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## **Trade Dress And Dilution** *After Traffix Devices And Victoria's Secret*

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## **Trade Dress And Dilution** *After TrafFix Devices And Victoria's Secret*

The Supreme Court has recently rendered two important decisions that place limits on the scope of claims that may be asserted under the trademark laws. These decisions do not create new limitations on trademark rights but rather remind practitioners that there always have been and will continue to be limitations to the scope of claims that can be asserted under the trademark laws.

### **I. TRADEMARK DILUTION**

“Dilution” is a diminishment of the distinctive qualities of a party’s mark caused by a defendant’s misuse of the mark. Dilution typically applies in cases where the Plaintiff has a famous mark, but defendant’s goods or services are so unrelated to the trademark owner’s goods and services that conventional trademark infringement (which requires proof of a likelihood of confusion)<sup>1</sup> would not apply. This is regarded as a “blurring” of the trademark. Dilution can also arise in factual contexts where there is a “tarnishment” of the trademark.

Dilution became a part of the federal trademark law upon enactment of the Federal Trademark Dilution Act, which took effect in January, 1996. Dilution is defined in the Lanham Act, §45, 15 U.S.C. §1127 as follows:

"the lessening of the capacity of a famous mark to identify and distinguish goods or services, regardless of the presence or absence of  
(1) competition between the owner of the famous mark and other parties, or  
(2) likelihood of confusion, mistake, or deception."

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<sup>1</sup> In the Second Circuit, eight factors are commonly weighed to determine whether a likelihood of confusion exists. These factors are:

1. The strength of plaintiffs' trademark;
2. The degree of similarity between plaintiff's and defendant's trademarks;
3. The proximity of the goods or services;
4. The likelihood that the defendant will bridge the gap between the parties goods or services;
5. Any evidence of actual confusion;
6. The defendant's intent in adopting its mark;
7. The quality of the defendant's goods or services; and
8. The sophistication or knowledge of the typical customer for the goods or services.

Polaroid Corp. v. Polaroid Electronics Corp., 287 F.2d 492, 495 (2d Cir. 1961), cert. denied, 368 U.S. 820, 82 S.Ct. 36, 7 L.Ed.2d 25 (1961).

The Lanham Act, §43(c)(1), 15 U.S.C. 1125(c)(1), defines an action for dilution as follows:

(c)(1) The owner of a famous mark shall be entitled, subject to the principles of equity and upon such terms as the court deems reasonable, to any injunction against another person's commercial use in commerce of a mark or trade name, if such use begins after the mark has become famous and causes dilution of the distinctive quality of the famous mark, and to obtain such other relief as is provided in this subsection.

**A. *Mosley v. V. Secret Catalogue, Inc.***

The United States Supreme Court issued a decision interpreting the Federal Trademark Dilution Act in *Victor Moseley and Cathy Moseley, dba Victor's Little Secret v. V Secret Catalogue, Inc.*, No. 01-1015 (U.S.). The Court held that an action for dilution requires proof of actual dilution.

The case arose from the Moseley's operation of an adult novelty store named "Victor's Secret" in Elizabethtown, Kentucky. Victoria's Secret requested the Moseleys to terminate use of that name. The Moseleys changed the store's name to "Victor's Little Secret", but Victoria's Secret continued its objection to the name. Victoria's Secret filed suit in U.S. District Court against the Moseleys and asserted claims of trademark infringement, unfair competition and trademark dilution.

The District Court granted summary judgment for the Moseleys on the claims of trademark infringement and unfair competition on the grounds that there was no likelihood of confusion. However, it granted summary judgment for Victoria's Secret on its claim of trademark dilution under the Federal Trademark Dilution Act. The Moseleys appealed the dilution ruling, and the Sixth Circuit affirmed the judgment. The U.S. Supreme Court reversed their decisions.

The Supreme Court's opinion focuses on the language of the Federal Trademark Dilution Act, which provides that the owner of a famous trademark is entitled to injunctive relief against another party's use of a trademark if that use "causes dilution of the distinctive quality". 15 U.S.C. § 1125(c)(1).

The Court concluded that the Act "unambiguously requires a showing of actual dilution, rather than a likelihood of dilution." Accordingly, to prove dilution, a trademark owner must submit evidence demonstrating an *actual* lessening of the trademark's capacity to identify and distinguish goods or services, not merely the *likelihood* of such lessening.

