Additional Coverage: Sky Not Falling after Pom v. Coke Decision

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Dear Client:

You'll recall, last week, we reported that the Supreme Court sided with Pom Wonderful in its Lanham Act case against Coca-Cola (Coke), essentially ruling that federal label authorization was not blanket protection from lawsuits [see WSD 06-13-2014]. We had a few readers chime in with differing opinions on how significant the ruling is for the alcohol industry. In order to set the record straight, WSD spoke with Peter Brody, a partner at Ropes & Gray's intellectual property litigation group, who among other things is considered an expert on intellectual property cases in a variety of industries, including beverage alcohol.

QUICK RECAP: Recall, Pom Wonderful sued Coke in 2008 under the Lanham Act for false advertising on its Minute Maid Pomegranate Blueberry product [see WSD 04-22-2014]. Pom's main beef with Coke is that the primary ingredients in Coke's Pomegranate Blueberry juice are apple and grape juice, while pomegranate and blueberry make up only a minute portion (0.5%) of the product. The lower courts sided with Coke on the basis that the courts trust the Food and Drug Administration (FDA) to regulate labeling. But the Supreme Court unanimously disagreed, allowing the case to more forward.

A WARNING SIGN: Peter says there are some significant distinctions between the federal agencies that regulate food and beverage (FDA) and alcoholic beverage (TTB). "With that said, I think there's a lot in this decision that I would describe as warning signs for the beverage alcohol industry."

For instance, Coke's label at issue here was not pre-approved by the FDA -- as the agency's main mission is to protect the health and safety of consumers -- rather it was "authorized by regulations," he says. "If this decision did anything it may have slightly clarified some of these distinctions between a requirement and an authorization. You can't challenge something that's required, but you can challenge something that's authorized, even if it's approved on a COLA."

Peter also made the point that the COLA approval process for alcoholic beverages contains both requirements and authorization elements. An example of a requirement would be including the abv on a wine label. Listing the varietal is more of an authorization because to call a product cabernet sauvignon it really only needs to contain about 75% cabernet grapes. And similar measures apply to the designation of origin.

"If you do the math, you could very easily conceive of a product that's only half what it says it is and the other half is a bunch of other stuff," he says. Technically, another winemaker that feels this is false advertising could bring a valid Lanham Act case against one of its competitors. Though he noted that this is pretty unlikely to happen because most winemakers like to have that flexibility.

The big question is whether this ruling will result in a flood of Lanham act cases. "I think you may see some test cases, I wouldn't say it's going to change the landscape dramatically." Additionally, both Peter and a few of our readers have indicated most industry lawyers were not advising their clients that COLA approval would protect them from lawsuits even before this decision.
So there you have it. The Supreme Court decision in this non-alcoholic beverage case does have implications for the alcohol industry, but the majority of experts we've spoken to do not believe it will significantly change the dynamics of the industry.

WSD BRIEFS:

Until Monday, Emily

"Anger is like gasoline. If you spray it around and somebody lights a match, you've got an inferno. [But] if we can put our anger inside an engine, it can drive us forward."
-- Scilla Elworthy

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