

Fall 2007

## Preventing Elder Fraud: Don't Let Good Intentions Go Bad

By Robert J. O'Regan

The painful dilemma of how to take care of aging and sick relatives is not easy to solve. The World War II generation in particular has more wealth and is living longer than previous generations, but changes in society have meant that family members are often unavailable to care for those who cannot be left alone, but who want to avoid assisted living and nursing homes. Friends and family who often try to maintain "independence," actually create the opportunity for fraud and abuse. When the burden falls on some family members, but not others, the care providers often feel entitled to financial reward. Fear of nursing homes is deep and pervasive; combined with the disintegration of the extended family, this also creates opportunities for predators to use undue influence and the elders' own incompetence to strip them of property and dignity. A power of attorney, which is an instrument that delegates authority for one person to act on someone else's behalf, is a very useful tool for shut-ins, but these instruments are often misused to plunder elders' estates.

Burns & Levinson attorneys recently won a precedent-setting case in the Massachusetts Appeals Court that ended a 14-year battle to prevent a home companion of only a few months from succeeding in a scheme to take everything from his 84-year-old employer. In *Estate of Moretti*, the victim Mr. Moretti, who was totally dependent and petrified of going into a nursing home, was housebound with serious physical ailments and depression. Childless and without any close family, he did have close friends from a lifetime of living in the same neighborhood and attending the same church. This extensive network of people was committed to keeping him at home. Home was a 6-unit apartment building that he had inherited from his late brother and sister (neither of whom had children either), the rents from which could comfortably support this retired fruit merchant from Boston's Haymarket. The network of friends located a companion, who the elder hired under a written contract negotiated by his longtime attorney, to stay with him overnight so he would not be alone. During the day the elder's needs were taken care of by a retired nun, a paid housekeeper, the local health center, and several other neighbors. Within weeks, however, the companion had displaced these resources, isolated the elder, threatened those who tried to intervene, intimidated visiting nurses, and taken control over all property that the elder had by using a power of attorney. The case was made more complicated because this clever schemer engineered transfers of property from the victim into a trust that the schemer controlled and a new will that also left him the same property so that, when Mr. Moretti died in 1993, he no longer owned the building and he had no money. This disrupted the plans of the elder and his siblings to leave the building to a close friend of nearly 40 years, who had taken care of them all as they lived into their 80's and became seriously ill, and several smaller bequests.

The precedent-setting aspect of the case was establishing that the companion had the burden of proof. The burden of

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proof usually belongs to the person challenging a transaction or a will so before this ruling, the companion would have expected that those challenging his actions would need to prove how he had taken advantage of his totally dependent employer. The companion could make this very difficult since he controlled most of the information, and he actually succeeded in the first trial, in 1996, when the judge decided that the burden of proof belonged to those challenging what he had done. When Burns & Levinson won an appeal from this first appeal, it resulted in a presumption that the companion had used his position of trust and confidence, and particularly the power of attorney, to transfer the apartment building and other property to his own advantage. Although the property was restored from the trust into the estate of the elder, this led directly to a will contest. The new Appeals Court decision invalidated the new will, so that Mr. Moretti's property passed as he had decided before the companion was hired.

No one, even a lawyer, wants 14-year long legal battles over these issues. The saddest aspect of the case is that it proved Mr. Moretti had lived the last 18 months of his life trapped, isolated, exploited, and abused. Based on our experience in this field, we believe this situation was hardly unique to Mr. Moretti. To help prevent fraud and exploitation of the elderly, family and friends should use common sense and good practices, similar to those routinely used in the business world.

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## AMAZING CLIENTS

### Indevus Pharmaceuticals – *Just The Right Medicine*

If you have not heard of Indevus Pharmaceuticals Inc., you probably will soon. The relatively young publicly-traded life science company is carving out a name and a niche for itself in an industry littered with broken dreams and fallen competitors. “This industry has one of the most capital intensive business models in existence, and it has an unnatural failure rate because most drugs aren’t successful enough to pay the freight of getting them to market,” says Dr. Glenn Cooper, Chairman and CEO of Indevus.

Cooper explains that “the typical time from discovery of a molecule [with potentially therapeutic use] to marketing of a drug is roughly 10 years, and it can easily cost a company in our space \$200 million just to get one drug through that pipeline.”

