

# World Trademark Review Daily

**No confusion from 'stuffing' towel dispensers with non-branded towelling  
United States - McDermott Will & Emery**

**Confusion**

November 08 2010

In direct contrast to a decision by the US Court of Appeals for the Fourth Circuit in a case brought by the same plaintiff, [Georgia-Pacific Consumer Products \(G-P\)](#), and involving the same claims for contributory trademark infringement, in [Georgia-Pacific Consumer Products LP v Myers Supply Inc](#) (Case 09-2980, September 15 2010), the US Court of Appeals for the Eighth Circuit has affirmed a district court's grant of summary judgment against G-P, finding no likelihood of confusion by consumers.

Plaintiff G-P designs and manufactures paper products and dispensers. In 2002 G-P introduced its enMotion automated touchless paper towel dispenser, designed to use G-P's proprietary, 'fabric-like' paper towelling. The dispensers bear G-P's marks ENMOTION, GEORGIA-PACIFIC and a stylised GP. G-P leases the enMotion dispensers to janitorial supply distributors, which sublease them to end users, such as hotels and restaurants. The leases and subleases expressly provide that only enMotion brand paper towelling may be used in the dispensers. A sticker and warranty card inside the dispensers state that only G-P-branded towels may be used.

G-P has brought several suits in efforts to halt the 'stuffing' of enMotion dispensers with non-G-P-branded paper towelling. G-P brought claims of contributory trademark infringement and unfair competition against one of its competitors, [Von Drehle Corp](#), in the US District Court for the Eastern District of North Carolina when von Drehle began manufacturing and selling to distributors an inferior paper towelling for use in G-P's enMotion dispensers.

The Fourth Circuit vacated and remanded the district court's grant of summary judgment to the defendant, finding that, to the extent that the defendant knowingly created its towels for use in G-P's enMotion machines and supplied them to distributors knowing that they would be used as such, the defendant may be liable for trademark infringement. The Fourth Circuit agreed with G-P that its reputation may suffer if it could not control the quality of towelling used in the enMotion dispensers (for further details please see "[No papering over competitor's towel stuffing](#)").

G-P also sued a distributor of von Drehle's paper towelling, [Myers Supply Inc](#), in the US District Court for the Western District of Arkansas. The court entered judgment for Myers on G-P's contributory trademark infringement after a bench trial. The court determined that, although Myers knew its customers were stuffing the enMotion dispensers with non-G-P-branded towels, there was no infringement because G-P had failed to show likelihood of confusion.

On appeal, GP argued that the district court had improperly dismissed its survey evidence, which had also been offered in the Fourth Circuit case. The Eighth Circuit affirmed the district court's holding for the defendant. In so doing, the Eighth Circuit agreed that G-P's survey evidence, allegedly showing a confusion level of 23%, was entitled to little probative weight in light of its methodological flaws. Myers also offered a survey that showed an 11% confusion level, which is a level that has been found sufficient for trademark infringement liability in prior cases. However, the Eighth Circuit noted that the probative value of both surveys were outweighed by multiple forms of evidence indicating that it is a common and acceptable practice to 'stuff' paper towels of one brand in an unleased dispenser bearing the marks of a different brand. One of G-P's regional managers testified that this was an acceptable practice, and G-P's own catalogues indicated that G-P sold paper towels to fill dispensers made by other companies.

Although G-P lost in the Eighth Circuit, suppliers who sell universal type paper towelling for use in G-P's proprietary enMotion dispensers may face liability for contributory trademark infringement if G-P can demonstrate that consumers do associate the quality of non-GP-branded towels with G-P based on the marks displayed on the dispensers.

However, the Eighth Circuit's decision suggests that a defendant may successfully counter survey results indicating an appreciable amount of consumer confusion by presenting solid evidence that prevailing practices in the industry at issue work to eliminate consumer confusion.

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