

Court Considers Whether Growth Claims Were Tall Tales

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Before much of the country was watching a 7'4" basketball player in the NBA finals, a grandmother in the Bronx was thinking about how to help her grandson grow to his full potential. Over the course of about a year, she purchased hundreds of bottles of PediaSure Grow & Gain to help him grow taller. Later, when she learned the product was "not a cure for shortness," she filed a class action against Abbott Labs, the company that makes it.

The plaintiff alleges that Abbott's claims that the product is "Clinically Proven to Help Kids Grow" misled consumers into thinking the product was clinically proven to help typical children grow taller, when that's not the case. Among other things, she pointed to a giraffe image accompanied by ruler-like marks on the label and to commercials showing parents lifting kids up so that they're taller as support for her interpretation of the claim.

Abbott argued that the phrase "Clinically Proven to Help Kids Grow" was not misleading because "grow" does not necessarily mean grow taller—instead, it could also refer to weight, body composition, or other forms of child growth. Abbott also argued that its disclaimer made clear that the studies supporting the claim involved children at risk for malnutrition or undernutrition, rather than all children generally.

A New York federal court recently denied Abbott's motion for summary judgment, holding that a jury could reasonably find that Abbott's packages and ads communicated a message that the product could help typical children grow taller. The court also held that the disclaimer didn't change the analysis, holding that a reasonable jury could find it ineffective because it isn't prominent and the language doesn't clearly explain how it limits the claim.

This case serves as a reminder that courts will generally look at the whole context of an ad (including images) to figure out what claims reasonable consumers are likely to take away from that ad. Ads can be literally true, but still misleading, if consumers take away a message that an advertiser can't support. Even a disclaimer may not help, especially if that disclaimer appears in "small print" and is difficult to understand.

We'll keep reporting about these cases to help you Grow & Gain a better understanding of advertising law.