

Court Says "Compare To" Claims Are Actionable

***Rexall Sundown, Inc. v. Perrigo Co.*, 2009 WL 2891021
(E.D.N.Y. September 10, 2009)**

A federal district court has ruled that store brand manufacturers may be liable under the Lanham Act for "compare to" claims that falsely imply that their products work as well as brand name products.

Manufacturers of store brand products routinely use "compare to" statements to alert users of brand name products to the existence of store brand alternatives. Such "compare to" statements are often defended as mere "invitations to try" a store brand product. But this latest ruling recognizes that "compare to" in certain contexts may convey implied messages of bioequivalence or parity performance which, if false, are actionable.

The case was filed by Rexall Sundown, the maker of OsteoBiFlex joint care products, against a store brand manufacturer of dietary supplements, Perrigo, whose products are promoted with claims like "Compare to Osteo Bi-Flex Glucosamine with Joint Shield Ingredients." Rexall Sundown alleges that Perrigo's "compare to" claims mislead consumers to believe that its store brand supplements are the same as Osteo BiFlex and work just as well.

Perrigo moved for summary judgment on Rexall Sundown's Lanham Act claims, arguing that "compare to" is a non-actionable "invitation to try" akin to puffery. The court disagreed. While recognizing that a "compare to" statement "without more" could "merely be a non-actionable, general invitation to consumers to compare products," the court held that some "compare to" statements "depending on their wording and context" may go further and "convey a specific" verifiable assertion. A jury reasonably could find that Perrigo's promotions crossed that line.

Specifically, the court observed that Perrigo's promotions did not make bare "compare to" statements. Rather, Perrigo's "compare to" claims invited consumers to compare the "ingredients" in OsteoBiFlex to Perrigo's products. Furthermore, the "compare to" claim appeared on the package in close proximity to efficacy and performance claims. In addition, Rexall Sundown proffered a consumer survey that confirmed that, based upon Perrigo's packaging, a substantial percentage of joint care supplement users believed that Perrigo's supplements provided the same joint care benefits or contained the same ingredients as OsteoBiFlex.

In these circumstances, the court concluded that Perrigo's "compare to" claims could not be dismissed as mere puffery. Accordingly, Perrigo's motion for summary judgment was denied.

Makers of brand name products who compete with store brands of lesser quality or efficacy should take comfort in this decision. The Lanham Act may be a means of challenging manufacturers of store brand products if they do not exercise care in making "compare to" claims. ♦

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