3-1-2015

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THE ROLE OF THE FIRST AMENDMENT IN FALSE ADVERTISING: HOW THE SUPREME COURT’S DECISION IN *POM WONDERFUL, LLC V. COCA-COLA, INC.* SUPPORTS A FUTURE OF EXPANDED PROTECTION

Carolyn Ward*

INTRODUCTION

A product’s commercial success or failure has become increasingly dependent upon the effectiveness of its advertising campaign. This reality is not lost on the companies who pay top-dollar for prime exposure of their products, as evidenced by the astronomical sums paid for Super Bowl commercials or full-page ads in Vogue.¹ The ever-increasing prices are a clear indication of the demand from marketers seeking to convey information and from consumers seeking to become better informed. With a greater scrutiny on the advertising industry as a whole, the inaccurate concepts conveyed through false and deceptive advertising have created quite a few new issues.

Unsurprisingly, some of the greatest concern stems from the marketing of products involving health and consumer safety. For decades, the advertising industry employed deceit, puffery, and misguidance throughout its campaigns in order to sell consumers an idea rather than a product.² In fact, the foundation of the entire advertising industry rested upon these tactics.³ Consumers have recently put a greater emphasis on discovering the truth behind products that they choose to

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3. See id.
use for their health and beauty care, rather than purchasing based on
what the advertisement itself sells. Although this new trend has impacted
the majority of markets, the food and beverage industry has continued to
incorporate deceit into its marketing strategy.

In order to handle this concern, Congress established a variety of
statutes to protect not only the food, drug, and cosmetic industries but
also the advertising industry.\(^4\) Although courts have struggled with the
interplay of these statutes, the Supreme Court recently made progress in
POM Wonderful, LLC v. Coca-Cola, Inc. by interpreting them to be
complementary to each other rather than conflicting.\(^5\) Although this
decision seemingly speaks directly to the resolution of statutory
interpretation, it also has a powerful underlying impact on the role of the
First Amendment in commercial speech.

Currently, commercial speech receives “quasi-protection” from
the First Amendment, which has subjected advertisements to an
intermediate level of scrutiny.\(^6\) Part I introduces the legal standards that
have previously prescribed the role of the First Amendment with regard
to commercial speech, specifically across the food, beverage, and
cosmetic industries. Part II will probe the distinctions that establish the
varying levels of review afforded to labels across these different
industries, pointedly the approval required of drug labels that has not
been required of food and beverage labels. Part III will then examine an
illustration of the Supreme Court’s latest attempt at resolving this
troubling distinction through its decision in the POM case. Part IV
discusses the implications that this decision will have on future
interaction concerning the FDCA and the First Amendment generally.
Part V calls for greater First Amendment protection against false or
misleading advertising in the food and beverage industry. Finally, Part
VI concludes that in this industry, commercial speech should be subject
to the most rigorous level of review to ensure that the First Amendment
only protects truth in advertising.

1125(a) (2012) (concerning Trademarks).
\(^6\) See DOYICE COTTON AND JOHN WOLOHAN, LAW FOR RECREATION AND
SPORT MANAGERS 559, 564 (5th ed. 2013).
I. EXPLORING FALSE ADVERTISING CLAIMS UNDER THE FDCA, THE LANHAM ACT, AND THE IMPACT OF PRECLUSION

A. Fundamental Protections Against False Advertising

Grounded in the Constitution is the explicit protection, among other things, of freedom of speech. Specifically, the First Amendment forbids Congress from passing any law "abridging the freedom of speech, or of the press." Freedom of speech encompasses protection of both commercial and non-commercial speech from government regulation. Under the First Amendment, non-commercial speech warrants full protection whereas commercial speech receives something less.

Commercial speech has been defined by the Supreme Court as "[s]peech where the speaker is more likely to be engaged in commerce, where the intended audience is commercial or actual or potential customers, and where the content of the message is commercial in character." Commercial speech protection has never been absolute. In fact, false or misleading commercial speech is not entitled to any protection under the First Amendment, and may be entirely prohibited in such circumstances.

To determine whether commercial speech receives First Amendment protection, the speech in question must pass a four-part test. First, the speech must not be misleading and must concern some lawful activity. Additionally, the asserted government interest at issue must be substantial and be advanced, in some way, by the regulation of

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7. See U.S. CONST. amend. I.
8. Id.
11. See id.
12. See id.
14. Id.
the commercial speech.\textsuperscript{15} Finally, the regulation must be “narrowly
drawn.”\textsuperscript{16} This last requirement effectively ensures the regulation be no
more extensive than necessary to serve the government interest being
asserted.\textsuperscript{17}

This stringent model of the commercial speech doctrine affords
broad protection to commercial speech as a whole. A more specific focus
on protecting the public from unsafe or mislabeled products within the
food and drug industry is rooted in the Federal Food, Drug, and Cosmetic
Act (FDCA).\textsuperscript{18} Certain provisions of the FDCA speak directly to
advertising in the context of misbranded labels.\textsuperscript{19} Courts have found
mislabeling in circumstances of a false label, a package form that does
not comply with guidelines, or the prominence of incorrect or misleading
information on the label.\textsuperscript{20} If the information printed on the package or
label is false, then its advertising is false or misleading in a material
respect.\textsuperscript{21} These regulations give the Food and Drug Administration
(FDA) nearly exclusive enforcement authority.\textsuperscript{22}

