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Supreme Court Poised To Rule On Standing In False Advertising Suits

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On June 3, 2013, the Supreme Court granted *certiorari* in *Static Control Components, Inc. v. Lexmark International, Inc.*, 697 F.3d 387 (6th Cir. 2012). The case, to be argued before the Court on December 3, presents the justices with an opportunity to resolve a three-way circuit split on the proper standard for determining a party's standing to sue for false advertising under the Lanham Act, 15 U.S.C. § 1125(a)(1)(B). In *Lexmark*, the U.S. Court of Appeals for the Sixth Circuit followed the Second Circuit's lead and applied a "reasonable interest" standard. However, the Third, Fifth, Eighth, and Eleventh Circuits have previously employed a multi-factor test, relying upon the Supreme Court's antitrust standing analysis from *Associated General Contractors of California, Inc. v. California State Council of Carpenters,* 459 U.S. 519 (1983) ("*AGC*"). Finally, the Seventh, Ninth, and Tenth Circuits utilize a narrower, categorical approach, allowing only direct competitors to sue for false advertising under the Lanham Act.

Standing Under 43(a)(1)(B). Section 43(a)(1)(B) of the Lanham Act defines the potential class of plaintiffs broadly. It provides that "any person who believes that he or she is or is likely to be damaged" may sue another party "who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which . . . in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities."

***The Sixth Circuit and* Lexmark**. Lexmark is a manufacturer of laser printers and toner cartridges. Static Control supplies toner cartridges to remanufacturers. Litigation between the two companies began more than a decade ago when Lexmark sued Static Control for copyright violations. Static Control countersued Lexmark under the Lanham Act for falsely claiming to customers that Static Control was infringing on Lexmark's patents for toner cartridges. The district court dismissed Static Control's claim for lack of standing. The Sixth Circuit reversed.

In doing so, the Sixth Circuit followed the "reasonable interest" approach first employed by the Second Circuit. Under that approach, a Lanham Act plaintiff has standing if he can show: (1) a reasonable interest to be protected against the alleged false advertising, and (2) a reasonable basis for believing that the interest is likely to be damaged by the alleged false advertising. *Famous Horse, Inc. v. 5th Ave. Photo Inc.*, 624 F.3d 106, 113 (2d Cir. 2010). The Sixth Circuit held that Static Control met these factors because it "alleged a cognizable interest in its business reputation and sales to remanufacturers and sufficiently alleged that these interests were harmed by Lexmark's statements to the remanufacturers that Static Control was engaging in illegal conduct." 697 F.3d at 411. Thus, the court reinstated Static Control's Lanham Act claim.

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The Three-Way Circuit Split. The Sixth Circuit's decision deepened a three-way circuit split. In contrast to the "reasonable interest" approach, the Third, Fifth, Eighth, and Eleventh Circuits employ a multi-factor test to determine standing for false advertising claims under the Lanham Act by relying upon the Supreme Court's antitrust standing analysis in *AGC*. In that case, the Supreme Court considered the class of plaintiffs who may maintain a private damages action under the antitrust laws. Although the antitrust statute in question defined that class broadly, the Supreme Court held that prudential standing factors were also necessary. The *AGC* test requires consideration of such factors as the (1) nature of the plaintiff's alleged injury and whether it is of the type Congress sought to redress; (2) directness of the injury; (3) plaintiff's proximity to the alleged injurious conduct; (4) speculativeness of damages; and (5) risk of duplicative damages or complexity in apportioning damages.

The Seventh, Ninth, and Tenth Circuits utilize a narrower approach, allowing only direct competitors to sue for false advertising under the Lanham Act. Those circuits find that, because a "false advertising claim implicates the Lanham Act's purpose of preventing unfair competition . . . to have standing for a false advertising claim, the plaintiff must be a competitor of the defendant and allege a competitive injury." *Stanfield v. Osborne Indus., Inc.,* 52 F.3d 867, 873 (10th Cir. 1995).

Will the Supreme Court Resolve the Split? Lexmark petitioned for certiorari and is arguing that the Supreme Court should adopt either the *AGC* approach or the "direct competitor" test, arguing they provide the most clarity on standing for false advertising claims. The Supreme Court's decision should be significant and will determine the question of standing and the reach of the Lanham Act's false advertising protections.

If the Court adopts the "direct competitor" test used by a minority of circuit courts, the class of potential plaintiffs would be restricted to only direct competitors. Static Control, which sells neither printers nor toner cartridges, would not have standing. The benefits of this approach would be to create a clear guide to the lower courts and limit the number of false advertising cases being litigated.

If the Court were to adopt one of the other two approaches, it would create a lower bar for bringing false advertising cases under the Lanham Act. The *AGC* approach is arguably more flexible and presents a middle-ground, while the "reasonable interest" approach represents the most permissive standard. Either analysis would allow suits from non-competitors injured by false advertising, including, potentially, suppliers, retailers, non-majority shareholders, consumers, trade associations or other entities.

It is difficult to predict how the Supreme Court will rule, but it is worth noting that current-Supreme Justice Samuel Alito authored a Third Circuit opinion applying the *AGC* standard. *See Conte Bros. Auto., Inc. v. Quaker State-Slick 50, Inc.*, 165 F.3d 221 (3d Cir. 1998). In the meantime, this is a case that could be a game-changer for both plaintiffs and defendants involved in or contemplating Lanham Act litigation.

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