Supreme Court To Clarify Standing For False Advertising

June 12, 2013

On June 3, 2013, the U.S. Supreme Court agreed to hear Lexmark International's petition from a lower court ruling that a party with merely a "reasonable interest" to protect had standing to sue for false advertising under Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a)(1). The counterclaiming party, Static Controls, alleged that Lexmark engaged in false advertising by informing customers that Static infringed various patents and copyrights. Lexmark and Static are not actual competitors.

The Supreme Court will decide the appropriate test for standing in these circumstances, which has divided the lower courts. In some Circuits only actual competitors have standing to sue for false advertising under the Lanham Act, whereas other Circuits apply a multi-factor test typically used for antitrust claims. Here, the Sixth Circuit applied a more lenient "reasonable interest" test.

The Supreme Court's forthcoming decision (not likely before late 2013 or early 2014) creates potential opportunities for false advertising plaintiffs if the Court adopts a more lenient standard, and potentially greater protection against false advertising claims nationwide if the Court adopts a more stringent standing requirement applicable to all Circuits. In all events, Static's counterclaims are a reminder that what is said about a lawsuit by a party outside of court—to customers and others—may give rise to potential liability, or at least the headache of defending against accusations of wrongdoing.