

# IP Bill to Fight COVID-19

With the emergence of the novel coronavirus pandemic, U.S. Sen. Ben Sasse (R-Nebraska) has proposed the Facilitating Innovation to Fight Coronavirus Act in an effort to combat the continued spread of the highly-communicable virus. The draft legislation seeks to strike a balance between the following two potentially competing interests:

1. facilitating opportunities for innovations that will detect, treat, and prevent the virus; and
2. protecting the private intellectual property (IP) rights of IP owners.

While the legislation has not been enacted as of the date of this client alert, we anticipate that Congress will pass a bill addressing this pandemic and IP rights in the near future. What follows is a summary of the current draft legislation.

## Innovation Opportunities

The draft legislation would rapidly improve opportunities for innovations that will detect, treat, and prevent the virus by providing broad immunity from the following activities:

- using or modifying a medical device for unapproved use to test or treat COVID-19 patients;
- practicing medicine outside one's specialty under the supervision of an individual licensed in that specialty;
- returning to the practice of medicine from retirement; and
- testing or treating a COVID-19 patient outside a conventional health care facility.

In short, the draft legislation would provide immunity from civil liability to those health care professionals battling against this virus. The rationale behind this grant of immunity is that medical professionals combating this virus in the current crisis environment should not be civilly liable for outcomes that might not be optimal in the same way that military medics are not civilly liable for their treatment of wounded warriors in times of war.

## IP Protection

While the draft legislation would pre-empt or negate the rights of IP owners having patents directed to the diagnosis, treatment, and/or vaccination of COVID-19, the legislation would also extend the patent term of pre-empted patents by a period of 10 years.

The 10-year extension would begin from the date on which the declaration of a national emergency is withdrawn and is intended to incentivize medical device, pharmaceutical, and biomedical innovators to rapidly target their resources toward tests, treatments, and vaccines for the virus.

## Unintended Consequences

The draft legislation, in its current form, does come with a number of potential unintended consequences. For example, how will owners of pre-empted patents regain exclusivity following the period of pre-emption? And since the proposed pre-emption period extends until the termination of the declared national emergency, what is the real value of a 10-year patent extension of patents directed to testing and treating COVID-19 when there may be no virus to detect or treat? In addition, is it possible that making a COVID-19 exception to the long-standing rule that patent owners are entitled to exclusive rights to their patented invention for a limited term could set a bad precedent allowing for future encroachments on the rights of patent owners in other technical fields? Further, in view of the multitude of

acts of individual, academic, and corporate volunteerism and generosity we've already seen, is this legislation even needed?

*We will continue to monitor the progress of this legislation and keep you apprised of any significant developments. If you would like to discuss how your IP rights or liabilities may be impacted by the COVID-19 pandemic, please contact one of the members of our [Intellectual Property Group](#).*

**Visit our COVID-19 Insight Center for our latest legislative and legal updates, articles, and resources.**

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