April 29, 2014 - U.S. Supreme Court Lowers the Bar to Recover Attorneys' Fees

In two cases heard together, the United States Supreme Court lowered the bar for an award of attorneys' fees in patent cases under 35 U.S.C. §285, holding that "an 'exceptional' case is simply one that stands out from others…." instead of where "both (1) the litigation is brought in subjective bad faith, and (2) the litigation is objectively baseless." The Court also held that determining a case to be 'exceptional' is at the discretion of the district courts "considering the totality of the circumstances," and that the Federal Circuit must review those determinations for an "abuse of discretion," not "de novo" as done previously.

In *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, no. 12-1184, the Court overturned the Federal Circuit, which had affirmed the district court's rulings on infringement and fee shifting under §285. The district court and the Federal Circuit had decided the fee-shifting issue under the standard set in *Brooks Furniture Mfg., Inc. v. Dutailier Int'l, Inc.*, 393 F.3d 1378 (Fed. Cir. 2005), which set a high bar for recovery of attorney fees requiring that "both (1) the litigation is brought in subjective bad faith, and (2) the litigation is objectively baseless." *Brooks*, at 1381. A litigation was considered "objectively baseless" only if it was "so unreasonable that no reasonable litigant could believe it would succeed." *iLOR, LLC v. Google, Inc.*, 631 F.3d 1372, 1378 (Fed. Cir. 2011).

In deciding to ease the requirements for showing an exceptional case, the Court stated that the "framework established by the Federal Circuit in *Brooks Furniture* is unduly rigid, and it impermissibly encumbers the statutory grant of discretion to district courts." Analyzing the language of the statute, the Court reasoned that an award of attorneys' fees in patent litigation is reserved for "exceptional" cases "in accordance with its ordinary meaning," since the Patent Act does not define "exceptional." The Court thus held that "an 'exceptional' case is simply one that stands out from others with respect to the substantive strength of a party's litigation position (considering both the governing law and the facts of the case) or the unreasonable manner in which the case was litigated." The Court noted that misconduct that rose to the "exceptional" level under *Brooks* was independently sanctionable, and thus §285 was superfluous, and that the two-prong test was too restrictive, in that meeting either prong should suffice.

In addition, the Court rejected the "clear and convincing" standard of review used by the Federal Circuit, stating that "nothing in §285 justifies such a high standard of proof" and indicating that the standard should be a "preponderance of the evidence," which is what has always governed patent infringement litigation.

The Court also decided *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, no. 12-1163. The Court applied its decision in *Octane* to *Highmark*, but focused more on the standard of review - that "the exceptional case determination is to be reviewed only for a abuse of discretion," since it is a matter of discretion, not the "de novo" standard previously used by the Federal Circuit. The Court noted that the determination is for the district court because "the text of the statute 'emphasizes the fact' [and] because the district court 'is better positioned' to decide whether a case is exceptional."

Several patent reform bills presently pending in Congress include provisions intended to make it easier for prevailing defendants in patent cases to recover their fees. The Supreme Court's decisions in *Octane Fitness* and *Highmark* indicate the Court's willingness to consider and resolve this issue favorably for patent defendants.