

## Supreme Court Likely to Reverse Ninth Circuit in Pom Wonderful v. Coca-Cola

Yesterday the Supreme Court heard oral argument in this case. The transcript of the argument is available [here](#). Pom brought this suit against Coca-Cola under the federal Lanham Act, alleging that Coca-Cola's label (see page 7 of Pom's [petition for certiorari](#)) of its "Pomegranate Blueberry" juice was deceptive and misleading to consumers when the juice in fact contained only 0.3% pomegranate juice and 0.2% blueberry juice. As a competitor in the marketplace, Pom—the seller of juices containing "overwhelmingly" (according to Pom) actual pomegranate juice—alleged that it was losing sales because of Coca-Cola's label. Coca-Cola argued that Pom's Lanham Act claim was preempted by the Food, Drug, and Cosmetic Act because Coca-Cola's label is authorized by FDA regulations. The federal district court and then the Ninth Circuit agreed, dismissing Pom's suit. But, based on yesterday's argument, the Supreme Court is likely to reverse that decision, and the question is how broadly will the Court do so. The Justices questioned the lawyers on both sides as to whether this suit would be preempted under state law (Pom: "it certainly would not be"; Coca-Cola: "they would be expressly preempted"), as the typical consumer class action against food companies is filed under state consumer protection acts, not under the Lanham Act (which is intended to prevent unfair competition). It is difficult to determine from the argument alone how this question will come out, but it seemed clear that Coca-Cola's preemption argument will be rejected. As Justice Kennedy put it to Coca-Cola's lawyer, "you want us to write an opinion that said that Congress enacted a statutory scheme because it intended that no matter how misleading or deceptive a label it is, if it passes the FDA, . . . there can be no liability." Such an expansive preemption argument was too much, at least for that Justice, to swallow.

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