Blogs
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Notable Ruling: Reasonable Consumers Not Misled by "Diet" Soft Drinks

The Ninth Circuit delivered a win for food and beverage companies just in time for the new year in a published opinion in *Becerra v. Dr Pepper/Seven Up, Inc.*, --- F.3d ---, 2019 WL 7287554 (9th Cir. Dec. 30, 2019). Plaintiff in *Becerra* alleged that use of the word "diet" to describe Diet Dr Pepper is misleading because it suggests the product will help consumers lose weight. She relied on several scientific studies to allege that aspartame, the artificial sweetener in many diet sodas, "is likely to cause weight gain," and "poses no benefit for weight loss." She also relied on the results of a survey that, according to Plaintiff, showed the majority of soft-drink consumers believe "diet" soft drinks will help them lose or maintain their weight. After several rounds of motion to dismiss briefing, the district court dismissed plaintiff's complaint with prejudice, and plaintiff appealed. The Ninth Circuit affirmed in an opinion authored by Judge Bybee. It held that "no reasonable consumer would assume that Diet Dr Pepper's use of the term 'diet' promises weight loss or management." That is because "[i]n context, the use of 'diet' in a soft drink's brand name is understood as a relative claim about the calorie content of that soft drink compared to the same brand's 'regular' (full-caloric) option." Importantly, the Court brought its common sense to bear on its reasonable consumer analysis. It rejected Becerra's argument that dismissal was improper "because she alleged a plausible *misunderstanding* of the word "diet." Reaffirming *Ebner v. Fresh, Inc.*, the Court explained that a plaintiff's unreasonable interpretation of a key label phrase does not give rise to a consumer fraud claim:

Diet soft drinks are common in the marketplace and the prevalent understanding of the term in that context is that the "diet" version of a soft drink has fewer calories than its "regular" counterpart. Just because some consumers may unreasonably interpret the term differently does not render the use of "diet" in a soda's brand name false or deceptive.

Addressing plaintiff's survey, the Court held that "it does not shift the prevailing reasonable understanding of what reasonable consumers understand the word 'diet' to mean or make plausible the allegation that reasonable consumers are misled by the term 'diet.'" Having held that no reasonable consumer is misled by the word "diet," the panel declined to address plaintiff's scientific studies purportedly showing that aspartame caused weight gain. Becerra's case was one of a series of similar lawsuits brought against soda companies in federal district court in New York and California. The Second Circuit affirmed dismissal of the three New York cases in three separate orders. *See Geffner v. Coca-Cola Co.*, 928 F.3d 198 (2d Cir. 2019) (per curiam); *Excevarria v. Dr Pepper Snapple Grp., Inc.*, 764 F. App'x 108 (2d Cir. 2019); *Manuel v. Pepsi-Cola Co.*, 763 F. App'x 108 (2d Cir. 2019). And the Ninth Circuit dismissed appeal of the remaining case on jurisdictional grounds. These cases indicate a potential tightening of the reasonable consumer standard as courts are increasingly willing to question plaintiff's view of how a reasonable consumer interprets a key label phrase.

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