CARLTON FIELDS

The Status of Business Method Patents

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Business method patents have a checkered history. They were once very much in vogue—numerous such patents issued, and many of them were litigated. Then, about two years ago, Congress enacted a special procedure that made it easier to challenge business method patents in the U.S. Patent and Trademark Office (USPTO). Then, in June 2014, the Supreme Court case *Alice v. CLS Bank* dealt a blow to business method patents. *See* "Patent Eligibility of Software" in the Summer 2014 edition of *Expect Focus*®. Business method patents raise issues that stem from the basic question: What is allowable as the subject of a patent? The earliest cases held that abstract ideas could not be patented, and that concepts such as accounting methods were not patentable. With the advent of computers, later cases found that business methods implemented by computer programs may not be abstract ideas and could be the subject of a patent. After that, the floodgates opened - both in terms of business patents filed and issued. Such business method patents include industry-specific patents (e.g., how to price an annuity) to generally applicable patents (e.g., the one-click method of buying online). One consequence of the large issuance of business method patents has been that non-practicing entities (NPEs) have bought patents merely to assert them in litigation. These NPEs, known as "patent trolls" by those who oppose the NPE concept, have filed numerous litigations based on business method patents, creating much controversy. In response, the American Invents Act, enacted over two years ago, instituted a special post-grant procedure to deal with business method patents: a party sued for infringing a business method patent may challenge the validity of that patent in the USPTO. This is less expensive and often faster than using the courts. The more expensive court action is often stayed pending the result of the USPTO proceeding. More recently, in *Alice v. CLS Bank,* the Supreme Court held a patent for a computer implemented electronic escrow service invalid because the invention was an "abstract idea" and not patentable. The Court did not specifically delineate between an abstract idea and a patentable invention, but it made clear that merely using a computer to perform the method does not make the invention patentable. There have been many complaints that the decision provides no road map regarding the line between patentable inventions and abstract ideas. But courts and the USPTO have interpreted *Alice* as being strongly against patentable business methods. As a result, *Alice* has had significant consequences, both in the courts and in the USPTO. Not only has the USPTO amended its standards for examining business method patents, but it has been rejecting such applications at a very high rate. The courts

have also been invalidating business method patents at a high rate, and very often at summary judgment, early in the case. While the current status of business method patents looks bleak, these types of patents have made comebacks before, and should not be counted out. In fact, some of the more recent cases provide a glimmer of hope for business method patents. But for now, the pendulum has certainly swung against them.

Authored By

Ethan Horwitz

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