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Supreme Court Ruling Encourages Courts to Award Attorney's Fees

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Have you ever wished you could make the abusive party on the other side of your patent suit pay for your attorney's fees? The U.S. Supreme Court has made your wish a reality. Recent U.S. Supreme Court precedent has made it easier to obtain attorney's fees in patent cases, especially in lawsuits initiated by non-practicing entities (NPEs). Colloquially known as "patent trolls," NPEs center their business model on the compilation and assertion of patents against companies in the hopes of receiving licensing fees or court awarded judgments. Although currently not illegal, the business practices of NPEs have typically been frowned upon by both practitioners and legislators alike. While legislation addressing the issue of NPEs has been slow in development, the U.S. Supreme Court has been very active in this regard. With their holdings in *Octane Fitness, LLC v. Icon Health & Fitness, Inc.* (*Octane Fitness*) and *Highmark Inc. v. Allcare Health Management System, Inc.* (*Highmark*), the Court lowered the standard for awarding attorney's fees to the winner of a lawsuit and made clear the standard of review to be used by appellate courts in attorney's fees appeals.

What is an "exceptional case"?

Courts are given discretion under 35 U.S.C. § 285 to award attorney's fees to the prevailing party in a patent suit in "exceptional cases." The standard for an "exceptional case" was previously established in *Brooks Furniture Mfg. v. Dutailier Int'l, Inc.* (*Brooks*), where the Federal Circuit held that an "exceptional case" must either involve material inappropriate conduct, or litigation that is both objectively baseless and brought in subjective bad faith. This is a fairly high standard, and as a result, attorney's fees were not often sought nor awarded by courts.

In *Octane Fitness*, defendant Octane Fitness was sued by plaintiff Icon for allegedly infringing a patent for an elliptical machine. Although Icon, a manufacturer and seller of exercise equipment, held a patent for the elliptical machine, Icon did not actually manufacture or sell that particular elliptical machine.

Octane Fitness prevailed in the district court, but was denied attorney's fees under 35 U.S.C. § 285 because the case was not an "exceptional case." On appeal, the Federal Circuit affirmed the district court's decision, agreeing that the case was not an "exceptional case." Both courts followed the standard set forth in *Brooks*. Even though defendant Icon never sold any products using the patented technology, both courts found that this was not an "exceptional case" that justified an award of attorney's fees to Octane Fitness.

The Supreme Court reversed the Federal Circuit decision in *Octane Fitness*, effectively overturning *Brooks*. The Court directed district courts to exercise their full discretion and consider the totality of the circumstances when making a determination of what is an "exceptional case." The Court also discarded the Federal Circuit's requirement that litigants establish entitlement to fees by clear and convincing evidence, holding that 35 U.S.C. § 285 "demands a simple discretionary inquiry" which "imposes no specific evidentiary burden, much less such a high one."

Although the Court did not define what "exceptional cases" means, it may be implied that frivolous suits, such as those brought by NPEs, fall into that category. Moreover, the bar for establishing an "exceptional case" has been lowered significantly.

An award of attorney's fees is now harder to reverse on appeal

In *Highmark*, a companion case to *Octane Fitness*, the U.S. Supreme Court addressed and clarified the standard for an appellate court's review of an award of attorney's fees. Defendant Highmark Inc. won in a patent infringement case and was awarded attorney's fees. The district court held that the case was an "exceptional case" because of plaintiff Allcare Health Management System's "pattern of vexatious and deceitful conduct throughout the litigation." On appeal, the Federal Circuit reversed the attorney's fee award, and overturned the district court's finding that it was an "exceptional case" by applying its longstanding *de novo* standard of review.

The U.S. Supreme Court vacated the Federal Circuit's judgment, rejected the *de novo* standard of review and established an abuse of discretion standard. In contrast to *de novo*, where a case is reviewed anew, the abuse of discretion standard instructs appellate courts to overturn a holding regarding attorney's fees only when there was an abuse of discretion by the district court involved.

When to seek attorney's fees

In light of *Octane Fitness* and *Highmark*, litigants should always keep in mind the very real option of obtaining attorney's fees. The U.S. Supreme Court is hoping that the high likelihood of being awarded attorney's fees and the low likelihood of the award being overturned on appeal will serve to prevent future abusive lawsuits, especially by NPEs. In currently pending patent infringement cases, defending litigants may want to consider the likelihood of being awarded attorney's fees as a bargaining chip in settlement negotiations.

Conclusion

The *Octane Fitness* and *Highmark* cases can be viewed as a big blow to NPEs and a big win for everyone else. These two cases put patent owners generally, and NPEs, in particular, on notice that they need to conduct proper due diligence before bringing a patent infringement suit or counterclaim. *Octane Fitness* and *Highmark* relate to all litigants in all patent cases, not just those involving NPEs. As a result, companies should be wary of whether their own litigation practices are overly aggressive or unreasonable. The end result of *Octane Fitness* and *Highmark* will undoubtedly reduce abusive patent litigation practices, and may very well reduce the number of patent infringement cases filed.

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