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WHAT'S NEWS

High court to decide if town of Gilbert is in violation of First Amendment

The U.S. Supreme Court announced July 1 that it will decide whether or not the town of Gilbert is in violation of the First Amendment by restricting where and when a church can place signs advertising Sunday morning services, according to the Associated Press.

The Good News Community Church has argued the town of Gilbert applies stricter rules to church signs compared to other types of non-commercial signs. Gilbert town code requires church signs must be 6-square feet and can be displayed in public areas only 14 hours before each event. Gilbert's ordinance allows political signs to be upwards of 32-square feet and an ideological sign can be up to 20-square feet.

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Obama taps former Procter & Gamble CEO as next head of VA

President Barack Obama named former Procter & Gamble CEO Robert McDonald as the next head of the Veterans Affairs Department, according to the Associated Press.

With the White House looking for a top-to-bottom overhaul of the VA, Obama said what makes McDonald the right choice is his "three decades of experience building and managing one of the world's most recognizable companies" and that "he's about delivering better results." McDonald, 61, is a former U.S. Army captain and graduate of the U.S. Military Academy at West Point.

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Arizona food prices continue to climb, led by spike in meat costs

Recent research has revealed the cost of a typical market basket of items hit $52.64 in the last quarter, according to a survey done by the Arizona Farm Bureau.

That number is just slightly up from the prior quarter, but the figure is close to 10 percent higher than the same time last year. The cost of meat is 15 percent more on average.

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FTC files lawsuit against T-Mobile over bogus charges on customer bills

The Federal Trade Commission sued T-Mobile Inc. on July 1 claiming the telecom company made hundreds of millions of dollars by placing charges on phone bills that were never authorized by the customers, according to news sources. FTC's suit says the company charged customers without their authorization for services by third-party companies such as ringtones and texts with celebrity gossip and claims T-Mobile's billing practices made it difficult for customers to realize the charges were there.

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GENERAL COUNSEL PROFILE

A Social Responsibility

PHOTO COURTESY OF THE DAILY JOURNAL

Mark A. Massara is the general counsel and vice president of social responsibility for O'Neill Wetsuits LLC, the largest recreational surfing and dive suit manufacturer in the world.

By Caitlin Johnson

If O'Neill Wetsuits LLC's General Counsel Mark A. Massara isn't at his desk, chances are he's down at the beach clad in an O'Neill wetsuit, surfboard in hand.

"The only valid excuse for being late or missing an appointment is that you were surfing," Massara said of his three-attorney legal team, noting that virtually everyone at the company, which is credited with inventing the wetsuit, either surfs, dives, fishes, does stand-up paddle boarding, boating or a combination thereof.

Massara moved in-house to the world's largest recreational surfing and dive suit manufacturer in 2010 after spending nearly two and a half decades working with nonprofit organizations on coastal zone protection initiatives.

Almost immediately out of law school, he undertook representation of and later became general counsel for Surfrider Foundation, where he successfully spearheaded the largest Clean Water Act case in U.S. history against two pulp mills dumping 40 million gallons of toxic wastewater into the ocean each day.

Mark A. Massara

Position:
General Counsel and Vice President of Social Responsibility

Company:
O'Neill Wetsuits LLC

Location:
Santa Cruz, Calif.

Size of legal department:
Three attorneys

From there he became the director of the Sierra Club's California Coastal Campaign, where he was an intimate participant in nearly every major coastal development and pollution threat based in California during the following two decades, including clashes with the ownership of the Pebble Beach Co. over development plans in Monterey and a proposed toll road highway along the border between Orange and San Diego counties that would have cut through San Onofre State Park.

On behalf of the environmental community,

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GUEST COLUMN

SCOTUS: The squeeze is on

Following the 'juice wars,' competitors now can self-report advertising violators

Jeffrey H. Wolf, *Quarles & Brady LLP*

In the ever-increasing world of competition for the almighty retail dollar, what if a product manufacturer mislabels its products in a manner that is viewed as misleading or deceptive? Historically, a manufacturer or marketer crossing that line could only be subjected to an enforcement action by the Food and Drug Administration, which could expose the company to civil liability under the Federal Lanham Act, 15 U.S.C. § 1125, among other claims.

But the fear of government reprisal is no longer the only possible consequence of a labeling violation. The United States Supreme Court held, in *POM Wonderful LLC v. Coca Cola Company* (12-761), that a product manufacturer may bring a private lawsuit against a business competitor over allegations of false advertising. The unanimous decision has potentially far-reaching implications and was a win for POM Wonderful. The California-based juice drink manufacturer had alleged that Coke's Minute Maid brand was deceiving consumers through

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Wolf

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misleading labeling, thus harming competition, in the marketing of its Pomegranate Blueberry beverage. The end result marked the first time the high court has recognized a private right of action in the context of Lanham Act labeling cases, although the decision stops short of affording such a right to consumers.

