

## High Court Fight Pits FDA Rules Against False Ad Claims

By **Sindhu Sundar**

*Law360, New York (April 18, 2014, 8:38 PM ET)* -- Pom Wonderful LLC is expected to argue to the U.S. Supreme Court on Monday that its competitor Coca-Cola Co.'s juice label misled consumers in practice even if it complied with U.S. Food and Drug Administration rules, testing the extent to which the agency's regulations should block private lawsuits between companies.

The dispute between the beverage giants spotlights a long-running tension between the FDA's technical rules on how a product should be labeled and the Lanham Act, a federal false advertising law that attorneys say can offer more protection against claims that can be misleading in context even when they are technically true. In this case, Pom is arguing that Coca-Cola misleadingly labeled a product that is more than 99 percent apple and grape juice as a pomegranate blueberry blended juice.

The Ninth Circuit had found that no matter how misleading Coca-Cola's marketing might be, Pom's claims under the Lanham Act are precluded by the Food, Drug and Cosmetics Act. But if Pom can convincingly argue that the FDCA regulations do not sufficiently factor in the power of context in the way consumers interpret labels in practice, the high court could find that there is enough of a public interest concern to allow the Lanham Act to fill in gaps left by the FDA regulations, attorneys said.

"What's going to be huge here is whether the court finds that these two federal statutes are irreconcilably in conflict, and if they are, whether the Lanham Act should yield to FDA rules," said Douglas Rettew, the chair of the trademark and copyright group at Finnegan Henderson Farabow Garrett & Dunner LLP. "But the Lanham Act false ad law says a label can be false even if it's true but will deceive in context. So Pom can argue that FDA standards do not provide the full range of protections that are in the public interest."

Coca-Cola can expect a vigorous line of questioning centered around the practical effect of a label. Coca-Cola's label reads "Minute Maid enhanced pomegranate blueberry flavored 100 percent juice blend," which Pom argues misleadingly suggests that the drink contains mostly pomegranate and blueberry juice.

But the beverage giant also has potentially strong comebacks to such questions if it can convince the panel that the name on a label was never designed to inform consumers of all of the ingredients in a product, attorneys said.

"A justice can say: 'Look, your product says "100 percent juice," and it says "pomegranate blueberry.'" For a consumer making a quick decision in the grocery store aisle, don't you think they're gonna assume

it's pomegranate blueberry juice?" said Dale Giali of Mayer Brown LLP.

"But Coke can have a great response to that: that it's impossible to get the full picture from just the product's name — otherwise it would be too long — and that's why we have the ingredient list," Giali said. "A consumer who cares can flip the bottle over and figure out exactly what is in the drink, and those ingredients should be listed in the order of predominance, according to FDA rules."

The conflict involves nuanced questions about consumer deception, and business interests are generally in favor of Coca-Cola's arguments. Attorneys said that Coca-Cola takes the business-friendly stance that there is a concrete regulatory scheme that is overseen by a federal agency and that should be enough to keep plaintiffs attorneys from intervening.

Pom meanwhile, offers an argument that consumer attorneys could also seize on — that FDA laws do not fully address the practical impact of a label and that the agency lacks the resources to take action against potentially misleading labels, leaving room for state laws to fill in the gaps, attorneys said.

"I get the sense that those justices who favor business interests and are less in favor of consumer class actions and plaintiff actions will lean toward Coke," Giali said.

Justices may pose questions to the companies that could shape the scope of their ruling, determining whether they limit their consideration merely to food and beverage labeling or expand it to other industries governed by the agency including drugmakers and device companies, attorneys said.

"They may ask if there is something special and unique about the beverage industry that requires the uniformity that Coke's position calls for," said Paul Llewellyn of Kaye Scholer LLP. "And if the answer is no, they may ask if there is a rational basis to limit ruling to juices or if it has implications beyond beverage labeling or even drugs."

--Editing by Jeremy Barker. Editing by Kat Laskowski.