A FOOD LABELING FIGHT AND ITS RIPPLE EFFECTS

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INTRODUCTION

Think back to a grueling and humid day in early summer 2014. Your thermometer seesaws between 90 and 93 degrees. You walk over to your fridge and see two ice-cold beverages: An hourglass bottle of POM Wonderful and a jug of Minute Maid Blueberry Pomegranate. On the POM bottle, you see the enticing phrase, "Pomegranate-Blueberry 100%." On the Minute Maid jug, you see "Pomegranate Blueberry" displayed in all caps. You are still conflicted, unsure which one offers a punchier taste.

In *POM Wonderful LLC v. The Coca-Cola Company*[1], the United States Supreme Court also grappled with those same phrases. Instead of determining which drink offered the punchier taste, the Supreme Court had to decide whether the Food Drug and Cosmetic Act ("FDCA") prevented POM Wonderful LLC ("POM") from suing Coca-Cola[2] under the Lanham Act for false or misleading food advertising. The Supreme Court concluded that the FDCA and the Lanham Act complemented each other; one did not foreclose the other.

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[1] 572 U.S. ____; 134 S. Ct. 2228 (2014).

[2] Coca-Cola through its Minute Maid brand sold the Blueberry Pomegranate; Coca-Cola has discontinued this product.

This Paper begins with a brief overview of the FDCA and the Lanham Act. It then summarizes the Supreme Court's decision in *POM Wonderful*. Finally, it concludes by evaluating the resulting impact of the Supreme Court's decision.

I. Overview of the FDCA and the Lanham Act.

A. The FDCA's role in regulating labels and labeling on food products.

The FDCA was enacted in 1938.[3] The Food and Drug Administration ("FDA") enforces the FDCA's provisions. The FDCA's driving purpose throughout these past decades remains the same: Protect the public's health and safety. The FDA fulfills that purpose by protecting the public from deficient or deceptive food, drug, cosmetic, dietary supplement, and medical device products.

This Paper focuses on how the statute bans the misbranding of "food."[4] The FDCA defines "food" as:

> (1) articles used for food or drink for man or other animals,
> (2) chewing gum, and
> (3) articles used for components of any such article.[5]

The statute also defines certain circumstances in which the FDA may deem that the food is misbranded: (1) false or misleading labeling in any particular; (2) offered for sale under the name of a different food; (3) an imitation of another food without proper labeling; and (4) where legally required information "is not prominently placed . . . with such conspicuousness[.]"[6]

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[3] Currently codified as 21 U.S.C. § 301 et seq. (2012).
[4] *Id.* at § 331(a).
[5] *Id.* at § 321(f).
[6] *Id.* at § 343(a), (b), (c), and (f). This list is not exhaustive.

Congress later amended the FDCA's labeling sections through enacting the Nutrition Labeling and Education Act ("NLEA").[7] In doing so, Congress gave the FDA regulatory authority to ensure that the nutritional labeling on food products accurately reflected the nutrients in the product and the corresponding health-related claims.[8]

B. The Lanham Act's role in preventing false or misleading trade practices.

The Lanham Act was enacted in 1946.[9] According to the Lanham Act's legislative history, Congress intended to protect law-abiding business owners and the public against "spurious and falsely marked goods."[10] And Congress intended for the Lanham Act to protect "persons engaged in such commerce against unfair competition."[11] To fulfill those intentions, Congress incorporated a private cause of action into the Lanham Act, which—among other things—gave a commercial plaintiff a private cause of action when the plaintiff has been harmed by a competitor's false or misleading advertising.[12]

II. The Two Statutes Meet Before the Supreme Court.

POM sued Coca-Cola—under the Lanham Act—alleging that Coca-Cola's advertising on its pomegranate-blueberry juice deceived consumers, and caused harm

