Legal Backgrounder

Vol. 31 No. 12 April 29, 2016

Washington Legal Foundation
Advocate for Freedom and Justice®
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Octane Fitness, Two Years On: How It Has Impacted District Courts' Award of Attorneys' Fees in Patent Cases

by Nirav Desai and Lauren Johnson

April 29, 2016 marks the two-year anniversary of the US Supreme Court's ruling in *Octane Fitness, LLC v. Icon Health and Fitness*.[1] *Octane* significantly altered the legal standard federal judges should follow when considering the award of attorneys' fees in patent infringement cases under 35 U.S.C. § 285. Under the statute, courts may award reasonable attorneys' fees in "exceptional cases." The required showing to prove a case is "exceptional" has always been a matter of judicial interpretation and has varied significantly. The Court's 2014 decision lowered the burden of proof and eliminated any requisite factors to prove a case is exceptional, leaving the details of the analysis to the court's discretion based on the totality of the circumstances.

The Court's *Octane* decision was hailed by many as providing an improved weapon against frivolous claims and defenses, particularly those brought by non-practicing entities. Indeed, in a later decision unrelated to § 285, the Court itself noted that § 285 and the *Octane* decision were safeguards available to district courts and encouraged their use to dissuade frivolous cases.[2]

Since *Octane*, the number of motions for attorneys' fees under § 285 has increased by 56% in federal district courts. The percentage of § 285 motions granted also increased, particularly between the year immediately preceding and the year immediately following the *Octane* decision. Additionally, courts with the most patent-heavy dockets have seen an increase in the percentage of attorneys' fees granted under § 285.

This Legal Backgrounder examines the effect of the Court's ruling in *Octane* as measured by § 285 motions filed and granted in the past two years. It first explains the prior standard of review as created and applied by the US Court of Appeals for the Federal Circuit and details the Supreme Court's reasoning in *Octane*. It then provides an empirical analysis of district courts' application of *Octane*, with a specific focus on popular patent-litigation jurisdictions.

Legal Standard: From *Brooks Furniture* to *Octane*

The *Octane* ruling altered the standard the US Court of Appeals for the Federal Circuit set in *Brooks Furniture Mfg., Inc. v. Dutailier Int'l, Inc*.[3] Under *Brooks Furniture*, to prove a case was exceptional, a party had to show by clear and convincing evidence that material inappropriate conduct occurred in the litigation or in securing of the patent. Absent misconduct, the moving party had to show by clear and convincing evidence that the litigation was both objectively baseless and had been brought in subjective bad faith.[4] In a subsequent opinion,

[1] 134 S. Ct. 1749 (2014).
[2] *Commil USA LLC v. Cisco Systems Inc.*, 135 S. Ct. 1920, 1931 (2015).
[3] 393 F.3d 1378 (Fed. Cir. 2005).
[4] *Id.* at 1381.

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the court clarified that litigation should be considered objectively baseless only when it was "so unreasonable that no reasonable litigant could believe it would succeed." *iLOR, LLC v. Google, Inc*.[5] The court also held that to establish subjective bad faith, moving parties must show that the "lack of objective foundation for the claim 'was either known or so obvious that it should have been known' by the party asserting the claim."[6]

The Supreme Court did away with these specific factors in *Octane* and lowered the burden of proof. It found that the *Brooks Furniture* analysis was overly rigid and "superimpose[d] an inflexible framework onto statutory text that is inherently flexible."[7] By limiting exceptional cases to only those involving litigation misconduct, the Federal Circuit courts had erroneously made sanctionable conduct the legal standard. Moreover, a standard that requires a showing of subjective bad faith and objectively baseless claims ignored cases that were exceptional but technically only satisfied one factor.[8] Overall, the Court found that the Federal Circuit's standard was so demanding that it rendered § 285 largely superfluous.[9]

