

## Covering Your Ads

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### **Sometimes "Compare To" Packaging Means Just What it Says**

The verdict in a recent high profile case alleging false advertising claims is significant for the store brand industry. The case involved Perrigo Company, a producer of dietary supplements for the private label market, and Rexall Sundown, Inc. The jury upheld the practice of communicating choice to consumers through the use of a comparison statement specifically identifying a national brand

Rexall brought a multi-million dollar Lanham Act false advertising claim against Perrigo alleging that "compare to" advertising statements on the packaging of the Perrigo products were false and misleading to consumers because the statements allegedly conveyed that Perrigo's generic nutritional supplements are equivalent to Rexall's Osteo Bi-Flex products even though, Rexall alleged, the formulation of Perrigo's products is materially different from Osteo Bi-Flex.

The jury unanimously found that statements such as "Compare to Osteo Bi-Flex Ingredients" on the packaging for Perrigo's store brand products were not false and misleading. In addition, the jury ruled in Perrigo's favor on a false advertising counterclaim it had asserted against Rexall Sundown based on an implied superiority claim arising from Rexall's Sundown's statement that one of the ingredients in Osteo Bi-Flex is "10 times more concentrated than typical Boswellia extracts." The jury determined that the statement was false and misleading and awarded Perrigo damages.

Sheppard Mullin represented Perrigo in the four week trial in the U.S. District Court for the Eastern District of New York.

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