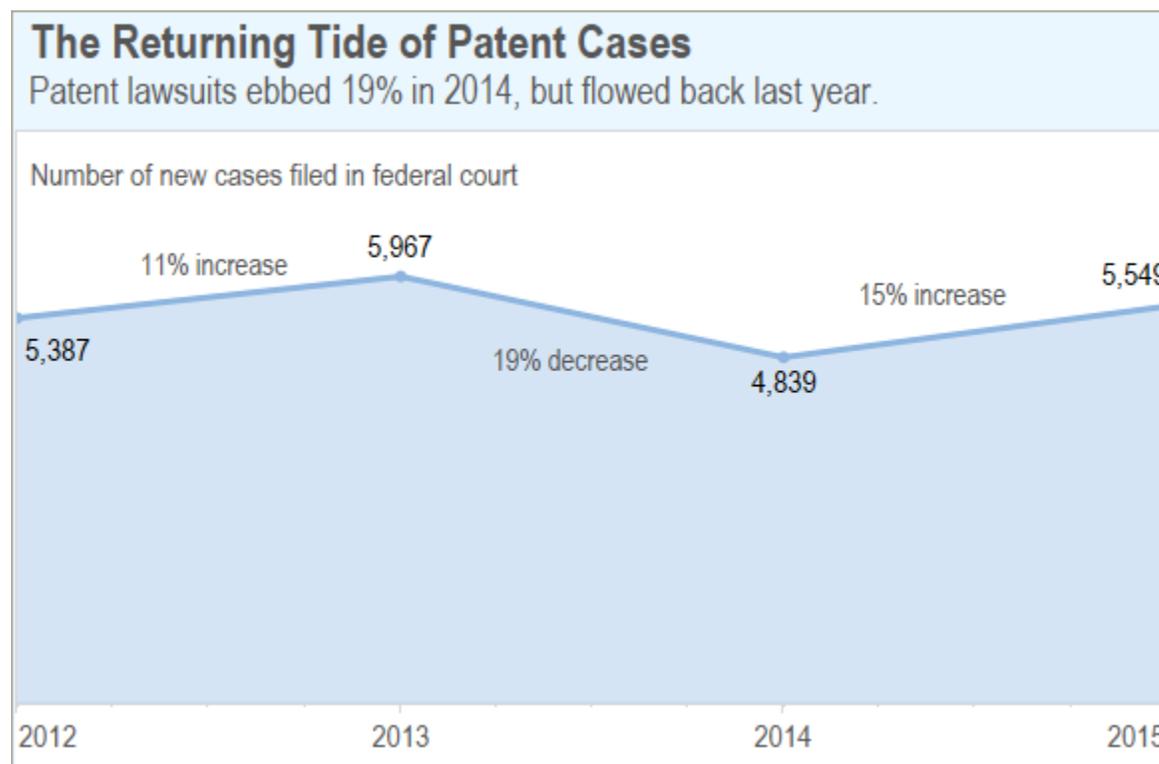


## How 2015's Crush Of Patent Lawsuits Kept IP Attys Busy

By Aeбра Coe

*Law360, New York (February 9, 2016, 5:19 PM ET)* -- The number of new patent complaints increased by nearly 15 percent in 2015 over the year before, and intellectual property attorneys say they are being pushed to take on more work as law firms stretch their resources to adapt to the influx of litigation.

Despite the U.S. Supreme Court's Alice Corp. and Octane Fitness rulings in 2014, which were aimed at limiting unreasonable and frivolous patent litigation, an initial 19 percent drop in the number of patent complaints filed that year was followed by a nearly equivalent uptick in 2015 in what some attorneys called a testament to the "unrelenting spirit" of nonpracticing entities.



Attorneys note that the increase in new complaints filed in 2015 merely made up for the hit the practice area took the year before, and while there has been a sea change in the way patent law is practiced that necessitates adaptation, staffing up is not one of the measures law firms are likely to take.

