

# 9th Circ. Urged To Reopen Dr Pepper 'Diet' Label Suit

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Law360 (January 24, 2019, 4:07 PM EST) -- A California soda drinker has asked the Ninth Circuit to revive her proposed class action against Dr Pepper/Seven Up Inc., saying the district court was too quick to dismiss her claims that the “Diet” in Diet Dr Pepper misleads customers into thinking the drink could help with weight management.

Shana Becerra told the Ninth Circuit on Tuesday that the Northern District of California should have taken her allegations that reasonable customers understand “diet” as indicating the drink is useful for regulating body weight as true, and that the court ignored her scientific evidence showing that aspartame, the sweetener used in Diet Dr Pepper, interferes with a person’s metabolism.

U.S. District Judge William H. Orrick [dismissed the suit](#) with prejudice in August, saying it was implausible that customers would think the soft drink could help with weight loss or management.

In her brief to the Ninth Circuit, Becerra said she has struggled with obesity since childhood and bought Diet Dr Pepper for 13 years based on the company’s advertising it as a “diet” drink, which she said she believed meant it would help keep her from gaining weight. But the artificial sweeteners used in the drink can cause weight gain and increase risk of chronic disease, she said, arguing that Dr Pepper omitted that to mislead consumers.

“Common sense and experience tell us many people drink diet soda to avoid the weight gain they understand would inevitably come with drinking sugar- and calorie-laden ‘regular’ sodas,” she wrote. “Consumers have come to believe that, because ‘diet’ soda lacks calories due to its artificial sweeteners, it is, like water, innocuous as to weight gain and other detrimental metabolic outcomes.”

In dismissing her complaint, she said, the district court erred in rejecting her allegations, saying instead it should have accepted her alleged facts about what reasonable consumers believe as true and then ruled her legal claims based on that.

She added the district court was wrong in finding her scientific evidence insufficient to state a claim and should not have rejected her suit based on the “short and plain statement of the claim” in the complaint.

The complaint alleged enough to make the claims scientifically plausible, Becerra wrote, adding that a proper review of her claims requires expert testimony and consideration of numerous other factors.

Dr Pepper counsel Van H. Beckwith of [Baker Botts LLP](#) said they expect the district court's decision to be affirmed, adding that other courts that have tackled the question, such as the Southern District of New York in [a case involving](#) Diet Coke, have also come to the conclusion that reasonable customers don't believe the sodas help manage their weight.

Representatives for Becerra could not immediately be reached for comment Thursday.

Becerra is represented by Andrew B. Sacks and John K. Weston of [Sacks Weston Diamond LLC](#), and Jack Fitzgerald, Melanie Rae Persinger and Trevor Matthew Flynn of the [Law Office of Jack Fitzgerald PC](#).

Dr Pepper/Seven Up Inc. is represented by Evan Young, Ariel D. House, Van H. Beckwith, Monica Hughes Smith and Stuart Plunkett of Baker Botts LLP.

The case is Becerra v. Dr Pepper/Seven Up Inc., case number [18-16721](#), in the U.S. Court of Appeals for the Ninth Circuit.

--Editing by Alanna Weissman.

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