

Bayer Settles False Ad Suit Over WeightSmart Vitamins

By Jeannie O'Sullivan

Law360, New York (April 27, 2015, 10:22 PM ET) -- Bayer AG will pay \$500,000 to settle a proposed class action alleging that it falsely advertised a vitamin to Florida consumers under a deal approved Monday in New Jersey federal court, ending a long legal battle that led to a precedential appeals ruling on class ascertainability.

U.S. District Judge Jose L. Linares ordered the pharmaceutical giant and its parent to reimburse One-A-Day WeightSmart vitamin buyers up to \$250 for those with valid claims and receipts and up to \$15 for those with valid claims and no receipts. The settlement also awards a \$5,000 incentive claim to its class representative, Gabriel Joseph Carrera, and \$125,000 to class counsel for fees and expenses from a \$500,000 common fund.

The court called the settlement “fair, reasonable and adequate.”

“The settlement agreement and proposed settlement were reached after lengthy and rigorous arm's-length negotiations between the parties,” the judge wrote.

The lawsuit and previous actions targeted the ingredient ECGC, a green tea extract promoted as boosting metabolism. Carrera and a previous class representative alleged that the vitamin — which Bayer stopped selling in January 2007 — didn't contain enough ECGC to be effective.

Consumer Dianne Gray first used that argument in a putative class action in September 2008, but the claims were dismissed in June 2009. An amended complaint listing Carrera as the proposed class representative followed, arguing that no scientific evidence supports the claim that WeightSmart's dose of ECGC even enhances metabolism.

Judge Linares denied Carrera's initial petition for nationwide class certification, ruling that a nationwide class of consumers could not be maintained because of varying state laws, but in November 2011 he granted a motion for state certification under the Florida Deceptive and Unfair Trade Practices Act.

In its challenge to certification, Bayer had argued that customers do not have proof that they purchased WeightSmart, since the most common proof of purchase would be a receipt from when the product was still available. Also, Bayer said, a class is unascertainable because retailers also sold knockoff vitamins containing ECGC and consumers often forget details about such small purchases.

Bayer appealed to the Third Circuit after Judge Linares found that Carrera met the requirements for

class certification and concluded that proof of purchase was traceable to loyalty card programs and online purchasing. A three-judge panel in August 2013 vacated the certification, reasoning that without sales receipts or other sales records, it was too difficult to ascertain whether a consumer actually belongs to the class.

The unusual ruling, and the court's subsequent denial of Carrera's motion for an en banc hearing, drew criticism from attorneys and consumer advocates who considered it a hurdle to small class actions. The Carrera decision "arguably eliminates class actions based on small-dollar consumer purchases in the Third Circuit," Mari C. Spears of Sedgwick LLP said at the time. Public Citizen argued that it threatened consumers' ability to hold companies accountable for deceptive marketing.

Third Circuit Judge Thomas L. Ambro also disagreed, declaring in a dissent to the en banc hearing denial that "Carrera gives fear that some wrongs will go unrighted because the wrongdoers successfully gamed the system."

Bayer got support from the Product Liability Advisory Council, which supported its certification challenge with an amicus brief saying the certification could undermine the right of businesses to due process.

The case was remanded to district court, and the two sides arrived at the proposed settlement in November.

Attorneys for the parties did not immediately respond to requests for comment Monday.

Carrera is represented by Carella Byrne Cecchi Olstein Brody & Agnello PC, Whatley Drake & Kallas LLC, Greg Davis LLC, the Law Offices of Howard W. Rubinstein PA, Emerson Poynter LLP and the Law Offices of Eric D. Wewers.

Bayer is represented by Coughlin Duffy LLP, DLA Piper and Bartlit Beck Herman Palenchar & Scott LLP.

The case is Carrera v. Bayer Corp. et al., case number 2:08-cv-04716, in the U.S. District Court for the District of New Jersey.

--Additional reporting by Gavin Broady. Editing by Brian Baresch.