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## Fujian Province Fuqing Damin Bio-engineering Co., Ltd. v. Fuzhou Nanhaian Bio-engineering Co., Ltd.

*Citation: The Supreme People's Court's Civil Judgment No. Minsanzhongzi 1/2002*

*Date of judgment: September 4, 2001*

### **Procedural history**

The Fujian Province Fuqing Damin Bio-Engineering Co., Ltd. (Damin) sued the Fuzhou Nanhaian Bio-engineering Co., Ltd. (Nanhaian) in the Fujian Province Higher People's Court on the ground that the latter's advertisement had constituted an act of unfair competition by false publicity and deliberate prejudice to its competitor's goodwill. The first-instance court decided that the act did not constitute an act of false publicity, but caused prejudice to the other party's goodwill. Both Damin and Nanhaian appealed in the Supreme People's Court.

### **Issue**

1. How to determine the act of unfair competition by means of false publicity to mislead consumers
2. How to determine the act of unfair competition as to impair others' commercial goodwill and the reputation of their product

### **Facts**

In April 1997, the Health Food Approval Certificate (the Certificate for short) was secured for the "Nanhaian Eel Calcium" Nanhaian made, in which it was stated that "the product is suitable for children and pregnant and nursing women, and middle-aged and old people". Before that, some

other enterprises were also approved to make eel calcium products, and to the product of “Damin Eel Calcium” Damin made was issued the Certificate in April 1998.

In its advertisement from April 1997 to October 1998, Nanhaian stated that only its eel calcium product was the “authentic, first developed calcium product in China made from natural fresh water eel spine”. It was “the only statutory calcium supplement health food of the kind of eel calcium the Ministry of Health had given its approval”; and it was the “calcium supplement specially made for children” by making a major breakthrough in the raw material, production process and formula of the calcium products”. “It was a calcium supplement much better than the average calcium supplement preparation”. In its advertising from 1998 to 1999, Nanhaian stated that of all the eel calcium products available in the market, only its products were the authentic eel calcium products. The consumers were quoted as saying that some eel calcium products were not approved by the Ministry of Health, nor could be consumed for calcium supplementation. Worse still, they did not even go through the toxicology test; their dosage was uncertain, and products unsafe. ”

The Fujian Higher People’s Court took the view that:

(1) Nanhaian’s advertisement of its products that they were approved as particularly suitable for the “consumer groups,” such as children, should not be deemed to be false publicity;

(2) Before Damin was granted the approval for its own eel calcium product, Nanhaian’s publicity that its product was “first developed in China” and was “the only one statutory health food of eel calcium” did not constitute an act of unfair competition against Damin; after Damin was granted the Certificate, Nanhaian’s similar publicity was misleading, false information prejudicial to its competitor’s goodwill and repute, and constituted an act of unfair competition; and

(3) Nanhaian’s comments on other eel calcium products that were not regulatorily approved did not constitute an act of unfair competition against Damin.

**Rule of law**

Article 9, paragraph one, of the Unfair Competition Law *A business operator may not, by adver*

*tisement or by any other means, make false or misleading publicity of their commodities as to the quality, ingredients, function, usage, producer, duration of validity or origin.*

Article 14 *A business operator shall not fabricate or spread false information to injure his competitors' commercial credit or the good will and repute of its competitors' commodities.*

### **Reasoning**

1. As for false publicity or advertisement, a business operator, advertising its goods or services, should do so in a truthful, correct and complete manner, and should not use misleading language or resort to other means to carry on unfair competition.

Nanhaian's assertion that only its own products were "authentic" was sufficient to make the average consumers wrongly believe that only the Damin's eel calcium products were authentic, and all other brands of the products were not. Such advertisements, with effect and functional comparison not based on evidence, was sufficient to make the average consumers wrongly believe that its eel calcium products had an effect better than those made by Damin. Besides, its publicity that its "calcium products for the special use by children" was not compatible with the "suitable consumer group" as indicated in the Health Food Products Approval Certificate, so it was false publicity. Additionally, since other companies had also been granted the approval to make eel calcium pills before Nanhaian, Nanhaian's advertisement that its products were "first developed in China" was false, and sufficient to mislead consumers about its leading position in the domestic R&D and in its technical capacity of making the eel calcium products, and caused prejudice to the legitimate rights and interests of its domestical competitors, including Damin. But its publicity that its products were the "only eel calcium health products of the kind available" was substantially an objective and truthful statement, and did not constitute an act of unfair competition because only Nanhaian was granted the approval to make the products before Damin was granted the Certificate. But, after Damin was granted the approval, Nanhaian's act to go on making the same assertion in its advertisement was one of unfair competition. To sum up, Nanhaian's act of advertisement was misleading and false, so constituted one of unfair competition.

2. As for injury to other's goodwill, any information that was spread by a business and created

wrong belief, and was unfavorable to others' goods or services on the part of consumers, would result in unfair competition.

In its advertisement, Nanhaian asserted, in the form of consumers' letter, that the eel calcium products of other brands "were made in a rough and slipshod way". While Damin was clearly mentioned, Damin, whose eel calcium was one of those of the other brands, was one whose reputation was injured. The advertisement was sufficient to mislead consumers that Damin's eel calcium was likely to have been made in a rough and slipshod way. Besides, Nanhaian injured other businesses of the eel calcium products "by confusing calcium supplements for children with those for adults." For the purpose to injure the goodwill and reputation of other domestic competitors, including Damin. Further, after Damin was granted the Health Food Approval Certificate, Nanhaian continued use of such words as "only one" and "statutory" in its advertisement of the products, denying the legitimacy of others' eel calcium health food products and impairing Damin's goodwill and the reputation of its products. Accordingly, Nanhaian's advertisement and publicity have caused prejudice, to an extent, to Damin's goodwill and the reputation of its products, and constituted an act of unfair competition.

### ***Holding***

1. Nanhaian had carried on false advertisement and publicity for its eel calcium products, which was sufficient to mislead consumers, and constituted an act of unfair competition;
2. By way of advertisement and publicity to fabricate and spread false information, Nanhaian had injured Damin's goodwill and the reputation of its products, and its act constituted one of unfair competition.