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BLOGS

Trademarks

Court Grants Partial Summary Judgment on Franchisor's Claim of Trademark Infringement

In *Homes & Land Affiliates, LLC v. Homes & Loans Magazine, LLC*, 2009 WL 260992 (M.D. Fla. Feb. 4, 2009), the court granted a franchisor partial summary judgment against one of its competitors on claims of trademark infringement. In this case, the franchisor published *Homes & Land*, a free magazine containing real estate advertisements found in display racks, which the franchisor licensed to franchisees in several markets across the country. The franchisor owned a federal registration of its mark HOMES & LAND®, which it first used in commerce in 1973, and also owned a domain name registration for its service mark HOMESANDLAND.COM.

The court examined whether there was a likelihood of confusion between the franchisor's marks and the defendant's HOMES & LOANS MAGAZINE and HOMESANDLOANSMAG.COM marks. The court found that the franchisor's marks were descriptive because they describe the products being offered but that the franchisor's promotion of the marks over the years had strengthened the otherwise weak marks. Further, the court found the mark HOMES & LAND® was incontestable under the Lanham Act but that HOMESANDLAND.COM did not share this presumption of strength. Citing widespread third-party use of the word "Homes" in real estate listing magazines and Web sites, the court noted the franchisor's marks were not particularly strong and found that the service mark HOMESANDLAND.COM was weak. The court did hold that the overall impression created by the marks was likely to cause confusion among consumers. In addition, both the identical nature of the products and the similar manner in which both parties sell advertisements contributed toward a finding of a likelihood of confusion. While the court could not find that the defendant adopted the franchisor's mark with the intention of deriving improper benefit, the court did rely on several instances of actual confusion to find a likelihood of confusion.