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Deceptive Labeling Suit Targets Abbott Over Ensure Drinks

By Erica Teichert

Law360, Washington (August 24, 2012, 5:16 PM ET) -- Abbott Laboratories Inc. was hit with a putative class action Wednesday alleging the company's nutrition division deceptively marketed its Ensure health shakes to baby boomers as a muscle and strength rebuilding tool without mentioning the claims relied on users adopting an exercise program.

Michael J. Otto contends that in marketing its Ensure Muscle Health Shake and Ensure Clinical Strength products, the company uses phrases like "#1 doctor recommended brand" and "targeted, specialized nutrition" to lure in customers and bolster Abbott's credibility among individuals who are concerned about losing muscle strength as they age.

The products use a trademarked proprietary ingredient called Revigor, which is Abbott's formulation of an amino acid metabolite, according to the suit. Otto claims that in order to deceive potential consumers, Abbott fails to mention that Ensure drinks or Revigor cannot rebuild customers' strength without being used in combination with an exercise program.

"Abbott capitalizes on the fears of a growing population of baby boomers and other individuals who are concerned about muscle loss," the complaint said. "To gain credibility with consumers, Abbott touts the purported health benefits of these supposed miracle elixir products with pseudoscientific terms and proclamations like the '#1 doctor recommended brand.'"

According to the complaint, Otto, 69, purchased Ensure drinks from several stores around June 2011 because they purported to help rebuild lost muscle and strength, and he believed the products' effects would occur without an exercise program. As such, he asserts he has suffered injury and lost money because of Abbott's false and misleading representations of the products.

The suit maintains that the deceptive labeling violates the California Consumers Legal Remedies Act, the California Unfair Business Practices Act, the California False Advertising Law, the Ohio Consumer Sales Practices Act and the Ohio Deceptive Trade Practices Act. It seeks to represent U.S. residents who purchased the Abbott-produced drinks from after Aug. 14, 2008, until the case's final disposition.

Abbott first announced the products in September 2010, and noted that they were being marketed primarily to individuals older than age 40, according the complaint.

Mark Pifko, counsel for Otto, told Law360 on Friday that the exact size of the class was unknown. The products have been sold in national grocery and drug store chains and other mass market retailers since 2010.

The suit seeks restitution and disgorgement of Abbott's revenues and profits stemming from the Ensure products.

"It's hard to imagine a more personal affront than deceiving people about what they put in their bodies," Pifko said. "A sophisticated company like Abbott should be held accountable for

knowingly confusing and misleading its customers.”

Abbott stood behind its advertising and labeling, saying that scientific evidence had proven Revigor's ability to restore lost muscle strength.

"Multiple scientific articles and studies confirm the accuracy of Ensure's claims for Revigor, and an independent regulatory agency with expertise in advertising claims has confirmed that Ensure with the ingredient Revigor rebuilds muscle naturally lost over time," Scott Stoffel, senior director of external communications for Abbott, told Law360.

Otto is represented by Roland K. Tellis, Mark P. Pifko and Natasha Mehta of Baron & Budd PC.

Counsel information for Abbott was not immediately available.

The case is Michael J. Otto v. Abbott Laboratories Inc., case number 5:12-cv-01411, in the U.S. District Court for the Central District of California.

--Editing by Eydie Cubarrubia.

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