

SUPREME COURT CLARIFIES STANDING FOR FALSE ADVERTISING CASES

On March 25, 2014, the United States Supreme Court issued a unanimous decision resolving an important issue that has implications for companies seeking redress for false advertising and disparagement. In *Lexmark International, Inc. v. Static Control Components, Inc.*, the Court determined that standing to bring false advertising claims under the federal Lanham Act is not limited to commercial competitors. Any commercial entity suffering lost sales or damage to reputation has standing to sue, as long as those injuries are "proximately caused" by the defendant's advertising.

While many false advertising cases involve disputes between direct competitors, *Lexmark* did not. Lexmark manufactures laser printers designed to work only with Lexmark toner cartridges. To try and prevent competition from remanufacturing companies that refurbish and sell used Lexmark cartridges, Lexmark's cartridges contain a microchip that disables the spent cartridge until the microchip is replaced. The defendant in *Lexmark*, Static Control, is not a remanufacturer but instead sells microchips that remanufacturers can use in refurbishing Lexmark cartridges. Unhappy with that development, Lexmark sued Static Control for copyright infringement and related transgressions. Static Control counterclaimed that Lexmark was liable for false advertising by, among other things, informing cartridge remanufacturers that it is supposedly "illegal" to use Static Control's products to refurbish Lexmark cartridges.

The question before the Court was whether Static Control had standing to assert a false advertising claim against Lexmark since Static Control is not a competitor of Lexmark but instead makes parts that are used by Lexmark's competitors.

The parties and various amici asked the Court to adopt one of three existing tests for standing: a balancing test (used by the 3rd, 5th, 8th and 11th Circuits), the "actual competitor" test (used by the 7th, 9th and 10th Circuits), and the "reasonable interest" test (used by the 2nd Circuit). The district court in *Lexmark* employed the balancing test and dismissed Static Control's false advertising claim for lack of standing. Reversing that decision, the Sixth Circuit used the reasonable interest test. The Supreme Court, however, rejected all three tests.

The decision, authored by Justice Scalia, set forth a new two-prong test: to have standing under the Lanham Act, a false advertising plaintiff must (1) "fall within the zone of interests" protected by the statute, and (2) have suffered harm proximately caused by the defendant's allegedly false advertising. Elaborating on the first element, the Court held that a plaintiff falls within the Lanham Act's protected zone of interests if the plaintiff is a business that has lost or will lose sales or has suffered injury to its reputation. According to the Court, this means that a consumer generally does not have standing under the Act, even if the consumer is a business misled by a supplier into buying an inferior product. As for determining proximate cause, the Court held that the economic or reputational injury must flow "directly from the deception wrought by the defendant's advertising; and that [] occurs when deception of consumers causes them to withhold trade from the plaintiff." The Court found that Static Control's allegations met the test and reinstated its false advertising claim.

The *Lexmark* decision has important implications for false advertising litigants. First, there is now a nationwide standard that should reduce forum shopping where standing may be an issue. Second, the Court's decision makes clear that a plaintiff and defendant need not be direct competitors for the plaintiff to have standing. At the same time, it remains to be seen just what courts will accept as proof that the deceptive advertising "proximately caused" consumers to "withhold trade from the plaintiff." Indeed, at the end of its decision, the Court alluded to the "relatively unique circumstances" of the case and emphasized that the decision addressed the sufficiency of plaintiff's allegations in its counterclaim, not the evidence eventually needed to prove the requisite proximate cause.

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