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Second Circuit again affirms dismissal of "diet soda" consumer fraud class action

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 Second Circuit: another nail in the diet soda coffin* (April 30, 2019); *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 to date has established that the sweetener used in diet soda actually causes weight gain. Recently, the Second Circuit came to the same conclusion in a "Diet Coke" class action, this time in a published opinion. *Geffner v. Coca-Cola Co.,* --- F.3d ---, No. 18-3548-cv, 2019 WL 2619934 (2d Cir. June 27, 2019). The Second Circuit ruled: "Consistent with the rulings of every court that has addressed this issue, we hold that when included in a soft drink title, the adjective 'diet' (1) refers specifically to caloric content rather than a generic promise of weight-loss, and (2) carries a primarily relative (in relation to the nondiet soft drink equivalent), rather than an absolute, meaning." *Id*. at *1.

Along the way, the Second Circuit rejected other theories of "Diet Coke" deception: "First, we reject any claims based on Coca-Cola's advertising. The use of physically fit and attractive models using and enjoying advertised products is so ubiquitous that it cannot be reasonably understood to convey any specific meaning at all. Similarly, the statement that Diet Coke will 'not go to your waist' is so vague and non-specific a representation that, at most, it amounts to inactionable 'puffery.' As for Coca-Cola's statement that Diet Coke is suitable for 'carbohydrate and calorie-reduced diets,' Plaintiffs allege no facts to suggest that this statement is false. On the contrary, Plaintiffs themselves acknowledge that 'Diet Coke does not contain sugar or calories' in their First Amended Complaint." *Id*. at *2 (footnotes omitted).