

CVS Escapes Vitamin E False Labeling Suit

By **Steven Trader**

Law360, New York (January 28, 2016, 3:40 PM ET) -- CVS Pharmacy has escaped a proposed class action accusing it of misleading shoppers about the heart health benefits of its vitamin E supplements after a Rhode Island federal judge found the supplements' label was in line with Food Drug and Cosmetics Act requirements.

U.S. District Judge Mary M. Lisi was unconvinced by shopper Ronda Kaufman's argument that she was tricked into buying CVS Pharmacy Inc. brand vitamin E supplements based on their apparent heart health. In reality, the vitamin's label contained only limited statements — some of which are supported by research — and properly discloses that the supplement isn't intended to cure or treat disease, as required by the FDCA, according to the judge.

"Kaufman's allegations that 'defendants misled consumers to believe these products protect consumers' hearts and/or reduce consumer's risk of heart disease;' and that she 'was misled by defendants' statements to believe its vitamin E products would reduce her risk of heart disease' are inconsistent with the statements that are actually written on the label, and they are in direct contravention of the explicit disclaimer on the product label," Judge Lisi wrote.

Kaufman sued CVS and its holding company CVS Caremark Corp. in May 2014, stating that the majority of scientific studies have found that vitamin E supplements don't provide any heart health benefits and that she wouldn't have purchased them if CVS hadn't claimed that they do.

She sought to represent a nationwide class of consumers, or in the alternative, two subclasses of New York and Rhode Island consumers, who had purchased CVS vitamin E products featuring a "heart health" label or a statement pertaining to its supposedly healthy effects on blood vessels, according to the complaint. She claimed the labels violated Rhode Island's Deceptive Trade Practices Act and New York's Consumer Protection Act, noting that the nationwide pharmacy retailer had unjustly enriched itself.

To support her contention that CVS knowingly misled its shoppers, Kaufman had submitted a collection of at least seven medical journal articles that she said showed vitamin E does not decrease or prevent heart disease, according to the court document.

However, Judge Lisi said on Wednesday that Kaufman had failed to connect her misrepresentation claims with the alleged findings in the clinical studies on which she relied. The label she disputes states that vitamin E helps maintain healthy blood vessels and supports heart health, whereas the studies she cites conclude that the supplement doesn't prevent heart disease.

“Moreover, the defendants’ vitamin E label explicitly states that the product itself is not intended to diagnose, treat, cure or prevent any disease, making the ultimate conclusions of the cited studies irrelevant,” Judge Lisi wrote.

What’s more, several of the studies introduced as evidence by Kaufman actually supported CVS’ claim that vitamin E was a good source of antioxidants, another claim that falls within the FDCA’s allowable representations, Judge Lisi said.

Under the FDCA, states are precluded from imposing requirements on nutritional labels that are beyond what’s allowed under federal law. As such, Kaufman’s claims are preempted by the FDCA, Judge Lisi said, but also insufficient to state a claim for fraud, according to the order.

Representatives for both parties did not immediately return a request for comment on Thursday.

Kaufman is represented by K. Joseph Shekarchi of Shekarchi Law Offices, Brian D. Penny, Laura Killian Mummert and Douglas Bench of Goldman Scarlato Karon & Penny PC and John Zaremba of Zaremba Brownell & Brown PLLC.

CVS Caremark Corp. and CVS Pharmacy Inc. are represented by William R. Grimm of Hinckley Allen LLP, and Robert M. Andalman and Daniel Lis of A&G Law LLC.

The case is Ronda Kaufman et al. v. CVS Caremark Corp. et al., case number 1:14-cv-00216, in the U.S. District Court for the District of Rhode Island.

--Additional reporting by Jody Godoy. Editing by Christine Chun.

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