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Pom V. Coke Will Impact Financial Services Too

Law360, New York (June 23, 2014, 11:22 AM ET) -- Legal and compliance departments, take note: the U.S. Supreme Court's recent decision in Pom Wonderful LLC v.Coca-Cola Co. confirms that even if an institution's conduct meets the specific requirements established by the federal agency responsible for implementing one federal consumer protection law, it may nevertheless be considered unfair or deceptive under a different federal statutory scheme. Although the Pom opinion was written in response to alleged deceptive practices in the food and drug context, the high court's reasoning has significant implications for a broad range of entities — including financial institutions — that are subject to both specific consumer protection rules as well as more general prohibitions on unfair, deceptive or abusive conduct.

Pom Wonderful LLC V. Coca-Cola Co.

In Pom, the Supreme Court considered whether pomegranate juice producer and distributor Pom Wonderful could sue competitor Coca-Cola for unfair competition under the Lanham Act based on Coca-Cola's use of an allegedly misleading label on a juice blend product. The Lanham Act authorizes one competitor to sue another for unfair competition arising from deceptive or misleading product descriptions. Specifically, Pom alleged Coca-Cola's label, which prominently displays the words "pomegranate blueberry," misleads consumers into believing the product consists predominantly of pomegranate and blueberry juice, when it actually contains only 0.3 percent pomegranate juice and 0.2 percent blueberry juice.

In its brief opposing Pom's petition for certiorari, Coca-Cola argued the Lanham Act should not apply because the label at issue satisfied the specific regulatory requirements for the labeling of food and beverage products promulgated by the U.S. Food and Drug Administration under the federal Food, Drug, and Cosmetic Act. According to Coca-Cola, permitting Pom to bring an action based on misrepresentation under the Lanham Act would undermine Congress' intent to have national uniformity in food and beverage labeling and would subject companies to "the views of multiple decision makers [...] as to how a product must be labeled in order to avoid consumer confusion."

In a unanimous decision, the Supreme Court rejected Coca-Cola's arguments and found that its compliance with FDCA regulations did not preclude its competitors from bringing Lanham Act suits based on misrepresentation or deception in beverage labeling. The high court noted the district court's conclusion that Coca-Cola's label was in compliance with the specific requirements of the FDA's regulations; however, the it disagreed that these regulations established "a ceiling on the regulation of food and beverage labeling." Instead, the court found that the FDCA and Lanham Act were designed by Congress to be complementary in both their purpose and scope, and that a finding that one statute precluded the application of the other would contravene congressional intent.

CFPB and Prudential UDAAP Standards

The Supreme Court's holding in Pom supports the position taken by the Consumer Financial Protection Bureau and federal prudential banking regulators that conduct complying with the specific requirements of consumer financial protection laws, such as the Truth in Lending Act, Truth in Savings Act and Real Estate Settlement Procedures Act, may nevertheless be found to violate other federal laws banning unfair, deceptive or abusive acts or practices.

For example, the CFPB's Supervision and Examination Manual states that financial institutions should not assume they are immune from a violation of the Consumer Financial Protection Act's prohibition on unfair, deceptive or abusive acts or practices simply by virtue of their compliance with other federal and state laws that aim to prevent unfair and deceptive conduct toward consumers:

[A] transaction that is in technical compliance with other federal or state laws may nevertheless violate the prohibition against UDAAPs. For example, an advertisement may comply with TILA's requirements, but contain additional statements that are untrue or misleading, and compliance with TILA's disclosure requirements does not insulate the rest of the advertisement from the possibility of being deceptive.

Likewise, the Federal Deposit Insurance Corporation's Compliance Manual also addresses this issue, stating that "certain practices may violate the [Federal Trade Commission Act] while complying with the technical requirements of other consumer protection laws." The FDIC provides the following examples:

- Even though a credit card advertisement contains all of the required TILA disclosures, if limitations or restrictions are obscured or inadequately disclosed, the FDIC may still consider it an unfair or deceptive act or practice.

- Under TISA, the FDIC could find that consumers are misled by advertisements of "guaranteed" or "lifetime" interest rates when the creditor or depository institution intends to change the rates, even if the disclosures satisfy the technical requirements of TISA.

The Board of Governors of the Federal Reserve System's Consumer Compliance Handbook and OCC Advisory Letter 2002-2003 contain guidance that is substantially similar to that provided by the FDIC.

Implications of Pom

In some respects, the holding in Pom is unsurprising. Prior to the ruling, lower courts already acknowledged that compliance with one federal consumer protection law did not necessarily grant immunity from the application of a separate federal consumer protection law. (See, e.g., In re Herrera, 422 B.R. 698 (B.A.P. 9th Cir. 2010) ("RESPA was not intended by Congress to occupy the field of account reporting by creditors to borrowers regarding their residential mortgage loans to the exclusion of all other federal law.") (emphasis added)

Nevertheless, Pom is significant because it reinforces a trend among financial services regulators of aggressively using UDAAP or similar authority to target practices that are explicitly regulated under, and even in compliance with, other consumer protection statutes. As with the FDCA and Lanham Act, Congress has not expressly stated in, for example, TILA that it intends to preclude the application of UDAAP standards to consumer lending. Thus, as in Pom, an institution that meets all of the specific requirements of a consumer disclosure statute may not find protection in the courts from a claim under a UDAAP or similar law, so long as the statutes are considered "complementary" in their purpose and scope.

In the absence of judicial constraints or congressional action, the application of UDAAP is left to the discretion of the CFPB and the federal prudential banking regulators. While flexible standards like UDAAP can play an important role in preventing bad actors from exploiting the inevitable gaps in even the most detailed regulatory scheme, they can also produce costly uncertainty for industry participants that just want to design compliance programs that follow the rules. Thus, regulators should use their UDAAP authority judiciously in the supervisory and enforcement context and instead define UDAAPs through notice-and-comment rulemaking as needed.

In the meantime, the Supreme Court's decision should serve as a reminder to financial institutions that they must not only fully comply with specific statutory and regulatory provisions, but must also carefully monitor customer complaints and emerging regulatory trends for potential UDAAP claims.

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