

## POM Loses a Round in Its Advertising Dispute With FTC, But Battle Continues

Article By:

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POM Wonderful LLC recently received a setback in its longstanding dispute with the **Federal Trade Commission**. On Sept. 30, 2012, U.S. District Judge Richard Roberts in the District of Columbia dismissed the juice maker's declaratory judgment action against the FTC. The judge's ruling, though, does not put an end to the POM-FTC battle, which is still on appeal in a related administrative proceeding.

POM filed suit in federal district court in September 2010, in anticipation of an impending FTC administrative action. The company challenged what it perceived as agency overreaching, in violation of its **First and Fifth Amendment** rights, and in violation of the **Administrative Procedure Act**. The basis of POM's complaint was the FTC's use of consent orders with two other companies (Nestle U.S.A. and Iovate Health Systems, Inc.) to establish new and more stringent advertising standards for medical and health claims.

When the FTC waved these consent orders in front of POM (in an apparent attempt to pressure the company into agreeing to tougher standards like Nestle and Iovate), POM responded by thumbing its nose and filing suit in federal court. POM contended that the FTC failed to adhere to the requirements of administrative law that, in order to modify advertising standards, the agency must go through a notice-and-rulemaking process. The FTC subsequently filed its administrative action against the company for alleged failures to adhere to the more stringent standards.

In large part because of the significant overlap of issues between POM's action in U.S. district court and the FTC's administrative action, Judge Roberts dismissed the district court case. The judge noted that judicial efficiency militated towards having the dispute play out in the administrative case only: "While the administrative proceeding is not identical to POM's current action, that forum is 'perfectly capable' of determining whether the proposed order exceeds the bounds of the FTC Act, violates the First and Fifth Amendments, and seeks to abrogate the FDA's power," he wrote. Other factors in the judge's holding were (1) that granting declaratory relief would have required the resolution of an anticipatory defense and (2) that POM's district court action appeared to be filed in part to secure tactical leverage.

[As we wrote earlier this year](#), the administrative law judge already ruled on the parties' dispute in May. POM touted that ruling largely as a victory because the judge rejected the enhanced advertising

standards at issue. However, the FTC and POM appealed the decision before the full commission (POM appealed because the judge still found POM liable under separate standards). Oral arguments in the appeal were held in August, and the outcome of the appeal is still pending.

We find it interesting – and somewhat encouraging for advertisers who are concerned about agency overreaching – that neither the district court action nor the administrative proceeding have rejected on the merits POM's challenge to the FTC's use of settlement agreements to effect enhanced standards. Any company that has come under the regulatory microscope can appreciate the tremendous pressure companies face to cooperate with an agency just to get out of hot water – at almost any cost. POM's bold stance may eventually have the result of reminding regulators to follow the rules set forth for them by the principles of administrative law.

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