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HOW FAR DOES THE APPLE (POMEGRANATE) FALL FROM THE TREE? PRECLUSION OF LANHAM ACT CLAIMS BY THE FOOD, DRUG, & COSMETIC ACT AND *POM WONDERFUL, LLC V. COCA-COLA CO.*

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I. INTRODUCTION

The pomegranate has a cultivation history of five to six thousand years, and was used as early as early Christian Europe as a religious decoration.[1] Today, pomegranates are often used in juices, ice cream, and candy.[2] Perceived health benefits provide the impetus behind the recent consumer popularity of pomegranates and pomegranate products.[3] However, would one have thought that a case involving pomegranates would reach the highest court in the United States? Indeed, on June 12, 2014, the United States Supreme Court issued its decision in *POM Wonderful LLC v. Coca-Cola Co.*[4] Involving a dispute between rival beverage companies that produced "pomegranate" juices, this case raised the significant question of whether commercial entities could bring Lanham Act claims for misnaming or mislabeling products despite the fact that the federal Food, Drug, and Cosmetic Act and its regulations already provided a legal framework for labeling food and beverages.[5] In other words, does the Food, Drug, and Cosmetic Act preclude Lanham Act claims for misnaming or mislabeling food and beverage products?

This Note analyzes the Supreme Court's recent decision in *POM Wonderful LLC.* Part II will provide background information on POM Wonderful, LLC, Coca-Cola Co., and their respective products as well as an introduction to false advertising claims under the Lanham Act and labeling laws under the federal Food, Drug, and Cosmetic Act. Part III will describe POM's lawsuit against Coca-Cola from the federal district court level, to the United States Court of Appeals for the Ninth Circuit, to the Supreme Court. Part IV analyzes whether the Supreme Court correctly decided the issue in *POM Wonderful LLC.* Part IV also discusses how lower courts have treated the *POM Wonderful* LLC decision since the June 2014 issuance. Have courts applied the Supreme Court's reasoning outside of the Food, Drug, and Cosmetic Act context? In addition, Part IV asks whether this decision, which somewhat bolters the Lanham Act's protections, would be a popular result in the food and beverage industry. Does the result help

[1] Michael T. Roberts, *Cheaters Shouldn't Prosper and Consumers Shouldn't Suffer: The Need for Government Enforcement Against Economic Adulteration of 100% Pomegranate Juice and Other Imported Food Products*, 6 J. FOOD L. & POL'Y 189, 195 (2010).

[2] *Id.*

[3] *Id.* ("The recent dramatic growth of consumer demand for pure pomegranate juice is driven largely by the promise of health benefits. Over eighty-one percent of consumers now consume pomegranate juice because of its health benefits.").

[4] 134 S.Ct. 2228 (2014).

[5] *Id*.

protect smaller companies that offer a niche product when larger companies are trying to compete and to squeeze the smaller companies out of that market? As a result, do companies have to be that much more careful now when labeling their products? Indeed, after *POM*, complying with Food and Drug Administration requirements does not by itself save a company from Lanham Act liability. Finally, Part V serves as a conclusion.

II. BACKGROUND

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A. POM Wonderful, LLC, Coca-Cola Co., and Their Respective "Pomegranate" Products

POM Wonderful is a privately held company with its corporate headquarters in Los Angeles, California.[7] POM's self-stated "mission is to introduce and supply consumers with the highest quality and best-tasting pomegranates and pomegranate food products."[8] POM produces, markets, and sells pomegranate food products and juices, one of which is a blueberry pomegranate juice blend.[9] The bottle label

[6] *POM Blueberry*, POM WONDERFUL, http://www.pomwonderful.com/pomegranate-products/juice/blueberry/ (last visited Nov. 24, 2014).

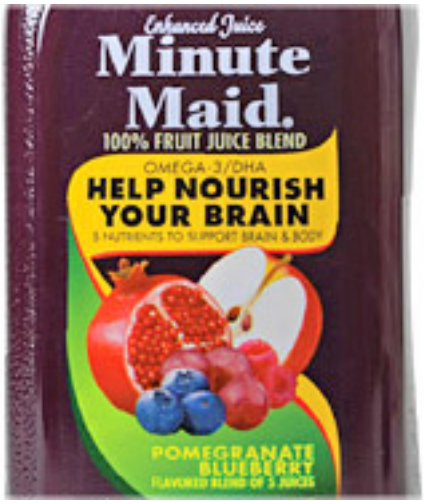
[7] *FAQS*, POM WONDERFUL, http://www.pomwonderful.com/faq/ (last visited Jan. 26, 2015).

[8] *Id.*

[9] POM Wonderful LLC v. Coca Cola Co., 727 F. Supp. 2d 849, 852 (C.D. Cal. 2010) *aff'd in part, vacated in part, remanded sub nom.* POM Wonderful LLC v. Coca-Cola Co., 679 F.3d 1170 (9th Cir. 2012) *rev'd*, 134 S. Ct. 2228, 189 L. Ed. 2d 141 (2014)

of this product contains the words "POM Wonderful Pomegranate Blueberry 100% Juice."[10]

With roots that trace to the late nineteenth century, Coca-Cola Co. describes itself as "the world's largest beverage company, refreshing consumers with more than 500 sparkling and still brands."[11] One of those brands is Minute Maid[12], which in September 2007 introduced a drink product called Minute Maid® Enhanced Pomegranate Blueberry Flavored 100% Juice Blend ("Blend").[13]



[14]

As the image above shows, the product's bottle contained the phrase "100% Fruit Juice" under which appeared the banner "Omega-3/DHA Help Nourish Your Brain 5 Nutrients to Support Brain and Body."[15] Under this phrase was an image of several different types of fruit, including "a half-cut pomegranate, a half-cut apple, and several

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[10] *POM 100% JUICE*, POM WONDERFUL, http://www.pomwonderful.com/pomegranate-products/juice/ (last visited Jan. 26, 2015).

[11] *Coca-Cola At a Glance: KO101 Video and Infographic*, COCA-COLA JOURNEY, http://www.coca-colacompany.com/our-company/infographic-coca-cola-at-a-glance (last visited Jan. 26, 2015); *About Us: Coca-Cola History*, WORLD OF COCA-COLA, http://www.worldofcoca-cola.com/about-us/coca-cola-history/ (last visited Jan. 26, 2015).

[12] *Brands*, COCA-COLA JOURNEY, http://www.coca-colacompany.com/brands/the-coca-cola-company (last visited Jan. 26, 2015).

