

Decision of the ADVERTISING REGULATORY BOARD

Complainant	Colgate-Palmolive (Pty) Ltd
Advertiser	Reckitt Benckiser Pharmaceuticals (Pty) Ltd
Consumer/Competitor	Competitor
File reference	645 - Dettol Hygiene Soap - Colgate-Palmolive
Outcome	Dismissed
Date	10 February 2020

The Directorate of the Advertising Regulatory Board has been called upon to consider a competitor complaint against the claim “PROTECTS FROM 100 ILLNESS-CAUSING GERMS”, appearing on Reckitt Benckiser’s packaging for its Hygiene Soap range.

Description of the advertising

The Complainant provided the following images in support of its complaint:



Front of Packaging



Back of Packaging



Side view on-shelf (different variant)

Complaint

The Complainant argued that the claim “PROTECTS FROM 100 ILLNESS-CAUSING GERMS” is phrased in a manner that conveys the product’s medicinal properties as a primary claim, in contravention of the provisions of the Code. Specifically, by incorporating the word “illness” in its germ protection claim, the Advertiser shifts the communication from protection against germs / bacteria (which is generally permitted for cosmetic products), to preventing the contraction of illnesses (which is not a permissible claim for a cosmetic product to make). Referencing the provisions of Appendix B, which provides guidance on typical cosmetic functions, the Complainant argued that “illness”, and more specifically protection against “illness-causing” germs, communicates a medicinal function or property to consumers in contravention of Clause 5 of Appendix B of the Code.

Such claims have been ruled against before by the Advertising Standards Authority (refer rulings Reckitt Benckiser / Colgate-Palmolive / 2015-1683F (3 September 2015) and a subsequent breach decision in the same matter, dated 27 September 2017).

In addition, it submitted that the claim refers to “100 ILLNESS-CAUSING GERMS”, and not 100 *strains* of the same germ. It explained that a “species” of germ refers to a collection of strains that share many features in common. For instance, the species *E. Coli* contains several strains and sub-types, but remains one *species* of germ. The likely interpretation from a consumer perspective would be that this soap protects against 100 illness-causing *species* of germs or, put differently, that this soap protects against 100 different types of illnesses (all caused by different species and/or strains of germs).

Unless the Advertiser produces evidence that it has actually tested this soap against 100 illness-causing *species* of germs, the claim should be regarded as unsubstantiated, and in breach of Clause 4.1 of Section II of the Code.

Response

Attorneys Herbert Smith Freehills, on behalf of the Advertiser, denied that the claim “PROTECTS FROM 100 ILLNESS-CAUSING GERMS”, as it appears in the context of Dettol 175g soap packaging, conveys any medical or curative aspects of Dettol hygiene soap as the primary purpose of Dettol hygiene soap. In reality, the soap communicates its primary function as a “Natural SOOTHING Hygiene Soap”, and only then, as a secondary function, adds that it also offers protection against 100 illness causing germs. The reasonable consumer would interpret this to mean that Dettol is primarily a hygiene soap aimed at cleaning the body, with a secondary germ protection benefit as permitted by Appendix B of the Code.

It referred to earlier decisions issued by the Advertising Standards Authority (“ASA”) of South Africa (under reference Dettol / Sara-Lee / 12667), which ruled that a “protects against germs” type of claim was acceptable in the context of such soaps, because the primary impression would be that the soap washes and cleans the body, and (in addition) protects against germs. This is exactly how consumers would interpret its current packaging. A similar approach was applied by the ASA Directorate in Protex for men Soap / Unilever / 22517, where it confirmed that “*to protect*” was one of the six permissible primary functions of a cosmetic. More recent decisions by the Advertising Regulatory Board (447-Lifebuoy-Reckitt Benckiser (7 October 2019)) came to the same conclusion.