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[7] Pub. L. No. 101-535, 104 Stat. 2353 (1990).
[8] 21 U.S.C. § 343(q)–(r).
[9] Currently codified as 15 U.S.C. § 1051 et seq. (2012).
[10] S. Rep. No. 79-1333, at 3 (1946), *reprinted in* 1946 U.S.C.C.A.N. 1274.
[11] 15 U.S.C. § 1127 ("The intent of this chapter is to regulate commerce within the control of Congress by making actionable the deceptive and misleading use of marks in such commerce . . . to protect persons engaged in such commerce against unfair competition[.]").
[12] *Id.* at § 1125(a)(1)(B).

to POM.[13] POM competed against Coca-Cola in the "pomegranate-blueberry juice market."[14] POM's pomegranate-blueberry juice blend consisted of 85 percent pomegranate and 15 percent blueberry.[15] Coca-Cola's pomegranate-blueberry juice blend, however, consisted of 99.4 percent apple and grape juices; 0.3 percent pomegranate juice; 0.2 blueberry juice; and 0.1 percent raspberry juice.[16] The small amounts of pomegranate and blueberry juices in Coca-Cola's juice blend did not prevent it from displaying "POMEGRANATE BLUEBERRY" on the juice blend's front label.[17] According to POM, Coca-Cola's advertising misled consumers into believing that its juice blend predominantly consisted of pomegranate and blueberry juices, when in fact it did not.[18] Coca-Cola's actions caused POM to lose sales; thus it sued under the Lanham Act to recover damages and obtain injunctive relief.[19]

Thus the issue before the Supreme Court was whether a private plaintiff may sue under the Lanham Act by alleging how a food label was false or misleading, even though food labels fall under the FDCA's regulatory power.[20] The Supreme Court first rejected arguments on how the FDCA preempted the Lanham Act.[21] Preemption

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[13] *POM Wonderful*, 134 S. Ct. at 2235.
[14] *Id.*
[15] POM BLUEBERRY, http://www.pomwonderful.com/pomegranate-products/juice/blueberry/ (last visited Apr. 2, 2015).
[16] *POM Wonderful*, 134 S. Ct. at 2235.
[17] *Id.* Below this prominent display, Coca-Cola placed "flavored blend of 5 juices" in smaller type. And below that, Coca-Cola wrote—in smaller type—"from concentrate with added ingredients." *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.* at 2236.
[21] *Id.*

cases were where federal law preempts state law.[22] This case was about whether one federal statute—the FDCA—forecloses a private cause of action under another federal statute—the Lanham Act.[23]

Next, the Supreme Court concluded that the FDCA does not bar claims under the Lanham Act. Mainly, no express term "forbids or limits Lanham Act claims challenging labels that are regulated by the FDCA."[24] Moreover, no terms in the Lanham Act limited its interaction with the FDCA.[25] And so the Supreme Court held that no textual provision in either statute prevented POM from suing Coca-Cola under the Lanham Act.[26] Rather, the two statutes complemented each other.[27]

In interpreting the Supreme Court's reasoning, think of a soccer team. Coca-Cola believed that the FDCA acted as an all-star goalie that blocked all shots on goal—i.e. private causes of action under the Lanham Act. The Supreme Court, however, held that the FDCA and the Lanham Act played for the same team; with each statute playing different, yet complementary positions. The FDCA acts as a stout defender that protects the net—i.e. the public—from deceptive food labeling. And the Lanham Act is the shooting forward that attacks the opposition—i.e. commercial competitors that use deceptive food labeling to bolster sales.

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[22] *Id.*
[23] *Id.*
[24] *Id.* at 2237.
[25] *Id.*
[26] *Id.*
[27] *Id.* at 2237–38.

III. The Resulting Impact of the Supreme Court's Decision.

A. Compliance with FDA regulations no longer immunizes companies from litigation.

Before the Supreme Court's decision in *POM Wonderful*, some ambiguity may have existed on whether the FDCA foreclosed claims under the Lanham Act. The Supreme Court has since slashed through that ambiguity. And so even if food and beverage companies fully comply with FDA regulations, they are not fully immunized from litigation.