[13] *POM Wonderful LLC*, 727 F. Supp. 2d at 852 (C.D. Cal. 2010).

[14] *Clearly, Coke Is Not the Real Thing*, VIEW FROM THE 14TH FLOOR, http://viewfromthe14thfloor.com/?tag=pomegranate-blueberry-juice (last visited Jan. 26, 2015).

[15] *POM Wonderful LLC*, 727 F. Supp. 2d at 852–53.

blueberries, grapes, and raspberries."[16] Under the image of fruit were the words "Pomegranate Blueberry" and "Flavored Blend of 5 Juices."[17] On the back of the bottle appeared "Minute Maid Enhanced Pomegranate Blueberry Is Made With A Blend Of Apple, Grape, Pomegranate, Blueberry, And Raspberry Juices From Concentrate And Other Ingredients."[18] Coca-Cola advertised its Blend on television and in print advertisements and through coupons and in-store promotions.[19] The Blend also appeared on the Minute Maid website.[20]

POM contended that these advertisements and the labeling described above represent that the Blend primarily consisted of pomegranate and blueberry juices when the Blend's primary ingredients were actually apple and grape juice.[21] In fact, Pom alleged that the Blend merely contained 0.3% pomegranate juice and 0.2% blueberry juice.[22] Also with 0.1% raspberry juice, that made the Blend 99.4% apple and grape juices.[23] Labeling the Blend to imply otherwise, according to Pom, resulted in lost sales for Pom.[24]

This was not the first time that Pom had accused another beverage company of passing a product as primarily pomegranate juice when it was not.[25] In fact, Pom sued another competitor, Purely Juice, in 2007 after Purely Juice started to sell and market a product labeled as "100% Pomegranate Juice."[26]

A judge from the United States District Court for the Central District of California found Purely Juice guilty of false advertising and misleading marketing and awarded Pom over a million dollars in damages.[27] A three-judge panel of the United States Court of Appeals for the Ninth Circuit affirmed on appeal.[28]

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[16] *Id.* at 853.
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *POM Wonderful LLC*, 727 F. Supp. 2d at 856.
[22] *Id.*
[23] POM Wonderful LLC v. Coca-Cola Co., 679 F.3d 1170, 1173 (9th Cir. 2012) *rev'd*, 134 S. Ct. 2228, 189 L. Ed. 2d 141 (2014).
[24] POM Wonderful LLC v. Coca-Cola Co., 134 S.Ct. 2228, 2235 (2014).
[25] In essence, what POM alleged is the notion of "economic adulteration," namely "a form of cheating that includes the padding, diluting, and substituting of food product." Roberts, *supra* note 1, at 190, 198-99.
[26] Roberts, *supra* note 1, at 190, 198.
[27] POM Wonderful LLC v. Purely Juice, Inc., No. CV-07-02633, 2008 WL 4222045, at *14–15 (C.D. Cal. July 17, 2008); Roberts, *supra* note 1, at 199 ("The

continued . . .

Although Pom previously had sued a company for false advertising of a pomegranate beverage, the lawsuit involving Coca-Cola would occur on a much larger stage, reaching the United States Supreme Court. Indeed, the case involved the important issue of whether the federal Food, Drug, and Cosmetic Act would prevent Pom and similarly situated companies from invoking the Lanham Act's provisions to protect themselves from false advertising and unfair competition.[29] The next subsections introduce and discuss the Lanham Act and the Food, Drug, and Cosmetic Act. Following that is a description of Pom's lawsuit against Coca-Cola and the important federal statutory interpretation required along the way. Ultimately, the Supreme Court would decide that the Food, Drug, and Cosmetic Act does not prevent a commercial entity from bringing a Lanham Act claim against a competitor allegedly mislabeling its food products.[30]

B. The Lanham Act

On July 5, 1946, the Trademark Act of 1946—also known as the Lanham Act—was signed into law.[31] Congress has described the dual purposes of statutory trademark protection as follows:

> The purpose underlying any trade-mark statute is twofold. One is to protect the public so it may be confident that, in purchasing a product bearing a particular trade-mark which it favorably knows, it will get the product which it asks for and wants to get. Secondly, where the owner of a trade-mark has spent energy, time, and money in presenting to the public the product, he is protected in his investment from its misappropriation by pirates and cheats.[32]

While the Lanham Act does not provide for the actual ownership of trademarks, the statute creates a national system of registration of

court determined that Purely Juice engaged in false advertising and misleading marketing and ordered Purely Juice to pay approximately $1.5 million in damages.").

[28] POM Wonderful LLC v. Purely Juice, Inc., 362 F. App'x 577, 582 (9th Cir. 2009).

[29] *POM Wonderful LLC*, 134 S.Ct. at 2233.

[30] *Id.*

[31] Ethan Horwitz & Benjamin Levi, *Fifty Years of the Lanham Act: A Retrospective of Section 43(a)*, 7 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 59, 59 n.2 (1996) (noting that the law was named for Texas Congressman Fritz G. Lanham and became effective one year from the date of passage).

[32] S. REP. NO. 1333, at 3 (1946).

trademarks.[33] Also, and consistent with the Lanham Act's second purpose—protection from competitors' unfair competition[34]—the statute "creates a cause of action for unfair competition through misleading advertising or labeling."[35] Indeed, "[t]he purpose of the false-advertising provisions of the Lanham Act is to protect sellers from having their customers lured away from them by deceptive ads or labels, or other promotional materials."[36] Section 43(a) of the Lanham Act provides for such cause of action:

> (1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—
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> (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or
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> (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,
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> shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.[37]

To sue for false advertising under Section 43(a), there must be allegations of an injury to a commercial interest, whether in reputation or sales.[38] This effectively means that consumers do not have standing to sue as plaintiffs under the Lanham Act,[39] but consumers still see

[33] *In re* ECCS, Inc., 94 F.3d 1578, 1579 (Fed. Cir. 1996).

[34] *See* 15 U.S.C. § 1127 (2012) (stating that, *inter alia*, "[t]he intent of this chapter is to . . . to protect persons engaged in such commerce against unfair competition").

[35] *POM Wonderful LLC*, 134 S.Ct. at 2234..

[36] Schering-Plough Healthcare Prods., Inc. v. Schwarz-Pharma, Inc., 586 F.3d 500, 512 (7th Cir. 2009).

[37] 15 U.S.C. § 1125(a) (2012).

