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Class Action Lawsuits and Dietary Supplements: Not Always a Fit?

By Joel Rothman

Class actions challenging advertising and labeling claims for dietary supplements and food products have become commonplace. Vitaminwater, POM Wonderful, and many other companies have been slapped with suits filed by class action lawyers alleging that product claims were unfair or misleading to a large group of consumers. It's important to keep in mind, however, that in cases in which consumer experiences with a product and its claims may differ greatly, individual lawsuits, instead of class actions, may be more appropriate.

Individualized Impact

Advertising claims can impact consumers in different ways. In disputes, claims must be analyzed to determine, 1) whether claims impacted consumers in some way—for instance, in making a purchasing decision, and 2) whether the claims deceived or misled consumers.

To determine how consumers interpreted an advertising claim, claims are generally reviewed according to what is known as the "reasonable consumer" standard. Applying this standard can be tricky. It requires evaluating how a claim is understood by the "reasonable consumer" of a product. Depending on the target consumer, the reasonable consumer's understanding might be sophisticated—or just the opposite, it might be uninformed. As a result, claims that are misleading to average consumers might still be correctly understood by a product's target consumers.

Because of this complexity, dietary supplement marketers and manufacturers often encounter difficulties substantiating product claims. If a claim is objective—such as a content claim or a comparison claim of fewer calories or more omega-3 content—the analysis is fairly straightforward. However, there are still many opportunities for mistakes to be made, and companies must be careful to ask themselves the right questions (e.g., Fewer calories than what? More omega-3 than what?) in order to cover all bases.

Subjective claims, on the other hand, are often more difficult to substantiate. Truthfulness is only one part of the analysis. It is common for claims to be true in the abstract but misleading in context. As a result, subjective claims need to be interpreted in context with all other claims—including marketing positions and visual images used to promote the product in advertising or on the label—in order to determine whether a claim is substantiated and not misleading.

When analyzing the impact of a claim, it is also imperative to keep in mind the different experience each individual has with a product. The extent to which claims require individualized treatment depends on the product and the claim. Claims related to how a product will perform depend on how each consumer's body reacts to a particular product.

Under traditional class action law, these types of claims should not be subject to class action treatment because each consumer's experience is different. A claim that is deceptive or misleading to one consumer who fails to receive the benefit advertised for a product might still be valid and true for another consumer who does receive the benefit.

Analyzing Claims in Lawsuits

Collective lawsuits over advertising claims can be brought about in different ways and by different entities.

The FTC, state Attorneys General, and the National Advertising Division (NAD) of the Better Business Bureau can all evaluate product advertising and claims to make sure they are not deceptive or misleading. It's important to point out that while the burden is high to demonstrate that a claim is misleading, when the government sues over a claim, the reliance factor is considered established—that is, it has already been determined that the claims would likely affect the general public at large.

By contrast, in private class action suits, it must be proven that all plaintiffs were similarly impacted by a claim—and this can be difficult to demonstrate because, as mentioned earlier, people experience products differently. This initial question of whether the group, as a whole, was impacted should be a threshold inquiry in these cases. However, it's a question that in recent years we've seen class actions fail to address.

Instead, class actions have tended to focus only on the second part of claims analysis—whether claims were misleading. Increasingly, supplement marketers—instead of forcing class action lawyers to first address whether group impact has been established—end up either immediately jumping in to fight the "misleading claims" issue, or, more commonly, they will settle questionable cases in order to avoid the enormous risk of having to pay huge legal fee awards to class action plaintiffs' counsel. (In the event that a company were to lose a case, an award of these fees to plaintiffs' counsel is almost always automatic. Arguably, the explosion of class action lawsuits over the past 20 years may have more to do with leverage gained by plaintiffs' lawyers seeking fees than it does to do with the invalidity of the claims under attack. These suits are supposed to compensate victims suffering small losses from such activity, but they often end up compensating the lawyers most of all.)

An Individualized Approach

Developments in some recent class action suits have put focus back on the contention that when plaintiffs' individual cases may be significantly different, they should not be classified as class action.

In August 2011, Celsius, the maker of an energy drink marketed as "Your Ultimate Fitness Partner," convinced a California State Superior Court Judge to dismiss a consumer class action lawsuit on summary judgment for lack of standing. The Court found that the plaintiff's individual experience with the product could never form the basis for standing to sue.

The product claims for Celsius all relate to the drink's effect on metabolism. These claims are supported by double-blind, placebo-controlled scientific studies performed by reputable institutions. The studies demonstrated that a statistically significant percentage of participants who drank Celsius burned 100 calories or more versus placebo.

Celsius was confident that its studies supported its claims. The NAD had reviewed the claims substantiation for Celsius in the past and determined the claims were supported. But Celsius also knew that in order to convince the Court that its claims were not misleading, it would need to do more than just show they were substantiated—it would need to examine the plaintiff's basis for complaining about the product and find out why he believed the claims were false or misleading.

This was a potentially expensive and risky proposition, considering the normal course of such litigation. However, by moving swiftly to take the plaintiff's deposition and avoiding the expensive and time-consuming motion-to-dismiss stage, Celsius was able to cost-effectively present its defense to the Court based on the facts.

The Court found that the plaintiff's expectation—that he would magically lose weight from drinking Celsius—was unreasonable as a matter of law. The Court also found that the plaintiff could not demonstrate that Celsius did not live up to its claims and work as promised. Therefore, the plaintiff lacked standing to complain about the claims for Celsius.

In reaching its decision, the court recognized that this plaintiff could never prove whether the Celsius supplement product's performance claims are true or not. Since this was an essential element of his claim, he lacked standing to show how he was damaged, and the class action case was dismissed.

This past June, another case saw the U.S. Supreme Court terminate the largest class action lawsuit ever filed, involving 1.5 million employees of 3400 Wal-Mart stores. The Supreme Court denied class action certification to the Wal-Mart employees for claims of employment discrimination. The Supreme Court held that the claims of each employee were too different from each other to be gathered all together in a class action.

Cases like Celsius's and Wal-Mart's may put focus back on the issue that cases of individual impact should be treated as individual lawsuits—not collective class actions. In fact, we have already seen courts around the country taking a closer look at these cases, and several have dismissed class action claims that were too individualized.

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