured and any negative impact projected by the Insured.
3. Upon compliance with policy terms, the claim is authorized by the Company and the policy will respond by reimbursing approved Litigation Expenses.

Q: Who chooses Litigation Counsel?

A: The Insured has choice of litigating counsel unless the:

1. Policy requires as part of the terms Choice of Litigating Counsel at time of subsequent litigation.
2. Insured gives the Company the right to choose Litigating Counsel for certain policy provisions.
3. Litigating Counsel selected by the Insured does not meet minimum criteria, and/or, selected counsel does not agree to the Company's required billing guidelines.

NOTE: Litigating Counsel must meet and adhere to the Company's minimum billing guidelines, whether chosen by the Company or the Insured.

Q: What are the qualifications for the approval of litigation counsel?

A: Approved counsel must comply with appropriate billing guidelines, reporting procedures, such as litigation updates, and adhere to ordinary and customary agreed upon hourly rates. The Company also requests a reasonable budget for the work to be done to get the insured through the lawsuit. Approved counsel MUST have relevant first-chair trial experience.

Q: Is there an approved litigating firm list, and if so, how do you get approved to get on it?

A: The Company does not have a "list" per se of approved litigating firms used. Litigating counsel is approved based upon compliance with the guidelines. The Company does not approve law firms; it approves individual counsel or a litigating team. The best way to be approved as litigating counsel is to be the "procuring cause", that is, the Insured was referred to the Company to obtain insurance and is selected by the Insured to be litigating counsel.

Q: Does the Insurance Company control and have final say as to the manner in which the lawsuit is handled?

A: No. Though the Company reserves the right to make recommendations as to how the case should or should not move forward, the Insured is ultimately in control of the lawsuit. However, the Company does have settlement approval authority.

Q: Does the Self-Insured Retention (SIR) reduce the policy limits?

A: No, the SIR does not reduce policy limits. Unlike a typical deductible, the SIR is paid out of pocket by the insured before the policy begins reimbursement. Once the Insured has satisfied the SIR, the policy begins reimbursement and the limits are not reduced by the SIR.

Q: What endorsements may be available to the policy?

A: There are several endorsements that may expand (for an increase in premium) or limit coverage of the policy. They include, but are not limited to, the following:

- **Licensee Coverage:** This endorsement is made available to provide that the licensee (ies) of the Insured may be defendants in Authorized Litigation against them by the Insured, provided that the License Agreement was terminated by the Licensee or the Insured because of material breach of contract.
- **Economic Benefit Relief:** This endorsement waives the Company's right to seek recovery of the first \$100K of the realized Economic Benefit by the named Insured. Upon approval by the Company, and additional premium, the Insured may be able to increase the relief amount up to \$250K.
- **Exclusionary Endorsement:** On occasion, it may be necessary to exclude certain party (ies) from an Authorized Litigation. This is many times due to an existing infringement or problem. It is important to realize that pre-existing circumstances are excluded from coverage if the Commercial Activity that led to the infringement began before the first policy period. The test is objective; it does not matter if the activity was known or unknown at the time of purchase of the Abatement Policy.
- **Re-Examination/Re-Issue Endorsement:** The policy will pay the associated costs as Litigation expenses if during Authorized litigation the insured decides to pursue having the insured patent claims reissued or the Defendant petitions to have the insured patent reexamined in the US Patent Office.

The aforementioned examples of available endorsements are not all-inclusive. The specific endorsements offered will only be determined after an application has been submitted for coverage, and as that application is underwritten and coverage is formally quoted.

Applicant should refer to the Specimen Policy for all terms and conditions of the Policy as well as all Exclusions. The above material in no way changes the terms or effect of the Policy language.

For further information, please contact:

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