

Practice Update

Supreme Court Allows POM Wonderful to Sue Coke for False Advertising, Despite Its Apparent Compliance with FDA Regulations

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In a unanimous decision, the Supreme Court in *POM Wonderful LLC v. The Coca Cola Co.* (June 12, 2014) held that the Food, Drug, and Cosmetic Act (FDCA) does not preclude a private party from bringing a Lanham Act claim challenging as misleading a food or beverage label that is regulated by the FDCA.

POM sells pomegranate juices and blends, and competes in the market with Coke's Minute Maid "pomegranate blueberry" juice, which contains 99.4% apple and grape juices, and only 0.5% pomegranate and blueberry juices. Despite the miniscule amount of pomegranate and blueberry juice, Coke prominently displays "pomegranate blueberry" on the front of its labels with the phrase "flavored blend of five juices" in much smaller type.

POM brought suit under the Lanham Act, alleging that the label misled consumers into believing that the juice was mainly made up of pomegranate and blueberry juice when it was not, which allegedly caused POM to lose sales. Coke argued that the FDCA precluded POM's claim. The FDCA, designed to protect the health and safety of the public, prohibits the misbranding of food and drink. To implement its

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provisions, the FDA promulgates regulations that cover, among other things, the labeling of mixes of different juice blends. One provision provides that if a juice blend does not name all the juices it contains and mentions only juices that are not predominant in the blend, then it must either declare the percentage of the named juice or indicate that the named juice is for flavoring. Juice labels are not preapproved by the FDA. Rather, the U.S. government has nearly exclusive after-the-fact enforcement authority over such labeling. While the FDCA expressly preempts certain state laws on misbranding, it does not address other federal statutes or the preclusion of claims thereunder.

The District Court granted partial summary judgment in favor of Coke. The Ninth Circuit affirmed in relevant part and explained that “for a court to act when the FDA has not – despite regulating extensively in this area – would risk undercutting the FDA’s expert judgments and authority.”

The Supreme Court reversed and held that a private party may bring a Lanham Act claim challenging a food label that is regulated by the FDCA. The opinion by Justice Kennedy first noted that the issue presented was not one of preemption (state law versus federal), but rather centered on the preclusion of one federal statute by another. Nevertheless, the Court looked to preemption principles insofar as they were designed to assess the interaction of laws bearing on the same subject.

The Court used traditional rules of statutory interpretation and placed great weight on the fact that neither statute disclosed a Congressional intent to bar unfair competition claims challenging labels regulated by the FDCA. This was bolstered by the fact that both statutes have coexisted for more than 70 years and, during that period, both statutes have been amended. Significantly, the FDCA was amended in 1990 to add an express preemption

provision for state laws, with no mention of federal preclusion.

The Court also observed that the two statutes complement each other in major respects. Although both statutes touch on food and beverage labeling, the Lanham Act protects commercial interests against unfair competition while the FDCA protects public health and safety. Thus, the two statutes address different issues and impose different requirements. More fundamentally, the Court explained that the FDA, an agency of rulemakers and regulators, does not have the same perspective or expertise in assessing the market dynamics of labels as competitors possess.

The Court also noted the consequences of precluding Lanham Act challenges to labels – because the FDA neither preapproves labels nor pursues enforcement against all objectionable labels, precluding Lanham Act claims would leave businesses with less effective protection in the food and beverage labeling realm than in many other, less regulated industries.

The holding in *POM Wonderful* should not be limited to food and drink labels regulated by the FDCA. It should apply with equal force to drug labels, especially labels for over-the-counter drugs, although the Court did point out that the FDA has a less extensive role in regulating food labels than it does in regulating other types of labels, such as drug labels, which could be a basis for distinguishing food and drink from other industries regulated by the FDA. The decision also provides insight into preemption issues and into the Court's view of the importance of Lanham Act false advertising claims.

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