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## Banana Boat Looks To Ice False SPF Advertising Class Action

By **Stewart Bishop**

Law360, New York (January 10, 2018, 8:57 PM EST) -- An attorney for the makers of Banana Boat sunscreen on Wednesday asked a New York federal judge to toss a proposed class action claiming they falsely exaggerate the sun protection level on its children's sunscreen as SPF 50, when in fact it provides much less protection, saying the Food and Drug Administration should take up the dispute.

The consolidated, putative class action claims that Edgewell Personal Care Co., Playtex Products LLC and Sun Pharmaceutical LLC, which jointly manufacture the sunscreen, knowingly claimed on their labels that the sunscreen offered more sun protection than it actually does.

During oral arguments before U.S. District Judge Kiyo Matsumoto in Brooklyn over a bid to nix the case, an attorney for Edgewell, Playtex and Sun, Michael J. Reiss of Latham & Watkins LLP, argued that the case should be stayed or dismissed, because the doctrine of primary jurisdiction leaves it to the FDA to decide if an agency-regulated product is in compliance with its rules.

"The FDA should be given the opportunity to either take up plaintiffs' claims and investigate or not," Reiss told Judge Matsumoto.

The plaintiffs say the label of and marketing materials for Banana Boat Kids SPF 50 prominently claim the product has a Sun Protection Factor of 50, defined as preventing sun damage for the user for 50 times longer than unprotected skin.

In May 2016, however, Consumer Reports magazine performed tests on Banana Boat Kids and Banana Boat Kids Tear-Free Sting-Free products and found their actual SPF was only 8, well below the American Academy of Dermatology's minimum recommendation of SPF 30.

The plaintiffs commissioned their own FDA-compliant testing of their own, and found that Banana Boat Kids SPF 50 sunscreen lotion had only an SPF of 12.69, according to an amended complaint.

Edgewell, Playtex and Sun contend that the FDA is already looking into the matter, noting that immediately after the filing of the seven suits that make up the consolidated class action, the FDA asked for bids for SPF testing of 20 unspecified sunscreen products, which may include the challenged Banana Boat Kids lotion.

In a situation in which the FDA is addressing the same issue, courts must give deference to the agency, which is in the best position to interpret its own rules and resolve any ambiguities, the defendants claim.

"At least in the first instance, go to the FDA and see what they have to say," Reiss said.

An attorney for the proposed class, Stephen DeNittis of DeNittis Osefchen Prince PC, told Judge Matsumoto that FDA action isn't required, since this is "nothing but a run of the mill deceptive labeling case."

"We're not asking the FDA to adopt a new rule," DeNittis said. "This is just a basic claim that the defendants promised an SPF of 50, and we were duped."

He called the defense's reliance on the FDA request for testing "a smoke screen" and noted that its unknown if the agency is even calling for tests of the Banana Boat sunscreen at issue in the case.

Judge Matsumoto reserved decision on the motion.

Edgewell, Playtex and Sun are represented by Michael J. Reiss, Kegan A. Brown, Virginia F. Tent and Daniel S. Schechter of Latham & Watkins LLP.

The plaintiffs are represented by interim co-lead counsel Hunter J. Shkolnik, Salvatore C. Badala and Paul B. Maslo of Napoli Shkolnik PLLC; Janine Lee Pollack and Carl V. Malmstrom of Wolf Haldenstein Adler Freeman & Herz LLP; and Stephen P. DeNittis, Joseph Osefchen and Shane Prince of DeNittis Osefchen PC.

The case is In Re: Edgewell Personal Care Co. Litigation, case number 1:16-cv-03371, in the U.S. District Court for the Eastern District of New York.

--Additional reporting by Rick Archer. Editing by Joe Phalon.

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