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## 5-Hour Energy Makers Can't Dump False Ad MDL

By **Caroline Simson**

Law360, New York (January 23, 2015, 1:48 PM ET) -- A California federal judge on Thursday again trimmed an amended class suit accusing the makers of 5-Hour Energy drinks of false advertising, finally tossing the plaintiffs' fraud-based claims about the products' television advertisements and state claims asserting breaches of warranty but allowing certain other warranty claims to proceed.

Following up on his September **decision** that also pared the multi district litigation, U.S. District Judge Philip S. Gutierrez dismissed without leave to amend the plaintiffs' claims that certain commercials attributing the product's energy boost and increased focus to B-vitamins and amino acids had falsely induced them into purchasing 5-Hour Energy drinks.

Even with an amended complaint, the plaintiffs hadn't pled with enough specificity which statements in the commercials they had relied on prior to making their purchase, he said.

"Alleging that plaintiffs 'saw some of all of these television advertisements' does not satisfy the pleading requirements under Rule 9(b) because it does not give defendants information about what specific statements plaintiffs' relied on to their detriment," Judge Gutierrez wrote. "Further, the allegations made regarding each plaintiff that they saw 'numerous advertisements, including on television' is also too vague under Rule 9(b)."

Those plaintiffs claimed that the commercials downplayed the amount of caffeine in the product, which they say is actually the source of the increased energy and focus.

As in September's order, Judge Gutierrez dismissed — this time without leave to amend — several breach of express warranty claims brought under New York and Pennsylvania law after finding that the plaintiffs hadn't given adequate pre-litigation notice. Siding with the defendants, he concluded that the plaintiffs' claim that they had fulfilled the notice requirement by filing their complaint was insufficient. He also dismissed breach of implied warranty claims brought under Pennsylvania law for the same reason.

The judge denied the motion to dismiss only as to several plaintiffs' allegations under the Magnuson-Moss Act, concluding that the plaintiffs had met the amount in controversy standard by alleging that they had purchased multi-packs of 5-Hour Energy products costing more than \$5 and their individual claims are greater than \$25.

He denied the plaintiffs leave to amend their complaint for a third time, noting that the suit has been pending since 2013 and it would prejudice the defendants to continue amending the suit. Moreover, the plaintiffs' inability to adequately plead their fraud-based claims — even after he had pointed out the flawed argument — showed that it would be futile to give them another chance, he said.

The plaintiffs in the suit accuse Innovation Ventures LLC, Living Essentials LLC, Manoj Bhargava and Bio Clinical Development Inc. — the makers of 5-Hour Energy drinks — of

deceptively marketing the product to downplay the high level of caffeine and overstate the product's effectiveness. The suit also claims that the defendants tout phony clinical studies that mislead consumers into believing that the product is more effective than a caffeine-based beverage.

Moreover, the name of the product itself is misleading because it doesn't actually provide five hours of energy and, in fact, provides no energy at all, the suit claims.

The plaintiffs are seeking to represent a nationwide class of consumers who purchased a 5-Hour Energy product, as well as several subclasses of purchasers of multipacks and decaffeinated versions of the products.

The putative class is represented by Bursor & Fisher PA, Faruqi & Faruqi LLP, and Geragos & Geragos APC.

The defendants are represented by Gerald E. Hawxhurst and Daryl M. Crone of Crone Hawxhurst LLP.

The case is In Re: 5-Hour Energy Marketing and Sales Practices Litigation, case number 2:13-ml-02438 in the U.S. District Court for the Central District of California.

— Editing by Ben Guilfooy.

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