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Fruit Juice Misbranding Claims Lose Their Lanham Act Bite

"Earth & Table" Law Reporter

Food label lawsuits are often exercises in byzantine legal logic. This is so because of the peculiar interplay between preemptive federal food labeling laws and regulations on the one hand and federal and state unfair competition and false advertising claims on the other.

The ability of individuals to pursue food mislabeling claims depends on whether allowing such claims to proceed would conflict with the purpose and intent of federal food labeling law and implementing regulations, such as those promulgated pursuant to the Food, Drug and Cosmetic Act of 1938 ("FDCA") or the Nutrition Labeling and Education Act of 1990 ("NLEA"). Those federal laws do not allow private lawsuits to enforce their provisions.

In *Pom Wonderful v. The Coca-Cola Co.*, the Court of Appeals for the Ninth Circuit just eliminated a federal Lanham Act basis for pursuing food misbranding claims over regulated juice products. This brief article examines the Pom case and what it means for the future of food label litigation.

The Nature of Pom's Fruit Juice Label Claim

Pom contends that Coca-Cola's labeling of its Minute Maid "Pomegranate Blueberry" juice label is misleading and deceptive because the juice product only contains 0.3% pomegranate juice, 0.2% blueberry juice (and 0.1% raspberry juice). Most of the product consists of 99.4% apple and grape "filler" juices. The brand label prominently displays the "Pomegranate Blueberry" name and features a colorful fruit vignette with a split ripe pomegranate, a sliced apple and a handful blueberries, raspberries and red grapes. The label includes the legend "Pomegranate Blueberry Flavored Blend of 5 Juices." Although not at issue in the case, Minute Maid's label also touts the fortified inclusion of an omega-3 fatty

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acid nutrient, DHA (docosahexaenoic acid), with the tag line of how its inclusion will "help nourish your brain."

Under Pom's theory of the case, the Minute Maid juice should be labeled as a "grape/apple" juice since those ingredients constitutes over 99% of the fruit juice product. Further, the fruit vignette is misleading because the contents are out of proportion with the actual ingredients. To support its claim, Pom developed expert witness survey evidence showing that over a third of those surveyed believed the juice mainly contained pomegranate and blueberry juice—not the miniscule amounts actually included in the product.

No survey evidence appears to test whether consumers can distinctly taste the blueberry and pomegranate flavor notes in the juice. Presumably, Coca-Cola's food engineers carefully devised a pleasing flavor profile for its "Pomegranate Blueberry" juice.

Pom contends that it created the current American market acceptance and demand for pomegranate juice. Because Pom's products are generally made with 100% pomegranate juice, Pom had to invest in pomegranate orchards to source its product consistently and had to educate the consumer marketplace about the potential health benefits of pomegranate juice consumption.[1] Its lawsuit against Coca-Cola and other juice manufacturers is intended to prevent free-riding on the demand Pom created for pomegranate juice through its extensive marketing efforts.

The Ninth Circuit's Reasons for Rejecting Pom's Lanham Act Claim

The *Pom v. Coca-Cola* case required the Ninth Circuit to decide what effect to give to two broad federal statutes—the Lanham Act and the FDCA—when they potentially conflict with each other. Courts are instructed to give as much effect to both statutes as possible. This guiding principle is easy to state, but much harder to apply.

Balancing these principles, the Ninth Circuit barred Pom's federal Lanham Act claim because FDA regulations effectively authorize the name Coca-Cola chose for its Pomegranate Blueberry juice. Under FDA regulations, a manufacturer may use the name of a flavoring juice that is not predominant by volume. *See* 21 C.F.R. 102.33.

Further, the appellate court rejected Pom's contention that the label should be altered so that the words "Pomegranate Blueberry" no longer appear in larger, more conspicuous type than the words "Flavored Blend of 5 Juices." By "extensively regulating the labeling of foods and beverages, the FDCA and its implementing regulations have identified the

words and statements that must or may be included on labeling and have specified how prominently and conspicuously those words and statements must appear." Despite these extensive regulations, "the FDA has not (so far as we can tell) required that all words in a juice blend's name appear on the label in the same size or that words hew to some other standard that Pom might have us impose." In summary, the Ninth Circuit held that the "Lanham Act may not be used as a vehicle to usurp, preempt or undermine FDA authority."

The Ninth Circuit did ***not*** evaluate whether the "Pomegranate Blueberry" label can be considered deceptive and misleading under federal law. Rather, the court panel observed that if "the FDA believes that the [food label] misleads consumers, it can act." In order to "give as much effect to Congress's will as possible, we must respect the FDA's apparent decision not to impose the requirements urged by Pom," keeping in mind "that we lack the FDA's expertise in guarding against deception in the context of fruit juice labeling."

