

Bayer WeightSmart Buyers Fail To Win Cert. In Ad Suit

By **Allison Grande**

Law360, New York (July 21, 2011, 7:20 PM ET) -- A New Jersey federal judge on Thursday refused to certify a putative class action accusing Bayer Corp. and Bayer Healthcare LLC of falsely advertising that their One-A-Day WeightSmart vitamins enhance users' metabolism as they age.

In denying plaintiff Gabriel Joseph Carrera's motion for class certification, U.S. District Judge Jose L. Linares ruled a nationwide class of consumers could not be maintained because the court would have to vary its application of the controlling law depending on the state in which the accused product was purchased.

The court would be unable to uniformly apply the New Jersey Consumer Fraud Act to the entire class as the plaintiff had requested, the judge said.

"Given the substantial contacts between plaintiff's claims and the states where One-A-Day WeightSmart was purchased, to disregard the individual laws of those states in favor of a blanket application of New Jersey law would ignore their strong compensatory interest in this matter and would threaten to upset the balance of our federal system," the ruling said. "The court thus follows the weight of authority counseling against the application of the NJCFA to out-of-state consumers."

Despite this holding, Judge Linares did give the plaintiff leave to file a motion for certification of a class of Florida consumers seeking relief under the Florida Deceptive and Unfair Trade Practices Act, a request that the plaintiff had suggested as an alternative to a nationwide class in only two short footnotes.

"While the court suspects that many of the parties' arguments with respect to certification of the proposed nationwide class would also apply to certification of a statewide class, the parties have provided no guidance as to where such overlap exists," the ruling said.

Consumer Dianne Gray originally filed the proposed class action in September 2008 accusing Bayer of falsely touting the benefits of its One-A-Day WeightSmart vitamins by advertising that an ingredient called EGCG, a green tea extract, boosted users' metabolism.

After her claims were dismissed without prejudice in June 2009, an amended complaint substituting Carrera as putative class representative was filed.

In seeking certification of the action alleging NJCFA claims and intentional and negligent misrepresentation claims against Bayer, Carrera argued that New Jersey law should govern the proposed nationwide class, because all of the decisions with respect to the marketing and labeling of One-A-Day WeightSmart took place at Bayer's headquarters in Morristown, N.J.

Judge Linares shot down this contention, ruling that the relevant guidance as to which state has the most significant relationship to a plaintiff's fraud claim, as well as several prior decisions in the New Jersey district court, weighed in favor of the nationwide class being governed by the law of the state where each consumer purchased the product.

"The consumers here had no direct involvement with Bayer in New Jersey and transacted only with third parties located nationwide," the ruling said. "Plaintiff's claims thus have substantial contacts with the states where One-A-Day WeightSmart was purchased, and application of those states' consumer protection laws would further their interest in compensating purchasers for harms they may have suffered."

Because of this conclusion, the proposed nationwide class failed to meet both the predominance and superiority requirements of Rule 23(b)(3), because the court would have to apply the distinct standards of varying state laws in order to adjudicate each class member's fraud claims, the ruling concluded.

Carrera is represented by James E. Cecchi and Lindsey H. Taylor of Carella Byrne Cecchi Olstein Brody & Agnello PC, Joe R. Whatley Jr., Edith M. Kallas, Patrick J. Sheehan and W. Tucker Brown of Whatley Drake & Kallas LLC, Greg Davis of Greg Davis LLC, Howard W. Rubinstein of the Law Offices of Howard Rubinstein, Christopher D. Jennings and Will T. Crowder of Emerson Poynter LLP, and Eric D. Wewers of the Law Offices of Eric D. Wewers.

Bayer is represented by Timothy I. Duffy and Lorna A. Dotro of Coughlin Duffy LLP, Christopher D. Landgraff, Rebecca Weinstein Bacon and Matthew R. Ford of Bartlit Beck Herman Palenchar & Scott, and Shirli Fabbri Weiss and Julie L. Hussey of DLA Piper LLP.

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

--Editing by John Quinn.

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