PATTISHALL insights

Join us on LinkedIn https://www.linkedin.com/company/pattishall-mcauliffe

OCTOBER 2014

Check That Label. And Then Check It Again: False Advertising Claims After *Pom Wonderful v. Coca-Cola*

By Elisabeth K. O'Neill

> "THE SUPREME COURT HAS OPENED THE DOOR FOR CHALLENGING MISLEADING LABELS BY PRIVATE COMPETITORS, LIKE POM, UNDER THE LANHAM ACT."

In its June 12, 2014 decision in *POM Wonderful LLC v Coca-Cola Co.*, the Supreme Court provided competitors with a powerful new tool to combat false and misleading statements on food and beverage labels, or any other FDA regulated materials – a private cause of action for false advertising under the Lanham Act. Justice Kennedy, writing for the unanimous Court[1], addressed the interplay between two federal statutes – the Food, Drug, and Cosmetic Act and the Lanham Act – and determined that they "complement each other in the federal regulation of misleading food and beverage labels. Competitors, in their own interest, may bring Lanham Act claims … that challenge food and beverage labels that are regulated by the FDCA." 134 S.Ct. 2228, 2233 (2014).

The long-fought battle between POM Wonderful LLC, a grower of pomegranates and distributor of pomegranate juice, and the Coca-Cola Company, which distributes fruit juices through its Minute Maid® division, began in 2008. POM sued Coca-Cola for false advertising under the Lanham Act and false advertising and unfair competition under California law. *See POM Wonderful LLC v. Coca-Cola Co.*, 2009 WL 6254619, at *1 (C.D. Cal. Sept. 15, 2009). POM alleged that purchasers of Coca-Cola's Minute Maid® Enhanced Pomegranate Blueberry Flavored 100% Juice Blend "are likely to be misled and deceived by Coca Cola's ... labeling, marketing and advertising, which damages not only the consuming public, but also POM as Coca Cola's competitor." *Id.* Coca-Cola argued that, through its claims, POM was trying to circumvent the FDCA's denial of a private right of action, and impermissibly to challenge the FDCA's labeling requirements. *See POM Wonderful LLC v. Coca-Cola Co.*, 2009 WL 7050005, at *1 (C.D. Cal. Feb. 10, 2009) . Eventually, both the district court and the Ninth Circuit ruled in Coca-Cola's favor, essentially finding that since the FDA did not impose label

1. Justice Breyer did not participate.

requirements as stringent as those sought by POM through its lawsuit, then POM should not have a private right of action to seek judicial imposition of such requirements under the Lanham Act.

The Supreme Court reversed the Ninth Circuit's ruling, and permitted 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, misleads consumers.

The key issue before the Court was whether The FDCA, which regulates labeling of food and beverages, among other things, precludes a false advertising claim over an FDCA-compliant label. It is worth noting – and the Court devotes part of the opinion to this point – that this is not a preemption case. Preemption addresses the situation when state and federal laws conflict. "This case, however, concerns the alleged preclusion of a cause of action under one federal statute by the provisions of another federal statute. So the state-federal balance does not frame the inquiry." *POM Wonderful*, 134 S. Ct. at 2236. The FDCA does preempt certain state laws on misbranding. 21 U.S.C. §343-1(a). The Court found, however, that the "FDCA, by its terms, does not preclude Lanham Act suits." *Id.* at 2237. Furthermore, the Court noted that when Congress enacted the preemption provisions of the FDCA, "by taking care to mandate express pre-emption of some state laws, Congress if anything 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." *Id.* at 2238, citing *Setser v. U.S.*, 132 S.Ct. 1463, 1469-70 (2012).

> "ULTIMATELY, THE COURT CHOSE TO READ THE LANHAM ACT AND FDCA AS COMPLEMENTS PROMOTING COMPATIBLE GOALS – ONE PROTECTING AGAINST UNFAIR COMPETITION, THE OTHER PROTECTING PUBLIC HEALTH AND SAFETY."

Ultimately, the Court chose to read the Lanham Act and FDCA as complements promoting compatible goals – one protecting against unfair competition, the other protecting public health and safety. The FDCA is enforced administratively by the federal government, and the Lanham Act by private parties through civil actions in federal court. The Court opined:

> Unlike other types of labels regulated by the FDA, such as drug labels, it would appear the FDA does not preapprove food and beverage labels under its regulations and instead relies on enforcement actions, warning letters, and other measures. Because the FDA acknowledges that it does not necessarily pursue enforcement measures regarding all objectionable labels, if Lanham Act claims were to be precluded then commercial interests—and indirectly the public at large—could be left with less effective protection in the food and beverage labeling realm than in many other, less regulated industries. It is unlikely that Congress intended the FDCA's protection of health and safety to result in less policing of misleading food and beverage labels than in competitive markets for other products.