Dealing specifically with the Complainant's allegation that the "100 ILLNESS-CAUSING GERMS" would be interpreted as 100 separate *species* of germs, as opposed to variations or strains, it argued that the Complainant was being unreasonable. Consumers are generally not experts on the subject matter and are unlikely to have a microbiology background. As such, there is no chance of them dissecting the claim to the extent that the Complainant has done. The "ordinary" understanding of the word "germ" would be "*a very small organism that causes disease*". Whether this refers to a specific species, strain, virus, bacteria or fungi is irrelevant for the purpose of an ordinary consumer's understanding. In this regard, it relied on a 2016 decision issued by the Kenyan Advertising Standards Committee in a dispute between it and the Complainant (Colgate), which deliberated on the claim "*She only Trusts Dettol to Protect her family from up to 100 illness causing germs ...*" The Kenyan Advertising Standards Committee noted, *inter alia*, as follows:

"... the hypothetical reasonably person, who is not a medical professional, will not distinguish, on a scientific level, between the various 'species' or 'strains' of influenza. They will simply know that the different illnesses which can be caused by these strains are spread by the transfer of 'germs' ..."

In any event, the Advertiser submitted the following evidence to show that its claim "PROTECTS FROM 100 ILLNESS-CAUSING GERMS" was adequately substantiated in terms of Clause 4.1 of Section II of the Code:

- A confidential report of a study of Dettol Original and Dettol Variant bar soaps compiled on 20 December 2017 by Bioscience Laboratories Inc.
- A confidential internal document dated 10 January 2018 which records and confirms the test results of the above-mentioned Variant Study
- A confidential report of a study of Dettol Original bar soap compiled on 28 November 2018 by Bioscience Labs.
- A confidential internal document dated 18 December 2018 which records and confirms the results of the Original Study.

- A confidential internal document for product testing methodology, dated 2 August 2018, setting out the requirements and methodology followed to test its products in support of various claims.

Because these reports and documents contain confidential information (as per Clause 5 of Section I of the Code), it submitted two non-confidential summaries of the independent Bioscience Labs studies which summarise the studies' findings to assist the Directorate.

Application of the Code of Advertising Practice

The Directorate considered the following clauses when deliberating on this matter:

- Section II, Clause 4.1 (Substantiation)
- Appendix B, Clause 5 (Unacceptable claims)

Decision

Having considered all the material before it, the Directorate of the ARB issues the following finding.

Substantiation

The Complainant is of the view that the claim “PROTECTS FROM 100 ILLNESS-CAUSING GERMS” would be understood by ordinary consumers to mean that this soap protects against 100 different *species* of germs, and not 100 different *strains* (i.e. separate sub-classes) of germs. In other words, so the Complainant argues, if the Advertiser has (for example) tested 20 different strains of *E. Coli*, these 20 different strains would not constitute 20 different “germs” for the sake of this claim, but rather only one “germ”, meaning that a further 99 “germs” still require testing to validate the claim. The Complainant argues that any evidence relied on for the purpose of this claim would have to show that 100 separate or different types (*species*) of germs had been tested.

The Advertiser rejected this argument and submitted that ordinary consumers are not likely to dissect this claim to such an extent. It argued that consumers are likely to attach a more general interpretation to the word “germ”, and would likely be ignorant of, and unconcerned with the question of whether the “germ” tested was a separate species, or merely a separate strain which also carries the potential to cause illness. It submitted a decision published by the Kenyan Advertising Standards Committee (which involved the same type of dispute between the same two parties), which confirmed a similar interpretation.

The Directorate is inclined to agree with the Advertiser’s approach in this instance. Contemporary online definitions for “germ” generally refer to a small, living thing (often referred to as a micro-organism) that causes disease. Certain family-oriented websites (for example, <https://kidshealth.org/en/kids/germs.html>) for instance, group bacteria, viruses, fungi and protozoa under the collective noun “germs”. In fact, none of the online definitions scrutinised appeared to draw any distinction between when a “germ” is considered a separate species or merely a strain of an already-existing species. It therefore appears that people generally do not draw such meticulous distinctions when referring to “germs”.

The Directorate, therefore, does not share the Complainant’s view that the Advertiser should demonstrate protection against 100 different *species* of germs specifically. The claim communicates an ability to protect consumers against 100 “germs” (understood to incorporate all kinds of micro-organisms that cause disease, irrespective of whether they are sub-species, strains, or stand-alone species).

