Regulation of Beverage Names: May Competitor Challenge Beverage Name Basedon on Lanham Act?

Pom Wonderful LLC v. The Coca-Cola Company, 679 F.3d 1170 (9th Cir. 2012), cert. granted January 10, 2014

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This beverage contains 99.4% apple and grapejuices. The plaintiff, Pom Wonderful LLC ("Pom Wonderful"), produces acompeting product containing only pomegranate juice and blueberry juice. PomWonderful sued Coca-Cola under Section 43(a) of the Lanham Act, alleging thatthe prominent use of "pomegranate blueberry" on the label of such a beverage wasdeceptive. It was apparently uncontested that the MINUTE MAID brand beveragelabeling was in compliance with Food and Drug Administration ("FDA")regulations on juice beverage labeling, which state that the manufacturer mayname a beverage using the name of a flavoring juice that is not the predominantjuice by volume in the beverage. (21 C.F.R . Section 102.33(c), issued by theFDA under authority granted by the Federal Food, Drug and Cosmetic Act("FDCA"), to regulate food and beverage labeling, including to police labelingwhich is false or misleading, 21 U.S.C. Section 343(a)(1)). The contested labelalso disclosed the actual juices in the beverage.

The case was brought before Judge S. James Oteroof the United States District Court for the Central District of California, whogranted Coca-Cola's motion to dismiss the complaint for failure to state aclaim (727 F. Supp. 2d 849 (2010)). Thisdecision was affirmed by the United States Court of Appeals for the Ninth Circuit, which held that the intent ofCongress was to comprehensively regulate the field of beverage labeling bygiving the FDA sole authority; accordingly, the plaintiff could not seekto impose more stringent standards of labeling via a claim under the LanhamAct. Such a result, according to thecourt, would "undermine the FDA's regulations and expert judgments," and "ifthe FDA believes that more should be done to prevent deception, or thatCoca-Cola's label misleads consumers, it can act." Neither party challenged prior settled lawthat the plaintiff did not have a private right of action to enforce the FDCAor to compel the FDA to make a specific determination as to whether the labelat issue was deceptive. The court notedthat the FDA could have acted under its policing authority against thisparticular label, but apparently chose not to do so. In so ruling, the court was also careful tostate that mere compliance with the FDCA or with FDA regulations would notalways, or even usually, insulate a defendant from liability under the LanhamAct. The court also held – an issue apparently not on review to the SupremeCourt – that the FDCA and FDA regulations may preempt false advertising claimsbrought by the plaintiff under Californiastate law, and sent the case back to the trial court to make a determination onthat issue. The lower (district) courthad not ruled on preemption because it dismissed the state claims on atechnicality about standing.

The question now before the United StatesSupreme Court is whether a private party can bring a Lanham Act deceptivelabeling claim challenging a product label already regulated, as to possibledeceptiveness, under the FDCA.

A broadly worded Supreme Court decision could have wide-ranging effects on the rights of plaintiffs seeking to bring Lanham Act deceptiveness claims in the areas of food, beverages, cosmetics and pharmaceuticals, all regulated by the FDA. The practical significance of the Supreme Court decision, however, may be limited by the existing high level of FDA regulation in some product areas. FDA regulation of advertising and labeling claims for prescription drugs, for example, is generally perceived as quite stringent, so potential plaintiffs in that field might not believe that a court (even if it could in a Lanham Act claim) would hold a competitor of the plaintiff to a higher standard than would the FDA. It may also be interesting to see whether the Supreme Court will weigh the FDA's theoretical authority to act, versus the FDA's practical ability to act, against food or beverage labeling that might only be

borderline misleading. The plaintiff in this case may well argue that the FDA may not act in many worthwhile cases due to budget constraints, creating an enforcement gap that should be filled by private claims under the Lanham Act. A Bloomberg news service report on the case quoted the plaintiff as stating that the Ninth Circuit's ruling "undermines the transparency that health-conscious consumers rightly expect so that they can make informed decisions about what they eat and drink." Clearly this decision will be anticipated with great interest for companies in these important industries.

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