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2nd Circuit reinstates suit over Amazon diet-drug sales

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(Reuters) - A federal appeals court on Thursday revived a proposed class action brought by a man claiming online retailer Amazon.com Inc sold him a diet drug containing a potentially hazardous substance.

The 2nd U.S. Circuit Court of Appeals ruled unanimously that a lower court too hastily concluded Dean Nicosia had agreed to a mandatory arbitration provision when he bought 1 Day Diet from Amazon's website.

"(R)easonable minds could disagree on the reasonableness of the notice" of the arbitration agreement provided by Amazon, wrote U.S. Circuit Judge Denny Chin, joined by Judges Robert Sack and Raymond Lohier.

Nicosia said he used Amazon's website in 2013 to purchase the product, which contained a prescription-only stimulant, sibutramine. Sibutramine was withdrawn from the market in 2010 at the request of the Food and Drug Administration, which warned that it carried cardiovascular and stroke risks.

Nicosia said the presence of sibutramine was not disclosed, and he was never notified nor offered a refund, even after Amazon stopped selling the product.

In 2014, Nicosia sued Amazon in the U.S. District Court for the Eastern District of New York, alleging the company violated federal product-safety and state consumer-protection laws. He sought damages and an injunction barring future sales of products with sibutramine.

Amazon moved to dismiss on the grounds that Nicosia's claims were covered by a mandatory arbitration provision.

The company said its records indicated Nicosia created an Amazon account in 2008, agreeing to its "Conditions of Use." Though the terms did not then contain an arbitration agreement, Amazon said users were advised they were subject to change, and one had by been added by 2013, when Nicosia ordered the diet drug.

Nicosia challenged Amazon's assertion that he registered with the site in 2008. He also argued Amazon's arbitration clause was a "browsewrap" agreement containing a link to terms and conditions but not requiring express agreement like "clickwrap" agreements.

Browsewrap agreements are typically only enforced by courts when they find users have "actual or constructive knowledge" of the terms, Nicosia argued. Amazon's were easy to miss when linked from the bottom of a busy screen, he said.

But the lower court granted Amazon's motion, finding Nicosia had constructive notice of the conditions. It also rejected his bid for injunctive relief.

On appeal, the 2nd Circuit said the lower court gave too much weight to Amazon's account of Nicosia's actions, rather than deferring to Nicosia's complaint, as was appropriate for a motion to dismiss.

The panel also said there was a legitimate question as to what notice Nicosia had about the Conditions of Use, assuming the agreement was a hybrid between clickwrap and browsewrap.

Chin compared the Amazon order page to an apple stand with a wall full of signs, among them a notice about additional terms and conditions in connection with purchases.

"Has the apple stand owner provided reasonably conspicuous notice? We think reasonable minds could disagree," he wrote, remanding the case back to address that question.

An Amazon spokesman declined to comment. A lawyer for Nicosia, Joseph Tusa, said he was pleased with the decision and looked forward to moving ahead in the lower court.

The case is *Nicosia v. Amazon.com Inc*, 2nd U.S. Circuit Court of Appeals, No. 15-42.

For Nicosia: Joseph Tusa of Tusa PC, Peter St. Philip and Scott Papp of Lowey Dannenberg Cohen & Hart, Timothy Blood and Paula Roach of Blood Hurst & O'Reardon and Gregory Duncan

For Amazon: Gregory Parks, Ezra Church and Regina Schaffer-Goldman of Morgan Lewis & Bockius

---- **Index References** ----

Company: AMAZON COM INC; MORGAN LEWIS STAMFORD LLC

News Subject: (Arbitration & Mediation (1AR68); Business Lawsuits & Settlements (1BU19); Class Actions (1CL03); Consumer Protection (1CO43); Judicial Cases & Rulings (1JU36); Legal (1LE33))

Industry: (Accounting, Consulting & Legal Services (1AC73); Legal Services (1LE31); Retail (1RE82); Retail Industry Highlights (1RE69))

Region: (Cyprus (1CY87); Europe (1EU83); Eurozone Countries (1EU86); Southern Europe (1SO59); Western Europe (1WE41))

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