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Attys React To High Court's Pom v. Coke Lanham Act Ruling

Law360, New York (June 12, 2014, 6:37 PM ET) -- The U.S. Supreme Court ruled Thursday that federal regulations do not preclude companies from bringing false advertising claims under the Lanham Act, allowing Pom Wonderful LLC to pursue allegations against The Coca-Cola Co. Here, attorneys share their thoughts on the significance of the decision.

William C. Acevedo, Wendel Rosen Black & Dean LLP

"The Supreme Court's ruling in POM v. Coca Cola really boosts a company's ability to cry more than foul when challenging a competitor's marketing claims. The court has drawn a distinction between the FDA's role in policing labeling claims for health reasons and the role of the Lanham Act regarding marketing claims for commercial reasons. After this ruling, following the technical letter of the Food, Drug and Cosmetic Act will not be enough. Labeling claims must also be vetted to ensure that they are not false or misleading in an advertising sense."

Angela Agrusa, Liner LLP

"Juice labeling is subject to very specific and comprehensive regulation under the FDCA. And manufacturers of juice products must take great care to follow these regulations so that FDA does not find the products misbranded. Today's decision means that manufacturers could now be exposed to Lanham Act claims from competitors even if they have followed the regulations. And if sued under the Lanham Act, the manufacturer cannot necessarily rely on its compliance with the FDCA to avoid that suit. This ruling, however, should not impact the preclusive effect of the FDCA on private enforcement claims based on state law."

Chip Babcock, Jackson Walker LLP

“This was a hard case for Coca Cola because POM's argument appealed to the justices on two levels: those who are sympathetic to competitor protection statutes like the Lanham Act which ultimately benefit consumers, as well as those who are concerned about strict adherence to legislative intent. The result, obviously, was a unanimous decision in favor of POM. But all is not lost for Coca Cola. The argument can still be made that it complied with FDA labeling requirements and that its label is not deceptive. In other words, Coke still has a jury argument to be fashioned out of this at the trial court.”

Barry Benjamin, Kilpatrick Townsend & Stockton LLP

"The ruling is significant because it puts companies in regulated industries on notice that they cannot hide behind government rules and regulations when confronting claims of false or deceptive advertising. Just like competitors in unregulated industries can bring Lanham Act claims to stop deceptive advertising claims, the Supreme Court’s decision ensures that competitors in regulated industries can do so as well. Advertisers cannot be complacent that just because their products, labeling, and advertising may comply with applicable government regulations, they can make unsubstantiated or false product claims. All advertising claims, both explicit and implicit, must be truthful and properly substantiated."

David Biderman, Perkins Coie LLP

“This decision means that food and drink manufacturers are now fair game for Lanham act claims from competitors for allegedly misleading labeling, even if their labeling fully complies with FDA regulations.”

Sherri N. Blount, Fitch Even Tabin & Flannery LLP

"Today's Supreme Court ruling sends a clear signal to food and beverage companies that they cannot make deceptive claims through product labeling. In reversing the Ninth Circuit, the Court held that companies may indeed bring Lanham Act claims challenging competitors' product labels, notwithstanding the label's compliance with FDCA labeling regulations. The Court firmly stated that the FDA does NOT have exclusive oversight in ensuring proper food and beverage labeling. Consumers are the real beneficiaries of today's ruling because allowing Lanham Act claims in connection with food and beverage labels ultimately gives the public greater protection against being misled."

Lee Carl Bromberg, McCarter & English LLP

"The Supreme Court decision allowing private Lanham Act claims, even when food and beverage labels comply with FDA regulations, will have far-reaching effects. Because they face greater exposure to claims of false designation of origin as a result of this decision, food and beverage companies must perform more careful risk-management analyses to ensure that they have defensible positions as to their marketing, labeling and advertising claims. Those same companies should assess what possible claims they have against competitors. Defense counsel like me must be prepared to articulate positions on the merits that claims about products are within the range of what those products truly offer."

Anderson Duff, Wolf Greenfield & Sacks PC

"This ruling shows that the federal [FDCA] and the Lanham Act are complementary, which means that a party in full compliance with the regulatory scheme established by the FDCA may still be sued by third parties for misleading advertising or labeling. This opens the door to more litigation between competitors who believe a particular product misleads consumers to their detriment. This should be good for consumers who now have both the FDA and private actors working to prevent deceptive marketing and labeling."

