

POM Wonderful Loses Long Fight With FTC Over Deceptive Ads

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The Federal Trade Commission has finally prevailed in a long-running dispute with POM Wonderful over allegedly misleading claims about the health benefits of the company's pomegranate products.

Without comment, the U.S. Supreme Court denied POM's challenge to an appeals court ruling that upheld the commission's order to stop making the unsubstantiated claims. The company asserted, among other things, that the order impinged on its First Amendment free speech rights.

The high court's action leaves its commercial speech doctrine in some uncertainty, supporters of the company said Monday.

"It's unfortunate that the Supreme Court ducked this excellent opportunity to clarify the confusing precedents about misleading speech," Cato Institute scholar Ilya Shapiro said. "Regardless of the scope of First Amendment protection for commercial speech, businesses and consumers need certainty and stability here—and they need it to come from courts, not through arbitrary and self-serving determinations by executive agencies."

First Amendment scholar Ron Collins said he was not surprised the court would decline review, in part because the justices are inclined lately to "leave it alone" when asked to update or change free speech doctrines.

FTC chairwoman Edith Ramirez applauded the court's rejection of POM's appeal. "I am pleased that the POM Wonderful case has been brought to a successful conclusion," she said in a statement. "The outcome of this case makes clear that companies like POM making serious health claims about food and nutritional supplement products must have rigorous scientific evidence to back them up. Consumers deserve no less."

The commission first filed a complaint against POM in 2010 asserting that its advertising since 2003 falsely claimed daily use of its products could prevent or treat ailments ranging from heart disease to erectile dysfunction. In 2012, an administrative law judge ordered the company to cease and desist from making some of the health claims unless they were supported by scientific evidence. The commission affirmed the judge's decision.

On appeal, the D.C. Circuit supported the commission's actions without de novo review, and stated that “the FTC Act proscribes—and the First Amendment does not protect—deceptive and misleading advertisements.” The decision did state, however, that under First Amendment precedents, the commission went too far in requiring two rounds of medical trials to support health claims made by the company. Judge Sri Srinivasan wrote the opinion, with Judge Merrick Garland—now a Supreme Court nominee—and Judge Douglas Ginsburg joining him on the decision.

In its appeal to the high court, POM insisted the ads were truthful and urged the justices to use the case to rein in the commission and other regulatory agencies.

“If this court intends its commercial-speech law to meaningfully curb the speech-restricting choices of federal agencies going forward, it should grant certiorari and resolve this disagreement in favor of the rule its cases already require,” the company’s lawyers wrote in their cert petition.

Thomas Goldstein of Goldstein & Russell is counsel of record on the petition, which includes full-color reproductions of some of the POM Wonderful advertisements at issue. He declined to comment on the court’s action Monday.

Justice Stephen Breyer recused himself in the case, as he has in past disputes involving the California company.

Breyer has not publicly explained his reason for recusal, but it does not appear to be financial. Founders Stewart and Lynda Resnick are sole owners of POM Wonderful and the parent company Roll Global.