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N.D. Cal. sounds the death knell on "diet" soda class actions

by Joe Reynolds

Takeaway: We previously reported on a string of cases by the Southern District of New York and Northern District of California dismissing deceptive labeling class actions based on the marketing of "diet" soda. See July 9, 2018 post, *"S.D.N.Y. joins N.D. Cal. in rejecting claim that "diet" soda is deceptive to a reasonable consumer."* One of those cases provided the class plaintiff one more opportunity to try and state a claim under California's consumer protection laws. In dismissing that plaintiff's renewed attempt, the Northern District of California made two key observations that will likely doom any future class action alleging that the marketing of "diet" soda is deceptive: (1) reasonable consumers understand that diet soda – at best – will help them lose or maintain weight ***relative*** to the consumption of regular (high calorie) soda, and (2) no scientific study to date has established that the sweetener used in diet soda actually causes weight gain, rending implausible any allegation to the contrary.

In *Becerra v. Dr Pepper/Seven Up, Inc.*, No. 17-CV-05921, 2018 WL 3995832 (N.D. Cal. August 21, 2018), the plaintiff – a regular purchaser of Diet Dr Pepper for 13 years – filed a putative class action against Dr Pepper/Seven Up, Inc. ("Dr Pepper") based on the term "diet" in Dr Pepper's marketing of Diet Dr Pepper. Just as in a recent case against Pepsi-Cola Company ("PepsiCo") regarding Diet Pepsi (featured in the prior post cited above), the plaintiff alleged that the term "diet" on a soft drink label leads consumers to believe that Diet Dr Pepper "assists with weight loss, or at least not weight gain," and that the sweetener in Diet Dr Pepper in fact leads to weight gain. *Becerra*, 2018 WL 3995832, at *3; *see also 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). Based on this allegation, the plaintiff brought claims under California consumer protection laws (the FAL, CLRA, and UCL), and for breach of express and implied warranty.

California's "reasonable consumer" test controlled the plaintiff's consumer protection claims, which require that a plaintiff plausibly allege that members of the public are "likely" to be deceived. *Becerra*, 2018 WL 3995832, at *4. The *Becerra* court had previously dismissed the plaintiff's claim because the plaintiff had not alleged any "facts or theories" to plausibly support the notion that "the label conveys more than that the drink has relatively less calories and sugar than normal soft drinks." *Id.* at *3 (emphasis in original). And, just as in the Southern District of New York's decision in *Manuel*, the *Becerra* court analyzed the scientific studies featured in the plaintiff's operative complaint (which the plaintiff relied on to substantiate the allegation that Diet Dr Pepper actually ***causes*** weight gain), ruling the studies only showed correlation and ***not*** causation.

In her amended complaint, the plaintiff also added a number of allegations, regarding (i) dictionary definitions of the term "diet," (ii) examples of Dr Pepper's advertisements, (iii) statements about diet soda and weight loss from the American Beverage Association, (iv) the results from a consumer survey asking consumers about their understanding of the impact diet soda has on their weight, and (v) additional scientific studies about whether the sweetener in Diet Dr Pepper actually causes weight gain. None of these new allegations saved the plaintiff's putative class action.

First, the *Becerra* court evaluated the plaintiff's eight new dictionary definitions of "diet," all of which associated the term with "losing weight, limiting food intake, or preventing disease." *Id.* at *4. But the Court refused to consider the term "diet" outside of the "context" in which it appeared – on the soft drink label. Highlighting the thorough reasoning of Judge Engelmayer in *Manuel*, the *Becerra* court held it is not plausible for reasonable consumers to look at "diet" in Diet Dr Pepper as "associated with weight loss, separate and apart from the specific context of the product." *Id.*

Second, the *Becerra* court evaluated advertisements from as early as the 1970s that allegedly conveyed the "impression" that consumption of Diet Dr Pepper is beneficial in terms of weight loss and healthy weight management. For example, one advertisement showed a "bikini-clad woman" with the text, "[j]ust keep sipping, watch what you eat, and pretty soon you'll start looking better and better too." *Id.* at *5. But again, the Court found that these advertisements suffered from the same problems as the dictionary definitions: all they convey are benefits as compared to regular soft drinks.

Third, the *Becerra* court rejected the plaintiff's reliance on two articles from the American Beverage Association, which discussed how drinking diet beverages can help consumers lose weight. Neither of these articles did anything more than support the *Becerra* court's view that a reasonable consumer "would simply not look at the brand name Diet [Dr Pepper] and assume that consuming it, absent any lifestyle change, would lead to weight loss." *Id.* at *6 (quoting *Becerra v. Coca-Cola Co.*, C 17-05916 WHA, 2018 WL 1070823 (N.D. Cal. Feb. 27, 2018) (analyzing identical claims against Diet Coke)).

Fourth, the plaintiff presented results from a survey of 400 California consumers purporting to show that 63.3 percent of them expected that soft drinks labeled "diet" would "help them maintain weight, or at least not affect their weight." *Id.* Dr Pepper contested the significance of the survey results, because the plaintiff had not also include allegations about the survey's methodology, what questions were asked, or who administered it. The *Becerra* court agreed and ruled that the amended complaint lacked other plausible allegations that could permit a reasonable inference that Diet Dr Pepper is misleading. It also concluded that the unsupported survey simply signified a "possible" consumer view, as opposed to a plausible one. Even so, the *Becerra* court found that the survey failed to challenge the view that "diet" only signals relatively fewer calories, as compared to regular soda.

Finally, the plaintiff included additional allegations about scientific studies concerning the impact of Diet Dr Pepper's sweetener on weight, further alleging that causation is not the pleading requirement because "unequivocal proof of causation" does not always exist. The *Becerra* court agreed but ruled that the plaintiff must nonetheless plausibly allege causation. Having failed to offer a "single finding of

causation" between the sweetener or diet soda products and weight gain, the plaintiff failed to supply "the plausibility of a causal link between Diet Dr Pepper and weight gain." *Id.* at *8. For this reason, the plaintiff failed to "cross the threshold from allegations of correlation to causation." *Id.* at *9. The *Becerra* court also noted that "continued scientific research" may allow the plaintiff to reach her desired conclusions but that her claims failed "today." *Id.*

In sum, the plaintiff's new allegations could not overcome the two key conclusions shared by the federal district courts: First, the message and meaning of "diet" in diet soda must be viewed in context when assessing whether that term is deceptive. And when properly viewed in context, reasonable consumers understand the benefits of diet soda only in relation to regular soda – not independently as a weight loss tool. Second, to plausibly allege that diet soda causes weight gain, a plaintiff must point to scientific studies that establish such a causal link. Mere allegations of correlation will not survive scrutiny. These two conclusions likely spell trouble for any future "diet" soda class actions.