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Swiss-American Must Face False Sunscreen SPF Class Action

By **Steven Trader**

Law360, New York (April 4, 2017, 6:36 PM EDT) -- Health care products maker Swiss-American must face a proposed class action claiming it falsely labeled its sunscreen with a higher sunburn protection value, after a New York federal judge rejected the company's argument that a majority of the claims were preempted by federal law.

Lead consumer Eli Dayan alleged in a December 2015 complaint that Swiss-American Products Inc. violated the federal Magnusson-Moss Warranty Act and more than 40 state consumer protection laws by selling its EltaMD UV Aero sunscreen with a label indicating it had a sunburn protection factor, or SPF, of 45, when in reality the value was closer to 18. The company responded by arguing that he'd not stated a valid claim under the MMWA, and that his state law allegations were preempted by the federal Food, Drug and Cosmetic Act.

In January, U.S. Magistrate Judge Vera M. Scanlon partially agreed, recommending that the MMWA claim be dismissed but that the remainder of the state law claims be kept alive. On Friday, Chief U.S. District Judge Dora L. Irizarry concluded that the magistrate's reasoning was sound, and adopted those suggestions in their entirety.

The magistrate had determined that express preemption did not apply because Dayan's state law claims "seek to hold defendant liable for failing to label properly the product's SPF value," which was a standard identical to, not more than, what is required under the FDCA.

With regard to the implied preemption challenge, the magistrate had reasoned that although the state law allegations touch on areas regulated by the FDCA and require reference to the FDCA's rules, "plaintiff's state law claims sit next to federal regulations and are not premised on defendant's alleged failure to comply with FDCA requirements."

On Friday, District Judge Irizarry said one of the problems with Swiss-American's arguments in its bid to reject the recommendation was that it was attempting to broaden both the scope of Dayan's claims and the doctrine of implied preemption.

The crux of Dayan's allegations is that the sunscreen was advertised as having an SPF value of 45 when in fact it has a lower, less protective number, thus deceiving consumers, Judge Irizarry noted. Based on that starting point, Dayan's claims can in fact sit alongside the federal Food and Drug Administration's SPF labeling regime, the judge said.

"Though admittedly a tricky distinction, the magistrate judge concluded correctly that the allegations plaintiff articulates are not entirely dependent on the FDCA because they would exist as traditional common law tort claims even if the FDCA had never been enacted," the judge wrote. "The complaint does not articulate a per se challenge to defendant's testing or labeling; instead, the allegation that the SPF value is not correct is used only to substantiate plaintiff's claim that plaintiff was deceived because the sunscreen did not protect him to the degree that was expected. In this way, plaintiff's claims sound in traditional state tort law."

In his complaint, Dayan alleges that after realizing the sunscreen he'd purchased was ineffective, he decided to have it tested by a laboratory, which is how he discovered the SPF discrepancy.

Swiss-American though had challenged the claims on the grounds that it too had tested the sunscreen, and its test results showed the product was indeed SPF 45.

Magistrate Judge Scanlon in the January recommendation rejected Swiss-American's argument that Dayan had failed to state a plausible claim for relief, ruling that while its tests may ultimately prove more persuasive in the end, it was not the court's role to decide so in a motion to dismiss.

On Friday, District Judge Irizarry again concluded that the magistrate's reasoning was correct.

"Ultimately, the magistrate judge concluded that, for plaintiff's claims to survive at this stage, it was sufficient for him to ... allege that the product falsely advertised itself as SPF 45 when its SPF is lower than that, and ... submit tests that he alleges were conducted in compliance with FDA regulations that he claims substantiate his allegations. The court agrees," Judge Irizarry wrote.

Joseph Lipari of The Sultzer Law Group, an attorney for Dayan, said they viewed it as an important decision on preemption "and are pleased with the court's finding that the claims are not expressly preempted because they parallel and are consistent with FDCA requirements and that they are not impliedly preempted because they touch on areas regulated by the FDCA but are not premised on a failure to comply with FDCA requirements."

Counsel for Swiss-American on Tuesday did not immediately return a request for comment.

Dayan is represented by Joseph Lipari, Jean Sedlak and Jason P. Sultzer of The Sultzer Law Group.

Swiss-American is represented by Jennifer L. Bloom, Joseph J. Saltarelli and Patrick L. Robson of Hunton & Williams LLP.

The case is Eli Dayan v. Swiss-American Products Inc., case number 1:15-cv-06895, in the U.S. District Court for the Eastern District of New York.

--Editing by Pamela Wilkinson.