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IP FRONTIERS

POM Wonderful — the Lanham Act vs. the FDA

Who controls what you know about your juice?

For a number of years, POM Wonderful, LLC, a privately held but seemingly well-funded company, given that it was founded by billionaires in 2002 and has arguably been litigious since its inception, has been embarking on a unique strategy to attack its competitors and take them out of the pomegranate juice business.

Specifically, POM Wonderful has been using the Section 43(a) of the Lanham Act to bring claims of false advertising against its competitors who purport to sell products with "pomegranate juice" on the label, when these products contain a minimal amount of this ingredient.

By RACHEL L. PEARLMAN
Daily Record Columnist

POM Wonderful's unique approach is now being adjudicated by the Supreme Court, who will hear oral argument on the matter, in *POM Wonderful LLC v. The Coca Cola Company* on April 21 and decide whether to uphold the Ninth Circuit's ruling that a private party cannot bring a Lanham Act claim challenging a product label. The Supreme Court will evaluate whether juice label regulation is the exclusive domain of the Food and Drug Administration.

In *POM Wonderful LLC v. The Coca Cola Company*, POM Wonderful brought action under the Lanham Act against Coca-Cola for selling a product called either "Pomegranate Blueberry" or "Pomegranate Blueberry Flavored Blend of 5 Juices" (the actual name of the product is in dispute) that contains 99.4 percent apple and grape juices, 0.3 percent pomegranate juice, 0.2 percent blueberry juice, and 0.1 percent raspberry juice, see *POM Wonderful LLC v. The Coca Cola Company*, 679 F.3d 1170, 1173 (9th Cir. 2012).

The Ninth Circuit held t that lawsuits under Section 43(a) of the Lanham Act are barred when a product's naming and labeling are regulated under the Food, Drug and Cosmetic Act and FDA regulations.

In its decision, the Ninth Circuit explained, "We are primarily guided in our decision not by Coca-Cola's apparent compliance with FDA regulations but by Congress' decision to entrust matters of juice beverage labeling to the FDA and by the FDA's comprehensive regulation of that labeling ... we must keep in mind that we lack the FDA's expertise in guarding against deception in the context of juice beverage labeling," *POM Wonderful v. The Coca Cola Company*, 679 F.3d at 1178.

A juice product that contains 0.5 percent pomegranate and blueberry juices hardly seems a "Pomegranate Blueberry" or a "Pomegranate Blueberry Flavored Blend of 5 Juices" beverage, but, according the Ninth Circuit, because the FDA permits manufacturers of multiple-juice beverages to identify their beverages with a non-primary, characteristic juice, Coca-Cola's label sufficiently comports with the requirements of the FDA juice-labeling regulations, *POM Wonderful v. The Coca Cola Company*, 679 F.3d at 1175.

Before the present case against Coca-Cola, in various cases, POM Wonderful had alleged, successfully, that the use of the terms similar to "pomegranate juice" by its competitors, on these competitors' labels, constituted a violation of the Lanham Act. For example, POM Wonderful won victories against Ocean Spray, Tropicana and Welch Foods by alleging that it was false advertising for these companies to include the word "pomegranate" in the labeling of juice products that "contain[] little or no pomegranate juice," *POM Wonderful, LLC., v. Ocean Spray, Inc.*, 642 F.Supp.2d 1112, 1124 (C.D. Cal 2009); see also *POM Wonderful, LLC., v.Tropicana, Inc.* No. CV 09-566, 2010 WL 3590162 (C.D.Cal. Sept. 7, 2010); see, e.g., *POM Wonderful LLC v. Welch Foods, Inc.*, CV 09–567 AHM, D.E. 29, at 6–7 (C.D.Cal. June 23, 2009).

The district courts that heard POM Wonderful's cases did recognize that a Lanham Act claim is barred when it would require a court to interpret ambiguous FDA regulations, but interpreted the Section 43(a) of the Lanham Act as not conflicting with this holding.

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POM Wonderful had standing to being these claims under the Lanham Act because, as explained by the Ninth Circuit, "The Lanham Act broadly prohibits false advertising. It authorizes suit against those who use a false or misleading description or representation 'in connection with any goods.' Such suits can be brought by any person 'who believes that he or she is or is likely to be damaged by' the use of that false description or representation,'" *POM Wonderful v. The Coca Cola Company*, 679 F.3d at 1174 (quoting 15 U.S.C. § 1125(a)).

