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## Patents

### Weak Patent Case Could Cost Drugmaker Roxane Labs Millions in Fees

**R**oxane Laboratories Inc. may have to pay more than \$2 million in attorneys' fees for bringing a groundless infringement suit against two generic drug companies (*Roxane Labs., Inc. v. Camber Pharm., Inc.*, 2017 BL 119794, D.N.J., No. 14-4042 (SRC), 4/12/17).

Roxane's patent infringement claims against Camber Pharmaceuticals Inc. and InvaGen Pharmaceuticals Inc. over calcium acetate capsules was objectively unreasonable, entitling the defendants to recover their attorneys' fees, Judge Stanley R. Chesler of the U.S. District Court for the District of New Jersey said in an April 12 opinion.

The U.S. Supreme Court's 2014 ruling in *Octane Fitness v. Icon Health & Fitness, Inc.* 134 S.Ct. 1749, 110 U.S.P.Q.2d 1337 (2014) has led to more courts ordering the losing party in patent cases to pay the winning party's attorneys' fees.

In another 2014 ruling, *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 134 S. Ct. 1744, 110 U.S.P.Q.2d 1343 (2014), the high court extended its *Octane Fitness* decision to apply a more deferential appellate standard of review for fee-shifting determinations.

**Decisions Hard to Overturn** Because district court judges' decisions on attorney's fees are now accorded more deference since *Highmark*, these decisions have also become more difficult for the losing party to overturn on appeal, Michael P. Kahn of Akin Gump Strauss Hauer & Feld in New York, told Bloomberg BNA in an April 18 telephone call.

"What we are seeing in the market is parties being a lot more cautious in the way they conduct their presuit investigations and how they enter into litigation to avoid outcomes such as the one in this recent decision by Judge Chesler," Kahn said. Kahn's practice focuses on litigating patent infringement disputes and related claims.

**Briefing on Award Amount Ordered** The court ordered Roxane to submit an opposition brief addressing the amount of the award within two weeks, with the defendants submitting a reply brief two weeks after that.

Roxane, which makes a generic calcium acetate capsule product, sued Camber and InvaGen, claiming the companies' competing generic calcium acetate capsule products infringed a Roxane patent covering a calcium acetate formulation.

Calcium acetate is used for reducing blood phosphate levels in people with end-stage kidney disease on dialysis.

Roxane lost the case, and the defendants asked the court to award them \$2.1 million in attorneys' fees and costs. The defendants said Roxane's infringement claim was objectively unreasonable and Roxane pursued the litigation in a manifestly unreasonable manner, entitling them to attorneys' fees under federal patent laws.

**Attorneys' Fees Warranted** Chesler agreed the case was exceptional and qualified for an award of fees because Roxane's patent infringement claim was objectively unreasonable.

Under *Octane Fitness*, the Supreme Court defined an "exceptional" case as "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."

Chesler said Roxane's patent infringement claim met the exceptional case standard.

**Case Is 'Exceptionally Meritless'** "[A]s to Roxane's infringement claim, this case stands out from others as exceptionally meritless," the judge wrote. "Roxane pursued an infringement claim for which it lacked any legal or factual support."

"Roxane's claim construction case was not supported by patent law, and was contrary to basic patent law, at that," Chesler said.

"Roxane has been unable to point to any colorable factual or legal support for its position," Chesler continued, observing Roxane relied on extrinsic evidence—the declarations of experts—rather than intrinsic evidence—the claims and specifications themselves and patent prosecution history—to support its position.

"Having failed to point to anything in the intrinsic evidence that shows some merit to its claim construction position, Roxane points to extrinsic evidence. But Federal Circuit law holds that, absent some ambiguity in the intrinsic record, extrinsic evidence may not be used," the opinion said.

"Roxane has not, at any point in this litigation, made a colorable argument that the intrinsic evidence supports its [claim construction] theory," he said. "[T]he pursuit of a patent infringement claim based on such a weak position is extraordinary."

Roxane was acquired by Columbus, Ohio-based West-Ward Pharmaceuticals, a subsidiary of Hikma Pharmaceuticals Plc, was represented by Gibbons P.C. and Sills Cummis & Gross, PC.

Camber and InvaGen were represented by Caesar Rivise Bernstein Cohen & Pokotilow Ltd.

BY DANA A. ELFIN

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