

## **Shubha Ghosh, What Makes a Case Exceptional? Fee Shifting as a Policy Lever**

*The Supreme Court's recent decision in Octane Fitness overruled the Federal Circuit's 2005 decision in Brooks Furniture, raising the standard for when a patent case is exceptional for the purposes of fee shifting. The current standard seems to be the one used by courts before the Brooks Furniture decision. This paper empirically examines how courts determined when a patent case was exceptional in the 2005-2013 period when the Brooks Furniture decision was the standard and in the 1982-2005 period, post founding of the Federal Circuit and pre-Brooks Furniture. The author has coded the published and unpublished district court opinions during these two periods and developed a statistical model to determine what variables were important for the district court in awarding fees to the prevailing party. Variables measure the status of the parties, the type of patent, the existence of repeat players, and indicators associated with "patent trolls" of various sorts. The author also looks to see how the district court opinions were reviewed by the Federal Circuit. By placing the empirical study in the broader development of attorney's fee shifting in patent law, the author makes some preliminary assessments of the efficacy of using fee shifting as a policy lever.*