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DC Circ. Revives Fee Suit Against Psychologist Group

By **Andrew Westney**

Law360, New York (September 05, 2014, 4:17 PM ET) -- The D.C. Circuit on Friday revived a potential class action suit accusing the American Psychological Association of duping its members into paying millions of dollars in special fees, saying they reasonably relied on the organization's representations in making the payments.

Therapists and other association members were told on the APA's website that they "must pay" a special assessment fee at the time they paid their annual dues, and a yearly statement came preprinted with the amount of the assessment, according to the opinion. After nearly a decade in which the association collected \$6 million per year, APA members in 2010 discovered the fees were actually voluntary and went to support lobbying by a separate, APA-affiliated organization.

A three-judge panel ruled a D.C. federal court erred in finding the plaintiffs' unjust enrichment claim against the APA was barred by its membership contracts, saying that the optional fee wasn't part of those agreements.

"Payment of the special assessment at no point formed any part of the explicit contractual arrangement between the APA and its members," according to the opinion. "It was instead an extra-contractual payment falling outside the 'scope' of the governing contracts. The bylaws and rules then pose no obstacle to an unjust enrichment claim seeking to recover assessment fees paid."

APA members filed separate suits in October and November 2010 that were consolidated in D.C. federal court, alleging that the group intentionally misled class members into paying the special assessment fee by misrepresenting that it was a requirement of APA membership. The consolidated complaint alleged violations of California's Unfair Competition Law and False Advertising Law along with the unjust enrichment claim.

In May 2012, U.S. District Judge John D. Bates **dismissed** that claim, ruling that unjust enrichment as a claim based on an implied contract was precluded by the express contract between the APA and its members.

The judge also dismissed the California claims, ruling the applicable protections were those of the District of Columbia, where the APA is based and where the class action was filed. In Washington, nonprofit groups such as the APA are exempt from liability in membership disputes, the judge ruled.

Judge Bates permitted the plaintiffs to file proposed amendments for fraudulent inducement, rescission and negligent misrepresentation, but rejected them as futile in February 2013, ruling that the APA members couldn't have reasonably believed that the assessment fee was mandatory rather than optional.

The panel reversed the trial court's ruling on the unjust enrichment claim, saying that mistaken overpayments such as the ones members made are typical of unjust enrichment claims and aren't invalidated simply because they are related to the subject matter of an express contract.

The APA wasn't entitled to keep the special fees on the grounds that they paid for lobbying activities, because the plaintiffs didn't pay the fees for lobbying, but instead were misled into thinking they had to pay the dues for membership, the panel said.

The members showed that they had reasonably relied on the APA's alleged misrepresentations about the fees, especially at the motion-to-dismiss stage, since the reliance issue is a question of fact more suitable for a trial, according to the opinion. The panel also reversed the dismissal of the members' fraudulent inducement claim for reasonable reliance.

However, the panel upheld the trial court's dismissal of the California state law claims, agreeing that D.C. law applied in the case and that it shielded the APA from statutory liability for membership-related disputes. The panel also affirmed the dismissal of the rescission claim because the members admitted there was no way to restore the pre-contractual status quo for the parties.

The panel reversed the district court's dismissal of the negligent misrepresentation claim with prejudice, ruling the claim can be refiled after it was dismissed by the trial court on procedural grounds.

Hassan A. Zavareei of Tycko & Zavareei LLP, who represents the members, said in a statement on Friday that the opinion establishes the basis for a nationwide class against the APA for thousands of psychologists who paid the fees.

"The decision also breaks new ground in holding that the consumer protection laws of an entity's home state apply to claims brought by residents of other states," Zavareei said. "This opens the door to nationwide class actions against businesses in their home states under their state's consumer protection laws."

The APA said in a statement Friday that it is reviewing the decision.

Circuit Judges Judith W. Rogers, Thomas B. Griffith and Sri Srinivasan sat on the panel for the D.C. Circuit.

The appellants are represented by Hassan A. Zavareei of Tycko & Zavareei LLP.

The APA is represented by David W. Ogden, Jonathan E. Paikin and Francesco Valentini of WilmerHale.

The case is In re: APA Assessment Litigation, case number 13-7032, in the U.S. Court of Appeals for the District of Columbia Circuit.

--Editing by Rebecca Flanagan.

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