

Fee Shifting - Will The Exception Become The Rule?

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35 USC § 285

“The court in exceptional cases may
award reasonable attorney fees to the
prevailing party”

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Requirements For Fees

- Prevailing Party
- Exceptional Case
- Exercise of Discretion to Award Fees

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Genesis of “Exceptional” in § 285

- Pre-1946: American Rule Governed
- 1946: § 70 Gave Courts Discretion to Award Fees
- 1952: § 285 Added Term “Exceptional”

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“Exceptional” Pre-*Octane*

- *Brooks Furniture Mfg., Inc. v. Dutailier Int’l Inc.*, 393 F. 3d 1378 (Fed. Cir. 2005)
 - Exceptional case either:
 - Material inappropriate conduct related to the matter in litigation
 - **OR**
 - Objectively baseless & brought in subjective bad faith

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Evidentiary Standard Pre-*Octane*

“Clear and Convincing Evidence”

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