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- Counterfeiting
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All Recent Topics ›

Key Features
- Supreme Court Table
- Legislation Table
- Regulation Table
- Hatch-Waxman Table
- Calendar of Events

Law Firms
- Alston & Bird
- Axinn Veltrop & Harkrider
- Bancroft
- Bingham
- DLA Piper
- Finnegan Henderson
- Fish & Richardson
- Fitzpatrick
- Foley & Lardner
- Goodwin Procter
- K&L Gates
- Kaye Scholer
- Kellogg Huber Hansen Todd Evans & Figel
- Kenyon & Kenyon
- Kirkland & Ellis
- Latham & Watkins
- Lathrop & Gage
- Lewis and Roca
- McKool Smith
- Moore & Van Allen
- Morrison & Foerster
- Nelson Mullins
- Patterson Belknap
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- Proskauer
- Quinn Emanuel
- Robbins Russell
- Robins Kaplan Miller & Ciresi
- Willcox & Savage
- WilmerHale

All Law Firms ›

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- Abbott
- Actavis
- Aereo

Previous | Next

Patent, Trademark & Copyright Journal: News Archive > 2014 > 04/25/2014 > News > Supreme Court/Lanham Act: Coke Argues FDCA Preempts Lanham Claim; Justices Reveal Discomfort With Label

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87 PTCJ 1520

Supreme Court/Lanham Act

Coke Argues FDCA Preempts Lanham Claim; Justices Reveal Discomfort With Label

By *Anandashankar Mazumdar*

April 21 — Whether federal food and beverage labeling regulations preempt claims under the federal false advertising law was the question before the U.S. Supreme Court in oral arguments on April 21, but several members of the court reflected some degree of discomfort over the idea that finding preemption would allow Coca-Cola Co. to get away with deceiving consumers regarding the content of its Minute Maid Pomegranate Blueberry juice blend (*Pom Wonderful LLC v. Coca-Cola Co.*, U.S., No. 12-761, *argued* 4/21/14).

BNA Snapshot

Key Development: The U.S. Supreme Court entertains oral arguments in a case over whether the federal food and drug safety laws and regulations preempt any claims under the federal false advertising statute.

Key Takeaway: The court seems to take both sides' arguments about preemption seriously, but several justices express discomfort over the name of a Minute Maid pomegranate blueberry juice blend that is composed of only 0.5 percent pomegranate and blueberry juice by volume.

One justice even went so far as to suggest that Coca-Cola was "cheating" consumers by labeling its juice as "pomegranate blueberry" when very little of those juices made up the content.

The petitioner, the maker of the Pom Wonderful line of juice and juice blends, emphasized, as it has all along, its confidence that it is unfairly losing sales to the Minute Maid product because consumers are misled into believing that Minute Maid Pomegranate Blueberry juice blend is equivalent in content to the more expensive Pom Wonderful Pomegranate Blueberry beverage.

Court Showed Skepticism for Coke's Position

Experts told Bloomberg BNA that the court seemed to be very skeptical of Coca-Cola's argument and revealed a visceral reaction against the idea that food and beverage labeling laws and regulations as promulgated by the Food and Drug Administration could somehow require courts to disregard the common-sense conclusion that consumers were indeed being misled by the Minute Maid label.

"They were really skeptical of this argument that a nationwide uniform standard for labeling required the government to let Coke get out of any reasonable false advertising claim," according to B. Brett Heavner of Finnegan, Henderson, Farabow, Garrett & Dunner LLP, Washington, D.C. "They're really uncomfortable with that and, frankly, I think they're right to be uncomfortable with that."

The position taken by the government was surprising, Heavner said. It allowed for a district court to determine first whether a label was in compliance with the FDA regulations and, if not, then going forward with a potential false advertising claim.

"That seems a little bit strange to me," he said. "That would be a little bit contrary to the idea of preemption."

Under that rubric, however, Coke would still be vulnerable to an attack based on the argument that it really was not in compliance with the FDA's food and beverage labeling regulations.

James D. Crowne of the American Intellectual Property Law Association noted that Pom Wonderful's argument very closely lined up with the position that the AIPLA took in its amicus brief. The preemption argument made by Coca-Cola did not seem well received by teh justices.

"An awful lot of time in that oral argument was spent on trying to come to grips with the inequity of the Ninth Circuit's position that would tolerate such a glaring misrepresentation of what the content of the product was," Crowne said.

