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POM v. Coke

An Analysis of the Decision and Its Impact

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Today's Speakers



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Juice Blend Made from 100% Juice with a Characterizing Flavor

There's Really a Name for That?



FDCA Rules Regarding Front-of-Package Image/Labels

- Juice-labeling regulations part of national uniform labeling rules set out in FDCA and regulated by FDA
- Naming of juice blends with characterizing flavor one of the most highly regulated areas under FDCA
 - Multiple juices – “blend”
 - Name (statement of identity) and image includes less than all juices; predominant juice not referenced
 - Product has a characterizing taste – “flavored”
 - “Flavored” and “blend” less prominent than other words
- Regulations were result of robust rulemaking, taking into consideration all the information that appears on a label

The Juice Wars



How We Got Here

- POM and the growth of the pomegranate juice market
- POM's 2008-2009 suits against competitors under Lanham Act and state consumer-protection laws, including Coke
- Consumer class action lawyers took note and filed parallel consumer class actions against many juice companies on same theory (under state consumer-protection laws)
 - Juice Wars part of much larger trend against the food & beverage industry
 - Approximately 500 pending consumer class actions challenging food and beverage labels under state law
 - Challenges to all sorts of labeling statements

Coke's Label

Coke's label meticulously follows FDCA rules and even goes above and beyond (mentions blend of 5 juices, has pictures of all the juices)



The Feds (And A Quick Word On National, Uniform Labeling Rules and Preemption)



National, Uniform Labeling Rules and Preemption

- FDCA may be enforced almost exclusively by federal government – 21 USC § 337(a)
- Express preemption of state law labeling law under the FDCA – 21 USC § 343-1
 - Aspect of labeling being challenged in lawsuit must be regulated under FDCA
 - FDCA rule from which regulation comes must be itemized in § 343-1
 - Lawsuit must be attempting to impose labeling requirement under state law that is not identical to FDCA regulation
- Implied Preemption
 - *Buckman/Perez* – narrow gap
 - Sherman Law – Cal's copycat of FDCA

POM v. Coke – What the Court Said



POM v. Coke – What the Court Said (Cont'd)

- Supreme Court goes to great lengths to say what case is NOT about
 - Not a preemption case
 - Not a state-law-verses-federal-law case
 - Key doctrine: preclusion
- Straightforward matter of statutory construction
 - Statutes do not say that Congress intended for FDCA to bar Lanham Act claim
 - No intention to preclude competitor suits

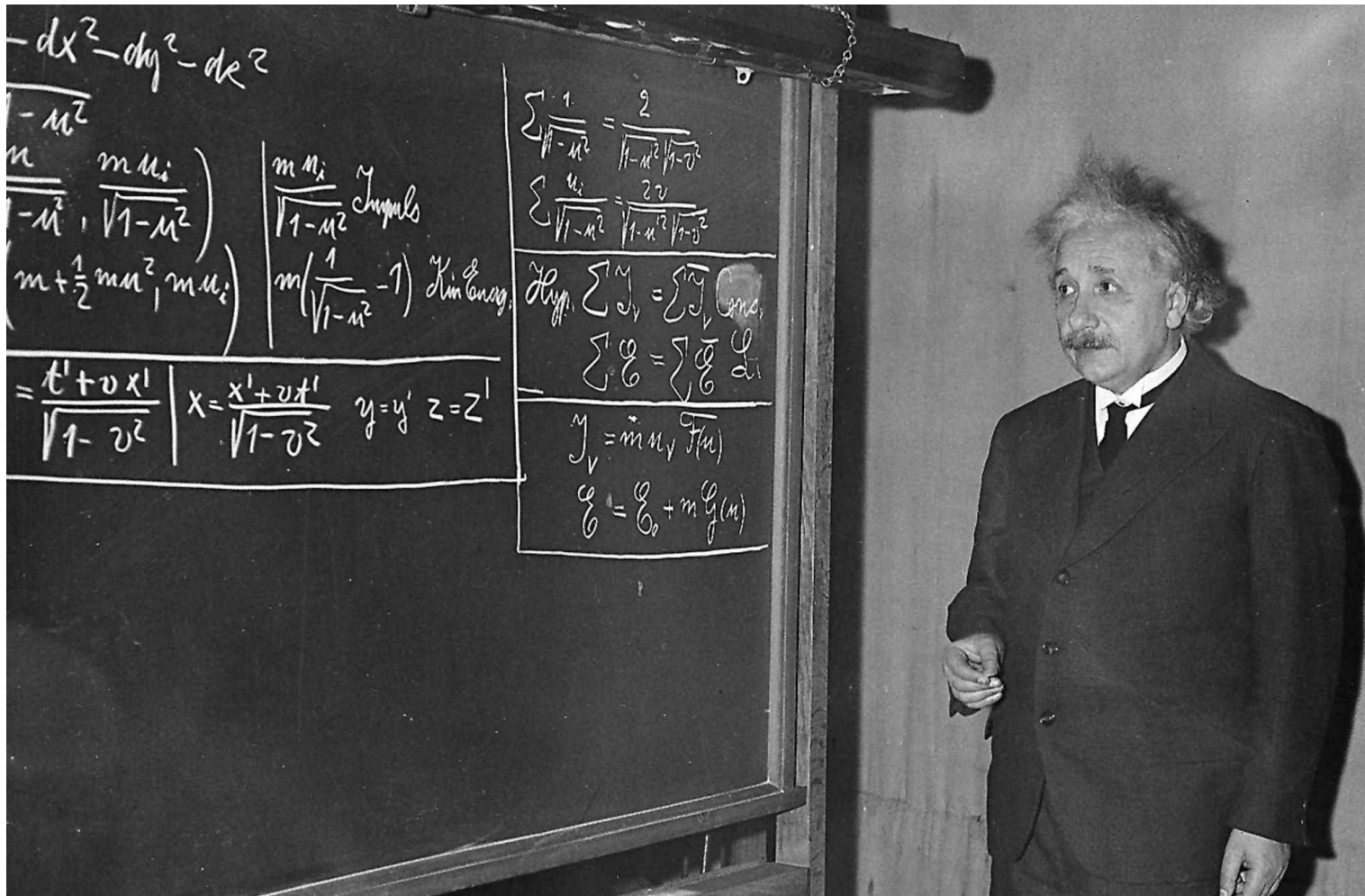
POM v. Coke – What the Court Said (Cont'd)

