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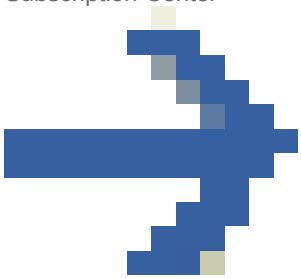

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Supreme Court to Decide Lanham Act False Advertising Standing Next Term

The Supreme Court announced yesterday that next term it will consider what is required to establish standing to sue for false advertising under Section 43(a)(1)(B) of the Lanham Act, an issue that has long clouded the case law and confounded litigants. Section 43(a), on its face, creates a cause of action for "any person who believes that he or she is or is likely to be damaged." The courts, however, have traditionally interpreted this term narrowly to provide standing only for business entities facing commercial or competitive injury as a result of false advertising. Although it is now well-settled that consumers do not have standing to sue for false advertising under section 43(a), the parameters of commercial or competitive injury have long been a murky matter. Next fall, the Supreme Court may clarify that issue with a decision that could have an important impact on whether non-competitors and non-competing entities (*e.g.*, trade associations) will have standing to sue for false advertising under federal law.

Last August, in ***Static Control Components, Inc. v. Lexmark International, Inc.***, the Sixth Circuit revived a false advertising counterclaim brought by Static Control alleging that Lexmark had falsely informed customers that Static Control had engaged in illegal conduct by selling products that infringed Lexmark's patent rights. The Eastern District of Kentucky had previously dismissed Static Control's counterclaim for lack of Lanham Act standing, finding that Static Control had failed to allege sufficient facts to satisfy the Supreme Court's multi-factor test for antitrust standing under ***AGC v. Cal. State Council of Carpenters***, which several circuits have adopted in deciding Lanham Act standing. Citing a prior opinion, the Sixth Circuit ruled that the test for Lanham Act standing in that Circuit is not the same as antitrust standing, but rather involves determining whether the claimant has a "reasonable interest" to be protected and a reasonable basis for believing that the interest is likely to be damaged by the alleged false advertising. Applying this "reasonable interest" test, the Sixth Circuit found that Static Control had sufficiently alleged a cognizable interest in its business reputation, which was likely to be harmed by Lexmark's representations to consumers.

The Sixth Circuit's *Static Control* decision leaves a three-way circuit split among the federal appellate courts regarding the proper test for Lanham Act false advertising standing. The Third, Fifth, Eighth, and Eleventh Circuits apply the Supreme Court's antitrust standing analysis from AGC when deciding Lanham Act standing issues, while the Seventh, Ninth, and Tenth Circuits follow a narrower approach by allowing only direct competitors to sue for false advertising under the Lanham Act. The Second and Sixth Circuits apply the "reasonable interest" approach identified in *Static Control*, which seems to represent the most permissive standard for Lanham Act standing.

In my experience, it is often a futile exercise to forecast which way the Supreme Court will fall on an issue, so I will not venture a guess in this posting. However, it is worth noting that the Third Circuit's ***Conte Brothers*** decision applying the antitrust standing analysis to Lanham Act false advertising cases was authored by none other than Justice Samuel Alito during his tenure on that court. We will continue to monitor the case and report on the decision next term.