[38] Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S.Ct. 1377, 1390 (2014).

[39] *See id.* (noting that "[a] consumer who is hoodwinked into purchasing a

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benefits from the provision's enforcement.[40] To prevail on a false advertising claim, a plaintiff must prove five elements: 1) existence of a defendant's false statement of fact about its own or another product in a commercial advertisement; 2) that the statement actually deceived or had the tendency to deceive a substantial segment of the audience; 3) materiality—*i.e*, likelihood that it influenced a purchasing decision—of the deception; 4) that the statement entered interstate commerce due to the defendant; and 5) injury or likelihood of injury to the plaintiff, whether by loss of sales to defendant or loss of goodwill associated with plaintiff's products, as a result of the defendant's false statement.[41]

C. The Food, Drug, and Cosmetic Act and FDA Regulations

Passed by Congress in 1938, the Food, Drug, and Cosmetic Act ("FDCA") has seen many amendments since its enactment,[42] and "has since served as the statutory basis for food regulation in the U.S."[43] The main goals of the FDCA remained consistent,[44] one of which is to protect the public from the misbranding of food, drugs, etc.[45] Although Congress previously had provided legislation addressing food and drugs in interstate commerce, "[b]y the Act of 1938, Congress extended the range of its control over illicit and noxious articles and stiffened the penalties for disobedience. The purposes of this legislation thus touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection."[46] An amendment to the FDCA, the Nutrition

disappointing product may well have an injury-in-fact cognizable under Article III, but he cannot invoke the protection of the Lanham Act—a conclusion reached by every Circuit to consider the question.").

[40] *POM Wonderful LLC*, 134 S.Ct. at 2234 (stating that "[t]hough in the end consumers also benefit from the Act's proper enforcement, the cause of action is for competitors, not consumers.").

[41] Wells Fargo & Co. v. ABD Ins. & Fin. Servs., Inc., 758 F.3d 1069, 1071 (9th Cir. 2014).

[42] Joe Dages, Comment, *Private Parties and the FFDC: How Creative Litigants Have Circumvented Section 310 and Undermined the NLEA's Express Preemption Amendments*, 62 CATH. U. L. REV. 1061, 1068 (2013).

[43] Roberts, *supra* note 1, at 207.

[44] Dages, *supra* note 42, at 1068.

[45] 62 Cases More or Less, Each Containing Six Jars of Jam v. United States, 340 U.S. 593, 596 (1951) (stating that "[m]isbranding was one of the chief evils Congress sought to stop. It was both within the right and the wisdom of Congress not to trust to the colloquial or the dictionary meaning of misbranding, but to write its own.").

[46] United States v. Dotterweich, 320 U.S. 277, 280 (1943).

Labeling and Education Act of 1990, provided a modern framework for labeling and enforcement.[47] This amendment was passed in response to concern that food and drink manufacturers did not provide accurate claims about their product's health and nutritional content.[48]

As mentioned, the FDCA prohibits the misbranding of food, drugs, devices, tobacco products, and cosmetics.[49] Drinks are also included in the statutory definition of food.[50] Misbranding occurs if, *inter alia*, a product's "labeling is false or misleading in any particular," or its label does not display words, statements, or other information prominently or conspicuously enough.[51]

With the FDCA as its implementing statute, the Food and Drug Administration has created regulations that further address food misbranding and labeling.[52] Relevant to the case this Note discusses, the FDA has promulgated rules that regulate how product labels should describe juice blends.[53] For instance, one pertinent regulation reads:

> If the product is a diluted multiple-juice beverage or blend of single-strength juices and names, other than in the ingredient statement, more than one juice, then the names of those juices, except in the ingredient

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[47] *See* Dages, *supra* note 42, at 1068–70.

[48] Dages, *supra* note 42, at 1069–70 (noting that the amendment gave the FDA the responsibility to decide what information must appear on nutritional labels).

[49] 21 U.S.C. § 331 (2012).

> The following acts and the causing thereof are prohibited:
> (a) The introduction or delivery for introduction into interstate commerce of any food, drug, device, tobacco product, or cosmetic that is adulterated or misbranded.
> (b) The adulteration or misbranding of any food, drug, device, tobacco product, or cosmetic in interstate commerce.
> (c) The receipt in interstate commerce of any food, drug, device, tobacco product, or cosmetic that is adulterated or misbranded, and the delivery or proffered delivery thereof for pay or otherwise. . . .

Id.

[50] *See* 21 U.S.C. § 321(f) (2012) (stating that "[t]he term "food" means (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.").

[51] 21 U.S.C. § 343(a), (f) (2012). *See also POM Wonderful LLC*, 134 S.Ct. at 2234 (stating that "[a] food or drink is deemed misbranded if, *inter alia,* 'its labeling is false or misleading,'§ 343(a) information required to appear on its label 'is not prominently placed thereon,' § 343(f), or a label does not bear 'the common or usual name of the food, if any there be,' § 343(i).").

[52] *POM Wonderful LLC*, 134 S.Ct. at 2234.

[53] *See* 21 C.F.R. § 102.33 (2014).

> statement, must be in descending order of predominance by volume unless the name specifically shows that the juice with the represented flavor is used as a flavor (e.g., raspberry-flavored apple and pear juice drink). In accordance with § 101.22(i)(1)(iii) of this chapter, the presence of added natural flavors is not required to be declared in the name of the beverage unless the declared juices alone do not characterize the product before the addition of the added flavors.[54]

III. POM WONDERFUL LLC V. COCA-COLA CO.

A. The District Court Decision

Pom filed suit against Coca-Cola on September 22, 2008, in the United States District Court for the Central District of California.[55] Pom's complaint contained allegations of false advertising under the Lanham Act, as well as false advertising and unfair competition under the California Business and Professions Code.[56] This Note focuses solely on the federal false advertising claims.

Early in the litigation, Coca-Cola moved the district court to dismiss Pom's complaint for failure to state a claim under the Federal Rule of Civil Procedure 12(b)(6).[57] The district court granted the motion with respect to Pom's Lanham Act claim for misnaming and mislabeling because the way in which Pom had pled its claim might impermissibly require the district court to interpret FDA regulations.[58] However, Pom subsequently amended its complaint to comply with the court's Rule 12(b)(6) decision.[59] In response to Pom's amended complaint, Coca-Cola again moved to dismiss pursuant to Rule 12(b)(6).[60] However, the district court denied the motion this time, and discovery proceeded in the case.[61]

On December 28, 2009, Pom and Coca-Cola filed cross-motions for summary judgment.[62] District Judge S. James Otero ruled on the

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[54] *Id.* at § 102.33(b).

