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Suit Against FTC Asks: Did Agency Change Advertising Rules in Middle of Game?

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Is there a way to hold a government agency like the Federal Trade Commission (FTC) accountable for the cost to businesses of what a company says are abrupt and systemic changes in regulatory standards? POM Wonderful LLC, a Los Angeles-based juice company, is trying to do just that by suing the FTC in District Court.

The FTC is reportedly investigating POM for alleged false advertising but hasn't filed a complaint against the company. POM claims in its own lawsuit, filed in U.S. District Court in the District of Columbia, that the agency is already inventing new deceptive-advertising law on its own – without going through the required rule-making procedures — and is getting ready to enforce it against POM.

Specifically, POM says the FTC is now requiring that advertisers obtain prior approval by the Food and Drug Administration before making claims that a product treats or prevents disease and that they must have two well-controlled studies before making non-disease claims.

POM alleges that the FTC has put out these new, obligatory advertising standards for the entire food industry not by going through formal rule-making that would give the industry a chance to have input, but simply by publishing consent orders that it entered into with Nestle U.S.A. and Iovate Health Sciences, Inc. POM says the FTC gave POM copies of these consent orders and told POM that these standards now have the force of law and delineate the "new definition of deception." POM says this action flies in the face of 20 years of FTC rules and regulations on food advertising.

POM alleges that the FTC is violating POM's First Amendment rights to engage in truthful speech and is damaging POM's good will and brand identification as a healthy juice company. Another notable argument that POM makes is a claim of due process deprivation in violation of the Fifth Amendment. The company alleges that the FTC's actions have disrupted its business and devalued the "tens of millions of dollars" invested in research that was conducted in accordance with the FTC's prior standards.

POM makes valid points. Companies ought to be able to reasonably rely on government standards so that they can decide how to allocate their resources. That is why federal agencies are required to undertake formal rule-making procedures and to allow businesses time to respond to proposed rules and, if necessary, to modify their practices in advance of the rules' implementation.

But regulators sometimes see such procedures as tedious and time-consuming. Hence the common practice of many agencies of making changes on the fly through settlement agreements with investigated companies. As POM alleges was done by the FTC, an agency may settle out with a company by requiring that company to implement more stringent measures. Since the agreement is private and between two parties, that document may contain any measure the two parties agree upon – whether or not common practice and whether or not more stringent than current regulatory standards. One of the wrinkles in agencies' use of such settlement agreements, though, is that these agreements often impact more than just the parties to the agreement.

The parties to the consent decree win (sort of) in that they keep the agency at bay. The agency wins in that it expeditiously (and extrajudiciously) gets to tighten its reins on companies subject to its regulations. But outside companies – which have diligently and reasonably relied on published regulations – may find themselves at a significant loss.