Adam Fox, Squire Patton Boggs

"Today's unanimous court clarifies the expansive nature of the Lanham Act's false advertising claim. The Lanham Act's authorization to pursue false advertising — or labeling — is not preempted (or, more accurately, precluded) by the [FDCA]'s empowerment of criminal enforcement to address misbranded labels. This is a case of straightforward statutory interpretation involving the harmonization of two statutes that overlap in their governance of product labeling, for which there's no clear, explicit preclusion of one by the other — but instead, complement one another."

Karen K. Gaunt, Dinsmore & Shohl LLP

"In rejecting the Ninth Circuit's contention that Lanham Act false advertising claims are precluded by the FDCA, the Supreme Court made it clear that operating in a regulated industry with particular labeling or disclosure requirements does not give a company a 'free pass' to disregard longstanding principles concerning truth in advertising. The decision recognizes the complementary nature of the Lanham Act with federal labeling requirements, and makes it clear that compliance with both is not mutually exclusive. It also recognizes the complementary nature of government regulation, with private actions by competitors under the Lanham Act, and the shared goal under both to protect consumers from false, misleading or unsubstantiated labeling and advertising."

Dale Giali, Mayer Brown LLP

"This is a significant victory for Pom and a defeat for Coke, the FDA and, potentially, certain aspects of uniformity and certainty regarding food labeling. But the court was careful to limit the decision to federal law and competitor suits. It held that the FDCA and the Lanham Act are complementary with respect to guarding against misleading food labels and that the Lanham Act plays an important role. While consumers will indirectly benefit from competitor Lanham Act claims regarding allegedly misleading food labels, the court makes it clear that this is not a question of state v. federal law or consumer suits, and does not in any way undermine preemption or labeling uniformity principles that

would apply to state-law claims against labels regulated by FDA. Because the onslaught of consumer class actions against the food industry are almost exclusively brought under state law, I believe that preemption and uniformity principles — to the extent they applied previously — will continue to apply in the same manner following Pom v. Coke."

Andra B. Greene, Irell & Manella LLP

"The unanimous Pom Wonderful decision today is significant. The Supreme Court reversed the Ninth Circuit's decision that food and beverage labeling laws preclude private trademark suits. The ruling will no doubt increase false advertising litigation against food and beverage companies on two fronts — suits by competitors against each other and consumer class actions bought by product purchasers. Compliance with FDA regulations alone will not protect companies from such lawsuits."

Michael Kelly, Kenyon & Kenyon LLP

"The decision is significant because of the added risk of false advertising suits that will now face the food and beverage industry. The court's unanimous ruling will likely increase false advertising suits, and food and beverage companies should reevaluate the risk of litigation prior to marketing a product, even if the product complies with FDA standards. Overall, the decision reinforces the Lanham Act's function of protecting consumers from deceptive advertising, even if that role is shared with the FDA."

Tim Kelly, Fitzpatrick Cella Harper & Scinto LLP

"The Supreme Court's decision in Pom Wonderful LLC v. Coca-Cola Co. essentially established that, at least in the false advertising/unfair competition context, manufacturers cannot hide behind one federal statute in order avoid liability under another. The mere fact that a product name or label may comply with the provisions of the federal [FDCA], does not mean that the chosen name or label is not misleading or otherwise deceptive under the Lanham Act. The court makes it clear that competitors are entitled to challenge consumer-facing representations — even where such

representations are consistent with another Federal statute — in order to ensure that marketplace competition remains fair. The situation presented here is not really very different from any other Lanham Act Section 43(a) situation. Yes, it potentially opens up the manufacturer to multiple suits and multiple assertions of what is 'clear' or not 'misleading,' but that has always been the case under Section 43(a)."

Jeffrey Kobulnick, Partner at Ezra Brutzkus Gubner LLP

"The court's ruling today is sound. The Lanham Act has long provided a cause of action for false advertising, without limitation or exclusion regarding claims in a particular industry. While the FDCA regulates food and drink, the court correctly recognized that Congress did not include any preemption of Lanham Act claims by the FDCA in either federal statute. It would be inconsistent and unreasonable to ignore the last 70 years of jurisprudence where the two statutes have co-existed, and to deny non-governmental parties — namely, competitors — a private cause of action for false advertising under Section 43(a) of the Lanham Act."

