

Pepsi's 'Diet' Claims Not Preempted, NY Consumers Say

Share us on: By [Rachel Graf](#)

Law360 (March 16, 2018, 3:21 PM EDT) -- Consumers accusing Pepsi-Cola Co. of misrepresenting that its "diet" drinks help with weight loss have asked a New York federal court to keep their proposed class action alive because a California court determined last month that similar claims are not in fact preempted by federal law, as [PepsiCo](#) has argued.

Consumers Elizabeth Manuel and Vivien Grossman noted Wednesday that U.S. District Judge William Alsup [concluded in February](#) that similar allegations in California federal court concerning [The Coca-Cola Co.](#)'s diet drinks are not barred by the federal Food, Drug and Cosmetics Act because the state laws at issue were not "expressly preempted." Manuel and Grossman further argued that they, unlike the California plaintiffs whose claims were ultimately tossed, have sufficiently argued that consumers are likely to be deceived by the word "diet."

"This court should, respectfully, find that the plaintiffs' claims in the present case are not in fact preempted by the FDCA, like Judge Alsup did, but decline to follow Judge Alsup's conclusion that the plaintiffs have not plausibly alleged reasonable consumers are likely to be misled," Manuel and Grossman said.

The PepsiCo consumers [alleged in October](#) that the noncaloric sweeteners in Diet Pepsi, aspartame, acesulfame potassium and sucralose, 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 has countered that the research highlighted by the consumers [fails to establish correlation or causation](#) between diet soda and weight gain. Judge Alsup likewise found that the consumers in the California suit didn't adequately support their assertions that Diet Coke causes weight gain.

Manuel and Grossman argued Wednesday that Judge Alsup held the Diet Coke drinkers' claims to too high of a standard. The Diet Coke buyers needed to prove only that their claims were "plausible" rather than "likely to succeed" at that stage of the litigation, Manuel and Grossman said, and shouldn't need to allege the products actually cause weight gain.

The consumers have alleged a "strong correlation between artificial sweeteners and weight gain," which should be enough, for now at least, to provide a "plausible scientific basis" for the claims, the filing said.

"To put it plainly, PepsiCo here, and indeed, respectfully, Judge Alsup, 'fundamentally misunderstands the court's role in ruling on a motion to dismiss,'" Manuel and Grossman said.

Counsel for each of the parties declined to comment.

The consumers are 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 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 Orlando Lorenzo.

<https://www.law360.com/classaction/articles/1022956/pepsi-s-diet-claims-not-preempted-ny-consumers-say>