The Metropolitan
Corporate Counsel®
National Edition
www.metrocorpcounsel.com
Volume 22, No. 6 June 2014

Pom v. Coke At The Supreme Court: FDA Approval May Not Preempt False Advertising Challenges To Labels

Paul W. Garrity
Tyler E. Baker

Sheppard Mullin Richter & Hampton LLP

The U.S. Supreme Court last month heard argument in *Pom Wonderful, LLC v. The Coca-Cola Company*, Docket No. 12-761, the outcome of which is likely to have significant and far-reaching effect in the realm of food and beverage labeling, and potentially have impact extending to other industries under federal Food and Drug Administration ("FDA") regulation of label content, such as pharmaceuticals, tobacco and dietary supplements. The case centers on the potential preclusive effect of the FDA's regulations regarding food and beverage labeling on claims for false advertising. Coca-Cola Company ("Coke") had successfully argued below that the FDA's regulations prevented Pom Wonderful, LLC ("Pom") from bringing a Lanham Act claim relating to Coke's labeling of a fruit juice product. The outcome of the case will significantly shape the landscape of false advertising litigation across the broad spectrum of products regulated by federal agencies.


Paul W. Garrity


Tyler E. Baker

The Lanham Act, codified at 15 U.S.C. § 1051 et seq., is the primary federal unfair competition statute, which prohibits various activities including trademark infringement, trademark dilution, false association and, relevant to this case, false advertising. In particular, the Lanham Act makes liable any actor who "in connection with any goods . . . or any container for goods, uses . . . any word, term, name, symbol, or device, or any combination thereof, or any . . . false or misleading description of fact, or false or misleading representation of fact, which . . . in commercial advertising or promotion, misrepresents the nature, characteristics, [or] qualities . . . of his or her . . . goods[.]" 15 U.S.C. § 1125(a). This statute provides a private right of action for one competitor to sue another competitor for false advertising or misleading product-labeling statements.

Congress in the Federal Food, Drug and Cosmetic Act ("FDCA") established a comprehensive system of food regulation, including provisions to ensure that food is labeled in a manner so as not to mislead consumers. 21 U.S.C. § 341-350(f). The FDA has promulgated regulations (relied on by Coke in its defense) that address various aspects of food labeling, including labeling of juice products, and specifically the words and statements that must or may be included on labeling and how prominently and conspicuously those words must appear. *See*, *e.g.*, 21 C.F.R. § 102.33(c)-(d); § 343. Importantly, the FDCA does not explicitly state that it displaces Lanham Act claims (only state law requirements), nor do the regulations implementing the FDCA contain provisions explicitly barring Lanham Act claims.

Pom produces, markets and sells bottled pomegranate juice and pomegranate juice blends. Coke markets and sells bottled juices and juice blends under the Minute Made brand. At issue in the case was Coke's 2007 release of a juice blend containing 99.4 percent apple and grape juices, 0.3 percent pomegranate juice, 0.2 percent blueberry juice, and 0.1 percent raspberry juice with a label reading "POMEGRANATE BLUEBERRY FLAVORED BLEND OF 5 JUICES." The product's label also featured a vignette of five fruits: a pomegranate, an apple, blueberries, grapes and raspberries. Pom sued Coke in federal district court, arguing that the name, labeling, marketing and advertising of Coke's product misled consumers into believing that the product contained primarily pomegranate and blueberry juices, when in reality it consisted of primarily apple and grape juices (with only small amounts of pomegranate and blueberry juices), in violation of the false advertising provision of the Lanham Act (in addition to California's false advertising and unfair competition laws).

The district court, in granting partial summary judgment for Coke, ruled that Pom's Lanham Act challenge to Coke's

Paul W. Garrity *is a Partner in the firm's New York office. He represents clients in complex commercial matters, particularly in the areas of intellectual property, advertising and marketing, trade secrets and regulatory enforcement. He has represented clients from a diverse spectrum of industries, including OTC pharmaceuticals, apparel, alcoholic beverages, media and entertainment, luxury goods, software, consumer products and financial services.* ***Tyler E. Baker*** *is an Associate in the Business Trial Practice Group in the firm's New York office. His practice encompasses intellectual property matters. Mr. Baker has experience in all areas of the litigation process in business and commercial disputes involving false advertising claims, trademark and trade dress infringement claims, copyright infringement claims, art ownership and acquisition claims, trade secrets, right of publicity/privacy claims, breach of contract claims, and fraud claims.*

Please email the authors at pgarrity@sheppardmullin.com or tbaker@sheppardmullin.com with questions about this article.

"POMEGRANATE BLUEBERRY FLAVORED BLEND OF 5 JUICES" product name was barred by the FDCA's implementing regulations, that the FDA had directly spoken on the issues that formed the basis of Pom's claim, and that the FDA had concluded that manufacturers of multiple-juice beverages may identify their beverages with a non-primary, characteristic juice. The district court reasoned that because Coke's label sufficiently comported with the requirements of FDA juice-labeling regulations, and that any further determination that the naming and label must be displayed in a particular way must be made by the FDA, Pom's Lanham Act claim relating to the product name, label and vignette was barred.

