LOEB & LOEB LLP

Health and Wellness Marketing Compliance Task Force

ALERT

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Magistrate Judge Recommends Certification of Two Proposed Classes in "vitaminwater" Litigation

A federal magistrate judge in New York has recommended that New York and California classes be certified to pursue injunctive and declaratory relief against Coca-Cola and Energy Brands for allegedly deceptive labeling of its "vitaminwater" brand of beverages based on, among other things, the allegedly high sugar content in the beverages and "flavor names that are associated with specific purported health benefits." The magistrate judge found that plaintiffs had demonstrated injuries sufficient to satisfy standing requirements under the unfair and deceptive practices statutes in both states, and concluded that the proposed classes should be able to proceed in their pursuit of injunctive relief. Notably, however, the magistrate found that plaintiffs had not demonstrated a workable damages formula and rejected plaintiffs' motion for Rule 23(b)(3) class certification for their monetary damages claims.

The named plaintiffs in *Ackerman v. Coca-Cola Co.* (E.D.N.Y., No. 09-00395) assert that defendants' misleading representations as to vitaminwater's health benefits influenced customers to pay a premium for the drinks. In a previous chapter of this long-running litigation, a district court judge deemed plaintiffs' claims to be preempted by FDA rulings, to the extent that the allegations rested solely "on the notion that vitaminwater's high sugar content made its health or implied nutrient content claims misleading[.]" The district court declined to dismiss plaintiffs' claims in their entirety, however, leaving room for plaintiffs to proceed with broader challenges to the drink brand's allegedly deceptive labeling and advertising.

After a lengthy consideration of the merits of plaintiffs' motion for class certification, the magistrate judge concluded that the proposed classes of New York and California consumers satisfied Rule 23's numerosity, commonality, typicality, adequacy of representation, and ascertainability requirements. Although the magistrate acknowledged that a request for monetary damages constituted an important element of plaintiffs' claims, he viewed injunctive relief as critical to plaintiffs' deceptive labeling claims and severed the requested remedies for class certification purposes. The magistrate recommended the proposed classes be permitted to proceed with their pursuit of injunctive relief but not with their monetary claims: "Proof that each class member paid a premium for vitaminwater over another beverage would not be susceptible to generalized proof."

It remains to be seen whether the district court will adopt the magistrate's recommendation, but the magistrate's willingness to certify a Rule 23(b)(2) class based on plaintiffs' claims that vitaminwater is "just another sugary soft drink" falsely labeled and marketed as healthy gives little comfort to companies defending these types of claims. The recommendation also puts companies on further notice that compliance with federal nutrition labeling laws may not always serve to insulate them from claims of false and deceptive advertising.

Loeb & Loeb LLP's Health and Wellness Marketing Compliance Task Force

Our Task Force was formed in response to the increase in regulatory enforcement actions and consumer class action lawsuits targeting producers and sellers of food, health and beauty products. The FTC and States Attorneys General are closely scrutinizing marketing and advertising practices looking for misleading product claims, including product misbranding and mislabeling. The regulatory framework governing the labeling and marketing of food, health and beauty products is ambiguous at both state and federal levels and, as a result, there has been a proliferation of lawsuits over marketing and advertising practices in this space. Our Task Force helps companies avoid liability, manage risk and defend against consumer class actions and regulatory enforcement.

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