The Court found that there was a "complete absence of evidence of any lessening of the capacity of the Victoria's Secret mark to identify and distinguish goods or services sold

in Victoria's Secret stores or advertised in its catalogs."<sup>2</sup> The Supreme Court then reversed the judgment and remanded the case.

## **B. Proof of Actual Dilution after *Victoria's Secret***

The *Victoria's Secret* case teaches that a trademark owner cannot prove dilution (in the use of *non-identical* marks) by relying on evidence that consumers mentally associate the trademarks of the owner and the accused infringer. "[S]uch mental association will not necessarily reduce the capacity of the famous mark to identify the goods of its owner," the Court explained. In the case of non-identical marks, the trademark owner must show that the diluting trademark causes consumers to change their impression of the owner's trademark.

The Court's language suggests that the standard may be different when the case involves identical trademarks. Specifically, the Court stated that "*at least where the marks at issue are not identical*, the mere fact that consumers mentally associate the junior user's mark with a famous mark is not sufficient to establish actionable dilution" (emphasis added). The implication is that use of a trademark that is identical to a famous trademark can give rise to dilution if it is shown that consumers mentally associate those trademarks.

The Court did not specify how much evidence was required to demonstrate actual dilution. However, the court's language suggests that the following types of evidence will be useful to establish dilution:

- Evidence that a consumer mentally associates the infringer's mark with the distinctive mark, for example:
  - direct testimony
  - survey evidence

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<sup>2</sup> There was evidence that a consumer had received a Victor's Secret advertisement, and that the consumer was offended by the ad and thought of the similarity to the name "Victoria's Secret" (so much so that he forwarded the ad to Victoria Secret's attention). However, there was no evidence that the consumer had changed his perception of Victoria's Secret; the consumer's offense was directed entirely at Victor's Secret, and there was no evidence of any impact on the Victoria's Secret trademark. There was also an absence of any expert opinion "concerning the impact, if any, [the Moseleys'] use of the name 'Victor's Little Secret on' the value of the Victoria's Secret trademark.

- Evidence of a change in consumer perception of the mark, for example:
  - Survey of consumers whether the infringer’s use lessens the capacity of a famous mark to identify and distinguish goods or services;
  - Survey that tests the “cachet” associated with a famous mark by testing consumers, willingness to pay a premium for the status value of the mark (such a survey would be most helpful to prove actual dilution if “before” and “after” surveys can be obtained, and the surveys show a diminishment of consumer perception of cachet);
  - Marketing expert opinion whether the infringer’s use reduces the identity and value of the mark;
  - Expert opinion as to whether additional unauthorized uses will enter the market based on incursions by the infringer;
  - Direct consumer testimony as to whether the infringer’s use lessens the capacity of a famous mark to identify and distinguish goods or services; and
  - Circumstantial evidence, e.g. loss of sales, news accounts etc.

The Court explained that its holding does not require a trademark owner to prove actual loss. Although a trademark owner must demonstrate actual dilution, it does not also need to demonstrate that the actual dilution results in actual loss of sales or profits. In other words, the owner must prove that the other party’s use of a trademark causes consumers to change their impression of the owner’s trademark, but the owner need not prove the adverse consequences of that changed impression.

### C. Tarnishment in light of *Victoria’s Secret*

Although the issue of whether tarnishment gave rise to a dilution claim was not directly before the Court, the court strongly suggested that tarnishment is not actionable under the Federal Trademark Dilution Act.

In Part IV of the opinion, the Court discusses the concept of “tarnishment” as a form of dilution. The Court notes that the lower courts both concluded that part of the dilution to the Victoria’s Secret mark was caused by tarnishment. However, the Court questions whether dilution by tarnishment “is actually embraced by the statutory text” and states:

[T]he contrast between the state statutes which expressly refer to both “injury to business reputation and to “dilution of the distinctive quality of a trade name or trademark,” and the federal statute which refers only to the latter, arguably supports a narrower reading of the [Federal Trademark Dilution Act].<sup>3</sup>

Although the Court did not expressly rule on the issue of tarnishment, the language of the opinion seriously undermines the concept of tarnishment as a form of dilution under federal trademark law.

