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United States: False Advertising: No FDA Preemption In Pom v. Coca-Cola

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Pom Wonderful LLC v. The Coca-Cola Company, 573 U.S. ___ (2014), 134 S. Ct. 2228

This case involves the labeling of a blended juice beverage named "Pomegranate Blueberry," sold under Coca-Cola's MINUTE MAID brand, depicted below.

This beverage contains 99.4% apple and grape juices. The plaintiff, Pom Wonderful LLC ("Pom Wonderful"), produces a competing product containing only pomegranate juice and blueberry juice. Pom Wonderful sued Coca-Cola under Section 43(a) of the Lanham Act, alleging that the prominent use of "pomegranate blueberry" on the label of Coca-Cola's beverage was deceptive. It was apparently uncontested that the MINUTE MAID brand beverage labeling was in compliance with Food and Drug Administration ("FDA") regulations on juice beverage labeling, which state that the manufacturer may name a beverage using the name of a flavoring juice that is not the predominant juice by volume in the beverage. (21 C.F.R. Section 102.33(c), issued by the FDA under authority granted by the Federal Food, Drug and Cosmetic Act ("FDCA"), to regulate food and beverage labeling, including to police labeling which is false or misleading, 21 U.S.C. Section 343(a)(1)). The contested label also disclosed the percentages of the actual juices in the beverage, but in smaller type.

The United States District Court for the Central District of California granted summary judgment for Coca-Cola, holding that the Lanham Act claim on the label was barred as a matter of law because it would conflict with FDA regulations, even though Pom Wonderful introduced a survey purportedly showing that 35% of consumers polled thought that the beverage contained mainly pomegranate and blueberry juices. *Pom Wonderful LLC v. The Coca-Cola Company*, 727 F. Supp. 2d 849 (C.D. Cal. 2010). On appeal by Pom Wonderful, the United States Court of Appeals for the Ninth Circuit affirmed and held that the intent of Congress was to comprehensively regulate the field of beverage labeling by giving the FDA **sole** authority. Accordingly, the plaintiff could not seek to impose more stringent standards of labeling via a claim under the Lanham Act. *Pom Wonderful LLC v. The Coca-Cola Company*, 679 F.3d 1170 (9th Cir. 2012). The question before the United States Supreme Court, on further appeal, was whether a private party can bring a Lanham Act deceptive labeling claim challenging a product label already regulated, as to possible deceptiveness, under the FDCA. The Court concluded that a private party could bring such a claim and remanded the case for trial.

In Justice Kennedy's opinion, dated June 12, 2014, in which all the members joined (except Justice Breyer, who did not participate), the Supreme Court reversed the Ninth Circuit and remanded the case for trial. The Court held that the FDA regulations did not comprehensively regulate fruit beverage labeling and that the plaintiff could sue Coca-Cola for false designation of origin under Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

The opinion stated several reasons for the decision including that (1) during almost 70 years of coexistence of the FDCA and the Lanham Act, Congress never amended either statute to clarify that Lanham Act Section 43(a) did not cover deceptive beverage labeling, (2) the focus of the FDCA is **public** health and safety, while the Lanham Act protects **businesses** and, indirectly, the public, against deceptive practices by their competitors, (3) the FDA did not specifically review or approve the label in question (unlike the FDA's specific review and approval of drug labels), and (4) the two federal statutes "complement each other with respect to remedies" because a competitor, who sues under the Lanham Act, may have a better "perspective or expertise" than the FDA "in assessing market dynamics" and "have detailed knowledge regarding how consumers rely upon certain sales and marketing strategies" (slip opinion at p. 11). Thus, the competitor plaintiff may have an awareness "far more immediate and accurate than that of agency rulemakers and regulators" that "Lanham Act suits draw upon . . .by empowering private parties to sue competitors to protect their interests on a case-by-case basis." This approach "takes advantage of synergies among multiple methods of regulation." To hold otherwise could leave competitors and consumers "with less effective protection in the food and beverage labeling realm than in many other, less regulated industries," contrary to the likely intent of Congress (slip opinion at p. 12).

The Supreme Court's opinion did not cite any Lanham Act deceptive advertising or labeling cases as examples, but there are such cases in which plaintiffs alleged that literally accurate statements in a label or an advertisement were, nonetheless, deceptive to substantial percentages of consumers (often by doing a survey to gauge consumer reactions). *See Illinois Bell Telephone Company v. MCI Telecommunications Corporation*, 1996 WL 717466 (N.D. Ill., 1996) (granting a preliminary injunction based on survey evidence showing that the statement "MCI's basic toll rates are ALWAYS lower" than the plaintiff's rates is misleading, even if literally true);and *Playskool, Inc. v. Product Dev. Group, Inc.,* 699 F. Supp. 1056 (E.D.N.Y. 1988) (statement that defendant's toy construction system "attaches to" plaintiff's toy construction system was literally true, but falsely implied that all of defendant's pieces can safely connect with the plaintiff's toys). **Cf.** *Coors Brewing Co. v. Anheuser-Busch Companies, Inc.*, 802 F. Supp. 965 (S.D.N.Y. 1992) (in which Fross Zelnick successfully used a survey to defend a false advertising claim involving literally accurate statements that were allegedly deceptive). The Supreme Court's recitation of the facts of the *Pom Wonderful* case, including a reference to the "miniscule amount of pomegranate and blueberry juices in the blend of the Coca-Cola juice drink," suggests that many of the Justices thought that the FDA has actually failed to protect consumers from deception. The juice drink at issue was an inexpensive supermarket shelf product. Many courts have held that consumers select such products from store shelves without great care or attention.

As to the broader effects of the Supreme Court's decision, many federal statutes give federal agencies the right to promulgate regulations on the information to be disclosed in product labels, data sheets, and the like, in particular industries, and use language similar to the language regarding false and misleading labeling of the FDCA. The opinion's broad endorsement of the superiority of Lanham Act litigation by competitors, in civil suits, to prevent deception, as compared to federal agency regulation, may make it difficult for parties in other industries to dismiss such suits on grounds that Congress intended such federal regulations completely to occupy the field in their industry. However, the opinion was also careful to comment that the FDA did not examine or approve the individual beverage label concerned in this case, contrary to the FDA's usual review of drug labeling. The implication is that there may be federal agency labeling regimes that do fully occupy the field, based, for example, on different legislative history, or because the agency has greater expert knowledge on the reaction of pertinent consumers or does an expert review of each individual label concerned. This was also not a case of a label directed to sophisticated commercial or industrial consumers, or a case involving a hazardous material, in which the Supreme Court might be moved by different policy considerations or facts about the comprehensiveness of the federal regulatory scheme. Therefore, this case does not necessarily close the door to a comprehensive federal regulation defense, regarding a different type of product, in future Lanham Act deceptive labeling suits.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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