To start mitigating that dual exposure, food and beverage companies must take two initial steps. First, they must continue to scrupulously comply with the FDA's labeling regulations. Second, they must strictly evaluate whether any of their competitors could in good faith argue that their labels are false or misleading. The second step is crucial even if they believe that their labeling complies with FDA regulations; mere compliance no longer acts as a safe harbor from competitor litigation.

B. A possible new trend in litigation: Competitor v. Competitor food labeling disputes.

To date, most of the public food labeling disputes still center on consumers—usually as part of a class action—suing product manufacturers for alleged mislabeling.[28] But competitor v. competitor food labeling disputes may be on the

[28] *See, e.g.*, Saubers et al. v. Kashi Company, 39 F. Supp. 3d 1108, 1109–10 (S.D. Cal. 2014) (a consumer class action alleging that Kashi Company misbranded 75 different food products as having "evaporated cane juice"—which is allegedly ordinary sugar—"to appeal to health-conscious consumers[.]"); Ibarrola et al. v. Kind, LLC, No. 13 C 50377, 2014 WL 3509790, at *1 (N.D. Ill. July 14, 2014) (a consumer class action alleging that the

horizon. The FDCA no longer acts as a hurdle for injured companies to sue their competitors—under the Lanham Act—that engage in false or misleading advertising. And litigation may even be a useful business tool to gain a competitive edge.

Take for instance Company Y, which sells a unique fruit-flavored sorbet that consists of 85 percent natural fruit. Y sells a carton of its sorbet for $5.00. It is the leader in the fruit-flavored sorbet market. A newcomer, Company X, tries to enter that market. It too sells fruit-flavored sorbet. But X lacks the brand-recognition of Y. And so, to compete in this market, X undercuts Y's fruit-flavored sorbet price by selling its fruit-flavored sorbet for $3.50. X further advertises that its sorbet consists of "nearly all natural fruit ingredients." Y distrusts that claim, and after investigating X's advertisement, Y discovers that X's sorbet consists of 99.9 percent artificial flavors.

Y then sues X under the Lanham Act for false or misleading advertising. In suing X, Y may not only seek monetary damages for X's misconduct, but also may seek injunctive relief that orders X to stop selling its deceptively labeled sorbet. Put

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manufacturer deceived consumers into buying "Vanilla Blueberry Clusters" and its other products by listing "evaporated cane juice"—a syrup derived from sugar cane syrup—to lure health-conscious consumers into thinking its products had less sugar); Suchanek et al. v. Sturm Foods, Inc. et al., 764 F.3d 750, 754–55 (7th Cir. 2014) (a consumer class action alleging that the manufacturer and distributor misled consumers by labeling their coffee product as having "fresh ground coffee," rather than "soluble coffee"—i.e. instant coffee); Engurasoff et al. v. The Coca-Cola Company et al., No. C 13-03990 JSW, 2014 WL 4145409, at *1 (N.D. Cal. Aug. 21, 2014) (a consumer class action demanding that Coca-Cola label its "phosphoric acid" ingredient in its carbonated cola beverages as an "artificial flavor and/or chemical preservative."); *and* Garcia et al. v. Kashi Co. et al., 43 F.Supp.3d 1359, 1367–68 (S.D. Fla. 2014) (a consumer class action alleging that the manufacturer misled consumers by labeling its cereal and other products as "all natural," when in fact, it contained certain synthetic ingredients).

another way, Y may use litigation to recoup lost sales and demand that its competitor cease selling the deceptive product. A win-win for Y.

C. Applying POM Wonderful's holding to other FDA-regulated products.

A thoughtful question emerges from the fray: Can the logic from *POM Wonderful* be applied to other FDA-regulated products—e.g. drugs, medical devices, cosmetics, etc.? Two recent cases answer, "Yes."

