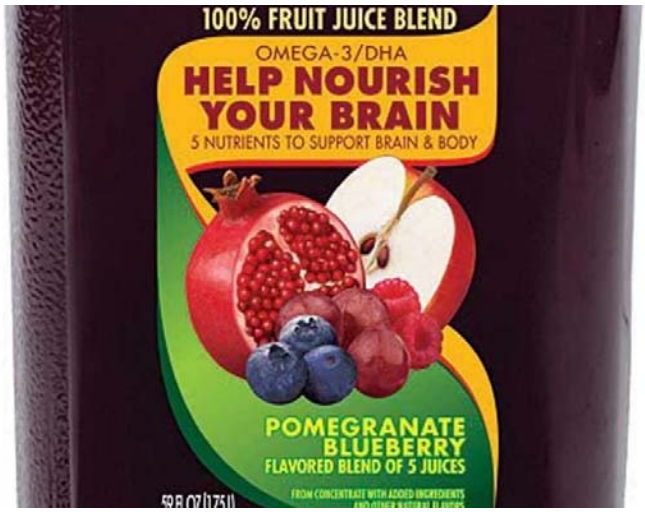
Supreme Court Permits Competitor False Advertising Suits to Proceed Under Lanham Act Despite FDA Regulation

June 12, 2014

by Phillip Barengolts, Partner

Today, the Supreme Court provided competitors with a powerful new tool to combat potentially false and misleading statements on food and beverage labels, or any other FDA regulated materials – a cause of action for false advertising under the Lanham Act. The unanimous opinion[1] in *POM Wonderful LLC v Coca-Cola Co.*, Slip Op. No. 12-761, 573 U.S. _ (2014)[2], specifically permits POM to proceed with its false advertising claim that Coca-Cola's MINUTE MAID juice, which contains 99.4% apple and grape juice, .3% pomegranate juice, .2% blueberry juice, and .1% raspberry juice, but displays the words "pomegranate blueberry" in all capital letters (as shown below), misleads consumers, overruling the Ninth Circuit's ruling to the contrary.



[1] Justice Breyer did not participate in considering this case.

[2] Read the entire opinion here: http://www.supremecourt.gov/opinions/13pdf/12-761_6k47.pdf.

PATTISHALL McAULIFFE NEWBURY HILLIARD & GERALDSON LLP ◦ 200 South Wacker Drive, Suite 2900 ◦ Chicago, IL 60606-5896 ◦ T (312) 554-8000 ◦ F (312) 554-8015 ◦ www.pattishall.com

The key issue before the Court was whether The Federal Food, Drug, and Cosmetic Act (FDCA), which regulates labeling of food and beverages, among other things, precludes[3] a false advertising claim over an FDCA-compliant label. The FDCA prohibits false or misleading labeling. 21 U.S.C. § 343(a). The FDCA does not allow private parties to enforce its provisions through a lawsuit. 21 U.S.C. § 337. Here, Coca-Cola complied with the Food and Drug Administration (FDA) requirements for juice labeling. 21 CFR § 102.33(d).

Both the district court and the Ninth Circuit had ruled in Coca-Cola's favor, essentially finding that since the FDA did not impose label requirements as stringent as those sought by POM through its lawsuit, then POM should not have a private right of action to impose such requirements under the Lanham Act. The Court, however, found that the "FDCA, by its terms, does not preclude Lanham Act suits." Slip Op. at 9. Furthermore, the Court noted that when Congress enacted the preemption provisions of the FDCA, "if anything [Congress] indicated it did not intend the FDCA to preclude requirements arising from other sources" and that "pre-emption of some state requirements does not suggest an intent to preclude federal claims." Slip Op. at 11, *citing Setser v. U.S.*, 566 U.S. __, __ (2012) (slip op., at 6-7).

Ultimately, the Court chose to read the Lanham Act and FDCA as complements – one protecting against unfair competition, the other protecting public health and safety. Slip Op. at 11. Indeed, the Court noted that "[a]llowing Lanham Act suits takes advantage of synergies among multiple methods of regulation." *Id.* at 12. This decision will have consequences for companies in regulated industries – especially those in the food and beverage fields – because, before placing products into the marketplace, they will now need to review labels and statements both to assure compliance with FDA regulations and in light of Lanham Act principles to avoid competitor suits.

* * *

Phillip Barengolts is a partner with Pattishall, McAuliffe, Newbury, Hilliard & Geraldson LLP, a leading intellectual property law firm based in Chicago, Illinois. Pattishall McAuliffe represents both plaintiffs and defendants in trademark, copyright, trade secret and unfair competition trials and appeals, and advises its clients on a broad range of domestic and international intellectual property matters, including brand protection, Internet, and e-commerce issues. Mr. Barengolts' practice focuses on litigation, transactions, and counseling in domestic and international trademark, trade dress, unfair competition, trade secret, Internet, and copyright law. He teaches trademark and copyright litigation at John Marshall Law School, and co-authored Trademark and Copyright Litigation, published by Lexis Publishing.

[3] This is not a preemption case – preemption addresses the situation when state and federal laws conflict. The Court made sure to point this out in its opinion. The FDCA does preempt certain state laws on misbranding. 21 U.S.C. §343-1(a).