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L'Oreal Aims To Sink 'Waterproof' Face Brush False Ad Claims

By **Mike Curley**

Law360 (August 21, 2020, 5:09 PM EDT) -- L'Oreal USA Inc. has slammed a suit from a customer who alleges it falsely advertised a face brush as "waterproof," telling a California federal court that her claims the brush should have worked indefinitely fly in the face of common sense.

In a motion to dismiss filed Thursday, the company called Nicole Marroquin's suit baseless, saying that the Clarisonic face brush she purchased worked as advertised for even longer than the one-year express warranty promised and that she cannot have expected it to remain waterproof, or for the battery to last, in perpetuity.

"If diamonds are forever, then reasonable consumers know that most every lesser purchase wears out with use, especially things like waterproof sealing or batteries of an assembled electronic device," the company argued. "Neither plaintiff's personal dissatisfaction with her device's impermanence nor her preference for some longer period of use amounts to an actionable claim."

Marroquin sued L'Oreal **in June**, saying that while the company claims its electric Clarisonic face brushes can be used in the "shower, bath or sink," the brushes aren't actually waterproof and break if exposed to water.

The packaging for every Clarisonic features a waterproof warranty and indicates the product is meant to be used in water, Marroquin says, adding that customers buy the product because the electric face brushes are intended to be more effective than other methods of facial cleansing. But the Clarisonic has a waterproofing defect that leads to battery failure, with customers reporting the product will no longer charge or turn on, according to the complaint.

But L'Oreal said in Thursday's motion that the face brush worked exactly as advertised under the one-year warranty, and didn't fail until after Marroquin had "enjoyed all she bargained for and then some."

Nothing on the packaging promised that the face brush would remain waterproof forever, nor that its battery would never degrade or fail, the company argued, calling such occurrences a "fact of life."

Reasonable customers don't expect waterproofing to last even on products whose entire purpose has to do with water, such as plumbing sealants, valves and gaskets, all of which have to be replaced after wearing out with age, the company said.

"Whether it's an electric razor, toothbrush, or skin cleansing device, consumers know that time and frequent, repetitive use will eventually wear out the waterproof seams around the circuitry of small, assembled electronics meant for manual use in the bathroom environment," L'Oreal argued.

That "fact of life" dooms all Marroquin's claims, L'Oreal said. The company also said Marroquin hasn't stated what alleged defect exists in the product, only that it failed well after the one-year express warranty expired.

"What was wrong with the design of the waterproof sealing or the batteries?" L'Oreal asked. "The complaint leaves L'Oreal and the court to guess."

Nowhere in the complaint does Marroquin allege that the company failed to live up to the warranty's promise of replacing the product if it failed within a year, the company added. On Marroquin's claim for breach of implied warranty of merchantability, the company argued that her admission that the brush worked and she used it regularly for a year proves that it was fit for its intended purpose.

L'Oreal also slammed her fraud claims, saying there's no representation that the product was supposed to work longer than the warranty, and the complaint doesn't identify any duty of L'Oreal to warn of an alleged defect that the complaint does not identify. The complaint also does not allege any "willful and malicious" conduct on the part of L'Oreal's officers, so the claims for punitive damages should be dismissed as well, the company argued.

The company said Marroquin had no standing for injunctive relief or for claims about the different models of brush she hadn't bought. If Marroquin is now aware of the alleged deception, she can't claim she's at risk of being fooled again, the company argued, adding that the complaint doesn't commit her to an intent to buy in the future.

And Marroquin hasn't identified the actual defect in the one model she has bought, so she can't claim that other models have a similar defect, the company argued, asking the court to dismiss her entire complaint with prejudice.

Representatives for Marroquin and L'Oreal could not immediately be reached for comment Friday.

Marroquin is represented by Scott A. Bursor, L. Timothy Fisher, Blair E. Reed and Brittany S. Scott of Bursor & Fisher PA.

L'Oreal is represented by M.D. Scully, Peter G. Siachos, Justin D. Lewis and Joanna Doherty of Gordon Rees Scully Mansukhani LLP.

The suit is Nicole Marroquin v. L'Oreal USA Inc., case number 1:20-cv-00790, in U.S. District Court for the Eastern District of California.

--Additional reporting by Lauren Berg. Editing by Alanna Weissman.