This Report summarizes cases granted review on October 19 and 30, 2015 (Part I).

I. Cases Granted Review

- Hughes v. PPL EnergyPlus, LLC, 14-614; CPV Maryland, LLC v. PPL EnergyPlus, LLC, 14-623. Under review is a Fourth Circuit decision holding that Maryland’s scheme guaranteeing a new electricity generator a price different from the price its electricity sells for in the federally regulated wholesale market is “field preempted” and “conflict preempted” by the Federal Power Act (FPA), 16 U.S.C. §824. Under the FPA, the Federal Energy Regulatory Commission (FERC) regulates the interstate transmission of electricity and the wholesale purchases of electricity; states regulate retail purchases and generation facilities. Major actors in today’s wholesale market are FERC-regulated regional transmission organizations (RTOs) that operate a forward-looking capacity market through an auction process. They accept price-per-unit bids from generators from lowest to highest until they have received adequate bids to satisfy their predicted demand three years into the future. The highest bid the RTO must accept to satisfy its region’s demand sets the “market-clearing price”—the price all generators are paid regardless of what they bid. When necessary, FERC is also able to incentivize new generators to enter markets by guaranteeing them a new-entry price adjustment that lasts for three years. Maryland participates in this federally-regulated system (as opposed to having vertically-integrated utilities), but found in 2012 that market forces were not providing sufficient long-term generation. In response, the Maryland Public Service Commission adopted a plan (the Generation Order) under which it accepted bids to build a new generating facility in Maryland. The winning bidder, petitioner CPV Maryland, was required to sell its output into the RTO’s wholesale market. In exchange, Maryland entered into a 20-year “Fixed/Indexed Pricing Contract” with CPV that “were in the form of contracts for difference, a hedge.” If the price received by CPV in the wholesale market falls below the contract’s fixed amount, Maryland’s local utilities would pay to CPV the shortfall; and “if CPV realized sales revenues above its yearly contract price, CPV would rebate the difference to local utilities.” Other generators participating in the RTO’s wholesale market filed suit in federal district court, alleging that the Generation Order injured them by depressing wholesale prices and was preempted by the FPA. The district court ruled that Maryland’s scheme was preempted, and the Fourth Circuit affirmed. 753 F.3d 467.

The Fourth Circuit concluded that Maryland’s scheme was both field preempted and conflicted preempted by the FPA. The court began by explaining that the FPA contemplates “a comprehensive scheme of federal regulation of all wholesales of [energy] in interstate commerce” and that FERC’s jurisdiction over such interstate wholesale rates is “exclusive.” The court reasoned that Maryland’s Generation Order was field preempted because it functionally sets the rate that CPV receives for its sales in the wholesale market. Doing so, the court said, “effectively supplants the rate generated by the [wholesale] auction with an alternative rate preferred by the state.” Maryland’s scheme has thus “eroded the effect of the FERC determination and undermined FERC’s exclusive jurisdiction.” As to conflict preemption, the court reasoned that the Generation Order “disrupts” FERC’s efficient wholesale auction signals in two ways—by actually setting the price received at wholesale and by offering a 20-year state subsidy that extends far beyond the three-year subsidy approved by FERC.
Both CPV and the commissioners of the Maryland Public Service Commission ask the Court to reverse the Fourth Circuit. They argue that the states, not FERC, retain sole authority to regulate and support power plant construction. In their view, the Fourth Circuit’s reasoning “strike[s] at the core of the States’ ability to support power plant construction through long-term contracts and ratepayer support.” They emphasize that “[m]uch capacity offered into the auction is already subject to long-term bilateral contracts” between local utilities and generators that are not preempted, and that the economic effect of the Generation Order contracts are no different than those contracts. The petitions assert that the Fourth Circuit’s “decision will hobble the States’ ability to assure the creation of reliable energy supplies to meet their citizens’ . . . energy infrastructure needs.” Respondents PPL EnergyPlus and other energy generators counter that the entire point of Maryland’s contact with CPV is to “ensure that CPV receives a fixed price for every unit of energy and capacity it sells in the [wholesale] auction, regardless of the market price.” They distinguish the situation where “a party who purchases electricity or capacity through a bilateral contract . . . proceed[s] to sell that same electricity or capacity into the [RTO] market.” That sort of contract does not dictate the RTO auction rate. The Generation Order contracts, by contrast, “ensure that CPV receives a particular rate” for the wholesale auction transaction. In response to the Court’s call for the views of the Solicitor General, the United States filed an amicus brief expressing its position that Maryland’s scheme is preempted because the Generation Order “directly distort[ed]” the wholesale auction’s clearing price.

- *Halo Electronics, Inc. v. Pulse Electronics, Inc.,* 14-1513; *Stryker Corp. v. Zimmer, Inc.,* 14-1520. Section 284 of the Patent Act states that district courts “may increase [patent infringement] damages up to three times the amount found or assessed.” 35 U.S.C. §284. In two cases consolidated for oral argument and decision, the Court will address whether the Federal Circuit erroneously adopted a rigid, two-part willfulness test for trebling patent infringement damages under §284, when the Supreme Court recently rejected an analogous framework under the statute authorizing an award of attorneys’ fees in patent cases, 35 U.S.C. §285. See *Octane Fitness, LLC v. ICON Health & Fitness, Inc.,* 134 S. Ct. 1749 (2014).

