

Commission Issues Decision In the matter of POM Wonderful LLC

January 17, 2013

On January 16, 2013, the Federal Trade Commission (“Commission”) issued an Opinion In the matter of POM Wonderful LLC upholding in part and overruling in part Chief Administrative Law Judge D. Michael Chappell’s May 2012 initial decision regarding advertising claims for POM Wonderful (“POM”) products. In pertinent part the Commission opinion, issued by Commissioner Maureen Ohlhausen, ruled the following:

- Thirty-nine of POM’s 43 ads made efficacy claims and were false and misleading;
- Two well-designed, well-conducted, double-blind, randomized controlled clinical trials (RCTs) are required to substantiate claims that a food can treat, prevent or reduce the risk of “serious diseases;”
- The proposed order does not violate POM’s 1st or 5th amendment rights;
- The past COO and President of POM Wonderful who, at the time of his employment, was responsible for the operations of the marketing team, “both participated directly in and had the authority to control the acts or practices at issue,” and thus should be held individually liable and subjected to a Final Order along with Steward and Lynda Resnick; and
- FDA-preapproval is not warranted as part of the remedy in the POM action.

The Commission also agreed with the ALJ’s conclusion that the Respondent’s actions were serious and deliberate. Two concurring statements were included: a statement by Commissioner Ohlhausen (rejecting the two RCT standard and concluding that extrinsic evidence should have been used to determine whether some of POM’s ads made implied disease claims) and a statement by Commissioner J. Thomas Rosch (agreeing with the majority opinion but noting that “having served as a Commissioner for seven years and having been a trial lawyer for nearly 40 years before... [he is] somewhat skeptical of relying so heavily on the opinions of experts who are paid by both Complaint Counsel and Respondents”).

The Commission ruling provides helpful insight into the Commission’s position regarding health-benefit claims and the level of substantiation required to make claims that a food or beverage product treats, mitigates or prevents a “serious disease.” The decision also reflects the Commission’s intent to pursue individual liability for company officers believed to play an integral role in the development of health-benefit related marketing campaigns.

More information regarding the ruling and related proceedings can be found [here](#).