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Beverage company puts the squeeze on rival with juice label case

One of the most difficult foods to consume is the pomegranate. They are wonderfully healthful, filled with vitamin C and antioxidants, but how to eat one has always been a mystery.

Sure, there are dozens of YouTube videos telling us how easy it is to get those pesky little treasures, the ruby red pomegranate seeds, out of the treasure chest. There's the water-immersion method, the brute force tear-it-apart method and, my favorite, the whack-it-with-a-wooden-spoon method. But just watching these videos shows that they are all lies. It is not at all easy to open and eat a pomegranate.

Despite each narrator's calm voice, what you really see in these instructional videos are seeds flying around, broken fingernails, impenetrable pomegranate rinds, water slopping on the table and permanently stained T-shirts — all while the demonstrator tries to disguise grunts or breathlessness caused by an unduly long period of anaerobic exertion.

That is why pomegranate juice costs so much. Real antioxidants don't come cheaply. And it explains why Pom Wonderful LLC, a California company that makes 100 percent pomegranate juice, was upset when the Coca-Cola Co.'s Minute Maid Division introduced a pomegranate-blueberry juice blend at a much lower price than Pom's products. Pom also sells a pomegranate-blueberry blend comprised of 85 percent pomegranate juice and 15 percent blueberry juice.

You might think, "What's Pom whining about? That's just fair competition. It's the American way."

Or is it? Pom filed a lawsuit against Coca-Cola under Section 43(a) of the Lanham Trademark Act. It alleges that Coca-Cola engaged in unfair competition by using a false or misleading product

description on the Minute Maid label. The container displays the words "pomegranate" and "blueberry" in capital letters. These words are far more prominent than other words on the label that show the juice to be a blend of five juices.

That is deceptive, Pom argues, because the Minute Maid juice in fact contains only an infinitesimal amount of pomegranate juice and blueberry juice — just 0.3 percent and 0.2 percent, respectively. The blend is 99.4 percent apple and grape juices, which are far less expensive than pomegranate juice.

After all the work Pom did to get those seeds out, it wasn't about to let Coca-Cola get away with this kind of chicanery and filed its false-advertising suit.

This would appear to be a straightforward deceptive advertising case under the Lanham Act, in which Pom would prevail if it could prove three basic elements:

- The label is false or misleading.
- It has the capacity to deceive a substantial segment of potential customers.
- It is likely to influence the

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consumer's purchasing decision.

But litigation, like peeling a pomegranate with a dull knife, is never easy. The 9th U.S. Circuit Court of Appeals dismissed Pom's Lanham Act claim, ruling that an entirely different statute, the Federal Food, Drug and Cosmetic Act, regulates food labeling and precludes regulatory action in this field under the Lanham Act.

The FDCA prohibits the misbranding of food and drink, including labeling that is false and misleading. The Food and Drug Administration implements the FDCA through regulations, including regulations about juice blend

INSIDE IP LAW



WILLIAM T. MCGRATH

William T. McGrath is a member of Davis, McGrath LLC, where he handles copyright, trademark and Internet-related litigation and counseling. He is also associate director of the Center for Intellectual Property Law at The John Marshall Law School. In 2013, he was honored with a Lisagor Award from the Chicago Headline Club. He can be contacted at wmcgrath@davismcgrath.com.

labeling. Though the regulations are very detailed, they do not require approval of juice labels by the FDA.

Unlike the Lanham Act, which allows competitors to bring private actions to challenge false advertising, the FDCA vests the U.S. government with nearly exclusive enforcement authority. The FDCA also pre-empts, in large measure, state laws regulating misbranding on food and drink labels.

In light of this extensive regulatory scheme, the 9th Circuit ruled that the FDCA precluded an action by a private party under the Lanham Act challenging a food label that is regulated by the FDCA. "For a court to act when the FDA has not — despite regulating extensively in this area — would risk undercutting the FDA's expert judgments and authority."

Pom took the matter to the Supreme Court, which viewed the case quite differently from the appeals court. *Pom Wonderful LLC v. Coca-Cola Co.* (June 12). The court found that the Lanham Act and the FDCA are not at odds in regulating food labels, but are complementary.

While the Lanham Act protects businesses from unfair competi-

tion, the FDCA protects public health and safety. And while enforcement of the detailed label regulations is committed to the FDA, the Lanham Act affords a private cause of action to injured competitors, who have a keener perspective on market dynamics and on how labels affect consumers. This is important because the FDA "acknowledges that it does not necessarily pursue enforcement measures regarding all objectionable labels."

In finding that a Lanham Act false-advertising claim is not precluded by the FDCA, the Supreme Court adhered closely to the statutory text. Neither statute contains an express preclusion of unfair competition claims. Since the statutes have co-existed for 70 years, if Congress believed that unfair competition suits would interfere with the FDCA's regulatory scheme, "it might well have enacted a provision addressing the issue."

Looking at *Pom Wonderful* through the eyes of a consumer, the case makes sense. We are too busy and have too many distractions in our lives to be able to carefully scrutinize food and drink labels. We need to be able to trust that a bottle with a picture of a big pomegranate on it, teeming with ruby-colored seeds, is not 99.4 percent apple juice.

And since a Supreme Court case earlier this year, *Lexmark v. Static Control* (March 25), clarified that consumers cannot bring a Lanham Act claim for false advertising when we have been hoodwinked, we need a market mechanism, namely private actions by competitors, to guard those interests for us. Then we can drink our pomegranate juice confident that it is really pomegranate juice.

The court remanded the case so that Pom's claims can be reinstated and fully litigated. It could take years to get a ruling on the merits of Pom's allegations. In the meantime, I for one will be scouring the grocery store shelves to see how Coca-Cola responds to the ruling.