Legal Opinion Letter

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9TH CIRCUIT'S *POM WONDERFUL* RULING COULD INFLUENCE FOOD CLASS ACTIONS

by
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Class action lawyers looking for a shakedown have gone on a food binge. They have focused on the food industry and the ever-obliging federal court sitting in the Northern District of California. Scores of "misbranding" cases have been filed there in the past few years, so many that one commentator recently noted that the court has become for false-labeling litigants what the Eastern District of Texas has been to patent trolls. The U.S. Court of Appeals for the Ninth Circuit's recent decision in *Pom Wonderful*, however, may cause them a touch of indigestion.

FDA Preemption. At first glance, the food industry seems an unlikely target for a litigation makeover. Food manufacturers should be able to rely on express preemption.

First, Congress has established through the Federal Food, Drug and Cosmetic Act ("FDCA") a comprehensive federal scheme of food regulation to ensure that food is safe and is labeled in a manner that does not mislead consumers (21 U.S.C. §§ 341-350f). In fact, Congress expressly preempted any state law that requires food manufacturers to include nutritional information on their packaging that is "not identical" to federal requirements (21 U.S.C. § 343-1(a)). The phrase "not identical" means information that is different from, or in addition to, federal requirements (21 C.F.R. § 100.1(c)(4)(i)(ii)).

Second, FDCA Section 337(a) expressly forbids private plaintiffs from suing to enforce the FDCA. That task was left exclusively to the Justice Department or the Food and Drug Administration ("FDA").

California Makes Up Its Own Recipe. The California courts haven't seen it that way. In *In re Farm Raised Salmon Cases*, for example, the California Supreme Court held that as long as California's labeling requirements were identical to the federal law, plaintiffs could get around the no-private-right-of-action bar by relabeling their claim under California's Unfair Competition Law. *See* 42 Cal. 4th 1077 (Cal. 2008). The Ninth Circuit has been similarly accommodating, holding in *Williams v. Gerber Products Co.* that whether a label is deceptive should not ordinarily be decided on a motion to dismiss, leaving cases to linger in court and driving up settlement values with the threat of bone-crunching e-discovery. *See* 552 F.3d 934 (9th Cir. 2009).

California Cuisine. Citing these and other cases, class counsel from around the country have recently come to the "Golden State" looking for a free lunch. Within the last several months, for example, 23 nearly identical "misbranding" class action cases were filed in the Northern District of

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California against various food manufacturers by a collection of counsel from nine law firms and six different states. These "assembly-line" complaints follow a common recipe: Posit a wrong by reading in isolation a few words on a food label, contrast those words with a cramped reading of an FDA regulation, then find a plaintiff and sue. For the remedy, insist that everyone in the U.S. who bought the product since 2008 gets a full refund, toss in punitive damages, and finish with an injunction requiring changes to product labeling more to class counsel's liking. The resulting broth, reflecting the makeup of the cooks who created it, is a recipe only a plaintiffs' lawyer could love.

***The Ninth Circuit's Decision in* Pom Wonderful**. After years of enablement, the Ninth Circuit may have finally said "Enough!" In *Pom Wonderful LLC v. Coca-Cola Co.*, the Ninth Circuit found preemption of false labeling claims against a backdrop in which the FDA had *not* acted; it was sufficient that the FDA "*can* act." *See* 679 F.3d 1170 (9th Cir. 2012).

In *Pom Wonderful*, the plaintiff alleged that its competitor violated the Lanham Act by misleadingly using the word "Pomegranate" and a picture of a pomegranate on its label even though the product consisted of over 99% apple and grape juices. Pom Wonderful brought claims under the false-advertising provision of the federal Lanham Act, as well as state law claims under California's Unfair Competition Law and False Advertising Law. The district court granted summary judgment to Coca-Cola.

On appeal, the Ninth Circuit affirmed. It ruled that the FDCA "comprehensively regulates food and beverage labeling." That means the plaintiffs cannot sue under the Lanham Act (1) to enforce the FDCA or its regulations; (2) to interpret ambiguous FDA regulations; or (3) even to decide whether conduct violates the FDCA. Express preemption is back on the menu. Significantly, the Ninth Circuit made no finding about whether the Coca-Cola label was deceptive. No matter. What mattered was that no court could make that determination:

> If the FDA believes that this context misleads consumers, it can act. But the FDA has apparently not taken a view on whether Coca–Cola's labeling misleads consumers—even though it has acted extensively and carefully in this field. (The FDA has not established a general mechanism to review juice beverage labels before they reach consumers, but the agency may act if it believes that a label in the market is deceptive.) As best we can tell, Coca–Cola's label abides by the requirements the FDA has established. We therefore accept that Coca–Cola's label presumptively complies with the relevant FDA regulations and thus accords with the judgments the FDA has so far made. Out of respect for the statutory and regulatory scheme before us, we decline to allow the FDA's judgments to be disturbed.

The case is final and citable, although plaintiff has filed a petition for rehearing *en banc*. It may be many more months before we learn just how strong the Ninth Circuit's new resolve is.

Conclusion. *Pom Wonderful*, like its product namesake, comes packed with nutrients. Food manufacturers beset by food labeling class actions ought to take it out of the pantry. With luck, the food trolls could find it gives them heartburn.

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