He noted that Justice Anthony M. Kennedy at one point even used the word "cheat" to refer to Coke's label. "That was a visceral reaction, but I think that was a visceral reaction that was shared by a lot of the folks on the court," he said.

Along those lines, Peter M. Brody of Ropes & Gray, Washington, D.C., said that "there are certain areas of the law that tend to turn on what was famously called in a Supreme Court obscentity case a 'you know it when you see it' standard."

"I my experience, cases that arise under the Lanham Act—and that includes both false advertising cases as well as

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trademark infringement cases—those cases tend to be you-know-it-when-you-see-it cases and judges tend to react immediately and viscerally. You can make a lot of arguments that are technnical, jurisdictional, and otherwise, but they're going to have a gut reaction."

Brody, as well as Crowne and Heavner, noted several justices' suggestions that the FDA was not equipped to be an all-purpose enforcer when it came to food and beverage labeling. Indeed, Brody said it was "startling," when Chief Justice John G. Roberts Jr. suggested that the FDA—unlike, say the Federal Trade Commission—had no particular expertise on the question of general consumer deception.

Pom Wonderful Objects to Minute Maid Drink

Pom Wonderful LLC of Los Angeles, founded in 2002, sells fruit-based beverages and snacks, many of them including pomegranate juice as a component, such as its pomegranate-blueberry juice blend.

In 2007, soft drink maker Coca-Cola Co. of Atlanta announced its plan to introduce a new pomegranate-blueberry beverage as part of its Minute Maid line of beverages, under the name "Pomegranate Blueberry" or "Pomegranate Blueberry Blend of 5 Juices."

The Minute Maid beverage product is 0.3 percent pomegranate juice, 0.2 percent blueberry juice and 0.1 percent raspberry juice. The remaining 99.4 percent of the volume is made up of apple and grape juices.

Pom Wonderful sued Coca-Cola, alleging false advertising under Section 43(a) of the Lanham Act, 15 U.S.C. §1125(a), as well as unfair competition and false advertising under California state law.

Coca-Cola Wins at District Court Level

Coca-Cola moved for dismissal pursuant to Fed. R. Civ. P. 12(b)(6), alleging that the action impermissibly challenged Food and Drug Administration regulations related to food and beverage labeling. Judge James S. Otero of the U.S. District Court for the Central District of California granted the motion in part, barring all claims that would require the court to interpret FDA regulations. The court also held that the Food, Drug and Cosmetic Act of 1938, 21 U.S.C. §301 et seq., as amended—specifically the provisions deriving from the Nutrition Labeling and Education Act (NLEA), Pub. L. No. 101-535, 104 Stat. 2353—preempted the state law claims to the extent that they imposed any obligations in addition to the FDCA.

Pom Wonderful then amended its complaint to circumvent the preemption issue by adding a misbranding allegation to the state law unfair competition claim. Coca-Cola again moved for dismissal under Rule 12(b)(6). The court denied the motion this time and allowed discovery to proceed in order to determine what conduct specifically was being alleged to have been labeling—and thus sheltered from a Lanham Act challenge—and what conduct did not constitute labeling, but rather advertising or marketing.

Following discovery, the court granted partial summary judgment in favor of Coca-Cola. The court reiterated its conclusion that Pom Wonderful's Lanham Act challenge to the Minute Maid label was barred because of the FDCA. FDA regulations permit a juice manufacturer to identify its beverage with a non-primary ingredient, and thus Coca-Cola was in compliance with the relevant regulations, the court said. As a result, the district court said, Pom Wonderful could not challenge the product's name or its labeling.

The district court then determined that Pom Wonderful lacked standing to assert its state law claims, because it could not show that it was entitled to restitution, a showing that it said was required under the relevant state statute.

The district court concluded that Pom Wonderful's action could proceed only to the extent that it did not challenge the product's name or label. Pom Wonderful conceded that it could not meet its burden as defined by the summary judgment order and the district court entered judgment in favor of Coca-Cola.

Appeals Court Affirms

On appeal, the U.S. Court of Appeals for the Ninth Circuit ruled that the FDCA and the FDA's rules regarding false and misleading food and beverage labels limited claims under the Lanham Act and the district court had appropriately barred the false advertising claim.

However, the appeals court did not rule that it was non-deceptive for Coca-Cola's label to state that the juice was a "Pomegranate Blueberry flavored blend" given that pomegranate and blueberry accounted for only half a percent of the volume of the product. Rather, the court said that the FDA's apparent decision not to take action on the product indicated that the labeling was in compliance with existing labeling regulations.

