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Lawyers Weigh In On High Court's Patent Rulings

By **Julia Revzin**

Law360, New York (April 29, 2014, 9:16 PM ET) -- The Supreme Court on Tuesday ruled in a pair of cases that the Federal Circuit's standards for awarding attorneys' fees to prevailing parties in "unreasonable" patent infringement cases must be eased. Attorneys tell Law360 why the high court's decisions matter.

William J. Cass, Cantor Colburn LLP

“Previously an ‘exceptional case,’ warranting attorneys’ fees, was confined to extreme situations involving clear and convincing evidence of either some material inappropriate conduct, or both subjective bad faith and objectively baseless litigation. Under Octane Fitness’ new flexible definition, the court, in its discretion, must apply a totality of the circumstances analysis to determine whether the case stands apart with respect to either the strength of the litigation position or the unreasonable manner in which the case was litigated. Furthermore, Highmark requires appellate review of an award of attorneys’ fees under an ‘abuse of discretion’ standard, resulting in a powerful remedy which is more difficult to challenge.”

Orion Armon, Cooley LLP

“‘Exceptional case’ under Section 285 has long been pled in nearly every complaint and answer. Now, many more parties will actually litigate the issue. But even under a lower legal standard and lower burden of proof, fee awards are only available when there’s a final judgment. The vast majority of cases settle, so most litigants won’t get an opportunity to raise the issue. Even when a final judgment is entered, litigation outcomes are often mixed, so a key question litigated in fee motions will be determining who is the prevailing party. One area that likely will be a subject of fee motions is the intersection of district court litigation and Patent Office post-grant proceedings. There are no precedents on whether it is reasonable for a patent owner to oppose a motion to stay litigation if all asserted claims are instituted in an inter partes review (or covered business method review) proceeding. In light of the Federal Circuit’s holding in Fresenius USA Inc. v. Baxter International Inc. that invalidation of patent claims in a Patent Office proceeding trumps a non-final district court judgment, and in light of the high invalidation rate for claims subject to inter partes review, there is little doubt that petitioners who win in the Patent Office will argue that the patent owner should reimburse litigation fees and costs.”

Michael Bunis, Choate Hall & Stewart LLP
"In the [Highmark Inc. v. Allcare Health Management Systems Inc. and Octane Fitness LLC v. Icon Health & Fitness Inc.] decisions, the Supreme Court is sending a clear message to Congress that the courts can handle what many consider excessive patent litigation by [nonpracticing entities]. Moreover, by rejecting the narrow Federal Circuit standard of Brooks Furniture and giving district courts more power to determine whether a case is exceptional, the Supreme Court is sending a warning to NPEs to watch out because judges now will have broad discretion to award fees to the prevailing party. Under this new standard, any company — NPE or otherwise — that brings baseless patent litigation risks the award of attorneys' fees, which is likely to hold up to appellate review."

Robert R. Brunelli, Sheridan Ross PC
"The Supreme Court today shifted power away from the Federal Circuit and back to the district courts, holding that an application for fees in a patent case be assessed by the district court under a preponderance of the evidence to determine whether the case stands out from others, such that an award of fees is appropriate, with that decision being reviewable only for an abuse of discretion. A likely result of these holdings is that patentees will further consolidate their infringement action filings into only the most patent savvy of district courts."

Stacey L. Cohen, Skadden Arps Slate Meagher & Flom LLP
"The Supreme Court's decisions today in Octane and Highmark have pared down the requirements for demonstrating that a case is 'exceptional,' giving district courts significantly more discretion to identify which cases 'stand out' as to the relative strength of a party's litigation position or to unreasonable conduct during the litigation, while also limiting review of such determinations to the 'abuse of discretion' standard. The Supreme Court's decisions today also confirmed the need for a fee-shifting provision in patent litigation separate and apart from the existing exceptions to the general rule against fee-shifting."

Michael J. Colitz III, GrayRobinson PA
"Today's Supreme Court decisions are significant for three reasons. First, the decisions make it easier for a prevailing party to obtain an attorneys' fee award. The second significance is the continuing trend of the Supreme Court to strike down Federal Circuit decisions as being too rigid or inflexible. The underlying Federal Circuit decisions had placed a number of hurdles before prevailing parties seeking to recover attorneys' fees. The Supreme Court dispensed with those hurdles and instead simply looked at the plain language of the statute. Finally, the decisions empower district court judges by basing the awards on discretion."

