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Washington Legal Foundation
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2009 Massachusetts Avenue, NW
Washington, DC 20036
202.588.0302 wlf.org

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Ninth Circuit Shuts Down Claim that "Diet" in Diet Soda is Unlawfully Deceptive

by Glenn G. Lammi

It's already the end of January, and for those of you who resolved to lose a few pounds this year, it may be time to check on your progress. Among other changes to your eating habits, perhaps you switched to diet soda. If so, did you switch because you thought "diet" implied that the soft drink is a weight-loss or weight-management tool?

That may sound a bit far-fetched, but this impression has provided the factual and legal basis for numerous consumer-fraud class actions filed in New York and California federal courts. It's been two years since we've written about this odd strain of food-labeling cases. Thanks to a December 30, 2019 Ninth Circuit ruling (yes, the Ninth Circuit) in *Becerra v. Dr. Pepper/Seven Up*, this should be the *last* post we publish on the subject.

In the Food Court

Becerra filed suit in the Food Court (Northern District of California) alleging the defendant's use of "diet" in Diet Dr. Pepper was a false or deceptive promise that the soda "would 'assist in weight loss' or at least 'not cause weight gain.'" Diet Dr. Pepper would not assist in weight loss, Becerra claimed, because it contained aspertame, a sugar substitute that some studies associate with weight gain. After allowing Becerra to amend her complaint three times, the district court ultimately ruled the lawsuit failed to state a valid claim and dismissed it with prejudice. Becerra appealed.

In the Ninth Circuit

The three-judge panel not only affirmed the Northern District's decision, it also selected the opinion for formal publication in the Federal Reporter. Why is this significant? The Ninth Circuit has developed an unfortunate preference of *not* formally publishing its decisions on food-labeling consumer-fraud cases. "Unpublished" decisions don't have precedential effect, though parties can cite them in court papers. *Becerra* stands as binding precedent for all district courts in the Ninth Circuit.

The opinion focuses on the reasonableness of Becerra's belief that the term "diet" implies the product will assist in weight loss. Under California law, plaintiffs alleging deception must establish a probability that a "significant portion" of consumers, "acting *reasonably* under the circumstances," could be misled. As we've written previously, too many trial judges in the Ninth Circuit have held that a jury, not the court, should make the "reasonable consumer" determination in consumer-fraud cases.

Notably, the *Becerra* panel didn't defer to a jury. It performed the reasonable-consumer determination and concluded as a matter of law that no reasonable consumer would be misled by "diet"

Glenn G. Lammi is Chief Counsel of Washington Legal Foundation's Legal Studies Division.

the way Becerra claimed to be. The court rejected Becerra's selective quotation of dictionary definitions, explaining that Dr. Pepper employed "diet" as an adjective, not a verb or noun as the plaintiff argued. Reasonable consumers, the court explained, understand "diet" to be a relative term in the context of soft drinks and their calorie counts.

The court also found that the ads and trade-association articles Becerra referenced in his argument either failed to support his perception of "diet" or instead substantiated Dr. Pepper's counterargument. And while the survey's results he presented nominally supported Becerra's claim, the court found that the survey was too limited in scope and too flawed in its design to "salvage" the plaintiff's reasonableness argument.

Second Circuit Set the Stage

The Ninth Circuit isn't the first federal circuit that seems to have grown tired of these diet-soda class actions. In the spring and summer of 2019, the Second Circuit considered appeals in three copycat consumer-fraud suits filed in New York federal courts.

First, the appeals court affirmed the lower court's dismissal of *Manuel v. Pepsi-Cola Co.*, a case we discussed here in May 2018. In a March 15 Summary Order (*i.e.*, unpublished, no precedential value), the panel agreed with the Southern District of New York that the studies Manuel cited on aspartame and weight gain could not establish a causal connection. Thus, Manuel could not "raise a plausible inference that the use of the word 'diet' is false, inaccurate, or misleading."

Then, on April 17, a Second Circuit panel in *Excevarria v. Dr. Pepper Snapple Group, Inc*. affirmed (in a Summary Order) the Southern District's dismissal of claims identical to Manuel's, reasoning that the scientific studies Excevarria cited did not support his fraud claim.

Finally, on June 27, a third Second Circuit panel reviewed "substantially identical claims (from the same attorney, no less) [that we summarily rejected] in the past few months." Frustrated by the repetition, the panel decided not to merely release another Summary Order: "Here, we employ a published opinion to reject Plaintiffs' claims." The court in *Geffner v. Coca-Cola Co.* found the plaintiff's belief that "diet" equated with weight loss or management "implausible on [its] face." The court found the advertising Geffner referenced in support of his claim that Diet Coke is a weight-loss device to be at most "puffery."

The court also explained that reasonable consumers understand what "diet" means in the broader context of the product and the packaging. Finally, the court found Diet Coke's compliance with federal labeling requirements to be "persuasive evidence of the meaning of the label 'diet' in the diet-soda context."

The End (?)

Not one single court has allowed a diet-soda lawsuit to proceed to trial. Two federal appeals courts, which heretofore have been reluctant to throw out claims based on the reasonable-consumer test, have published opinions laying waste to the plaintiffs' legal theory.

Conceivably, the law firm responsible for these class actions could track down other litigious diet-soda consumers in different parts of the country and hope for more favorable results. But it's more likely that the lawyers will reach into their bag of tricks and move on to the next legal theory or industry target. In the meantime, we applaud the Second and Ninth Circuit panels for establishing well-reasoned precedents in an area of litigation where good law is in short supply. When consumer-fraud defendants are before district court judges who are reluctant to make the reasonable-consumer determination as a matter of law, these companies can point to decisions like *Becerra* and *Geffner*. We also applaud the soft-drink companies for investing considerable resources to achieve these positive outcomes. They helped create precedents that other, less profitable businesses may use to defend themselves.

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