- Lanham Act to fill in holes within FDA's enforcement regime for false and misleading labels
 - FDA regulatory scheme is really about “health and safety,” not about false advertising
 - FDA does not have time or interest to enforce labeling rules in order to stamp out false advertising
 - Lanham Act is a good tool to enforce false-advertising principles regarding food labels
 - Consumers will benefit
 - Lanham Act and FDCA complement each other and can be harmonized

POM v. Coke – What the Court Said (Cont.)

- Uniformity for national markets
 - POM Opinion: there will always be some variation—disuniformity—whenever individual suits are allowed under federal law.
 - Enforcement of state-law labeling requirements not permitted under 343-1.

POM v. Coke – What Does it Mean?



POM v. Coke – What Does it Mean? (Cont'd)

- How will Lanham Act and FDCA be harmonized?
- Increase in competitor cases?
- Effect on consumer class actions?
- How does *POM* decision inform the day-to-day business of deciding what to say on food labels?

What Will This Lanham Act-FDCA Harmony Sound Like?



What Will This Lanham Act-FDCA Harmony Sound Like? (Cont'd)

- Harmonizing not likely to be nearly so easy as the Court's opinion seems to suggest
 - Where FDA regulations don't specifically address a subject, it should be straightforward
 - Where the FDA permits but does not require a form of labeling, a competitor is free to pursue a false-advertising claim
- Full effect of decision will be felt when competitor suits challenge language mandated by FDA
 - *POM* opinion implies that Lanham Act suits can proceed

Why Might This Harmony Be a Bit Off Key? (Cont.)

- Potential battle between courts and FDA
 - E.g., FDA says X is required; courts say it is forbidden
- In *POM*, government filed amicus brief arguing that Lanham Act liability should be precluded if, but only if, FDA regulations specifically address an issue—Supreme Court expressly rejected the position

A Simple Example of Disharmony

Nutrition Facts			
Serving Size 24 pieces (30g) Children Under 4 - 16 pieces (20g)			
Servings Per Container about 9 Children Under 4 - about 14			
Amount Per Serving	Children Under 4		
Calories	130	90	
Calories from Fat	40	25	
% Daily Value*			
Total Fat 4.5g	7%	3g	
Saturated Fat 1g	5%	1g	
Trans Fat 0g		0g	
Polyunsaturated Fat 1.5g		1g	
Monounsaturated Fat 1g		0.5g	
Cholesterol 0mg	0%	0mg	
Sodium 170mg	7%	115mg	
Potassium 45mg	1%	30mg	
Total Carbohydrate 23g	8%	15g	
Dietary Fiber 1g	4%	Less than 1g	
Sugars 8g		5g	
Protein 1g		1g	
% Daily Value			
Protein		0%	
Vitamin A	0%	0%	
Vitamin C	0%	0%	
Calcium	10%	10%	
Iron	10%	15%	
Zinc	10%	15%	
*Percent Daily Values are based on a diet of 2,000 calories. Your daily values may be higher or lower depending on your calorie needs.			
		2,000	2,500
Total Fat	Less than	65g	80g
Sat Fat	Less than	20g	25g
Cholesterol	Less than	300mg	300mg
Sodium	Less than	2,400mg	2,400mg
Potassium		3,500mg	3,500mg
Total Carbohydrate		300g	375g
Dietary Fiber		25g	30g
INGREDIENTS: UNBLEACHED ENRICHED FLOUR (WHEAT FLOUR, NIACIN, REDUCED IRON, THIAMINE MONONITRATE (VITAMIN B1), RIBOFLAVIN (VITAMIN B2), FOLIC ACID), SUGAR, GRAHAM FLOUR (WHOLE GRAIN WHEAT FLOUR), SOYBEAN OIL, PARTIALLY HYDROGENATED COTTONSEED OIL AND/OR SOYBEAN OIL, CORNSTARCH, COCOA (PROCESSED WITH ALKALI, DEXTROSE, MALTODEXTRIN, CALCIUM CARBONATE (SOURCE OF CALCIUM), BAKING SODA, SALT, SOY LECITHIN, NATURAL AND ARTIFICIAL FLAVOR, DEXTRIN, CONFECTIONER'S GLAZE, CARNAUBA WAX, ZINC OXIDE (SOURCE OF ZINC), REDUCED IRON.			
CONTAINS: WHEAT, SOY.			

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Questions?

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