STATE OF VERMONT

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
Docket No. 443-7-14 Wncv

State of Vermont
Plaintiff

v.

Living Essentials, LLC, and
Innovation Ventures, LLC,
Defendants

DECISION
Defendants' Motion for Permission to Appeal (MPR #5)

Defendants Living Essentials, LLC, and Innovation Ventures, LLC, market and sell a beverage, in various formulations, known as "5-hour ENERGY®." The State alleges that the manner in which Defendants have done so violates Vermont's Consumer Protection Act, 9 V.S.A. §§ 2451–2481x. On February 26, 2015, the court denied Defendants' motion to dismiss; it later denied Defendants' motion for reconsideration. On May 28, 2015, long after the 10-day period for doing so had expired, Defendants filed a motion seeking V.R.A.P. 5(b) interlocutory review of the February 26 decision insofar as Count 4 of the complaint goes. Defendants argue that the court erred by failing to conclude that Count 4 challenges the safety of the caffeine in their products as consumed by adolescents and the U.S. Food and Drug Administration has primary jurisdiction over that issue.

In Count 4, the State alleges as follows:

> Defendants engaged in unfair and deceptive trade practices in commerce, in violation of the Vermont Consumer Protection Act, 9 V.S.A. § 2453(a) [sic] by making statements regarding the suitability of 5-hour ENERGY® for adolescents because they do not have competent and reliable scientific evidence to substantiate their claims.

Complaint ¶ 114. Count 4 incorporates all previously stated allegations. *Id.* ¶ 113.

Among other things, this count depends on a determination that Defendants' representations are reasonably interpreted to mean what the State alleges: that their products are suitable for use by adolescents. It further depends on whether the advertising substantiation doctrine is enforceable under the Vermont's Consumer Protection Act. The court has not ruled on either of those issues yet.

At its most general level, the well-established advertising substantiation doctrine demands that an advertiser making a claim about a product have a reasonable basis for doing so.

See Dee Pridgen and Richard M. Alderman, Consumer Protection and the Law §§ 11:5 (WL updated Nov. 2014). Defendants essentially argue that, in this case, the issue of substantiation is the same thing as proof of safety. The implied premise is that *any* unsubstantiated claims touching on the issue of safety that they make in their advertisements must be dealt with by the regulator in charge of product safety rather than as a matter of unfair or deceptive advertising. This simply has not been how the history of such advertising has unfolded. See *id.* §§ 11:7 (describing the FTC's regulation of claims about dietary supplements), 11:10 (describing the FTC's regulation of health and safety claims), 11:11 (describing the FTC's regulation of food and nutrition claims and the interplay between the FTC and the FDA). However related the concepts may become in particular cases, reasonable substantiation is not the same thing as proof of safety and Defendants have not shown how the FDA has primary jurisdiction over any specific issue in this case. On this record—the complaint alone—Defendants' primary jurisdiction argument is overstated and depends on an unsupported premise.

If the State's claim evolves to require the determination of an issue over which the FDA has primary jurisdiction, that matter can be dealt with when it arises. Defendants have not demonstrated that the bare allegations of the complaint necessarily include any such issue.

No departure from the final-judgment rule is warranted in this case. See generally *In re Pyramid Co. of Burlington*, 141 Vt. 294 (1982) (discussing appropriateness of interlocutory review in detail). Defendants' motion is out of time, and they have not identified a crisp primary jurisdiction issue that the trial court has ruled on and that the Supreme Court might be inclined to reverse. The court's dismissal decision was a procedural one predicated on scant allegations, the general principles of the advertising substantiation doctrine, and Defendants' vague primary jurisdiction argument. "An order denying a motion to dismiss a complaint . . . may rest on resolution of a clearly determinative question of law" and thus potentially be appropriate for interlocutory review. 16 Wright and Miller, et al., Federal Practice and Procedure: Jurisdiction 3d § 3931 (WL updated April 2015). That is not, however, the case here. Improvident interlocutory review simply results in the delay and unnecessary expense that Rule 1 counsels against.

ORDER

For the foregoing reasons, Defendants' motion for permission to appeal is *denied.*

Dated at Rutland, Vermont this 30th day of September 2015.

Mary Miles Teachout

Mary Miles Teachout,
Superior Judge