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Imperium In Rarefied Air With $7M Patent Atty Fee Award

By **Matthew Bultman**

Law360 (April 11, 2018, 10:22 PM EDT) -- Imperium IP Holdings Ltd. secured a whopping $7 million in attorneys' fees last week in a patent case against Samsung Electronics Co. Ltd., among the largest of its kind since a U.S. Supreme Court ruling made it easier for winning patent litigants to recover fees.

Following Imperium's victory at trial, Judge Amos Mazzant in the Eastern District of Texas found the case warranted fees under the high court's 2014 decision in Octane Fitness v. Icon Health & Fitness, which held the winning side can recover fees in "exceptional" cases that "stand out from others."

Among other things, Judge Mazzant said Samsung didn't produce certain documents until midway through the trial and witnesses gave false testimony about the company's knowledge of Imperium's patents, which cover digital camera imaging technology.

Samsung also misrepresented key facts in the case, according to the judge, including that it was tracking the patents in earlier litigation.

"It should be noted that none of defendants' conduct in isolation makes this case exceptional," Judge Mazzant wrote. "However, when a party does all of these things mentioned above and continues to infringe the patents-in-suit, the court can only conclude this case is exceptional."

The judge on April 3 awarded Imperium $7.08 million in attorneys' fees, nearly the full amount that it had requested.

The award — the largest attorneys' fee award in the patent-heavy Eastern District of Texas — comes after Judge Mazzant previously tripled the jury's roughly $7 million damages award based on the finding that Samsung's infringement was willful.

"The total is now $28,035,669, and growing as time and Samsung sales march on," said John Battaglia of Fisch Sigler LLP, an attorney for Imperium. "The current sum includes the infringement damages found by the jury, plus enhanced damages, interest, costs, and now attorneys' fees."

In the years since the Octane Fitness ruling, litigants have requested fees more frequently, while judges have been granting more of these requests and are doing so at a higher rate.

The average award over the last year was around $1.3 million, according to statistics compiled by Nirav

Desai of Sterne Kessler Goldstein & Fox PLLC. The median award is significantly less than that — a little under $400,000.

"What that tells us is there are a lot of five- and six-figure numbers being awarded," Desai said. "Getting into the seven and eight figures is far more rare."

Also uncommon, attorneys said, is for the winning side to be given all, or close to all, the fees it requests.

From a practical perspective, Lionel Lavenue of Finnegan Henderson Farabow Garrett & Dunner LLP said giving an advance warning to the other side — putting them on notice of potential issues that could lead to an exceptional case finding — may help litigants secure full fees later down the road, should those issues stand uncorrected.

"If the court sees ... that they never gave them an opportunity to correct, then some courts will not award fees in that situation, or they'll reduce fees," Lavenue said, adding, "the earlier you can send the warning letter, the better."

Here's a look at some other notable fee awards post-Octane Fitness.

Gilead Scores $14M in Hep C Case

In a bombshell 2016 decision, Judge Beth Labson Freeman in the Northern District of California threw out a $200 million jury verdict that Merck & Co. Inc. won in a patent case against rival Gilead Sciences Inc. over hepatitis C medications, citing "serious and outrageous misconduct."

The case, which dated back to 2013, involved two Merck patents.

Judge Freeman's decision centered on testimony of a retired Merck patent attorney, whom the judge found lied about his participation in a 2004 conference call with the developers of what would later become Gilead's lucrative hepatitis C drugs, Sovaldi and Harvoni.

She later ruled that Gilead was entitled to attorneys' fees to repair the cost of litigating the case and awarded Gilead almost $14 million, an amount she said was warranted given that "the amount at stake in a case" that Gilead argued was "extraordinarily complex."

Gilead, the judge wrote in court documents, "should not be 'liable for defending an action in which the record demonstrated egregious misconduct' by Merck."

Merck has filed an appeal in the case with the Federal Circuit.

Alzheimer's Institute Slapped With $11.8M in Fees

The Alzheimer's Institute of America Inc. took Eli Lilly & Co. and Elan Pharmaceuticals Inc. to court in 2010, claiming the companies infringed patents for Alzheimer's diagnosis technology. It also filed a separate lawsuit against Eli Lilly unit Avid Radiopharmaceuticals Inc. over the same patents.