Monte Cooper, Orrick Herrington & Sutcliffe LLP
"The brevity of both unanimous decisions is as notable as their content. The Supreme Court speaks succinctly with one voice, articulated through Justice [Sonia] Sotomayor, that the Federal Circuit needs to accord significantly greater deference to district courts' evaluation of the merits of patent litigation. Not only is the criteria for awarding fees for exceptional cases under Section 285 significantly liberalized, but the Supreme Court, critically, also makes clear that a district court's exception case decisions need not be balanced through the lens of clear and convincing proof. And then the high court further instructs that all aspects of an exceptional case fee award are to be evaluated by the Federal Circuit solely for an abuse of discretion. The combination of the brief and unanimous opinions suggests a confidence that district courts are in the best position to recognize when questionable patent litigation crosses the line so as to warrant exceptional case status, and an award of (what is likely) significant litigation fees."

Sona De, Ropes & Gray LLP
"The Supreme Court decisions in Octane Fitness and Highmark may not necessarily open the floodgates to attorneys' fees. These rulings caution litigants to exercise more diligence in raising claims in the first place and reevaluate the merits of those claims as the case progresses to avoid grounds for such a finding. However, litigants who fail to do so will be more likely to face an exceptional case ruling. The Supreme Court has certainly given the district courts more flexibility to direct the latter to pay the prevailing party's fees contrary to convention."

R. David Donoghue, Holland & Knight LLP
"The most significant result of the Octane Fitness and Highmark decisions will likely be their impact upon Congress' current patent reform efforts. The decisions themselves make clear that district courts can do what they were already doing in large part under the prior Federal Circuit standard — awarding fees when cases truly were 'exceptional.' The current patent reform goes further than that. As patent reform advances in the Senate, it will be interesting to see whether these decisions reduce the focus upon fee-shifting, or continue toward a lower threshold for awarding fees, mooting any impact of Octane Fitness and Highmark."

Scott Doyle, Shearman & Sterling LLP
"In today's rulings, the Supreme Court may have dramatically changed the risk and return equation for patent trolls. The extent to which economic costs are actually shifted from the defendants to trolls, however, depends on whether district court judges will now more freely impose sanctions for meritless suits. By rejecting the old rule that sanctions are appropriate only in the extreme case which is "objectively baseless" and "brought in subjective bad faith," the Supreme Court empowered district court judges to knock out the financial pillars of troll litigation: low litigation costs with little risk of loss. Today's decisions provide the sledgehammer; we'll see if it gets lifted."

Jeffrey M. Drake, Miller Canfield Paddock & Stone PLC
"Between the newer post issuance validity proceedings at the Patent Office and the rulings in the Highmark/Octane cases, the balance of power has shifted from non-practicing entities toward those defending meritless patent suits."

Raymond R. Ferrera, Adams and Reese LLP
"Today's ruling is a welcome development for corporate defendants in patent infringement actions. These cases relax the circumstances under which the exceptional case standard can be applied to meritless plaintiffs so that attorneys' fees are more easily recovered. Today's cases loosen the standard for a defendant requesting attorneys' fees from proof by clear and convincing evidence that a plaintiff's claims were objectively baseless and brought in subjective bad faith to a finding of unreasonableness within the discretion of the trial court. The legal standard on appeal is therefore changed to consideration of whether the trial court abused its discretion."

Anthony J. Fitzpatrick, Duane Morris LLP
"It will be very interesting to see what impact these decisions may have on the proposed patent legislation that has been the subject of great debate on Capitol Hill and elsewhere. The retired Chief Judge of the Federal Circuit, Paul Michel, has consistently argued that the courts, not Congress, should manage patent infringement litigation, and these decisions may be an example of the courts doing precisely that."

Shawn Hansen, Nixon Peabody LLP
"In Octane and Highmark, the Supreme Court breathed new life into the question of fee shifting in patent cases, which had become superfluous due to the rigidity of the now-rejected Brooks Furniture rule. Under Brooks Furniture, fee shifting had become virtually nonexistent absent serious litigation misconduct. Not only did the Supreme Court restore discretion to the district courts and reduce the standard applicable there from clear and convincing evidence to preponderance of the evidence, it also protected district court determinations on appeal by raising the appellate standard to abuse of discretion. This is a transformation of fee shifting in patent cases. Taken together, the Supreme Court's rulings should increase the number of fee awards in patent cases as well as the probability that fee awards will be upheld on appeal. Patent plaintiffs who formerly had no reason to fear exposure to fee shifting under the Brooks Furniture rule absent litigation misconduct, now have real and immediate exposure for weak litigation positions. In contrast, patent defendants should be concerned about fee shifting exposure only in cases of litigation misconduct or willful infringement, and the latter is unlikely. Today's rulings have much more pronounced impact on patent plaintiffs. That said, while popular sentiment supports heavy disincentives for patent trolling behavior, which may be among the drivers of the Octane and Highmark decisions, the quintessential patent troll model of containing liability in shell companies provides substantial shelter from the risks of fee shifting exposure, making fee shifting a less than powerful tool against patent trolls."

