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Federal Circuit Law on Attorneys' Fees After *Octane Fitness*

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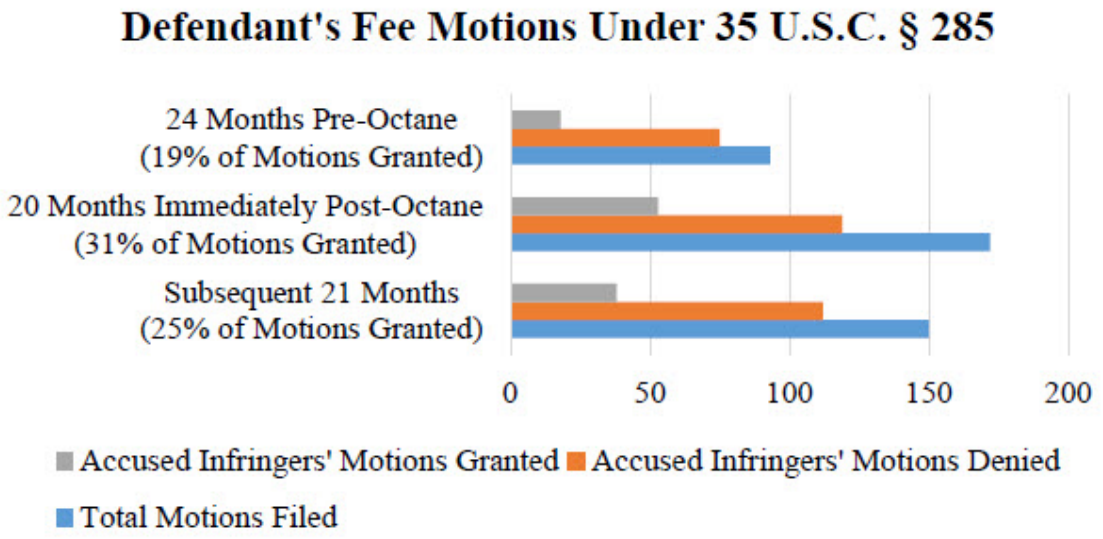
S.Ct.: *Octane Fitness* and *Highmark*

- 2005-2014: no attorneys' fees under § 285 unless:
  - (1) litigation misconduct, or
    (2) litigation objectively baseless and brought in subjective bad faith *Brooks Furniture* (Fed. Cir. 2015)
- *Octane Fitness* (S.Ct. 2014)
  - "An exceptional case is simply one that stands out from others"
  - § 285 should be analyzed by considering factors
  - no specific evidentiary burden
- *Highmark* (S.Ct. 2014)
  - § 285 decisions reviewed for abuse of discretion

What Happed After *Octane Fitness*?

- At district court level, attorneys' fee motions increasingly granted:



Source: Kappos, The State of the Patent System, IPLaw360 (Nov. 27, 2017)

What Happed After *Octane Fitness*?

- Anecdotally, Fed. Cir. affirms many of these decisions (Rule 36 or non-precedential opinions)
  - deferential abuse of discretion standard
- Dispositions of Fed. Cir. precedential decisions:

No fees	Fees Awarded	Remanded
SFA (2015)	Lumen (2016)	Oplus (2015)
Mankes (2016)	Bayer (2017)	Gaymar (2015)
Univ. Utah (2017)	Nova (2017)	
Checkpoint (2017)	Rothschild (2017)	
	Adjustacam (2017)	
	Inventor Holdings (2017)	

SFA Sys. v. Newegg (Fed. Cir. 2015)

- Plaintiff NPE dismissed case 1-day after prevailing on claim construction and defeating SJ of indefiniteness; other cases previously filed by same plaintiff
- *Held: affirmed D.Ct. determination that case was not "exceptional" and no fees warranted*
  - No showing case lacked merit
  - No obligation to reevaluate D.Ct. rulings to determine if fees warranted
  - No showing case this was litigated in unreasonable manner for nuisance settlement, but prior litigation should be considered if abusive in awarding fees

Mankes v. Vivid Seats Ltd. (Fed. Cir. 2016)

- Patent case based on divided infringement dismissed under pre-*Akami IV* precedent; D.Ct. denied fee request
  - On appeal, Fed. Cir. vacated dismissal of case for reconsideration under *Akami IV*
- *Held: affirmed D.Ct. determination of no fees*
  - Due to remand, atty fees for Defendants would be inappropriate because they were no longer prevailing parties
  - Even under pre-*Akami IV* legal standard, Plaintiff pressed plausible arguments for a change in the governing law that were under active judicial reconsideration by Fed. Cir. and S.Ct.
  - Arguments made in good faith and "appropriately reflected the shifting legal landscape"
  - No abuse of discretion

U. Utah v. Max-Planck (Fed. Cir. 2017)

- U. Utah lost protracted inventorship dispute; D.Ct. denied Max-Planck's motion for $8 million in attorneys' fees
- *Held: affirmed D.Ct. determination of no fees*
  - D.Ct. did not abuse discretion in "thorough" opinion that explained case did not stand out because inventorship claim was legally and factually well-grounded, even if unsuccessful
  - "*Octane Fitness* does not require anything more" than this

Checkpoint v. All-Tag (Fed. Cir. 2017)

