

Class Cert. Denied, Claims Trimmed In Cold Therapy Suit

By **Steven Trader**

Law360, New York (October 3, 2016, 3:37 PM EDT) -- A proposed class of patients accusing Breg Inc. of hiding from them the potential dangers of its cold therapy machines were denied certification on Friday by a California federal judge who found lacking a common set of classwide facts, though Breg must face some consumer protection law claims.

Named patient Stacey Lucas and others had sought to certify both a nationwide and California subclass of consumers who claimed Breg provided them false and misleading instructions that hid the dangers of using the Polar Care 500, but U.S. District Judge Cynthia Bashant shut down that bid Friday after finding that too many individual questions regarding key issues like reliance and damages predominated.

A host of individual factors, such as a prescribing physician's advice and how that advice factored into the patient's decision-making, were in play at the time each patient decided to either rent or buy the PC 500, the judge said.

"The court cannot assess whether a reasonable consumer would attach importance to the misrepresentations or omissions regarding the risks associated with the PC 500 because each patient's decision-making calculus was dependent upon a variety of information and circumstances specific to the individual," Judge Bashant wrote Friday.

What's more, not every proposed class member is entitled to restitution because not everyone paid out-of-pocket for the device, therefore the question of damages was also an individual issue, the judge said. Judge Bashant also declined to certify a class seeking an injunction, ruling that not every proposed class member was likely to be harmed in the future.

The litigation started in 2011, when Stacey Lucas accused Breg, a California-based maker of sports medicine orthopedic care products, of tricking users of its cold therapy machine by hiding the fact that prolonged use could actually lead to injuries.

By October 2014, four other consumers had joined Lucas' suit, which alleged violations of California's consumer protection laws, fraud, and breaches of implied and express warranty. Though no one in the group actually suffered any personal injury, they sought certification based on economic injury in December.

But Judge Bashant on Friday found that class membership could not so easily be determined, because the criteria for it relied on members' own subjective memories of whether or not they saw any

misleading instructions or were warned of the device's risks by their physicians.

"Issues of reliability aside, inquiries into putative class members' memories of the circumstances surrounding their use of the product would require the type of individualized fact-finding and 'mini-trials' that defeat ascertainability," Judge Bashant wrote.

In its opposition to class certification, Breg had asked the court to grant summary judgment, arguing that the group's claims were time-barred and that they lacked standing to pursue injunctive relief and restitution.

On Friday, Judge Bashant partially sided with Breg, finding that none of the named patients had alleged a likelihood of using the device in the future, thus they lacked standing to pursue an injunction. Likewise, only one named patient, Tarek Albaba, alleged to have paid out-of-pocket for the device, thus none of the others were entitled to monetary restitution for costs their insurers actually paid.

However, the claims that Breg violated California's Consumer Legal Remedies Act and False Advertising and Unfair Competition Laws were not time-barred, Judge Bashant ruled, because that statute of limitations did not begin ticking until the patients could have reasonably discovered they were being harmed, which happened less than four years ago, the judge said.

"We are all very pleased with the court's well-reasoned order," Paul Cereghini of Bowman and Brooke LLP, an attorney for Breg, told Law360 via email on Monday. "We are hopeful that this ruling will be a major step towards bringing this litigation to an end."

Representatives for the consumers Monday did not immediately return a request for comment.

The consumers are represented by Chase M. Stern and Will Lemkul of Morris Sullivan & Lemkul LLP, and Marc O. Stern of the Law Office of Marc. O. Stern APC.

Breg is represented by Paul G. Cereghini, Marion V. Mauch, Eden M. Darrell and Robert L. Wise of Bowman and Brooke LLP.

The case is Stacey Lucas et al. v. Breg Inc. et al., case number 3:15-cv-00258, U.S. District Court for the Southern District of California.

--Additional reporting by Kali Hays. Editing by Kelly Duncan.

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