MEALEY'S™
California Section 17200 Report

# Pom Wonderful Brings Food Labeling Dispute To The U.S. Supreme Court: When Are Claims Based On Allegedly Improper Product Labeling Barred By The Food, Drug, And Cosmetic Act?

*by*
*Claudia M. Vetesi*
*and*
*Lisa A. Wongchenko*

*Morrison & Foerster LLP*
*San Francisco*

**A commentary article reprinted from the March 2014 issue of Mealey's California Section 17200 Report**

LexisNexis®

# Commentary

## Pom Wonderful Brings Food Labeling Dispute To The U.S. Supreme Court: When Are Claims Based On Allegedly Improper Product Labeling Barred By The Food, Drug, And Cosmetic Act?

**By**
**Claudia M. Vetesi**
**and**
**Lisa A. Wongchenko**

*[Editor's Note: Claudia M. Vetesi and Lisa A. Wongchenko are associates in Morrison & Foerster LLP's San Francisco office. Copyright by Claudia M. Vetesi and Lisa A. Wongchenko. Replies to this commentary are welcome.]*

A long-standing false advertising dispute between beverage companies Pom Wonderful and Coca-Cola has reached the United States Supreme Court and carries far-reaching implications for other food labeling litigation. On January 10, 2014, the Supreme Court granted certiorari in *Pom Wonderful LLC v. The Coca-Cola Co.*, 679 F.3d 1170 (9th Cir. 2012). *See Pom Wonderful LLC v. The Coca-Cola Co.*, 1345 S. Ct. 895 (2014). The Court will review the Ninth Circuit Court of Appeals' ruling that Pom's Lanham Act false advertising claims against Coca-Cola were broadly precluded by the Food and Drug Administration's (FDA) juice labeling regulations. The scope of preclusion and preemption by the Food, Drug and Cosmetic Act (FDCA) is an often contested issue, and the anticipated ruling by the Supreme Court has food companies and plaintiffs' attorneys following this case closely.

At the time of the Ninth Circuit's decision, *Pom Wonderful* was seen by some as a significant development for the food industry, particularly in light of the wave of "food misbranding" class actions being filed in federal courts. These cases challenged many aspects of food products' labels as "misbranded" based on alleged non-compliance with FDA regulations and policies. But despite the breadth of the Ninth Circuit's discussion of the preclusive effect of the FDCA, district courts have disagreed on the ruling's application and limits, often restricting its application to Lanham Act claims and declining to extend its holdings to nearly identical state claims.

Now the Supreme Court will decide whether the Ninth Circuit erred in finding that the FDCA trumped Pom's Lanham Act claim. A reversal could mean a narrowing of the Ninth Circuit's preclusion ruling—an unwelcome step for most companies defending against "misbranding" claims.

### The Dispute Over Coca-Cola's 'Pomegranate Blueberry' Juice

The dispute between Pom and Coca-Cola began more than five years ago. Pom sells pomegranate juice and pomegranate juice blends. In September 2007, Coca-Cola announced a new product called "Pomegranate Blueberry Flavored Blend of 5 Juices," with the words "Pomegranate Blueberry" featured prominently on the label. Believing that it was losing sales to Coca-Cola's new juice, Pom sued Coca-Cola in September 2008. Pom alleged that Coca-Cola misled consumers into believing that its Pomegranate Blueberry drink consists primarily of pomegranate and blueberry juice when, in fact, it consists of over 99% apple and grape juice.

Pom challenged the name, labeling, marketing, and advertising of Coca-Cola's Pomegranate Blueberry drink, bringing claims under the false advertising

provision of the Lanham Act, which authorizes suit against those who use a false or misleading description or representation about any goods. 15 U.S.C. § 1125(a). It also claimed that Coca-Cola violated California's Unfair Competition Law (UCL) (Cal. Bus. & Prof. Code § 17200 *et seq.*) and False Advertising Law (FAL) (*Id.* § 17500), California's consumer protection statutes that protect against deceptive business practices.

