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Fee Awards Loom Large In Patent Law 3 Years After Octane

By **Ryan Davis**

Law360, New York (April 27, 2017, 5:14 PM EDT) -- Three years ago, the U.S. Supreme Court's Octane Fitness decision made it easier for winning parties in patent cases to recover attorneys' fees, which statistics show has markedly increased the number of fee requests and awards and which attorneys say has made litigants more rigorous about presenting strong arguments.

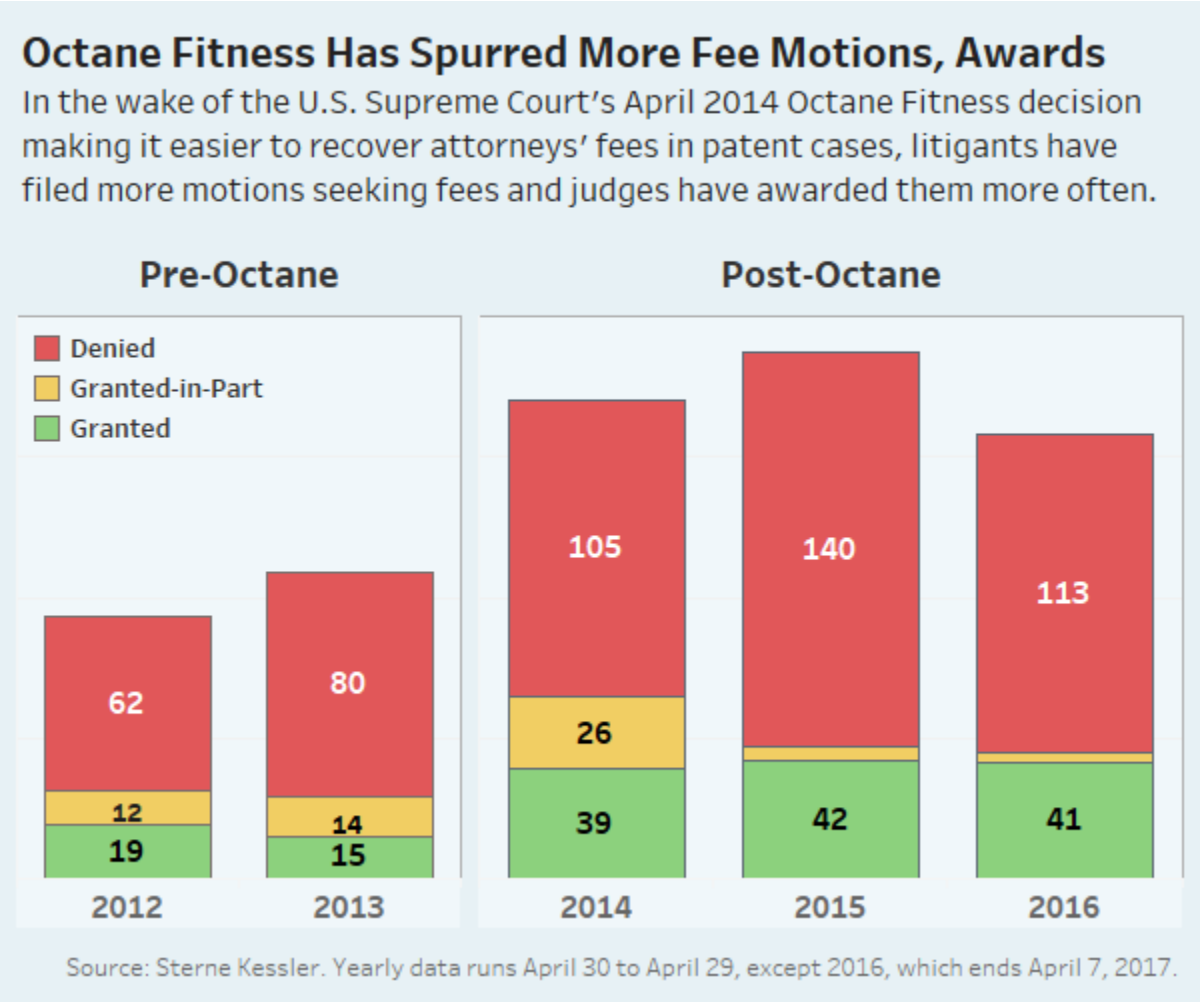
The ruling, handed down on April 29, 2014, stripped away what the justices called "unduly rigid" rules established by the Federal Circuit about when fee awards are appropriate and instead gave judges broad discretion to award fees when the losing party's case "stands out from others" or is litigated in an "unreasonable manner."

