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PERSPECTIVE

Becerra v. Dr Pepper/Seven Up: A victory over the space aliens

By Matthew Levitt and Neil Coulson

As last year drew to a close, the 9th U.S. Circuit Court of Appeals affirmed U.S. District Judge William H. Orrick III's decision in *Becerra v. Dr Pepper/Seven Up*, 2019 DJDAR 12144 (9th Cir. Dec. 30, 2019), dismissing a false advertising case challenging the use of the word "diet" on the cans and bottles of the popular sugar-free soft drink, Diet Dr Pepper. The central allegation of the *Becerra* complaint was that "Because of the product's use of the term 'diet,' its lack of calories, and the manner in which DPSU markets it, consumers reasonably believe that drinking Diet Dr. [sic] Pepper will assist in weight loss or healthy weight management." They cited eight different dictionary definitions of diet, all of them similar to "a regimen of eating and drinking sparingly so as to reduce one's weight." The complaint supported its contentions with a near-disturbing focus on the "extremely fit bodies" of models used in Dr Pepper advertisements, although the ads themselves were not the subject of challenge.

The word "diet" can mean any of several things. It can refer to the totality of an individual or group's nutritional consumption, as in, "The American diet contains too many calories and fat," or "Jeanine subsists almost entirely on a diet of caviar and boxed red wine." It can refer to a specific eating plan, often temporary and in the service of a goal such as weight loss. Or, it can refer to a beverage having little or no sugar, often artificially sweetened, and often in contrast with a sugar-containing, non-diet product line by the same maker.

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Judge William Orrick rejected the premise that survey data must be taken as truth on a motion to dismiss. These are important precedential findings to the extent that plaintiffs continue to plead about questionable survey and similar data in support of otherwise implausible false-advertising allegations.

Although "diet" can have several meanings, it is rarely ambiguous which one is appropriate in a given context. When the National Cancer Institute publishes a report on the status of the "American Diet," nobody thinks it means that all of America has suddenly adopted the same weight-loss regimen. To think such a thing, one would have to be oblivious to the context in which words are used. An alien visitor from space, still getting accustomed to the ways of Earthlings, might excusably be confused as to the usage of "diet" in such a context. A reasonable consumer — the hypothetical creature employed by the law to help determine the plausibility of a deceptive advertising claim — would not.

In Court, No One Can Hear You Scream

The *Becerra* case, however, is part of a notable trend in recent consumer class actions. Plaintiffs' counsel seize upon a word or other characteristic of a product label and interpret it as if they, and by extension American consumers, were newly arrived space visitors who do not have years of experience with the marketing of products and services, and understand nothing about the context in which words are used. That has been a feature of the most ridiculed consumer class actions of the past, such as the allegation that Froot Loops cereal misrepresented itself as containing real fruit, as if Earth consumers knew nothing about grain-based, sweetened cereals. *Videtto v. Kellogg*, 08-cv-1324 (E.D. Cal.). Competitors are not immune from the space-alien approach in some Lanham Act cases, as POM Wonderful showed in the 2000s when it sued four rival juice companies for using "pomegranate" on their labels as if it were a claim that the drinks were substantially made of pomegranate juice, only to be informed via four not-liable verdicts that Earth jurors know the difference between a flavor designator and an ingredient statement. *POM Wonderful v. Coca-Cola Co.*, 2:08-cv-6237 (C.D. Cal.); *POM Wonderful v. Ocean Spray Cranberries, Inc.*, 2:09-cv-565 (C.D. Cal); *POM Wonderful v. Tropicana*

Products, 2:09-cv-566 (C.D. Cal.); *POM Wonderful v. Welch's*, 2:09-cv-567 (C.D. Cal.). Extraterrestrial influence can even be found in cases such as the recent rash of actions against outlet mall retail stores, alleging that such stores disguise made-for-outlet merchandise as if it were main-line product marked down — as if consumers just returned from a long interstellar voyage and missed the last 30 years of how outlet stores have evolved.

