

9th Circ. Affirms Siemens Win In False Ads Appeal

By Jonathan Capriel

Law360 (October 8, 2021, 5:56 PM EDT) -- A Ninth Circuit panel said in a split decision that a lower court was right to grant health care technology company Siemens summary judgment in a false advertising case lodged by diagnostic product manufacturer Quidel Corp., finding that there's no "direct evidence" to sway a reasonable jury.

Two of the three judges on Thursday denied San Diego-based Quidel's effort to revive the lawsuit, which claimed that Siemens Medical Solutions USA Inc. and an affiliate company engaged in misleading marketing to promote a product that helps screen for Graves' disease and is sold directly to laboratories. This hurt Quidel, who sold a similar product, thereby violating the Lanham Act, the company's complaint said.

But the majority opinion said Quidel failed to show that any statements Siemens made actually influenced the laboratories to switch from one product to another. In fact, two lab directors said that the advertising literature, like package inserts and press releases, rarely make an impact on purchasing decisions, according to the panel.

"There is no direct evidence in the record for which a reasonable juror could find that Siemens' allegedly false statements were material to the decision-making processes of the two laboratory customers," the order said.

The opinion also called out Quidel for "cherry-picking" statements from a decision maker at a third laboratory, Dr. Mark Silberman, in an attempt to pad its case.

At issue are two products that help detect thyroid-stimulating immunoglobulins, or TSI, an antibody that can latch onto the thyroid and cause the autoimmune condition Graves' disease. Quidel claims its product, Thyretain, directly detects TSI only. Siemens markets its product, Immulite, as a TSI-only detector as well, but Quidel's lawsuit claims Immulite is less accurate because, despite its ads, it picks up other "thyroid-blocking antibodies" and can lead to misdiagnosis.

Immulite is cheaper and quicker at delivering test results than Thyretain, and two major lab companies have switched from Quidel to Siemens's product — Sonic Healthcare USA and Laboratory Corporation of America Holdings, more commonly known as LabCorp, according to court documents.

Judge Mark J. Bennett disagreed with the majority ending the case, saying Quidel shouldn't have to prove that Siemens' allegedly false statements influenced the labs' decision making.

By making a claim under the Lanham Act "plaintiffs are not required to present evidence that defendants' misrepresentation actually influenced consumers' purchasing decisions, but that it was *likely* to influence them," the judge wrote citing a 2002 First Circuit decision, in *Cashmere & Camel Hair v. Saks Fifth Ave.*

"Put another way, a juror could easily find that Siemens's statements were likely to influence the laboratories' purchasing decision because its statements attracted the laboratories and prompted them to conduct their own tests before ultimately purchasing Immulite," Judge Bennett wrote.

Neither party immediately responded to requests for comment.

Judges Jacqueline H. Nguyen, Mark J. Bennett and Ryan D. Nelson sat on the panel for the Ninth Circuit.

Quidel Corp was represented by T. Kevin Roosevelt of Finlayson Toffer Roosevelt & Lilly LLP.

Siemens was represented by Joseph W. Goodman and Miles D. Scully of Gordon and Rees LLP, and Jonah M. Knobler, Michael D. Schwartz, Rachel B. Sherman and Julie A. Simeone Patterson Belknap Webb & Tyler LLP.

The case is *Quidel Corporation v. Siemens Medical Solutions USA, Inc. et al.*, case number 20-55933, in the U.S. Court of Appeals for the Ninth Circuit.

--Editing by Gemma Horowitz.