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March 2014

POM Wonderful's Decertification Decision Will Be Hard to Swallow for the Plaintiffs' Class Action Bar

On March 25, 2014, Judge Dean Pregerson, of the U.S. District Court, Central District of California, decertified a nationwide class of consumers in a class action brought against POM Wonderful LLC over allegedly false and misleading health claims related to its pomegranate juice. Judge Pregerson's decertification order is significant because it makes class certification more difficult for plaintiffs, requiring that: 1) Plaintiffs comport with the rigorous analysis of class-wide damages set forth in the recent U.S. Supreme Court decision of *Comcast Corp. v. Behrend*, 133 S. Ct 1426 (2013); and 2) Plaintiffs demonstrate that the putative class is ascertainable, which has been the recent focus of many courts, many of whom have denied class certification on that basis. See, e.g., *Carrera v. Bayer Corp.*, 727 F. 3d 300 (3d Cir. 2013).

First, Judge Pregerson found that the two damages models offered by Plaintiffs' experts failed to support a class action, as the models failed to show that Plaintiffs' damages stemmed from the defendant's actions that created the legal liability, as required by the Supreme Court's rigorous analysis in *Comcast*. The first damages model – the "Full Refund" model – assumed that consumers purchased POM's juice solely based on their alleged health benefits and therefore used the full retail price paid as the measure of damages. The Court found that this model could not accurately measure class-wide damages because it ignored any benefit or value consumers may have gotten from drinking POM's juice. The second damages model – the "Price Premium" model – quantified damages by comparing the price of POM with other refrigerated juices of the same size because it assumed that demand for POM would have been less and the POM market price would have been lower if not for the alleged misrepresentations. In rejecting this damages model, the Court found that it failed to explain how POM's health claims caused any damages or comport with *Comcast's* requirement that class-wide damages be tied to a legal theory.

Second, consistent with the recent trend of federal decisions, such as *Carrera*, recognizing plaintiff's burden to show an "ascertainable" class for certification, Judge Pregerson raised concerns about the practical effects of proceeding as a class action, finding that the class was unascertainable: "based on the volume of product sold, every adult in the United States is a potential class member...These millions of consumers paid only a few dollars per bottle, and likely made their purchases for a variety of reasons. No bottle, label, or package included any of the alleged misrepresentations. Few, if any, consumers are likely to have retained receipts during the class period, which closed years before the filing of this action." Judge Pregerson concluded by stating "there is no way to reliably determine who purchased Defendant's products or when they did so."

This decision will most certainly be widely cited by defendants embroiled in class action litigation, as it gives them additional ammunition in their fight to defeat class certification.