[55] *POM Wonderful LLC*, 727 F. Supp. 2d at 858.

[56] *Id.* at 858–59. The state law claims of false advertising and unfair relied competition relied on California Business and Professions Code §§ 17500 and 17200, respectively.

[57] *POM Wonderful LLC*, 679 F.3d at 1174.

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *POM Wonderful LLC*, 727 F. Supp. 2d at 852.

summary judgment motions without oral argument.[63] On May 5, 2010, the district court granted partial summary judgment in favor of Coca-Cola on Pom's Lanham Act claims.[64] In the district court's view, the FDCA's labeling regulations precluded a Lanham Act false advertising claim because

> [t]he FDA has directly spoken on the issues that form the basis of Pom's Lanham Act claim against the naming and labeling of the Juice, and has therefore, reached a conclusion as to what is permissible. Indeed, the FDA has spoken on several occasions, and each time, it has concluded that manufacturers of multiple-juice beverages may identify their beverages with a non-primary, characteristic juice, as Coca Cola does here.[65]

The court described the safety-oriented nature of the FDA regulations and found that Coca-Cola's label complied with those regulations.[66] According to the district court, Pom had not shown that Coca-Cola has mislabeled the Blend in violation of FDA regulations.[67] Nonetheless, the district court noted its deference to the FDA in a "determination that naming and labeling must be displayed in a particular way or fashion."[68] Finally, the district court advised Pom that the result it desired could not come from the federal courts and that Pom must lobby Congress or the FDA in order to alter the "considered judgments of the FDA."[69]

In essence, the district court's reason for granting Coca-Cola's summary judgment motion on Pom's mislabeling claims under the Lanham Act was that, as long as the Blend's label had complied with the FDCA and its accompanying regulations, the Lanham Act could serve as no remedy for Pom.[70] However, Pom would continue to fight for its Lanham Act claims on appeal. Pom filed its notice of appeal on

[63] *Id.*
[64] *Id.* at 873.
[65] *Id.* at 871.
[66] *Id.*
[67] *Id.* at 871–72.
[68] *Id.* at 872 (stating that "[i]n any event, any such determination that naming and labeling must be displayed in a particular way or fashion, as Pom suggests, would necessarily be for the FDA to determine, and so, is not for this Court to construe or interpret.").
[69] *Id.* at 872–73.
[70] *Id.* at 873.

this issue to the United States Court of Appeals for the Ninth Circuit on May 28, 2010.[71]

B. The Ninth Circuit Decision

In its opening brief to the Ninth Circuit, Pom in part framed the issue as whether the district court had erred when it determined that the Lanham Act included "an exception from liability for false and misleading juice product labels that allegedly comply with certain regulations promulgated by the Food and Drug Administration pursuant to the Federal Food, Drug, and Cosmetic Act."[72] A three-judge panel consisting of Judge Nelson, Judge O'Scannlain, and Judge Smith considered Pom's appeal.[73] The court heard oral argument on February 8, 2012 and issued its decision on May 17, 2012.[74] As to the issue this Note discusses—whether the FDCA and the FDA regulations bar a mislabeling claim under the Lanham Act—the Ninth Circuit affirmed the district court's decision.[75] Judge O'Scannlain wrote the opinion detailing the court's decision.[76]

Not surprisingly, the Ninth Circuit framed the issue as "whether the Food, Drug, and Cosmetic Act bars a Lanham Act claim alleging that the name and labeling of a juice beverage are deceptive."[77] The court determined that the former "authorizes suit [for anyone who has been or is likely to be damaged] against those who use a false or misleading description or representation 'in connection with any goods,'" while the latter "comprehensively regulates food and beverage labeling" and can only be enforced by the FDA or the Department of Justice.[78] The court described previous rulings on how these two statutes interact with one another. For example, the court noted the principle that a private party cannot sue under the Lanham Act to enforce the FDCA or accompanying regulations to circumvent their narrow enforcement mechanisms—*i.e.*, that only the FDA or Department of Justice can sue to enforce.[79] The court also reiterated

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[71] Brief for Appellant at xii, POM Wonderful LLC v. Coca-Cola Co., 679 F.3d 1170 (9th Cir. 2012) (No. 10-55861) 2010 WL 6834516, at *6.

[72] *Id.*

[73] *POM Wonderful LLC*, 679 F.3d at 1172.

[74] *Id.* at 1170.

[75] *Id.* at 1179.

[76] *Id.* at 1172.

[77] *Id.*

[78] *Id.* at 1175.

[79] *Id.* at 1175–76 (reasoning that to allow such action "would undermine Congress's decision to limit enforcement of the FDCA to the federal government") (citing Mylan Labs., Inc. v. Matkari, 7 F.3d 1130, 1139 (4th Cir. 1993)).

the rule that a plaintiff may not bring a Lanham Act action that would require a court "to interpret ambiguous FDA regulations, because rendering such an interpretation would usurp the FDA's interpretive authority."[80] Indeed, Pom previously had encountered that very principle with respect to Coca-Cola's initial Rule 12(b)(6) motion before the district court.[81]

In addition to the rules described above, the court devoted significant space to articulate the principles in *PhotoMedex, Inc. v. Irwin*,[82] a prior Ninth Circuit decision that the court believed controlled the current case before it. The court in *Pom* determined that, while not an "automatic trump or a firm rule," *PhotoMedex* stands for the proposition that "the Lanham Act may not be used as a vehicle to usurp, preempt, or undermine FDA authority."[83] This principle of *PhotoMedex* would frame the court's analytical focus as it considered whether Pom's mislabeling and misnaming claims under the Lanham Act were barred.[84]

The court concluded that Pom's Lanham Act claims for mislabeling and misnaming were barred under *PhotoMedex*.[85] According to the court, Pom could not bring a Lanham Act claim for misnaming because the Blend's name did not violate FDA regulations.[86] The court noted that the FDA regulations specifically allow a manufacturer to name a beverage with a flavoring juice name that is not predominant by volume.[87] According to the court, to allow a Lanham Act claim challenging a name otherwise valid under the FDA regulations "would require us to undermine the FDA's apparent determination that so naming the product is not misleading."[88]

The court applied the same analysis to Pom's Lanham Act claim for mislabeling.[89] The court determined that the FDA has already decided how a manufacturer must display words and statements on labels whether in terms of size or prominence.[90] Like the district court, the Ninth Circuit emphasized the possibility that "[i]f the FDA believes that more should be done to prevent deception, or that Coca-

[80] *Id.* at 1176 (citing Sandoz Pharms. Corp. v. Richardson-Vicks, Inc., 902 F.2d 222, 231–32 (3d Cir. 1990)).
[81] *See supra* text accompanying notes 57–59.
[82] 601 F.3d 919 (9th Cir. 2010).
[83] *POM Wonderful LLC*, 679 F.3d at 1176.
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.* at 1176–77.
[88] *Id.* at 1177.
[89] *Id.* ("The same goes for the labeling component of Pom's claim.").
[90] *Id.* (citing 21 C.F.R. § 102.33(c), (d)).