Cases dealing with the issue of false advertising often invoke
additional protections. The Lanham Act, primarily intended to protect
commercial interests from unfair competition, broadly prohibits false
advertising.\textsuperscript{23} The Act protects against “false designations of origin, false
descriptions, and dilution.”\textsuperscript{24} Any person engaged in commerce that uses
any false or misleading representation or description of fact triggers a
violation under this Act.\textsuperscript{25} In order for representations to violate the Act,
they must either be likely to cause confusion as to the origin of the good,
or misrepresent the nature or qualities of goods, services, or commercial
activities.\textsuperscript{26}

\begin{footnotes}
\item 15. \textit{Id.}
\item 16. \textit{Id.}
\item 17. \textit{Id.}
\item 19. \textit{Id.}
\item 20. 21 U.S.C. § 343(a) (2012).
\item 25. \textit{Id.}
\end{footnotes}
Under the Lanham Act, any person may bring a claim who "believes that he or she is likely to be damaged by" the use of a false description or representation.\(^\text{27}\) To establish a claim of false advertising, the plaintiff must be able to demonstrate that the statement in the advertisement at issue is in fact false.\(^\text{28}\) To establish falsity of an advertisement, the claimant must either prove that the advertisement is literally false based on factual evidence, or that the advertisement, although technically truthful, is likely to deceive customers.\(^\text{29}\) In cases alleging misrepresentation, the plaintiff must also be able to show that the defendant misrepresented an "inherent quality or characteristic" of the product through its false advertising.\(^\text{30}\)

\textit{B. Preclusion Issue}

Although the aforementioned legal standards seemingly fit well together in the realm of false advertising claims, many courts have not found that to be the case.\(^\text{31}\) A major concern for a plaintiff attempting to bring a claim of misrepresentation under both the FDCA and the Lanham Act is the issue of preclusion.\(^\text{32}\) Historically, courts have decided that "claims requiring the interpretation or application of the FDCA . . . are precluded from being brought by private litigants."\(^\text{33}\)

 Often, this issue is wrongly asserted as one concerning preemption.\(^\text{34}\) Preemption cases, however, turn on one major question:

\begin{itemize}
  \item 28. See Nat’l Basketball Ass’n v. Motorola, Inc., 105 F.3d 841, 854 (2d Cir. 1997).
  \item 29. See id.
  \item 30. Id.
  \item 31. See, e.g., PhotoMedex, Inc. v. Irwin, 601 F.3d 919 (9th Cir. 2010) (teaching that courts must generally prevent private parties from undermining the FDA through private litigation); Cytosport, Inc. v. Vital Pharm., Inc., 894 F. Supp. 2d 1285 (E.D. Cal. 2012) (barring a competitor’s Lanham Act claim based on the extensive regulations of the FDA in area of concern without enforcement).
  \item 32. See POM Wonderful LLC v. Coca-Cola Co., 134 S. Ct. 2228, 2236 (2014).
  \item 34. Courts across the country are addressing questions presented by the constitutional issue of federal preemption to determine when, and to what extent,
whether state law is preempted by a federal statute.\textsuperscript{35} Cases concerning the legal standards at issue here do not address any type of state law, thereby removing these claims from any state-federal balance inquiry.\textsuperscript{36} These cases do, however, address questions of whether the provisions of one federal statute preclude plaintiffs from bringing a claim under a separate federal statute.

Preclusion typically comes in one of two forms — issue preclusion or claim preclusion.\textsuperscript{37} Issue preclusion forecloses the opportunity to litigate a matter that has already once been litigated and decided.\textsuperscript{38} Claim preclusion forbids a matter that has never been litigated from being raised based on the determination that it should have been raised in an earlier suit.\textsuperscript{39} Although the conflict between the FDCA and the Lanham Act does not fit squarely into either of these two categories, courts are often required to decide whether the FDCA limits Lanham Act claims or if the two regulations are actually complementary to one another.\textsuperscript{40}

II. "WELL-SETTLED" DISTINCTIONS BETWEEN THE FDCA’S ROLE IN MISBRANDED FOOD LABELS COMPARED TO MISBRANDED DRUG LABELS

Courts have long struggled with understanding that the FDCA and the Lanham Act operate as two separate statutes focusing on protection of two different areas of the consumer marketplace. As mentioned above, the Lanham Act’s primary intention is to protect


\textsuperscript{36} See POM Wonderful, 134 S. Ct. at 2236.


\textsuperscript{38} Id.

\textsuperscript{39} Id.

commercial interests from unfair competition. Conversely, by setting federal labeling requirements, the FDCA focuses on protecting the public from mislabeled products. Prior decisions concerning these two regulations provide a glimpse of how the courts perceived the role of the FDCA within the First Amendment.

A. Food and Beverage Labeling

The permission of Lanham Act claims to be brought in conjunction with the FDCA illustrates the major concern for consumer protection within the food and beverage industry. Cases concerning mislabeling problems date back over 20 years, as exemplified by a 1989 decision in Grove Fresh Distributors, Inc. v. Flavor Fresh Foods, Inc. Here, a food distributor brought suit against a food manufacturer for falsely labeling, shipping, and advertising its orange drink as “Flavor Fresh 100% Orange Juice from Concentrate” when it actually contained various additives such as sugar. Grove Fresh maintained that Flavor Fresh Foods’ misrepresentation “caused confusion, deception, and mistake in the orange juice market” and consequently “hindered the sales of orange juice products [it] distributed.” This triggered a claim under section 43(a) of the Lanham Act. Despite Flavor Fresh Foods’ argument that this assertion was simply an attempt to recover damages under the FDCA, which it asserted was impermissible under well-settled law, the court found that the defendant had actually mischaracterized the nature of the Lanham Act claim. Because Grove Fresh did not base its claim on the FDCA regulations alone, the court held that it sufficiently asserted an independent basis for its claim as to not bar any recovery.

Another prior case between POM Wonderful and Ocean Spray Cranberries involved a Lanham Act claim, alleging “false advertising” for the sale of a pomegranate and cranberry juice that was almost

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41. See supra Part I.A.
42. See id.
44. Id. at 715.
45. Id.
46. Id.
47. Id. at 715–16.
48. Id. at 716.
completely comprised of apple juice. Against Ocean Spray’s argument that the FDCA pre-empted the Lanham Act false advertising claim, a California district court clarified that the key issue in this line of cases is whether the false advertising involves a fact that can be “easily verified.” This question does not require the truth of the fact to be determined by the FDCA. Ultimately the court declined to limit the scope of POM Wonderful’s allegations under the Lanham Act based on the FDCA.