First, in *JHP Pharmaceuticals LLC v. Hospira Inc. et al.*, a federal district court concluded that the FDCA did not foreclose claims under the Lanham Act relating to drug advertising disputes.[29] In *JHP Pharmaceuticals*, the plaintiff, Par Sterile Products, LLC ("Par Sterile"), sued some its competitors for false or misleading drug advertising under the Lanham Act.[30] Par Sterile invested millions to get its New Drug Application ("NDA") for a 1 mL and 30 mL injectable epinephrine—under its "ADRENALIN" brand name—approved by the FDA.[31] The FDA ultimately approved the NDA for the 1 mL version of ADRENALIN.[32] In Par Sterile's complaint, it alleged that the defendants sold injectable epinephrine products that were not FDA-approved and that they mislead the public in various ways—all claims arose under the Lanham Act.[33] The defendants—like Coca-Cola—rebutted Par Sterile's Lanham Act claims by arguing that the FDCA foreclosed those claims as

[29] No. CV 13-07460 DDP (JEMx), 2014 WL 4988016 (C.D. Cal. Oct. 7, 2014).
[30] *Id.* at *1.
[31] *Id.*
[32] *Id.*
[33] *Id.*

to drug advertising requirements; further, they argued that *POM Wonderful* only applied to food labeling disputes.[34]

But this federal court held that the FDCA did not foreclose drug advertising disputes under the Lanham Act. According to this court, even though the Supreme Court in *POM Wonderful* repeatedly mentioned food and beverages, "the arguments, logic, and holding of *POM Wonderful* are couched in much broader language and strongly suggest a more wide-ranging application."[35] Moreover, this court concluded that the "logical building blocks" of *POM Wonderful* "equally appli[ed] . . . to drug marketing, medical device labeling, [and] cosmetics branding[.]"[36]

Second, in *Par Sterile Products, LLC v. Fresenius Kabi U.S.A., LLC*, a federal district court also concluded that the FDCA did not foreclose Lanham Act claims for false or misleading advertising on drug products.[37] In this case, the plaintiff, also Par Sterile, sued Fresenius Kabi U.S.A., LLC ("Fresenius") alleging that Fresenius misrepresented its Vasopressin Injection "as safe, effective[,] and FDA-approved" when, in reality, Par Sterile sold the only FDA-approved vasopressin injection.[38] Fresenius countered Par Sterile's allegations by arguing that Par Sterile improperly tried to enforce the FDCA via a Lanham Act claim.[39]

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[34] *Id.* at *2, *4.
[35] *Id.* at **4–5.
[36] Id. at *5.
[37] No. 14 C 3349, 2015 WL 1263041 (N.D. Ill. Mar. 17, 2015).
[38] *Id.* at *2.
[39] *Id.* at *3.

This federal court—in light of *POM Wonderful* and *JHP Pharmaceuticals*—concluded that the FDCA and Lanham Act "can typically be enforced in full alongside one another, given their complementary purposes."[40] To that end, so long as Par Sterile refrained from alleging something that directly conflicted with the FDCA or FDA-regulations, the FDCA did not foreclose claims under the Lanham Act for false or misleading drug advertising.[41]

These two cases may spark other courts to expand the holding in *POM Wonderful* to other FDA-regulated products. And because of these cases—coupled with *POM Wonderful*—other manufacturers of FDA-regulated products may now be required to do the same as food and beverage companies—i.e. strictly comply with FDA-regulations and actively protect against competitors' lawsuits under the Lanham Act.

CONCLUSION

The Supreme Court in *POM Wonderful* created many ripple effects and caused new questions to emerge. In particular, companies—from food manufacturers to possibly manufacturers of other FDA-regulated products—must now continue to strictly comply with FDA regulations, and actively protect against competitors' lawsuits under the Lanham Act. Despite those demanding obligations, companies can take solace in this: Nothing beats an ice-cold beverage on a grueling and humid summer day.

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[40] *Id.* at *4.
[41] *Id.*