May 21, 2012

Ninth Circuit:
FDA Regulations Broadly Preempt Food Labeling Claims

By William L. Stern, Linda L. Lane, and Jae Hong Lee

Last week, the Ninth Circuit issued a broad FDA preemption ruling that elbows aside federal deceptive-labeling claims in the latest slugfest between Pom Wonderful and Coca-Cola that has been going on for almost five years. The decision is important because it finds preemption against a backdrop in which the FDA had *not* acted, and finds a competitor's Lanham Act claims preempted simply because the FDA "*can* act." This was a competitor-versus-competitor Lanham Act case, but the breadth of the holding should spill over into consumer cases brought under state false advertising laws. That *Pom Wonderful* emerged from the Ninth Circuit—a circuit notoriously unfriendly to FDA preemption arguments—makes this ruling all the more remarkable.

FACTS

Pom Wonderful ("Pom") produces, markets, and sells bottled pomegranate juice and pomegranate juice blends. In 2007, Coca-Cola, under its Minute Maid brand, announced a new product called, "Pomegranate Blueberry Flavored Blend of 5 Juices." Pom sued, alleging that by using the product's name ("Pomegranate") and its labeling, Coca-Cola misled consumers into thinking that the product consisted primarily of pomegranate and blueberry juices when, in fact, it was consisted of over 99% apple and grape juices. Pom brought claims under the false-advertising provision of the federal Lanham Act, as well as state law claims under California's Unfair Competition Law ("UCL") and False Advertising Law ("FAL").

THE NINTH CIRCUIT'S DEFERENCE TO THE FDA

The Central District granted summary judgment to Coca-Cola. On appeal, the Ninth Circuit affirmed the dismissal of the federal claim and remanded the state law claims back to the district court for reconsideration of standing issues.

Lanham Act. The Ninth Circuit noted the potential conflict between the Lanham Act and the FDCA, stating that the Lanham Act "broadly prohibits false advertising," while the FDCA "comprehensively regulates food and beverage labeling." However, the Court ruled that the FDCA trumps and can limit Lanham Act claims. The Ninth Circuit acknowledged "Congress's decision to entrust to the FDA the task of interpreting and enforcing the FDCA." Citing its own precedent in *PhotoMedex*[1], the Ninth Circuit gave considerable deference to the FDA in stating that where "the FDA has not concluded that particular conduct violates the FDCA … a Lanham Act claim may not be pursued if the claim would require litigating whether that conduct violates the FDCA." The Court stated that private parties should not be able to use litigation to undermine the FDA's judgment.

[1] 601 F.3d 919, 929 (9th Cir. 2010).

Demonstrating the potentially broad preemptive implications of its ruling, the Ninth Circuit *assumed* that the Coca-Cola label was potentially deceptive. However, this did not matter since the Court stubbornly determined that this was not a decision that *any* court should make:

> If the FDA believes that this context misleads consumers, it can act. But the FDA has apparently not taken a view on whether Coca-Cola's labeling misleads consumers—even though it has acted extensively and carefully in this field. (The FDA has not established a general mechanism to review juice beverage labels before they reach consumers, but the agency may act if it believes that a label in the market is deceptive.) As best we can tell, Coca-Cola's label abides by the requirements the FDA has established. We therefore accept that Coca-Cola's label presumptively complies with the relevant FDA regulations and thus accords with the judgments the FDA has so far made. Out of respect for the statutory and regulatory scheme before us, we decline to allow the FDA's judgments to be disturbed.

Slip op. at *7. Recognizing the potentially broad sweep of its holding, the Ninth Circuit then cautioned that "mere compliance with the FDCA or with FDA regulations will [not] always (or will [not] even generally) insulate a defendant from Lanham Act liability."

Pom's state law claims. The Ninth Circuit remanded the UCL and FAL state law claims to the district court for reconsideration of the standing issues in light of the California Supreme Court's decision in *Kwikset*[2], issued after the district court's initial grant of summary judgment. Contrary to the district court's opinion, *Kwikset* found that standing under the UCL did not depend on eligibility for restitution. *See id.*, p. 895. The Ninth Circuit held that the standing provision under the FAL was materially similar to that under the UCL. The Ninth Circuit also directed the district court to consider whether Pom's state law claims were expressly preempted by federal law and whether California's safe-harbor doctrine insulated Coca-Cola from liability based on the state law claims. The district court's future rulings on these issues could serve as important authority for trial courts facing similar state law claims in California and around the nation.

Curiously, the Ninth Circuit never mentions its own expansive decision in *Williams v. Gerber Prods. Co.*,[3] which declined to find preemption under the FDCA as to front-of-package labeling claims arising from baby food products, even going so far as to suggest that a false labeling claim, by its nature, is not susceptible to dismissal on the pleadings but rather, must await factual development regarding proof of deception as to whether a reasonable consumer would be deceived by the packaging. *See id.*, pp. 938-39 (reasonable consumer cannot be expected to look past a product's packaging and read the FDA nutrition label). Nor did it mention the California Supreme Court's decision, *In re Farm Raised Salmon Cases*,[4] which held that the FDCA does not preempt UCL and CLRA claims alleging that defendant grocery stores were engaged in the deceptive marketing of food products by failing to disclose that farm-raised salmon sold in their stores contained artificial coloring. *Id.*, pp. 1096-97.

[2] *Kwikset Corp. v. Superior Ct.*, 246 P.3d 877 (Cal. 2011).

[3] 552 F.3d 934 (9th Cir. 2008).

[4] 42 Cal. 4th 1077 (Cal. 2008).

CONCLUSION

A few weeks ago, a commentator wrote that the federal courts in California have become for false labeling litigants what the Eastern District of Texas is to patent trolls. Part of the problem was that the Ninth Circuit and California courts had given little regard to the FDA and preemption. The Ninth Circuit's decision in *Pom Wonderful* ought to come as a welcome relief to food and drug manufacturers

To view the Court's opinion, click here.

Contact:

Linda L. Lane
(858) 720-7989
llane@mofo.com

Jae Hong Lee
(858) 720-5120
jaehonglee@mofo.com

William L. Stern
(415) 268-7637
wstern@mofo.com

About Morrison & Foerster:

We are Morrison & Foerster—a global firm of exceptional credentials in many areas. Our clients include some of the largest financial institutions, investment banks, Fortune 100, technology and life science companies. We've been included on *The American Lawyer*'s A-List for eight straight years, and *Fortune* named us one of the "100 Best Companies to Work For." Our lawyers are committed to achieving innovative and business-minded results for our clients, while preserving the differences that make us stronger. This is MoFo. Visit us at www.mofo.com.