B. Drug Labeling

Although courts have previously held that the FDCA plays a broad role when it comes to assertions of false advertising in the food and beverage industry, and therefore the commercial speech protection of the First Amendment as well, the outcome of cases related to drug mislabeling have not been so accommodating. Courts have emphasized the FDCA’s approval of labels and ingredients when considering the validity of a Lanham Act claim. For example, in *American Home Products Corporation v. Johnson & Johnson*, a court in the Southern District of New York held that the U.S. Food and Drug Administration’s (FDA) approval of a label is a complete defense to a competitor’s action.

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50. Id. at 1118.

51. Id. ("Put differently, the key issue in the line of cases dealing with FDCA or FDA regulation preclusion of Lanham Act claims is whether the false advertising involves a fact that can be ‘easily verified,’ without requiring the truth of the fact to be determined by the FDA.").

52. Id. at 1120.


55. See, e.g., *American Home Prods. Corp.*, 672 F. Supp. at 144. See also Connor Sullivan, *A First Amendment Approach to Generic Drug Manufacturer Tort Liability*, 123 YALE L.J. 495, 498 (2013) ("All manufacturers are required to submit annual reports containing information relating to the safety, effectiveness, and appropriate labeling of approved drugs.").

under the Lanham Act and thereby precluded liability for false
advertising. Despite the "considerable" scientific and medical dispute
in the early 1980's of whether the ingestion of Aspirin was causally
related to Reye Syndrome, the FDA decided not to require a warning
label based on the uncertainty of the statistical evidence. Plaintiffs
asserted that Johnson & Johnson was false in its advertising claims of
both the efficacy and safety of Aspirin, but the court gave more weight to
the FDA's decision.

In a similar decision, the Third Circuit faced the issue of whether
a plaintiff asserting a Lanham Act violation needed to show that the
defendant's advertising claims are "inadequately substantiated" under
FDA guidelines, or whether the plaintiff simply needs to show that "the
claims are literally false or misleading to the public." Sandoz
Pharmaceuticals Corporation v. Richardson-Vicks, Inc. concerns
Pediatric 44, a children's cough medicine that advertised it would "start
to work the instant [the children] swallow" by "shielding irritated cough
receptors on contact." Facing a claim that this advertising was false and
misleading because the FDA never approved the active ingredient to be
effective for the relief of coughs, the court found that the claims were not
literally false and there was no evidence to support the contention that
the consumer advertising claims were misleading. Because the Lanham
Act false advertising claim was based on an issue that the FDA has not
yet determined, i.e. whether or not the primary ingredient in Pediatric 44
was active or inactive, Sandoz Pharmaceuticals' claim was barred.

57. Id. at 145.
58. Id. at 139.
59. Id. at 145-46.
61. 902 F.2d 222.
62. Id. at 224.
63. Id. at 231-32.
64. Id. at 232.
III. THE REDEFINITION OF PRIOR “WELL-ESTABLISHED” LAW REGARDING MISBRANDED FOOD LABELS:

POM WONDERFUL LLC v. COCA-COLA COMPANY

The courts’ long struggle with the interplay between the First Amendment; protections for food, beverage, and drug labeling under the FDCA; and the concern over false advertising under the Lanham Act and the First Amendment is undeniable. Certain instances have shown that some courts give more deference to the discretion of the FDCA, while others afford more protection to consumers faced with the possible danger from misleading labels. A recent case that worked its way to the Supreme Court may have, however, given a more definitive role to the FDCA within the First Amendment’s non-absolute protection of commercial speech.

A. Factual Background

POM Wonderful, a company that makes and sells pomegranate juice products, is no stranger to claims concerning mislabeled beverages that allege to be pomegranate juice. Most recently, the company sued its competitor, Coca-Cola, over a pomegranate blueberry juice that it

65. See, e.g., Mutual Pharm. Co. v. Ivax Pharm., Inc., 459 F. Supp. 2d 925, 946 (C.D. Cal. 2006). In some cases, courts have refused to interpret and apply FDCA statutory or regulatory provisions in order to determine the falsity or misleading nature of a label. See, e.g., Braintree Laboratories, Inc. v. Nephro-Tech, Inc., 96–2459-JWL, 1997 WL 94237 (D. Kan. Feb. 26, 1997); All One God Faith, Inc. v. The Hain Celestial Group, Inc., 2009 WL 4907433 at *8 (N.D. Cal. Dec. 14, 2009). However, if a court would only need to verify whether a specific level or conduct conforms to what the FDA required, a Lanham Act claim is not barred. Id.


67. See, e.g., POM Wonderful, LLC v. Ocean Spray Cranberries, Inc., 642 F. Supp. 2d 1112, 1116 (C.D. Cal. 2009) (alleging Ocean Spray’s pomegranate cranberry juice was mislabeled regarding the amount of cranberry juice and pomegranate juice it contained); POM Wonderful, LLC v. Organic Juice USA, Inc., 769 F. Supp. 2d 188 (S.D.N.Y. 2011) (asserting that competitor was falsely labeling adulterated pomegranate juice as “100% pure”); POM Wonderful, LLC v. Purely Juice, Inc., 362 F. App’x. 577, 579 (9th Cir. 2009) (bringing suit over juice marketed as “‘100%’ pomegranate juice with ‘no added sugar’” when competitor should have known the representation was false).
produces within its Minute Maid Division.  

Although the company's dispute did not arise solely over the name of the product, the fact that the words "pomegranate blueberry" are displayed more prominently than any other words listed on the label stimulated concerns.

The wording on the label is very telling of how Coca-Cola wanted to market its juice product. The primary display of language included the words "pomegranate blueberry" in all capital letters on two separate lines. Below those words in much smaller font was the phrase "flavored blend of 5 juices." Listed in even smaller font on the next line were the words "from concentrate with added ingredients." Additionally, a vignette of the fruits depicted on the label pictures a pomegranate that is almost double the size of the other fruits included.