Stephen M. Hash, Vinson & Elkins LLP
"The Supreme Court seems to be seeking a middle ground between the existing exceptional case standard and various bills currently pending before Congress to loosen that standard. Perhaps wary of the proposed 'loser pays' language in pending bills, this holding strikes a compromise by giving district courts greater flexibility to award attorneys' fees in exceptional cases, allowing them to weigh the totality of the circumstances on a case-by-case basis. While the new framework will provide less certainty to litigants, it may very well sidestep a legislatively dictated move to a straight 'loser pays' rule."

Julianne Hartzell, Marshall Gerstein & Borun LLP
"It is not surprising, in light of prior precedent seeking to bring patent law into accord with other areas of law, that the Supreme Court gave 'exceptional' its plain and ordinary meaning. However, this additional flexibility will give district courts the discretion to consider the individual behavior of the parties and should remove the need for further legislative reform of fee shifting in patent cases. The same definition of 'exceptional case' may also ultimately be applied to the grant of fees under the Lanham Act, although the tests applied by several circuits currently require a finding of willfulness or bad faith."

Holmes J. Hawkins III, King & Spalding LLP
"Technology companies are all too often faced with frivolous or marginal infringement claims by patent assertion entities who use the high cost of litigation to extract cheap settlements. Today's Supreme Court decisions are significant because they will help level the playing field by making it easier for these companies to recover their litigation costs in these types of cases. In addition, the fact that both decisions were unanimous sends a strong message to would-be plaintiffs to think twice before pursuing weak infringement claims."

Barry Herman, Womble Carlyle Sandridge & Rice PLLC
"The [John] Roberts Supreme Court has been telling the Federal Circuit for years to get in line with other courts of appeal, but the decision today in Octane may be the most hostile one yet. The Federal Circuit judges might not mind being told that the framework they have applied since 2005 is 'unduly rigid,' but I

doubt they appreciate the Court's admonishment that the analysis 'begins and ends with the text' of the statute that is 'patently clear.'"

Allyson Ho, Morgan Lewis & Bockius LLP
"Although the Patent Act allows for the shifting of attorneys' fees in 'exceptional cases,' the Federal Circuit has traditionally limited that to instances where there was 'material inappropriate conduct' or an 'objectively baseless' claim that was 'brought in subjective bad faith.' The Supreme Court rejected that formulation because it does not align with the plain meaning of the term 'exceptional' and because both avenues for attorneys' fees are too restrictive. Sanctionable conduct is a separate category that does not necessarily overlap with the statute, and there is a common-law exception to the 'American rule' when there is willful disobedience or actions taken in bad faith. The Court further increased the availability of attorneys' fees by rejecting the Federal Circuit's requirement that attorneys' fees be proved by clear and convincing evidence, ruling instead that the normal preponderance-of-the-evidence standard should apply. In line with Octane Fitness, the Supreme Court also held that a district court's award of attorneys' fees under Section 285 should be reviewed only for abuse of discretion, and not de novo. The take-away from the pair of decisions is that the Supreme Court has afforded district courts wide latitude to deal with inappropriate patent claims and associated litigation. It will be interesting to see how, if at all, the decisions impact ongoing patent-reform efforts in Congress."

Jennifer Hoekel, Armstrong Teasdale LLP
"Theoretically any company that has been sued by a patent troll will have a much better chance at a fee award. Further, the opinion could make it more difficult for a troll to maintain questionable litigation. Historically trolls have faced very little risk in suing companies over marginal patents or infringement claims. This made it easier for them to send cease and desist letters and sue over patents that were not related to the target companies core business. For example, manufacturers often receive cease and desist letters directed to their back office operations (like email, scanning and faxing). Today's decisions should change the risk analysis undertaken by the patent assertion companies. I don't think that these opinions change the landscape significantly for traditional patent lawsuits between competitors seeking to enforce more traditional types of patents. The court is still requiring uncommon or rare behavior to support a fee award."

