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Symantec Ruling Raises Bar For Consumer Fraud Claims

By **Allison Grande**

Law360, New York (June 22, 2016, 10:12 PM ET) -- The Ninth Circuit's recent ruling that a putative class of consumers can't bring fraud claims against Symantec for hiding an anti-virus software defect shows that consumers must prove they relied on specific misrepresentations, attorneys say, solidifying a defense that will help businesses bat down a wide range of false and deceptive advertising claims.

In a **three-page opinion** issued Monday, which was just six days after it heard oral arguments in the matter, the three-judge appellate panel rejected plaintiff Kathleen Haskins' assertion that a California district court had erred in dismissing her suit alleging Symantec Corp. had violated the state's unfair competition law by waiting several years to disclose to customers that there had been a data breach that exposed Norton Antivirus' source code and could make their information vulnerable.

Instead, the panel agreed with the lower court that Haskins couldn't prove the company made any false representations in violation of Business and Professions Code Section 17200 without citing any particular ads. In doing so, the panel affirmed that Rule 9(b) of the Federal Rules of Civil Procedure requires litigants to state with particularity the circumstances constituting fraud, including the specific misrepresentations that were disseminated.

"The decision solidifies the defense argument that courts need to hold claimants to the 9(b) fraud pleading standards and adds a Ninth Circuit arrow, if you will, in the pleading quiver of the defense," Mintz Levin Cohn Ferris Glovsky & Popeo PC member Daniel Herling said. "Claimants will either have to buttress the fraud prong of 17200 claims with facts at the pleading stage or find themselves facing possible dismissal early on in a case."

While the brief opinion by the Ninth Circuit panel was unpublished, attorneys say that ruling is nonetheless important due to the blow that it deals to class action initiatives in the data security arena in general.

"Technically, the decision is narrow on its face," Dorsey & Whitney LLP partner Robert Cattanach said. "In a broader sense, however, the decision has much more significance: Once again, a United States Circuit Court of Appeals — and one considered generally sympathetic to plaintiff causes in data security matters — has declined to allow a case even to proceed."

Defense attorneys also flagged as significant the panel's refusal to allow Haskins to skirt the requirement to plead and prove individualized reliance on a specific misrepresentation in light of what the opinion described as the "narrow" exceptions identified by California's high court in the Tobacco II cases. In that dispute over advertising campaigns for cigarettes targeted to adolescents, the California Supreme Court held in a 2009 ruling that it is unreasonable to expect plaintiffs to allege individualized reliance on specific misrepresentations when a marketing campaign is particularly extensive and pervasive.

"Any crack in Tobacco II's end-around to specific reliance is welcome," Kelley Drye & Warren LLP partner Jeffrey S. Jacobson said. "Here, the district court told the plaintiff that if she wanted to rely on the Tobacco II exception, she must explain in detail the 'long-term advertising campaign'

supposedly at issue and how she was misled by it. She couldn't do that, and the Ninth Circuit's affirming dismissal on that basis is newsworthy."

Laurence Pulgram of Fenwick & West LLP, who argued the case before the Ninth Circuit on behalf of Symantec, also pointed to the panel's commentary on the Tobacco II ruling in a comment provided to Law360 Wednesday.

"This opinion confirms that the 'Tobacco II exception' does not swallow the rule: a plaintiff must still plead and prove a specific false advertisement she saw and relied on — excepting only an ad campaign like the tobacco companies' decades long saturation advertising," Pulgram said.

The dispute before the Ninth Circuit hinges on a unique convergence of consumer protection law with both product liability and data security underpinnings.

Philip Cook, managing attorney of Los Angeles-based Cook Law Firm, noted that while data breach and privacy cases typically turn on negligence claims or statutory violations, the Symantec dispute distinguishes itself by attempting to tie a data security incident to a product defect.

"The case is interesting from a practice point of view for us who do data breach work in that it demonstrates the way that data breaches can give rise to another type of legal claim and under what circumstances those claims will be accepted by the court," Cook said.

The matter is also part of the ongoing genesis of how courts understand theories of relief and damages claims in the consumer protection and data security context, Cook noted.

"These types of cases are all about selecting the right kinds of claims to argue," Cook said.

In the dispute before the Ninth Circuit, Haskins chose to zero in on what her attorney Timothy Blood of Blood Hurst & O'Reardon LLP characterized during oral arguments as "straightforward" consumer protection case and false advertising claim where "the plaintiff purchased what she thought was anti-virus software that was uncompromised, that would work as intended, but in fact was compromised."

Blood insisted that his side had "extensively" raised two specific points that supported Haskins' claims under California's unfair competition law: that she had a reasonable expectation that she would be buying secure software and that she had read and relied on advertisements in several publications in deciding to purchase the product.

But, building on the skepticism that they had expressed with this contention during oral arguments, the appellate panel quickly swatted down the stance in its opinion Monday, writing that Haskins' complaint failed because she didn't allege that she read and relied on a specific misrepresentation by Symantec.

"It basically comes down to that you have to tell the court where [the fraudulent misrepresentation] was, what it said and how it was misleading," Herling said.

The holding that fraud allegations need to be highly particular and specific is likely to make both sides rethink their strategy in future litigation under the popular California statute, attorneys say.

"If you're a plaintiff, you're going to be looking for something a little bit more specific in terms of what the allegation was that you were relying on," Axinn Veltrop & Harkrider LLP partner Thomas Rohback said. "And from the defense perspective, I expect that this is something that they'll be citing all over the country, as well as in the Ninth Circuit, to support the argument that in consumer unfair competition cases where plaintiffs are going to plead fraud, they have to comply with 9(b)'s specificity requirements."

However, defense attorneys were quick to note that while making pleadings more specific may help plaintiffs stave off an early dismissal, these adjustments could end up dooming their case down the road.

By adding more details about what a particular plaintiff saw, when she saw it and how it affected

her, courts may find themselves reluctant during the class certification stage to greenlight a massive class of consumers because of doubts over whether the particular facts alleged by one plaintiff could apply more broadly, attorneys say.

"It's imperative for attorneys who do class action work on the plaintiffs side to find theories of relief and causes of action that allow you to enhance the common experience and diminish individual experiences," Cook said. "Because if the theories that are selected lead the court to conclude that common questions don't predominate, you might win the battle but lose the war."

U.S. Circuit Judges Richard R. Clifton and Sandra S. Ikuta and U.S. District Senior Judge Royce C. Lamberth sat on the panel for the Ninth Circuit.

Haskins is represented by Timothy G. Blood, Thomas J. O'Reardon II and Paula M. Roach of Blood Hurst & O'Reardon LLP, Richard L. Coffman of The Coffman Law Firm, and Ben Barnow of Barnow & Associates PC.

Symantec is represented by Laurence Pulgram, Tyler Newby and Molly Melcher of Fenwick & West LLP.

The case is Haskins v. Symantec Corp., case number 14-16141, in the U.S. Court of Appeals for the Ninth Circuit.

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