POM Wonderful, 134 S. Ct. at 2239. In other words, the Supreme Court has opened the door for challenging misleading labels by private competitors, like POM, under the Lanham Act. The facts of the case and the Court's ruling addresses food and beverage labels, but companies in all regulated industries would be wise to examine their current labeling practices to assure compliance not only with FDA regulations but also with Lanham Act principles to avoid competitor suits. ■

*firm*UPDATE

APPOINTMENTS

Seth I. Appel

Seth has been appointed to the Membership Committee of the Copyright Society of the U.S.A.

Jonathan S. Jennings

The American Bar Association Section of Intellectual Property has appointed Jonathan as its Liaison to the ABA's Forum on Franchising.

The Public Interest Law Initiative (PILI) has appointed Jonathan as a Director of its pro bono legal services organization.

Robert W. Sacoff

The ABA Section of Intellectual Property Law has appointed Bob as the Section's liaison to Zurich-based AIPPI, the International Association for the Protection of Intellectual Property, for 2014-2015.

PRESENTATIONS

Robert W. Sacoff

Bob spoke on "Survey Evidence in Trademark Litigation" at the AIPPI World Congress in Toronto on September 16th. As reported in the *AIPPI Congress News*, he compared and contrasted judicial attitudes in the U.S., U.K., and Canada as to the respective roles of survey evidence and the judge's personal views and experience.

PUBLICATIONS

Trademarks and Unfair Competition

David C. Hilliard, **Joseph N. Welch II** and **Uli Widmaier** have published the Tenth Edition of their law school text book on "Trademarks And Unfair Competition." Published by LexisNexis, the book is used in over fifty law school courses nationally.

NOTEWORTHY

Lawyers for the Creative Arts

Pattishall McAuliffe is proud to sponsor Lawyers for the Creative Arts at its Annual Benefits Luncheon on Thursday, October 23, 2014 at the Palmer House Hilton in Chicago, Illinois. This year, LCA will celebrate 42 years of providing *pro bono* legal services to artists and arts organizations financially unable to retain legal counsel. Special thanks to recent volunteers, **Phil Barengolts**, **Paul A. Borovay**, **Jessica A. Ekhoff** and **Jonathan S. Jennings**.

Martindale-Hubbell AV® Preeminent Rating

Ashly Iacullo Boesche has recently been received an AV® Preeminent rating from the Martindale-Hubbell Bar Directory. Other AV®-Rated Pattishall lawyers include **Brett A. August**, **Thad Chaloemtiarana**, **David C. Hilliard**, **Jonathan S. Jennings**, **Robert M. Newbury**, **Robert W. Sacoff** and **Joseph N. Welch II**.

NOTEWORTHY

The Legal 500 United States

"Niche Chicago-based firm **Pattishall, McAullife, Hilliard & Geraldson LLP** has a solid reputation for its thought leadership and expertise on trademark litigation matters.

Trial lawyer, **Phillip Barengolts'** key clients include PepsiCo, and he also recently represented Bayer in appealing a trademark dispute against Aceto Agricultural Chemical regarding the client's Proline-branded pesticide product. Barengolts also acted for plaintiff Fortres Grand in appealing its case against Warner Brothers Entertainment for claims that a fictional computer program in *The Dark Knight Rises* movie infringes the client's software trademark and caused consumer confusion.

Senior partner **David C. Hilliard** has a longstanding track record of trial and appellate level matters.

Jonathan S. Jennings has experience in grey market goods-related cases and **Janet A. Marvel** handles anti-counterfeiting work."

firm HONORS & AWARDS

2014 Guide to the World's Leading Trade Mark Lawyers

Robert W. Sacoff has been recognized as one of the World's Leading Trademark Lawyers.

American Lawyer Media and Martindale-Hubbell

Brett August, **David C. Hilliard**, **Jonathan S. Jennings**, **Robert M. Newbury**, **Robert W. Sacoff** and **Joseph N. Welch II** were selected as "2014 Top Rated Lawyers in Intellectual Property Law."

Chicago Best Lawyers, 21st Edition

Robert M. Newbury was honored as the Chicago Litigation-Intellectual Property, Patent Law and Trademark Law "Lawyer of the Year."

David C. Hilliard was honored as a "Best Lawyer" in Intellectual Property and Trademark Law.

PATTISHALL
MCAULIFFE
NEWBURY
HILLIARD &
GERALDSON LLP

200 South Wacker Dr.
Suite 2900
Chicago IL 60606-5896

312.554.8000 | pattishall.com | twitter.com/pattishall