



## The Seventh Circuit Clarifies what Constitutes an "Exceptional Case" under the Lanham Act and Calls for Uniformity among the Circuits

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The Lanham Act allows prevailing parties to recover an award of attorneys' fees in "exceptional cases."<sup>1</sup> Cases have been held "exceptional", for example, where the suit was frivolous, or the infringement in bad faith, or there was misconduct during litigation.

Since its addition to the Lanham Act in 1975, the circuit courts have grappled with what constitutes an "exceptional" case and, accordingly, have set different standards. In some jurisdictions, the standards for recovery by the plaintiff differ from the standards for recovery by the defendant.

Judge Posner called for uniformity in the recent case of *Nightingale Home Healthcare, Inc. v. Anodyne Therapy, LLC*. (Case. No. 10-2327, November 23, 2010).<sup>2</sup> Recognizing the divergent tests applied in the federal law, the Seventh Circuit characterized "exceptional cases" as ones where a party takes an oppressive action with the primary purpose of stifling its competition. Applying an abuse of process standard, the Seventh Circuit concluded that a "case under the Lanham Act is 'exceptional,' in the sense of warranting an award of reasonable attorneys' fees to the winning party, if the losing party was the **plaintiff and was guilty of abuse of process in suing**, or if the **losing party was the defendant and had no defense yet persisted in the trademark infringement or false advertising**."<sup>3</sup> The Seventh Circuit clarified that these are the same standard applied to different sides in a litigation:

It should be enough to justify the award if the party seeking it can show that his opponent's claim or defense was **objectively unreasonable** – was a claim or defense that a rational

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<sup>1</sup> 15 U.S.C. § 1117.

<sup>2</sup> [http://scholar.google.com/scholar\\_case?case=4979066464634840700](http://scholar.google.com/scholar_case?case=4979066464634840700)

<sup>3</sup> *Id.* at 10.



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litigant would pursue only because it would impose disproportionate costs on its opponent – in other words only because it was extortionate in character if not necessarily in provable intention.<sup>4</sup>

The Seventh Circuit also rejected adopting different standards for plaintiffs and defendants due to the fact that most parties in trademark cases are "symmetrically situated."<sup>5</sup>

Applying these standards to the case at issue, the Seventh Circuit upheld the district court's award of attorneys' fees to Anodyne. Nightingale purchased Anodyne's infrared lamps, which were approved by the Food and Drug Administration ("FDA"). The FDA approvals did not expressly extend to the treatment of peripheral neuropathy, but most physicians and health care providers prescribed them for this particular disorder. After Nightingale and Anodyne got into a price dispute, Nightingale sued Anodyne for false advertising, claiming that the Anodyne sales representative had falsely represented that the lamp had been approved by the FDA for the treatment. Both the district court and Seventh Circuit found the claim to be baseless. Apparently, Nightingale brought the suit solely in an attempt to obtain a price reduction from Anodyne.

*Nightingale* is an easy case of bad conduct on the part of the plaintiff which warrants the award of attorneys' fees. It will be interesting to see how the other circuits react to the Seventh Circuit's opinion and how the district courts will apply the standard.

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<sup>4</sup> *Id.* at 13.

<sup>5</sup> *Id.* at 10-11.