Greg Korn, Kinsella Weitzman Iser Kump & Aldisert LLP

"The U.S. Supreme Court in Pom Wonderful LLC v. Coca-Cola Co. reversed a decision of the Ninth Circuit Court of Appeal and held that the federal [FDCA] does not preclude false advertising claims under the Lanham Act which challenge the mislabeling of food products. The court held that the FDCA and Lanham Act instead 'complement' each other. The fact that the U.S. government is vested with exclusive enforcement of the mislabeling of products in violation of the FDCA does not prevent the filing of private lawsuits under the Lanham Act where those same misrepresentations can cause commercial injury to 'competitors.' The court's ruling allows Pom to proceed on a claim that Coca-Cola has falsely advertised a 'pomegranate blueberry' drink which, to quote the court, '[i]n truth . . . contains but 0.3 percent pomegranate juice and 0.2 percent blueberry juice.'"

Joel Leviton, Stinson Leonard Street LLP

"The implication is that food and beverage manufactures must vet labels — and ads — to assess whether a label is potentially deceptive regardless of whether the label complies with the FDCA. The FDA, however, does not preapprove food and beverage labels, like it does with labels for pharmaceuticals. This raises the question of whether actual preapproval of a label from the FDA would insulate against a Lanham Act claim. Based on the court's application of statutory interpretation principles and the cited purposes of the two statutes at issue — protecting the public, in the case of the FDCA, and protecting commercial interests of competitors, in the case of the Lanham Act — the decision signals that even preapproval by the FDA would not insulate against a Lanham Act claim. The court disagreed with the government, which argued that the Lanham Act should be precluded if the FDA regulations specifically require or authorize the challenged aspects of the labels. The court rejected that approach, recognizing that Congress intended the FDCA and the Lanham Act to complement each other. Bottom line, compliance with FDA regulations does not excuse a party from assessing other advertising and labeling issues."

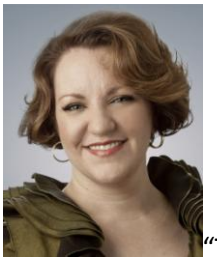
Theodora McCormick, Sill Cummis & Gross PC

"The Supreme Court's decision on Thursday that juice maker POM Wonderful can proceed with its lawsuit against Coca-Cola alleging that the label on Coke's 'Pomegranate Blueberry' beverage is misleading because 99 percent of the drink consists of apple and grape juice opens the door to more litigation brought on behalf of both competitors and consumers for deceptive labeling. The Supreme Court held that while Coke's label may technically comply with FDA regulations, it could still be misleading. The decision essentially eviscerates what most food and beverage companies viewed as a safe harbor — as long as their labeling complied with governing FDA regulations, they would be immune from private lawsuits for false or deceptive advertising. It not only creates an additional layer of review, but will also create significant logistical challenges as companies are forced to evaluate whether they need to change their labeling in response to a private lawsuit."

Michelle Mikol, Brinks Gilson & Lione

"The decision does not come as much of a surprise given the tenor of the oral arguments, during which the court expressed concern that without a private cause of action under the Lanham Act, there would be no recourse against misleading labels. The FDA does not preapprove food and beverage labels and has very limited resources. Moreover, there is no private right of action to enforce under the FDCA. As a result, the court indicated that the food and beverage industry could, in turn, have less effective protection than other industries if Lanham Act claims were precluded. As a practical matter, the industry will now likely see an increase in product label Lanham Act litigation."

Amie Peele Carter, Faegre Baker Daniels



"This ruling clarifies the higher and broader standards food and beverage companies face in the area of product labeling. Technical compliance with the federal [FDCA] will not bar competitors from complaining about the sufficiency of product descriptions. While the federal government has nearly all of the enforcement authority under the FDCA, the Lanham Act permits injured competitors to bring enforcement lawsuits. Case law regarding the Lanham Act's unfair competition standards regarding false or misleading product descriptions does not generally provide bright line tests. More litigation likely will result."

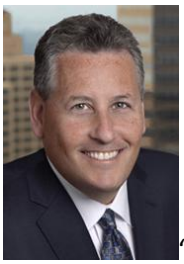
Mark S. Puzella, Fish & Richardson PC

"The court's decision in Pom Wonderful LLC v. The Coca-Cola Co. is important because it identifies a potential new front in false advertising litigation. Companies that sell products governed by FDCA labeling requirements and have relied solely on compliance with the FDCA in their pre-marketing review run a significant risk of similar litigation. Branding professionals need to review their labels — and any other marketing — to assure compliance with the Lanham Act separate from compliance with FDCA regulations. It is highly likely that in competitive and mature markets participants will be reviewing competitors' labeling with renewed and increased scrutiny."

