



15-SECOND ADVERTISING LAW ALERT

“EPISTEMOLOGICAL PROBLEM” CREATES NON-ACTIONABLE PUFFERY

An implied comparative claim was found to be non-actionable puffery, while consumer perception tests of the claim were dismissed as irrelevant in a recent decision that may prove controversial.*

BACKGROUND

Defendant diaper manufacturer claimed in a TV commercial that its products “fit more naturally” and that they were designed for “babies of the human variety.” The on-screen image suggested that competing diapers were designed to fit bricks. The Defendant’s own testing concluded that the ad was “very persuasive.”

Plaintiff, a competitor, sued for false or misleading advertising under Section 43(a) of the Lanham Act and renewed a previously unsuccessful motion for a preliminary injunction.

Among other things, Plaintiff submitted consumer tests purporting to show that 51 percent of consumers thought its diapers had a more natural fit compared to 45 percent who preferred Defendant’s diapers.

DECISION

The motion was denied on several independent grounds, but primarily on a finding that Plaintiff was not likely to prevail on the merits because the “fit more naturally” claim is non-actionable puffery.

The court found that the claim was inherently vague and impossible to prove true or false. It interpreted the results of Plaintiff’s consumer tests as proof that consumers, themselves, could not determine what a natural fit was (51 vs. 45 percent was a “coin toss”).

It also found that, since the test respondents were not the wearers of the diapers, their “subjective” perceptions could not be dispositive.

“Ultimately [this] Lanham Act claim fails because at the core of this dispute is an epistemological problem, namely, the problem of how one can ever ‘know’ (much less *prove*) whether certain diapers ‘fit more naturally’ than others.”■

Richard J. Leighton: 202-434-4220
Leighton@khlaw.com

* *The Procter & Gamble Co. v. Kimberly-Clark Corp., et al.*, No. 07-C-883 (E. D. Wisc., Aug 5, 2008).