Jake Holdreith, Robins Kaplan Miller & Ciresi LLP

"The effect of the Octane and Highmark decisions remains to be seen and will depend on how district courts use their

discretion to award fees based on the Supreme Court restoring the 'totality of the circumstances' test that prevailed before 2005. It may not be the case that there are dramatic changes: the Supreme Court noted that fee awards should be 'rare' or 'unusual' under the restored test. It is not clear who the winners and losers will be either. There have been far more fee awards to patentees than to patent defendants in the last 10 years, but the largest dollar awards have been to defendants."

Allen E. Hoover, Fitch Even Tabin & Flannery LLP
"The Supreme Court's decisions today in [Highmark and Octane Fitness] are interesting but will likely be of limited applicability. Most patent cases settle well before the stage where the district court would make an 'exceptional case' determination. Additionally, in Octane Fitness, the Court itself indicated that exceptional cases, by definition, are rare. These decisions are significant, however, in that they demonstrate the Court's increasing willingness to consider patent issues."

Kenneth E. Horton, Kirton McConkie PC

"In Octane Fitness, the Supreme Court threw out the rigid standard used by the Federal Circuit in awarding attorneys' fees. An 'exceptional' case is now simply one that stands out from others with respect to the substantive strength of the party's litigating position (in light of the governing law and the facts) or the unreasonable manner in which the case was litigated. Given that the rigid formula has been overturned, more motions for attorneys' fees awards will be both filed and granted. For those currently — or considering — fighting NPEs, this decision will serve as a valuable tool."

Jonathan S. Kagan, Irell & Manella LLP
"Last year, Chief Judge [Randall] Rader of the Federal Circuit co-wrote an editorial in The New York Times in which he argued that district court judges have the discretion to 'make patent trolls pay.' Some judges questioned his reasoning, suggesting that the 'exceptional' case standard of Section 285 of the Patent Act was too stringent and that district judges who relied on it were likely to be reversed. Today, the Supreme Court came down strongly on the side of Rader. Read together, the Octane Fitness and Highmark cases send a strong signal to district court judges that they can hold weak cases to be 'exceptional,' and their opinions will be given strong deference by reviewing courts."

Hunter Keeton, Wolf Greenfield & Sacks PC
"Today's decisions provide a powerful new tool for defendants to combat meritless patent infringement cases. NPEs occasionally bring suits that have little merit from the outset, or become so after claim construction. Yet the Federal Circuit's rigid interpretation of the 'exceptional case' standard required to receive attorneys' fees made it hard for defendants to hold NPEs to account. The Supreme Court's move to consider the totality of the circumstances makes it easier for defendants to secure such fees, as does the new deference to the district court's decisions on the issue."

Cynthia Kernick, Reed Smith LLP, Member of Highmark legal team
"The Supreme Court's decisions today, in both Highmark and Octane, show an understanding of the respect that rightly should be afforded to district judges in patent cases. These opinions will work together to make patentees, especially Patent Acquisition Entities, stop to think about the true merits of infringement claims before they are asserted. But there is a subtle aspect of the Highmark decision. The Supreme Court recognized that the Federal Circuit, in reversing the district court, wrongly asserted de novo review simply because an element of the objectively baseless prong on exceptional cases involved consideration of whether the patentee's claim construction was reasonable. The Supreme Court rightly noted that even in this circumstance, there were underlying factual issues that required the district court's determination to be reviewed for abuse of discretion. This begs the question of whether the Supreme Court is ready to tackle the standard of review on claim construction itself and set aside de novo review there as well."

Imran Khaliq, Arent Fox LLP

"The Court's decision has significantly revised the standard for fee shifting in patent cases by interpreting 'exceptional' to mean '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.' Also, by jettisoning the 'clear and convincing' standard, district courts now have considerable discretion considering the 'totality of circumstances' in deciding whether to award fees. Clients and practitioners will need to be very mindful of claims they bring and how they litigate cases to avoid the drastic remedy of fee shifting."

Jim Lennon, Young Conaway Stargatt & Taylor LLP
"Awarding fees under [Section] 285 isn't a new tool for judges and I would say while the high court's decision lowers the bar to an exceptional case finding under 285, I wouldn't expect to see much increase in the number

of findings of exceptional case, at least not in districts with considerable experience in patent litigation like Delaware. That said, I expect patent litigants to see this as an encouragement to assert 285 claims more often, as was more common pre-Therasense. The Supreme Court attempts to clarify what 'exceptional case' means under the statute, explaining: '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.' Delaware judges have a wealth of experience and thus perspective concerning patent litigation, which should mean only the truly 'rare' case will stand out and meet this standard."

