

Patent Troll Case May Herald More Antitrust Probes

By **Melissa Lipman**

Law360, New York (January 22, 2014, 6:16 PM ET) -- The New York attorney general's case against MPHJ Technology Investments LLC, which settled last week, targeted extreme patent-enforcement tactics, but the suit could prove to be just the first example of antitrust enforcers taking on patent trolls, attorneys say.

Billed as a "groundbreaking settlement," the deal New York Attorney General Eric T. Schneiderman announced Jan. 14 requires MPHJ to make a good-faith effort to determine whether companies it contacts for licensing may actually be infringing its patents before contacting them, and prohibits the company from trying to hide its identity from those businesses.

Schneiderman's office said the deal should serve as a guideline for other so-called patent trolls, but experts said MPHJ's alleged tactics were so egregious that the settlement didn't really address questions about how to deal with patent assertion entities at issue in the broader debate over patent trolls, which has captured Congress's attention and inspired the Federal Trade Commission to pursue an in-depth study into the topic.

Still, with other attorneys general and the FTC investigating the company — according to a suit MPHJ filed challenging the FTC's investigation under the First Amendment — experts say the case could be a harbinger of enforcement to come.

"This is a particular species of troll that is not the type that has, to my mind, generated the significant policy concerns driving the FTC inquiry and a lot of the public debate," said Squire Sanders partner Mark Botti. "On the other side of it ... even though it's limited, it is a first step toward doing something in this area."

MPHJ has attracted considerable attention from government enforcers in recent months with a patent enforcement campaign that until recently had largely involved sending licensing demand letters to scores of small businesses over its patent for scanning technology. But earlier in January, MPHJ expanded its attack, suing The Coca-Cola Co., insurance company Unum Group and department store chain Dillard's Inc. for patent infringement.

The Schneiderman settlement, however, focused mainly on MPHJ's efforts to extract license fees from small and medium-size businesses.

The company had written to hundreds of New York companies that MPHJ claimed "likely" infringed its

scanner patents, a move the attorney general said gave the false impression that MPHJ had done its due diligence on each company. Instead, MPHJ simply sent form letters to companies that met certain industry and size thresholds in an effort to convince them to pay license fees, without ever filing an infringement suit against a New York business, according to the attorney general.

"What the settlement in New York addresses is conduct that most everybody would find indefensible in theory, whether it was by a troll or anybody else," said Mayer Brown LLP's Christopher Kelly. "A bad-faith assertion of a patent right in order to extract a royalty, designed to avoid actually putting the patent to the test in court ... is hard to defend, regardless of who's asserting it."

Indeed, several other attorneys general have already begun pursuing MPHJ with complaints that experts say are based more in consumer protection claims than in antitrust allegations. That includes Nebraska's attorney general, whose office is investigating MPHJ; Vermont's attorney general, who sued the company in May under the state's consumer protection laws; and Minnesota's top prosecutor, who reached a settlement with MPHJ in August that requires its demand letters to be reviewed by state officials.

In addition, the FTC sent the company a draft complaint in December accusing the company of violating the Federal Trade Commission Act and threatening to sue unless the patent owner agreed to a proposed consent judgment, according to a suit MPHJ filed earlier in January claiming its letters are protected under the First Amendment.

There has been some question about whether antitrust enforcers and lawmakers should wait until the FTC's patent-assertion entity is complete before pursuing cases against patent trolls. Commissioner Maureen Ohlhausen has urged deliberate caution for Congress, while Commissioner Julie Brill has said enforcers shouldn't hold off on taking action if they identify viable antitrust violations.

The question is whether the cases against MPHJ are just easy action against an outlier, or if they point to further enforcement to come, experts say.

"You never know whether [the attorney general's action is] going to be limited ... or if it is low-hanging fruit before they go after harder matters," Botti said. "It's just hard for me to believe an attorney general's office that's serious about its job is going to stand down until developments at the federal level have run their course."

--Additional reporting by Ryan Davis, David McAfee and Dan Prochilo. Editing by Elizabeth Bowen and Philip Shea.