

Diet Soda Claims Go Flat in the Ninth Circuit

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On December 30, 2019, the United States Court of Appeals for the Ninth Circuit issued an opinion in *Becerra v. Dr Pepper/Seven Up, Inc.*, No. 18-16721 (9th Cir.) that may be the final nail in the coffin of a series of cases filed against diet soda manufacturers in recent years. The Ninth Circuit affirmed the Northern District of California’s dismissal of claims that Dr Pepper/Seven Up had mislead consumers into believing that drinking their diet soda products would “assist in weight loss or healthy weight management.”

The claims in *Becerra* were based on several studies finding that ingesting zero-calorie sweeteners, such as those used in diet sodas, may lead to greater calorie consumption and weight gain. False advertising claims based on these studies have also been recently rejected by the Second Circuit, see *Geffner v. Coca-Cola Co.* (2d Cir. 2019), *Manuel v. Pepsi-Cola Co.* (2d Cir. 2019), and *Excevarria v. Dr Pepper Snapple Group, Inc.* (2d Cir. 2019), and the Ninth Circuit followed suit. Looking to dictionary definitions, the Court found that the term “diet,” when used as an adjective on the packaging for soda and other beverages is commonly understood to mean “reduced in or free from calories” and that no reasonable consumer would understand it to mean anything else. Because the operative complaint alleged, at most, that some consumers “may unreasonably interpret the term differently,” the Court held that the district court correctly dismissed the plaintiff’s false advertising claims as a matter of law.

Together, these decisions likely spell the end of the road for false advertising claims based on the use of the term “diet” to describe soft drinks. They also may have broader implications for false advertising claims in general. The question of whether a reasonable consumer would be deceived by a marketing claim is typically considered a question of fact appropriate for summary judgment or trial, but these decisions suggest that some of the most consumer-friendly courts in the country are willing to resolve this question at the pleadings stage when the plaintiff’s alleged interpretation of the claim is anything but reasonable.