George C. Lewis, Merchant & Gould PC
"The recent Supreme Court rulings on the award of attorneys' fees in patent litigations in Highmark and Octane represent a continued trend by the U.S. courts, in general, to attempt to reign in the abuses of the legal system by patent trolls. By making the award of attorneys' fees to defendants easier to obtain in questionable cases and limiting the ability to appeal such awards, patent plaintiffs will have much more risk when bringing patent litigations, especially on weak cases. Whether the increased risk will be enough to change the economics of patent trolling is yet to be seen."

Alan Littmann, Goldman Ismail Tomaselli Brennan & Baum LLP
"By rejecting rigid [Federal Circuit] tests, the Court again shows confidence in district courts' ability to handle patent cases as they do the rest of their docket. The Court rejects the 'clear and convincing evidence' standard for exceptional cases, establishes abuse-of-discretion review and draws comparisons to non-patent litigation. In the 2007 Teleflex opinion, the Court also rejected rigid obviousness rules. We should keep an eye on the Nautilus case to see if this trend continues for indefiniteness. The Court's recent opinions suggest it will continue to rely on the judgment of district courts — perhaps at the expense of the Federal Circuit."

David Long, Kelley Drye & Warren LLP
"This marks a major change in recovering attorneys' fees in patent cases. To be clear: such recovery is reserved for 'rare' instances of exceptionally questionable infringement allegations or litigation tactics beyond a typical patent case. But recovering fees is more likely than under the old standard. Courts now have a better tool for deterring litigation abuses at the center of current patent reform efforts. Congress may well table the more drastic and less flexible fee-shifting proposals so that district courts on the front line of the issue can exercise their increased discretion under this new flexible standard to curb patent litigation abuses."

Joshua Lorentz, Dinsmore & Shohl LLP
"In rejecting the Federal Circuit's standard for an exceptional case, the Supreme Court held that an 'exceptional' case is simply one that stands out due to the strength of a party's litigating position or the unreasonable manner in which the case was litigated. District courts may determine whether a case is 'exceptional' at their discretion. While the full impact of the holding may not be realized until subsequent cases are adjudicated, it seems certain that accused infringers — particularly those facing lawsuits from patent assertion entities — will more frequently assert that cases are exceptional under Section 285 and will likely have more success in doing so."

Kevin C. May, Neal Gerber & Eisenberg LLP
"The Supreme Court appears to be opening the door to increased fee shifting in patent cases, but it is unclear whether a significant change will be seen. In some patent cases, it is difficult to establish that a case is either objectively baseless or brought in subjective bad faith, at least until the patent claims have been construed. If a party pushes forward in the face of an adverse claim construction, that can be a different story. The ultimate question is whether these rulings will have an impact on frivolous patent litigation. In my view, these decisions will have little impact on the number of cases being filed, but they are likely to have an impact on the

settlement dynamics. The parties with questionable claims or defenses are going to be more inclined to settle, and parties on the other side are going to be more inclined to push forward to judgment and the possibility of a fee award. This is likely to embolden defendants to reject 'cost of defense' settlements in frivolous cases."

David McMahon, Barger & Wolen LLP
"In [Octane Fitness and Highmark], the U.S. Supreme Court issued two decision pertaining to when a party is entitled to the recovery of attorneys' fees in a patent lawsuit. Over the past 10 years or so, it was unusual to see fee awards in patent cases as the prevailing standard was very high. The bottom line of the Supreme Court's rulings is that in 'exceptional cases' reasonable attorneys' fees may be awarded to a prevailing party in a patent case. Interestingly, the Court leaves it to the trial court to define which cases are exceptional. This is to be done in the court's exercise of its discretion on a case by case basis. This is a dramatic change. The prior standard used in these types of matters required a finding of 'subjective bad faith' and/or 'objectively baseless' conduct. Those standards were very high; making the circumstances where a fee award was granted to be rare. The policy surrounding this decision appears to deter parties who have abused the patent system for their own financial gain."

James Morando, Farella Braun & Martel LLP
"The US Supreme Court's decisions in Octane Fitness and Highmark reflect a common sense interpretation of the fee shifting statute that Congress has included in the Patent Act. District court judges handling patent cases on a day to day basis are in the best position to make decisions regarding when it is appropriate to grant fee awards unburdened by formulistic criteria or high evidentiary standards. However, these decisions may not as a practical matter have the impact that some may think. While correctly restoring trial court discretion to award fees when exceptional circumstances present themselves and making their decisions subject only to the more relaxed abuse of discretion standard on appeal, the reality is that most district courts are and will likely still continue to be reluctant to award fees except in the most egregious circumstances."