The Court rejected the rigidity of *Brooks Furniture*, holding that "an 'exceptional case' is simply one that stands out from others with respect to the substantive strength of a 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."[10] As such, the Court held that "[d]istrict courts may determine whether a case is 'exceptional' in the case-by-case exercise of their discretion, considering the totality of the circumstances."[11] Moreover, it held that the entitlement to fees should be established by a preponderance of the evidence, as it had "not interpreted comparable fee-shifting statutes to require proof of entitlement to fees by clear and convincing evidence," and "nothing in § 285 justifies such a high standard of proof."[12]

The Federal Circuit has viewed the *Octane* ruling as a substantial change in the analysis.[13] While the court occasionally returns to pre-*Octane* caselaw for guidance concerning misconduct cases,[14] it has recognized that moving parties no longer must provide evidence of specific factors that existed under the *Brooks Furniture* standard.[15] Rather, courts should generally look to the substantive strength of a party's litigation position and whether the party litigated the case in an unreasonable manner.[16]

The Effect of *Octane*

To examine the effect of the *Octane* decision, it is illustrative to compare the number of § 285 motions filed in the two years preceding *Octane* to the number of motions filed in the subsequent two years.[17] Figure 1 represents data from all district courts.

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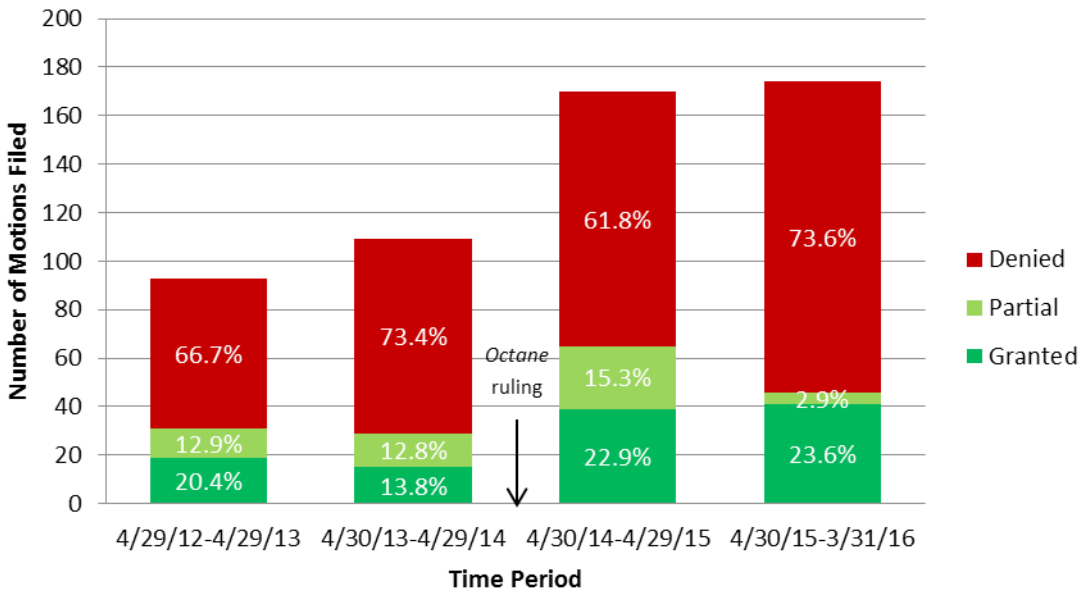
[5] 631 F.3d 1372, 1378 (2011).
[6] *Highmark, Inc. v. Allcare Health Mgmt. Sys., Inc*., 687 F.3d 1300, 1309 (Fed. Cir. 2012) (*quoting In re Seagate Tech*., LLC, 497 F.3d 1360, 1371 (Fed.Cir.2007)) *vacated and remanded sub nom. Highmark Inc. v. Allcare Health Mgmt. Sys., Inc*., 134 S. Ct. 1744 (2014).
[7] *Octane*, 134 S. Ct. at 1756.
[8] *Id*. at 1757.
[9] *Id*. at 1758.
[10] *Id*. at 1756.
[11] *Ibid*.
[12] *Id*. at 1758.
[13] *See AdjustaCam, LLC v. Newegg, Inc*., 626 F. App'x 987, 990 (Fed. Cir. 2015).
[14] *See SFA Sys., LLC v. Newegg Inc*., 793 F.3d 1344, 1349 (Fed. Cir. 2015) (holding that "although the Supreme Court rejected our *Brooks Furniture* test in *Octane Fitness,* it gave no indication that we should rethink our litigation misconduct line of § 285 cases.").
[15] *AdjustaCam, LLC*, 626 F. App'x at 991.
[16] *SFA Systems, LLC*, 793 F.3d at 1347-52.
[17] All data collected for this analysis comes from Docket Navigator Analytics, which sorts the results of § 285 motions into categories of granted, denied, partial (denied-in-part, granted-in-part), and other. The "other" category included rulings which were either not relevant or duplicative of rulings appearing in the other categories, and were, therefore, excluded from the data set. The data reflects statistics through March 31, 2016 available on Docket Navigator as of April 8, 2016.

