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Nivea Maker Can't Duck Suit Claiming Lotion Was A Drug

By **Adam Lidgett**

Law360 (May 22, 2019, 3:18 PM EDT) -- A California federal judge has refused to toss a proposed class action claiming that one of Nivea's body lotions was a drug that required government approval, saying the claims of the consumer behind the case were plausible enough to remain in court.

U.S. District Judge Larry Alan Burns on Monday denied Beiersdorf Inc.'s motion to dismiss Ashley Franz's lawsuit claiming that Nivea Skin Firming Hydration Body Lotion was a drug and put on the shelves without first properly getting approval from the U.S. Food and Drug Administration. While the judge said the court itself wasn't making a factual finding that the lotion was, in fact, a drug, he said Franz has met her burden of plausibly alleging that the lotion was a drug.

"The court is not deciding that the lotion is a drug," the judge said. "That's a factual question not suitable for resolution at this stage of the litigation. It is simply determining that Franz's claims clear the relatively low bar of plausibility."

Beiersdorf moved to toss Franz's second amended complaint — which claimed the company flouted California's Unfair Competition Law — in January, arguing she fell short on pleading that the company actually meant for the lotion at issue to be used to affect a person's bodily function or structure, as a drug would.

The company pointed to the product's label, which it said shows that the lotion was meant to be used as a cosmetic moisturizer.

Franz, however, had her own interpretation of the labeling, saying that it actually backs her argument it was meant to be used as a drug. She said claims on the lotion bottle that the product tightens and firms up skin was enough to fit into the definition of a drug under the Federal Food, Drug, and Cosmetic Act.

Beiersdorf was able to duck the suit before in 2017 when Judge Burns dismissed her suit on the grounds that she didn't have standing and because the amount of money at play wasn't high enough for the court to have jurisdiction over her state law claim.

A panel of the Ninth Circuit, however, reversed that decision in December. The appellate judges found that she met the \$5 million minimum amount in controversy and that she met her burden to show she had standing.

Counsel for Franz declined to comment, citing ongoing litigation.

Representatives for Beiersdorf were not immediately available for comment on Wednesday.

Franz is represented by Patricia N. Syverson, Manfred P. Muecke, Elaine A. Ryan and Nada Djordjevic of [Bonnett Fairbourn Friedman & Balint PC](#), Stewart M. Weltman and Todd L. McLawhorn of [Siprut PC](#) and Max A. Stein of [Boodell & Domanskis LLC](#).

Beiersdorf is represented by Alycia A. Degen, Kara L. McCall and Elizabeth M. Chiarello of [Sidley Austin LLP](#).

The case is Franz v. Beiersdorf Inc., case number 3:14-cv-02241, in the U.S. District Court for the Southern District of California.

--Editing by John Campbell.

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