

Ninth Circuit Confirms Dr Pepper Can Stick to its “Diet”

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The Ninth Circuit recently affirmed the dismissal of a putative class action alleging that defendant Dr Pepper/Seven Up, Inc. (“Dr Pepper”) violated various California consumer fraud laws by using the term “diet” in naming and marketing Diet Dr Pepper. [*Becerra v. Dr Pepper/Seven Up, Inc.*, 945 F.3d 1225 \(9th Cir. 2019\)](#). Plaintiff alleged that this “diet” label misled consumers by promising that the product would assist in weight loss or, at minimum, not cause weight gain. The Ninth Circuit, however, agreed with the District Court that plaintiff failed to allege that reasonable consumers would understand the word “diet” in a soft drink’s brand name to promise weight loss, healthy weight management, or other health benefits, and upheld the dismissal of the lawsuit in its entirety.

In October 2017 plaintiff Shana Becerra filed suit against Dr Pepper in the Northern District of California, alleging that the use of the word “diet” in the Diet Dr Pepper brand name contains an “implicit promise [] that, because Diet Dr Pepper does not contain sugar or calories, it will assist in weight loss, or at least healthy weight management.” District Court Justice William Orrick disagreed and, after plaintiff’s fourth unsuccessful attempt to file a pleading that adequately states a claim, granted Dr Pepper’s motion to dismiss plaintiff’s third amended complaint without leave to amend.

On appeal, the Ninth Circuit affirmed the District Court decision and found that, “[w]hen considering the term in its proper context, no reasonable consumer would assume that Diet Dr Pepper’s use of the term ‘diet’ promises weight loss or management.” Instead, the Court found, “[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.” Therefore a reasonable consumer would understand the use of the term “diet” in this context to mean that the “diet” version of a soft drink has fewer calories than its non-diet counterpart, and not that the “diet” soft drink will assist in weight loss, healthy weight management, or other health benefits.

In reaching its decision, the Ninth Circuit rejected plaintiff's argument that, regardless of the common understanding of the word "diet" in the context of a soft drink brand name, her complaint should nonetheless have survived because she alleged a plausible "misunderstanding" of the word. Citing Ninth Circuit precedent affirming dismissal of claims based on similar unreasonable assumptions, the Court noted that "[j]ust because some consumers may unreasonably interpret the term ['diet'] differently does not render the use of 'diet' in a soda's brand name false or deceptive."

The Court also gave little weight to survey results summarized in plaintiff's third amended complaint that purportedly showed that some consumers expected diet soft drinks to help them lose weight or maintain/not affect their weight. While survey results are ordinarily not to be taken lightly at the pleading stage, where the Court is required to accept the allegations surrounding the survey as true, the Court held that the survey nonetheless "cannot, on its own, salvage [plaintiff's] claim," given that "a reasonable consumer would still understand 'diet' in this context to be a relative claim about the calorie or sugar content of the product," and the survey "does not address this understanding or the equally reasonable understanding that consuming low-calorie products will impact one's weight only to the extent that weight loss relies on consuming fewer calories overall." Accordingly, the Court found "the survey 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.'"

This decision serves as an important reminder of the key role that context and reasonableness play in determining whether an advertising claim is false or deceptive as a matter of law, and that these considerations can tip the scales even at the pleading stage of a case. Now, with the weight of this lawsuit lifted, Dr Pepper can breathe easier knowing it can keep the Diet Dr Pepper brand just the way it is.

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