68. See POM Wonderful, 134 S. Ct. at 2233.
69. Id. at 2235.
70. Id.
71. Id.
72. Id.
73. Id.
74. POM Wonderful, LLC v. Coca-Cola Co., 679 F.3d 1170, 1173 (9th Cir. 2012).
However, the product actually contained a breakdown of 99.4% apple and grape juices, .03% pomegranate juice, .02% blueberry juice, and .01% raspberry juice.  

B. Procedural History

Based on the belief that it was suffering a decrease in sales, POM Wonderful claimed that, inter alia, Coca-Cola violated the false advertising provisions of the Lanham Act in a California district court. The company alleged that the advertising of the Coca-Cola beverage misled consumers to believe that the juice was primarily a pomegranate and blueberry blend when it actually consisted of apple and grape juice. Specifically, POM challenged the name, labeling, advertising, and marketing of the pomegranate blueberry juice.

The district court found that POM Wonderful’s Lanham Act challenge of the name and labeling of Coca-Cola’s product was barred. The court held that this suit may be construed as “impermissibly challenging” FDA regulations that allow for this name and labeling of the product. If this suit were to proceed, the court felt that it might have to improperly interpret and apply FDA regulations on juice beverage labeling. The FDCA’s regulations had “directly spoken on the issues that form the basis of POM’s Lanham Act claim against the naming and

75. See POM Wonderful, 134 S. Ct. at 2235.
76. See POM Wonderful, LLC v. Coca-Cola Co., 727 F. Supp. 2d 849, 858–59 (C.D. Cal. 2010). Originally, POM Wonderful alleged causes of action for false advertising under the Lanham Act, false advertising under the California Business and Professions Code, and statutory unfair competition under the California Business and Professions Code. Id.
77. Id. at 856.
78. See id. at 853–56 (challenging claims of “brain-nourishment” on coupons, in-store promotions, print advertisements, television advertisements, and the Minute Maid Website).
79. Id. at 871–73.
80. Id. at 871.
81. Id. at 872.
labeling of the Juice” and so barred the claim with regard to the labeling and naming challenges. 82

On appeal in the Ninth Circuit, POM Wonderful argued that the district court erred in holding that the FDCA bars its Lanham Act claim and that the FDCA pre-empts POM Wonderful’s state law claims against the name and labeling of Coca-Cola’s pomegranate blueberry juice. 83 After examining the history of Lanham Act claims brought in accordance with the FDCA, the court discussed the “agreed upon” limitations that the FDCA places on claims under the Lanham Act. 84 The court believed that enforcing the FDCA and its regulations under a Lanham Act claim would undermine Congress’ decision to limit the enforcement of the FDCA to the federal government, as well as potentially require a court to interpret the ambiguous regulations of the FDA. 85 After following what the court believed its task to be – giving both statutes as much effect as possible – the Ninth Circuit still concluded, as the district court did, that the FDCA and its regulations barred a Lanham Act claim for the both naming and labeling aspects of Coca-Cola’s product. 86

The court made an important note, however, that it does not hold the label as non-deceptive. 87 It simply stated that it is up to the FDA to take a view on whether or not this label misleads consumers. 88 Although the FDA has not established a form of general review of beverage labels prior to their distribution to consumers, the court operated under the assumption that if the label were in fact deceptive, the FDA would have acted. 89

82. Id. at 871.
84. The agreed upon limitations include: (1) a plaintiff may not sue under the Lanham Act to enforce the FDCA or its regulations, (2) a plaintiff may not maintain a Lanham Act claim that would require a court originally to interpret ambiguous FDA regulations, and (3) a Lanham Act claim may not be pursued if the claim would require litigating whether a particular conduct violated the FDCA. Id. at 1175–76.
85. Id.
86. Id. at 1176–77.
87. The court claimed that, as best it can tell, the label “abides by the requirements the FDA has established,” leading it to presume that the label complies with the relevant FDA regulations. Therefore, since the FDA does not speak to the deceptive nature of the label, neither did the court. Id. at 1178.
88. Id.
89. Id.
C. The Supreme Court

The lower courts’ decisions make it clear that the previous understanding in cases of this nature is that the necessity of interpretation or application of FDA regulations would be fatal to a Lanham Act claim brought under the FDCA. In June of this year, the Supreme Court took a stance on the true role it believes that the FDCA plays in Lanham Act cases related to false advertising and commercial speech.

After an unsatisfying decision for POM Wonderful in both the district court and the Ninth Circuit court of appeals, the case continued to make its way up the ladder to attempt a more favorable verdict in the Supreme Court of the United States. The Court was asked to consider the intersection of the FDCA and the Lanham Act, and whether the Ninth Circuit was correct in holding that a Lanham Act claim is precluded by the FDCA in the realm of labeling for food and beverages. Specifically at issue was whether a private party may bring a Lanham Act claim challenging a food label that is regulated by the FDCA. Ultimately, the Supreme Court found the holding of the lower courts to be incorrect.

In reaching this conclusion, the Court pointed out that this was not a case of pre-emption despite the fact that the lower courts treated it as such. A pre-emption case deals with whether a state law is preempted by a federal statute, but this case addressed the potential preclusion of a cause of action concerning one federal statute based on the provisions of a separate federal statute. Upon interpretation of the

90. See POM Wonderful LLC v. Coca-Cola Co., 727 F. Supp. 2d 849, 858–59 (C.D. Cal. 2010), aff’d 679 F.3d 1170 (9th Cir. 2012), rev’d 134 S.Ct. 228 (2014) (holding that POM was precluded from pursuing its Lanham Act claim against the naming and labeling on the juices bottle because it complies with the relevant FDA regulations); POM Wonderful LLC v. Coca-Cola Co., 679 F.3d 1170 (9th Cir. 2012), rev’d 134 S. Ct. 228 (2014) (upholding the district courts holding that the FDCA and its regulations preclude POM’s Lanham Act false advertising claim).
92. Id.
93. Id. at 2233.
94. Id.
95. Id. at 2236.
96. Id.
97. See supra Part I.B.
98. See POM Wonderful, 134 S. Ct. at 2230.
two statutes, it is clear that the express language within both does not forbid or limit any Lanham Act claims under the FDCA. Without these terms, the Court found that food and beverage labels regulated by the FDCA are not off limits for Lanham Act claims.