In addition, the Directorate disagrees with the Complainant’s argument that the Advertiser should prove an ability to protect against 100 different types of illnesses (as advanced in paragraphs 14 and 15 of the complaint). The claim does not read “PROTECTS AGAINST 100 ILLNESSES”. It reads “PROTECTS AGAINST 100 ILLNESS-CAUSING GERMS”. It does not purport to protect against 100 different illness, but rather to protect against 100 germs which are known to cause illness. These two interpretations are inherently different, and the Complainant’s hyper-critical interpretation is rejected.

Because the Complainant's interpretation appears to be incongruent with how consumers are likely to interpret the claim, it is not necessary for the Advertiser to provide evidence in the manner requested by the Complainant. However, for the benefit of the Complainant, the Directorate notes the Advertiser's submission that the Bioscience Lab reports tested 136 microbial strains (refer paragraph 25.1 and 25.2 of the response), and appears to have demonstrated an ability to reduce the microbial population of more than 100 of these 136 microorganisms by at least 90% after exposure of approximately 60 seconds. The respective Bioscience reports appear to corroborate this submission.

Given the above, the Directorate does not need to consider the Advertiser's evidence at this time, and does not need to determine whether the claim contravenes Clause 4.1 of Section II of the Code for the reasons advanced by the Complainant.

Unacceptable claims

The Complainant argued that the claim "PROTECTS FROM 100 ILLNESS-CAUSING GERMS" is presented as the primary function of this product, which is in contravention of Clause 5 of Appendix B of the Code.

Before deliberating on this issue, it is worth exploring how the Code defines and views cosmetic products, and why it prohibits attempts by cosmetic advertisers to rely on medicinal claims.

Clause 3.1 of Appendix B defines a "cosmetic product" as "*... any substance or preparation intended to be placed in contact with the various external parts of the human body (epidermis, hair system, nails, lips and external genital organs) or with the teeth and the mucous membranes of the oral cavity with a view exclusively or mainly to cleaning them, perfuming them, changing their appearance and/or correcting body odours and/or protecting them or keeping them in good condition*".

Clause 3.2 adds that products which do not possess at least one of these main characteristics, and are not intended to be applied to, *inter alia*, the skin, hair, nails, teeth, lips or genital organs, would not be regarded as cosmetics.

There is no dispute between the parties that the Advertiser's soaps are cosmetic products. No allegation is made that these soaps are registered as medicinal soaps, and the parties appear to agree that they constitute cosmetic products. The Advertiser added that these soaps are stocked side-by-side with other hygiene and ordinary soaps in retail channels, which is how consumers would be exposed to them.

This is significant, because it suggests that both parties, and arguably all consumers, would realise that this is a cosmetic product. It is, at the end of the day, a soap bar. It is clearly intended to clean, protect and possibly deodorise or perfume users, which is why one would purchase any soap. Following the logic of Clause 3.2 of Appendix B, there can be no dispute that this is a cosmetic product, and the Directorate sees no reason to assume that consumers would not realise this as well.

Clause 3.2 of Appendix B then adds "*... primary cosmetics can also have secondary functions e.g. a body wash with an anti-germ or germ reduction secondary function, where the primary purpose complies with 3.1. Claims for these secondary functions can only be made in a cosmetic sense and must not convey the impression that the cosmetic product confers medicinal properties*".

The significance of this portion lies in the fact that it *allows* cosmetic products to promote secondary, or additional functionality, such as germ reduction type claims. The only caveat is that there must be no impression created that the cosmetic product "confers medicinal properties".

When explaining what is meant by the term "medicinal" properties, Clause 4 of Appendix B differentiates between claims that would be regarded as being made in a "cosmetic context" and those regarded to be made in a "medicinal context". Examples of "medicinal context" claims include:

- Permanent or drastic effects after completion of a treatment;
- Healing or curative aspects;
- To be used restrictively because of the potency of the treatment;

- The effect is aimed at treatment of or relieving a disease condition.

Clause 5 of Appendix B, which the Complainant alleges has been contravened, reads as follows:

“Unacceptable claims are claims that are used and not substantiated. Claims that convey the impression that a cosmetic product possesses medicinal properties are not permitted.