Figure 1: Data for All District Courts



In the year immediately preceding the *Octane* decision, 109 motions under § 285 were filed across all districts. This number rose to 170 in the year directly following the ruling—a 56% increase. Two years prior to the decision, the total number had only been 93. The most recent year has seen just as many motions filed and may still see more as further data emerges in 2016.

The number of § 285 motions granted has increased significantly since *Octane*. In the year immediately preceding the *Octane* decision, 15 motions were granted in their entirety across all districts. This number rose to 39 in the year directly following the ruling—a 160% increase. Similarly, comparing the two years prior to *Octane* to the two years afterward, the average number of motions granted increased from 17 to 40—a 135% increase. By any of these measures, the number of motions granted has well more than doubled in the wake of *Octane*.

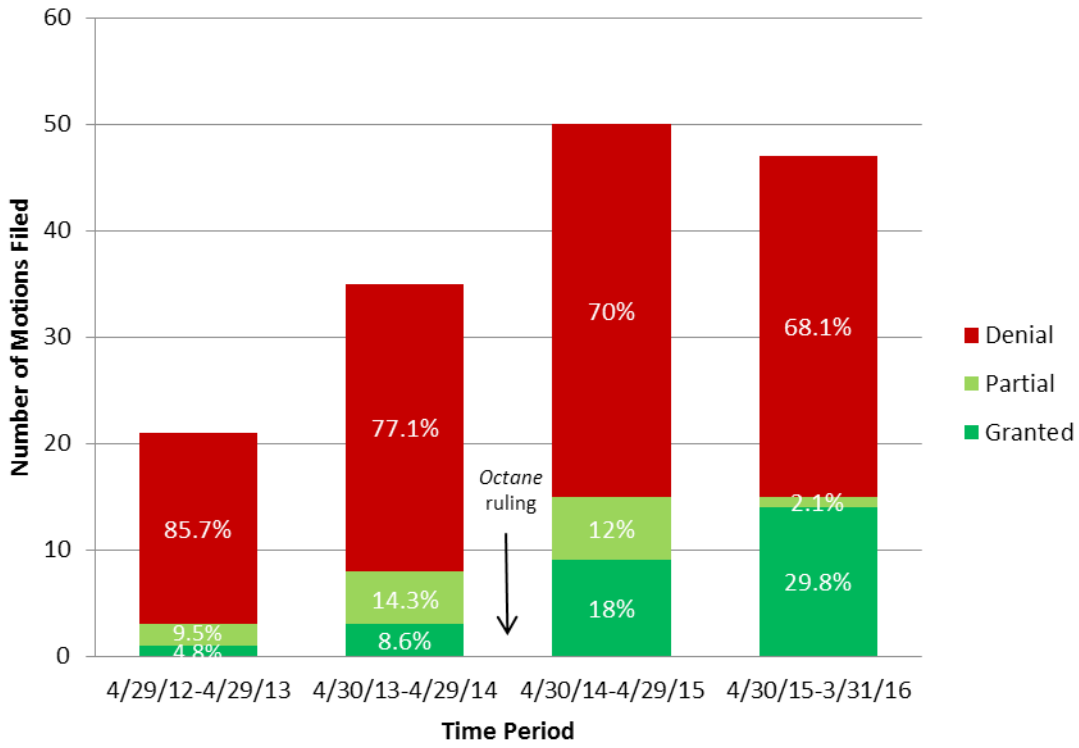
While not as dramatic as the rise in the *number* of motions granted, the *percentage* of § 285 motions granted has also experienced an uptick since *Octane*. Between the years immediately before and after *Octane*, the percentage of motions granted in full increased just over nine percentage points from 13.8% in the year prior to 22.9% in the year following. Similarly, comparing the two years prior to *Octane* to the two years afterward, the average percentage of motions granted increased from 17.1% to 23.25%—an increase of 6.15 percentage points. And the percentage of motions granted has remained about the same in the first and second years following the *Octane* decision.