### The District Court Finds Pom's Lanham Act Claim Barred

Coca-Cola moved to dismiss Pom's claims, arguing that its labels comply with FDA's juice labeling requirements. Pom's claim, it argued, was nothing more than an improper challenge to those regulations. The district court granted the motion as to Pom's Lanham Act claim against "Pomegranate Blueberry's" name and labeling, finding the claims expressly barred by FDA's regulations. Allowing the claim to proceed could improperly require the court to interpret and apply FDA regulations on juice beverage labeling. However, it held that Pom could still challenge Coca-Cola's non-labeling advertising and marketing. *Pom Wonderful LLC v. The Coca-Cola Co.*, No. CV 08-06237 SJO (JTLx), 2009 U.S. Dist. LEXIS 65233, at *5-15 (C.D. Cal. Feb. 10, 2009). The court also held that the FDCA expressly preempted Pom's state law claims to the extent the UCL and FAL impose obligations that are not identical to those imposed by the FDCA and its implementing regulations. *Id.* at *17-21. Pom amended its complaint, and the court denied Coca-Cola's second motion to dismiss. *Pom Wonderful LLC v. The Coca-Cola Co.*, No. CV 08-06237SJO (FMx), 2009 U.S. Dist. LEXIS 123482 (C.D. Cal. Sep. 15, 2009).

The district court affirmed its stance on Pom's Lanham Act claim once more in its order granting partial summary judgment to Coca-Cola. It reiterated that the Lanham Act challenge to Pomegranate Blueberry's name and labeling was barred by FDA's regulations: the agency "has directly spoken on the issues that form the basis of Pom's Lanham Act claim against the naming and therefore [ ] reached a conclusion as to what is permissible." *Pom Wonderful LLC v. The Coca-Cola Co.*, 727 F. Supp. 2d 849, 871 (C.D. Cal. May 5, 2010). Because Coca-Cola's label "sufficiently comports with the requirements of" FDA's juice-labeling regulations, and because any further "determination that naming and labeling must be displayed in a particular way of fashion" must be made by FDA, the court confirmed that Pom's claim challenging the name and labeling of Pomegranate Blueberry was barred. *Id.* The court also dismissed Pom's state law claims for lack of statutory standing for failure to show that it was entitled to restitution. *Id.* at 870.

While the court held that some triable issues remained on the non-labeling aspects of Pom's Lanham Act claim, such as other advertising materials, 727 F. Supp. 2d at 876, Pom conceded that the summary judgment order prevented it from carrying its burden on the claim. Judgment was entered in favor of Coca-Cola, and Pom appealed. (May 24, 2010 Final Judgment, ECF No. 376; May 28, 2010 Notice of Appeal, ECF No. 377.)

### The Ninth Circuit Affirms Rejection Of Pom's Claims, But Adds Uncertainty To Preemption Doctrines

On appeal, the Ninth Circuit affirmed dismissal of Pom's Lanham Act claim and remanded the state law claims back to the district court for reconsideration of standing issues. The district court later dismissed the state law claims as expressly preempted by FDA regulations and insulated by California's safe-harbor doctrine. *Pom Wonderful LLC v. The Coca-Cola Co.*, No. cv-08-06237 SJO (FMx), 2013 U.S. Dist. LEXIS 33501, at *11-15 (C.D. Cal. Feb. 13, 2013).

In dismissing Pom's Lanham Act claim, the Ninth Circuit addressed the difficult inquiry a court must conduct when there is a potential conflict between "two broad federal statutes." *Pom Wonderful*, 679 F.3d at 1175. While the Lanham Act "broadly prohibits false advertising," the FDCA "comprehensively regulates food and beverage labeling." *Id.* When such a potential conflict arises, "[c]ourts try to give as much effect to both statutes as possible." *Id.* The Ninth Circuit noted that in such instances, courts have focused on Congress's decision to entrust to FDA the task of interpreting and enforcing the FDCA. In light of that focus, courts have agreed that the FDCA may operate to limit claims under the Lanham Act. *Id.* at 1176.