5.1 In general, no cosmetic claims for products used on mucous membranes (except the oral cavity) are permitted.

5.2 Claims suggesting permanent effects are not permitted for cosmetics.

5.3 The term ‘cosmeceutical’ is not a recognised category of cosmetic products. Its use is misleading and thus not permitted.

5.4 An advertisement shall not claim or imply that a cosmetic product can cure or permanently prevent a specific condition that is a symptom of disease.

5.5 Claims implying any sort of physiological action beyond the scope of the defined activity of a cosmetic product, are not permitted”.

There is no allegation that inappropriate mucous membrane claims are made, that permanent efficacy is communicated, that “cosmeceutical” is being used, or that physiological actions that are beyond the scope of cosmetic products are being suggested. The Complainant merely argues that the Advertiser creates an impression that the product possesses medicinal properties, and that the reference to “illness” casts the scope of its claim wider than what would be permissible for cosmetic products. The Directorate, however, does not agree.

The claim “PROTECTS FROM 100 ILLNESS-CAUSING GERMS” does not create a sense of “permanent or drastic effect after completion”, does not imply any ability to “heal” or

“cure” and makes no attempt to suggest that the product is “... aimed at treatment or relieving a disease condition” (refer Clause 4 of Appendix B). There is also no suggestion on the packaging that the product should be used restrictively because it offers potent treatment. By inference, there can be no conclusion that the product possesses “medicinal” properties.

The Sara-Lee matter to which the Advertiser referred accepted that hygiene soaps were permitted to communicate, as a secondary function, the ability to “protect against all germs”. At the time, the Advertising Industry Tribunal (the “AIT), who adjudicated the matter, appears to have accepted that the primary purpose of these soaps (which it points out were clearly labelled as hygiene soaps) was to clean and eliminate body odours, which invariably meant that these were cosmetic products. The AIT did not believe that the claimed ability to “protect against all germs” created a contrary impression with consumers that the purpose of the product was not, in fact, to clean, but rather to prevent or treat disease. It felt that the message was clear that these cosmetic hand washes / soaps clean and perfume your hands and body, but also offer germ killing capabilities.

Considering that these soaps appear to be regarded as cosmetic products by both parties and consumers, that they are stocked with other cosmetic soaps of this kind, and that nothing on the packaging appears to communicate a “medicinal context” as set out in Clause 4 of Appendix B, it is hard to reach a conclusion that the product communicates any “medicinal properties” as per Clause 5 of Appendix B.

The Directorate accepts, while not necessarily being bound by it, that the ASA ruling under reference Reckitt Benckiser / Colgate-Palmolive / 2015-1683F (3 September 2015) upheld an objection against this very claim as used in that commercial. However, the context created in that commercial was entirely different to what is the case here. In the Reckitt-Benckiser matter, the commercial created a scenario where a mother could effectively ignore the potential risks associated with dirt and /or injuries, because Dettol was said to provide protection from any potential germ infection. The Directorate pointed out that:

“It is therefore not necessarily true that consumers would instinctively realise or appreciate the primary cosmetic nature and function of the products being promoted.”

Even when the ‘Dettol mom’ is shown bathing her daughter, the dirt being washed is contextualised and accompanied by the claim that it ‘protects from up to 100 illness causing germs’. The primary cosmetic function of the products is therefore eclipsed by the secondary germ reduction claim”.

The context in that commercial is not present here. The soaps are accepted to be regarded as cosmetic products, and the additional functionality “PROTECTS FROM 100 ILLNESS-CAUSING GERMS” is merely presented as an additional function, not unlike the Sara-Lee matter.

The Directorate also notes that the category of “hygiene” soaps has grown in scope and prominence over the last few years. While there may have been a risk, when this category launched, that consumers might be confused as to whether the product was a soap or medicine, that risk has dissipated as consumers have become familiar with the category.

The claim does not appear to fall foul of either of the scenarios outlined in Clause 3 and 4 of Appendix B, and do not create a “medicinal context” in the manner that the Code seeks to prevent. Accordingly, it cannot be ruled to “... *convey the impression that a cosmetic product possesses medicinal properties ...*”.

As such, the claim “PROTECTS FROM 100 ILLNESS-CAUSING GERMS” as communicated on the Advertiser’s packaging is not found to be in contravention of Clause 5 of Appendix B.