Cola's label misleads consumers, it can act."[91] However, the Ninth Circuit believed that its precedent prohibited the court from second-guessing the FDA when it, armed with its expertise, had already regulated "extensively in this area."[92] However, for all of the above reasons, the Ninth Circuit affirmed the district court's grant of summary judgment in favor of Coca-Cola as to Pom's Lanham Act claims for mislabeling and misnaming the Blend.[93]

The court appeared to somewhat qualify its decision by stating that compliance with the FDCA and FDA regulations by itself would not protect a defendant from liability under the Lanham Act.[94] Instead, the court explained that deference to Congress and Congress' consequent deference to the FDA served as the primary basis for the court's decision.[95] In conclusion, the Ninth Circuit declared that "[t]o give as much effect to Congress's will as possible, we must respect the FDA's apparent decision not to impose the requirements urged by Pom. And we must keep in mind that we lack the FDA's expertise in guarding against deception in the context of juice beverage labeling."[96]

C. The Supreme Court Decision

POM filed its petition for writ of certiorari on December 21, 2012.[97] The Supreme Court of the United States granted the petition on January 14, 2014.[98] One commentator noted that the Supreme Court's consideration of the case "has the potential to redefine how businesses label a wide variety of products."[99] One partner in a prominent law firm remarked that "this is a huge case for the food and

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[91] *Id.*

[92] *Id.*

[93] *Id.* at 1179.

[94] *Id.* at 1178.

[95] *Id.* (stating that "[w]e are primarily guided in our decision not by Coca–Cola's apparent compliance with FDA regulations but by Congress's decision to entrust matters of juice beverage labeling to the FDA and by the FDA's comprehensive regulation of that labeling.").

[96] *Id.*

[97] *POM Wonderful LLC, Petitioner v. The Coca-Cola Company*, SUPREME COURT OF THE UNITED STATES, http://www.supremecourt.gov/search.aspx?filename=/docketfiles/12-761.htm (last visited Jan. 25, 2015) [hereinafter Supreme Court Docket].

[98] *Id.*

[99] Michael Bobelian, *In POM v. Coca-Cola, Supreme Court Could Shake Up Food Labeling*, FORBES, http://www.forbes.com/sites/michaelbobelian/2014/04/22/supreme-court-asked-to-referee-dispute-between-coca-cola-and-POM/ (last visited Jan. 25, 2015).

beverage industry[.]"[100] Given the significance of the case, it is thus unsurprising that the Supreme Court received several amicus briefs, including briefs from the United States Government, the Chamber of Commerce of the United States, the American Beverage Association, the International Trademark Association, and former FDA Commissioner Dr. Donald Kennedy.[101]

Notably, Dr. Kennedy, who served as FDA Commissioner from 1977-1979, wrote in support of POM's position, arguing that "[t]he FDCA merely sets a 'floor' for regulation of labels on which other laws can build."[102] On the other side, a different former FDA Commissioner, Dr. Michael Friedman, wrote on behalf of Coca-Cola.[103] Dr. Friedman served as Acting Commissioner and Lead Deputy Commission from 1997-1998.[104] In Dr. Friedman's view, the FDA regulations constitute "consistent, clear, objective, and scientific standards [that] best serve[s] the public interest[,]" and the industry does not require additional regulation through private enforcement.[105] The American Beverage Association also filed an amicus brief in support of Coca-Cola.[106] Founded in 1919 under a different name, the American Beverage Association is a trade association representing the non-alcoholic beverage industry.[107] Not surprisingly, Coca-Cola is a member of the American Beverage Association.[108] POM is not.[109] In its brief, the American Beverage Association expressed concern that "beverage companies would be deprived of clear guidance about how

[100] Katy Bachman, *Why Food and Beverage Advertisers Should Be Worried About* POM v. Coca-Cola*: Supreme Court to Decide If Juice Label Was Misleading*, ADWEEK, http://www.adweek.com/news/advertising-branding/why-food-and-beverage-advertisers-should-be-worried-about-POM-v-coca-cola-157099 (last visited Jan. 25, 2015).

[101] Supreme Court Docket, *supra* note 97.

[102] Brief of Former FDA Commissioner Dr. Donald Kennedy as Amicus Curiae Supporting Petitioner at 2 POM Wonderful LLC v. Coca-Cola Co., 134 S.Ct. 2228 (2014) (No. 12-761).

[103] *See* Brief of Dr. Michael Friedman, Former Acting Commissioner and Lead Deputy Commissioner for the United States Food and Drug Administration as Amicus Curiae in Support of Respondent, POM Wonderful LLC v. Coca-Cola Co., 134 S.Ct. 2228 (2014) (No. 12-761), 2014 WL 1348459.

[104] *Id.* at 1.

[105] *Id.* at 3.

[106] Brief of Amicus Curiae American Beverage Association in Support of Respondent, POM Wonderful LLC v. Coca-Cola Co., 134 S.Ct. 2228 (2014) (No. 12-761), 2014 WL 1348458 [hereinafter ABA Amicus Brief].

[107] *History,* AM. BEVERAGE ASS'N, http://www.ameribev.org/about-aba/history/ (last visited Jan. 25, 2015).

[108] *See Active Members*, AM. BEVERAGE ASS'N, http://www.ameribev.org/members/active-members/ (last visited Jan. 25, 2015).

