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Revisiting Octane Fitness and Highmark: Attorneys' Fees for "Exceptional" Cases

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On April, 29, 2014, the U.S. Supreme Court issued its decisions in *Octane Fitness, LLC v. ICON Health & Fitness, Inc*. and *Highmark Inc. v. Allcare Health Management System, Inc*. These decisions made it easier for a prevailing party in a patent litigation to receive attorneys' fees in "exceptional cases" under 35 U.S.C. § 285. More specifically, in *Octane Fitness*, the Supreme Court lowered the burden of proof required to show exceptionality and granted district courts wider discretion to award attorneys' fees. Similarly, in *Highmark*, the Supreme Court reined in the Federal Circuit's ability to overturn the awards by setting an "abuse-of-discretion" standard of review for awards of attorneys' fees. This client alert assesses the real-world effect of these decisions as of today.

The Supreme Court noted that the previous exceptional-case determination framework (which required that the case be "objectively baseless" and "brought in subjective bad faith") was "unduly rigid." Instead, the Supreme Court held "that an 'exceptional' case is simply one that stands out from others with respect to the substantive strength of the party's litigating position (considering both the governing law and the facts of the case) or the unreasonable manner in which the case was litigated. District courts may determine whether a case is 'exceptional' in the case-by-case exercise of their discretion, considering the totality of the circumstances." See our Client Alert from May 5, 2014, for more details as to the specifics of these landmark cases, here.

Patent litigants and district courts alike have been empowered by the new standards set in the *Octane* and *Highmark* rulings. Prior to the rulings, district courts granted 13 percent of attorneys' fee motions (based on a study by the Federal Circuit Bar Association). However, since the rulings, district courts have granted between 40 and 50 percent of attorneys' fee motions. The increase in likelihood of being awarded attorneys' fees has spurred litigants to file motions for attorneys' fees. One study saw a 41 percent increase in filing motions for attorneys' fees since the second half of 2014 (after the *Octane* and *Highmark* decisions) and a 65 percent increase in the first half of 2015. It is clear that attorneys' fees have a higher likelihood of being awarded, and litigants have latched on to that fact.

Recently, on August 19th, two defendant corporations were awarded attorneys' fees in excess of $6.5 million (and expected to reach nearly $8 million due to additional fees from continuing the case to this point). This is the largest fee awarded since Octane (though, surprisingly, only the fourth largest award in the past decade).

Even celebrity pop stars Justin Timberlake and Britney Spears are in on the action, being awarded attorneys' fees in excess of $750,000 after successfully defending against a frivolous infringement suit brought against them for jumbo screen technology used at their concerts.

As of this past Tuesday, more than one year after the Supreme Court decisions, the dust has finally

settled in the Octane case. After the Supreme Court and the Federal Circuit remanded the case back to the district court, the district court awarded Octane Fitness $1.7 million in attorneys' fees. However, this gain did not come without some pain. Octane Fitness originally sought over $2.8 million in fees, which included $1 million in cost for the appeal related to the original attorneys' fees issue.

The district court judge parsed the appeal into two portions, awarding attorneys' fees for the portion dealing with claim construction and non-infringement, but denying an additional $1 million in attorneys' fees expended for the portion relating to the original § 285 motion for attorneys' fees. The district court judge reasoned that, while the claim construction and non-infringement portions of the appeal were brought based on the same exceptionally weak arguments rejected by the district court, and thus were deemed "exceptional," the plaintiff had reasonably relied on existing case law in the appeal of the decision on the original § 285 motion.

Parsing of conduct during litigation for purposes of awarding attorneys' fees has become more commonplace after Octane and Highmark. Although courts are awarding attorneys' fees with greater frequency, the amounts awarded are typically limited to what can be attributed to "exceptional" behavior rather than the entirety of the fees. One study from the *Berkley Technology Law Journal* (July 2015) noted that most fees awarded have been limited to between $200,000 and $300,000. Thus, it should be noted that, in many instances, litigants may only be able recoup a fraction of the total cost of litigation.

It is clear that § 285 motions for attorneys' fees are a real tool delivering real results. Moreover, the results are not limited to the collection of fees. Litigants are having success putting pressure on non-practicing entities (NPEs) early during litigation and as litigation progresses. For example, NPEs are dismissing cases after unfavorable rulings (e.g., in Markman hearings) if it appears their positions have become less meritorious for fear of paying fees (something an NPE never wants to do). Additionally, defendants may be interested in sending a message to the next plaintiff in line to dissuade frivolous lawsuits: "You better have a legitimate case because we have no problem asking for, and we will receive, our attorneys' fees."

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