

manatt

October 7, 2008

ADVERTISING LAW

NEWSLETTER OF THE ADVERTISING, MARKETING & MEDIA PRACTICE GROUP OF MANATT, PHELPS & PHILLIPS, LLP

IN THIS ISSUE

- **FTC Goes After Fake Cancer Cures**
- **Senate Panel Scrutinizes Medical Device Ads**
- **Jones Day Sues Real Estate Site Over Home Purchase Posts**
- **Adidas Trademark Award Slashed by 80 Percent**

FTC Goes After Fake Cancer Cures

The Federal Trade Commission has charged five companies and settled complaints with six others over bogus claims for cancer cures.

In an announcement on September 18, Lydia Parnes, director of the FTC's Bureau of Consumer Protection, said the agency is introducing a campaign to warn consumers about fake claims for cancer cures. The campaign is being conducted in cooperation with the Food and Drug Administration and Canadian regulators.

Parnes said the agency has sent out more than 100 warning letters. In response, many marketers stopped making or revised the complained-of claims, she said. The six companies that settled the FTC complaints for false and deceptive advertising paid restitution ranging from \$9,000 to \$250,000, Parnes said, with the other five complaints to be heard by administrative law judges. Those cases are Omega Supply (San Diego, Calif.), Native Essence Herb Company (El Prado, N.M.), Daniel Chapter One (Portsmouth, R.I.), Gemtronics, Inc. (Franklin, N.C.), and Herbs for Cancer (Surprise, Ariz.).

FDA official Douglas Stearn said his agency is worried that by opting for such products, consumers may miss out on effective treatments for cancer. Some of the products could also have adverse interactions with other drugs, he said.

UPCOMING EVENTS

October 21, 2008

ACI: Sports Sponsorship Advertising and IP

Topic:

"When Retired Players Sue: From Coscarart v. Major League Baseball to Parrish v. NFLPA"

Ronald S. Katz

"Morality and an Agreement's Mortality--Taking Appropriate Measures to Avoid the Termination of an Endorsement Deal"

Linda Goldstein

The Carlton Hotel
New York, NY

[For more information](#)

...

October 22, 2008

D.C. Bar CLE Seminar

Topic:

"Copyright Law and Litigation"

Kenneth M. Kaufman

D.C. Bar Conference Center
Washington, D.C.

[For more information](#)

...

November 20-21, 2008

**PMA's 30th Annual
Promotion Marketing Law
Conference**

Topic:

"Navigating the Potholes: The Evolving Landscape for

[back to top](#)

Senate Panel Scrutinizes Medical Device Ads

On September 17, the Senate Special Committee on Aging held a hearing on direct-to-consumer advertising of medical devices.

In a statement, the committee's chairman, Herb Kohl (D-Wisc.), said the hearing was prompted by concerns that the Food and Drug Administration might have to increase its scrutiny of DTC marketing of medical devices, similar to what it has done with drug ads.

In the spring, the U.S. Supreme Court issued a decision, *Riegel v. Medtronic*, in which it determined that state-law-based lawsuits alleging injuries by certain medical devices were barred, on the grounds that they are preempted by federal regulations. Bills to overturn *Riegel* are pending in both houses of Congress.

Just a small percentage – about \$193 million last year – of DTC medical advertising is for medical devices, according to TNS Media Intelligence. That amount, however, was close to double the amount spent in 2005.

As DTC marketing of medical devices grows, some lawmakers, medical groups, and consumer health advocates are starting to argue that such ads should be restricted. They say the ads can mislead patients, and can have a greater impact on a patient than a drug, because devices can remain inside the body for years and often require a surgical procedure to implant and/or remove.

David Nexon of the Advanced Medical Technology Association, a trade group representing medical device makers, says the existing FDA regulations for DTC advertising are sufficient. He points out that an ad for a medical device might encourage a patient to ask a doctor about it, but unlike pills, the process of getting a medical device generally involves a more in-depth risk/benefit analysis, since surgery is typically involved.

