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Standing Out: The Supreme Court Eases Standard for Awarding Attorney's Fees in Patent Cases

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In a pair of decisions concerning the recovery of attorney's fees in patent litigation, the Supreme Court rejected the current criteria for both determining whether to award fees and reviewing such determinations on appeal. In *Octane Fitness v. ICON Health & Fitness*, and *Highmark v. Allcare Health Mgm't Sys.*, both issued on April 29, 2014, the Court seemingly made it easier for parties to obtain fees in patent litigation and harder for such awards to be overturned on appeal. While these decisions are widely thought to impact so-called patent trolls (more accurately described as non-practicing entities), they likely will have an effect on all patent litigation.

Since 1952, the Patent Act has provided that "[t]he court in exceptional cases may award reasonable attorney fees to the prevailing party." Congress left the meaning of "exceptional" undefined, and for over half a century the courts interpreted the term holistically based on the totality of the circumstances. While fees were not awarded as a matter of course, they were awarded when district courts thought the circumstances warranted them.

In 2005, the Federal Circuit, the court responsible for hearing all appeals of patent cases, changed the fee award landscape. The court held in *Brooks Furniture* that an "exceptional case" only existed where "there has been some material inappropriate conduct" or when the litigation has been *both* "brought in subjective bad faith" and was "objectively baseless." Moreover, according to the Federal Circuit, proof of entitlement to fees had to be established by "clear and convincing evidence," the highest burden of proof in civil cases. Because the bar for proving a case exceptional was set so high, the possibility of an award of fees was so remote that it ceased to be much of a deterrent for litigants, in particular patent plaintiffs.

In *Octane Fitness*, a case ironically *not* involving non-practicing entities, but rather competitors in the fitness industry, the Supreme Court rejected the Federal Circuit's interpretation in *Brooks Furniture* of the fee statute as "unduly rigid." Noting that "exceptional" means exactly what it is defined to mean -- uncommon, rare or not ordinary -- the Court said that an "'exceptional' case is simply one that stands out from others with respect to the substantive strength of a party's litigating position … or the unreasonable manner in which the case was litigated."

What does "stands out" mean? While that will be left to the district courts on a case-by-case basis, the Supreme Court seemingly meant for it to apply to a greater scope of cases than under the *Brooks Furniture* approach. One can surmise that the Court did this to give judges latitude to divine and define what makes a case "stand out," and presumably lower the bar even more than where it was pre-2005 for fee shifting in patent litigation. Interestingly, the Court looked in large measure to the copyright law for support of the new exceptional case interpretation. Yet copyright law (17 U.S.C. § 505) does not use

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"exceptional case" at all but simply states that "the court may also award a reasonable attorney's fee to the prevailing party." The references to the copyright law may be a harbinger of an era of fees being awarded more liberally, as many Circuit courts have held in the copyright context.

The Court's opinion reads as if there had been a fairly seamless approach to patent fee awards up until the *Brooks Furniture* decision. *Brooks Furniture* was the flashpoint for the Court, and the Court spared no flame in turning it to a cinder, finding it flawed in virtually every respect. But pre-*Brooks Furniture*, the judiciary had determined the award of fees to require some truly "extraordinary" circumstances, and the award was a rarity. In the Court's view, the Federal Circuit had gone too far in reducing the "totality of the circumstances" to unreasonably rigid criteria.

In *Highmark*, consistent with its Octane Fitness opinion and the elimination of objective baselessness as a requirement for an award of fees, the Supreme Court changed the standard of review of an award or denial of fees on appeal from de novo to an abuse of discretion standard. This much higher standard of deference should give comfort to trial judges that their "discretion" will not be overturned.

Many may see these decisions as providing some deterrent to non-practicing entities from pursuing specious claims in the hopes of quick settlements without the hammer of fee shifting hanging over their heads. That is presumably one goal of the Supreme Court based on a reading of these decisions, but the same construct applies in all patent litigation regardless of the party. For instance, a defendant that intends to zealously defend against a charge of infringement will have to seriously consider the Monday morning quarterbacking when some, or all, of its defenses flame-out, even if not "baseless" at the start. Similarly, it remains to be seen whether the decision has impact in other areas. For example the Lanham Act uses the same "exceptional" language in its fee statute.

Much is being said about this decision as being "anti-troll." In practice, however, it is likely that more than just trolls will be exposed to the bright light of fee awards.

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