“So far, it’s been more of a stretching of existing resources than a hiring frenzy,” McDermott Will & Emery LLP partner Paul Devinsky said. “Notwithstanding the recent surge in new cases, law firms have been forced to compete more aggressively and work more efficiently, especially in terms of managing discovery and overall case management.”

So, rather than hiring more attorneys across the board, the case is usually that each attorney works more, is pushed to become more efficient, and develops a wider breadth of knowledge, according to Orrick Herrington & Sutcliffe LLP partner Amy Van Zant.

“There’s been tremendous pressure to decrease costs and be more efficient,” Van Zant said.

One other earthquake still shaking the world of patent law is the America Invents Act, passed at the end of 2012, which enacted a number of changes and set up the Patent Trial and Appeal Board inter partes review process.

“There has been a decrease in trial work but an increase in patent office litigation,” Knobbe Martens Olson & Bear LLP partner Joseph Re said. “The nature of the work is changing.”

Scott W. Doyle, the head of Fried Frank Harris Shriver & Jacobson LLP’s intellectual property litigation group, noted that law firms are not necessarily feeling added pressure to meet the staffing needs for the increased number of patent cases filed in district court, but they do feel a strain to address an increase in the number of inter partes review petitions.

“Moving into 2016 and beyond, law firms will have to focus on maintaining staff that has enough depth and breadth to handle traditional district court litigation and proceedings before the PTAB,” Doyle said.

Several attorneys noted that while they are fairly busy, the number of cases filed in 2015 may be deceptive for a couple of reasons.

First, rather than a steady flow of complaints filed over the course of the year, there was a major influx of cases filed in November and December leading up to the Dec. 18 abolishment of the infamous “Form 18,” which heightened the specificity requirements for filing patent infringement suits. Patent holders wanted to get their suits in before the more stringent filing standards took effect.

Also, because of the increasing popularity of IPR, many cases, including the influx filed at the end of the year, are put on hold immediately after they are filed, and the PTAB’s review process, which is a simpler and less time-intensive process than a federal court trial, takes over instead.

Last, post-AIA years cannot be compared to pre-AIA years, the attorneys noted, because the new law requires patent holders to file suits against multiple defendants individually rather than naming a large number of defendants in one suit. That artificially inflates the number of cases filed, when compared with pre-2013 levels, they said.

Nonetheless, the spike from 2014 to 2015 takes all of that into account, and, despite two Supreme Court rulings unfavorable to excessive filing, patent litigation isn’t waning the way some thought it might.

Latham & Watkins LLP partner Richard G. Frenkel said that his firm largely takes cases that involve disputes between big players in a given industry.

"Those cases, I can't say they've gone up," Frenkel said. "We're busy, but we've been busy with those for years. Competitor cases have probably remained about the same. What really went up are the NPE cases."

Devinsky said that while the Supreme Court's Alice and Octane Fitness rulings likely continue to have a negative influence on new filings, the 2014 shock seems to have worn away, and patent owners now appear to have adjusted to those cases.

"NPEs now seem to consider them just another business risk," he said.

William O'Brien of IP boutique One LLP said there seems to be a consensus that what happened in 2015 was a partial recovery from the 19 percent dropoff in cases in 2014 after the uncertainty created by Alice and Octane.

"Over the course of 2015, patent owners and their counsel adjusted to some of the recent developments — which is what accounts for the partial recovery in my view," O'Brien said. "This is still a cautious and uncertain era — it is certainly not business as usual — but the effects of the AIA and other recent developments have not been as catastrophic as some may have feared."

Van Zant pointed to what she called the resilience of nonpracticing entities when explaining the rise in patent complaint filings in 2015.

"They are quite clever and quite malleable, and they are good at adjusting to changing conditions," she said. "Maybe that's the American way."

*Methodology: Law360's analysis of trends in new patent complaints uses raw data from PACER filtered by Law360's sophisticated docket tracking systems. The data is then normalized and reviewed by Law360 reporters to build a reliable and revealing data set.*

--Editing by Jeremy Barker and Philip Shea.

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