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

## IN THIS ISSUE



# Second Circuit Snuffs Out 'Light' Cigarette Class Action

In a key win for tobacco companies, the U.S. Court of Appeals for the Second Circuit has "decertified" a class action alleging harm resulting from deceptive claims about the safety of light cigarettes.

In *McLaughlin v. American Tobacco Co.*, the Second Circuit reversed Eastern District Judge Jack Weinstein's 540-page opinion which certified the class two years ago, finding it "suffers from an insurmountable deficit of collective legal or factual questions."

The complaint alleges violations of the Racketeer Influenced and Corrupt Organizations Act (RICO). It claims tobacco companies marketed light cigarettes as a lower-risk substitute for regular cigarettes, although internal documents demonstrated the companies were aware that the risks were virtually the same. According to lawyers, the class could be as large as 60 million people.

For a RICO class action, "each plaintiff must prove reliance, injury and damages," the court observed. The lower court had found that the plaintiffs could prove all three on a class-wide basis. The Second Circuit found, to the contrary, that none of the elements could be satisfied.

## 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

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**October 22, 2008**
**D.C. Bar CLE Seminar**

**Topic:**
"Copyright Law and Litigation"

**Kenneth M. Kaufman**

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

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**November 20-21, 2008**
**PMA's 30th Annual Promotion Marketing Law Conference**

**Topic:**
"Navigating the Potholes: The Evolving Landscape for

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The Second Circuit agreed that the tobacco companies knew that light cigarettes had a health impact similar to regular cigarettes. "Most smokers who smoke Lights obtain just as much tar and nicotine as they would if they smoked full-flavored cigarettes, principally by 'compensating' – that is, either by inhaling more smoke per cigarette (e.g., by covering ventilation holes, drawing more deeply with each puff, etc.) or by buying more," habits that cannot be tested by the Federal Trade Commission's machine for measuring tar and nicotine content. "Cigarette manufacturers have apparently been aware of this phenomenon for some time," the court said.

Judge Weinstein found that the plaintiffs could prove on a class-wide basis that they relied on the companies' misrepresentation concerning the relative safety of light cigarettes. The Second Circuit disagreed, ruling that "reliance on the misrepresentation cannot be the subject of general proof."

Smokers could have purchased light cigarettes for reasons other than health, such as taste preference or an expression of personal style, the court reasoned. Accordingly, each light cigarette smoker would have to prove whether he or she relied completely, in part, or not at all on deceptive marketing claims.

The court also ruled that the issue of loss causation "cannot be resolved by way of generalized proof." It reasoned that "[g]iven the lack of an appreciable drop in the demand or price of light cigarettes after the truth about Lights was revealed . . . plaintiffs' argument that defendants' misrepresentation caused the market to shift and the price of Lights to be inflated fails as a matter of law."

Finally, the court said that "out-of-pocket losses cannot be shown by common evidence because they constitute an inherently individual inquiry: individual smokers have incurred different losses depending on what they would have opted to do, but for defendants' misrepresentation." In so ruling, the court rejected the lower court's finding that plaintiffs could prove collective damages on a class-wide basis and could individually claim shares in a damages fund.

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## Case Challenges Apple's Millions of Colors Claim

A lawsuit seeking class-action status claims that Apple is deceiving consumers by touting its new 20-inch iMac as

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

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**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"

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. Practice Group Members

capable of displaying "millions of colors at all resolutions."

In fact, the complaint states that the monitors are able to display just 262,144 colors.

In contrast, the current 24-inch model and previous generation 20-inch model both display 16,777,216 colors on 8-bit, in-plane switching (IPS) screens, the lawsuit states. According to the complaint, Apple describes the display of both the 24-inch and 20-inch iMacs as though they were interchangeable, even though the new 20-inch iMac display offers 98% fewer colors.

The lawsuit claims further that the technology used in the different monitors is completely different. The new 20-inch iMac uses a 6-bit twisted nematic film (TN) LCD screen, which the complaint claims is the "least expensive of its type," providing a narrower viewing angle than the display of the 24-inch model, less color depth, less color accuracy, and greater susceptibility to washout.

The week before the current lawsuit was filed, Apple settled a similar lawsuit by two professional photographers contending that the display on the company's Intel-based notebooks provides only the "illusion of millions of colors through the use of a software technique referred to as 'dithering,' which causes nearby pixels on the display to use slightly varying shades of colors that trick the human eye into perceiving the desired color even though it is not truly that color." The terms of the settlement were confidential.

