By Jonathan Hudis

The branding and labeling provisions of the Food, Drug and Cosmetic Act (“FDCA”), 21 U.S.C. §§ 331, 343, and the unfair competition provisions of the Lanham Act, 15 U.S.C. § 1125(a)(1), are complementary; and the former does not preclude competitor suits under the latter, said a unanimous Supreme Court in POM Wonderful LLC v. Coca-Cola Co. (Appeal No. 12-761, June 12, 2014). Therefore, notwithstanding the branding and labeling provisions of the FDCA, POM Wonderful LLC’s (“POM’s”) Lanham Act lawsuit against Coca-Cola Co. (“Coca-Cola”) for the deceptive and misleading labeling of the juice blend sold by Coca-Cola’s Minute Maid Division may proceed.

POM and Coca-Cola’s Minute Maid Division are competitors in the pomegranate-blueberry juice market. Coca-Cola’s MINUTE MAID® juice blend is sold bearing a label displaying the words “Pomegranate Blueberry” with far more prominence than the other words on the label – describing the beverage to be a blend of five juices. In fact, the MINUTE MAID® juice blend only contains a miniscule percentage of (more expensive) pomegranate and blueberry juices, and a much larger percentage of (less expensive) apple and grape juices.

POM’s suit alleges that the name, label, marketing and advertising of Coca-Cola’s juice blend product misleads consumers into believing the product consists predominantly of pomegranate and blueberry juice, when in fact the beverage predominantly contains apple and grape juices. POM, as pomegranate grower and pomegranate juices distributor, asserts that Coca-Cola’s confusion of consumers causes POM to lose sales.

The District Court granted partial summary judgment to Coca-Cola, opining that the FDCA and its regulations preclude challenges to the name and label of Coca-Cola’s juice blend. This ruling was affirmed in relevant part by the Ninth Circuit Court of Appeals. Reversing the Ninth Circuit, the Supreme Court determined that this analysis was simply incorrect.

Section 43(a)(1) of the Lanham Act, 15 U.S.C. § 1125(a)(1), in relevant part, provides:

(a) Civil 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— …

(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, 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.
On the other hand, the FDCA prohibits the misbranding of food and drink. 21 U.S.C. §§ 321(f), 331. Food or drink is deemed misbranded if, inter alia, its labeling is false or misleading, 21 U.S.C. § 343(a), information required to appear on its label is not prominently placed thereon, 21 U.S.C. § 343(f), or a label does not bear the common or usual name of the food, if there is any, 21 U.S.C. § 343(i). The Food & Drug Administration ("FDA") has promulgated regulations to implement these provisions. See, 21 C.F.R. § 102.33 (2013) – regarding juice blend labeling. The Government does not preapprove juice labels under these regulations, but rather uses its enforcement authority to compel compliance. 21 U.S.C. §§ 333(a), 337.

Whereas competitors have a private right of action under the unfair competition provisions of the Lanham Act, private parties may not bring FDCA food-and-drink misbranding enforcement suits. 21 U.S.C. § 337. Moreover, while the FDCA specifically pre-empts state requirements that are of the type but not identical to the requirements in some of the misbranding provisions of the FDCA, 21 U.S.C. § 343-1(a), there is no mention of precluding other federal statutes that may cover this area.

Thus, the Court was careful to note that POM v. Coca-Cola is not a state pre-emption case, but rather involves the claim that the specific misbranding provisions of the FDCA preclude private suits under the more general unfair competition provisions of the Lanham Act. The Court further notes that resolution of this question may be resolved by a matter of simple statutory construction.

The FDCA and the Lanham Act have co-existed for nearly 70 years. In all that time, Congress has not enacted legislation precluding Lanham Act lawsuits in areas covered by the food-and-drink labeling provisions of the FDCA. The Court viewed this as “powerful evidence” that Congress did not intend FDA oversight to be the exclusive means of ensuring proper food and beverage labeling. Rather, another means to achieve this goal is by private lawsuits between competitors under the Lanham Act. In particular:

When two statutes [such as the FDCA and the Lanham Act] 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.

Enforcement of the FDCA and the detailed prescriptions of its implementing regulations is largely committed to the FDA in order to protect public health and safety. Lanham Act suits empower private parties to sue competitors to protect their interests on a case-by-case basis. These complementary federal statutes, said the Court, take advantage of synergies among multiple methods of regulation. This is consistent with the congressional design to enact two different statutes, each with its own mechanisms to enhance the protection of competitors and consumers.

POM v. Coca-Cola is the second time during the Supreme Court’s 2013-2014 term that the Court has defined the contours of a suit brought under the provisions of Lanham Act Section 43(a), 15 U.S.C. § 1125(a). In Lexmark International, Inc. v. Static Control Components, Inc., Case No. 12-873 (S.Ct., March 25, 2014), the Supreme Court defined and described the dual
tests under which a non-competitor may bring a claim for false advertising under Trademark Act Section 43(a), 15 U.S.C. § 1125(a). Under the Zone-of-Interest Test of *Lexmark v. Static Control*, a plaintiff comes within the zone of interest protected by Lanham Act Section 43(a) if the injury it claims is to its commercial interest in reputation or lost sales. Under the Proximate Cause Test, a plaintiff suing under Trademark Act Section 43(a) must show economic or reputational injury flowing directly from the deception wrought by the defendant’s false advertising; and that occurs when deception of consumers causes them to withhold trade from the plaintiff.

Thus, under *POM v. Coca-Cola* a competitor can maintain a claim under Lanham Act Section 43(a) that is complementary to another federal statute which may cover the same area of regulation. *Lexmark v. Static Control*, on the other hand, defines the limits of a suit brought by a non-competitor, so long as the plaintiff satisfies the so-called Zone-of-Interest and Proximate Cause Tests. These cases may signal a loosening of the Court’s requirements for Lanham Act Section 43(a) suits, contrary to the Court’s prior rulings limiting the reach of such claims. See, e.g., *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003) (unaccredited copying of an uncopyrighted work not a false designation of origin); *Traffix Devices Inc. v. Marketing Displays Inc.*, 532 U.S. 23 (2001) (functionality); and *Wal-Mart Stores Inc. v. Samara Bros. Inc.*, 529 U.S. 205 (2000) (distinctiveness).