

## **D.C. Circuit Court Ruling in Favor of FTC on POM Wonderful Ads**

By Dee Pridgen, January 30, 2015

Today a three-judge panel of the D.C. Circuit Court of Appeals issued a 3-0 ruling that was overwhelmingly in favor of the FTC's position on the need for adequate substantiation for health-related claims in advertisements for food and dietary supplements. With one minor exception, the panel affirmed the FTC's prior ruling in January 2013 against the advertiser.

POM Wonderful was known for its advertisements touting the supposedly proven ability of its products (pomegranate juice, as well as concentrated liquid and pills) to "cheat death" by preventing, ameliorating or curing cardiovascular disease, prostate cancer and erectile dysfunction. The FTC had found in its earlier decision that POM's ads specifically referenced medical studies and used imagery that suggested that its disease-related claims were scientifically proven. The FTC in its administrative hearing concluded, however, that the advertiser did not have sufficiently sound medical studies to back up its claims, and that although POM said or implied in its ads that its claims were "established," in fact its studies were flawed or were contradicted by its own later studies.

Judge Srinivasan, writing for the Appeals Court panel, said that since POM Wonderful's ads were deceptive and misleading, they were not protected by the First Amendment. The Commission concluded, and the Court of Appeals panel agreed, that when an advertiser makes a claim that its disease-related benefits are "scientifically established," it is not "too onerous" to demand at least one randomized, double-blinded, placebo-controlled clinical trial (RCTs) to substantiate such claims, even with regard to a food product such as pomegranate juice. Judge Srinivasan stated that "Requiring RCT substantiation as a forward-looking remedy is perfectly commensurate with the Commission's assessment of liability for petitioners' (POM's) past conduct: if past claims were deceptive in the absence of RCT substantiation, requiring RCTs for future claims is tightly tethered to the goal of preventing deception," thus passing muster under the First Amendment. The Appeals Court was not convinced, however, that the FTC had shown sufficient justification for requiring two such studies to back up any future disease-related claims by POM. The Court admitted that a two-study requirement might be adequately justified in other cases.

In sum, the FTC in the POM Wonderful case has succeeded in obtaining judicial confirmation that when products, even food or beverages, make disease-related cure, prevention or amelioration claims in the style of drugs or medicines, that these advertising claims must be backed by a specific type of scientific substantiation, rather than relying solely on the traditional but vague standard of "competent and reliable" scientific evidence.