[109] *See id.*

to design labels that comply with the law."[110] The American Beverage Association also noted concern about the cost for manufacturers who might potentially be required to change the labels on their products.[111]

The Court heard oral argument in *POM* on April 21, 2014, and issued a decision on June 12, 2014. In its unanimous[112] decision, the Court reversed the Ninth Circuit's ruling that the FDCA precluded POM's assertion of Lanham Act claims for misnaming and mislabeling in its suit against Coca-Cola.[113]

Justice Kennedy wrote for the Court. The opinion first described the bases for and rationale behind both the Lanham Act and the FDCA.[114] While the Lanham Act ultimately may benefit consumers, Justice Kennedy emphasized that the "cause of action is for competitors", and the "Lanham Act creates a cause of action for unfair competition through misleading advertising or labeling."[115] On the other hand, the FDCA "is designed primarily to protect the health and safety of the public at large."[116] As part of this goal, the FDCA and its FDA regulations prohibit the misbranding of food and drinks.[117]

After describing the basis for the dispute between POM and Coca-Cola, the Court articulated the legal and analytical framework of its decision. The Court framed the issue as "whether a private party may bring a Lanham Act claim challenging a food label that is regulated by the FDCA."[118] As a preliminary matter, the Court noted that the case did not involve pre-emption because that constitutional doctrine is only invoked in terms of how a state law stands in relation to a federal statute or federal agency action.[119] Instead, the Court determined that the case involved "alleged preclusion of a cause of action under one federal statute by the provisions of another federal statute."[120] In addition, the Court noted that the case was one of statutory interpretation.[121]

Having established the analytical framework, the Court examined the text and structure of the FDCA and the Lanham Act, concluding

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[110] ABA Amicus Brief, *supra* note 106, at 3.
[111] *See id.*
[112] Justice Breyer did not participate in the case. *POM Wonderful LLC*, 134 S.Ct. at 2242.
[113] *Id.* at 2241–42.
[114] *See id.* at 2233–34.
[115] *Id.* at 2234.
[116] *Id.*
[117] *Id.* (citing 21 U.S.C. §§ 321(f), 331 (2012); 21 C.F.R. § 102.33 (2013)).
[118] *Id.* at 2236.
[119] *Id.*
[120] *Id.*
[121] *Id.*

that the former statute did not bar claims brought under the latter statute.[122] The Court first determined that no express language in either statute bars or limits Lanham Act claims over labels otherwise regulated by the FDCA.[123] Therefore, as Justice Kennedy wrote, "food and beverage labels regulated by the FDCA are not, under the terms of either statute, off limits to Lanham Act claims."[124] The Court found the lack of express, preclusive language significant because the FDCA and the Lanham Act had coexisted since 1946 (the date of the Lanham Act's passage).[125] If Lanham Act claims conflicted with the FDCA during this time, Congress "might well have enacted a provision addressing the issue."[126] The Court conceded that amendments to the FDCA in 1990 included a preemption provision.[127] However, this provision preempted state laws and did not intend to preclude federal claims.[128]

The Court next studied the respective structures and purposes of the FDCA and the Lanham Act and noted complimentary roles for the two statutes.[129] The FDCA addresses public health and safety.[130] The Lanham Act provides protection for commercial interests from unfair competition.[131] The Court also determined that the remedies supplied by each statute complement each other.[132] The FDCA establishes an enforcement mechanism whereby the FDA regulates and deals with violators.[133] On the other hand, the Lanham Act authorizes private parties to sue competitors.[134] This private enforcement exists because "[c]ompetitors who manufacture or distribute products have detailed knowledge regarding how consumers rely upon certain sales and marketing strategies"—information perhaps not as readily available to federal agencies such as the FDA.[135] The Court concluded that this structure reflected congressional intent to maintain two separate, albeit complimentary statutes to protect consumers and competitors alike but

[122] *Id.* at 2237.
[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *Id.* at 2237–38.
[128] *Id.* at 2238 (stating that "[b]y 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.").
[129] *Id.* at 2238.
[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] *Id.*
[134] *Id.*
[135] *Id.*

through different mechanisms.[136] Given the FDA's own admission that it does not track and remedy all violations of its labeling regulations, the Court established that Congress likely did not intend for commercial interests in the food and beverage industry to receive less protection than other industries by barring Lanham Act claims.[137]

The Court next rejected Coca-Cola's argument for preclusion of Lanham Act claims based on its assertion that Congress intended to institute national uniformity in food and beverage labeling through the FDCA,[138] but the Court's final discussion dealt with the U.S. Government's opinion in the case as amicus curiae.[139] In fact, the Government agreed with neither POM nor Coca-Cola.[140] In the Government's view, the FDCA and its accompanying FDA regulations constituted a ceiling on food and beverage labeling regulation.[141] Therefore, the Government urged that Lanham Act claims are barred "to the extent the FDCA or FDA regulations specifically require or authorize the challenged aspects of [the] label."[142] However, the Court rejected this argument based on its previous discussion of the complimentary structure of the two statutes.[143] The Court also commented on the proper balance of power between Congress and federal agencies:

> It is necessary to recognize the implications of the United States' 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

[136] *Id.* at 2239.
[137] *Id.*
[138] *See id.*
[139] *See id.* at 2240.
[140] *Id.*
[141] *Id.*
[142] *Id.* (citing Brief for the United States as Amicus Curiae Supporting Neither Party at 11, POM Wonderful LLC v. Coca-Cola Co., 134 S.Ct. 2228 (2014) (No. 12-761)).
[143] *Id.*

congressional authorization.[144]

Having rejected Coca-Cola's and the Government's arguments for preclusion of Lanham Act claims by the FDCA, the Court announced its reversal of the Ninth Circuit decision and remanded the case for further proceedings.[145]

IV. ANALYSIS

A. The Supreme Court Correctly Decided POM Wonderful LLC v. Coca-Cola Co.

Given the purposes behind the two statutes, the Supreme Court correctly decided that the FDCA and its regulations do not preclude Lanham Act claims for misnaming and mislabeling. First, the Court rightly decided to focus on the express language initially.[146] After all, statutory construction begins with the plain language of the statute(s) at issue.[147] In *POM*, the Court determined that neither the FDCA nor the Lanham Act contained express language indicating preclusion.[148]

Next, the Court examined the structure—here, the purposes and enforcement mechanisms—of each statute and concluded that the laws not only have coexisted for seventy years but also complement each other.[149] The Lanham Act protects commercial interests, as "[t]he purpose of the false-advertising provisions of the Lanham Act is to protect sellers from having their customers lured away from them by deceptive ads (or labels, or other promotional materials)."[150] Out of concern for safety, the FDCA outlaws misbranding.[151] Although the statutes prohibit essentially the same evil—misbranding—the different remedies provided by the statutes arguably serve separate purposes. Under the FDCA and FDA regulations, the government's enforcement power protects the public.[152] Under the Lanham Act, a private party's

[144] *Id.* at 2241.

