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U.S. Supreme Court Clarifies Test For Standing To Sue Under Federal False Advertising Statute And Rejects Test Used By Several Circuits To Prohibit Suits Brought By Non-Competitor Businesses

In *Lexmark International, Inc. v. Static Control Components, Inc.*, decided on March 25, 2014, a unanimous Supreme Court clarified the test for standing under the federal false advertising statute, §43(a) of the Lanham Act, 15 U.S. C §1125(a), holding that a federal false advertising cause of action extends to plaintiffs who fall within the "zone of interests" protected by the statute and whose injury was proximately caused by a violation of the statute. The decision closed a split among the Circuits, which have applied a variety of tests to determine federal false advertising standing. Of particular note, the Supreme Court rejected the categorical "direct-competitor" test for standing, used by the Seventh, Ninth and Tenth Circuits to prohibit federal false advertising suits brought by non-competitor businesses. The Court's decision broadens standing for false advertising claims in these jurisdictions and will likely reduce forum shopping.

Factual Background

Lexmark is a manufacturer of laser printers and toner cartridges. It sells the only type of toner cartridge that works with its laser printer. Other "remanufacturers," however, obtain and refurbish used Lexmark cartridges, which they then sell in competition with Lexmark's cartridges. In order to stem this competition, Lexmark established a "Prebate" program giving customers a discount on new cartridges if they return their empty cartridges to Lexmark, allowing Lexmark, rather than the remanufacturers, to refurbish and sell the old Lexmark cartridges. Each Prebate cartridge contains a microchip that disables the empty cartridge, unless Lexmark replaces the chip.

Static Control, a seller of components for the remanufacturers of Lexmark cartridges, developed a microchip that mimicked Lexmark's. By purchasing Static Control's microchips and using them to replace the Lexmark microchip, remanufacturers were able to refurbish and resell used Lexmark cartridges.

Lexmark and Static Control's litigation began in 2002, when Lexmark brought claims alleging that Static Control's microchips infringed Lexmark's copyrights. Static Control asserted various counterclaims, among them a claim for Lanham Act false advertising accusing Lexmark of sending letters to remanufacturers falsely stating that Static Control's microchip was infringing. Each company lost its claims against the other at the district court level. In August 2012, the Sixth Circuit reversed the trial court's finding that Static Control lacked standing to bring its federal false advertising claim, thereby reviving the claim, which is the subject of the Supreme Court Opinion discussed here.

The Supreme Court's Test for Standing

Writing for the Court, Justice Scalia employed what he termed a "straightforward" approach rooted in basic rules used to determine standing under statutory causes of action. Standing to sue exists where the plaintiff's claim (1) falls "within the zone of interests protected by the law invoked," and (2) where it is properly alleged that the injury suffered by the plaintiff was "proximately caused" by the alleged statutory violation, here the alleged false advertising. The Court held that "a direct application of the zone-of-interests test and the proximate-cause requirement supplies the relevant limits on who may sue."

The Court also reviewed -- and rejected -- three alternative tests employed by various Circuits to determine standing to sue under the Lanham Act's false advertising provisions. These were (1) a five factor test (used by the Third, Fifth, Eighth and Eleventh Circuits) derived from antitrust decisions; (2) the "categorical test," used by the Seventh, Ninth and Tenth Circuits, permitting Lanham Act false advertising suits to be brought only by an actual business competitor; and (3) the "reasonable interest" approach used by the Second Circuit, and applied by the Sixth Circuit in the *Lexmark* litigation to reverse the District Court and confer standing on Static Control to sue under the Lanham Act.

In rejecting the direct competitor test, the Court held that, so long as a plaintiff can demonstrate an injury that falls within the zone of interests protected by the Lanham Act, and that the defendant's violation of the statute proximately caused the injury, the plaintiff need not be a direct competitor of the plaintiff.

Application of the Supreme Court's Test

Applying its approach, the Court concluded that Static Control had standing to sue under §1125(a) of the Lanham Act.

The injuries alleged by Static Control -- lost sales and harm to its business reputation -- were "precisely the sort of commercial interests the [Lanham] Act protects," and Static Control sufficiently alleged that its injuries were proximately caused by Lexmark's false advertising.

The Court acknowledged that the *Lexmark* case did not present the classic false advertising claim in which one competitor directly damages another by making false statements that cause customers to switch. The Court noted however that "diversion of sales to a direct competitor . . . is not the only type of injury cognizable under §1125(a)." For several reasons, Static Control met the proximate causation requirement at the pleading stage even though it was not a direct competitor of Lexmark's.

First, Static Control alleged that Lexmark directly targeted and disparaged Static Control by falsely advertising that Static Control's microchip product infringed Lexmark's intellectual property -- in other words, that Static Control's business was illegal. Proximate causation, the Court concluded, exists in such a case: "When a defendant harms a plaintiff's reputation by casting aspersions on its business, the plaintiff's injury flows directly from the audience's belief in the disparaging statements." Under such circumstances, the fact that Lexmark and Static Control were not direct competitors did not negate proximate causation: "when a party claims reputational injury from disparagement, competition is not required for proximate cause." Moreover, the Court explained, "that is true even if the defendant's aim was to harm its immediate competitors, and the plaintiff merely suffered collateral damage."

This last statement arguably represents an expansive vision of Lanham Act standing, going beyond the Court's explicit rejection of the "categorical" test restricting standing only to direct business competitors. The Court's formulation suggests not only that non-competitors may have standing, but that the reputational injury suffered need not be directed solely at the non-competitor, and that the "collateral" injury to the non-competitor plaintiff could support its standing to sue for federal false advertising. To illustrate the point, Justice Scalia posed a hypothetical case involving two rival carmakers. If the first carmaker publicly asserts that the airbags used by the second carmaker are defective, both the second carmaker *and* its airbag supplier will suffer reputational harm and resulting loss of sales. In such circumstances, reasoned Justice Scalia, neither party's injury is derivative of the other's: "each is directly and independently harmed by the attack on its merchandise and each would have standing to assert claims for federal false advertising."

Second, Static Control alleged that it sold microchips that had no other use than refurbishing Lexmark toner cartridges. Thus, any false advertising that decreased the remanufacturers' business also necessarily harmed Static Control's sales. Indeed, the Court noted, there would be virtually a 1:1 relationship between the number of refurbished cartridge sales lost by the remanufacturers and the number of microchip sales lost by Static Control. In these "relatively unique circumstances," wrote the Court, the remanufacturers are "not more immediate victims" of the false advertising than Static Control. On the contrary, the Court concluded that where the alleged injury "is so integral an aspect of the [violation] alleged," proximate cause is unquestionably satisfied.

If you would like to discuss how the Supreme Court's decision in *Lexmark* may affect you, please contact any of the members of Bryan Cave's Commercial Litigation or Intellectual Property Client Service Groups or the authors of this client alert:

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