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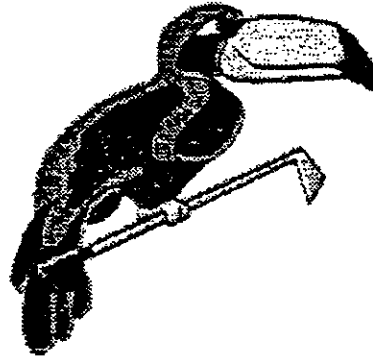
<sup>3</sup> This is consistent with the questioning during oral argument in which several justices expressed doubts as to whether dilution under the Federal Trademark Dilution Act encompasses tarnishment. (Oral Argument pp. 3-6, 44-46).

**D. Decided Cases Following *Victoria's Secret***

*Kellogg Co. v. Toucan Golf Inc.*, 67 USPQ2d 1481 (6<sup>th</sup> Cir. 2003) (affirming judgment of no dilution of “Toucan Sam” logo by Defendants’ Golfbird logo.).



*Toucan Sam*



*Golfbird*

*Nitro Leisure Products L.L.C. v. Acushnet Co.*, 67 USPQ2d 1814 (Fed. Cir. 2003) (Acushnet’s motion for preliminary injunction enjoining Nitro Leisure Products from refurbishing and reselling Acushnet golf balls denied; the Court of Appeals affirmed the denial as there is neither trademark infringement nor dilution.)

*Playtex Products Inc. v. Georgia-Pacific Inc.*, 67 USPQ2d 1923 (SDNY 2003) (plaintiff’s “Wet Ones” mark for premoistened wipes is not diluted by defendants’ “Quilted Northern Moist Ones” mark for similar product).

*Pinehurst Inc. v. Wick*, 66 USPQ2d 1610 (MDNC 2003) (Cybersquatter diluted “Pinehurst” trademark for golf resort by registration and use of “pinehurstresort.com” and “pinehurstresorts.com” domain names.)

“Because of the unique nature of domain names in electronic commerce and the resulting economic harm when marks are registered as domain names by cyberpirates, Defendants’ use of Plaintiff’s service marks in their Pinehurst domain names constitutes dilution. . . Defendants have diluted Plaintiff’s marks due to the identical or virtually identical character of their domain names to Plaintiff’s marks.”

## II. TRADE DRESS AND FUNCTIONALITY

The defense of "functionality" has long been recognized as a defense to a trade dress infringement claim. The defense of functionality reflects the public policy judgment that free competition in goods and services will be encouraged except where an article is protected by patent. Where an article is not patented, it can be freely copied and sold, and the law of unfair competition cannot be used as a substitute for non-existent patent rights. The Supreme Court has from time to time taken up cases where the lower courts have granted protection to product designs under unfair competition principles. The Court, in *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S.973, 84 S.Ct. 1131 (1965), regarding a claim of state law unfair competition from selling copies of a popular pole lamps of the 1960s, stated that:

An unpatentable article, like an article on which the patent has expired, is in the public domain and may be made and sold by whoever chooses to do so. What Sears did was to copy Stiffel's design and to sell lamps almost identical to those sold by Stiffel. This it had every right to do under the federal patent laws. That Stiffel originated the pole lamp and made it popular is immaterial. "Sharing in the goodwill of an article unprotected by patent or trade-mark is the exercise of a right possessed by all -- and in the free exercise of which the consuming public is deeply interested." *Kellogg Co. v. National Biscuit Co.*, *supra*, 305 U.S., at 122. To allow a State by use of its law of unfair competition to prevent the copying of an article which represents too slight an advance to be patented would be to permit the State to block off from the public something which federal law has said belongs to the public. The result would be that while federal law grants only 14 or 17 years' protection to genuine inventions, see 35 U. S. C. §§ 154, 173, States could allow perpetual protection to articles too lacking in novelty to merit any patent at all under federal constitutional standards. This would be too great an encroachment on the federal patent system to be tolerated.

