

Statutory attorney fees: thou shalt not lie

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The Dusseldorf Appeals Court recently issued a decision with the unorthodox title, "Thou shalt not lie". This title, chosen by the leading German patent infringement appeals court, referred to the obligation of the parties to disclose the value of litigation in good faith.

The "value of litigation" is a concept unique to Germany. In terms of numbers, the statutory attorneys' fees are about 1.5% of the value of litigation, and the statutory court fees are about 1% of the value of litigation for first-instance patent infringement proceedings. Legally, the value of litigation is the plaintiff's interest in the claims asserted (eg, back damages plus future injunctive relief). Accordingly, the plaintiff has the first opportunity to propose a value of litigation in good faith. The defendant can object, but the court decides based on its own discretion.

The statutory fees are minimum fees and are fully reimbursed by the losing party. Contingency fees are admissible only in rare cases. Undercutting statutory fees violates the codified canons of professional ethics.

But why did the appeals court need to intervene? In view of the substantial amount of fees being paid, the path set down by the law was becoming increasingly less attractive. In order to avoid a large upfront payment, intentionally understating the value of litigation on the part of the plaintiff and failure to contest this figure on the part of the defendant were becoming much more common sins. This was not only motivated by the reduction in parties' court fees, but also boosted by the increased billing of cases by the hour. This system encouraged law firms to set cheap basic fees – based on a low value of litigation – and push up cases by the hour, with many people working on them. Historically, German patent infringement attorneys have been keen to keep cases streamlined by working with small teams. Only in complex cases has additional billing by the hour been used. Remember – no discovery exists in Germany.

When the value of litigation is understated, the court (ie, the public purse) does not obtain the codified pecuniary compensation. Increasingly, the courts are faced with much more paperwork produced under the billing-by-the-hour system and with high-risk cases which may not have been filed by plaintiffs prepared to deal with the appropriate costs.

Thus, the Dusseldorf Appeals Court rendered its "Thou shalt not lie" decision, allowing the prevailing party to request an increase in the value of litigation based on the facts, even after a decision on the merits. For example, say that both parties agree on a value of litigation of €1 million. After the final decision, the winning party may then request a readjustment of the value of litigation to, for example, €30 million, thus raising the cost reimbursement obligation for the losing party by a factor of 30. By increasing the risk that the parties may have to reimburse costs that are far beyond their budgets, this decision of the appeals court may already encourage the parties to put their cards on the table from day one.

In a second recent decision the appeals court further confirmed the court's powers to fix a punitively high value of litigation in cases where the parties appear to refuse to provide the facts to calculate the reasonable value of litigation. Again, this should encourage the parties to supply accurate information about the value of litigation. Finally, the appeals court held that intentionally misinforming the court regarding the facts relevant to the value of litigation constitutes intent to defraud the public purse. Such intent to defraud has consequences under criminal law for the parties and their lawyers, as well as under the canons of professional ethics for their lawyers.

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