

April 28, 2014

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Supreme Court to Untie Regulatory Knot in Juice Labeling Dispute

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Hearing oral arguments on April 21, 2014, the United States Supreme Court has waded into the contentious world of food labeling in the case of *Pom Wonderful LLC v. Coca-Cola Co.*¹ While the facts of *Pom* may present a garden-variety “truth-in-labeling” dispute to most trademark and regulatory lawyers, the case may resolve an important question for anyone involved in food or drug sales and marketing: whether a private party can bring a false advertising claim with respect to a product label regulated by—and conforming to—federal labeling requirements, as enforced by the U.S. Food and Drug Administration (FDA). We summarize here *Pom*’s path to the Supreme Court and where it may lead.

How we got here

Pom Wonderful LLC (Pom) produces, markets, and sells POM WONDERFUL brand bottled pomegranate juice and various pomegranate juice blends, including a pomegranate-blueberry juice blend. Coca-Cola’s Minute Maid subsidiary is one of Pom’s primary competitors in the bottled pomegranate juice market.

In 2008, Pom sued Coca-Cola under the federal Lanham Act² and California law, alleging that the name, labeling, marketing, and advertising of the pomegranate-blueberry juice product named “Minute Maid Enhanced Pomegranate Blueberry Flavored 100% Juice Blend” (Pomegranate Blueberry) constituted false advertising. Specifically, Pom alleged that Pomegranate Blueberry’s labeling misled consumers because the product contained little actual pomegranate or blueberry juice (less than 0.5 percent) but consisted almost entirely of apple and grape juices. Coke defended itself by arguing that FDA regulations under the Federal Food, Drug, and Cosmetic Act (FFDCA) expressly authorized the name and label of Pomegranate Blueberry, precluding any Lanham Act liability, and preempting Pom’s labeling claims under state law.

The United States District Court for the Central District of California sided with Coke. The court dismissed Pom’s Lanham Act challenge to Pomegranate Blueberry’s name and labeling because it “may be construed as impermissibly challenging the FDA’s regulations regarding an acceptable ‘common or usual name’ and appropriate labeling for a multiple-juice beverage.”³ The court stated: “any such determination that naming and labeling must be displayed in a particular way or fashion, as Pom suggests, would necessarily be for the

¹ 679 F.3d 1170 (9th Cir. 2012), *cert. granted*, 134 S. Ct. 895 (U.S. 2014).

² The Lanham Act was passed primarily to protect commercial interests. “A competitor in a Lanham Act suit does not act as a vicarious avenger of the public’s right to be protected against false advertising. Instead, the statute provides a private remedy to a commercial plaintiff who meets the burden of proving that its commercial interests have been harmed by a competitor’s false advertising.” *Sandoz Pharm. Corp. v. Richardson-Vicks, Inc.*, 902 F.2d 222, 230 (3d Cir. 1990) (citations omitted; internal quotations omitted).

³ *Pom Wonderful LLC v. Coca Cola Co.*, CV 08-06237 SJO (JTLx), 2009 WL 7050005, at *3 (C.D. Cal. Feb. 10, 2009) *aff’d sub nom. Pom Wonderful LLC v. Coca-Cola Co.*, 679 F.3d 1170 (9th Cir. 2012).

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FDA to determine, and so, is not for this Court to construe or interpret.”⁴ Perhaps less surprisingly, Pom’s state law claims were preempted “to the extent they [sought] to impose obligations differing from those contained in the FFDCA and its accompanying FDA regulations regarding the Juice’s ‘common or usual name’”⁵

Although Pom could not challenge Pomegranate Blueberry’s name and labeling, the California federal court allowed Pom’s Lanham Act claim to proceed with regard to Coke’s advertising and marketing of the product because findings relating to that conduct would not require the interpretation of FDA regulations.⁶

Pom appealed to the United States Court of Appeals for the Ninth Circuit, which affirmed in part. Emphasizing the FDA’s primary jurisdiction over juice beverage labeling, the Ninth Circuit concluded that Pom’s Lanham Act claim would create a conflict with FDA regulations governing juice labeling, and that the FDA had the responsibility and unique expertise to protect against deception in labeling:

We are primarily guided in our decision not by Coca-Cola’s apparent compliance with FDA regulations but by Congress’s decision to entrust matters of juice beverage labeling to the FDA and by the FDA’s comprehensive regulation of that labeling. To give as much effect to Congress’s will as possible, we must respect the FDA’s apparent decision not to impose the requirements urged by Pom. And we must keep in mind that we lack the FDA’s expertise in guarding against deception in the context of juice beverage labeling. In the circumstances here, the appropriate forum for [Pom’s] complaints is the [FDA].⁷

In January 2014, the Supreme Court accepted Pom’s petition for certiorari to decide 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 Food, Drug, and Cosmetic Act.”⁸

Why *Pom* matters

Pom brings into stark contrast the interrelationship between the FFDCA and the Lanham Act. The FFDCA places food labels squarely within the authority of the FDA.⁹ “Compared to the Lanham Act, which is primarily intended to protect commercial interests from unfair competition, the FFDCA, which was passed by Congress in response to unsafe drugs and fraudulent marketing, is intended to protect the public from unsafe or mislabeled products by setting forth federal labeling requirements.”¹⁰ In 1990, Congress passed the Nutrition Labeling and Education Act (NLEA),¹¹ which amended the FFDCA to prescribe nutrition

⁴ *POM Wonderful LLC v. Coca Cola Co.*, 727 F. Supp. 2d 849, 872 (C.D. Cal. 2010) *aff’d in part, vacated in part, remanded sub nom. Pom Wonderful LLC v. Coca-Cola Co.*, 679 F.3d 1170 (9th Cir. 2012).