[145] *Id.* at 2241–42.

[146] *See id.* at 2237.

[147] Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 475 (1992) (stating that "[i]n a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished.").

[148] *POM Wonderful LLC*, 134 S.Ct. at 2237.

[149] *Id.* at 2238.

[150] Schering-Plough Healthcare Prod., Inc. v. Schwarz Pharma, Inc., 586 F.3d 500, 512 (7th Cir. 2009).

[151] *62 Cases, More or Less, Each Containing Six Jars of Jam v. United States*, 340 U.S. 596 (1951) (stating that "Congress exerted its power to keep impure and adulterated foods and drugs out of the channels of commerce.").

[152] *See id.*

enforcement power protects its commercial interests.[153] From a policy perspective, both are laudable goals. These goals, combined with the absence of evidence that Congress intended the FDCA to preclude Lanham Act claims for mislabeling or misnaming, convince the author that the Supreme Court reached the right decision in *POM*.

Interestingly, the Supreme Court did not really critique the Ninth Circuit's opinion in any substantive way, apart from reversing the lower court. The Ninth Circuit's decision largely was based upon its prior decision in *PhotoMedex, Inc. v. Irwin*.[154] The Ninth Circuit had reiterated the principle from *PhotoMedex* that "the Lanham Act may not be used as a vehicle to usurp, preempt, or undermine FDA authority."[155] However, the Supreme Court did not mention *PhotoMedex* in its opinion.[156] Given the Supreme Court's reasoning for its decision, this makes sense. The Supreme Court emphasized the complimentary structure of the FDCA and the Lanham Act and the absence of express preclusion provisions in both statutes.[157] How could such complimentary statutes possibly usurp FDA authority? Because of the way the Supreme Court framed its analysis, the Court never even had to broach the issue of *PhotoMedex*.[158]

B. Lower Courts' Treatment of POM

After the Supreme Court's June 12, 2014, issuance of the *POM* decision, how would lower courts treat the decision? How are courts citing *POM*? Of course, lower courts must follow the Supreme Court's decisions, but would lower courts extend the Supreme Court's analysis and apply *POM* outside of the FDCA context? As the discussion below demonstrates, courts quickly began citing *POM* even outside of the FDCA context. One concurring Michigan appellate judge even adopted *POM*'s analytical framework to resolve a preclusion question about the Federal Employers' Liability Act and the Federal Railroad Safety Act.[159]

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[153] *Id*. at 596–97.

[154] *POM Wonderful LLC*, 679 F.3d at 1176.

[155] *Id.*

[156] *See generally POM Wonderful LLC*, 134 S.Ct.

[157] *See id.* at 2237–38.

[158] *See* JHP Pharm., LLC v. Hospira, Inc., No. CV 13–07460, 2014 WL 4988016, at *4 (C.D. Cal. Oct. 7, 2014) (noting that "*PhotoMedex* was the primary case relied on by the lower courts in *POM Wonderful,* and although it was not specifically overruled, its precedential value may be limited.").

[159] *See* Trout v. Grand Trunk W. R.R. Co., No. 312727, 2014 WL 4792201, at

continued . . .

Less than two weeks after the decision, the Court of Appeals of Washington cited *POM* in a case involving Washington's Consumer Protection Act.[160] The case, *McCarthy Finance, Inc. v. Premera*, addressed, *inter alia*, whether insurance policy holders could assert claims under the state Consumer Protection Act, notwithstanding a government insurance commissioner's right to regulate.[161] The court answered in the affirmative and at one point cited *POM* for the proposition that "[i]n general, multiple statutes can provide 'synergies [of] multiple methods of regulation' consistent with each statute providing 'its own mechanisms to enhance the protection of competitors and consumers.'"[162]

It also would not be long before a court addressed *POM* in the food industry context. In *Ibarrola v. Kind LLC*, the United States District Court for the Northern District of Illinois addressed a defendant food manufacturer's motion to dismiss in an unreported opinion.[163] The consumer plaintiff alleged that the defendant violated Illinois' consumer protection statute and common law by labeling its food product as containing no "refined" sugar when the plaintiff contended the product did contain "refined" sugar.[164] At the motion to dismiss stage, the defendant argued, *inter alia*, that the plaintiff's complaint must be dismissed on the theory that the FDA has primary jurisdiction over the issue raised regarding the food label.[165] However, the district court refused to dismiss the complaint on this basis due to the Supreme Court's *POM* decision issued just a month earlier.[166] According to the district court, "the Supreme Court recently called this rationale [of the primary jurisdiction of the FDA] into question."[167] Interestingly, the district court here applied the Supreme Court's reasoning in *POM* outside of the FDCA and Lanham Act context.[168] Probably out of caution so as not to violate Supreme Court precedent, the district court determined that the FDA might not have sole

*13 n.1 (Mich. Ct. App. Sept. 25, 2014) (Gleicher, J. concurring) (noting that his "analysis derives in large measure from *POM Wonderful LLC* [*v.*] *The Coca–Cola Co* . . . .").

[160] *See* McCarthy Fin., Inc. v. Premera, 328 P.3d 940, 951 n.45 (Wash. Ct. App. 2014).

[161] *Id.* at 949.

[162] *Id.* at 949 n.45 (citing *POM Wonderful LLC*, 134 S.Ct. at, 2239).

[163] Ibarrola v. Kind, LLC, No. 13 C 50377, 2014 WL 3509790 (N.D. Ill. July 14, 2014).

[164] *Id.* at *2.

[165] *Id.* at *5.

[166] *Id.* at *6.

[167] *Id.* The district court ultimately did dismiss the plaintiff's complaint but did not do so on the basis of the doctrine of primary jurisdiction. *See id.*

[168] *See id.*

enforcement powers as to food labels in the primary jurisdiction context.[169] The district court dismissed the complaint on other grounds,[170] so the court's application of *POM* was not vital to its ruling on the motion. Nonetheless the court's cautionary treatment of *POM* provides an interesting example of how lower courts have applied the Supreme Court decision.