Under the previous rules, fee awards were seen as extremely difficult to win, so they were requested infrequently and granted even less often. Octane Fitness marked a clear shift, according to statistics compiled by Nirav Desai of Sterne Kessler Goldstein & Fox PLLC. Litigants now request fees more frequently, while judges grant more of them and do so at a higher rate.

"The number of motions filed and the grant rate, those numbers don't lie," Desai said.

Using data from Docket Navigator, he found that in the two years immediately preceding Octane Fitness, there were 93 motions for attorneys' fees filed in patent cases in 2012 and 109 in 2013. In the 12 months after the decision, there were 170 motions filed, followed by 187 in the second year, and 158 to date in the third, through early this month.

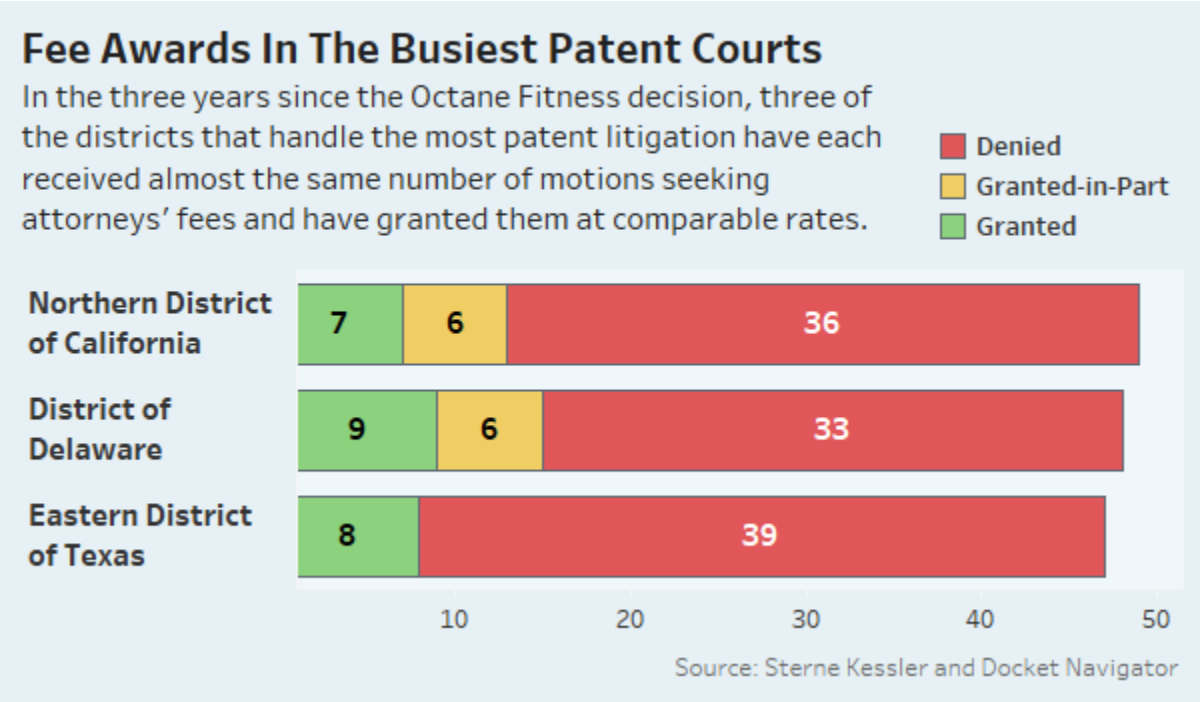
The number of decisions awarding fees also increased. In the two years preceding the decision, judges granted 19 and 15 fee awards in full. In the year after the decision, there were 39 such awards, followed by 42 in the second year and 41 through early April.



The rate at which judges award fees has increased as well. For instance, in the year prior to Octane Fitness, 14 percent of fee motions were granted completely, but in the last 11 months, the rate has been 26 percent.

Three of the busiest districts for patent litigation, the Eastern District of Texas, the District of Delaware and the Northern District of California, have all received about the same number of motions for attorneys' fees and have granted them at comparable rates, the statistics show.

