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## Makeup Giants Can't Appeal Animal Testing Suits' Green Light

By **Megan Stride**

Law360, Chicago (November 14, 2012, 7:59 PM ET) -- A California federal judge on Tuesday rejected Mary Kay Inc. and Estee Lauder Inc.'s attempts to appeal rulings that allowed two putative class actions over their animal testing practice disclosures to survive, saying there's not enough ground for differences of opinion on the issues they raised.

Consumers in both lawsuits allege that the cosmetics companies defrauded American consumers by failing to disclose that they use animal testing for some products sold in foreign markets and that the plaintiffs would not have bought any Mary Kay or Estee Lauder products had they known about that practice.

U.S. District Judge Cormac J. Carney refused to fully dismiss the suits in September, and both companies asked him to certify interlocutory appeals, arguing that his rulings put too broad a disclosure duty on manufacturers.

Judge Carney refused those bids on Tuesday, writing in both orders that "the mere fact that a party strongly disagrees with a court's ruling is not a substantial ground for difference of opinion warranting certification."

In the September orders at issue, Judge Carney dismissed fraudulent advertising and misrepresentation claims from the suits but rejected the companies' motions to ax the suits entirely. The decisions preserved duty to disclose claims based on Estee Lauder and Mary Kay's alleged omissions.

The judge determined in those rulings that a manufacturer has a duty to disclose any facts that are material to a consumer, and that information about Estee Lauder and Mary Kay's animal testing was material because the plaintiffs allege they would not have purchased the companies' products had they known about it.

Mary Kay and Estee Lauder then argued that interlocutory appeals were appropriate on the issues of whether a manufacturer has an affirmative duty to disclose non-safety-related material facts about its corporate practices to consumers, and whether buying a nondefective product based on fraudulent omissions can be a sufficient injury to give a plaintiff standing.

On Tuesday, Judge Carney again said it does not make sense to apply a rule established by the Ninth Circuit in *Wilson v. Hewlett-Packard Co.* requiring a safety issue to trigger a duty to disclose because warranty law does not apply in the immediate cases.

The judge also found that the information the companies allegedly had a duty to disclose was also unrelated to the performance or characteristics of the products the plaintiffs purchased, and therefore is outside the scope of warranty protections.

The judge further found that the companies' disagreement with his application of the California Supreme Court's reasoning in *Kwikset Corp. v. Superior Court*, a false marketing suit, to allegations of fraudulent omissions is not enough to warrant certification of an appeal.

Michael J. Avenatti of Eagan Avenatti LLP, who represents the plaintiffs in both lawsuits, said Wednesday that the defendants "are in a lot of trouble in connection with both of these cases."

"And as we expected, their Hail Mary passes failed," Avenatti added, referring to the bids to appeal.

The plaintiffs' lawyer said he and his team are now preparing to go through discovery procedures to turn up information on the companies' alleged animal testing practices, as well as "their attempts to conceal those practices from the public."

Mary Kay attorney M. Sean Royall of Gibson Dunn & Crutcher LLP declined to comment Wednesday, and an attorney for Estee Lauder did not respond to requests for comment.

Estee Lauder is represented by Darrel J. Hieber, Jason D. Russell and Kenneth A. Plevan of Skadden Arps Slate Meagher & Flom LLP. Mary Kay is represented by Bradley Joseph Hamburger, M. Sean Royall and Theane Evangelis Kapur of Gibson Dunn & Crutcher LLP. Avon is represented by Dennis S. Ellis, Katherine Frenck Murray and Nicholas James Begakis of Paul Hastings LLP.

The plaintiffs in the Estee Lauder and Mary Kay suits are represented by Michael J. Avenatti and Scott Howard Sims of Eagan Avenatti LLP and by Filippo Marchino and Damon Rogers of The X-Law Group PC.

The cases are *Janna Herrera et al. v. The Estee Lauder Cos. Inc. et al.*, case number 8:12-cv-01169, and *Ashley Stanwood v. Mary Kay Inc.*, case number 8:12-cv-00312, both in the U.S. District Court for the Central District of California.

--Additional reporting by Ama Sarfo. Editing by Jeremy Barker.

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