

*A Winthrop & Weinstine blog dedicated to bridging the gap between legal & marketing types.*

## [Do You Smell That?](#)

Posted on February 10, 2011 by [Brent Lorentz](#)



[Clorox](#) and [Church & Dwight](#) recently settled a lawsuit relating to cat litter. (News release [here](#).) The basis for the lawsuit was Church & Dwight's allegation that Clorox was airing an advertisement which misleadingly implied that cats preferred Clorox's Fresh Step cat litter to Church & Dwight's Arm and Hammer Super Scoop cat litter:

"The Clorox Advertisements clearly depict multiple cats rejecting and refusing to use a litter box containing Church & Dwight's Super Scoop litter. Moreover, the Clorox Advertisements depict every cat presented with a choice between the parties' competing litter products choosing Clorox's Fresh Step litter over Super Scoop."

If you have some time, I strongly recommend you read the [Complaint](#). It's a relatively brief 23-pages (double-spaced) and contains some entertainment value that inevitably arises where lawyers (many of whom often take themselves too seriously) are required to explain and describe something as uncivilized as feline bowel movements. Some of my favorites gems include:



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"A cat litter box is intended to serve as a cat's 'bathroom'; it is the place in the home where cats are supposed to eliminate waste, so that they don't do so on furniture or bare or carpeted floors."

"... cat waste has a strong odor that is unpleasant to most people. As a result, if a cat uses a litter, but the litter is not effective in eliminating or significantly subduing cat waste odor, consumers will be dissatisfied with the litter."

"The Commercial's ... claim of better odor elimination ... clearly communicate[s] that cats... prefer Fresh Step over Super Scoop because Fresh Step is better at eliminating odors than Super Scoop. ...[T]he commercial is about cats' preference..., not human preference."

And last, but not least:

"The Clorox Advertisements are unambiguous that the judges of whether Fresh Step is superior at eliminating odors are cats, not people. But cats do not talk, and it is widely understood in the scientific community that cat perception of malodor is materially different than human perception. Thus, it is not possible to scientifically determine whether cats view one substance to be more or less malodorous than another substance."

Despite the levity of this post, there is a serious lesson to consider: companies must be able to substantiate the exact claims made in [comparative advertising](#). If you are considering comparative advertising, it is important to determine exactly what your advertisement is claiming (not just what you are intending that it claim), and then ensure that you have conducted sufficient testing to establish that the claim is in fact true.