The United States District Court for the Southern District of California came to a different conclusion regarding the doctrine of primary jurisdiction in *Saubers v. Kashi Co.*[171] In essence, the district court refused to extend *POM*'s holding on preclusion to the doctrine of primary jurisdiction.[172] According to the district court,

> Plaintiffs [sic] reliance on this case is inapposite, however, because *POM Wonderful* makes no mention of the primary jurisdiction doctrine and stands principally for the proposition that Lanham Act unfair competition claims brought by a competitor are not precluded by the regulatory scheme of the federal Food, Drug, and Cosmetic Act.[173]

In contrast to the Illinois district court in *Ibarrola*, the California district court in *Saubers* refused to extend *POM*'s reasoning to the primary jurisdiction context at the motion to dismiss stage of the litigation.[174]

The United States District Court for the Central District of California, the venue in which the *POM* litigation began, apparently saw the significance of the Supreme Court's consideration of *POM*. At least it appeared so when the district court stayed its decision in *JHP Pharm., LLC v. Hospira, Inc.*, another case involving the FDCA and Lanham Act, until after *POM*'s issuance.[175] Although *JHP* involved pharmaceuticals, the case followed the same basic fact pattern as *POM—i.e.*, the plaintiff alleged the defendants violated the Lanham Act through misrepresentations about their products, but the defendants claimed the FDCA precluded those Lanham Act claims.[176] After *POM*, the district court denied the defendants' motion to dismiss

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[169] *See id.*
[170] *See id.*
[171] *See* Saubers v. Kashi Co., No. 13CV899, 2014 WL 3908595 (S.D. Cal. Aug. 11, 2014).
[172] *Id.* at *4.
[173] *Id.*
[174] *See id.*
[175] *See JHP Pharm., LLC*, No. CV 13–07460, 2014 WL 4988016, at *2.
[176] *Id.* at *1–2.

in *JHP*.[177] However, more significant than the disposition of those motions was the district court's discussion of the *POM* decision and how it addressed questions about extension of the Supreme Court's ruling. Indeed, the district court tackled the possibility that *POM* only applied to cases involving food and beverages and concluded that:

> The logical building blocks of the Court's specific holding with regard to food and beverage labeling would seem to be equally applicable to food and beverage advertising, drug marketing, medical device labeling, cosmetics branding, or any other kind of marking or representation which would fall under both the Lanham Act and the FDCA, unless preclusion is required for some specific reason.[178]

Therefore, the district court held that *POM*'s general presumption in favor of the permissibility of Lanham Act claims applies to all products regulated by the FDCA.[179] Although this interpretation only represents the view of one federal district court, a broad application of *POM* is something that many manufacturers will probably seek to avoid. Related issues are addressed in the immediately following section.

C. Is POM a Popular Decision for the Food and Beverage Industry?

One commentator noted that the Supreme Court's consideration of *POM* "has the potential to redefine how businesses label a wide variety of products."[180] One partner in a prominent law firm remarked that "[t]his is a huge case for the food and beverage industry[.]"[181] An obvious benefit of *POM* for the food and beverage industry is the potential for more protection for every company through Lanham Act claims. After all, "[t]he purpose of the false-advertising provisions of the Lanham Act is to protect sellers . . . ."[182] Every company in the industry could see added commercial protection. Indeed, the Lanham Act has a private enforcement mechanism, unlike the FDCA or FDA regulations for which the FDA or Department of Justice must address

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[177] *Id.* at *10–11.

[178] *Id.* at *5.

[179] *Id. But see id.* at *4 (noting that "the extent of the shift in doctrine after *POM Wonderful* is not entirely clear . . . ").

[180] Bobelian, *supra* note 99.

[181] Bachman, *surpa* note 100.

[182] *Schering-Plough Healthcare Prods., Inc.*, 586 F.3d at 512.

violators.[183] Unfortunately, the most obvious downside to *POM* stems from the very benefit just discussed: the companies of the industry would be asserting Lanham Acts against each other.

The perception of whether *POM* is a good result for the food and beverage industry might depend on with whom one speaks regarding the decision. For example, consider the answer if one asked POM versus if one asked Coca-Cola. While it is obvious the parties to the litigation would have differing opinions, might the answer go deeper than that when considering the industry as a whole? Might an industry split occur along the lines of larger entities versus smaller entities? Or those with larger total markets shares versus those with smaller shares? Given the American Beverage Association's amicus brief in *POM*, the power of the beverage industry's trade association certainly appears to side with Coca-Cola.

POM markets and sells an arguably niche product.[184] Compare POM to Coca-Cola, the largest beverage company in the world with over 500 brands.[185] Perhaps, the companies with niche markets have "more" to protect and thus would be more likely to raise Lanham Act claims. Perhaps the companies with much broader markets would more often be on the defending side of a Lanham Act action. On the other hand, as one scholar has noted, larger entities may use the Lanham Act to harm their smaller competitors:

> Of course, the Lanham Act can be used to harass small rivals in order to signal them to reduce their competitive efforts (for example, to stop making explicit comparisons) or to face the expensive consequences of defending, and possibly losing, a lawsuit. Thus, there is some potential for anticompetitive misuse of private advertising litigation.[186]

Which type of entity in the food and beverage industry the *POM* decision most benefits or harms is an interesting question raised by this discussion, but the true answer is one beyond the scope of this Note. It certainly leaves the question open for future research.

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[183] *See id.* at 509.

[184] *See* Roberts, *supra* note 1, at 197 ("POM Wonderful is the largest grower and distributor of pomegranates and pomegranate juice in the United States, growing and distributing the Wonderful variety of pomegranates and 100% pomegranate juice containing no added sugars or preservatives.").

[185] *Coca-Cola at a Glance: KO101 Video and Infographic*, *supra* note 11.

[186] Ross D. Petty, *Supplanting Government Regulation with Competitor Lawsuits: The Case of Controlling False Advertising*, 25 IND. L. REV. 351, 358 (1991).

V. CONCLUSION

In *POM Wonderful, LLC v. Coca-Cola Co.*, the Supreme Court held that the FDCA and its FDA regulations do not by themselves bar Lanham Act claims for mislabeling or misnaming beverage products. One point to consider is whether all industries—not just the food and beverage industry—producing FDCA-regulated products must be wary of *POM*. The Central District of California certainly believed so when it concluded that *POM*'s language and holding easily could be applied in the pharmaceutical context.[187] Where other lower courts fall on this issue would be an interesting trend to track, and an appellate court may very well face that question in the near future.

[187] *See JHP Pharm., LLC*, No. CV 13–07460, 2014 WL 4988016, at *4.