Benjamin L. Riemer, Bell Nunnally & Martin LLP

"This is a victory for businesses whose competitors are falsely advertising. In addition, it is also a major victory for the consuming public that relies on representations by companies to be true. As Justice Kennedy noted in the court's opinion, businesses that have an economic interest in regulating false advertising are also doing the public a service by pursuing enforcement of the Lanham Act."

Daniel Silverman, Venable LLP, former in-house counsel at POM Wonderful



"The general issue before the court is whether a competitor can sue for false advertising under the Lanham Act challenging a product label, or whether the FDA has exclusive regulatory authority over food names and labels and therefore the Lanham Act claim should be precluded. This decision proves that competitors can be successful at challenging their rivals and we can expect more vigorous litigation between competitors, as well as more class actions arising from consumer product labeling issues."

Paul D. Swanson, Lane Powell PC

"In its groundbreaking POM Wonderful v. Coca-Case decision, the Supreme Court paved the way for more competitor lawsuits over false and misleading food and beverage labels. Lower courts had previously ruled that federal Lanham Act false advertising claims are precluded by the Food and Drug Administration's detailed regulations governing the content of fruit juice labels. The Supreme Court unanimously rejected that preclusive result by holding that Lanham Act false advertising claims and FDA regulations serve entirely different, but complementary purposes. The former provides a remedy for unfair competition; the latter focuses on food quality and safety issues. When the POM Wonderful decision is paired with the Supreme Court's recent decision in Lexmark Int'l v. Static Control Components that expands the standing of those who may pursue federal false advertising claims, the predictable outcome will be the filing of many more food and beverage labeling lawsuits."

Monica R. Talley, Sterne Kessler Goldstein & Fox PLLC

"Viewed in conjunction with the March ruling in the Lexmark case, the decision in Pom v. Coke clearly communicates that the Supreme Court is unwilling to unduly limit the ability to bring false advertising claims under the Lanham Act. Lexmark clarified that parties need not be direct competitors to bring a false advertising claim under the Lanham Act. Today's Pom v. Coke ruling holds that labels regulated by the FDCA are not exempt from Lanham Act claims; even in situations where labels may not be false on their face and acceptable under FDCA standards, they may still give rise to a Lanham Act false advertising claim if in context they have a tendency to mislead or deceive the public.

Taken together, these decisions strengthen the ability of businesses to protect against statements that mislead consumers."

Charlotte E. Thomas, Duane Morris LLP

"While Pom Wonderful involved an action between competitors and the decision refers to the two complementary federal statutes, the decision also spoke of 'multiple methods of regulation.' Pom Wonderful may be viewed as an endorsement of a 'third' enforcement mechanism — that of actions brought for deceptive and misleading product descriptions under state consumer protection statutes. Indeed, the court suggests that the FDA regulations represent a floor — or rather not a 'ceiling.' This reference seems to dovetail into Wyeth v. Levin, which permitted a private action under state tort law against a drug manufacturer where the labeling complied with FDA regulations and approvals but where the manufacturer could have provided additional information to provide a safer label. Because the decision focuses on methods of enforcement for deceptive and misleading labels, Justice Kennedy gave little guidance on the impact of the FDCA beyond allowing the Lanham Act to proceed. He went as far as to acknowledge the 'level of detail' at which the FDA had examined deception and confusion in juice-blend labeling, but also suggested that the FDA regulations were a 'floor' as to juice blend labeling requirements. Still, it could be argued that the FDA's position on blended juice labeling could be relevant and therefore admissible as to whether specific labeling or marketing results in a 'likelihood of confusion.' Presumably, the court's dual system of enforcement for false and misleading product descriptions would allow for a 'blend' of proof on the likelihood of confusion element."

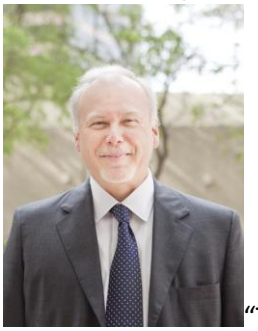
Rhonda Trotter, Kaye Scholer LLP

"Food and beverage companies will now have an additional enforcement mechanism to challenge false advertising by their competitors. But such suits are a double-edged sword: these same companies might just as easily be named as defendants in Lanham Act suits challenging their own product labeling. Although it remains to be seen whether the court's decision will create a new influx of false advertising litigation related to food and beverage labeling, the increased attention to food and beverage labeling claims in recent years suggests that companies in this space should pay close attention to the court's decision and its repercussions."

