



Portfolio Media, Inc. | 111 West 19th Street, 5th floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Judge Keeps State Claims In 5-Hour Energy False Ad MDL

By **Emily Field**

Law360, New York (January 25, 2017, 10:10 PM EST) -- A California federal judge on Tuesday allowed a proposed class of consumers to move forward with claims over allegedly misleading ads under some state laws in multidistrict litigation accusing the makers of 5-Hour Energy drinks of overstating the product's effectiveness.

U.S. District Judge Philip S. Gutierrez tackled a number of arguments aimed at the remaining claims brought by consumers who say the makers of 5-Hour Energy drinks — Innovation Ventures LLC, Living Essentials LLC, Manoj Bhargava and Bio Clinical Development Inc. — deceptively market the product and downplay its high caffeine content.

Two years ago, **the judge dismissed** without leave to amend consumers' 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 consumers hadn't pled with enough specificity which statements in the commercials they had relied on prior to making their purchases, he said.

That order didn't address whether off-label representations, such as television commercials, could be a basis of liability for claims brought under New York, Pennsylvania and New Mexico unfair business and consumer protection laws and New Jersey false advertising and warranty laws, according to the instant order.

The 5-Hour Energy drink makers **had urged** the judge to expand his reasoning in the 2015 order to the remaining claims, according to the opinion.

However, the New York, New Jersey and New Mexico consumer protection laws don't require plaintiffs to prove they relied on an alleged misrepresentation, only that they were exposed to it, the judge said.

With regards to the Pennsylvania law, however, the judge concluded that reliance is a necessary part of an unfair trade practices and consumer protection claim.

Although the consumers, Michael Casey and Donna Thompson, were able to generally describe the commercials they saw, the judge sided with the drink makers' argument that it wasn't sufficient to establish that they relied on those commercials.

"Because defendants have shown the Pennsylvania plaintiffs' reliance claims lacking, the court grants defendants' motion for summary judgment on the [unfair trade practices and consumer protection law] claims to the extent that those claims are based on off-label representations," the judge said.

One of the drink makers' other arguments for partial summary judgment on the consumers' claims was their repeated purchases of 5-Hour Energy drinks, which show that they weren't injured and were in fact "satisfied" customers, according to the order.

They also contended that, after their first purchase of the energy drink, they had personal experience with the product and didn't need to rely on statements on its packaging to understand its effects, according to Judge Gutierrez.

However, even if some consumers thought they got some energy from the drink and bought it more than once, the consumers may still be able to prove their claims at trial by showing that the drink acts as a placebo and provides no energy, the judge said.

At trial, the question of whether consumers were harmed by 5-Hour Energy drink ads will hinge on if they can prove the drink doesn't provide five hours of energy, the judge said. But at this point, the evidence at most shows that some consumers bought the drink a number of times and some ultimately grew unhappy with the product, according to the judge.

"The question of whether 5-Hour Energy is effective raises a genuine dispute of fact that is destined for resolution by the trier of fact, and not the court at summary judgment," the judge said.

Representatives for the parties didn't immediately respond to requests for comment Wednesday.

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

The drink makers 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.

--Additional reporting by Caroline Simson and Cara Salvatore. Editing by Breda Lund.

All Content © 2003-2017, Portfolio Media, Inc.