Contrary to the opinion of the lower courts, the Supreme Court actually found that rather than conflicting with each other, these two statutes complimented each other based on their individual provisions. The two statutes imposed “different requirements and protections.” Based on this finding, the Court felt that it would show “disregard for the congressional design” to hold that Congress’ intent was for one statute to preclude the other. Because the FDA has acknowledged that it does not have a general review or preapproval process for food and beverage labels in its provisions, precluding Lanham Act claims could result in less effective protection of commercial interest in the food and beverage industry as compared to other, less regulated industries. The Court made it clear that it did not believe this was the intent of Congress in regards to the FDCA’s protection of health and safety.

IV. WHAT THIS MEANS FOR THE FUTURE OF THE FDCA AND THE FIRST AMENDMENT

Prior to this decision, there was great speculation about what the Supreme Court would decide. Many legal professionals speculated about the impact that this case would have on the future of food wars and the

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99. See id. at 2237.
100. See id.
101. See id. at 2231 (“The Lanham Act and the FDCA complement each other in major respects, for each has its own scope and purpose. Both [statutes] touch on food and beverage labeling, but the Lanham Act protects commercial interests against unfair competition, while the FDCA protects public health and safety.”).
102. Id. at 2238.
103. Id.
104. The FDA seemingly does not preapprove food and beverage labels under its regulations in the same manner it does for other labels, such as drug labels. It instead relies on enforcement actions, warning letters, and other measures to effectively regulate these labels when they raise a concern for public health and safety. See id. at 2239.
105. See generally id. at 2239 (asserting that the centralization of the FDCA enforcement authority in the federal government does not indicate that Congress’ intent was to foreclose on private enforcement of other federal statutes).
“far-reaching effect” concerning food and beverage labeling.\textsuperscript{106} Although the exact reasoning the Court would take to reach its decision was unclear, there was great anticipation of some type of impact on false advertising litigation over products regulated by federal agencies.\textsuperscript{107}

This recent Supreme Court decision has implemented a significant change in the way courts are to approach cases involving a Lanham Act claim arising under the FDCA in the food and beverage realm.\textsuperscript{108} As mentioned above, various lower courts gave a great amount of deference to the FDCA.\textsuperscript{109} It is now clear that courts can no longer use the historically exclusive enforcement authority given to the United States as an excuse to not interpret or apply the regulations of the FDCA when two federal statutes are at issue. The Supreme Court exemplified the importance of correct statutory interpretation and thereby clarified the correct result in doing so going forward.\textsuperscript{110}

The FDA had previously acknowledged that it did not pursue enforcement measures regarding objectionable labels.\textsuperscript{111} Although the FDA has various provisions regarding food and beverage labeling, such as “[i]f a juice blend does not name all the juices it contains and mentions only juices that are not predominant in the blend, then it must declare the percentage content of the named juice or ‘indicate that the named juice is present as a flavor or flavoring,’” the FDA has never preapproved juice labels under these regulations.\textsuperscript{112} The only time in which a food or beverage label falls under review is when a controversy

\begin{itemize}
\item \textsuperscript{107} \textit{Id.}
\item \textsuperscript{108} \textit{See id.} (requiring that courts now view the statutes as complementary rather than conflicting and do not automatically defer to the regulations of the FDCA to bar Lanham Act liability in cases where food and beverage labeling is involved).
\item \textsuperscript{109} \textit{See supra} Part II, III.B.
\item \textsuperscript{110} The fact that this was a statutory interpretation case that followed traditional rules does not change simply because the case involves multiple federal statutes nor because an agency is involved. Based on this, the Court found the best way to harmonize the two was not to bar the Lanham Act claim. \textit{See POM Wonderful}, 134 S. Ct. at 2237.
\item \textsuperscript{111} \textit{See supra} note 91 and accompanying text.
\item \textsuperscript{112} \textit{POM Wonderful}, 134 S. Ct. at 2235–36. \textit{See 21 U.S.C § 343}.
\end{itemize}
arises from the alleged misleading nature of the description printed on it.\footnote{113} Contrast this approach with the FDA’s regulation of other types of labels, such as drug labels, and a dramatic difference is apparent.\footnote{114} With regard to drug labels, the FDA reviews all drug labels prior to distribution in an effort to guarantee consumer protection.\footnote{115} Despite the fact that some cases have argued discrepancies with the hazardous effects of certain drugs that are not necessarily listed on the label, this issue does not speak to a lack of review but rather a high amount of deference to the FDA for its use of “best” judgment.\footnote{116}

The continuous representation by the government that the FDA does not preapprove juice labels is illustrative of the less extensive role that the FDA has played when regulating the food and beverage industry versus regulating the drug industry.\footnote{117} However, in this decision the Supreme Court made it clear that the FDCA is not an overarching preclusive authority in respect to suits over deceptive or misleading food labeling.\footnote{118} This holding indicates that the Court believes the Lanham Act should have more expansive control over consumer protection than it previously has. Based on this interpretation, the First Amendment may play a bigger role in consumer health and safety than it currently occupies.

Although this decision has set a new and quite arguably correct precedent, it has only done so in a very small facet of the consumer marketplace industry. The Court in POM Wonderful deals only with the issue of mislabeling within the food and beverage industry.\footnote{119} As mentioned above, the FDA calls for more regulation over the drug industry,\footnote{120} so it seems as though the ruling here seeks to align food and beverage cases with the elevated review of misleading labels courts look to in drug cases.

