

# The Pendulum Swings: Is Patent Litigation (Coming) Back?

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Anyone who has litigated patents knows about the enforcement pendulum. In the years after the creation of the Federal Circuit and particularly after the Federal Circuit's decision in *State Street Bank*, patent litigation was a gold rush. Patent litigation gave rise to [billionaires](#), created a new industry of publicly-traded enforcement entities, and the term "patent troll" entered the lexicon.

But a basic principle of the universe is that every action creates an opposing reaction. Starting in 2006 with *Ebay*, the Supreme Court substantially eliminated injunctions for non-practicing patent owners. And in 2007, the Supreme Court loosened the standard for showing a patent claim obvious in *KSR*. Passage of the American Invents Act in 2011 was like a dagger to the heart for much of the patent-litigation landscape. It is no surprise that many publicly-traded patent enforcement entities hit their [peak market value](#) in mid-2011. And some have pretty much [abandoned patent enforcement](#) altogether.

In 2014, the patent-enforcement system took another body blow with the Supreme Court's decision in *Alice* overruling (in practice if not formally) the Federal Circuit's *State Street* decision. Between IPRs, CBMs, *Alice* eligibility challenges, the inability to secure an injunction, and the uncertainty of holding onto a verdict (if you managed to get that far) with *de novo* claim construction and obviousness review at the Federal Circuit, patent litigators and patent owners fled the field. The Supreme Court's decision lowering the standard to award attorneys' fees to a prevailing party in *Octane Fitness* accelerated the exodus.

The effect of these blows to the patent-enforcement ecosystem was to wipe out the entire middle market for patent licensing and enforcement. The so-called "patent troll" enforcement model—where a patentee sues dozens of defendants settling quickly and cheaply to ensure that no case ever sees a judgment—survived. And the highest-dollar cases between competitors with the financial wherewithal to litigate for years in multiple different fora continued to be filed.

But the middle market—valuable patents often owned by individuals or small businesses without the resources to fight for years in PTAB, in the courts, and on appeal—died. And without a middle market for enforcement, there is no middle market for licensing outside litigation. It has been a brutal decade for the independent inventor.

But are we about to see a resurgence in the middle market? Several trends suggest that the answer is yes.

## 1. The Rise of Middle Market Litigation Finance

Most legal professionals have heard of Burford, but have you heard of [Woodsford](#), [Fortress](#), [Bentham](#), [Second Avenue](#), [Randolph Square](#), and a host of others? Litigation finance is no longer only for massive portfolios with more than 100M in demonstrable damages. It is now possible to secure litigation finance for quality patents with sub-1M investments for cases worth as little as 5-10M. The more damages the better, but litigation finance is no longer limited to the sport of kings.

## 2. *Alice* Loses its Bite

In the immediate aftermath of the *Alice* decision nobody, and I mean nobody, had any idea what it meant. It was likely that so-called "do it on a computer" business method patents were dead and that functionally-claimed software patents were vulnerable, but beyond that  $\backslash\_(\_)\_/$ . The dust is settling, and the district courts and the Federal Circuit have, albeit a bit haphazardly, begun to zero in on the characteristics of eligible and ineligible patent claims. The Federal Circuit's holding in *Berkheimer* that what is routine and well understood is a question of fact gives patentees even more breathing room. Most importantly, patent litigators can now identify

patents vulnerable to an *Alice* challenge with a reasonable (if not yet high) degree of certainty. The PTO's new 101 guidance only helps.

### 3. PTAB Chills Out

For the first few years after its founding PTAB killed just about every patent it saw. PTAB is still a very real (and expensive and annoying and arguably unconstitutional) threat, but it isn't quite the death squad that it was from 2013 to 2015.

### 4. The *Halo* Effect

While *Octane Fitness* made it easier for a prevailing party to receive a fee award, its reasoning led to the Supreme Court's decision in *Halo* in 2016 loosening the standard for an award of enhanced damages for willful infringement. Coupled with a Federal Circuit that seems to be moving in the direction of deference to district courts, treble damages have become a much more real prospect in patent litigation.

To be sure, there are still plenty of headwinds for the independent inventor. But it's always darkest before the dawn and dawn is breaking.



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