

# Advertising and Food Alert: The Food, Drug, and Cosmetic Act Does Not Shelter a Beverage Company from Claims of Deceptive and Misleading Food and Beverage Labeling and Advertising

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On June 12, 2014, the Supreme Court, in an 8-0 ruling, held in *POM Wonderful LLC v. Coca-Cola Co.* that a competitor may sue another under the Lanham Act for unfair competition because of false or misleading food and beverage labeling and advertising even when that labeling and advertising otherwise meet the requirements of the Federal Food Drug and Cosmetic Act ("FDCA").

POM is a well-known producer of pomegranate juice. In fact, it may have created the market for pomegranate juice in the United States. Among its products, POM markets and sells a pomegranate-blueberry juice. Coca-Cola, through its Minute Maid Brand, is one of POM's main competitors in the pomegranate-blueberry juice market. But Coca-Cola's pomegranate blueberry juice consisted of 99.4% apple and grape juices, 0.3% pomegranate juice, 0.2% blueberry juice, and 0.1% raspberry juice. Despite that ratio, Coca-Cola prominently displayed the words "POMEGRANATE BLUEBERRY" on its pomegranate-blueberry juice's label. It included disclosures about the other juices in much smaller type on the label. Due to the contents of the label, POM sued Coca-Cola under the Lanham Act, alleging Coca-Cola's label was misleading. Coca-Cola contended that because its label met all content and labeling requirements of the FDCA, it was not false or misleading. Affirming a District Court ruling in favor of Coca-Cola, the Ninth Circuit Court of Appeals ruled that the food and labeling requirements of the FDCA precluded private lawsuits under the Lanham Act.

The issue before the Supreme Court was whether the FDCA displaces the Lanham Act with respect to charges of food and beverage mislabeling. The Supreme Court rejected the lower courts' reasoning. It began its analysis with the plain text of both the Lanham Act and FDCA. It found that the FDCA did not expressly preclude private parties' claims under the Lanham Act; nor did the Lanham Act expressly limit itself to claims outside the Food and Drug Administration (FDA)'s regulatory oversight.

The Supreme Court then turned its attention to the congressional intent behind both statutes. Congress could have enacted a provision in the FDCA that gave the FDA sole power and authority to ensure proper food and beverage labeling. It did not. According to Justice Kennedy, the failure to grant such powers to the FDA is "powerful evidence" that Congress never intended for the FDA to have exclusive oversight over ensuring lawful food and beverage labeling.

Coca-Cola argued that Congress intended national uniformity in food and beverage labeling. In its view, permitting Lanham Act claims would adversely affect such uniformity. But the Court was not persuaded. It noted that the FDCA only preempts inconsistent state law. While some variations in outcome may result from permitting such private causes of action, in the view of the Court, "this is the means Congress chose to enforce a national policy to ensure fair competition."

Finally, the Court dismissed the argument of the federal government that the Lanham Act was precluded to the extent that the FDCA or FDA regulations specifically require or authorize the challenged portions of the label (i.e., the name of the product). Again, the Court was not impressed, holding that the two statutes complement one another and could be applied consistently.

The *POM Wonderful* decision may be good news to some, and troubling news to others. For companies seeking to address a competitor's false food and beverage labeling, it is now clear they may assert such claims under the Lanham Act. Their competitor cannot use the FDCA as a shield to food and beverage mislabeling claims brought by private parties under the Lanham Act.

As a result of the decision, food and beverage companies must:

1. Ensure that their labeling accurately reflects the product's ingredients; and
2. Avoid using labeling or advertising as a means to prop up the quality or quantity of a certain ingredient in a product in a manner that is false or misleading.

These companies should take proactive steps and install comprehensive labeling controls to ensure their labeling fully complies with the law as clarified by the Supreme Court. New labeling controls act as the necessary safeguard against Lanham Act claims by private parties. Failure to implement new labeling controls may expose the company to liability under both acts.

Gray Plant Mooty is a full-service law firm with specialized practices in food and agribusiness and intellectual property. Contact **Phillip Kunkel** or **Sheldon Klein** if you have any questions about this alert.