

ALERT



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Court Rejects Work Product Claim for Withheld Ad Studies

We recently became aware of an advertising case that may be of interest to you. In *Procter & Gamble Co. v. Ultreo, Inc.*, No. 07 Civ. 8379, 2008 WL 110245 (S.D.N.Y. Jan. 8, 2008), the United States District Court for the Southern District of New York considered whether the work product doctrine protected the disclosure of certain substantiation studies conducted at the request of the advertiser's outside counsel.

In *Ultreo*, Procter & Gamble ("P&G") brought a false advertising claim against Ultreo pursuant to the Lanham Act and New York business laws. P&G challenged Ultreo's claim that Ultreo's power toothbrush "cleans beyond the reach of the toothbrush's bristles by virtue of its high-speed sonic bristle action and ultrasound wave technology." In the course of discovery, P&G sought to compel disclosure of five studies conducted by and on behalf of Ultreo to support Ultreo's advertising claims. Ultreo argued that the studies were protected by the work product doctrine because they were requested by outside counsel. The court stated that there was "no doubt" that Ultreo's outside counsel had been "involved in the decision to commission" the studies after he had "concluded that a legal challenge by P&G to Ultreo's advertising was likely."

The primary issue for the court was whether the outside counsel's "affirmation that the Studies were conducted at his request in anticipation of litigation was sufficient to shield them from discovery." The court decided it was not. The court emphasized that "[t]he fact that these investigations were undertaken in consultation with outside counsel, under the looming specter of litigation does not, by itself, clothe them with protection." According to the court, "the question is not whether the studies were conducted at the request of counsel. Instead, the law requires that, for the studies to be privileged as work product, Ultreo must show that the studies 'would not have been prepared in substantially similar form but for the prospect of that litigation.'" The court decided that Ultreo had not shown that the studies met this criteria. The court based this decision on several factors.

First, the court found that “clinical studies and laboratory studies were a core element of Ultreo’s business plan,” which “was built around developing a new and innovative toothbrush, and conducting scientific investigations to demonstrate that the toothbrush worked.” Indeed, Ultreo had already produced a number of other studies to P&G. The court also found that the withheld studies “were part of Ultreo’s routine business efforts to achieve substantiation for their advertising claims.” In fact, Ultreo’s earliest marketing plans discussed the need for additional clinical studies prior to the launch of its new toothbrush.

Second, Ultreo’s CEO “did not differentiate between the studies now withheld as work product and Ultreo’s routine clinical studies.” In both internal and external communications, the CEO “included the [withheld] Studies in his references to Ultreo’s routine clinical research.” In one early, pre-litigation email, he wrote that clinical testing was “necessary to demonstrate the efficacy of the Ultreo toothbrush,” but his email made no reference to the need to conduct such studies in anticipation of litigation.

Third, according to the court, the withheld studies were “virtually indistinguishable” from the studies Ultreo had already produced. Upon *in camera* review, the court found “no indication on the face of the documents that the studies are distinguishable from those that were — or would be — conducted irrespective of litigation.”

The court concluded that the withheld studies would have been prepared in substantially similar form whether or not Ultreo anticipated litigation. Therefore, they were not protected by the work product doctrine. The court ordered Ultreo to produce the substantiation studies to P&G.

This decision highlights the importance of substantiating advertising claims and the potential discovery and disclosure issues that must be taken into account when gathering data or evidence to support these claims.

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