Thus, the court said, any Lanham Act claims brought by a manufacturer of a competing beverage were barred. Pom Wonderful successfully petitioned the Supreme Court for a writ of certiorari (87 PTCJ 552, 1/17/14).

Pom Emphasizes Deception of Consumers

Seth P. Waxman of Wilmer Cutler Pickering Hale & Dorr LLP, Washington, D.C.—who was U.S. solicitor general from 1997-2001—began his argument for Pom Wonderful by labeling Coca-Cola's juice label "an egregious violation of the law" that "grossly misleads customers, as Coke anticipated."

Waxman also asserted that the label was not, in fact, authorized by the beverage labeling laws and regulations. However, Pom Wonderful's principal argument was that the FDCA did not explicitly preempt the false advertising provisions of the Lanham Act and should not preempt the Lanham Act by implication because both statutes could be given effect.

Specifically, it was quite possible for Coke to comply with requirements under both federal statutes if the FDCA and its accompanying regulations were viewed as merely a "floor" to define the minimum obligations for beverage labeling.

Addressing the objection to the name of the Minute Maid juice only and setting aside for the moment other concerns about the labeling, Justice Elena Kagan noted the arguments that in implementing its beverage labeling regulations, the FDA had gone through a thorough, detailed and extensive rulemaking process that had taken into account not only health and safety concerns, but also concerns about misleading consumers. Thus, according to this argument, the FDA had preempted this particular subject.

However, Waxman said, "we know that that is not, in fact, how the FDA construes its regulation, and we know that because just by examining the FDA's own limited enforcement history."

According to Pom Wonderful, the "misbranding provisions of the FDCA are prohibitions. They are not permissions. And the rules that the FDA has promulgated announce essentially an enforcement forbearance."

Furthermore, Waxman noted that in promulgating the regulations, the FDA said that it would not bring an enforcement action when a juice was named according to its minority components but that it warned "manufacturers that even compliance with this, where there is a small amount of the non-predominant juice name has great capacity to mislead" and that it "encouraged" juice manufacturers to be more specific.

Given this, he said that it was unlikely that Congress intended to preempt the federal false advertising law in a case like the instant one.

Justice Samuel A. Alito Jr. asked what would have happened in a situation in which the FDA, concerned about a hypothetical allergy to pomegranate or blueberry, were to mandate that the label disclose those ingredients.

"That's the kind of judgment that we want the FDA to make, because the purpose of the FDCA is to protect public health and safety," Waxman replied. However, that would not change the question of whether the name or the label as a whole was misleading.

"What's misleading consumers here is that they have no way on God's green earth of telling that the total amount of blueberry and pomegranate juice in this product can be dispensed with a single eyedropper."

—Seth P. Waxman, counsel for petitioner

"What's misleading consumers here is that they have no way on God's green earth of telling that the total amount of blueberry and pomegranate juice in this product can be dispensed with a single eyedropper," he said. "It amounts to a teaspoon in a half gallon."

Justice Anthony M. Kennedy then turned to the question of explicit preemption. The labeling statute, 21 U.S. Code §343-1, explicitly prohibits states from establishing their own food and beverage labeling laws.

However, Waxman asserted that Pom Wonderful's claim—if it had been brought purely under state, as opposed to federal, law—would still not have been preempted.

"Not only is it parallel to the misbranding provision, but the provision that it's parallel to is not preempted," Waxman said.

Government: Some Aspects of Claim Should Be Heard

Melissa Arbus Sherry of the Office of the U.S. Solicitor General, Washington, D.C., then rose to give the government's argument, in support of neither party. According to the government, the FDA's regulations regarding naming did in fact preempt a Lanham Act claim over the name.

"The purpose of that is to have some form of standardization so that when a consumer goes to a marketplace to purchase a particular product, it knows what is going to be in the product," Sherry said. "The idea being by allowing manufacturers to choose to name their juice product based on the juice that flavors the product as opposed to based on the juice that is predominant by volume, that consumers will come to understand that when a juice says 'pomegranate and blueberry flavored,' what it means is that the juice is present as a flavor."

To the extent that Pom Wonderful was claiming that the 0.5 percent of pomegranate and blueberry juices was not enough even to flavor the Minute Maid juice was a question of fact that had not been resolved, Sherry said.