⁵ *Pom Wonderful LLC*, 2009 WL 7050005, at *8.

⁶ *POM Wonderful LLC*, 727 F. Supp. at 874-75.

⁷ *Pom Wonderful LLC*, 679 F.3d at 1178 (brackets in original; internal quotations omitted).

⁸ See Petition for a Writ of Certiorari at *i, *POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 895 (2014) (No. 12-761).

⁹ See *POM Wonderful LLC*, 727 F. Supp. 2d at 862.

¹⁰ See *id.* (internal quotations omitted).

¹¹ *POM Wonderful LLC*, 727 F. Supp. at 863.

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labeling and branding for foods, including multi-juice beverages.¹² “[T]he NLEA addressed the issue of when consumers may be led to believe that a named juice is present in a beverage more than is actually the case.”¹³

A wrinkle complicating the interplay between the FFDCA and the Lanham Act is that the FFDCA can only be enforced by the FDA or the Department of Justice—not by private litigants.¹⁴ “This special consideration has led courts to tread carefully when applying the Lanham Act to the advertising of goods . . . that are also subject to regulation by the FDCA lest it be used as a vehicle to accomplish indirectly something a party could not accomplish directly.”¹⁵ On the other hand, the fact that something is regulated by the FDA does not automatically bar a claim of fraud under another federal statute, including the Lanham Act.¹⁶ The inquiry turns on whether courts are required to interpret and apply FDA regulations in adjudicating a Lanham Act violation.¹⁷ The two laws’ overlapping jurisdiction was ripe for Supreme Court review, and *Pom* provided the ideal test case.

The Justices weigh in

An eight-judge panel for the Supreme Court heard oral argument from Pom, Coke, and the United States government on April 21. (Justice Stephen Breyer did not participate.) Pom argued that juice labels consistent with FDA requirements “do not represent a pronouncement that for all purposes, for all statutes, the name on -- the name ascribed to the product is okay” because, in fact, “[w]hat the FDA doesn’t do . . . is regulate or interpret . . . what kinds of things are going to so mislead consumers that they think there is going to be a substitute in the marketplace where there isn’t.”¹⁸ Coca-Cola responded that by disclosing that Pomegranate Blueberry is a “flavored blend of five juices,” it complied with the NLEA’s naming requirements, which Congress intended would create “national uniformity” in juice labeling by preempting claims like Pom’s.¹⁹

The panel seemed troubled by Coke’s position that compliance with FDA labeling rules should immunize companies from liability for mislabeling or falsely advertising their product. Justice Anthony Kennedy asked Coke if “you want us to write an opinion that said that Congress enacted a statutory scheme because it intended that no matter how misleading or how deceptive a label it is, if it passes the FDA . . . there can be no liability.”²⁰ “I think it’s relevant for us to ask whether people are cheated in buying this product,” he added.²¹

Justices Kennedy and Ruth Bader Ginsburg expressed their concern that the FDA cannot, for lack of resources, police and prioritize review of juice drink labeling. “In the real world, the

¹² See *id.* at 863 & n.18.

¹³ See *id.* at 863.

¹⁴ *Summit Tech., Inc. v. High-Line Med. Instruments Co., Inc.*, 922 F. Supp. 299, 305 (C.D. Cal. 1996).

¹⁵ *Mut. Pharm. Co. v. Ivax Pharm., Inc.*, 459 F. Supp. 2d 925, 934 (C.D. Cal. 2006).

¹⁶ *In re Epogen & Aranesp Off-Label Mktg. & Sales Practices Litig.*, 590 F. Supp. 2d 1282, 1291 (C.D. Cal. 2008) (brackets omitted).

¹⁷ See *Mut. Pharm. Co.*, 459 F. Supp. 2d at 935 (“So long as courts are not required to perform authoritative interpretation and direct application of FDA regulations, then the simple fact that a matter touches upon an area dealt with by the FDA is not a bar to proceeding with a claim under the Lanham Act.”) (internal quotations omitted).

¹⁸ Transcript of Oral Argument at 9:7-10; 13:1-6, *POM Wonderful LLC v. The Coca-Cola Company*, No. 12-761 (S. Ct. argued Apr. 21, 2014).

¹⁹ *Id.* at 37:16-22.

²⁰ *Id.* at 38:18-22.

²¹ *Id.* at 28:12-14.

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FDA has a tremendous amount of things on its plate, and labels for juices are not really high on its list,” Justice Ginsburg said.²² She continued: “You are asking us to take what it has said about juice as blessing this label, saying it’s not misbranding, when its regulations aren’t reviewed by the Court, when there is no private right of action, and say that that overtakes the Lanham Act. It’s it’s [sic] really very hard to conceive that Congress would have done that.”²³ Justice Kennedy likewise doubted that “FDA has sufficient resources to police food and beverage labeling. . . . And this is relevant because we want to see what the likely intention of Congress was with reference to these two statutes,” i.e., the Lanham Act and the FDCA.²⁴

Reading the tea leaves

Where the court lands is anybody’s guess, though the panel seemed reluctant to give FDA jurisdiction over beverage labeling the preclusive effect for which Coke advocated. One way or another, *Pom* will shed light on whether adherence to federal labeling requirements, without more, can shield the label’s maker from liability for alleged mislabeling. K&L Gates will report on further developments as they unfold.

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²² *Id.* at 42:21-24.

²³ *Id.* at 42:24-43:5.

²⁴ *Id.* at 43:18-24.