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Half a year since Octane

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It's been nearly half a year since the Supreme Court, in *Octane Fitness*, ostensibly lowered the standard for finding a patent case to be exceptional for purposes of fee-shifting. At the time, *Octane* generated much commentary and speculation, with some predicting a flood of fee awards and others predicting even more confusion at the district court level.

At this half-year mark, we took the opportunity to do a quick survey. As of October 28, 2014, we found approximately 75 district court decisions involving motions for fee awards. Our survey was not meant to be statistically rigorous and we did not review in detail all 75 decisions. Here are a few interesting observations from what we did find.

Only about 18% of the motions were granted during this post-*Octane* period.

- 50 denying
- 13 granting (6 by defendants; 8 by plaintiffs)
- 10 granting in part (4 by defendants; 6 by plaintiffs)
- 2 still pending additional briefing

We don't have pre-*Octane* statistics and therefore can't comment on whether or not this grant rate represents a significant change. But 18% does not seem to indicate an overwhelming trend to awarding fees. Interestingly, where the motion was granted or granted in part, the patent plaintiffs were the slight majority of successful movants. So, these numbers also do not seem to indicate an overwhelming shift within the grant rate towards defendants.

Of the 13 decisions awarding fees, only 3 came on some type of post-*Octane* remand or reconsideration. In *Kilopass Tech., Inc. v. Sidense Corp.*, the district court awarded fees to the defendant after having previously denied the parties' cross motions for fees. In *Integrated Technology Corp. v. Rudolph Technologies, Inc., et al*, after its previous finding of willfulness was vacated on appeal, the district court still found grounds to award fees on remand under *Octane* to plaintiff. In *Medtrica Solutions Ltd. v Cygnus Medical LLC*, the district court awarded fees to plaintiff upon reconsideration after previously denying the motion. However, 2 cases are pending additional briefing.

So, *Octane* did not unleash a flood of motions for reconsideration. While this is not a rigorous observation, the numbers tends to indicate that the “change” in the standard was not seen to affect pending fee motions. But, interestingly, where the change in standard was raised to the court, the result was a favorable ruling to plaintiff in 2 out of 3 cases.

A few “caveat” observations:

First, some thought that *Octane* would have a significant negative effect on Non-Practicing Entities (NPEs), since the lower standard would incentivize defendants to defend cases more aggressively than settle early on. It’s possible that some NPEs may have shelved “dubious” cases that they might otherwise have filed. We have seen some statistics indicating a drop in the overall number of patent cases being filed this year. But the numbers do not overtly indicate a particular statistical disadvantage to patent plaintiffs, such as NPEs. In fact, not surprisingly, the superficial indications are that the lowered standard can affect both sides of litigation. As much as Octane would make it easier for successful defendants, it also lowered the standard for successful plaintiffs, including NPEs, to get their fees awarded.

Second, we did not survey for overall distribution of motions by plaintiffs versus defendants. For a prevailing patent plaintiff, the effect of *Octane* is potentially more subtle since such plaintiffs are also typically seeking enhanced damages for willful infringement. It would be interesting to see if *Octane* can lead to situations in which damages are not enhanced for plaintiffs, but attorneys' fees are awarded.

Third, our survey did not distinguish decisions where the case was deemed exceptional, but no or minimal award was made. The district courts have significant discretion on fee motions. Even if *Octane* relaxes the standard for being exceptional, this alone does not mean that courts will make significant fee awards. In fact, some courts have still commented that fee awards should be “rare.” Even if the lowered standard forces more findings of “exceptional” cases, district courts can manage the results based on their discretion by regulating the size of fee awards.

Fourth, we also looked briefly at Rule 11 motions during this same period to see if there was any obvious halo effect. We found 29 decisions. Only two cases appear to have granted sanctions outright, though 2 other cases are pending additional briefing. However, we did not have an opportunity to review each of the decisions in detail. By these numbers, we did not see any halo effects on the grant rate of Rule 11 motions. But it’s possible that the filing rate of Rule 11 motions might have increased post-*Octane*.

As the opportunity arises, we will take a closer look at this developing area and update this blog with further observations and comments.