Justice Sonia M. Sotomayor then asked whether it was the government's position that a federal district court would be authorized to determine whether a label was in compliance with the FDCA and FDA regulations and then based on that determine whether a Lanham Act claim could go forward.

"That's correct," Sherry replied.

However, Kennedy expressed discomfort about what seemed to be the government's position that "if the label is specifically authorized, then the Lanham Act is precluded, but if the FDCA has simply failed to forbid it then it's not."

"Because if it is, I think it's very hard to work with," he said.

Sherry, however, said that such a structure should not be "difficult to work with."

Moving beyond simply the name of the product, however, Sherry said that the government was not taking the position that the overall labeling of the Minute Maid product was generally immune to an attack through the Lanham Act.

"When we talk about the label more generally, we mean how those words are presented on the label and other aspects of the label," she said.

Echoing an exchange from Waxman's presentation, Chief Justice John G. Roberts Jr. asked whether the FDA had considered consumer confusion in promulgating its labeling regulations.

"It absolutely took into account consumer confusion," she replied. "There were comments with respect to this particular regulation, and the commenters were consumers saying that they were concerned that they were being misled with respect to the juice content."

"What does the FDA know about that? I mean, I would understand if it was the FTC or something like that, but I don't know that the FDA has any expertise in terms of consumer confusion apart from any health issues."

—Chief Justice John G. Roberts Jr.

"What does the FDA know about that?" Roberts asked. "I mean, I would understand if it was the FTC or something like that, but I don't know that the FDA has any expertise in terms of consumer confusion apart from any health issues."

Kagan brought back the question of treating the FDA regulations as a floor, rather than as a ceiling, for beverage labeling.

"There is no irreconcilable conflict if we view what the FDA has done as just setting a floor," Kagan said. She wondered whether the complexity of the process that the FDA had engaged in was the evidence that the FDA regulations were not just a floor, but a ceiling.

"No," Sherry replied. "I think you look to whether or not allowing the claim to go forward would complement what the agency has done or would actually conflict with what the agency has done. And here, we think there is a real conflict."

"Well, I guess I don't understand that," Kagan said. "Why wouldn't it complement? You've said 'here is the floor to make it not misleading, but we are not saying that there are some things that wouldn't mislead a lot of consumers

anyway,' and then the Lanham Act can come in and supplement that and really put us in a position where nothing is misleading at all."

Sherry replied that the FDA had considered this matter and found that it made sense to allow the label to be connected to the flavor rather than the content by volume of the juice.

> ***"You don't think there are a lot of people who buy pomegranate juice because they think it has health benefits and they would be very surprised to find when they bring home this bottle that's got a big picture of a pomegranate on it and it says 'pomegranate' on it, that it is less than one-half of one percent pomegranate juice? The FDA didn't think that would mislead consumers?"***
>
> ***—Justice Samuel A. Alito Jr.***

Alito then asked, "You don't think there are a lot of people who buy pomegranate juice because they think it has health benefits and they would be very surprised to find when they bring home this bottle that's got a big picture of a pomegranate on it and it says 'pomegranate' on it, that it is less than one-half of one percent pomegranate juice? The FDA didn't think that would mislead consumers?"

Sherry agreed that beyond the question of the name, the Lanham Act should be applicable to evaluation this question.

Coke: Federal Preemption Implied

Kathleen M. Sullivan of Quinn Emanuel Urquhart & Sullivan LLP, New York, arguing for Coca-Cola, began by stating that Pom Wonderful's claim would be preempted had it been only a state law claim, and it indeed should be preempted as a federal law claim, by implication.

"Our position is that were these claims that Pom is making brought as state law claims, they would be expressly preempted, and it cannot be that Congress meant to preempt these claims if brought as state law claims" but nevertheless allow them to go forward as federal claims.

"Well, why can't it be? There are plenty of statutes which say you can't bring state law or federal law claims. Congress knows how to do that," Kagan said. "They just say 'no claims' or 'notwithstanding any law to the contrary.'?"

Sullivan then alluded to arguments made in the past by Kagan herself that a more specific statute can narrow a more general statute.

Justice Ruth J. Bader Ginsburg then asked for an example "where Congress precluded some state claims and said nothing at all about federal laws in which this court has held that the express preclusion of state law claims implicitly precluded federal claims?"

Sullivan admitted that there was no such Supreme Court decision, but that there had been several railroad safety law decisions along these lines at the appeals court level that had not been contradicted.

