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ALERT

Federal Circuit Patent Bulletin: *Gaymar Indus., Inc. v. Cincinnati Sub-Zero Prods., Inc.*

June 26, 2015

"In view of the serious consequences of a finding of misconduct, it is important that the district court be particularly careful not to characterize bad lawyering as misconduct."

On June 25, 2015, in *Gaymar Indus., Inc. v. Cincinnati Sub-Zero Prods., Inc.*, the U.S. Court of Appeals for the Federal Circuit (Prost, Bryson, Dyk*) affirmed-in-part, reversed-in-part, and remanded the district court's denial of Cincinnati Sub-Zero's (CSZ) motion for attorney fees in a case involving U.S. Patent No. 6,517,510, which related to a patient temperature control system including a blanket that can conductively warm or cool the patient, that was cancelled during concurrent inter partes reexamination. The Federal Circuit stated:

Section 285 provides: "The court in exceptional cases may award reasonable attorney fees to the prevailing party." "District courts may determine whether a case is 'exceptional' in the case-by-case exercise of their discretion, considering the totality of the circumstances." The inquiry into the objective reasonableness of a party's litigating position may still be relevant under Octane because, if a case "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," it is "exceptional" under § 285.

In the first order, the court noted that CSZ's claim that Gaymar's litigation position was objectively baseless was solely based on Gaymar's apparent knowledge of prior art which disclosed "the only feature that distinguished the asserted claims of the '510 patent from the prior art." The court found that CSZ had failed to establish by clear and convincing evidence that Gaymar's litigation position was objectively baseless, relying on the fact that CSZ could have but did not move for summary judgment in lieu of awaiting the outcome of the PTO reexamination, suggesting that "this case was closer than CSZ would now have this court believe." The court also relied on the fact that "[i]n its reply papers, Gaymar addressed CSZ's invalidity arguments at great length and in considerable detail." . . .

[Here,] the district court chose not to rest its decision on the reasonableness of Gaymar's litigation position—a step it might have taken—but instead refused to award fees under Octane based in significant part on its finding that "[g]iven CSZ's own litigation misconduct, it does not have 'clean hands' sufficient to render this an 'exceptional case.'" To be sure, the conduct of the parties is a relevant factor under Octane's totality-of-the-

circumstances inquiry, including the conduct of the movant, but we conclude that the district court committed clear error here in finding misconduct by CSZ. . . .

The final two examples of supposed misconduct arose against a background of a dispute between the parties as to whether Gaymar had the burden of addressing validity in its preliminary injunction (to show likelihood of success) or whether Gaymar was obligated to address the issue only after CSZ raised the issue. . . . Without question, CSZ's arguments (particularly as to the third and fourth examples) could be properly characterized as overstatements. But none of the cited examples amounts to misrepresentation or litigation misconduct. In addressing potential litigation misconduct in analogous contexts, other circuits have concluded that isolated overstatements do not rise to the level of sanctionable litigation misconduct under Federal Rule of Civil Procedure 11.

In summary, the examples cited by the district court—whether considered in isolation or in the aggregate—amount to sloppy argument, at worst. While such sloppiness on the part of litigants is unfortunately all too common, it does not amount to misrepresentation or misconduct. In view of the serious consequences of a finding of misconduct, it is important that the district court be particularly careful not to characterize bad lawyering as misconduct. "CSZ's own litigation misconduct" was cited by the district court for finding that this was not an exceptional case in light of Octane. Because none of the examples cited by the district court constitutes litigation misconduct, a remand is required.