The U.S. Court of Appeals for the Ninth Circuit affirmed, holding Pom's Lanham Act claim barred, but made a point to say that it was not holding that Coke's label was non-deceptive. Rather, the appellate court noted that although the FDA had the ability to act if it believed that the label misled consumers, it had not taken a view one way or another, despite its extensive and careful actions in the field. Because Coke's label apparently abided by established FDA requirements, the appeals court accepted that Coke's label presumptively complied with the relevant FDA regulations and the judgments the FDA had made, and declined to allow such judgments to be disturbed out of respect for the statutory and regulatory scheme. The Ninth Circuit did not go so far as saying that mere compliance with the FDCA or FDA regulations would always insulate a defendant from Lanham Act liability, and was primarily guided in its decision not by Coke's compliance with FDA regulations, but rather by Congress's "decision to entrust matters of juice beverage labeling to the FDA and by the FDA's comprehensive regulation of that labeling." Admitting it lacked the FDA's expertise in guarding against deception in juice labeling, the court respected the FDA's apparent decision not to impose the requirements urged by Pom, and stated that the appropriate forum for Pom's complaint was the FDA.

The U.S. Supreme Court granted certiorari to entertain the question of whether the court of appeals erred in holding that a private party cannot bring a Lanham Act claim challenging a product label regulated under the FDCA. Pom argued that in failing to reconcile the Lanham Act with the FDCA, the Ninth Circuit did not apply the Supreme Court's "irreconcilable conflict" standard, under which a court must give full effect to allegedly competing federal statutes unless they are in "irreconcilable conflict." Pom contended that, instead, the Ninth Circuit presumed Coke's label complied with the FDCA and FDA regulations, which alone precluded a court from considering Pom's Lanham Act claim, thus allowing the FDA's mere authority to regulate juice labeling bar application of the Lanham Act to any label failing within that authority. Further arguing that the Lanham Act and the FDCA serve different purposes (unfair competition prevention vs. public health and safety), Pom stated that Coke could have easily complied with FDA requirements and marketed a product that was not misleading under the Lanham Act by not prominently emphasizing the pomegranate and blueberry aspect of the drink or by disclosing the actual percentage of each fruit therein. Finally, Pom noted that FDA has cautioned manufacturers that mere compliance with labeling regulations does not mean that label is not misleading and manufacturers are under obligation to ensure that label is not misleading.

In response, Coke argued that product labeling that is specifically authorized by the FDCA and/or implementing FDA regulations cannot be challenged as false or misleading under the Lanham Act. Coke's position was that once Congress and the FDA consider and approve a label statement as accurate or non-misleading, a private party cannot contest that statement or try to show it is deceptive under another federal statute. Coke also argued that because Congress expressly preempted states from regulating food labels via the FDCA scheme, the act and its regulations were not meant to be a floor, but rather the exclusive body of regulation relating to food and beverage labels, which would also preclude federal claims that encroached on that area.

At oral argument, in responding to Coke's argument, Chief Justice Roberts expressed confusion over why it would be impossible to have a label that complied fully with the FDA regulations and also happened to be misleading for a reason that "has nothing to do with health." Justice Ginsburg expressed skepticism that Congress would consider the FDA as having approved Coke's label when the FDA regulations at issue are not reviewed by a court and when there is no private right of action under the FDCA. Justice Kennedy and Justice Ginsburg, in light of congressional intent, both expressed doubt that the FDA has sufficient resources to police food and beverage labeling.

The Supreme Court's ruling here, which at the argument favored Pom's position, will have far-reaching impact, both in the food and beverage industry and in a whole host of other industries regulated by the FDA, including pharmaceuticals, dietary supplements and personal care products. If Pom prevails, and the Court rules that the Lanham Act is not barred by the FDCA and its implementing regulations, food manufacturers, although perhaps compliant with FDA labeling requirements, will still be subject to suits by competitors or other individual parties for any alleged misleading or false claims on their product packaging. By clarifying that the Lanham Act is not preempted, thereby keeping a private right to challenge the accuracy or implications of food product labels, such a ruling would inevitably maintain or increase the level of private false advertising claims both by competitors and class action plaintiffs. Moreover, the ruling could arguably be broadened to also apply to other federal regulatory bodies, such as the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) and the Environmental Protection Agency (EPA), and the labels that fall under those regulatory schemes of such agencies. Additionally, such a ruling could have effect on advertisers subject to advertising challenges in forums besides the federal courts. For example, the National Advertising Division ("NAD") has indicated that it does not have to give deference to federal agency actions in reaching its own conclusions regarding the accuracy or meaning of advertiser claims. A Supreme Court ruling against preemption in this case may further cement the NAD opinion that regulatory determinations do not have binding or preclusive effect on the NAD.