John Murphy, BakerHostetler
"The Supreme Court has turned over a great deal of power to district courts here, which many say is bad news for plaintiffs. But to me it's not so clear. Under the old regime, losing defendants were largely safe from additional penalties because any 'reasonable' defense foreclosed not only a fee award to plaintiffs, but also enhanced damages for willful infringement. By eliminating the 'reasonable defense' rule for fees, the Supreme Court may ultimately have given meritorious plaintiffs significantly better chances at obtaining not only fee awards, but also treble damages as a result of willfulness verdicts."

Gene Paige, Keker & Van Nest LLP
"The Supreme Court's decisions in Octane and Highmark resemble its ruling in eBay Inc. v. MercExchange LLC. In each case, the Court reversed the Federal Circuit's adoption of rules specific to patent cases, and instructed that more general law should be applied. There, it was approving injunctions without considering the traditional equitable factors; here, it was applying tests for fee-shifting more stringent than the statutory language required, and reviewing such awards under standards different than those approved in Cooter & Gell v. Hartmarx and Pierce v. Underwood."

Michael M. Rosen, Fish & Richardson PC
"The Supreme Court's twin rulings in Octane Fitness and Highmark significantly lowered the standard for awarding attorneys' fees and restored the district court's discretion in awarding fees. The rulings may give patentees pause before filing questionable suits, as they are now more likely to wind up paying fees if they lose, and those awards are more likely to withstand appellate review. The rulings also blunted at least some of the ongoing congressional effort to rein in the excesses of so-called patent trolls, since much of that effort has focused on making it easier for prevailing parties to collect attorneys' fees."

Joel Sayres, Faegre Baker Daniels LLP
“Together, these opinions (correctly in my view) restore Section 285 exceptional-case determinations to the sound discretion of district courts, without the unsupported strictures of Brooks Furniture, and provide confidence that such a determination by a district court — which is closer to the facts and history — will not be reversed based on a cold reading of the record. Practically, this should encourage prevailing defendants to seek fees where previously they might have been dissuaded by the Federal Circuit’s onerous standards. Ideally, this should correspondingly give pause to PAE’s before asserting weak claims, or at least counsel more diligence before filing suit.”

Bart Showalter, Baker Botts LLP
“The decisions reflect the Supreme Court’s continuing suspicion of Federal Circuit jurisprudence. Here, the Supreme Court did not think the high standard developed by the Federal Circuit to recover attorneys' fees under Section 285 was consistent with the statute, and also disagreed with the Federal Circuit’s standard of review of lower court decisions awarding fees. The two decisions send a signal to patent litigants and district court judges that awards of attorneys' fees will be easier for frivolous lawsuits and that those awards will be more difficult to reverse at the Federal Circuit. This could have a chilling effect on the decision of some patent owners to file lawsuits of questionable merit.”

Jeremy A. Smith, Bradley Arant Boult Cummings LLP
"The Supreme Court took steps to curb the cost of patent litigation by establishing a new standard granting trial courts wider latitude to award expenses to successful litigants and give greater deference to those awards once they are made during appellate review. These rulings will likely make it easier for targets of 'patent trolls' to recoup litigation expenses incurred in defending against infringement claims and may help prevent frivolous litigation. This may be a significant step towards solving the perceived 'patent troll' problem as it increases the possibility that questionable claims of infringement could backfire."

Colette Verkuil, Morrison & Foerster LLP
“The clear signal from the Supreme Court that fee-shifting should be available in more patent cases is especially interesting in light of the current debate in the Senate regarding patent reform. The bill passed by the House included a fee-shifting provision and the recently published compromise bill in the Senate also included a fee-shifting provision. Although it is difficult to predict how the 'exceptional case' standard set forth in Octane Fitness will be applied by the district courts, we will certainly see far more successful litigants filing for fees.”

Ari Zytcer, Vorys Sater Seymour and Pease LLP
“This decision is significant because it provides lower courts with greater discretion to determine whether a case is ‘exceptional’ within the meaning of Section 285 of the Patent Act, thereby providing a disincentive to plaintiffs asserting patent infringement unless the plaintiff is confident in the substantive strength of its position. While this already being viewed as a great result for combating so called patent trolls, the decision will likely have broad-reaching implications for all potential plaintiffs, as awards for attorneys' fees will be more difficult to challenge.”

--Editing by Emily Kokoll.

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