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Potential False Advertising Claim Trumps FDA Approval

By Bart A. Lazar and Tiffany Shimada

The Supreme Court surprised the food and beverage industry in its decision, *POM Wonderful LLC v. Coca-Cola Co.* in holding that FDA approval of a label does not prevent a competitor from challenging whether the label is false or deceptively misleading. The decision could have spillover effect outside of that industry, as it now holds that competitive challenges for false advertising or unfair competition can be maintained, notwithstanding that labeling may have passed muster under the Federal Food Drug and Cosmetic Act (FDCA) (and, potentially, other acts that involve regulatory oversight for labelling). While food and beverage marketers must always take into consideration the commercial impression created by their labels and advertising, reliance upon FDA approval in formulating statements on labels alone is insufficient to avoid competitive challenges.

POM sells pomegranate juice products, including a pomegranate-blueberry juice blend. Coca-Cola, a POM competitor, also makes a pomegranate-blueberry juice blend; however, the majority of Coca-Cola's juice blend is composed of apple and grape juices, with the pomegranate portion only constituting 0.3% and blueberry 0.2%. POM brought suit under a part of the Federal Lanham Act which creates a cause of action for, among other things, unfair competition through misleading advertising and labeling. POM's complaint was that marketing the juice as "pomegranate-blueberry" in a prominent fashion and using images of a pomegranate on equal footing with other ingredients, misled consumers to believe that they were getting a more potent blend of pomegranate juice from Coca-Cola, at a cheaper price than POM's juice.

The California District Court summarily held for Coca-Cola, a holding the Ninth Circuit Court of Appeals affirmed, finding that because the FDA approved Coca-Cola's label, POM's Lanham Act claim could not be sustained. Because a regulatory body with jurisdiction had already deemed the language featured on the label in compliance, the Lanham Act could not be used to second-guess that approval.

In a unanimous opinion, however, the Supreme Court reversed. The Court focused on the scope and purpose of each statute: the Lanham Act's purpose in this regard is to protect commercial interests against unfair competition, while the FDCA's purpose is to protect public health and safety. The goals of each statute are not mutually exclusive, and the Supreme Court saw them as working together to further protect consumer interests. The statutes had coexisted for many decades, and the Court took note that Congress had not made any overt action to indicate that the Lanham Act was somehow subservient. Further, the Supreme Court observed that the FDA has limited resources with regard to policing product labels in the

marketplace, with no private cause of action available, while competitors are perhaps much better placed to assess whether labels are misleading, and do something about it. Competitors possess more intimate knowledge of how sales and marketing strategies ultimately affect consumer purchasing, the Court noted. Such increased accountability in the marketplace may even "provide incentives for manufacturers to behave well."

The Supreme Court did not rule on the merits of the false advertising claim, as the case came up on the threshold question of whether it could go forward or not. It is therefore back to the District Court for POM to prove its claim against Coca-Cola. In the meantime, there will certainly be additional review of existing and new labelling and advertising to avoid crossing the line into what is now an expressly acknowledged basis for a claim of unfair competition under a potent Federal statute.

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