Peter Vogl, Orrick Herrington & Sutcliffe LLP

"The Supreme Court's decision in POM imposes a new obligation on consumer products companies to not only ensure that their product labels conform to agency regulations but also to make sure that their labels are not misleading consumers. As such, companies will no longer be able to effectively rely on the safe harbor provided by FDA regulations. Meeting FDA label requirements had presented companies with a relatively clear path to compliance. By adding the obligation that labels must also be compliant with Lanham Act precedent against false advertising, companies will be confronted with greater uncertainty and increased risk of private parties availing themselves of the judicial system."

Michael Walsh, Strasburger & Price LLP



"Technical compliance with the FDCA is not enough to avoid litigation under the FDCA. While preemption and preclusion have much in common, what remains to be seen is whether trial courts will appreciate the nuanced difference. It will be important for lawyers to explain to trial courts that POM is not elevating a corporation's right to pursue claims under the Lanham Act, above those of consumers whose claims are preempted. Under the Lanham Act the court has recognized that Congress left enforcement of 'false and misleading' claims to regulation through litigation. This is a green light to FDA regulated industries to sue competitors. If you listened to the oral argument you would have assumed Coke's chance of success was proportional to the .3 percent of pomegranate in its pomegranate beverage."

Ivan Wasserman, Manatt Phelps & Phillips LLP

"The court considered whether one federal statute, the [FDCA,] trumped another federal statute, the Lanham Act. In its opinion, the court found that Congress did not intend for one

statute to trump the other, but rather that they complement each other by serving different, albeit somewhat related purposes. The end result of the case is that the Lanham Act remains a powerful tool for competitors to challenge claims that are damaging them in the marketplace, even in instances where the claims at issue are subject to FDA regulation."

Harold P. Weinberger, Kramer Levin Naftalis & Frankel LLP
"This is potentially a very significant decision. The first part of the opinion, in which the court holds that the mere fact that the FDCA regulates these products does not bar a Lanham Act claim, was totally predictable. The second part is more interesting. The government took the position that the name of the product could not be challenged because it was authorized by FDA regulations, but the court found that FDCA and its regulations are not a ceiling on the regulation of food labels and are intended to complement, not preclude, claims under the Lanham Act, a conclusion that may have been influenced in part by the fact that FDA does not actually approve the labels. Whether that will be extended to drugs, where FDA does approve the labels, remains to be seen."

Thomas Williams, Ulmer & Berne LLP

"The court held that there is nothing in either the Lanham Act or the FDCA to suggest that Congress intended one statute to preclude the other. If Congress had intended that the FDCA precluded a Lanham Act claim, it could have done so in the statute. Instead, the opinion says two statutes are complementary, 'Competitors, in their own interest, may bring Lanham Act claims like POM's that challenge food and beverage labels that are regulated by the FDCA.' POM's false advertising claim may proceed. The court did not opine on what impact, if any, compliance with regulations may have on the merits of the false advertising claim. The court merely reversed and remanded. That is a big open question that the lower courts will need to sort through."

Lynda Zadra-Symes, Knobbe Martens Olson & Bear LLP

"Today's ruling indicates that the reach of the Lanham Act regarding false and misleading advertising extends beyond the FDCA labeling requirements in protecting companies from having their actual and potential customers deceived or misled by their competitors' advertising or labeling. In view of this ruling, companies should not rely only on complying with FDA labeling regulations but should also be aware of the broader requirements under the Lanham Act to not 'misrepresent the nature, characteristics, qualities, or geographic origin' of their products or services."

Robert Zelnick, McDermott Will & Emery LLP

“Today's decision by the U.S. Supreme Court reaffirms that food and beverage advertising requires a multi-level legal clearance. The advertising must comply with labeling and other requirements of the FDA and other relevant federal agencies, and in addition it must not convey a false or misleading message that could hurt a competitor's business. It is not enough merely to comply with federal regulations, and to assume that advertising or labeling that meets agency requirements is immune from lawsuits by competitors under the Lanham Act.”

--Editing by Emily Kokoll.