The court went on to hold that the "Lanham Act may not be used as a vehicle to usurp, preempt, or undermine

FDA authority." *Id.* Specifically, it established three broad principles:

- First, a plaintiff may not "sue under the Lanham Act to enforce the FDCA or its regulations because allowing such a suit would undermine Congress's decision to limit enforcement of the FDCA to the federal government." *Id.* at 1175-76.
- Second, a plaintiff may not "maintain a Lanham Act claim that would require a court originally to interpret ambiguous FDA regulations, because rendering such an interpretation would usurp FDA's interpretive authority." *Id.* at 1176.
- Third, "[w]here FDA has not concluded that particular conduct violates the FDCA, we have even held that a Lanham Act claim may not be pursued if the claim would require litigating whether that conduct violates the FDCA." *Id.*

Based on these principles, the Ninth Circuit held that FDA regulations barred Pom's Lanham Act claim to the extent it was based on "Pomegranate Blueberry's" name and labeling because, "as best we can tell, FDA regulations authorize the name Coca-Cola has chosen." *Id.* FDA regulations permit a manufacturer to name a beverage using the name of a flavoring juice that is not predominant by volume. Moreover, "the FDCA and its implementing regulations have identified the words and statements that must or may be included on labeling and have specified how prominently and conspicuously those words and statements must appear." *Id.* at 1177. As such, for a court to act when FDA has not "would risk undercutting the FDA's expert judgments and authority." *Id.*

While the Ninth Circuit explained why Coca-Cola's labels complied with FDA's juice regulations, the Court also stated that it was "primarily guided" in its 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." *Id.* at 1178. This statement, in addition to the three broad principles above, went on to cause much disagreement about *Pom Wonderful*'s holding and scope. While it was clear that Pom's Lanham Act claim challenging Coca-Cola's labeling could not survive, the Ninth Circuit's opinion left a fair amount of uncertainty.

At first glance, the Court's analysis suggests a simple balancing act between two federal statutes: the Lanham Act and the FDCA. But at the same time, the opinion contains broad conclusions about the dominance of FDA's—not plaintiffs', courts', or other statutes'—authority over food labeling. If Congress' decision to entrust food labeling issues to FDA, *not* Coca-Cola's compliance with the regulations, is the reason Pom's claim failed, then what types of food labeling disputes are appropriate for the courts to decide? And why did the Court discuss in detail its conclusion that Coca-Cola's labeling did, in fact, comply with FDA's juice labeling regulations? Furthermore, if deference to FDA is so important in the context of Lanham Act claims, does the same reasoning defeat identical claims brought under state law? Similarly, if enforcement of FDA requirements is impermissible under the Lanham Act, is enforcement of the same requirements under state laws that adopt FDA regulations allowed? These questions were soon brought to the surface of labeling disputes in the district courts.

## Application Of *Pom Wonderful* To Food Misbranding Claims Brought By Private Plaintiffs Under State Law

The broad language of the Ninth Circuit's ruling created a potential weapon to defeat other food labeling challenges, particularly in the growing number of cases alleging violations of the FDCA through state consumer protection laws. A number of food manufacturers facing private class action lawsuits based on food "misbranding" argued that *Pom Wonderful* confirmed that these class actions were nothing more than impermissible enforcement proceedings. The first principle articulated by the Ninth Circuit's opinion is that a plaintiff may not "sue under the Lanham Act to enforce the FDCA or its regulations because allowing such a suit would undermine Congress's decision to limit enforcement of the FDCA to the federal government." *Pom Wonderful*, 679 F.3d at 1175-76. Food company defendants argued that state law claims attacking food labeling were preempted because, as *Pom Wonderful* teaches, only the government can enforce FDA regulations.

The district courts, however, were not convinced. Most rejected this argument, instead finding that *Pom Wonderful*'s holding was limited to Lanham Act claims. *See, e.g.*, *Delacruz v. Cytosport, Inc.*, No. 11-cv-3532 CW, 2012 WL 2563857, at *7 n.3 (N.D. Cal. June 28,

2012) ("The Ninth Circuit's preemption ruling [in *Pom Wonderful*] was limited to a finding that the FDCA preempted Pom's claims under the Lanham Act"). The key difference was that plaintiffs' state law claims were based on violations of state labeling laws that simply incorporated by reference the FDCA. For example, California's Sherman Law adopts the FDCA and its implementing regulations, allowing plaintiffs to argue that they were seeking to enforce *state*, not federal, regulations. Most courts allowed this type of claim to dodge preemption based on a California Supreme Court case, *In re Farm Raised Salmon Cases*, 175 P.3d 1170 (Cal. 2008), which allowed plaintiffs to indirectly enforce the FDCA through the Sherman Law. The Court explained that "[w]hile Congress clearly stated its intent to allow states to establish their own identical laws, it said absolutely nothing about proscribing the range of available remedies states might choose to provide for the violation of those laws, such as private actions"). 175 P.3d at 1178.

