

Beware numerical values in advertisements! Legal trouble caused by indication of "100%"

1. Act of using a misleading indication as to quality, etc. (Article 2, paragraph (1), item (xx) of the Unfair Competition Prevention Act)

An act of using an indication on goods or services, in advertisements, or in trade documents, etc. in a way that is likely to mislead as to the place of origin, quality, content, manufacturing process, purpose, or quantity, etc. or an act of transferring, etc. goods using such an indication constitutes the act of unfair competition specified in Article 2, paragraph (1), item (xx) of the Unfair Competition Prevention Act.

Civil remedies, such as a demand for compensation for damage and a demand for an injunction, are available against an act of using a misleading indication as to quality, etc. In addition, an act of using a misleading indication as to quality, etc. may become subject to criminal penalty (Article 21, paragraph (3), items (i) and (v) of the Unfair Competition Prevention Act).

2. Court cases

(1) "100% survival" case

2019 (Ne) 10008, Intellectual Property High Court judgment rendered on March 30, 2021 (court of prior instance: Tokyo District Court)

[Facts]

The Appellant, which sells medical tools used in vitrification cryopreservation, warming, and thawing of ova, etc., alleged that indications, such as "100% post-warm survival," used on the website and in catalogs, etc. of the Appellee, which handles the same kinds of products, are misleading as to the quality and contents of products, and demanded an injunction and compensation for damage against the indications based on the Unfair Competition Prevention Act. As the claims were dismissed in the prior instance, the Appellant was dissatisfied with the judgment and filed an appeal.

[Issue]

The issue was whether indications, such as "100% post-warm survival" and "100% survival," used in advertisements differ from the actual product performance and quality and are misleading for consumers.

[Judgment]

Submitted scientific articles and other evidence are insufficient for supporting the "100% survival rate," and also no reasonable grounds are found for the Appellee to believe those indications to be legitimate. In spite of that, advertisements included

indications, such as "100% post-warm survival" and "100% survival," and these indications were determined to mislead consumers as to the quality and performance of the products.

## (2) Oligosaccharide-containing foods case

2018 (Wa) 3789 Tokyo District Court judgment rendered on February 9, 2021 (prior instance)

2021 (Ne) 10018, Intellectual Property High Court judgment rendered on January 27, 2022

### [Facts]

The plaintiff sells oligosaccharide-containing foods under the name of "Kaiteki-Origo," and the defendant sells a similar product under the name of "Hagukumi-Origo." The plaintiff alleged that the defendant advertised the defendant's product by using indications, such as "oligosaccharide 100%," and misled consumers, and demanded an injunction and compensation for damage based on the Unfair Competition Prevention Act.

### [Issue]

The issue was whether the indications, such as "oligosaccharide 100%," differ from the actual product quality and are misleading for consumers.

### [Judgment]

It was found that the defendant's indications "oligosaccharide 100%" and "pure 100% oligosaccharide" differ from the actual purity (53.29%), and mislead consumers. As these indications are contrary to the facts, the defendant's act was determined to constitute an act of using a misleading indication as to quality, etc.

## 3. Measures

In the two court cases above, an act of using indications containing the numerical value "100%," which differs from the actual quality or component, in advertisements resulted in misleading consumers, and therefore the act was determined to constitute an act of using a misleading indication as to quality, etc. Because of this, when using indications concerning the numerical value "100%," etc. in advertisements in Japan, one should be aware of the fact that the contents of the indications need to be scrutinized (e.g., checking whether a numerical value used in an advertisement coincides with the actual quality, performance, or component) and that objective data are needed for supporting the numerical values used in the advertisements.