# Client Alert

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## DC Circuit Deems POM Wonderful Advertisements Deceptive But Finds FTC's Attempt to Require Two Randomized Placebo-Controlled Clinical Trials for Future Claims Violates First Amendment

On Friday, January 30, the US Court of Appeals for the DC Circuit issued its opinion in *POM Wonderful, LLC, et al. v. Federal Trade Commission*, affirming the FTC's (Federal Trade Commission) ruling in 2013 that a series of advertisements for POM's pomegranate juice and supplements were deceptive and thus violated the FTC Act. However, the court provided some limited, yet important, relief to POM Wonderful and the other petitioners (POM). The DC Circuit's decision provides important guidance to companies advertising consumer products.

First, the court discussed several key errors by POM in its advertisements:

- POM touted positive results from scientific studies but did not acknowledge or report negative results of studies that POM was aware of (and that conflicted with the positive results POM was advertising);
- POM failed to acknowledge significant limitations in its advertised studies' methodologies;
- POM asserted that studies proved a causal link between consumption of POM's products and the treatment and prevention of numerous diseases when the cumulative scientific evidence in POM's possession did not establish that link;
- POM invoked medical symbols, referenced medical journals and disclosed the amount of money POM spent on research in effort to strengthen the overall claim that scientific studies established the advertised benefits.

Second, the court rejected certain defenses POM proffered:

- POM argued that it had properly qualified its claims by using words such as "initial" and "preliminary." The DC Circuit agreed with the FTC that the qualifying language did not neutralize the claims made when the positive results to consumers were "otherwise described in unequivocally positive terms," particularly viewing the claims "in the context of each ad in its entirety."
- POM's extensive research (over $35 million on pomegranate-related research and over 100 sponsored studies) did not shield POM from the consequences of its failure to acknowledge negative results.

Third, despite agreeing with most of the FTC's analysis, the court provided POM with some important relief on an issue that should be of general concern to advertisers. The FTC had ordered POM to substantiate any future disease-related claims with *at least two* randomized, placebo-controlled, clinical trials ("RCTs"). As we have previously written, the FTC has increasingly required two RCTs for substantiating certain types of claims. Until now, the FTC had not been challenged on this heightened requirement.

Applying the First Amendment to this requirement, the DC Circuit upheld the Commission's order "to the extent it requires disease claims to be substantiated by at least one RCT" because the FTC had a substantial interest in ensuring the accuracy of commercial speech and had adequately shown that requiring one RCT was no more extensive than necessary. But the court held that the FTC "failed … to justify an across-the-board two-RCT requirement for all disease claims by petitioners."

Although the court noted that the FTC may be able to show that a "two-RCT requirement" is merited in future cases, the decision shows courts will closely scrutinize efforts by the FTC to impose such a stringent requirement on advertising. This decision should provide guidance for parties faced with FTC investigations in future advertising substantiation matters.

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