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Plaintiff's Bar Targets Dietary Supplement Efficacy Claims

Law360, New York (January 30, 2014, 5:42 PM ET) -- For at least three years, the number of putative consumer fraud class actions filed in state and federal courts from coast to coast against companies that manufacture and sell dietary supplements containing glucosamine and chondroitin has snowballed. The defendants have ranged from GNC Corp., Target Corp., Walgreens Co., Costco Corp. and Rite Aid Corp. to Botanical Laboratories Inc., Supple, Natrol Inc. and Nutramax Laboratories Inc.

Product sales skyrocketed through the 2000s to some $2 billion worldwide, but have slowed in recent years with conflicting press on the results of scientific research. With a growing consumer base and plaintiffs bar interest in this industry, more lawsuits may be anticipated.

While courts have trimmed some claims, such as breach of warranty for failure to provide timely notice, they have not been inclined to dismiss the lawsuits in the earliest stages, and a federal court in California has certified a class in a suit involving a glucosamine beverage. That ruling is under interlocutory review before the Ninth Circuit.

The Judicial Panel on Multidistrict Litigation recently issued two orders transferring six of the actions pending before federal courts in four states to a Maryland court for consolidated pretrial proceedings. In re GNC Corp Triflex Prods Mktg & Sales Practices Litig. (No. II), MDL No. 2491; In re Nutramax Cosamin Mktg & Sales Practices Litig., MDL No. 2498 (J.P.M.L. Dec. 17, 2013).

According to JPML, the scientific issues — whether clinical studies demonstrate that these ingredients do not provide the advertised joint-health benefits — will require “extensive expert discovery” and “one or more Daubert hearings,” thus making centralization the best way to prevent duplicative discovery and inconsistent pretrial rulings, as well as to conserve litigant and court resources.

Unless the parties can reach some kind of agreement to resolve allegations that the products cannot deliver the promised relief from joint pain or rebuild cartilage, the potential damages that can be recovered, including punitive damages and injunctive relief, such as barring certain product claims and corrective advertising, are likely to garner considerable public attention in the coming months. Any further negative publicity generated by class-action lawsuits would not likely have a salutary effect on the industry.

A lawsuit pending against Walgreens since November 2012, was recently stayed as the parties attempt to explore the possibility of a settlement through mediation. And a federal court in Illinois has given final approval to the settlement of class claims against Rexall Sundown Inc. requiring the company, which continues to stand by its glucosamine products and their efficacy, to establish a guaranteed settlement fund of $2 million. Pearson v. NBTY Inc., No. 11-7972 (N.D. Ill. Jan. 3, 2014). These cases could provide a

template for the resolution of more recently filed lawsuits

Typical of the actions is one brought by a New York resident against Rite Aid alleging that the company falsely advertises and labels its house brand line of joint health dietary supplements containing glucosamine and chondroitin as effective in addressing joint pain or stiffness. Lastres v. Rite Aid Corp., No. 13-6550 (E.D.N.Y. Nov. 25, 2013).

Seeking to represent a class of consumers who purchased any of a number of these Rite Aid supplements in New York, plaintiff Louis Lastres claims that the company's representations about the efficacy of the products "are totally contradicted by all credible scientific evidence."

Lastres claims that he purchased one of the products relying on the company's claims that they would "help rebuild cartilage & lubricate joints." According to the complaint, the company made its product representations "through a variety of media including its website and online promotional materials and the labeling/packaging of the Supplements themselves." Lastres alleges that he received no benefit from the product and that he would not have purchased it if he had been aware that "Rite Aid had both misrepresented the benefits of the [s]upplements and, in addition, concealed its knowledge of studies demonstrating the lack of efficacy of those products."

Alleging unfair or deceptive acts and practices, false advertising and breach of express warranty under New York law, Lastres seeks restitution and disgorgement, injunctive relief, corrective advertising, statutory and punitive damages, attorney's fees and costs.

While Lastres focuses on studies that have purportedly disproven the products' efficacy claims, other plaintiffs challenge company representations that their efficacy claims are backed by clinical studies. A complaint against Nutramax Laboratories Inc., for example, alleges that its website refers to studies supporting arthritis-relief claims and contends that the studies are "fundamentally flawed, not scientifically valid and/or possess obvious, unmitigated bias, i.e., the study itself was sponsored by Nutramax." Dorfman v. Nutramax Labs Inc., No. 13-0873 (S.D. Cal. Apr. 11, 2013).

Some products subject to litigation have a label stating that they are "not intended to diagnose, treat, cure or prevent any disease," but it remains to be seen whether courts would determine on the merits if such statements effectively counter, from the perspective of the reasonable consumer, the impact of allegedly pervasive advertising touting the products' ability to treat arthritis symptoms.

In the Rexall Sundown settlement, the Illinois federal court approved a requirement that the company cease making certain product claims while revising others and adding the phrase "individual results may vary" to product labels. Among the claims that Rexall agreed to stop using were "renew[s]," "help[s] renew," "repair[s]," "help[s] repair," "rebuild[s]" and "help[s] rebuild cartilage." Any other statements including these terms will be modified using terms such as "support[s]" or "protect[s] cartilage."

Regardless of the merits of the plaintiffs' claims, it is apparent that dietary supplement makers would benefit from a careful review of the clinical studies on which they base their product promotions and choose their labeling, advertising and website representations with an eye not only toward federal regulators, but also the plaintiffs bar. One lawsuit or agency warning letter quickly spawns new litigation, and the pressure to settle only increases as courts allow them to proceed as class actions and the costs of discovery mount.

It makes sense to seek early dismissal, but preemption and standing grounds have not proved entirely

successful to date, and courts have split over whether class representatives have standing to pursue claims for products they have not purchased.

The California federal court that certified a class of consumers who purchased a glucosamine beverage determined that common questions of fact predominated, despite evidence showing that most consumers purchased the product multiple times, giving rise to an inference that some potential class members were satisfied with the product. In the court's view, that inference did not support the company's argument that many or most of the putative class members lacked standing. Carbral v. Supple, No. 12-0085 (C.D. Cal. Feb. 14, 2013) (pending before Ninth Circuit at No. 13-55943).

Still, every colorable defense should be asserted to defend brand integrity, and counsel may want to consider the body of law that has developed in specific jurisdictions as dozens of consumer fraud complaints against food and beverage companies have made their way through the courts. The sufficiency of the pleadings, whether consumers can be misled if product labels provide limiting statements, and if the primary jurisdiction doctrine or preemption is applicable are issues that have been explored at length under federal and state laws relevant to those industries. The U.S. Food and Drug Administration's oversight of dietary supplements differs from its oversight of foods, beverages, drugs, medical devices, and cosmetics, but, to borrow from Gertrude Stein, a label is a label is a label.

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