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False Food Advertising Claims Require Plausibility, Not Possibility

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Article By Foley & Lardner LLP
Craig S. Fochler IP Litigation Current

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Earlier this year, in *"Is the "Food Court Closing,"* we reported indications of a change in the leanings of federal courts in California when viewing class action false advertising allegations regarding food and beverage products at the motion to dismiss stage. For years, these courts were viewed as interpreting the sufficiency of the allegations in a manner favorable to plaintiffs. During the past few years, however, these courts began viewing plaintiff's pleadings more critically. They have been applying a more stringent legal requirement of claim plausibility consistent with the United States Supreme Court's. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (explaining that a pleading must "state a claim to relief that is plausible on its face"); *Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009) (explaining that the claim must be "across the line from conceivable to plausible" citing *Twombly*, 550 U.S. at 570). Under the *Twombly* and *Iqbal* interpretation of the plausibility requirement, the false advertising plaintiff's pleadings must make plausible that a significant number of reasonable consumers acting reasonably would be deceived by the alleged false claim. *See Ebner v. Fresh, Inc*., 838 F.3d 958, 965 (9th Cir. 2016) quoting *Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496, 508 (2003).

The application of this less plaintiff friendly plausibility requirement to food and beverage false advertising pleadings has continued in 2018, particularly with regard to drink claims. For example, a number of decisions have dismissed claims that use of the term "diet" for a soft drink, *e.g.*, Diet Coke, causes consumers to believe that the beverage will help the consumer to lose weight or not to gain weight on the ground that such beliefs are not plausible. *See generally Manuel v. Pepsi-Cola Co.*, No. 17 Civ. 7955 (PAE), 2018 U.S. Dist. LEXIS 83404 (S.D.N.Y. May 17, 2018); *Becerra v. Coca-Cola Co*., No. C 17-05916 WHA, 2018 U.S. Dist. LEXIS 31870 (N.D. Cal. Feb. 27, 2018); *Becerra v. Dr Pepper/Seven Up, Inc*., No. 17-cv-05921-WHO, 2018 U.S. Dist. LEXIS 142074 (N.D. Cal. Aug. 21, 2018); *Excevarria v. Dr. Pepper Snapple Group, Inc.*, No. 17 CIV. 7957 (GBD) (S.D.N.Y. dismissed April 28, 2018).

The decision in *Becerra v. Dr Pepper* makes clear that the applicable requirement is plausibility, not possibility. *Becerra v. Dr Pepper/Seven Up, Inc.*, 2018 U.S. Dist. LEXIS 142074, at *27. In *Becerra v. Dr Pepper*, the plaintiff attempted to avoid a third dismissal of her claim for being implausible by bolstering her second amended complaint with eight additional dictionary definitions of "diet," Dr. Pepper's own advertisements, two American Beverage Association articles and a consumer survey. *Id.* at *10. Citing dictionary definitions, *Becerra* argued that "there is no reason consumers cannot believe 'diet' means assisting with weight loss." *Id.* at *13. Following the reasoning of the dismissal of the complaint in *Manuel* at *34 and discussing the dictionary definitions evidence, the *Becerra*court held that "even if 'diet' sometimes means assisting with weight loss, in the context of soft drinks it is unambiguous that it signals only a soft drink's relatively less sugar or calories when compared to its regular counterpart." *Becerra v. Dr Pepper/Seven Up, Inc*., 2018 U.S. Dist. LEXIS 142074, at *13. The court interpreted the Dr. Pepper advertising and trade association article evidence as confirming this finding. *Id.* at *22.

Likewise, the pleading of a consumer survey in the *Becerra* second amended complaint was of no avail to the plaintiff's position. Becerra plead the results, but not the methodology, of a survey of 400 California and 400 nationwide consumers. *Id.* at *20–23. The survey asked questions such as "do you expect soft drinks labeled 'diet' to help you lose weight." *Id.* at *20. The plaintiff argued that the results showed Dr. Pepper's use of the

term "diet" to communicate weight loss (12.5%) or at least help not gain weight (63.3%). *Id.* at *21. Relying upon a prior decision, the plaintiff went on to argue that "the Court must presume [survey data as] truth on a motion to dismiss." *Id.* at *21 (citing *Shalikar v. Asahi Beer U.S.A.*, No. LA CV17-02713 JAK (JPRx), 2017 U.S. Dist. LEXIS 221388 (C.D. Cal. Oct. 16, 2017)). The court rejected *Becerra's* argument and distinguished *Shalikar*, as follows:

> *Shalikar* does not bear the weight Becerra puts on it. In that case, the court found consumer claims were plausible based on allegations about the "words, pictures, [and] diagrams" on the product's packaging, and not based on the survey alone. *Shalikar*, 2017 U.S. Dist. LEXIS 221388, 2017 WL 9362139 at *7. The court in *Naimi v. Starbucks Corp.*, No. 17-cv-6484, 2018 U.S. Dist. LEXIS 110398, at *14, n. 4(C.D. Cal. June 27, 2018), recently pointed out this distinction and rejected the presumption of truth for survey data because the complaint in *Naimi* lacked other plausible allegations that could permit a reasonable inference a product is misleading.
>
> Here, the complaint resembles *Naimi* in its lack of other plausible allegations supporting a reasonable inference that Diet Dr Pepper is misleading.

Id. at *21–22.

In *Naimi* the plaintiff had alleged that Starbucks mislead consumers regarding espresso content of Starbucks' "Doubleshot® Espresso." *Naimi v. Starbucks Corp.*, No. LACV 17-6484-VAP (GJSx), 2018 U.S. Dist. LEXIS 110398 (C.D. Cal. June 27, 2018), at *4, *appeal filed* July 18, 2018. The district court dismissed the complaint, holding that the plaintiffs "have not alleged sufficient facts supporting their contention that such a representation is false" based on the reasoning that "it is implausible on the record before the Court to contend that the Product contains less than two shots' worth of Starbucks brand espresso." *Id.* at *30. Thus, *Naimi* further demonstrates the higher standard of plausibility being applied in food cases, as did the 9th circuit's affirmation earlier this year of the dismissal of a similar case. *Forouzesh v. Starbucks Corp.*, 714 F. App'x. 777, (9th Cir. 2018) (relating to ice in drinks allegedly being deceiving as to drink volume).

In sum, the application of the correct plausibility standard in recent years has resulted in the dismissal of cases which plead claims that defy common sense, but earlier had a good chance of surviving a Rule 12(b)(6) motion.

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