



## GLOBAL LITIGATION | FALSE ADVERTISING | DECEMBER 4, 2009

### **PBM PRODUCTS, LLC AND PBM NUTRITIONALS, LLC V. MEAD JOHNSON NUTRITION COMPANY AND MEAD JOHNSON & COMPANY, EDVA, ACTION NO. 3:09-CV-269**

False advertising litigation and big awards are alive and well in this sluggish economy. PBM Products, LLC, a manufacturer of private label infant formula, won a \$13.5 million damages verdict last month against Mead Johnson in the Eastern District of Virginia, and on Dec. 1, 2009, Chief Judge James R. Spencer granted PBM's request for a permanent injunction.

The case is relatively unusual given both the size of the verdict and the fact that it went to trial after the Court denied PBM's motion to preliminarily enjoin Mead's advertisement that its products provided babies with unique developmental benefits not present in store brands. PBM, however, was not deterred. It changed counsel and pressed forward with trial.

The Court's Dec. 1 Order permanently enjoined Mead from publishing or circulating any advertisement, promotional material, or other literature concerning PBM's infant formula that is false, including, but not limited to the following statements: "It may be tempting to try a less expensive store brand, but only Enfamil® LIPIL® is clinically proven to improve brain and eye development," or "There are plenty of other ways to save on baby expenses without cutting back on nutrition," or from implying the same. Mead was also directed to retrieve any and all advertisements, promotional materials, or other literature containing said claims.

After the jury trial, Mead's laches defense was rejected by the Court. Mead had argued that certain statements at issue had been made for more than two years. The Court cited a Fourth Circuit case, *Scotts v. United Indus. Corp.*, 315 F.3d 264, 275 (4<sup>th</sup> Cir. 2002), which held that when evaluating consumer deception, an advertisement must be viewed in context. The Court found the 2008 mailer at issue clearly took on a new approach in tone and message towards store brand infant formula/private label infant formula manufacturers. Interestingly, perhaps a comment on the current economy, competition in the marketplace, or simply how PBM tried its case, the Court's Dec. 1 Order also stated: "Mead Johnson consciously decided that its marketing should be more aggressive and risky as it witnessed a decrease in its sales and an increase in store brand sales," citing a PBM trial exhibit.

**FOR FURTHER INFORMATION:**

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