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ALERT

June 12, 2014

IN SECOND MAJOR LANHAM ACT OPINION OF TERM, SUPREME COURT CONFIRMS PLAINTIFFS' ABILITY TO CHALLENGE FOOD AND BEVERAGE LABELING AS FALSE OR MISLEADING ADVERTISING

A unanimous Supreme Court today, in a dispute concerning blended fruit juice labeling, held that parties claiming injury based on competitors' allegedly false or misleading product descriptions have recourse under the Lanham Act, 15 U.S.C. § 1125(a), notwithstanding provisions of the Federal Food, Drug, and Cosmetic Act ("FDCA"), 21 U.S.C. §§ 321(f), 331, that govern misbranding of food and beverages. *POM Wonderful LLC v. Coca-Cola Co.*, No. 12-761.[1] The FDCA reserves enforcement authority over its food and beverage labeling implementing regulations to the Food & Drug Administration ("FDA"). In contrast, Lanham Act enforcement relies on suits brought by private litigants. The Court's decision — overturning a Ninth Circuit Court of Appeals ruling holding that a Lanham Act suit between blended fruit juice makers was precluded by the FDCA — concluded that the statutes complement, rather than conflict with, each other.

POM Wonderful addressed a Lanham Act challenge by pomegranate-blueberry juice blend producer, marketer, and seller POM, to a Coca-Cola Minute Maid brand juice blend's labeling, marketing, and advertising. POM alleged that Coca-Cola misleads consumers into believing its product predominantly contains pomegranate and blueberry juice, when in fact it contains just 0.3% pomegranate and 0.2% blueberry juices — with nearly all the rest being (less expensive) apple and grape juices. Coca-Cola is liable for false or misleading advertising, POM argues, because its juice blend label: (1) prominently features the name "Pomegranate Blueberry" on two lines, followed in much smaller type by "Flavored Blend of 5 Juices" and other qualifying phrases; and (2) displays a "vignette" of blueberries, grapes, and raspberries, and halved pomegranates and apples, that POM maintains visually misleads consumers with respect to the blend's respective juice components. The gravamen of POM's appeal was that the two statutes provide a complementary mechanism for both protecting consumers' health and safety (via the FDCA), and ensuring business competitors' ability to challenge product claims that mislead consumers and cause competitive injury (via the Lanham Act). The Supreme Court largely agreed.

First, the Court made clear that inasmuch as the case turns on preclusion doctrine (*i.e.*, assessing whether one federal statutory scheme must give way to another), the first analysis is one of statutory interpretation. In this respect, the Court ruled that neither of the two statutes' respective texts limits or bars Lanham Act challenges to labeling that also happens to be regulated under the FDCA. The absence of such a restriction, the Court observed, is all the more significant because the two statutory schemes "have coexisted since the passage of the Lanham Act" nearly seventy years ago. Slip Op. at 9. The fact that Congress has amended both statutes since, but not found reason to adjust either

[1] Justice Breyer did not take part in the case's consideration or decision.

regulatory framework — even though it did choose to expressly pre-empt state laws governing misbranding regulated under the FDCA — "is powerful evidence that Congress did not intend FDA oversight to be the exclusive means of ensuring proper food and beverage labeling." Slip Op. at 10 (quotation omitted).

As further evidence of the complementary nature of the statutes, the Court noted their respective scopes and purposes: both touch on food and beverage labeling, with the Lanham Act protecting commercial interests via private suits that turn on companies' market expertise, and the FDCA protecting public health and safety through a detailed regulatory framework overseen by the FDA. The statutes together operate to enhance competitor and consumer protection, vindicating different interests based on respective expertise. In this respect, the Court noted that — unlike drug labeling — food and beverage labeling is not pre-approved by the FDA. "It is unlikely," the Court concluded, "that Congress intended the FDCA's protection of health and safety to result in less policing of misleading food and beverage labels than in competitive markets for other products." Slip Op. at 12. Even acknowledging the FDCA's greater specificity with respect to labeling regulations, the Court found that neither the two statutes' structures, nor any empirical evidence of which it was aware, suggested that both cannot be fully enforceable according to their respective terms.

Finally, the Court also rejected a middle-of-the road argument made by the United States Solicitor General that the FDCA precludes POM's ability to challenge the name of Coca-Cola's product — on the premise that FDA regulations specifically authorize the names of juice blends — but not its ability to challenge other aspects of the label. First, the Court observed that the Government's position would require an impossible line-drawing exercise, distinguishing between regulations that specifically authorize certain conduct versus those that merely tolerate it. Second, the Court found that the Government's position, like that of Coca-Cola, essentially requires viewing the FDCA and its regulations as a "ceiling," when Congress instead intended that the FDCA and the Lanham Act complement one another.

POM Wonderful is the Supreme Court's second unanimous Lanham Act decision this term. In March, it confirmed in *Lexmark International, Inc. v. Static Control Components, Inc.*, No. 12-873, that diverse market participants have standing to sue for false or misleading advertising under Section 43(a) of the Act. (Kramer Levin's Client Alert addressing *Lexmark* is available here.) Taken together, these two decisions may augur increasingly active Lanham Act litigation.

The Supreme Court's *POM Wonderful* decision may be found here:
http://www.supremecourt.gov/opinions/13pdf/12-761_6k47.pdf

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