Sears has been held liable here for unfair competition because of a finding of likelihood of confusion based only on the fact that Sears' lamp was copied from Stiffel's unpatented lamp and that consequently the two looked exactly alike. Of course there could be "confusion" as to who had manufactured these nearly identical articles. But mere inability of the public to tell two identical articles apart is not enough to support an injunction against copying or an award of damages for copying that which the federal patent laws permit to be copied. Doubtless a State may, in appropriate circumstances, require that goods, whether patented or unpatented, be labeled or that other precautionary steps be taken to prevent customers from being misled as to the source, just as it may protect businesses in the use of their trademarks, labels, or distinctive dress in the packaging of goods so as to prevent others, by imitating such markings, from misleading purchasers as to the source of the goods. But because of the federal patent laws a State may not, when the article is unpatented and uncopyrighted, prohibit the copying of the article itself or award damages for such copying. Cf. *G. Ricordi & Co. v. Haendler*, 194 F.2d 914, 916 (C. A. 2d Cir. 1952). The judgment below did both and in so doing gave Stiffel the

equivalent of a patent monopoly on its unpatented lamp. That was error, and Sears is entitled to a judgment in its favor.

A. *Traffix Devices, Inc. v. Marketing Displays, Inc.*

The public policy favoring competition was recently reconfirmed by the Supreme Court in its decision in *Traffix Devices, Inc. v. Marketing Displays, Inc.*, 121 S.Ct. 1255, 532 U.S. 23, 149 L.Ed.2d 164 (2001). The *Traffix Devices* case involved a claim that the design of an outdoor temporary road sign using dual springs was protectable trade dress, and the allegation that the dual spring trade dress was infringed by the defendant who sold a product which was copied from the plaintiff's product. The Supreme Court clarified the standards for determining functionality, stating:

“ [i]n general terms, a product feature is functional,’ and cannot serve as a trademark, ‘if it is essential to the use or purpose of the article or if it affects the cost or quality of the article.’ ” *Qualitex*, 514 U. S., at 165 (quoting *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U. S. 844, 850, n. 10 (1982)).

The Court explained that a second test – e.g. a functional feature is one the “exclusive use of [which] would put competitors at a significant non-reputation-related disadvantage” is incorrect as a comprehensive definition of functionality. The court concluded that the “the dual-spring design provides a unique and useful mechanism to resist the force of the wind. Functionality having been established, whether MDI’s dual-spring design has acquired secondary meaning need not be considered.”

The court further admonished that:

“There is no need, furthermore, to engage, as did the Court of Appeals, in speculation about other design possibilities, such as using three or four springs which might serve the same purpose. 200 F. 3d, at 940. Here, the functionality of the spring design means that competitors need not explore whether other spring juxtapositions might be used. The dual-spring design is not an arbitrary flourish in the configuration of MDI’s product; it is the reason the device works. Other designs need not be attempted.

Because the dual-spring design is functional, it is unnecessary for competitors to explore designs to hide the springs, say by using a box or framework to cover them, as suggested by the Court of Appeals. *Ibid.* The dual-spring design assures the user the device will work. If buyers are assured the product serves its purpose by seeing the operative mechanism that in itself serves an important market need. It would be at cross-purposes to those objectives, and something of a paradox, were we to require the manufacturer to conceal the very item the user seeks. . . .

The Lanham Act does not exist to reward manufacturers for their innovation in creating a particular device; that is the purpose of the patent law and its period of exclusivity. The Lanham Act, furthermore, does not protect trade dress in a



functional design simply because an investment has been made to encourage the public to associate a particular functional feature with a single manufacturer or seller. The Court of Appeals erred in viewing MDI as possessing the right to exclude competitors from using a design identical to MDI's and to require those competitors to adopt a different design simply to avoid copying it. MDI cannot gain the exclusive right to produce sign stands using the dual-spring design by asserting that consumers associate it with the look of the invention itself. Whether a utility patent has expired or there has been no utility patent at all, a product design which has a particular appearance may be functional because it is "essential to the use or purpose of the article" or "affects the cost or quality of the article." *Inwood*, 456 U. S., at 850, n. 10.

Under *TrafFix Devices*, the finder of fact should inquire whether the feature in question has a functional purpose. If so, that is the end of the discussion. If the feature is functional, it cannot act as a trademark. The existence of hypothetical alternative designs does not alter the fact that the product features in question are functional.

This strict standard is at odds with past practice in the U.S. Patent and Trademark Office, in which the Trademark Manual of Examining Procedure directed the Examining Attorneys to focus on the availability of alternative design features in deciding whether a claim to trademark registration in the configuration of a product design could be granted. Furthermore, the Examining Attorneys were not given much training, tools or resources to allow them to make judgments about functionality. These problems have been improved to a degree by the implementation of a much stricter review of functional designs in the wake of the *TrafFix Devices* decision. The Trademark Manual of Examining Procedure §1202.02 (May 2003) as amended obliges the Examiners to focus on functionality, and not on the possibility of alternative designs. T.M.E.P. §1202.02 (a)(v)(B) (p. 1200-42 to 1200-44). Nevertheless, the Examining Attorneys will continue to be at a disadvantage in *ex parte* trademark prosecution where an applicant has more knowledge of the product and the competitive marketplace than the Examining Attorney.

