

Case law

Case Details

National ID: 19J/2010

Member State: Portugal

Common Name: link

Decision type: Other

Decision date: 20/09/2010

Court: First Section of ICAP's Jury for Ethics in Advertising (Lisbon)

Subject:

Plaintiff: Johnson & Johnson, Lda.

Defendant: Chefaro Portuguesa – Distribuição de Produtos Farmacêuticos, Unipessoal, Lda.

Keywords: average consumer, comparative advertising, health and safety, misleading advertising

Directive Articles

Unfair Commercial Practices Directive, [Chapter 2, Article 5, 4., \(a\)](#) Unfair Commercial Practices Directive, [Chapter 2, Section 1, Article 6, 2., \(a\)](#) Unfair Commercial Practices Directive, [Chapter 2, Section 1, Article 7, 1.](#)

Headnote

(1) Claims such as "The first patch for herpes with active properties", "The first patch for herpes that is auto-dissolving", "dissolves automatically" and "(...) a patch that seals and protects the wound" can be made in an advertisement campaign when they can be proven by the trader.

(2) In the context of an advertisement for herpes patches, it is clear for the average consumer that the claim "Relieves pain" refers to the pain caused by the herpes virus, and that the claim "Totally painless" refers to the application/removal of the patch.

(3) Generic comparisons that apply to all directly competing products, do not constitute comparative advertising.

Facts

The plaintiff and the defendant manufacture and sell patches to place on oral herpes wounds. The "Herpatch" belongs to the defendant and the "Compeed Herpes Patch" to the plaintiff.

The plaintiff argued that the claims used in the defendant's advertisement campaign ("The first patch for herpes with active properties", "The first patch for herpes that is auto-dissolving", "Herpatch dissolves automatically", "(...) a patch that seals and protects the wound", "Relieves pain" and "Totally painless") were false and amounted to illicit and misleading comparative advertising, because they confuse the consumer with regards to the patches for oral herpes.

Legal issue

It was held that:

(1) The claim "The first patch for herpes with active properties" was proven by the defendant.

(2) There is no contradiction between the claims "The first patch for herpes that is auto-dissolving", "Herpatch dissolves automatically" and "(...) a patch that seals and protects the wound" because the facts were proven and they were not ambiguous or contradictory in a way that could mislead the consumer;

(3) Contextually, it is clear that the claim "Relieves pain" refers to the pain caused by the virus and the claim "Totally painless" refers to the application/removal of the patch, a difference which is clear and understandable by the average consumer to whom the message is directed and so the claims do not create doubts or ambiguity and are sufficiently proven.

(4) The defendant's advertisement campaign does not amount to comparative advertising, because the claims consist of generic comparisons applicable to all of the directly competing products, making it impossible for the average consumer to identify the plaintiff's patch.

Decision

Under which circumstances is an advertisement campaign using strong claims misleading and confusing to consumers?

URL: http://www.icap.pt/icapv2/icap_site/deliberacao_detalhe.php?AG4JPQ51=ADotela9Xr1&AHAJJg5i=&AGoJNwtela9Xr1tela9Xr1=ADAJag4y

Full text: [Full text](#)

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Result

The plaintiff's allegations were rejected.