He adds that “a team of good lawyers is critical” in navigating the regulatory and statutory framework for government approvals when moving a product from the research phase into clinical studies and then into marketing. “From the time you start working at the research bench, only one out of 10,000 molecules you look at will ever get to be a clinical phase drug, so you need experienced professional help to make it,” he says.

After years of patient work, Indevus is definitely making it now. The company, which focuses primarily on developing drugs for urological and endocrine applications, is well-positioned to serve the needs of an aging population. It has four successful drugs already penetrating the market: SANCTURA for overactive bladder; VANTAS for treatment of prostate cancer; DELATESTRYL for treatment of testosterone deficiency associated with male hypogonadism; and SUPPRELIN for treating precocious puberty.

Furthermore, some of the company’s most exciting drugs are just now emerging from the clinical and regulatory approval phases. PRO 2000, for example, is a topical microbicide for the prevention of sexually transmitted diseases, such as HIV, herpes, Chlamydia and Gonorrhea. “This drug could provide us with one of the key tools needed to break the back of the global pandemic of sexually transmitted diseases,” Cooper says. “It will give women more complete control over their reproductive health in a



way that condoms alone cannot,” he adds, noting that clinical trials in Africa have been promising along with the assurance of \$150 million of allocated funding from the National Institute of Health and the European Union.

Indevus is also working on post-clinical trial regu-

latory approvals for VALSTAR, which will treat bladder cancer, a disease that will become more problematic with an aging population. It is even seeking approval of a new medical device, a ureteral stent that makes voiding easier for passing kidney stones. The stent also spontaneously dissolves within weeks after insertion, eliminating the need for surgical removal.

“We are also looking at partnerships on other products we have in clinical testing,” says Cooper. Among the drugs in test stages are ALKS 27, which is designed to treat chronic obstructive pulmonary disease, the fourth leading killer among all diseases in the United States. Indevus is also working on partnered development of Naltrexone implants for drug addiction treatment, and IP 751 for the treatment of pain and inflammation associated with interstitial cystitis, a common urological problem.

“With these drugs, we are an emerging player in the biotech sector in Boston, and we expect significant growth in the years to come,” Cooper states, noting that “we have now hit all of our goals for building out a national sales force [with 100 sales reps] handling a promising portfolio of drugs.”

Cooper says the Indevus formula for success is partly based on its “virtual laboratory” for drug development. “We winnow down the risks of development by focusing on the acquisition of drugs developed elsewhere, and often we license those products from European companies and small biotech firms in this country that want assistance in [optimizing] sales,” he explains.

“We also stay focused on a dual mission that is both economic and societal . . . [because] we’re not just making widgets,”

#### Featured Client



DR. GLENN COOPER  
Chairman and CEO  
of Indevus

Cooper adds. “People with an interest in medicine must get their satisfaction from victories that come incrementally over a period of years,” he says, emphasizing that patient and dedicated professional assistance is also part of the Indevus success story.

Dr. Cooper should know, having embarked on his career in pharmaceutical development only after years of study at Harvard University and Tufts School of Medicine. He also worked in internal medicine at the Beth Israel hospital and infectious diseases at Massachusetts General Hospital before heading to Eli Lilly to do antibiotics research.

“I decided I loved the blend of science and business and the challenge of being successful at both,” he says, noting that his Lilly career culminated in his heading up all clinical research in Europe for the company. That responsibility led to higher level positions with smaller companies, including a CEO position with Progenitor, a former subsidiary to Interneuron, which was the predecessor to Indevus.

When Cooper took over in 1993 as CEO of the fledgling public company that would become Indevus, he quickly sought after a team of legal professionals that would complement and work well with the medical professionals he had in place. “Early on, I wanted to establish corporate legal relationships with the right kind of firm, and I wanted one large enough to offer all the essential services we needed but small enough to provide amazing levels of attention,” Cooper recalls, adding that Indevus “has really grown up with Burns & Levinson.”

He says “there is a nice parallel story of growth and success here,” asserting that “the relationship with our law firm has become one of our most important corporate partnerships.” Cooper credits Josef B. Volman and George N. Tobia Jr. for spearheading a legal service team that “gives us great support [and] whatever we need in finance, general corporate and SEC work, mergers and acquisitions, intellectual property protection and business litigation.”

