U.S. Supreme Court Lowers the Bar for Awards of Legal Costs in Patent Lawsuits

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Author: Paul Horbal

In a unanimous decision, the United States Supreme Court this week relaxed the standard for determining whether a successful litigant should be compensated for legal feesincurred in patent infringement lawsuits.

In recent years, the lower Federal Circuit Court had set a high bar for costs awards. Previously, a party needed to demonstrate that the lawsuit had been brought in “subjective bad faith” and was “objectively baseless”, or else involved “material inappropriate conduct”. Critics noted that this was a nearly impossible standard to meet – since bad faith and willful misconduct are very difficult to prove – and that this tilted the playing field too far in favour of so-called non-practising entities (NPEs), who had little to lose in asserting patents widely.

The U.S. Supreme Court has now held that costs awards are appropriate in an “exceptional” case; that is, a case 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.” Evidence of bad faith or intentional misconduct is no longer required to prevail. Moreover, the Court held that the decisions of trial courts regarding costs should be afforded deference by appellate courts.

As a point of comparison, the Canadian patent litigation system has been relatively free of assertions by NPEs. There are other factors at play: the reluctance of Canadian courts to grant injunctions and our smaller market, for example. However, the threat of costs awards also serves to skew a “cost-benefit” analysis away from launching the sorts of “exceptional” lawsuits contemplated by the U.S. Supreme Court.

While the decision this week lowers the bar, costs awards in the United States are still far from automatic. Nevertheless, the decision should cause at least some prospective plaintiffs to reconsider the merits of their patent assertions.