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The Second Circuit puts another nail in the diet soda class action coffin

by James F. Bogan III

Takeaway: In prior posts, we have reported on the dismissals of putative class actions asserting that the "diet" in "diet soda" is false or misleading. *See N.D. Cal. sounds the death knell on "diet" soda class actions* (September 11, 2018) and *S.D.N.Y. joins N.D. Cal. in rejecting claim that "diet" soda is deceptive to a reasonable consumer* (July 9, 2018). The courts rejecting this theory of deception as implausible have done so based on two key conclusions: (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 has established that the sweetener used in diet soda actually causes weight gain. Less than two weeks ago, the Second Circuit came to the same conclusion in another such class action. In *Excevarria v. Dr Pepper Snapple Group, Inc.*, --- F.App'x. ---, No. 18-1492, 2019 WL 1761696 (2d Cir. Apr. 17, 2019) (Summary Order), two class representatives alleged that the term "diet" in "Diet Dr Pepper" was false or misleading, because it supposedly conveyed to reasonable consumers that consumption of the beverage would assist in weight loss. Central to plaintiffs' theory of deception was the claim that the sweetener in Diet Dr Pepper (aspartame) "is likely to cause weight gain, does not help in weight loss or healthy weight management, and . . . increases the risk of [metabolic] disease such as diabetes." *Id*. at *1. The Southern District of New York rejected the allegations as implausible and the Second Circuit affirmed, ruling: "[E]ven assuming (without deciding) that Plaintiffs are right that a reasonable consumer would understand the word 'diet' to convey promises about weight loss or management, they have still failed to state a claim here. None of the studies cited by the Complaint or the PFAC [proposed first amended complaint] establish a causal relationship between aspartame and weight gain, as has been determined by a number of courts in substantially identical cases involving complaints that cite the same studies." *Id*. In so ruling, the Second Circuit cited a number of cases discussed in our September 11, 2018 and July 9, 2018 posts. Accordingly, the Second Circuit sustained the district court's dismissal of the plaintiffs' original complaint and the denial of their motion for leave to file an amended complaint, ruling: "neither the Complaint nor the PFAC state a claim, because Plaintiffs cannot raise a plausible inference that 'Diet Dr Pepper' as a brand name is false or misleading." *Id*. at 4.