Cooper says the law firm not only fits well with his growing company, it provides counsel and advice that is essential to modern public company survival. “As a public company in the post-Sarbanes environment, it is absolutely critical to have dedicated and highly skilled assistance with regulatory and SEC concerns to clear your pathway,” he states. “We get that from Burns & Levinson,” he says, asserting that both Indevus and its law firm are looking down the road to a very bright future. ■

# Search Engine Advertising – Can They Use My Trademark?

By Anne C. Pareti

Imagine that you are interested in researching the success of your company's product, so you run an Internet search in Google® using the product's trademark. To your surprise, the foremost result is an ad for your biggest competitor, exploiting your trademark. Can they do that? And more importantly, what can you do about it?

Internet search engines provide sponsored ads, those ads which are prominently located at the top of an Internet search results page, as follows:

- The search engine sells advertising space whereby a consumer will select the criterion for showing the ad.
- Advertisers select keywords, such as the brand name or type of products or services being sold. Keywords enable advertisers to effectively target appropriate consumers.
- The consumer enters a query into the search engine. When the query matches a keyword selected by the advertiser, the ad will appear.

Often, a business will use one of its trademarks as a keyword. In this way, once a consumer enters the trademark, the ad will appear, featuring the trademarked product. In general, advertisers choose their own ad text and keyword triggers. However, it is possible that a competitor or other unauthorized party may use your trademark for advertising purposes, in an attempt to attract the attention of consumers seeking similar products. Simply because the search engine provided this advertising space to your competitor, does not mean that the trademark is used in a lawful manner. In fact, this type of keyword advertising may be a form of trademark infringement.

There are several steps you can take to remove the unauthorized use of your trademark:

First, every search engine provider has a trademark policy. While search engines do not encourage advertisers to use keywords in a manner to deceive or confuse the public, they do not police,

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or review, who buys which terms, or keywords. This means that the burden of policing your trademark online falls on you. To assist you, each Internet search engine provider has created procedures whereby trademark owners can object to the unauthorized use of a trademark. For most search engines, you can complete and submit a simple online form, detailing the issue and establishing your ownership of the trademark. The search engine will conduct a limited investigation of the claims raised in the online form, and may decide to disable the use of the disputed term or trademark in the ad text.

Second, you, or an attorney can send a letter to your competitor, informing them of your trademark rights. Often, your competitor may have hired a third party to handle its advertising and optimize its presence on the web, and thus, may not be aware of the infringing use of the trademark. Furthermore, sending a letter directly to your competitor can expedite the removal process, as they may decide to take down the ad, eliminating your need to await review by the search engine provider.

If you are presented with this situation, Burns & Levinson's Intellectual Property / SciTech attorneys can assist you with removing ads which infringe your trademark. ■■

At Burns & Levinson, your personal and business success is our top priority – so whatever your legal need, consider it done. Our core practices include Business/Corporate, Business Litigation, Intellectual Property, Real Estate and Private Client services where we represent dynamic, growth-oriented businesses, privately and publicly held companies, universities, institutions and individuals.

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These include:

**Access.** Schemes to defraud and exploit the elderly often depend isolating the victim for success. When an elderly relative or friend is less able to get out or stay in contact with persons outside the household, it is critical that those who care about him or her make the effort to stay connected. Access to friends and relatives can minimize the opportunity for fraud and abuse.

**Reliability.** Fear of being left alone or being put into a nursing home is a primary reason why the elderly make deals with the devil. Potential victims need constant reassurance and demonstrations that they are truly cared for, and that they will not be abandoned. Secrets, including secret threats and secret deals, are frequently used to defend fraud and abuse.

**Accountability.** If the elder is truly incapable of supervising his or her own finances, whoever is responsible for personal care (meals, hygiene, medication, etc.) should ordinarily not also have sole control over the elder's property. Supervision means more than knowing what is going on, it means having the real ability to insist on compliance with directions. Combining financial and personal care responsibilities eliminates cross-checking and accountability, creating the opportunity for exploitation and abuse. In this case, the companion claimed that Mr. Moretti promised the apartment building as compensation to let him die at home, something that could have been prevented if the companion had been accountable to someone with real ability to supervise him.

