

Dietary Supplements Alert--Be Careful in Making Product Claims

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An unprecedented \$53 million nationwide class action settlement demonstrates the legal risk associated with dietary supplement marketing.



Plaintiffs, on behalf of a class of New York and California consumers, alleged that Reckitt Benckiser's "Move Free Advanced" dietary supplements violated state laws against false or misleading advertising because the supplements did not perform as labeled or advertised to treat joint pain and stiffness or to alleviate arthritis symptoms. After nearly four years of litigation, and after the U.S. District Court for the Northern District of California denied summary judgment to Reckitt Benckiser, the parties settled the lawsuit for \$53 million. ***Yamagata v. Reckitt Benckiser LLC*, 445 F. Supp. 3d 28 (N.D. Cal. 2020).**

Dietary supplements have been in the crosshairs of regulatory and class actions for some time. Section 5 of the FTC Act requires generally that advertisers must have a reasonable basis for all expressed and implied product claims in their advertising. With regard to dietary supplements specifically, the FTC has published an [advertising guide](#) for the industry. The guide explains that brands making claims about the efficacy or safety of dietary supplements must have "competent and reliable scientific evidence" to substantiate their claims. Such substantiation

should prove all expressed claims in marketing materials and package labeling, as well as any implied advertising claims for the product.

Reckitt Benckiser's labels claimed the supplements "support joint comfort," a phrase that the California court interpreted as similar to "reduces joint pain." The court found that the label and related advertising claims contained disease claims. Disease claims for dietary supplements, in general, are harder to substantiate than structure/function claims. The FDA dictates that manufacturers may make statements "describing the role of a nutrient or dietary ingredient intended to affect the structure or function in humans" but may not make statements implying that the supplement can "diagnose, mitigate, treat, cure, or prevent a specific disease or class of diseases."

In addition, the court reasserted that FTC and state law requirements for advertising claims are not preempted by FDA label approval. Even if the FDA were to approve a label, there are numerous cases that stand for the proposition that the FTC may still review the label's claims on its own. A competitor or class of consumers similarly has the right to challenge the advertising under state law, notwithstanding FDA approval. It is likely that the court's reminder that FDA approval does not preempt false advertising challenges put more pressure on Reckitt Benckiser to settle this dispute.

The plaintiffs cited scientific studies proving that glucosamine and chondroitin supplements, such as Reckitt Benckiser's, have no particular beneficial effect on joint health. Therefore, the plaintiffs asserted they were damaged by spending money on ineffective supplements they hoped would treat their arthritis pain. Reckitt Benckiser's summary judgment motion had rested on the purported benefits of solely another ingredient, calcium fructoborate, and not on the effects of glucosamine or chondroitin. The court denied the motion, holding a triable issue of fact existed as to whether calcium fructoborate provides the advertised benefit, so the case was headed for a full trial before the settlement.

Under the settlement, class members with proof of purchase will receive full refunds for their purchases. Class members with no proof of purchase will either receive (1) cash refunds for up to three purchases for a total of \$66 (\$22 per purchase) or (2) their choice of up to \$225 worth of certain Reckitt Benckiser consumer products, free of shipping charges. If the entire fund is not claimed, the refund amounts will be increased. If, however, there are too many claims, the refund amounts will be reduced.

The plaintiffs assert that this is the largest settlement ever for a false advertising case relating to dietary supplements. It settles the class actions pending in California and New York as well as another action in Illinois and a potential lawsuit in Vermont.

This case highlights the legal risk in advertising and marketing dietary supplements. All claims require support by competent and reliable scientific evidence. The alternative to the legal vetting and clearance of claims could be incredibly expensive litigation.

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Kyle-Beth Hilfer has over thirty years' experience providing legal counsel to advertising, marketing, promotions, intellectual property, and new media clients. Leveraging her deep understanding of branding, Kyle-Beth ensures regulatory compliance for her clients' advertising and marketing campaigns.

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