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Pom-Coke High Court Battle Extends Far Beyond Juice

By **Greg Ryan**

Law360, New York (January 13, 2014, 9:09 PM ET) -- The U.S. Supreme Court's decision to consider Pom Wonderful LLC's accusations that Coca-Cola Co. mislabeled a juice blend could change the course of not just marketing disputes between business competitors, but also ever-popular consumer class action litigation over food labeling, and even medical device injury lawsuits.

Pom is challenging a Ninth Circuit decision upholding the dismissal of its Lanham Act claims that Coca-Cola misleadingly labeled a product that is more than 99 percent apple and grape juice as pomegranate blueberry blended juice. The Supreme Court agreed Friday to hear the dispute.

The case is the first food labeling dispute taken on by the high court since the litigation's recent explosion in popularity, particularly in California. Unlike the class actions brought by consumers, however, this case centers on alleged violations of the Lanham Act, a federal false advertising law often invoked by one company against another. The class actions, by contrast, are typically brought under state consumer protection laws.

Still, the Pom case shares enough similarities to the class actions that its ultimate resolution could have a dramatic effect on the consumer litigation, attorneys say.

“It could establish ... the fact that the [U.S. Food and Drug Administration] should be the primary authority for determining labeling decision and that those decisions should not be made by the courts,” Perkins Coie LLP partner David Biderman said.

The high court will consider whether a private party can bring a Lanham Act claim over a product label that is regulated by the Food, Drug and Cosmetic Act. Some companies have successfully argued that consumer labeling claims are preempted by the same law.

“It's something we're very interested in, because it can be used by the interested parties in the consumer class actions as an indication of how the FDCA exists with other causes of action trying to challenge food labels,” said Mayer Brown LLP partner Dale Giali, who has represented food companies in the consumer actions.

Reed Smith LLP counsel James Beck speculated that food labeling class actions may have even been a reason the Supreme Court took the case. The high court accepted the case for review even though the U.S. solicitor general had advised it to leave the Ninth Circuit ruling in place.

“I read that they think it's of greater importance than the solicitor general did,” Beck said. “To me, it suggests that they are aware of what's going on with the California food cases, and they may understand the impact this has on that.”

The ruling could affect suits over other FDA-regulated products, especially medical devices, according to Beck. The Lanham Act allegation implicates the FDCA's bar against private enforcement, the same issue at play when a judge finds a medical device injury claim is preempted, he said.

Non-food companies have had mixed results in using the Pom decision to secure dismissals. Pointing to Pom, Novartis Pharmaceuticals Corp. successfully argued that a plaintiff in a drug injury suit in California was precluded from contending the drug's labeling should have been formatted differently. The same argument failed in Florida, however, where a judge concluded that Pom did not apply because it involved food, not drug, labeling.

Food companies facing consumer class actions have not met with much success in wielding Pom as a dismissal tool. For instance, a California federal judge declined in March to dismiss state law false advertising claims under Pom, finding the analysis was limited to resolving conflicts between federal laws.

But if the Supreme Court were to uphold the Ninth Circuit's decision, that could change, attorneys said. It all depends on how broad the ruling is.

“It's hopefully going to clarify how the FDCA works with respect to these collateral attacks” by consumers and business competitors alike, Giali said.

At the very least, a ruling affirming Pom could help fellow juice makers facing consumer actions, according to Montgomery McCracken Walker & Rhoads LLP attorney Kristen Polovoy.

“If the Supreme Court ... decides that certain FDA regulations governing juice ingredient labels govern the claims in that case to the exclusion of other laws, then those express preemption arguments could be equally applicable to private plaintiffs making juice product labeling claims analogous to Pom's,” she said.

Of course, the high court could reverse the Ninth Circuit and find the FDCA does not bar Lanham Act claims, an outcome that “would put the whole labeling law in turmoil, because no company would have certainty” over whether its labeling was legal, Giali said.

Pom is represented by Seth Waxman, Randolph Moss, Brian Boynton, Felicia Ellsworth and Nicole Ries Fox of Wilmer Cutler Pickering Hale and Dorr LLP.

Coca-Cola is represented by Steven Zalesin and Travis Tu of Patterson Belknap Webb & Tyler LLP.

The case is Pom Wonderful LLC v. The Coca-Cola Co., case number 12-761, in the U.S. Supreme Court.

--Editing by Kat Laskowski and Philip Shea.