To review a bit of beverage history on this planet, the first national diet soda brands were introduced in the 1960s. By 1965, Diet Dr Pepper —the subject of this suit — existed, as did Diet Pepsi and Coca-Cola's Tab. Their popularity soared during the 1980s, and diet versions of other, non-carbonated ready-to-drink beverages, such as iced teas, also became commonplace. They rank among the most popular beverages, and consumers are very familiar with what they are: versions of other popular beverages modified by the substation of low-calorie or no-calorie sweeteners for sugar, while otherwise attempting to replicate the taste profile of the non-diet product.

Although consumption of a diet soda may be consistent with going on a diet, in the sense of a special eating regimen for weight control, no reasonable consumer views "diet" on a container of diet soda as a representation that consuming the product is tantamount to going on such a program, or even a component of one. Such is the holding of the district and appellate courts in the *Becerra* case.

Judge Orrick of the Northern District of California, in dismissing the case, showed every sign of being an experienced Earthling with his use of the all-important word, "context": "[W]hen viewed in the context of a 'Diet Dr Pepper' label, it is not likely that a reasonable consumer would interpret 'diet' in the manner Becerra suggests." As the court pointed out, the plaintiff cited definitions "selectively" from different contexts. The court even followed the dictionary links cited by Becerra, finding others from the same sources that sound much more like a diet soft drink — e.g., "containing much less sugar than usual and often sweetened artificially, or containing less fat than usual." The court found, again using that key word, that "in the context of soft drinks it is unambiguous that is signals only a soft drink's relatively less sugar or calories when compared to its regular counterpart." It was logic than even a space alien could understand. By Grabthar's Hammer, its sugar free!

Close Encounters of the Survey Kind

When false-advertising cases get into the expert discovery stage, the standard method for showing that a food container communicates a specified false message is a consumer survey. Typically, the threshold is that if at least 20% of consumers report understanding the false message, then it is communicated to a reasonable consumer. This standard implies that unreasonable consumers make up less than 20% of the population, so that if at least 20% of consumers receive a particular message, that 20% must include some reasonable consumers along with all of the unreasonable ones. In 2020, it almost seems quaint to posit that no more than 20% of American consumers could interpret something unreasonably; it's too easy to think of patently unreasonable beliefs to which much larger proportions of Americans seem deeply committed, let alone ready to interpret from a soft drink can. Judges are therefore empowered to overrule the populist approach to consumer reasonableness. Thus, although the *Becerra* plaintiffs bolstered their third amended complaint (following a prior dismissal with leave to amend) with the results of a survey supposedly finding that over 75% of consumers "expect a diet soft drink to either help them lose weight, or help maintain or not affect their weight," it was unavailing.

Nevertheless, it takes some nerve for a court to dismiss a case in spite of a survey apparently showing that such a large percentage of consumers receive a misleading message. Judge Orrick spent some time critiquing the survey, but ultimately held that a purported survey does not establish a plausible misleading advertising claim in the absence of "other plausible allegations that could permit a reasonable inference a product is misleading." This is true in part because a court cannot properly evaluate the methodology of a survey based on just what is pled in a complaint, and Judge Orrick rejected the premise that survey data must be taken as truth on a motion to dismiss. These are important precedential findings to the extent that plaintiffs continue to plead about questionable survey and similar data in support of otherwise implausible false-advertising allegations.

The plaintiffs' firms that filed the *Becerra* case have filed other challenges to the same and other diet soft drinks in different courts. California courts in *Becerra v. Coca-Cola Co.*, 17-civ-5916-WHA (N.D. Cal.) and New York courts in *Manuel v. Pepsi-Cola Co.*, 17-civ-7955-PAE (S.D.N.Y.), and *Excevarria v. Dr. Pepper Snapple Group Inc.*, 17-civ-7957-GBD (S.D.N.Y.), reached the same result, with the last-mentioned affirmed by the 2nd Circuit last April. Most of these decisions are unpublished, and the 2nd Circuit ruling is a non-precedential "Summary Order." In the 9th Circuit's recent decision, however, we finally have a public, appellate repudiation of space-alien pleading that isn't hidden away in a judicial Area 51.

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