There are innumerable federal trademark registrations directed at product configurations which have been granted. Many of these registrations should never have been granted and will be found invalid for functionality if litigated in the future. The trend in the case law since the *TrafFix Devices* case is to recognize functional designs for what they are and not to let manufacturers impede free competition by asserting trade dress claims.

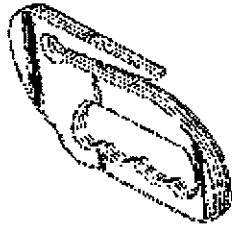
In cases involving unregistered trade dress, the Lanham Act as recently amended specifies that "the person who asserts trade dress protection has the burden of proving that the matter sought to be protected is not functional." 15 U.S.C. §1125(a)(3). In contrast, if the trade dress is the subject of a trademark registration, then the burden of proof is on the accused infringer to prove functionality. Some courts have applied a "bursting bubble" or "piercing the presumption" analysis in determining the value of a trademark registration, See, e.g. *Tie Tech, Inc. v. Kinedyne Corp.*, 296 F.3d 778, 785 (9<sup>th</sup> Cir. 2002) where the court concluded that the existence of a registration shifts the burden of production to the party

challenging validity of a trademark, but that once the party has come forward with evidence of functionality, then the registration loses any evidentiary value. *Id.* at 783.

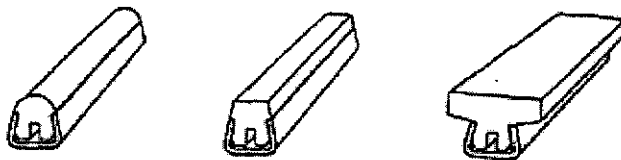
**B. Decided Cases Following *TrafFix Devices***

A sampling of cases following *TrafFix Devices* is as follows.

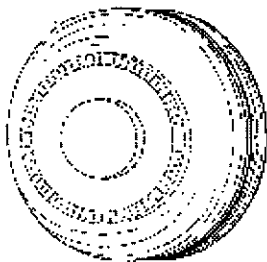
*Tie Tech, Inc. v. Kinedyne Corp.*, 296 F.3d 778, 785 (9<sup>th</sup> Cir. 2002) where the court affirmed the District Court's grant of summary judgment that the registered trademark in the appearance of a webbing (strap) cutter product was functional.



*Valu Engineering, Inc. v. Rexnord Corp.*, 278 F.3d 1268 (Fed. Cir. 2002) where the court determined that opposed trademark applications in the appearance of conveyor guide rails were functional. The three alleged trademarks had the following appearance:



*Eco Manufacturing LLC v. Honeywell International Inc.*, Case No. 1:03-cv-0170-DFH (S.D. Ind. June 20, 2003) (not for publication slip opinion), where the court denied Honeywell's motion for preliminary injunction asserting infringement of trade dress in its well-known registered trademark in a round thermostat design.

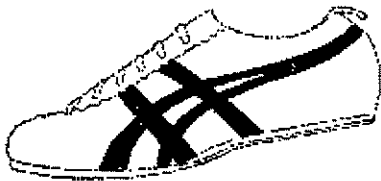


The court concluded that the design was functional, and moreover, that Honeywell's trade dress registration had been procured by fraud on the U.S. Patent and Trademark Office.

*Eppendorf-Netheler-Hinz GmbH v. Ritter GmbH*, 62 USPQ2d 1534 (5<sup>th</sup> Cir. 2002), where the court reversed a judgment of infringement involving claimed trademark rights in the

trade dress of disposable pipettes having certain features (flange on top of tip; fins connecting flange to body; plunger head; plunger; length of tips; 8 sizes of tips; color scheme; angle of the stump of tips). The court, following *TrafFix Devices*, concluded that the features each served a functional purpose and therefore was not protectable, even though alternative designs were possible.