- Allegation that Checkpoint never reviewed actual accused products made in Belgium pre-suit, but similar products made in Switzerland
  - *Second appeal*: original fee appeal remanded due to *Octane Fitness*, but D.Ct. again awarded fees for same reasons.
- *Held: Award of attorneys' fees* ***reversed***
  - D.Ct. ignored remand instruction that tests on actual accused products are not always necessary to show infringement, and undisputed Belgium and Swiss accused products very similar
  - Objectively reasonable litigation position and no evidence of improper motive in bringing suit
  - Reiterated that fee awards are not a penalty for losing a patent case

Oplus v. Vizio (Fed. Cir. 2015)

- D.Ct. court found case exceptional, ***but declined to award fees.*** Findings that plaintiff:
  - Manufactured venue; abused discovery process; counsel misused defendant's confidential information from a prior case; disavowed statements of its own expert
  - Explanation for denying fees was that both parties had engaged in unspecified delay and avoidance tactics
  - On appeal, Plaintiff did not dispute findings, agreed misconduct was "severe"
- *Held: vacated and remanded, district court must articulate the reasons for its fee decision*
  - Fed. Cir. found that tactics described by district court must have increased "expense and frustration" for all

Gaymar Indus. v. Cincinnati (Fed. Cir.2015)

- D.Ct. declined to award fees after plaintiff abandoned its patent during litigation
  - *Held*: *fee denial affirmed*
  - Fed. Cir.: D.Ct. did not abuse its discretion in finding; D.Ct. may correctly consider objective baselessness (from *Brooks Furniture*) under *Octane*'s totality of circumstances test
- D.Ct. also found that *defendant* committed litigation misconduct
  - *Held: vacated and remanded for further consideration*
    - Alleged misconduct were isolated overstatements, not misrepresentations or litigation misconduct
    - D.Ct. should be careful not to equate bad lawyering with misconduct

Lumen v. FindTheBest.com (Fed. Cir. 2016)

- D.Ct. awarded fees after patent invalid under § 101, finding suit "exceptional" because claims were frivolous and plaintiff sought nuisance settlement
- *Held*: *fee award affirmed; remanded to calculate amount*
  - Even if the conduct was not quite sanctionable, D.Ct. reasonably found exceptional case
  - Baseless infringement allegations not even supported by P's claim constructions
  - Deterrence can only be considered to determine *whether* to award fees. Unlike sanctions, D.Ct. cannot consider deterrence determining the *amount* of fee award.

Bayer v. Dow AgroSciences (Fed. Cir. 2017)

- Fees awarded after protracted contract and patent dispute finding that arguments were “implausible” and contradicted by plaintiff’s own documents and witnesses
- *Held: fee award affirmed*
  - Noted abuse of discretion “is a highly deferential standard of review”
  - Cannot say that the district court abused its discretion
  - Applied the correct legal standard and examined the totality of circumstances
  - “Thorough” opinion

Nova v. Dow Chemicals (Fed. Cir. 2017)

- Plaintiff filed equity action to set aside prior adverse $61 million judgment, alleging fraud occurred in obtaining judgment. (Time-barred from bringing Rule 60 motion.) Action dismissed & fees awarded.
  - Fee award based on weakness of Plaintiff's litigation position, finding claims "didn't stand up" and were "not even plausible"
- *Held: fee award affirmed*
  - D.Ct.'s reliance on filing equity action was ***error***, because simply filing an action to set aside a prior judgment, without more, does not make a case exceptional
  - ***But****:* no abuse of discretion holding litigating position was baseless; alleged conflicting testimony was immaterial and not necessarily in conflict

Rothschild v. Guardian (Fed. Cir. 2017)

- Plaintiff withdrew case due to impending motions to dismiss and for Rule 11 sanctions. D.Ct. declined to award fees because Plaintiff properly dropped case
- *Held: reversed and remanded*
  - abuse of discretion for D.Ct. to ignore allegations that Plaintiff willfully ignored prior art and engaged in vexatious litigation in 50 other lawsuits resulting in low settlements
  - error to conflate § 285 and Rule 11 requirements by stating that awarding attorneys fees would contravene Rule 11. "Whether a party avoids or engages in Rule 11 conduct is not the appropriate benchmark" for determining an exceptional case

Adjustacam v. Newegg (Fed. Cir. 2017)

- Patent case against Plaintiff and many other defendants who settled early for low amounts; D.Ct. declined to award fees after Plaintiff dismissed
- *Held: reversed and remanded to calculate fees*
- Abuse of discretion when court relies on erroneous legal conclusions or assessments of evidence:
  - Failure to follow prior mandate when case remanded after *Octane Fitness:* second judge "wholesale" adopted first judge's original factual findings, no new analysis
  - Plaintiff's arguments were objectively baseless, as shown by its own evidence
  - Noted irregular settlements with other defendants

Inventor Holdings v. BBB (Fed. Cir. 2017)

- D.Ct. dismissed case under § 101 and Fed. Cir. affirmed; D.Ct. then awarded fees from date of *Alice* through appeal
- *Held: fee award affirmed*
  - No abuse of discretion because patent claims were dubious before *Alice*
  - *Alice* was "a significant change in the law" and plaintiff had an obligation to reassess the merits of its case after *Alice*
  - No error in awarding attorneys fees through Fed. Cir. appeal b/c of prior holding that § 285 allows D.Ct. to award fees for the entire case and any appeals (*Therasense*, Fed. Cir. 2014)
  - D.Ct. in best position to assess case and award fees