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S.D.N.Y. joins N.D. Cal. in rejecting claim that "diet" soda is deceptive to a reasonable consumer

by Joe Reynolds

Takeaway: Defendants confronted with deceptive labeling class actions often face an uphill battle in convincing courts, at the threshold motion to dismiss stage, that a reasonable consumer would not be deceived by a product label. As the number of false labeling claims continues to grow, usually as the springboard for wide-ranging class actions, courts have expressed a greater willingness to assess the plausibility of a "deceptive" label at the pleadings stage. A recent string of dismissals by the Southern District of New York and Northern District of California highlight the importance of context in assessing whether a label would likely deceive a reasonable consumer as a matter of law.

In *Manuel v. Pepsi-Cola Co.*, No. 17-CV-7955-PAE, 2018 WL 2269247 (S.D.N.Y. May 17, 2018), *appeal filed*, No. 18-1748 (2d Cir. June 12, 2018), the plaintiffs filed a putative class action against Pepsi-Cola Company ("PepsiCo") based on the term "diet" in PepsiCo's marketing of Diet Pepsi. They claimed that the term "diet" leads consumers to believe "the product will assist in weight loss, or at least healthy weight management, for example, by not causing weight gain," whereas the "scientific evidence" demonstrated that the sweetener in Diet Pepsi in fact leads to weight gain. *Id.* at *1. Accordingly, the plaintiffs brought claims under New York law for unfair and deceptive business practices, false advertising, fraud, negligent misrepresentation, and breaches of express and implied warranties.

In dismissing these claims, Judge Engelmayer of the Southern District of New York first noted: "It is well-settled that a court may determine as a matter of law than an allegedly deceptive advertisement would not have misled a reasonable consumer." *Id.* at *8 (quoting *Fink v. Time Warner Cable*, 714 F.3d 739, 741 (2d Cir. 2013)). And he further observed that three other, recent district court decisions had dismissed substantively identical claims: *Becerra v. Coca-Cola Co.*, No. 17-CV-5916-WHA, 2018 WL 1070823 (N.D. Cal. Feb. 27, 2018); *Becerra v. Dr Pepper / Seven Up, Inc.*, No. 17-CV-5921-WHO, 2018 WL 1569697 (N.D. Cal. Mar. 30, 2018); and *Excevarria v. Dr. Pepper Snapple Grp.*, No. 17-CV-7957-GBD, ECF No. 54 (S.D.N.Y. Apr. 18, 2018). Each of these decisions dismissed the claims for the same reason: no reasonable consumer would understand that a "diet" soft drink is a weight *loss* product.

Judge Engelmayer joined these decisions for two independent reasons.

First, he emphasized the importance of context, stating that "context is crucial" in determining whether a particular advertisement would mislead a consumer. *Manuel*, 2018 WL 2269247, at *8 (quoting *Fink*, 714 F.3d at 472). The term "diet" in "Diet Pepsi" does not "stand in isolation," but instead immediately precedes Pepsi. Reading the term in context thus "connotes a *relative* health claim—that Diet Pepsi

assists in weight management *relative to* regular Pepsi." *Id.* (emphasis in original). Reading "Diet Pepsi" without reference to Pepsi, according to Judge Engelmayer, "deprives the term 'Diet' of its essential referent." *Id.* And quoting Judge Learned Hand, Judge Engelmayer emphasized that "[w]ords are not pebbles in alien juxtaposition" but have "only communal existence" and "take their purport from the setting in which they are used." *Id.* (quoting *NLRB v. Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941) (Hand, J.)).

Judge Engelmayer also highlighted the importance of the "context" of soft drinks more generally. The word "diet" – "in the context of soft drinks" – "unambiguously signals reduced calorie content relative to the non-diet version of the drink in question." *Id.* Accordingly, he concluded that reasonable consumers "well acquainted with diet soft drink labels that plaintiffs admit are 'ubiquitous,' surely understand that 'diet' soft drinks are simply 'lower calorie or calorie-free versions of their sugar-laden counterparts.'" *Id.* at *9 (quoting *Becerra*, 2018 WL 1569697, at *6).

Second, even if plaintiffs could allege that "diet" denotes a weight loss product, plaintiffs failed to "allege (other than conclusorily) that Diet Pepsi actually frustrates weight loss for any segment of the population." *Id.* The plaintiffs had alleged that the sweetener in Diet Pepsi is "likely to cause weight gain," and cited 14 scientific articles and studies in support. But after closely examining each study, the *Manuel* court concluded they "point only to a non-causal association between [sweetener] consumption and weight gain (or related health problems)." *Id.* at *10-*11. And "[i]n law, as in science, '[c]orrelation is not causation.'" *Id.* at *11 (quoting *Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135, 173 (2003)). Because plaintiffs failed to allege any causal relationship between the sweetener in Diet Pepsi and weight gain, they could not establish actual deception—*i.e.*, that contrary to their expectations, plaintiffs' 'received a beverage whose consumption is likely to lead to weigh gain.'" *Id.* (quoting plaintiffs' complaint).

The *Manuel* decision illustrates how certain district courts are scrutinizing the recent flood of false labeling class actions. Context is key to evaluating how a reasonable consumer in the marketplace would understand a commonly used term. And rather than credit plaintiffs' conclusory allegations about causation, *Manuel* analyzed each of the cited studies and assessed whether each established causation, as opposed to mere correlation.