

Amazon Says Fine Print Still Mandates Arbitration

By **Cara Salvatore**

Law360, New York (November 30, 2015, 10:03 PM ET) -- Retail behemoth Amazon insisted Monday that arbitration is the only recourse for a customer who bought a dangerous supplement through the site, telling a panel of Second Circuit judges that the customer clicked to signify his assent to the fine print — and that it didn't matter how allegedly fine or ill-placed it was.

In oral arguments before a three-judge panel of the Second Circuit, the retailer said that customer Dean Nicosia should not be allowed to revive a suit accusing Amazon of allowing him to be sold a supplement containing the U.S. Food and Drug Administration-controlled substance sibutramine.

Although the legal blurb presented to Nicosia simply included links to the actual terms governing his purchase, it didn't matter at the end of the day, Amazon said. Nicosia still clicked the button to place his order.

"It was clear he was agreeing to site conditions," lawyer Gregory Parks of Morgan Lewis told the panel.

"Do you agree it needs to be conspicuous?" U.S. Circuit Judge Denny Chin asked.

"No, your honor, I do not agree it needs to be conspicuous," Parks said.

The "1 Day Diet" weight-loss supplement that Nicosia bought contained hidden amounts of sibutramine, a controlled substance only available by prescription that has been linked to serious heart events.

Chin compared the situation to that of a salesman offering an apple to a customer whose yes response "signifies agreeing to all terms and conditions."

But Parks said that wasn't exactly it. He said to imagine there was a sign alongside the apples.

"Because they have notice of those terms and conditions by looking at the front of the sign, it doesn't matter if they look at the back of the sign" that says what the terms actually are, Parks said.

However, Nicosia lawyer Joseph Tusa of Tusa PC said that clicking the payment button didn't simultaneously mean the customer was providing consent to be bound by terms that were in a small font size or were hard to find.

"How small can they go and have it be enforceable?" Tusa asked. "Amazon knows how to draw your attention to something when they want to."

In August, the putative class **filed its brief** with the Second Circuit, arguing the retail giant didn't give sufficient notice of its arbitration provision. Nicosia said the "conditions of use" font was too tiny to constitute sufficient notice.

Nicosia further argued that the district court mistakenly relied on Amazon's representation that Nicosia clicked his consent to its terms and conditions, saying the court improperly considered it a "click-wrap" case, in which customers click to accept the terms and conditions, rather than a "browse-wrap" case, in which the terms and conditions are posted through a hyperlink.

A district court judge tossed the suit in February, saying Nicosia had agreed to be bound by Amazon's terms and conditions, which included the arbitration provision, each time he made the purchase. Nicosia purchased 1 Day Diet from a third-party seller on Amazon.com in January and April 2013, and is accusing Amazon of profiting from its failure to perform due diligence to ensure drugs containing sibutramine aren't sold on its site.

He also alleged that Amazon's failure to warn or reimburse consumers once it has detected and pulled an offending product is a violation of the Consumer Product Safety Act, as well as several Washington state laws.

Nicosia is represented by Joseph Tusa of Tusa PC.

Amazon is represented by Gregory Parks of Morgan Lewis & Bockius LLP.

The case is Nicosia v. Amazon.com Inc., case number 15-423, in the U.S. Court of Appeals for the Second Circuit.

--Additional reporting by Caroline Simson, Dani Meyer and Jessica Corso. Editing by Catherine Sum.