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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

4th Circ. Raises Bar For False Ad Plaintiffs In GNC Ruling

By **Sindhu Sundar**

Law360, New York (July 9, 2015, 8:01 PM ET) -- The Fourth Circuit recently found that consumers accusing manufacturers of making false advertising statements must show that no reasonable expert would agree with the statements, a first-of-its-kind ruling by a federal appellate court that attorneys say will fell many such suits in the early pleading stages.

The Fourth Circuit's June 19 ruling dealt a blow to consumers suing GNC Corp. in consolidated putative class actions over the supplement maker's marketing claims about its TriFlex brand joint health supplements. The appeals court found that the plaintiffs didn't show proof that GNC's advertising of the products' effectiveness was literally false, because the supplement maker cites clinical studies that support its claims.

The plaintiffs had argued that the "vast weight" of scientific evidence doesn't support those claims, but the panel ruled that wasn't enough to support their view that GNC's marketing was literally false — they had to show that "no reasonable expert" would agree. The finding vindicates manufacturers' arguments that decades of state law have established that if reasonable experts disagree on the truth of an advertising claim, then plaintiffs can't show it is actually false.

Consumers can still argue that a manufacturer made misleading claims — the plaintiffs in the GNC case have so far declined to do so — though the Fourth Circuit's ruling doesn't outline standards of proof for those claims. But the appeals court has posed a major hurdle for suits that challenge the truthfulness of advertising claims to get past the motion to dismiss stage, attorneys say.

"Private plaintiffs try to get past motions to dismiss with all these allegations, and a lot of them end up settling because supplement manufacturers realize it's more expensive to go on," Jonathan Cohn of Sidley Austin LLP said. "But now it will be much harder to get past that stage."

Manufacturers in advertising suits have already taken note. Riddell Inc., known for its NFL football helmets, is **trying** to persuade a West Virginia federal court to dismiss a proposed class action against it over its marketing claims about its "Revolution" helmets. The court had previously denied its motion to dismiss the suit, which targeted Riddell's claims that the helmets reduce incidents of concussion by 31 percent, but vacated its ruling after the Fourth Circuit's ruling in the GNC case, and asked the parties to brief the court on the effects of the appellate ruling.

The plaintiffs in that case had argued that the Fourth Circuit ruling doesn't foreclose claims about misleading statements, but Riddell argued that the plaintiffs have to argue that the statement they take

issue with is true, but nonetheless misleading, and show proof to support why.

"What's novel in the Fourth Circuit's ruling is that the court seems to be setting a higher standard of proof if the claim is that an advertising statement is literally false," August Horvath of Kelley Drye & Warren LLP said. "Plaintiffs basically must show 'beyond reasonable doubt' that it's false, to make an analogy to criminal law, rather than just by a preponderance of evidence, which has been the default standard in these cases."

"But if a plaintiff is just saying that the claims are misleading, then you could bring a challenge and face a lesser burden, that probably doesn't require complete consensus among experts."

The question of how plaintiffs can show the claims are misleading could emerge as another battlefront, particularly in light of this ruling, attorneys say.

Private consumers are not allowed to bring suits about the lack of substantiation of marketing claims, because that is the purview of regulatory bodies. And the recent Fourth Circuit decision holds that there can be no so-called battle of the experts over advertising statements that are actually false. So plaintiffs making claims about misleading advertisements may have to tailor their arguments to meet those boundaries, attorneys say.

"We're going to see the word 'misleading' a lot more in these cases, but plaintiffs may have to walk an even finer line between misleading and unsubstantiated advertising claims," Horvath said. "It's going to require more skill from plaintiffs."

Gerber Products Co., which is facing a proposed class action in California federal court on its alleged false advertising of a baby formula product, has also cited the Fourth Circuit's GNC ruling in trying to persuade the court to toss the case. The court had previously **denied** the children's foodmaker's summary judgment motion.

"We'll see how all these courts apply the Fourth Circuit ruling," Dale Giali of Mayer Brown LLP said. "The thing is, we're talking about advertising, and not whether a product actually works or not. And the law has grown around the notion of advertising that we don't want product manufacturers to be in straitjackets, where they can only say something if it is incontrovertibly true."

Circuit Judges Paul Niemeyer, Henry Franklin Floyd and Clyde H. Hamilton sat on the panel for the Fourth Circuit.

Plaintiffs are represented by Robert Jeffrey Berg of Denlea & Carton LLP.

GNC is represented by Joseph R. Palmore of Morrison & Foerster LLP and E. Duncan Getchell Jr., Gordon W. Schmidt and Courtney S. Schorr of McGuireWoods LLP.

The case is In Re: GNC Corp.; Triflex Products Marketing and Sales Practices Litigation, case number 14-1724, in the U.S. Court of Appeals for the Fourth Circuit.

--Additional reporting by Zachary Zagger and Y. Peter Kang. Editing by Chris Yates and Emily Kokoll.