*ASICS Corp. v. Target Corp.*, 67 USPQ2d 1835 (D.C. Minn. 2003), where the court denied a preliminary injunction seeking to enjoin use of a stripe on the side of a shoe based on infringement of the ASICS registered trademark in trade dress having the following appearance:



ASICS had obtained a patent in which the stripes were illustrated in the patent figures, described, and were even defined as elements in the claims of the patent. In addition, ASICS had issued marketing literature explaining the functional origins of these stripes as follows:

The "OLYMPIC LINE" [ASICS' shoe] had two parallel lines on the outer side of each shoe running from the instep to the arch; and intersecting those was a long "Y" shaped line starting from the back of the shoe, going over the little toe to the sole. This design is still used on ASICS shoes today. These lines were not just for decoration. They were there to keep the leather around the toes from going slack and losing its shape; and to protect the Achille's [sic] tendon area.

The court concluded that the stripe design was functional and denied injunctive relief.

*Shire US Inc. v. Barr Laboratories, Inc.*, 66 USPQ2d 1837 (3<sup>rd</sup> Cir. 2003), where the court denied a preliminary injunction against a generic drug maker's generic medication that had a similar color and appearance to a prior manufacturer's ADHD medication. .

### **C. International Treatment of Functionality**

The issues faced in the above cases also arise in proceedings in other countries, often to the same result. A sampling follows.

*Lego Canada Inc. v. Ritvik Holdings Inc.* (Federal Court of Canada 2003) in which the court held that the shape of the LEGO block was functional, and dismissed claims of infringement against the manufacturer of MEGA BLOKS.

*Mega Bloks Inc. v. Lego System A/S* (Zurich Commercial Court 2003) in which the court held that the shape of the LEGO block was functional, and cancelled Lego's form mark registrations.

*Société des Produits Nestlé SA v. Master Foods AS* (Danish Supreme Court 2003 (Case 159/2001) in which the court held that Nestlé's tube shaped packaging for Smarties candies was functional, and ordered cancellation of Nestlé's registration for this shape.

#### **D. Alternatives To Trade Dress Claims**

The problem faced by designers of successful functional products is substantial. Trade dress is not going to provide a basis for an infringement claim. It is not enough to simply say that there is a unique arrangement of elements that can be protected. As was stated by the Ninth Circuit: "where the whole is nothing but an assemblage of functional parts, and where even the arrangement and combination of the parts is designed to result in superior performance, it is semantic trickery to say that there is some sort of 'overall appearance' which is non-functional." *Leatherman Tool Group, Inc. v. Cooper Industries, Inc.*, 99 F.3d 1009, 1013 (9<sup>th</sup> Cir. 1999) (reversing jury verdict for Plaintiff, and holding that the product configuration of the well-known "Leatherman" pocket survival tool is functional and not protectable as trade dress). There can be the risk of being found guilty of fraud on the Patent and Trademark Office if misleading arguments are asserted.

The above cases suggest that product designers should be diligently seeking design patents on their functional product designs that they expect will be commercially significant. Design patents are relatively simple to prepare and prosecute and during their fourteen year term provide a greater measure of protection than trade dress offers. However, a design patent must be filed within one year of first public offer, sale or use of the product, otherwise the patent will be invalid. 35 U.S.C. §102(b).

#### **E. Proof of Functionality**

The above cases provide evidentiary suggestions for an accused infringer who desires to show that the trade dress in a product configuration is functional, in particular:

- Plaintiff's patents and patent applications should be closely examined for statements about the design, how it improves over prior art, its efficiency, etc.
- Plaintiff's early sales literature needs to be unearthed and reviewed for statements touting the functional benefits of the product
- Depositions of Plaintiff's engineers to seek admissions of the functional reasons for product design features
- Expert testimony as to the use, purpose, cost and quality of the elements of the Plaintiff's design
- Expert testimony regarding why alternative designs or design elements are less desirable.
- Proof of specifications (for example military specifications), standards and other contractual requirements that require a particular feature as part of a supplied product

## **F. Conclusion**

Trade Dress is not dead. The court's decision does not disturb decades of case law involving registration and assertion of trade dress rights in product packaging, including containers, jars and bottles. The court's decision does not address issues of trade dress claims asserted in product coloration. If product design features are principally decorative and ornamental there will still be grounds for a trade dress claim. There are many situations where a trade dress assertion is appropriate. But where a product design features have an effect on the function of a product a much closer scrutiny will apply.

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