Thus, a tension developed between the broad affirmance of FDA's authority over labeling determinations in *Pom Wonderful* and the narrow reading of preemption in the district courts.

Some courts, however, applied the Ninth Circuit's opinion to both Lanham Act and state law claims based on the idea of deference to FDA or the primary jurisdiction doctrine. For example, one court found that "[t]he *Pom* case is especially instructive" in a case challenging cosmetics labeling brought under California consumer protections statutes. *Astiana v. Hain Celestial Grp., Inc.*, 905 F. Supp. 2d 1013, 1015 (N.D. Cal. 2012). The fact that *Pom Wonderful*'s discussion of FDA's authority was in the context of the Lanham Act made no difference; "Congress had entrusted the task of guarding against deception to the FDA." *Id.*

Another judge also relied on *Pom Wonderful* in dismissing a Lanham Act claim challenging "organic" statements. *All One God Faith, Inc. v. Hain Celestial Grp., Inc.*, No. C 09-3517 SI, 2012 U.S. Dist. LEXIS 111553, at *25 (N.D. Cal. Aug. 8, 2012). "[G]uided by" *Pom Wonderful*, it found that the plaintiff's allegations "would inevitably require the Court to interpret and apply federal organic standards, potentially create a conflict with those standards, and would intrude upon and undermine the USDA's authority to determine how organic products should be produced, handled processed and labeled." *Id.* at *34.

And in *Hood v. Wholesoy & Co.*, No. 12-cv-05550-YGR, 2013 U.S. Dist. LEXIS 97836 (N.D. Cal. July 12, 2013), the court dismissed state law claims challenging the term "evaporated cane juice" as unlawful under California's Sherman Law. The court found that the determination of those claims "would require the Court to decide an issue committed to the FDA's expertise without a clear indication of how FDA would view the issue." 2013 U.S. Dist. LEXIS 97836, at *12. Relying on *Pom Wonderful*, the court concluded that rendering a decision "would usurp the FDA's interpretive authority." *Id.* at *20.

Whether *Pom Wonderful* was a preemption, deference, primary jurisdiction, or statutory balancing case remained unsettled.

**The Supreme Court Grants Certorari: Will It Limit The Ninth Circuit's Ruling?**

On February 24, 2014, after the Supreme Court granted its writ of *certiorari* to review the Ninth Circuit's decision, Pom filed its opening brief. The company contended that the Court of Appeals erred in foreclosing its Lanham Act claim based on its finding that FDA did not *prohibit* Coca-Cola's labeling. Brief for Petitioner at 3-4, *Pom Wonderful LLC v. The Coca-Cola Co.*, No. 12-761 (U.S. Feb. 24, 2014), *available at* http://www.scotusblog.com/case-files/pom-wonderful-llc-the-coca-cola-company/. At the heart of the appeal is the contested issue of scope: Pom argued that the Ninth Circuit denied the labeling challenge for the simple reason that "FDA regulates food labeling under the FDCA." *Id.* at 3.

Specifically, Pom argued that the Ninth Circuit's "non-committal" discussion of Coca-Cola's labeling, in favor of leaving the entire issue in FDA's hands, incorrectly failed to give full effect to the two federal statutes at issue. *Id.* at 14, 20. Coca-Cola "could have easily complied" with both the FDCA and Lanham Act, Pom argues. *Id.* at 15. Moreover, FDA's juice regulations are a floor, not a ceiling, for labeling requirements. *Id.* at 32. The company also asserted that the court's expansive reasoning would extend beyond juice labeling to food and other products whose labels are subject to regulation by FDA and other agencies. It could also call into question other statutory regimes in which

Congress has authorized private parties to enforce a statute alongside federal regulators. Under the Ninth Circuit's reasoning, Pom argued that any time an agency has broad authority to regulate in a given sphere, that regulation could preclude private actions under entirely different statutes. *Id.* at 54-56.

