FDA Labeling Regulations Do Not Necessarily Bar Unfair Competition Claim

June 12, 2014

On June 12, 2014, the United States Supreme Court, reversing a decision by the Ninth Circuit, held that the labeling regulations promulgated by the Food and Drug Administration ("FDA") did not prevent POM Wonderful LLC ("POM") from suing Coca-Cola Co. ("Coca-Cola") for the alleged false and misleading advertisement of the latter's consumer juice product. *POM Wonderful LLC v. Coca-Cola Co.*, 573 U.S. __, No. 12-761 slip op. at 2 (June 12, 2014).

POM is a grower of pomegranates and sells a variety of juices and juice blends incorporating pomegranates, including a pomegranate blueberry blend. Coca-Cola, through its Minute Maid subsidiary, sells a juice blend prominently described as "pomegranate blueberry," the contents of which include 99.4% apple and grape juice, .03% pomegranate juice, and 0.2% blueberry juice.

POM sued Coca-Cola claiming, among other things, that Coca-Cola's label "misled consumers into believing that the product consisted predominately of pomegranate and blueberry juice." Slip op. at 6. "That confusion," POM complained, "caused it to lose sales." *Id.* POM sought an award of damages and injunctive relief based on Coca-Cola's alleged violation of Section 43 of the Lanham Act. 15 U.S.C. § 1125.

When it enacted the Lanham Act in 1946, Congress stated as its intent "'to regulate commerce . . . by making actionable the deceptive and misleading use of [trade]marks . . .[and] to protect persons engaged in such commerce against unfair competition . . . .'" Slip op at 2-3 (quoting 15 U.S.C. § 1127). The Lanham Act provides "a federal remedy that 'goes beyond trademark protection'" and "creates a cause of action for unfair competition through misleading advertising or labeling." Slip op. at 3 (quoting *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 29 (2003). "Though in the end consumers also benefit from the Act's proper enforcement, the cause of action is for competitors, not consumers." *Id.*

Coca-Cola responded to POM's suit arguing that the FDA had the exclusive authority to regulate juice labeling, requiring that POM's lawsuit be dismissed. Specifically, the Federal Food, Drug and Cosmetic Act ("FDCA") prohibits the misbranding of food and drink. 21 U.S.C. §§ 321(f), 331. "A food or drink is deemed misbranded if . . . 'its label is false or misleading.'" Slip op., at 4 (quoting 21 U.S.C. § 343(a)). The FDA promulgates regulations governing the labeling of juices and their contents, but labels do not need prior FDA approval before a juice is sold to the public. Slip op. 4-5. "Unlike the Lanham Act, which relies in substantial

part for its enforcement on private suits brought by injured competitors, the FDCA and its regulations provide the United States with nearly exclusive enforcement authority . . . .” *Id.* at 5.

The District Court agreed with Coca-Cola and granted it partial summary judgment, finding that the “‘FDA has directly spoken on the issues that form the basis of POM’s Lanham Act claim . . . .’” Slip op. at 6 (quoting 727 F. Supp. 2d 849, 873 (CD Cal. 2010). The Ninth Circuit Court of Appeals affirmed, noting that “’for a court to act when the FDA has not – despite regulating extensively in this area – would risk undercutting the FDA’s expert judgment and authority.’” Slip op. at 7 (quoting 679 F.3d 1170, 1178 (2012).

The Supreme Court, in reversing the lower court’s decision, notes that “this is not a pre-emption case.” Slip op. at 7. Pre-emption concerns the relationship between state and federal law and not the relationship between overlapping federal statutes. *Id.* Addressing overlapping federal statutes is matter of statutory interpretation.

The Supreme Court began its statutory analysis by recognizing that that “no textual provision in either statute discloses a purpose to bar unfair competition claims like POM’s.” Slip op. at 9. The Court continues that “[t]his absence is of special significance because the Lanham Act and the FDCA have coexisted since the passage of the Lanham Act in 1946. If Congress had concluded . . . that Lanham Act suits interfere with the FDCA, it might well have enacted a provision addressing the issue during these 70 years. *Id.* (citations omitted). The Court then pointed to the pre-emption provision added to the FDCA in 1990, barring states from imposing labeling requirements on food and beverages different than what the FDCA requires. Slip op. at 10. “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. “ Slip op. at 11.

From its review, the Court found that “[t]he structures of the FDCA and the Lanham Act, reinforce the conclusion drawn from the text. When two statutes complement each other, it would show disregard for the congressional design to hold that Congress nonetheless intended one federal statute to preclude the operation of the other.” Slip op. at 12. The Court adds that it “is quite consistent with the congressional design to enact two different statutes, each with its own mechanisms to enhance the protection of competitors and consumers.” Slip op. at 12.

The Court rejected Coca-Cola’s argument that allowing private Lanham Act claims would undermine the national uniformity of food and beverage labeling, something, it contends Congress intended in enacting the FDCA. The Court states that “[a]lthough the application of a federal state such as the Lanham Act by judges and jurists in courts throughout the country may give rise to some variation in outcome, this is the means Congress chose to enforce a national policy to ensure fair competition.” Slip op. at 13-14.

The Court finally addresses the government's position on the case. The government "submit[ted] that the Lanham Act claim is precluded 'to the extent the FDCA or FDA regulations specifically require or authorize the challenged aspects of [the] label.'" Slip op. at 15 (citation omitted). In rejecting the government's position, the Court states that, "[i]n addition to raising practical concerns about drawing a distinction between regulations that 'specifically . . .authorize' a course of conduct and those that merely tolerate that course, . . .[] the flaw in the Government's intermediate position is the. . . assum[ption] that the FDCA and its regulations are at least in some circumstances a ceiling on the regulation of food and beverage labeling. But, as discussed above, Congress intended the Lanham Act and the FDCA to complement each other with respect to food and beverage labeling." Slip op. at 15.

Closing the door of the government's argument, the Court significantly concludes that: "[i]t is necessary to recognize the implications of the [Government's] argument for preclusion. The Government asks the Court to preclude private parties from availing themselves of a well-established federal remedy because an agency enacted regulations that touch on similar subject matter but do not purport to displace that remedy or even implement the statute that is its source. Even if agency regulations with the force of law that purport to bar other legal remedies may do so, [] it is a bridge too far to accept an agency's after-the-fact statement to justify that result here. An agency may not reorder federal statutory rights without congressional authorization."

Slip op. at 17.

For some time there has been confusion concerning how to reconcile a competitor's unfair competition claim brought under the Lanham Act with other federal laws and regulations governing how a product is presented to the public. The Court's decision in *POM* is an important pronouncement that in instances where government regulation is passive – *i.e.* regulatory pre-approval of consumer information is not required – courts should read the Lanham Act cause of action as complementary with other regulatory authority. While parties can still cite to their conformity with regulatory requirements relating to disclosures as a defense to any claim of unfair competition, *POM* holds that such conformity will not bar an unfair competition claim.

For more information, please contact your Lathrop Gage attorney or the attorney listed above.