Administrative Judge in FTC versus POM Wonderful Lowers the Bar, but POM Still Can't Clear It

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On May 17, Chief Administrative Law Judge Michael Chappell issued his Initial Decision in the FTC's case against POM Wonderful, accusing POM of making unsubstantiated claims that its pomegranate juice and pomegranate extract supplement pills can prevent, treat, cure or mitigate heart disease, prostate cancer, erectile dysfunction, and other medical conditions. The decision found POM, its parent company Roll Global, and individual principals Stewart and Lynda Resnick and Matthew Tupper to have violated the FTC Act, and imposed a 20-year injunction against making such unsubstantiated claims in connection with any food, drug or dietary supplement product.

At the outset, the court determined the evidentiary standard to be applied to claims that a food product prevents, treats, mitigates or cures diseases. Here, in the portion of the decision that dominates POM's own press release, POM succeeded in convincing Judge Chappell that the FTC does not require an advertiser to have either (1) prior FDA approval of the product for treating such diseases or (2) at least two solid, randomized clinical trials, as would normally be required for FDA approval of a new drug, before making such claims. The judge instead adopted the more flexible standard that the appropriate level of substantiation depends on the specific facts and on what experts in the field would consider adequate, relying on past Commission case law (e.g., *In re Pfizer, Inc.,* 81 F.T.C. 23 (1972); *FTC v. Direct Marketing Concepts, Inc.,* 624 F. 3d 1 (1st Cir. 2010); *Removatron Int'l Corp. v. FTC*, 884 F.2d 1489 (1st Cir. 1989)) and on the status of pomegranate juice as a non-hazardous food that is not marketed as a substitute for other medical treatment. In certain cases, he conceded, the FTC's flexible standard might parallel that of the FDA. *See, e.g., FTC v. Nat'l Urological Group*, 645 F. Supp. 2d 1167 (N.D. Ga. 2008).

The real crux of the opinion, however, was that even under the flexible substantiation standard, POM could not

support its implied claims that its products can prevent, treat, cure or mitigate *any* diseases or medical conditions. Of the approximately 40 advertisements and promotional items that the FTC staff ultimately selected for challenge from POM's large body of marketing material, approximately half were found by Judge Chappell to have stepped over the line by implying, without substantiation, that POM's juice or pills prevent, treat, cure or mitigate a disease or medical condition. Some of these advertisements were also found to be making deceptive "establishment claims", stating or implying not only the health benefit, but the existence of scientific or clinical proof of the health benefit. Other POM advertisements were found to be vague enough that they did not imply such specific benefits, but only general promotion of health.

In one of the more striking but less widely reported findings, four interviews by POM principals on

news or talk shows were deemed immune from challenge regardless of what they communicated because they were not advertisements. Judge Chappell's conclusion relied heavily on the fact that POM had not "paid" for these appearances. Defining advertising only as "paid" promotional speech will raise eyebrows and may become a basis for Commission review, given its implications for the FTC's ongoing initiatives in the areas of social media marketing, endorsements and testimonials, often not paid-for in the traditional sense.

POM has also stated that it will appeal portions of the ruling to the Commission, ensuring that this particular theater of the Juice Wars will remain active for months to come. Juice-case observers will be watching to see if any or all of the key holdings in the Initial Decision are modified upon review.