\footnote{113} See POM Wonderful, 134 S. Ct. at 2235–36.  
\footnote{115} See supra note 46 and accompanying text, Part II.B.  
\footnote{116} See supra Part II.B.  
\footnote{117} See supra Part II.A.  
\footnote{118} See POM Wonderful, 134 S. Ct. 2228 (2014).  
\footnote{119} Id.  
\footnote{120} See supra Part II.B.}
This decision has reached the attention of not only the lower courts, but also business marketing publications that have been reporting headlines indicating projections for the future of the FDCA’s role in the First Amendment. As everyone attempts to make sense of this decision, one consequence remains perfectly clear—that this ruling means food labels will come under increased scrutiny. Although the implications of this recent decision are just beginning to emerge, it is fair to speculate about just how far First Amendment protections will be expanded, and if that expansion is truly appropriate based on the perceived intentions of the framers of the Constitution. When reviewing the Supreme Court’s decision with a high level of scrutiny, it becomes clear that the pros of having greater First Amendment protection over false or misleading advertisements greatly outweighs the cons for a variety of reasons.

V. A NEED FOR GREATER PROTECTION AGAINST FALSE OR MISLEADING ADVERTISING ON FOOD AND BEVERAGE LABELS

Countless studies have examined how much credit consumers give to advertising campaigns. Undoubtedly, the advertising market is a profit-driven mechanism that seeks to convey information to consumers in every way possible to interest prospective buyers in a certain product. Despite the variance throughout the advertising industry over its existence, consumers have long relied on labels to gather information. Consumers put their trust in labels to identify product information such as ingredients and calories, among other things, so it is unsurprising that the Supreme Court finally held that there should be no deference given to other statutes that emphasize the credibility of the manufacturer.

Although the Supreme Court’s decision is a step in the right direction for the expansion of First Amendment protection in the realm


122. See supra note 109.
of false advertising, there are valid arguments for and against further expansion. To understand the argument in favor of expansion and the proposal of even broader-sweeping protection, one must first acknowledge the negative assertions against the Supreme Court’s call for a more stringent review of labels.

Allowing for greater First Amendment protection over the misleading nature of many food and beverage labels creates a chilling effect on manufacturers and advertising agencies.\textsuperscript{123} The standard for “misleading” is blurry, and if courts allow for only advertising that is completely and indisputably true, manufacturers will inherently be more reserved with their labels, if they choose to advertise at all. This chilling effect could snowball into disastrous harm to consumers. If manufacturers and advertisers fear liability for what they put on their labels, they may omit important information due to the possibility that the information may not receive First Amendment protection.\textsuperscript{124} For example, if a label included a description similar to “May Contain Nuts,” the “may” language is not definitive enough to constitute a truth or falsity, so it could potentially be left off of the label. If a consumer were allergic to nuts but purchased the product based on a lack of warning against the potential inclusion of an allergen, this could be a huge threat to the consumer’s health and safety. Undoubtedly, liability for harming a consumer over an allergen would be exponentially greater than the damages received for not passing muster under the heightened First Amendment protection. Arguably, the Supreme Court’s proposed expansion forces companies to weigh the risk of human safety against the risk of suit for false advertising, which is not a balancing test worth performing.

Despite the plausible concerns over expanding the scope of the First Amendment to encompass protection of false and misleading advertisements, there are clear benefits that are both explicitly conveyed and implied from the Supreme Court’s reasoning. In the interest of fostering economic growth, protecting consumers from the detrimental trickery of the advertising industry, and enhancing the marketplace of

\textsuperscript{123} See generally DAVID KOHLER ET AL., MEDIA AND THE LAW (2nd ed. 2014) (discussing the fact that punishing some speech inherently leads to lesser speech being published).
\textsuperscript{124} See id.
ideas, the *POM Wonderful v. Coca-Cola* decision should not only impact the food and beverage industry, but should expand to protect all areas of false advertising concern where two federal statutes may be in conflict.

**A. Foster Economic Growth**

The heart of the advertising industry centers around marketing products for future sales.125 Advertisers strive to create both brand recognition and brand loyalty to have consumers associate products with feelings, memories, and desires in the hopes that the advertisement speaks enough for the product that a consumer will purchase it based purely off aesthetics.126 For a significant amount of the history of advertising, manufacturers’ desire to move products off the shelf for a profit had jeopardized truthful advertising.127 Not until recently, with the increase of consumer awareness about the harmful effects of many products, have market trends put more of an emphasis on the search for truth in advertising rather than the sale of an image or an idea.128

The Supreme Court clearly addresses the concern over the regulations the FDA imposes on food, beverage, and drug labels through the *POM* opinion, indicating that the agency does not have the same “perspective or expertise” necessary to assess the current market dynamics.129 Day-to-day competitors, on the other hand, have detailed knowledge as to what consumers look for in a sales or marketing strategy.130 Through an increased awareness of unfair competition practices, competitors have a more immediate ability to spot these problems with accuracy as soon as they arise.131 The Court concedes that there could be unintentional consequences to allowing agency rule makers and regulators to determine what is false or misleading in an

125. See supra note 2.
126. See id.
127. See id.
128. See id.
130. See id. at 2239.
131. See id. at 2238 (“[Competitors’] awareness of unfair competition practices may be far more immediate and accurate than that of agency rulemakers and regulators.”).
advertisement rather than allowing the experts in the field to make the determination.  

The syllogism presented by this argument is a fairly direct one: advertisers seek a profit by appealing to consumers through their marketing and sales campaigns, consumers desire truthful depictions of products and what they contain, thus advertisers must convey truth in their campaigns to derive a profit from sales. An overwhelming majority of consumers avoid products that they know do not work in the way they are marketed, or include/exclude what the consumer may be looking for. By marketing products through false information, not only does the marketplace become unfair for those who are discredited by the falsity, but it also becomes unprofitable due to the loss of purchases of the misleading products. More and more, consumers seek the truth, and will purchase for honesty rather than a perception of a product that an advertiser wants to illustrate.