According to Sullivan, part of the essential purpose of the NLEA was to create a single, uniform standard for food labeling with only a single source—the FDCA and the FDA—for the final word.

> ***"Is it part of Coke's narrow position that national uniformity consists in labels that cheat the consumers like this one did?"***
>
> ***—Justice Anthony M. Kennedy***

Kennedy then interrupted with a question that revealed his feelings about the Minute Maid label: "Is it part of Coke's narrow position that national uniformity consists in labels that cheat the consumers like this one did?"

Sullivan countered by stating that Kennedy was reaching a conclusion of fact that was not supported by the record, but Kennedy would not be put off.

"I think it's important for us to know how the statutes work," he said. "And if the statute works in the way you say it does and that Coca-Cola stands behind this label as being fair to consumers, then I think you have a very difficult case to make. I think it's relevant for us to ask whether people are cheated in buying this product. Because Coca-Cola's position is to say even if they are, there's nothing we can do about it."

Sullivan confirmed that the aspects of the label being challenged by Pom Wonderful had not been changed. However, she said that it was in compliance with the FDCA and the FDA regulations.

Ginsburg then suggested that "the two acts are serving different purposes."

"The law that you are relying on is supposed to be concerned with nutritional information and health claims," not whether a competitor "is losing out because of the deception. The consumer is able to buy the Coke product much cheaper and the Pom product costs more; the consumer thinks that they are both the same, so they'll buy the cheaper one."

Sullivan again denied that the FDA regulations were solely concerned with health and safety and that it had indeed taken consumer confusion into account. The FDA had authorized the use of this type of labeling, she said.

"It's an authorization," Sotomayor agreed. "And that's where I'm having a little bit of difficulty, because it's not that you have to use this name. You're permitted to use this name under their regulations. But why are you permitted to use it in a misleading way?"

"I need to make very clear that we believe that under the FDCA and the FDA regulations, Coke's label is as a matter of law not misleading." Sullivan replied.

Regard the question of preemption, Roberts asked "I don't know why it's impossible to have a label that fully complies with the FDA regulations and also happens to be misleading on the entirely different question of commercial competition, consumer confusion that has nothing to do with health."

"What Congress wanted was national uniformity so that a manufacturer could print one label and sell in the 50 states and not have its juice legal when you leave on the flight in California and illegal when you land in D.C.," Sullivan replied.

However, the Lanham Act applies nationally, Kennedy said.

> ***"You want us to write an opinion that said that Congress enacted a statutory scheme because it intended that no matter how misleading or how deceptive a label it is, if it passes the FDA, there can be no liability? "***

"You want us to write an opinion that said that Congress enacted a statutory scheme because it intended that no matter how misleading or how deceptive a label it is, if it passes the FDA, there can be no liability? That's what you want us to say?" Kennedy asked.

Sullivan said that it was the FDA that defined what "misleading"

> ***—Justice Anthony M. Kennedy***

meant. Without that deference to the FDA, she said that there would be "a logistical nightmare that you have to change your label in response to every jury verdict."

"Suppose the reality is that consumers are misled," Ginsburg suggested.

In such a case, the proper course would be for Pom Wonderful to go to the FDA and petition it to alter its regulations.

However, she asserted that allowing a juice to be named according to its flavor, rather than according to its predominant content, was not misleading: "Why? Because we don't think that consumers are quite as unintelligent as Pom must think they are. They know when something is a flavored blend of five juices."

> ***"Don't make me feel bad because I thought that this was pomegranate juice."***
> ***—Justice Anthony M. Kennedy***

> ***"He sometimes doesn't read closely enough."***
> ***—Justice Antonin G. Scalia***

"Don't make me feel bad because I thought that this was pomegranate juice," Kennedy said.

Amid the ensuing laughter in the court room, Justice Antonin G. Scalia quipped, "He sometimes doesn't read closely enough."

Both Ginsburg and Kennedy then expressed reservations about leaving the issue of deceptive labeling or consumer confusion entirely in the hands of the FDA, which might not have the resources to add that to its health and safety responsibilities.

"In the real world, the FDA has a tremendous amount of things on its plate, and labels for juices are not really high on its list," Ginsburg said.

And this issue might be important to understanding Congress's intent with regard to the balance between the FDCA and the Lanham Act, Kennedy said.

Justice Stephen G. Breyer recused himself from this matter.

For More Information

Crowne is a former managing editor of this publication and a current member of its board of advisors.

The transcript of the oral argument is available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-761_8m58.pdf.

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