

Pepsi Says False Ad Suit Over 'Diet' Soda Is Preempted

Law360, New York (January 23, 2018, 3:33 PM EST) -- Pepsi-Cola Co. has urged a New York federal court to toss a proposed class action claiming the company's "diet" drink contributes to weight gain, saying the state-law claims are preempted by federal law allowing zero-calorie sodas to be labeled as "diet."

PepsiCo said Friday that Congress and the U.S. Food and Drug Administration allow companies that labeled a soft drink brand as "diet" before 1989 to continue using the term if the product has 40 calories or fewer, thereby preempting the proposed class action. If the consumers want to change the regulations, they should petition the FDA rather than pursue this lawsuit, the company argued.

"Plaintiffs are not entitled to upend the entire regulatory scheme for diet soft drinks," the filing said.

Consumers Elizabeth Manuel and Vivien Grossman alleged in October that Diet Pepsi is made with the non-caloric sweeteners aspartame, acesulfame potassium and sucralose, which contribute to weight gain and an increased risk of metabolic disease, diabetes and cardiovascular disease. The product's representation that it is diet is therefore misleading, since the soda won't help with weight loss, the complaint alleged.

But PepsiCo countered that the Nutrition Labeling and Education Act allows the use of "diet" in a soft-drink name if the drinks have no more than 40 calories per serving or 0.4 calories per gram. The FDA implemented the regulations, and the consumers don't challenge that PepsiCo is in compliance with them, the filing said.

"Over the past 25 years, FDA has had numerous opportunities to revisit these regulations governing diet soft drinks in response to citizens' petitions or through standard notice-and-comment rule-making," PepsiCo argued. "It has never done so."

Additionally, the consumers haven't alleged that they were deceived by Diet Pepsi in particular, the company said. The consumers cite research into the broad effects of artificial sweeteners, but none of the studies name Diet Pepsi, according to the filing. Even then, the research establishes neither correlation nor causation between diet soda and weight gain, PepsiCo said.

"Even giving plaintiffs every benefit of the doubt and reading the complaint in the light most favorable to them, not one of these studies looks at Diet Pepsi in particular or purports to find causation between the levels of artificial sweetener present in Diet Pepsi and weight gain," the filing said. "Not one."

Consumers' counsel Abraham Z. Melamed of Derek Smith said they intend to oppose the dismissal bid.

"We will ultimately obtain justice for the hundreds of thousands, and possibly even millions of consumers affected by what is in our opinion one of the biggest consumer frauds in the past 50 years," Melamed said by email.

Counsel for PepsiCo declined to comment.

The proposed class is represented by Derek T. Smith and Abraham Z. Melamed of Derek Smith Law Group PLLC, Jack Fitzgerald, Trevor M. Flynn and Melanie Persinger of The Law Office of Jack Fitzgerald PC, and Andrew Sacks and John Weston of Sacks Weston Diamond LLC.

PepsiCo is represented by Andrew S. Tulumello and Chantale Fiebig of Gibson Dunn & Crutcher LLP.

The case is Elizabeth Manuel et al. v. Pepsi-Cola Co., case number 1:17-cv-07955, in the U.S. District Court for the Southern District of New York.

--Editing by Jack Karp.

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