[back to top](#)

Jones Day Sues Real Estate Site Over Home Purchase Posts

The law firm, Jones Day, has filed a complaint alleging that

Sweepstakes, Games & Contests"

[Linda Goldstein](#)

Topic:

"Consumer Product Safety: Hear from the Regulators How the New Laws Affect Your Promotion"

[Kerrie L. Campbell](#)

Marriott Downtown Magnificent Mile
Chicago, IL

[For more information](#)

...

December 4-5, 2008 Film & Television Law

Topic:

"Product and Music Placement, Branded Entertainment: Issues and Litigation"

[Linda Goldstein](#)

Topic:

"The Value of Fame: Understanding the Right of Publicity"

[Mark S. Lee](#)

Century Plaza Hyatt Regency
Los Angeles, CA

[For more information](#)

NEWSLETTER EDITORS

[Jeffrey S. Edelstein](#)

Partner

jedelstein@manatt.com
212.790.4533

[Linda A. Goldstein](#)

Partner

lgoldstein@manatt.com
212.790.4544

OUR PRACTICE

Whether you're a multi-national corporation, an ad agency, a broadcast or cable company, an e-commerce business, or a retailer with Internet-driven promotional strategies, you want a law firm that understands ... [more](#)

[Practice Group Overview](#)

BlockShopper.com violated its trademark by mentioning the law firm's name in posts about homes bought by two of its lawyers and linking to the firm's Web site.

The complaint, which was filed last month in federal court in Chicago, centers on two stories on the BlockShopper.com Web site about condominiums purchased by Dan Malone Jr. and Jacob Tiedt. "Use of the Jones Day marks, the link to the Jones Day Web site and the use of proprietary information from the Jones Day Web site creates the false impression that it is affiliated with and/or approves, sponsors or endorses the business conducted by defendants," the complaint states.

BlockShopper is a two-year-old site that uses information gathered from public records to post articles about the real estate market in Chicago, South Florida, St. Louis, and Nevada.

Jones Day objected to the articles about its two lawyers' purchases, and demanded that they be taken down. BlockShopper says it has temporarily removed the articles while the lawsuit is pending.

[back to top](#)

Adidas Trademark Award Slashed by 80 Percent

A \$305 million award against Collective Brands Inc. for violating the trademarked three-stripe logo owned by Adidas AG has been cut by close to 80 percent.

A federal court in Oregon reduced the amount awarded to the footwear maker to \$64.4 million. The court found that portions of the judgment the jury awarded in May were improper and didn't follow the law. However, the court rejected a request by Collective Brands for a new trial, upholding the jury verdict that the retailer, which owns the Payless ShoeSource and Stride Rite chains, violated Adidas' trademark by selling shoes with two or four stripes.

The suit originated in 2001, when Adidas sued Payless ShoeSource Inc. Last year, Payless changed its name to Collective Brands.

Collective Brands CEO Matt Rubel said in a statement that although he was pleased the judge had reduced the award to a more "reasonable" amount, the company still plans to appeal.

[Practice Group Members](#)

INFO & RESOURCES

- [. Subscribe](#)
- [. Unsubscribe](#)
- [. Sarbanes-Oxley Act](#)
- [. Newsletter Disclaimer](#)
- [. Technical Support](#)
- [. Manatt.com](#)

In its decision, the court upheld the \$30.6 million award representing royalties Payless would have had to pay for a license from Adidas to use the mark. It slashed profits Payless had to disgorge from \$137 million to \$19.7 million, finding Adidas' accounting of those profits to be incorrect. It also reduced punitive damages from \$137 million to \$15 million. "[T]here was no physical harm or disregard for a person's health or safety, there were no lost sales, Adidas suffered no economic harm that jeopardized its business in any way, and, even though Payless acted willfully, it did not do so for the entire period addressed here," the court wrote.

In June, Collective Brands settled a trademark lawsuit filed by K-Swiss Inc. for \$30 million. In July, a separate court issued a preliminary injunction requiring the company to post a disclaimer that American Eagle by Payless-branded shoes and handbags were not affiliated with American Eagle Outfitters, which claimed Collective Brands had used its trademark to market the items.

[back to top](#)