In the first case, Halo Electronics held patents covering its “open construction” packaging for its surface mount transformers—components that are integrated into computers, routers, and similar products. The open construction solved a prior industry problem where the packages cracked when soldered to a circuit board. A jury found that Pulse Electronics directly infringed, and induced others to infringe, Halo’s patents. The evidence showed that a Pulse engineer performed a cursory review of the Halo patents and that Pulse failed to rely on that review when assessing whether it was infringing Halo’s patent. The jury awarded Halo $1.5 million in royalty damages and found it was “highly probable” that Pulse’s infringement was willful. The district court, however, declined to treble the damages under §284, finding that Pulse’s defenses were not objectively baseless. The Federal Circuit affirmed. 769 F.3d 1371. Circuit precedent established a two-pronged test under which enhanced damages could be awarded under §284 only where the patentee shows by clear and convincing evidence that the infringer (1) had no objectively reasonable basis for its position and (2) acted in subjective bad faith.

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In the second case, a jury found that Zimmer, Inc.’s pulse lavage device (a medical instrument for cleaning wound sites) infringed on Stryker’s patent and awarded Stryker $70 million in lost profits. The jury rejected Zimmer’s “invalid patent” defense and found that it willfully infringed Stryker’s patent claim. The district court awarded treble damages under §284. The Federal Circuit reversed the trebling, finding that the district court failed to conduct the “objective assessment” analysis required by the two-pronged test. 782 F.3d 649. Even though Zimmer’s defenses ultimately “failed at trial,” the Federal Circuit said, “it still made a reasonable case that the . . . patent’s asserted claims were obvious and thus invalid.” The Federal Circuit expressly declined to address whether Octane’s rejection of a willfulness standard under §285 for awarding attorney’s fees altered the analysis for trebling damages under §284.

Petitioners in both cases urge the Court to reverse the Federal Circuit’s rigid, two-part willfulness test. They argue that the circuit court’s two-part test has no basis in the text of §284, and that it undermines Congress’s intended deterrent effect by immunizing infringers from punitive damages so long as they present at least one plausible defense at the post-trial appellate stage. Bolstered by Octane’s rejection of a similar analytic framework for awarding attorney’s fees under §285, petitioners argue that the Court should empower the district courts with flexible discretion to treble damages in appropriate cases. Analogizing to older cases under prior iterations of the Patent Act, they suggest that trebling may be appropriate in a broad range of cases, such as where the defendant did not act in good faith or caused unnecessary expense or injury. Respondents, by contrast, contend that Octane does not require reversal of the Federal Circuit’s test. They assert that attorney’s fees under §285 are compensatory, while enhanced damages under §284 are punitive. And, they insist, the Court has long required willfulness or reckless behavior as a prerequisite for awarding punitive damages.

Voisine v. United States, 14-10154. Congress bars anyone convicted “in any court of a misdemeanor crime of domestic violence” from possessing firearms. 18 U.S.C. §922(g)(9). The law defines “misdemeanor crime of domestic violence” as an offense that, among other things, involves the “use or attempted use of physical force” on specified members of a defendant’s household. ld. §921(a)(33)(A). The question presented is whether “a misdemeanor crime with the mens rea of recklessness qualifies as a ‘misdemeanor crime of domestic violence’ as defined by 18 U.S.C. §§921(a)(33)(A) and 922(g)(9).”

In separate cases, petitioners Stephen Voisine and William Armstrong entered guilty pleas to domestic assaults under a Maine statute that proscribes both intentional and reckless “offensive physical contact” with “a family or household member.” Me. Rev. Stat. §207-A(1)(A). The factual bases for petitioners’ pleas did not specify whether their assaults were intentional or reckless. Petitioners were later convicted of possessing firearms in violation of 18 U.S.C. §§921(a)(33)(A) and 922(g)(9). Petitioners appealed their convictions, arguing that reckless conduct does not constitute the “use of physical force” within the meaning of §921(a)(33)(A). They relied on United States v. Castleman, 134 S. Ct. 1405 (2014), which held “that Congress incorporated the common-law meaning of ‘force’” in §921(a)(33)(A). Petitioners maintain that the term “force” should also be
read to incorporate the common-law mens rea for battery, which (they assert) requires intent. The First Circuit rejected their argument and affirmed their convictions. 778 F.3d 176.

The First Circuit emphasized §922(g)(9)’s “particular purpose” of “ensur[ing] that domestic abusers convicted of misdemeanors, in addition to felonies, are barred from possessing firearms.” The court reasoned that “a broader reading of §922(g)(9)’s mens rea requirement better ensures that a perpetrator convicted of domestic assault is unable to use a gun in a subsequent domestic assault.” According to the First Circuit, this position is consistent with Castleman’s observation that domestic violence is a “term of art” that “encompasses a range of force broader than that which constitutes ‘violence’ simpliciter,” including “acts that might not constitute ‘violence’ in a non-domestic context.” Quoting Castleman, the Court stated that a “squeeze of the arm [that] causes a bruise” is “hard to describe as ‘violence’ within the meaning of [other general federal criminal statutes],” but is “easy to describe as ‘domestic violence’” within the meaning of §922(g)(9). The First Circuit also looked at whether Maine’s statute prohibited “the type of conduct that supports a common-law battery conviction.” It concluded that the Maine statute defined “recklessness as a mens rea involving a substantial amount of deliberateness and intent” sufficient to satisfy the “paradigm of domestic assault” and battery contemplated by §922(g)(9).
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