

Blistex Can Ditch Packaging Class Action Over Lip Balm

By **Ryan Boysen**

Law360, New York (July 5, 2017, 8:21 PM EDT) -- A proposed class action alleging Blistex Inc.'s distinctive applicator design is "deceptive" because it prevents customers from using every last drop of the lip balm inside was tossed on Wednesday, with an Illinois federal court saying the suit was riddled with "a myriad of flaws."

U.S. District Judge Elaine E. Bucklo said Alana Hillen's allegations that the applicator's "deceptively wasteful packaging" caused consumers to purchase more of the lip balm than they would otherwise have to were sufficient to give her standing to sue — barely.

"Where plaintiff's claims fall short, however, is in their substance," Judge Bucklo wrote in her opinion dismissing the case.

Hillen's claims — violations of the Illinois Consumer Fraud and Deceptive Business Practices Act and common law fraud by omission — all rested on an alleged act of deception, but the judge said that no matter how hard she squinted, she simply couldn't see deception lurking behind Blistex's applicator design.

"Plaintiff does not contend that the tubes of medicated lip ointment she purchased contained less of the product than the net weight stated on the label," Judge Bucklo wrote. "Nor does she claim to have been surprised by the shape of the tube, which indeed is pictured on the packaging."

Mark Eisen of Benesch Friedlander Coplan & Aronoff LLP, which represented Blistex, told Law360 he was "pleased that the court followed common sense and dismissed this action with prejudice."

"As the court held, it is simply inconceivable that the Blistex packaging is deceptive or misleading," he said. "Plaintiff cannot predicate a consumer class action on a theory that 'no reasonable consumer' would ascribe to."

Hillen's claims boiled down to calling the applicator tip, a hollow mold of solid plastic, deceptive, Judge Bucklo said, because the fact that it is solid prevents customers from squeezing out any lip balm trapped inside of it.

Hillen said other types of lip balm dispensers, like Chapstick's lipstick-like twist-out design,

allowed customers to use nearly all of the product, meaning "continued use of the dispenser despite its known flaw confirms Blistex's intent to deceive consumers," according to the complaint.

"Even, however, if plaintiff's allegations about the solid tip are construed as alleging a deceptively cavernous tip, they come no closer to stating an [Illinois Consumer Fraud and Deceptive Business Practices Act] or a common law fraud claim," Judge Bucklo wrote, adding that Hillen had tacitly conceded "that consumers expect some amount of product to remain in the tube."

Blistex argued the same point in its motion to dismiss, saying similar applicators are commonly used for household and cosmetic products, and that the mere allegation that customers might "have to work extra hard to obtain the last drops of the product does not render the tube deceptive ... lest toothpaste tubes everywhere be deemed deceptive."

Hillen had sought to certify a class of all U.S. residents "who purchased Blistex Medicated Lip Balm within three years of the date of the filing of this complaint," the complaint said.

Representatives for Hillen did not respond Wednesday to requests for comment.

Hillen is represented by Robert J. Pavich of the Pavich Law Group PC and Charles S. Zimmerman, Michael J. Laird and Caleb Marker of Zimmerman Reed LLP.

Blistex is represented by David S. Almeida and Mark S. Eisen of Benesch Friedlander Coplan & Aronoff LLP.

The case is Alana Hillen v. Blistex Inc., case number 1:17-cv-02074, in the U.S. District Court for the Northern District of Illinois.

--Editing by Catherine Sum.

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