California: The Epicenter of Food Label Lawsuits

While the Ninth Circuit rejected Pom's federal Lanham Act claim, it actually revived Pom's California state law unfair competition and false advertising law claims. They had been dismissed on separate grounds along with the federal Lanham Act claim. Those state law claims were remanded to the California federal district court for further review and consideration.

California is the epicenter of food labeling lawsuits. How did California courts become the preferred venue for food label lawsuit in the first place? The key is California's Sherman Food, Drug and Cosmetic Law. It incorporates language identical to the misbranding laws of the Federal Food, Drug and Cosmetic Act ("FDCA") and associated FDA food labeling regulations.

While private parties cannot pursue food labeling misbranding claims under the FDCA, they can pursue such claims under the Sherman Act if they do not seek to impose labeling requirements above and beyond those provided for under federal law. The fact that federal food labeling laws cannot be enforced by private parties is not disabling under California law.

In re Farm Raised Salmon Cases

The California Supreme Court discusses the interplay between federal food labeling regulations and state law tort claims at length in the *In re Farm Raised Salmon Cases*, a groundbreaking decision that paved the way for many current food label class action lawsuits. The *Farm Raised*

Salmon Cases dealt with the issue of whether grocery stores were violating the Sherman Act (and thus FDA regulations by incorporation) by selling artificially colored farmed salmon without disclosing the use of color additives to their customers. The plaintiffs alleged that the flesh of farm-raised salmon appears grayish without the chemical additives and that consumers believe the color of salmon is an important indication of its origin, quality, freshness and flavor.

The California Supreme Court held that state law consumer protection and false advertising claims can be maintained by private parties so long as they do not seek to impose different labeling requirements on food producers than that articulated under federal food labeling regulations. Thus, the crucial question for "Pomegranate Blueberry" juice label litigation is whether Pom seeking to impose *different* labeling requirements under the guise of state law claims than those explicit requirements set forth in federal food label regulations.

Courts struggle with how to apply a food labeling preemption test. Private plaintiff litigants and their counsel tend to read federal food regulations very aridly and differently than bureaucratic federal regulators. FDA enforcement actions can be halting, ambiguous or non-existent. Yet, in the private litigant world, any perceived deviance from the supposed letter of federal regulations amounts to an extreme form of strict liability for any labeling violation.

Is a Dimwit an Ordinary Consumer?

Labeling class action complaints invariably state that misbranded food products are worthless and must be taken off the store shelves immediately. They sometimes contend that food labels are misleading by employing a "dimwit" consumer as a point of reference. For example, in a class action complaint alleging violations of omega-3 food labeling regulations, the plaintiff alleged that whether a food product label is misleading should be evaluated from the standpoint of the "ignorant, the unthinking, and the credulous, who, when making a purchase, do not stop to analyze."[2]

Whether this "dimwit" consumer purchaser model is the correct standard to apply itself raises an important, threshold preemption question. Under the FDCA, labels should be evaluated from the perspective of "an ordinary individual under customary conditions of purchase and use." *See* 21 C.F.R. 343(f). If state food labeling regulations are really governed by what a "dimwit" understands rather than an ordinary consumer, then California state laws and regulations would appear to be based on a different regulatory scheme than that set forth under the FDCA—hence making the

state law false advertising and unfair competition claims subject to automatic dismissal on preemption grounds.

Analyzing how the California district courts will handle these and other knotty food labeling preemption issues will be a continuing source of discussion in Lane Powell's "Earth and Table" Food Law Reporter—especially since food label litigation appears to be an expanding cottage industry for class action attorneys.

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[1] In a separate FTC lawsuit against Pom, an administrative law judge ruled that Pom could not properly substantiate a number of the health benefits it claims accrue from consuming its pomegranate products. *See* ALJ Initial Decision in *In re Pom Wonderful*, FTC Docket No 9344 (filed May 17, 2012).

[2] *See Ogden v. Bumble Bee Foods, LLC* Complaint, ¶ 8, filed on April 12, 2012, Case No. CV12-01828 (USDC, N.D. Cal.). The quotation is from a case entitled *United States v. El-O-Pathic Pharmacy*,192 F.2d 62, 75 (9th Cir. 1951). The citation is inapt. In fact, the *El-O-Pathic* case did not involve food products at all; rather the case pertained to misbranded "sex hormone" drugs which did not bear adequate instructions for use. The *Bumble Bee Foods* class action complaint itself thus conflates FDA drug cases with food labeling cases. The strained use of FDA drug case citations reflects a certain desperation on the part of class action plaintiff lawyers who apparently feel compelled to cast consumers as hare-brained in order to advance of state law food labeling claim.