

Diet Soda Lawsuit Fizzles Out

Proskauer on Advertising Law Blog on April 30, 2018

Recently, a plaintiff's purported class action against Diet Dr. Pepper went flat when a California federal judge held that the term "Diet" alone on a soft drink label does not constitute a claim that the soft drink will assist in weight loss.

In *Becerra v. Dr. Pepper/Seven Up, Inc.*, Plaintiff Shana Becerra brought a putative class action in the Northern District of California against Dr. Pepper, claiming the prominent display of the term "diet" on the Diet Dr. Pepper label falsely indicated that the product would contribute to healthy weight management and would not cause her to gain weight. 2018 WL 1569697 (N.D. Cal. Mar. 30, 2018). Instead, Becerra alleged that the use of artificial sweeteners in Diet Dr. Pepper actually caused her to gain weight.

Judge William H. Orrick dismissed Becerra's claim, holding that nothing on the label, packaging, or advertising of Diet Dr. Pepper would suggest to a reasonable consumer that Diet Dr. Pepper will help a consumer with weight loss or healthy weight management. Rather, the court held, a reasonable consumer would know that the term "diet" on the Diet Dr. Pepper label is simply used to denote a lower calorie version of the standard Dr. Pepper soft drink. From the term "diet," a reasonable consumer has no basis to infer anything more than the fact that the soft drink is calorie-free; that term, standing alone, does not imply that the soft drink has any benefit for weight loss or weight management.

Judge Orrick dismissed Becerra's complaint without prejudice, granting her leave to amend. The court warned Becerra, however, that the scientific studies she cited in her complaint to support her allegation that the aspartame in Diet Dr. Pepper caused weight gain were insufficient to state a claim. The studies did not establish any causation between aspartame and weight gain. At best, these studies merely evidenced a correlation between weight gain and the consumption of artificial sweeteners like aspartame. Because Becerra failed to cite a single study that found a causative link between aspartame and weight gain, this provided a separate basis to dismiss her claim.

A materially identical suit was also brought against the maker of Dr. Pepper by two New York consumers in the Southern District of New York. Relying on Judge Orrick's decision and another California decision involving another brand of soft drink, Judge Daniels of the Southern District of New York dismissed this suit without prejudice in an April 18, 2018 summary order. Although both dismissals were without prejudice, it is difficult to conceive how either case can plausibly be revived. Watch this space for further developments.

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