It is also instructive to examine the effect in popular patent-litigation districts, namely the District of Delaware, the Central District of California, and the Eastern District of Texas.[18] Figure 2 represents data from these courts.

[18] These courts were selected in light of a recent report by *Lex Machina* with statistics regarding the number of patent cases filed in 2015 in district courts. *See* Brian Howard, *Lex Machina 2015 End-of-Year Trends*, (Jan. 7, 2016), available at https://lexmachina.com/lex-machina-2015-end-of-year-trends/.

ISBN 1056 3059

Figure 2: Data for Three Popular Patent-Litigation Districts



The first post-*Octane* year reflects a significant increase in the total number of motions filed in those three courts, from 21 filed two years prior to *Octane* and 35 filed one year prior, to 50 in the year after the Court's ruling. A noteworthy increase from 8.6% to 18% occurred in the percentage of motions granted. Parties have filed 47 motions for fees so far in the second year after *Octane*, and the percentage granted increased to 29.8%.

Of the three courts, the Eastern District of Texas has the most notorious reputation as a "magnet jurisdiction" for patent litigation, especially for non-practicing entities. An assessment of the data on attorneys' fee motions filed and granted for that district alone is inconclusive on the two-year impact of *Octane*. In the first year after *Octane*, an increase in the number of motions filed did occur (increasing from nine to 13), but none of these motions were granted. In the second year, however, three motions have already been granted out of ten filed.

Conclusion

Octane took to heart Congress's intention that the imprecise term "exceptional cases" be interpreted and applied through the eyes of the proverbial "beholder," *i.e.*, federal judges. The justices also understood that the term should be interpreted in the context of the purpose of § 285, which was to deter baseless patent-infringement claims or defenses through the award of attorneys' fees. The Court decided that when the Federal Circuit created a relatively narrow test for awarding fees, it failed to appreciate that congressional intent.

As discussed above and demonstrated by the data presented, the Federal Circuit and federal district courts have heeded the Court's message. The data that emerges from the remainder of 2016 will help indicate whether that trend in the district courts continues. The Eastern District of Texas's approach to § 285 motions throughout 2016 will be an especially important indicator of *Octane*'s deterrent effect on frivolous patent claims and defenses. Although, as noted above, the current § 285 motion data for that court is inconclusive, data on the filing of patent suits in the Eastern District of Texas reflects a reduction in total patent-complaint filings.[19] Perhaps some portion of this decrease can be attributed to parties' wariness of the new lower bar for attorneys' fees.

[19] According to data from Docket Navigator, 291 patent cases were filed in the first quarter of 2016, as compared to 549 cases in the first quarter of 2015.

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