The defendants each secured favorable judgments after AIA was found to have appropriated inventions from others and engaged in deceptive conduct. The Eastern District of Pennsylvania judge overseeing Avid's case called the scheme "rare and beyond common decency."

Avid was awarded $3.9 million in attorneys' fees, while a Northern District of California judge granted Eli Lilly and Elan a combined $7.9 million.

The Federal Circuit upheld the fee awards in August after AIA appealed, rejecting the novel argument that only juries can award attorneys' fees in patent cases. The appeals court said it did not violate AIA's Seventh Amendment right to a jury trial when the judges awarded the fees.

Fed. Circ. Tosses $10.3M Award in Security IP Case

Checkpoint Systems Inc. in 2015 was ordered to fork over a hefty $6.6 million after a long-running battle with All-Tag Security SA and Tyco Retail Solutions unit Sensormatic Electronics over anti-theft tags used in stores. An additional $3.7 million in interest and expenses was later tacked onto the award.

The ruling came several years after a jury in the Eastern District of Pennsylvania found the defendant companies did not infringe Checkpoint's patent and that it was invalid.

U.S. District Judge Petrese B. Tucker found Checkpoint filed the suit with the "improper motivation" of interfering with the defendants' business and protecting its own competitive advantage. The judge also said that its presuit investigation was inadequate.

But the Federal Circuit reversed that decision and threw out the award in June 2017, finding Checkpoint's infringement case was reasonable and the litigation was not abusive. The court said it has cautioned that fee awards "are not to be used 'as a penalty for failure to win a patent infringement suit.'"

"Motivation to implement the statutory patent right by bringing suit based on a reasonable belief in infringement is not an improper motive," the Federal Circuit wrote in its ruling. "A patentee's assertion of reasonable claims of infringement is the mechanism whereby patent systems provide an innovation incentive. Here, no such harassment or abuse is shown."

The Supreme Court earlier this year **declined** to review the case.

Cisco Ordered to Pay $8M After 'Aggressive' Litigation

Following a 2016 trial in Delaware federal court, SRI International Inc. was awarded $23.7 million for what jurors found was Cisco Systems Inc.'s willful infringement of patents covering technology for monitoring computer networks and identifying suspicious activity.

One year later, then-U.S. District Judge Sue Robinson doubled the award based on the willfulness verdict and ordered Cisco pay SRI roughly $8 million in attorneys' fees and costs. According to court documents, the district court relied heavily on Cisco's litigation conduct.

Judge Robinson wrote that Cisco "pursued litigation about as aggressively as the court" has ever seen and "crossed the line" in several regards. For example, the judge said Cisco waited until the eve of trial to drop numerous theories about the validity of the patents.

"Cisco's litigation strategies in the case at bar created a substantial amount of work for both SRI and the court, much of which was needlessly repetitive, or irrelevant or frivolous," the judge wrote.

Cisco has filed an appeal with the Federal Circuit.

UCB Lands $6.2M Award After Beating Apotex Claims

Biopharmaceutical company UCB Inc. ended 2015 on a positive note, when a judge in the Southern District of Florida awarded just over $6.2 million in a patent case Apotex Inc. filed over a manufacturing process for a blood pressure medication.

U.S. District Judge Donald M. Middlebrooks had tossed the lawsuit two years earlier after finding Apotex's founder, Dr. Bernard Charles Sherman, misled the U.S. Patent and Trademark Office into allowing the patent and gave the patent examiner results from experiments he never conducted.

The Federal Circuit affirmed the judge's ruling in favor of UCB In 2014. After the Supreme Court said it would not hear Apotex’s appeal, Judge Middlebrooks awarded UCB over $6.2 million in attorneys' fees and expenses, citing "egregious misconduct throughout the [patent] production and trial."

"In short ... this case involved an orchestrated scheme to deceptively obtain a patent by targeting a competitor's existing and widely available product through lies and deception," the judge wrote in a December 2015 order.

--Editing by Katherine Rautenberg and Catherine Sum.