By no longer granting deference to the FDA, the Supreme Court essentially allows for the protection of the Lanham Act and, inherently, the First Amendment to demand this truth through advertising that consumers seek on a daily basis. As mentioned above, the Lanham Act is structured around its sole intention of protecting advertisers against unfair competition. Although it has long been established that competition is what makes the marketplace succeed, pervasive unfairness taints any hope there was for an expansion upon that success. An economic market that is at a standstill does not advance the growth for which all economists and politicians strive.

By focusing more on the truth in commercial speech, rather than the implications upon it that result from regulations, the Supreme Court has indirectly granted greater First Amendment protection over commercial speech. This broad protection will undoubtedly give teeth to Lanham Act claims by establishing an additional burden for allegedly deceitful advertisements to overcome. With respect to the POM decision, an additional burden will require that advertisers be much more cautious.
about how their labels portray the products that they are attached to. By truly considering every element that is included on a food or beverage label in an effort to produce the most accurate depiction of a product in future advertising campaigns, marketers will be automatically meeting the demands of the market without even realizing it. In doing so, consumers will put more trust in products, which will eventually lead to more purchases. Thus, the expanded protection of the First Amendment over the prevention of false and deceitful advertising will inevitably increase purchase incentives and foster the economy through fair competition in ways that expand upon marketplace success rather than level it out at its current standstill.

B. Protect Consumers From Harmful Effects of Trickery

There was a point in time when the advertising industry was built around deceit and puffery in advertisements. Perhaps the most notable venture into the notion of trickery that had negative implications on consumer health dates back to the ages of the Marlboro man. For ages, it was common practice for marketers to position cigarettes as a common staple in life, persuading men that they would be perceived as rugged and creating a socialite complex in women, all without any mention of the negative affects that nicotine had on consumer health. As soon as the health risks became apparent, the deceit that once made advertising so successful became an overwhelming concern.

Clearly, the regulations that govern the public health and safety of consumers affected by food, beverage, and drugs are at the heart of this case. It is important to note that nothing about the Supreme Court’s holding discredits the authority or accuracy of the context of these statutes in anyway. Rather, the Court finds concerns over consumer

137. See supra note 2.
138. See id.
139. See id.
health to be harmonious with what the First Amendment seeks to protect through the punishment of commercial speech.\textsuperscript{141} Viewing all of the statutes that speak to the same subject as ones that conflict with each other is an approach that creates more harm to consumers and their well-being than Congress ever intended.\textsuperscript{142}

Under the previous understanding that the federal statutes conflicted with each other, courts found sincere difficulty in where the authoritative credit should be due. On one hand, the statutes need to protect the concern for consumer safety.\textsuperscript{143} On the other hand, however, the government has a vested interest in steering clear of intruding on the job it has delegated to agencies.\textsuperscript{144} In the present case, it is not unreasonable for the government to fear that their overarching supervision of food and drug labels would have a certain "chilling effect" on advertisers in the sense that future instances would indicate that marketers and advertisers left off some true speech in concern of being punished for any potential false speech that could be published on an advertisement.\textsuperscript{145}

This concern is credible, no doubt, and of importance across many areas of the law. For example, we do not allow the government to prohibit commercial speech on matters of pure speech based on the newsworthiness that we associate with such advertisements.\textsuperscript{146} The issue of newsworthiness goes by the wayside when it comes to conflicting concerns of consumer protection. Under no circumstances would any court be able to argue that the information on a food or beverage label should be privileged from government interference on the basis that it is newsworthy. The question then becomes, is there something about consumer protection that we can equate to the perceived importance of newsworthiness to merit a lack of government interference and an expanded view of First Amendment protection?

In the same way we value important information, we value safety to consumers. It is a grave concern that issues of public interest go uninhibited as a means to properly inform our society of the happenings

\textsuperscript{141. See id. at 2233.}
\textsuperscript{142. See id.}
\textsuperscript{143. See id. at 2231.}
\textsuperscript{144. See id.}
\textsuperscript{145. See id.}
\textsuperscript{146. See KOHLER, ET AL., supra note 123, at 63.}
of today's prominent issues. Similarly, it is inherent that accurate information go uninhibited to consumers in consideration of their safety. This inherent need for uninhibited truthful advertisements leads to the conceivable conclusion that to further this interest untruthful speech be regulated to advance those same concerns. At the heart of untruthful, or rather, "false," advertising is trickery and deceit.\footnote{147. See supra note 2.}

By correlating First Amendment protection in the realm of consumer safety to that of the newsworthiness threshold in advertisements on pure speech, there is undoubtedly a need for a line to be drawn in cases such as this. As the matter stood previously, the First Amendment did not provide any absolute protection to advertisements related to health and safety conveying descriptions of ingredients included (or not included) in a food or beverage.\footnote{148. See, e.g., POM Wonderful, LLC v. Coca-Cola Co., 679 F.3d 1170 (9th Cir. 2012).} Although there is a decent argument that allowing the First Amendment to enter into the realm of food and beverage advertising would create somewhat of a "chilling effect" on speech, as mentioned above, the benefits of First Amendment protection highly outweigh the risks of this effect. By expanding the protection of the First Amendment to truthful advertisements in this industry, there is an incentive created for marketers and companies to convey accurate descriptions on their labels in order to avoid the liability that would go hand-in-hand with the false advertisements. An incentive to create the truest ads would automatically decrease the risk of consumer harm through trickery and deceit. By putting these two techniques that advertisers once found so useful at the heart of liability in cases of consumer safety, not just in the food and beverage industry but in general, the Supreme Court's decision would establish a greater protection against these inevitable harms.