**Stability.** Since longtime and successful business relationships are generally not changed, and the elderly typically make few changes in their lawyers, accountants, business advisors, doctors, or others who have a record of loyal service, an unwarranted change in these relationships is a strong indication of potential fraud or abuse.

The Burns & Levinson Probate & Trust Litigation Practice Group works with the elderly, their family and friends to help prevent fraud and exploitation and to recover property that has been wrongfully taken. As shown by *Estate of Moretti*, we are committed to achieving these goals and to long term relationships with our clients. ■■

## What's Your Preference?

By Lauren E. Darcy  
and Cornelius J. Chapman

When one of your customers files for bankruptcy, your response may simply be to write off their receivables as a cost of doing business.

But wait – it can get worse, and often does.

Suppose you've been diligent in pursuing the customer and succeeded in collecting at least some of what they owed you as they slid into insolvency. You may find yourself being sued to give the money back.

What if you reclaim a high-margin piece of machinery by agreement with the customer when they realize they cannot pay for it? You may find yourself being sued not for your wholesale cost, but for the price you charged the customer, including your profit.

Under the federal Bankruptcy Code, payments received from a customer within 90 days before bankruptcy may be recovered by the insolvent company or its trustee. These payments are referred to as "preferential transfers" (or simply "preferences") because their effect is to favor sellers who receive such payments over those whose invoices remain unpaid. The power to recover preferences is designed to ensure that all unsecured creditors are treated equally in bankruptcy cases.

Not every payment that looks like a preference must be returned however, since your company may have a valid legal defense.

Two defenses that are commonly used are:

1. The "ordinary course" defense: If your claim was incurred by the debtor in the ordinary course of business, and the payment to you was made by them in the ordinary course of business or according to ordinary business terms in the industry, the payment may be beyond the reach of the bankrupt company and its trustee.
2. The "new value" defense: This defense may be available to your business if you provided the debtor with new materials or credit that allowed it to stay in business in the months leading up to bankruptcy.

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These and other defenses are helpful, but creditors who are sued to recover preferences often end up returning at least part of the payment they received because the cost of defending a preference claim can exceed the benefit of keeping the entire payment.

However, the best defense against a customer's insolvency is a good offense, and sellers of goods to less creditworthy buyers can protect themselves by taking appropriate business and legal steps long before a bankruptcy filing.

When a customer first falls behind in payments, you are generally free to cut off credit, modify the terms of sale or impose new conditions on future shipments unless you have agreed to the contrary. One method you can use to improve your chances of recovery in a bankruptcy is to require that the customer collateralize each shipment with a "purchase money security interest."

A purchase money security interest is one taken by the manufacturer or supplier of goods to secure the unpaid balance of the purchase price, or by a third-party lender to secure advances that enable a borrower to purchase goods. Automobile makers and manufacturers of other "big ticket" items have historically used purchase money financing, but the benefits are not limited to large-scale enterprises.

If a seller takes back a purchase money security interest, payments received during the 90-day look-back period are less likely to be treated as preferences because the seller is a secured, rather than an unsecured, creditor. A preference is a payment that enables a creditor to receive more than it would

## Focus

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have in a Chapter 7 liquidation case; if the creditor is fully secured by a purchase money security interest when the payment is received, it is not a preference since the creditor would have been paid as much in a liquidation.

The rules for purchase money security interests differ depending on whether a buyer uses your product as inventory for resale or capital equipment. In each case a seller must file a public notice under the Uniform Commercial Code before the product is received by the buyer; in the case of inventory, a seller must also give notice to any prior secured party with a security interest in inventory, which often includes the buyer's bank. If all steps are properly taken, the seller comes ahead of both unsecured creditors and a prior secured party (such as the bank) that would normally come ahead of you in line.

If you apply a payment on a purchase money receivable to an older non-purchase money sale, you will not be entitled to the same "super priority," however.

We assist our clients in the entire life-cycle of the credit function, from cradle to the unfortunate grave of bankruptcy. An ounce of prevention – in the form of a purchase money sales program for your credit department – is worth a pound of painful bankruptcy cure. ■