

## High Court Decision In Pom V. Coke Could End Food Wars

*Law360, New York (January 28, 2014, 5:55 PM ET)* -- The U.S. Supreme Court has decided to wade into a battle between Pom Wonderful and The Coca-Cola Co. over whether the labels on Coke's Minute Maid pomegranate-blueberry juice blend violate the Lanham Act's prohibition against false advertising.

Despite Solicitor General Donald Verrilli's recommendation that the court deny Pom's petition, the Supreme Court granted certiorari in the case, agreeing to resolve the question of "whether the court of appeals erred in holding that a private party cannot bring a Lanham Act claim challenging a product label regulated under the Food, Drug and Cosmetic Act." Although the issue to be addressed by the court is focused on claims involving the Lanham Act — a federal false-advertising law typically invoked in business disputes between competitors — the decision could put an end to the recent explosion of consumer class action food-mislabeling litigation involving state law claims.

In 2007, Pom Wonderful brought suit against Coca-Cola, alleging that its "pomegranate-blueberry juice" labels were misleading because the product is actually made with more than 99 percent apple and grape juice. The district court dismissed Pom's Lanham Act claim, and in a 2012 decision, the Ninth Circuit affirmed, citing § 337(a) of the Federal Food, Drug, and Cosmetic Act ("FDCA"), which directs that "all such proceedings for the enforcement, or to restrain violations, of [the FDCA] shall be by and in the name of the United States."

The court determined that Pom could not maintain its claim because the U.S. Food and Drug Administration comprehensively regulates food and beverage labeling and could act if it believed that Coke's labels failed to comply with its regulations. In so holding, the Ninth Circuit determined that a private party may not bring a Lanham Act claim that seeks to indirectly enforce FDA-labeling regulations. Driving the court's decision was a recognition that allowing such claims would undermine the FDA's authority to impose a uniform regulatory scheme.

To date, results have been mixed for food and beverage companies seeking to rely on Pom Wonderful's preemption analysis to defeat private class actions asserting state law false advertising claims. Some courts have relied on Pom Wonderful's reasoning in finding the claims preempted. For example, District Judge Phyllis Hamilton dismissed a plaintiff's California Unfair Competition Law and Consumer Legal Remedies Act claims in *Astiana v. Hain Celestial Grp Inc.*, 905 F. Supp. 2d 1013, 1015-17 (N.D. Cal. 2012), holding that these claims were barred by Pom Wonderful and the primary-jurisdiction doctrine.

Other courts, however, have allowed state law claims to go forward, refusing to extend the Ninth Circuit's decision beyond Lanham Act claims. District Judge George King, for example, held in *Vinson v. JM Smucker Co.*, Case No. CV 12-4936-GHK (VBKx), 2013 U.S. Dist. LEXIS 183515, \*14 (C.D. Cal. March 25, 2012), that the "analysis in Pom Wonderful was specific to resolving conflicts between federal laws"

and did not extend to plaintiff's state law claims. This split in authority could be resolved by the Supreme Court's decision in *Pom*.

If the Supreme Court upholds the Ninth Circuit's ruling, the impact of such a decision will depend, in part, on the breadth of the court's analysis and whether it can be read to suggest that the regulation of food and beverage labels should be taken entirely out of the hands of private parties and left to the FDA. But even if the court explicitly limits its holding to Lanham Act claims, if it adopts the Ninth Circuit's analysis, that analysis arguably applies to all claims asserted by private parties; not just Lanham Act claims, or claims involving labels that presumptively comply with FDA regulations, as was the case with *Coke's* labeling.

First, the logic behind the Ninth Circuit's ruling in *Pom Wonderful* is not limited to Lanham Act claims. FDCA § 337(a) does not say "All Lanham Act proceedings ..." have to be brought in the name of the United States. It says "all such proceedings ..." Under the plain meaning of the statute, if Lanham Act claims are barred, "all" claims should be barred. This is particularly true because the same concerns that mitigate against allowing the Lanham Act to serve as a vehicle for alleging FDCA violations attend the use of state consumer protection statutes for the same purpose. Nothing in the Ninth Circuit's opinion suggests that there is anything special about Lanham Act claims that would justify treating them differently than false-advertising claims asserted under state laws. Absent such a justification from the Supreme Court, a decision affirming *Pom Wonderful* could arguably be read to preclude all private causes of action that seek to indirectly enforce FDA regulations.

Second, the Ninth Circuit was clear that its decision did not depend on whether the challenged label appeared to comply with relevant FDA regulations. In fact, the court explicitly stated that it was "primarily guided in [its] decision not by Coca-Cola's apparent compliance with FDA regulations, but with Congress's decision to entrust matters of juice beverage labeling to the FDA[.]" According to the Ninth Circuit, the question under section 337 is not a question of "what" type of claims may be enforced, but "who" may enforce FDA regulations. The court determined that, at least in the Lanham Act context, the answer to that question is the FDA, and the FDA only.

Thus, a ruling affirming *Pom Wonderful* on the grounds articulated by the Ninth Circuit could crystallize the FDA's role as the primary authority over food labeling, limiting or entirely prohibiting private parties from asserting false advertising claims — state or federal — in the face of comprehensive FDA regulation. Such a ruling would certainly be welcomed by food and beverage companies, as it would offer some level of protection against legal challenges to their labels — at least for those whose labels are FDA compliant.

If, however, the Supreme Court were to reverse the Ninth Circuit's decision, such a ruling would likely only add to the confusion and uncertainty currently faced by food companies whose labels are arguably FDCA compliant, but who are nonetheless faced with private actions challenging the contents of those labels. Although a reversal would not preclude food and beverage companies from arguing that the courts should defer to the FDA (or other regulatory authorities) on primary jurisdiction grounds, if the court determines that Lanham Act and state law claims may go forward despite FDA regulations, it may ultimately be left to juries across the country to decide in individual instances whether a particular label violates the FDCA and is therefore false or misleading.

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