\section*{C. Enhance the Marketplace of Ideas}

The marketplace of ideas is a concept introduced as the most dominant theory of First Amendment protection.\footnote{149. See Kohler, et al., supra note 123, at 64.} At the heart of this theory many scholars have found that a marketplace of ideas can only be
ensured through the protection of speech. To advance the goal of this theory, which is a search for the truth, citizens must be engaged and informed through a variety of content but also granted the ability to weigh the truth and falsity that runs throughout such information. Even some false speech is left in the marketplace in order to further the search for the truth because of its instructive nature as well as the notion that suppression builds mistrust.

Although the idea is that in the search for the truth, consumers will sort out what is true speech and what is false speech by having many resources in the marketplace, there is inevitably a risk to such approach. Considering the benefits of false speech, even the greatest supporters of it note that not all false speech is beneficial. The marketplace of ideas theory conveys this thought by not protecting all speech, specifically that which is deemed harmful. Some speech has been perceived to be so harmful in nature that its harm could be too great to go unregulated. Typically, this type of harm is equated with something so “imminent and grave” that we could not risk allowing the marketplace to sort it out on its own. Prior to this decision, this type of grave harm had primarily been addressed in the context of publications rather than advertisements. The speech that met this harm typically consisted of speech on obscene topics, such as sex, violence, rape, nudity, etc.

There is no question that the speech in the POM case does not involve any type of content that has previously been regarded to create such a “grave and imminent” harm as to be excluded from the marketplace of ideas. However, those topics were held to be offensive based on the context and publication that each was present in: pure speech through print, broadcasting, and the like. Although this highly regarded theory of First Amendment protection gives great guidance in some respects, it is silent as to others. There is no clear intent, however,

150. See Kohler, et al., supra note 123, at 62.
151. See id.
152. See id.
153. See id.
154. See id.
155. See Kohler, et al., supra note 123, at 62.
156. See id. at 63.
157. See id.
158. See id.
that those who created and support the marketplace of ideas theory ever intended to exclude commercial speech in the analysis. As has become clear in so many prior instances involving the intent of the framers, simply because something was excluded does not mean that there would never come a time when such a concern could potentially be addressed.

This case brings commercial speech into consideration for First Amendment protection. When looking to the theories of why speech should be afforded First Amendment protection, the one that clearly equates with the forefront of concern for commercial speech is the marketplace of ideas. By expanding the First Amendment protection to encompass more of commercial speech, it inherently pulls much more speech into the marketplace of ideas. By adding even more speech to the already robust marketplace, this protection would enhance the content of the public sphere thereby furthering the intent of the theory.

Adding commercial speech to the marketplace would have benefits for both the public sphere itself and the future of advertising. Commercial speech would bring a great amount of additional content to the marketplace through the copious amount of advertising that is done across all products. Additionally, there would be a greater opportunity for consumers to voice their opinions, adding to the engagement this theory seeks to drive. Engagement over advertisements would likely yield higher results of determining what consumers perceive to be the truth over falsity because of the visual impacts that commercial speech presents that pure speech cannot deliver. Providing more content for the public to analyze not only facilitates participation in the marketplace, but also reminds consumers of the significant impact their perceptions can have.

As for the impacts on advertising itself, what consumers have to say when presented with commercial speech in the marketplace would likely have a great impact on the future of advertising. By creating a zone for consumers to essentially screen all advertisements, manufacturers can use the feedback as a tool to direct the future of their marketing campaigns based on what was well-received versus what was not. Because currently, the First Amendment only requires intermediate scrutiny of commercial speech, consumers who review the content in the marketplace of ideas can add an elevated layer of scrutinizing review. This additional review could almost equate to the strict scrutiny that commercial speech should truly be afforded. Upon seeing the successful
results of what the heightened level of review does for not only consumers but also the economy, the consideration may arise to give commercial speech an elevated level of review. 

The difficulty of adding commercial speech into the marketplace of ideas would be defining which of this speech creates such a "grave and imminent" harm as to be undeserving of First Amendment protection. Undoubtedly, the type of content found to create that harm in pure speech would translate to commercial speech. The question at issue is then if there is any other speech that would be considered to meet this threshold as to not receive any First Amendment protection whatsoever. Based on the holding of *POM*, it is clear that consumer safety is a great area of concern, and the harm that could be caused to consumers through false and deceptive advertising is likely to be one that is both "grave and imminent." Although it may take a period of trial and error, encompassing commercial speech in the marketplace of ideas through an expansion of First Amendment protection will not only enhance the robustness of the public sphere but will also inevitably sort out the truly harmful false and deceptive advertisements.

**CONCLUSION**

The decision of the Supreme Court in *POM* has opened the floodgates for cases involving false advertising. Although the case directly deals with statutory authority between the FDCA and the Lanham Act, there are enough implications concerning the First Amendment to start the conversation about how much protection should be afforded to misleading and deceptive commercial speech. Although this case brought this issue back to the forefront of concern, it is up to future cases to determine the exact role that the First Amendment should play in advertising that could inevitably have a long-lasting impact on consumer health and safety.

Based on the implications of *POM*, it is clear that the Court intended for some type of expanded First Amendment protection greater than what is currently offered to commercial speech, specifically in the distinction of what is false and what is true. In accordance with the ability to foster economic growth, protect consumers from harmful deceit

and trickery, and enhance the marketplace of ideas, greater credence should be placed on the importance of regulating advertising in the interest of the First Amendment. Although currently advertising is subject to an intermediate level of scrutiny under the First Amendment, this case and future cases are likely to demand the highest level of review to subject only the truest of advertisements to First Amendment protection.

With an increased concern for consumer safety, the marketplace demands that marketers and advertisers convey the truth. More weight is put on this purchasing incentive than any other factor considered at the point of sale. By giving greater First Amendment protection to advertising that is truthful, there is inevitably an incentive created for future ads to focus on consumer health and benefits not only in the food and beverage industry, but across the entire advertising spectrum.