Coca-Cola, of course, says these concerns are baseless. In its response to Pom's petition for *certiorari*, Coca-Cola argued that the Ninth Circuit reached a "much narrower conclusion that product labeling that is *specifically authorized* by the [FDCA] and/or implementing regulations issued by the FDA cannot be challenged as 'false or misleading' under the general proscriptions of the Lanham Act." Put another way, "once Congress and FDA consider and directly approve a label statement as accurate and non-misleading, a private party cannot contest that very statement, or attempt to show that it is or false or deceptive, under another federal statute." Brief in Opposition to Petition at 1, *Pom Wonderful LLC v. The Coca-Cola Co.*, No. 12-761 (U.S. Feb. 22, 2013), *available at* http://www.scotusblog.com/case-files/pom-wonderful-llc-the-coca-cola-company/. As discussed above, however, the Ninth Circuit was careful to note that its ruling was "primarily guided" by FDA's comprehensive regulation of juice beverage labeling, and "not by Coca-Cola's apparent compliance with FDA regulations." *Pom Wonderful*, 679 F. 3d at 1178. In defending the Court's ruling, Coca-Cola has opted to take the narrowest reading of the decision's reasoning.

The United States government has also weighed in, with yet a third approach. It submitted an *amicus* brief supporting neither party, opining that the Lanham Act claim "is barred only to the extent the FDCA or FDA regulations specifically require or authorize the challenged aspects" of the label. Brief for the United States as Amicus Curiae Supporting Neither Party at 9, *Pom Wonderful LLC v. The Coca-Cola Co.*, No. 12-761 (U.S. Mar. 3, 2014), *available at* http://www.scotusblog.com/case-files/pom-wonderful-llc-the-coca-cola-company/. In essence, the government views both Pom's and the Ninth Circuit's positions as too extreme. It argued that the Court's rejection of Pom's Lanham Act claim based on the *name* of "Pomegranate Blueberry" was correct because FDA regulations specifically permit the juice's name. *Id*. But Coca-Cola is not entirely in the clear. The government also contended that the Ninth Circuit should have permitted Pom's Lanham Act claim to proceed regarding the features of the label not specifically authorized by federal regulations, such as the type-size and placement of the alleged misrepresentations. *Id.* at 10-11. In its view, the fact that the FDA could have regulated other aspects of the label, but chose not too, was not enough to preclude the Lanham Act claim. *Id.* at 24. The Ninth Circuit, it concluded, went too far.

However it decides, the Supreme Court's ruling will likely have far reaching effects on food labeling litigation, including the influx of "misbranding" class actions brought under state law. An endorsement of the Ninth Circuit's broad language rejecting *compliance* as necessary for FDCA preemption would further fuel the argument that deference to FDA precludes the many lawsuits that are not directly based on FDA regulations, such as suits challenging the terms "natural," and "evaporated cane juice." A more narrow reading, focusing on Coca-Cola's compliance with juice labeling regulations and the balancing of two federal statutes, would likely have the opposite effect, weakening the primary jurisdiction doctrine in food cases and creating an increasingly important distinction between those aspects of a label that are expressly regulated and those that are not.

## Conclusion

Oral argument is currently set for April 21, 2014. The Supreme Court's grant of *certiorari* likely indicates that it wants to clarify the bounds of the FDCA's ability to preclude Lanham Act claims, and the scope of its decision will undoubtedly steer the path of food cases. This is a ruling that those in the food, drug, and cosmetic industries will be watching closely, as food labeling litigation continues to flood the courts. ■

**MEALEY'S: CALIFORNIA SECTION 17200 REPORT**
*edited by Emerson Heffner*
**The Report** is produced monthly by

LexisNexis®

1600 John F. Kennedy Blvd., Suite 1655, Philadelphia, PA 19103, USA
Telephone: (215)564-1788 1-800-MEALEYS (1-800-632-5397)
Email: mealeyinfo@lexisnexis.com
Web site: http://www.lexisnexis.com/mealeys
ISSN 1543-2106