At issue in POM Wonderful was whether one federal statute regulating and enforcing food labeling preempted or overrode efforts by private parties to bring lawsuits under a separate federal statute. The two competing statutes are the Food, Drug and Cosmetic Act ("FDCA") and the Lanham Act. Specifically, the court considered whether a private party, rather than just regulators, may bring a Lanham Act claim challenging a product label regulated under the FDCA. The Supreme Court answered this question in the affirmative.

POM makes and distributes pomegranate juice products, including a pomegranate-juice blend. The Coca-Cola Co., one of POM's competitors, makes a juice blend that it labeled with the words "pomegranate blueberry." However, despite prominently marketing its juice blend as pomegranate blueberry, 99 percent of the beverage was made from apples and grapes and it contained only 0.3 percent pomegranate juice and 0.2 percent blueberry juice.

Based on this, POM sued Coca-Cola under the Lanham Act, alleging that the beverage giant's juice label constituted an unfair trade practice under the Lanham Act. POM argued that the Lanham Act's provisions deterring unfair trade practices complement, without supplanting, the FDCA. Coca-Cola, on the other hand, argued that the Lanham Act cannot apply to issues of food labeling, that food-labeling statutes narrow the scope of a general statute for unfair trade practices and, accordingly, it was immune from liability under the Lanham Act. Basically, Coca-Cola asserted that the government regulates food labeling, and that its label was not misleading.

Initially, the U.S. District Court for the Central District of California partially granted Coca-Cola's motion to dismiss for failure to state a claim because POM's allegation of false advertisement, in part, challenged FDA regulations permitting the "Pomegranate Blueberry" labeling. The district court also held that the FDCA preempted POM's state-law claims under California's Unfair Competition Law and False Advertising Law. However, the district court allowed the parts of POM's case that existed outside of the FDA's regulatory scheme to proceed.

Ultimately, the district court granted summary judgment in Coca-Cola's favor because the FDA permits beverage makers to label their beverages based on non-primary components. The district court also held that the FDCA barred both POM's Lanham Act and state-law claims.

The 9th Circuit affirmed, ruling that although compliance with the FDCA or the FDA may not always insulate a party from Lanham Act liability, it would respect Congress's judgment to place regulation of food labeling in the hands of the FDA.

But the Supreme Court concluded that while the federal government can go after misleading labels, private parties can also challenge "practices that allegedly mislead and trick consumers." Essentially, the Court reasoned that there was no danger to the government's regulatory ability if private parties could also engage in false advertisement enforcement. The court also rejected Coke's argument that allowing a deceptive-labeling claim would interfere with national uniformity under FDA laws. Justice Anthony Kennedy, writing for the Court, said Congress chose to allow challenges under trademark law "to enforce a national policy to ensure fair competition." Justice Kennedy, strongly endorsing POM's position, also noted that "[n]othing in the text, history, or structure of the FDCA or the Lanham Act shows the congressional purpose or design to forbid these (private) suits." "Quite to the contrary, the FDCA and the Lanham Act complement each other in the federal regulation of misleading food and beverage labels. Competitors, in their own interest, may bring Lanham Act claims like POM's that challenge food and beverage labels that are regulated by the FDCA."

While the full impact of the decision remains to be seen, for now at least, it has cleared the way for POM to proceed with its lawsuit against Coca-Cola. The opinion was somewhat narrowly tailored to only affect manufacturers' claims made, or implicitly made, in their names and product labels.

However, POM Wonderful perhaps signals that the Supreme Court is moving away from interpreting the law to give the government exclusive control over regulatory enforcement, which can mean an onslaught of private suits in the food and drug arena, at a minimum. It could also lead to other types of private lawsuits that, in the past, could only be brought by other governmental agencies, such as the Securities and Exchange Commission and the Federal Trade Commission.

The decision also creates greater uncertainty about labeling requirements and may lead to a flurry of competitor-initiated Lanham Act claims that mimic consumer-protection claims. These cases could include strategically-filed lawsuits designed to control or impact channels of product distribution or, in some instances, attempt to justify poor sales.

Regardless, POM Wonderful no doubt will affect the uniformity of food-labeling rules and, ultimately, product manufacturers and distributors will need to take a closer look at their labeling practices.

Jeffrey H. Wolf *is a partner at Quarles & Brady LLP in Phoenix and a member of its Commercial Litigation and Franchise and Distribution Industry groups. His practice focuses on representing franchisors, manufacturers and marketers of products and services in a variety of disputes, including claims for breach of contract, business torts and unfair competition claims brought under the Lanham Act and state law. He can be reached at jeffrey.wolf@quarles.com or (602) 229-5643.*