

Failure to Conduct Adequate Pre-Suit Investigation of Infringement Can Lead to Award of Attorneys' Fees Even if Infringement Was Not Decided

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ThermoLife International LLC v. GNC Corporation, Nos. 2018-1657 and 2018-1666 (Fed. Cir. May 1, 2019)

The exclusive licensee of four patents relating to the ingestion of amino acids to enhance vascular function brought infringement suits against numerous accused infringers. The district court held all asserted claims *invalid* and ended the case on the merits. The district court later made an exceptional-case determination and granted the accused infringers' motion for attorneys' fees under 35 U.S.C. § 285 for failure to adequately investigate the issue of *infringement*. The Federal Circuit affirmed.

On appeal, the Federal Circuit found no abuse of discretion in the district court's determination that the patent licensee failed to conduct adequate pre-suit investigation. In particular, the Federal Circuit agreed with the district court that review of the accused product's labels and simple testing could have revealed to the patent licensee that products in the litigation did not infringe the asserted patents.

The Federal Circuit further explained that early notice of an "exceptional case" claim was not required just because the patent licensee and alleged infringers agreed to prioritize the issue of validity over infringement. The district court also did not abuse its discretion by resting its exceptional-case determination on the issue of infringement, even though infringement was not fully litigated before the judgment on the merits. The Federal Circuit acknowledged that the patent licensee had filed and settled many infringement suits for "seemingly small amounts," and concluded that this conduct, combined with the evidence of inadequate pre-suit investigation, supported an exceptional-case determination under § 285.

[A copy of the opinion can be found here.](#)

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