Cases involving attorneys' fee requests form a fairly small subset of all patent litigation, but there is now a greater chance that bringing weak infringement claims or making unsupportable arguments during a patent case can put a litigant on the hook for its opponent's fees. The practical impact of the decision has been to push parties to take more reasonable positions, attorneys say.



The ruling has "definitely" affected litigation behavior, Desai said, and parties are "making sure the claims and defenses they're asserting are really thought through before bringing them."

The effect has been particularly notable with respect to nonpracticing entities, whose sometimes-questionable legal tactics were seen as prime candidates for fee awards when the decision came out.

"I think there's no question that NPEs have changed their modus operandi," said Lionel Lavenue of Finnegan Henderson Farabow Garrett & Dunner LLP. "They're being more careful now, since they know the risk is so much higher."

That cannot be attributed entirely to Octane Fitness, he noted, since new pleading requirements established in 2015 mandate that patent complaints must include more detailed allegations.

"Between the two, there is certainly a change that I've seen," Lavenue said.

The number of new patent suits filed each year has **d**eclined since Octane Fitness came out, and many other changes in patent law during that time, including the rise of inter partes reviews, make it difficult to tell how much the decision had to do with that trend. However, attorneys say Octane Fitness may have played a role in discouraging some litigants from bringing suits they might have otherwise have filed.

There is one major category of patent case where Octane Fitness has had not made a notable dent: those in which patent owners file suit and seek a quick settlement that amounts to less than the cost of litigation.

Given the choice, most defendants settle those cases, so there is no chance of the litigation reaching a decision that could result in fees being awarded, said Orion Armon of Cooley LLP.

"I don't think Octane Fitness has materially reduced the number of low-dollar nuisance cases that companies tend to complain about when they discuss patent reform," he said.

The ruling is being used to penalize litigants when they file frivolous or egregious cases that result in a court decision, he added, but "what it is not doing is curing the troll problem."

The broad level of discretion that Octane Fitness gives judges to decide both when to award fees and how much to award has led to inconsistency in how the ruling is being applied, attorneys said.

Since the high court established that fees are warranted when a case "stands out from others," the outcome necessarily hinges on each judge's subjective perception. Behavior that stands out to one judge may not stand out to another, so fee motions have to be tailored very specifically.

"You've got to know your judge if you're considering filing a motion," Desai said.

Lavenue said that in order to determine if it is worth the effort to seek attorneys' fees under Octane Fitness, he looks at every fee motion the judge has ruled on in the past and whether it was granted, and tries to discern what the judge considers to be an exceptional case.

"That's an analysis you have to do separately and individually each time," he said. "Nobody knows exactly where that line is, and that line is different for every judge."

In many cases, judges seem to be basing their decisions on whether to award fees on criteria similar to those used to award sanction under Rule 11 for bringing a baseless case without an adequate pre-filing investigation. Judges are often reluctant to impose sanctions given their harsh connotations and may be using attorneys' fees as a substitute, Lavenue said.

"If they see that a case is extraordinary or even close to extraordinary, they may award fees, rather than Rule 11 sanctions," he said.

The subjective nature of the analysis has also led to variations across the country, Armon noted. Judges have different levels of experience and see different types of patent cases, so what "stands out" for one judge may not for another. Armon said that for Octane Fitness to be applied more fairly and predictably, the standard should be the same nationwide.

The Federal Circuit could do that by saying fees should be considered based on what is exceptional across all patent cases, rather than in a local jurisdiction, he said, although that could run afoul of the broad level of discretion the high court endorsed.

"Looking long term, Octane Fitness will only have a bigger impact than it has had so far if the Federal Circuit is able to provide some uniformity," he said.

For now, the heightened possibility of attorneys' fees has become an important part of the patent litigation landscape, since fee awards have been imposed in an array of cases, against both plaintiffs who file weak suits and defendants who mount unreasonable defenses.

"When the Octane Fitness decision came out, the question I had in mind was: Is this really only relevant to nonpracticing entity cases, or is it more widely applicable?" Desai said. "With three years of data, we can see that it has influenced many kinds of litigation. It’s not just NPE cases, it’s competitor-to-competitor cases and Hatch-Waxman cases. It’s widely applicable to all kinds of cases."

--Editing by Rebecca Flanagan and Jill Coffey.