POM Wonderful attained positive results against Ocean Spray, Tropicana and Welch's despite these defendants alleging that POM Wonderful's Lanham Act claims were by the FDCA and FDA regulations, see, e.g., *POM Wonderful v. Tropicana*, 2010 WL 3590162 at *1.

The FDCA comprehensively regulates food and beverage labeling and provides that a food is misbranded if "its labeling is false or misleading in any particular," 21 U.S.C. § 343(a)(1), or "[i]f any word, statement, or other information required by" the FDCA or its regulations "to appear on the label or labeling is not prominently placed thereon with such conspicuousness ... and in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use," *id*. § 343(f).

A private plaintiff may sue under the Lanham Act's false-advertising provision, but the FDCA can only be enforced only by the FDA or the Department of Justice, see *id*. § 337(a); see *POM Wonderful v. The Coca Cola Company*, 679 F.3d at 1176.

In the past, the FDA has exercised its power to regulate juice labeling, including in high profile situations. FDA Commissioner David Kessler famously led the FDA in seizing 24,000 cartons of Proctor & Gamble's Citrus Hill orange juice when the cartons read "We pick our oranges at the peak of ripeness. Then we squeeze them before they lose their freshness," when, in reality, Citrus Hill was a blend of juices from Brazil and Florida, reduced to concentrate through evaporation, and months later, reconstituted with water, orange oil, orange pulp and "orange essence," Kessler, David. A Question of Intent, 20-24.

The Ninth Circuit's decision set aside POM Wonderful's positive results against defendants such as Ocean Spray, Tropicana and Welch's, and held that that courts must generally prevent private parties from undermining, through private litigation, the FDA's considered judgments, *POM Wonderful v. The Coca Cola Company*, 679 F.3d at 1178. This holding leaves private plaintiffs without recourse when a label is arguably misleading and strips Section 43(a) of the Lanham Act of its power to protect consumers.

In addition to the litigants themselves, two prominent IP organizations have weighed in on this case. Both organizations have taken positions contrary to the Ninth Circuit and argued that the Ninth Circuit's decision is harmful to the public.

The International Trademark Association characterized the Ninth Circuit's decision as one that "risks undermining the protection of consumers and promotion of fair and effective commerce that INTA's members value, and risks undermining the goal of informed decision-making by consumers," that "will eliminate the ability of businesses to promote fair competition and protect consumer confusion by combating false and misleading advertising," brief for the INTA as Amicus Curiae, p. 3, *POM Wonderful LLC v. The Coca Cola Company*.

The American Intellectual Property Law Association argued that "This case in particular provides a compelling illustration for why the Lanham Act should be broadly applied. Petitioner claims that the inclusion of literally one teaspoon of pomegranate and blueberry juice transforms a quart of apple and grape juice into a 'Pomegranate Blueberry Flavored Blend of 5 Juices.' The public is not well-served by this deception," brief for the AIPLA as Amicus Curiae, p. 4, *POM Wonderful LLC v. The Coca Cola Company*.

Former FDA Commissioner Dr. Donald Kennedy also filed an amicus brief taking a position contrary to the Ninth Circuit. Kennedy argued that there is no conflict between the FDCA and the Lanham Act and that "[T]his case is precisely the kind of false advertising case traditionally covered by the Lanham Act. Nothing about the FDCA changes that conclusion ... the FDCA merely sets a 'floor' for regulation of labels on which other laws can build," brief for the Donald Kennedy as Amicus Curiae, p. 4, *POM Wonderful LLC v. The Coca Cola Company* (quoting *Wyeth v. Levine*, 555 U.S. 555, 577-78 (2009)) (internal quotations omitted).

Although they are motivated by promoting their own products, competitors are in a good position to understand what constitutes false advertising and due to their own interests, will expend resources in pursuit of fair competition, whether not they are motivated primarily by consumer protection. Stripping competitors of the ability to pursue these claims outside of the FDA mechanisms is contrary to consumer interests.

In the case of the Citrus Hill seizure, it was Tropicana that brought the issue to the FDA, but the FDA does not always have the bandwidth to pursue all misleading labeling claims (and in fact was mocked for the Citrus Hill seizure), thus, the Lanham Act is an important tool and should remain a player in this arena.

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