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## Woody Allen Sees No Humor In American Apparel Ad

American Apparel has apologized to Woody Allen after he sued the clothing company for $10 million over its unauthorized use of a photo of the filmmaker dressed in Hasidic clothing on billboard ads.

"We deeply admire Woody Allen as a filmmaker and an inspiring social and political satirist," the company stated in a press release. "We sincerely regret offending him in any way."

The images of Allen appeared in two billboard ads in New York City and Los Angeles that went up last year. In his complaint, the 72-year-old Allen stated that American Apparel never contacted him about displaying his likeness in ads, and he never gave his consent.

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The photo is from Allen's 1977 movie, *Annie Hall*. A tagline in Hebrew accompanying the photo translates to "The Holy Rebbe."

In its statement, American Apparel also claimed that it "had no intention of selling garments through the use of Mr. Allen's image," but meant the billboards "strictly as a social parody."

When asked for comment when the ads first appeared last year, American Apparel spokesperson Alexandra Spunt told the *Forward*, "Woody Allen is our spiritual leader."

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## Grocery Chain Blames Malware for Data Breach

Software that was surreptitiously installed on its computer servers caused a security breach involving up to 4.2 million credit and debit cards, Hannaford Bros. Co. has said.

The grocery chain confirmed that it informed regulators in Massachusetts that the "malware"—or malicious software—enabled the data breach, which has been connected to at least 1,800 cases of fraud. Unauthorized charges have appeared in places as far flung as Mexico, Italy, and Bulgaria.

A spokesperson said Hannaford does not know how the malware ended up on practically all of its 271 stores' servers.

The security breakdown has caused alarm in the industry because it appears to be the first time a significant theft of card data has occurred while the information was being transferred over the Internet. Typically, security breaches involve information stored in databases.

According to Hannaford, the hack, which happened sometime between December 7, 2007, and March 10, 2008, enabled thieves to steal card numbers as shoppers swiped their credit and debit cards at machines at checkout counters and the data was sent to banks for approval.

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## Unclaimed Money Site Sued For Fraud

Pennsylvania Attorney General Tom Corbett has sued a Web site claiming to help people find money and property they didn't know they had.

When investigators typed the names of cartoon characters like Batman, Spiderman, and Wile E. Coyote into http://www.unclaimedmoney.us.com, the Web site informed

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them that they had unclaimed money sitting in a number of places, state prosecutors said in a press release announcing the lawsuit against the site's owner. But the free search was basically useless, and searchers had to pay $24.95 for a detailed report.

In the lawsuit, Corbett's office charges the site's owner with misleading consumers and failing to comply with reporting requirements, in violation of Pennsylvania consumer protection laws. The defendants named in the complaint include the Web site, Areg Sakanyan, and related business entities Modeling Group, Unclaimed Money Database, and Unclaimed Money.

Corbett said consumers looking for unclaimed money can visit http://www.missingmoney.com, a free Web site that compiles information from many states' unclaimed property administrators.

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## U.K. Businessman Gets Record Award for Online Libel

In one of the first cases in the U.K. arising from Internet harassment by a competitor, real estate developer Peter Walls has won close to $200,000 for defamation by people using a Web site created by Walls' business rival.

According to court testimony, Peter Walls, 55, his family, and 30 staff members were subjected to "vicious and unpleasant anonymous, defamatory attacks."

The two-year crusade began in April 2004 when Walls' rival John Finn launched a Web site called "Dad's Place" through his company, Pallion Housing Ltd. Others then used the site, its anonymous forums, and newsletters to post vicious lies about Walls, including that he was a pedophile, corrupt, employed hitmen, and sexually harassed and bullied staff. The movements of Walls and his family were also tracked online every day. Finn also made extensive efforts to make the site known, according to court testimony.

Walls told the court that he believed Finn, a housing landlord, started the campaign to blackmail Walls to pay a higher price for houses Finn was selling.

In addition to the 100,000 pounds ($198,700) awarded on April 3, 2008,
Walls' company, Gentoo Group Ltd., and several other unnamed people had already received close to 20,000 pounds

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in damages stemming from the harassment campaign.

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