

'Natural' Menopause Drug Deception Suit Survives Dismissal

By **Steven Trader**

Law360, New York (September 26, 2016, 9:55 PM EDT) -- The woman alleging a "natural" menopause remedy made by Nature's Bounty Inc. is ineffective and actually contains synthetic ingredients and lead can continue pursuing her proposed class action after a New York federal judge concluded Monday she had standing, and denied most of the supplement maker's dismissal motion.

U.S. District Judge Margo K. Brodie found reasonable almost every one of Carolyn Sitt's claims accusing Nature's Bounty and its parent, NBTY Inc., of deceiving women by calling its black cohosh menopause remedy "natural" and "nonsynthetic," even though the supplement supposedly contains synthetic chemicals and traces of lead, and its effectiveness is not supported by scientific evidence.

Sitt alleged in her July 2015 suit that the company's deceptive and false practices and advertising violated New York business law, the consumer protection statutes in all 50 states and the Magnuson-Moss Warranty Act, and that the remedy maker had unjustly enriched itself.

Nature's Bounty argued that Sitt doesn't have standing to assert claims on behalf of consumers in states where she doesn't live and didn't buy the product. However, Judge Brodie pointed out that the company doesn't actually contest that Sitt has sufficiently pled that she purchased and was harmed by the product in New York, "thus she has satisfied the standing requirement for class actions" and could represent a nationwide class if certified, the judge concluded.

Sitt's bid for an injunction was a different story, though, as the consumer had not alleged a likelihood of continuing or future injury and therefore lacked standing to pursue injunctive relief, Judge Brodie found, batting down her claim for unjust enrichment as well.

Having settled the issue of standing, Judge Brodie went about fleshing out the rest of Nature's Bounty's dismissal motion, starting with its argument that none of the statements found on black cohosh's label would deceive a reasonable consumer.

The two statements at issue on its product's label and advertising are that it "helps alleviate hot flashes, night sweats and mild mood changes," and that "studies document black cohosh's ability to help support the physical changes that occur in women's bodies over time."

Nature's Bounty argued that Sitt has not proven that black cohosh isn't effective and thus can't sustain her argument that its statements are misleading, but Judge Brodie concluded that Sitt's allegations were specific enough to keep around at this point.

"Factual disputes about whether the studies actually prove that black cohosh is ineffective, or whether there is mere scientific debate regarding the benefits of black cohosh, cannot be resolved by the court on a motion to dismiss," the judge wrote.

Nature's Bounty had also argued that its representation of using "only the finest quality herbs and spices" could not mislead a reasonable consumer because Sitt's accusation that the product is contaminated with lead is "demonstrably false," but Judge Brodie again sided with Sitt.

"Although a consumer reading the nutrition label may note that the product contains other ingredients besides black cohosh, a consumer could nevertheless reasonably conclude that the product does not contain lead, as the lead content -- even if minimal -- is not disclosed to consumers," Judge Brodie wrote. "Therefore, the court finds that these allegations are sufficient to plead the 'materially misleading' element of plaintiff's ... claims."

Likewise, while Nature's Bounty argued that an objective consumer would know better than to assume every ingredient is natural after seeing "natural whole herb" and "natural menopausal relief" statements on the label — along with a disclaimer that the product contained "other ingredients" — Judge Brodie again shot down the remedy maker, finding the opposite to be true.

"Although defendants are correct that these representations do not promise that the product is 'all' or '100 percent' natural, a reasonable consumer could assume that the product contains only natural ingredients," Judge Brodie wrote.

"The fact that the fine print on the back of the labeling could indicate to a consumer that other ingredients were not 'natural' does not render another conclusion so patently or objectively unreasonable so as to warrant dismissal as a matter of law," the judge added.

Joseph Lipari of The Sultz Law Group PC, an attorney for Sitt, on Monday called Judge Brodie's decision an important and significant victory.

"We view the decision as very important inasmuch as it provides litigants with clarity as to what is required in order to demonstrate Article III standing and maintain a national class," Lipari told Law360 on Monday.

Representatives for Nature's Bounty late Monday did not immediately return a request for comment.

Nature's Bounty is represented by Nicholas R. Alioto, Desiree M. Ripo and Amanda L. Groves of Winston & Strawn LLP.

Sitt is represented by Joseph Lipari, Jean Sedlak and Jason P. Sultz of The Sultz Law Group PC.

The case is Carolyn Sitt v. Nature's Bounty Inc. et al., case number 1:15-cv-04199, in the U.S. District Court for the Eastern District of New York.

--Editing by Catherine Sum.