New York Law Journal

Class Action Against Amazon Over Sale of Diet Pill Is Revived

Andrew Denney, New York Law Journal

August 25, 2016

A federal appeals court has reinstated a class action lawsuit against Amazon Inc. regarding its sale of a diet pill that contained a banned stimulant, finding the company failed to prove the plaintiff had agreed to settle his claim through arbitration.

According to court papers, in January and April 2013, Dean Nicosia purchased 1 Day Diet, a weight loss drug that contains a banned substance called sibutramine, which is classified as a schedule IV stimulant.

Weight loss supplement known as "1 Day Diet"

The U.S. Food and Drug Administration withdrew sibutramine from the market in 2010 after it was revealed that it was associated with an increased risk of heart attacks and strokes. But the FDA did not reveal that 1 Day Diet contained the drug until November 2013.

Amazon ceased sale of the product but did not inform Nicosia contained sibutramine or offer him a refund.

Nicosia filed a class action suit against Amazon alleging violations of the Consumer Product Safety Act and seeking damages and an injunction to prevent the company from further sale of products containing sibutramine.

Amazon's conditions of use contains a provision mandating binding arbitration to settle claims against Amazon regarding the products it sells and that claims would be settled on an individual basis and not through class action.

Amazon did not compel arbitration in the case and instead moved to dismiss Nicosia's complaint for failure to state a claim, arguing that he had registered for an Amazon account in 2008 and, in so doing, agreed to the company's conditions of use.

The conditions did not include the mandatory arbitration provision in 2008, but did include it after a 2012 update, which would have applied when Nicosia bought the pills.

Nicosia challenged the company's argument that he had registered for an account and noted that there was no arbitration provision in place in 2008.

He also argued that, in 2008, the conditions contained a choice of forum clause designating state and federal courts in King County, Washington, as the exclusive forums for any claims against the company exceeding $7,500.

In February 2015, Eastern District Judge Sandra Townes granted Amazon's motion. She found that Nicosia had constructive notice of the company's conditions of use and that, regardless of the fact that he agreed to the conditions before the mandatory arbitration provision was added, he was given notice that the terms were subject to change.

Townes also ruled that Nicosia did not have standing to bring an injunction.

But on Thursday, a panel of the U.S. Court of Appeals for the Second Circuit partially vacated Townes' ruling.

Writing for the court in *Nicosia v. Amazon*, 15-423-cv, Judge Denny Chin said the court was not convinced that Nicosia was bound by the arbitration clause and that Townes erred in relying on Amazon's argument that Nicosia created the Amazon account in 2008, which ignores the possibility that he could have used an account he shared with a family member to buy the diet pills.

Townes applied Washington law to the question of whether the parties are contractually bound to arbitrate under Amazon's 2012 conditions of use.

When a purchaser places an order from Amazon, the purchaser is asked to click on a "place your order" button on the site's order page, which states elsewhere that, by clicking on the button, the purchaser agrees to Amazon's conditions of use. The page also contains a hyperlink to the conditions.

Chin said the question in the case is whether or not a "reasonable offeree" knew that making a purchase amounts to assenting to additional terms.

Judge Denny Chin of the U.S. Court of Appeals for the Second Circuit
NYLJ/Rick Kopstein

In observing Amazon's order page Chin said that the court is not convinced that the notice of the contract is sufficient under Washington law. A purchaser is not specifically asked if they agree with the conditions—a setup known as a "browsewrap" agreement—when prompted to "place your order."

The message that placing an order amounts to an agreement to the conditions of use is neither bold or capitalized, Chin said, and the page itself contains numerous links of various colors, sizes and locations, which obscure the message.

Chin drew on fellow Second Circuit Judge Pierre Leval's "apple stand" analogy from the court's 2004 decision in *Register.com v. Verio,* 356 F.3d 393, 403, in which a visitor to an apple stand sees a basket full of apples and, behind that, a wall full of signs. Some of the signs include relevant information, such as prices and methods of payment, while others include less relevant information, such as ads for other apple stands. Among those signs is one containing additional terms that are conditional to the visitor's purchase.

"Has the apple stand owner provided reasonably conspicuous notice?" Chin said. "We think reasonable minds could disagree."

The panel found, however, that Nicosia is not entitled to injunctive relief, as he was unable to show that he was under real or immediate threat of injury. Amazon has ceased sales of 1 Day Diet and Nicosia did not allege that he intends to use Amazon again in the future to buy any products.

Chin was joined on the decision by Judges Robert Sack and Raymond Lohier Jr.

Nicosia was represented by Joseph Tusa of Tusa P.C. in Southold, who presented oral arguments in the case; Lowey Dannenberg Cohen & Hart partner Peter St. Phillip and associate Scott Papp; Timothy Blood, a partner at the San Diego, California-based Blood Hurst & O'Reardon and associate Paula Roach; and Gregory Duncan, a Charlottesville, Virginia, solo attorney.

Amazon was represented by Morgan, Lewis & Bockius partner Gregory Parks, who presented oral arguments, and partner-elect Ezra Church, who each work in Morgan Lewis' Philadelphia office; and associate Regina Schaffer-Goldman, who works in the firm's New York office.

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