

Pom Trial Loss Gives Food Cos. Juice To Beat Labeling Suits

By **Sindhu Sundar**

Law360, New York (March 22, 2016, 10:48 PM ET) -- Pom Wonderful's latest defeat in a false advertising suit against a rival, this time Coca-Cola, hands food makers battling consumer suits a significant weapon in the form of a rare jury verdict vindicating a food label that even Justice Anthony Kennedy once suggested could have fooled him.

A federal jury in California rejected Pom Wonderful LLC's claims that The Coca-Cola Co. unit Minute Maid's "Enhanced Pomegranate Blueberry Flavored 100% Juice Blend" misled consumers because the two juices in the label actually comprised just 0.5 percent of the fruit drink. The verdict marks Pom's fourth defeat in its labeling trials against its competitors in recent years, all of which have been watched closely by food companies seeking to fend off consumer lawsuits over similar labeling claims.

Since such consumer suits virtually never go to trial, Pom's courtroom battles have provided a much-needed record for food companies to build their case on how juries are likely to perceive such labels, defense attorneys say. And food companies are poised to use these results to undermine claims by consumers that similarly worded labels could have misled them, they say.

"Certainly, this provides another data point for food companies to say, 'You know what, consumers are smarter than plaintiffs lawyers give them credit for, and consumers can read these labels carefully and use their common sense to know exactly what they're getting,'" said Dale Giali of Mayer Brown LLP. "And it is an important data point because we have so few about what a jury thinks when these cases actually go to trial."

Pom's losses are a big blow to claims over similarly worded labels, with which a company has perhaps tried to create a certain impression or evoke a certain association in a consumer but did not make any explicitly false claims. In the Minute Maid label at issue, Coca-Cola argued that the product never claimed to be a pomegranate drink — the label stated merely that the product was "flavored" with pomegranate and blueberry juices, which appears to have satisfied the jury.

The verdict seems to be reinforced by some of Pom's prior losses in trials attacking other competitors, including a 2011 federal jury verdict in California that found that Pom hadn't proved that the advertising and labels on Ocean Spray's pomegranate-cranberry juice drink were misleading because it contained only a trace amount of pomegranate juice.

Pom has also lost similar false advertising trials against Welch Foods Inc. and Pepsi Co. unit Tropicana, though in slightly different outcomes. In the Welch trial, which concluded in 2010, the jury found that

even though Welch had deceptively marketed a white-grape and pomegranate juice that contained little pomegranate, it also said that Pom was not injured by that intended deceit.

But Pom's battle against Coca-Cola is significant in particular because the defendant seemed to make a credible argument that it had complied with labeling rules governed by the U.S. Food and Drug Administration. Coca-Cola presented its emphatic case on FDA compliance before the U.S. Supreme Court in April 2014, the hearing that prompted Justice Kennedy's remark to a Coca-Cola attorney to not make him "feel bad because I thought that this was pomegranate juice."

The high court had allowed Coca-Cola's claims to proceed, remanding the case to the lower court after finding that its claims for false advertising under the federal Lanham Act could coexist with its obligations under the Federal Food, Drug and Cosmetic Act.

On remand, the federal jury seemed satisfied with Coca-Cola's compliance with FDA labeling rules, a finding that defense attorneys say has positive implications for food companies defending consumer labeling suits.

"I think the jury has sent a subtle message that common sense really precludes a finding of liability when a company follows labeling rules set under the FDCA, one of the oldest regulatory schemes," said Richard Wegener of Faegre Baker Daniels LLP.

On the other hand, plaintiffs attorneys believe that although the latest Pom verdict could impede consumer claims involving similar labeling language, it doesn't hamper what they see as a large number of consumer allegations over more specifically misleading labels.

"I think that any time there's a favorable jury verdict for either plaintiffs or defendants, you have the relative camps out there touting that particular verdict as a referendum on all cases that are even remotely similar," said Ryan J. Clarkson of plaintiffs firm Clarkson Law Firm PC.

"On a case that's similar, sure, I think this verdict will have a chilling effect on claims that are that similar," he added. "But here, Coca-Cola was just marketing a product as a flavored blend of five juices, making no representations as to relative allocations of those juices."

Pom is represented by Forrest A. Hainline III of Goodwin Procter LLP, and Kristina M. Diaz, Matthew D. Moran and Brooke S. Hammond of Roll Law Group PC.

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

The case is Pom Wonderful LLC v. The Coca-Cola Co., case number 2:08-cv-06237, in the U.S. District Court for the Central District of California.

--Additional reporting by Bonnie Eslinger. Editing by Christine Chun and Aaron Pelc.
