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I. INTRODUCTION

The cola wars. The Apple "I'm a PC" ads. "Miller Lite Has More Taste Than Bud Light." For as long as there have been advertisements and marketing, companies have been favorably comparing their products and services to those of their competitors and sometimes engaging in outright disparagement in doing so. Not infrequently, the aggrieved company shifts the field of battle from the marketplace to the courthouse, as when DirectTV sued Dish, and when AT&T sued Verizon, alleging that the defendant crossed the line by relying on falsities to damage the plaintiff's reputation.

Plaintiffs sometimes bring such cases under the Sherman Act, alleging that the defendant's conduct harmed not only the plaintiff's reputation but competition as well. However, the courts' reluctance to bless antitrust claims predicated upon tortious conduct has frustrated the efforts of most plaintiffs bringing such claims. As a result, plaintiffs have more often turned to another statute that was intended to "protect persons engaged in . . . [interstate] commerce against unfair competition": Lanham Act Section 43(a), which in relevant part prohibits unfair competition in the form of "false or misleading description of fact, or false and misleading representation of fact" that "misrepresents the nature, characteristics, qualities, or geographic origin of [a company's] or another person's goods, services, or commercial activities."

In two cases decided this term, the Court both adopted an expansive view of Lanham Act standing and removed a potential defense to Lanham Act liability that had previously been available to companies in some regulated industries. These two cases will undoubtedly cause more companies to seek judicial protection from the marketing slings and arrows of their competitors and others.

II. BRINGING CLAIMS UNDER THE SHERMAN ACT

Because claims predicated upon allegedly false or misleading statements to the market typically involve unilateral conduct, most plaintiffs have brought their antitrust claims based upon such conduct under Sherman Act Section 2. Some of those claims have foundered for lack of evidence of market power or the dangerous probability of the defendant gaining monopoly

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power.[2] Most such claims, however, sped head-first into the high hurdle that plaintiffs face in predicating antitrust claims upon what is fairly characterized as tortious conduct.

As the Supreme Court observed in *Brooke Group,*[3] "[e]ven an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws." Thus, the courts have consistently observed that "while the disparagement of a rival . . . may be unethical and even impair the opportunities of a rival, its harmful effects on competitors are ordinarily not significant enough to warrant recognition under § 2 of the Sherman Act."[4] Judge Easterbrook has expressed even more skepticism about such claims: "Antitrust law condemns practices that drive up prices by curtailing output. False statements about a rival's goods do not curtail output in either the short or the long run. They just set the stage for competition in a different venue: the advertising market."[5]

Nevertheless, most courts have not barred the door altogether to antitrust claims predicated upon false statements or advertising. Rather, most courts to consider the issue have held that such claims are viable and should be permitted to go forward if the plaintiff can satisfy a six-part test endorsed by Areeda & Turner.[6] Under that test, false or misleading statements made in marketing can support antitrust claims if the plaintiff can prove that those statements were: (1) clearly false; (2) clearly material; (3) clearly likely to induce reasonable reliance; (4) made to buyers without knowledge of the subject matter; (5) continued for prolonged periods; and (6) not readily susceptible of neutralization or other offset by rivals.[7] These courts have held that only by satisfying this test can plaintiffs "'overcome a presumption that the effect on competition of such a practice was *de minimis.*'"[8]

In a limited number of cases, courts have found the plaintiff's allegations were sufficient at least for purposes of defeating a motion to dismiss; and in some cases that the evidence was sufficient to defeat summary judgment. For example, in *National Ass'n of Pharmaceutical Mfrs,*[9] the Second Circuit reversed the district court's order dismissing a Section 2 claim by a generic drug supplier and its trade association against the supplier of a branded drug, Inderal, alleging that a letter sent by the defendant to pharmacists regarding the pros and cons of its branded version of Inderal versus plaintiff's generic version was false and misleading.

In doing so, the Court rejected the conclusion of the District Court that "'one letter sent in the context of an ongoing debate between the generic pharmaceutical manufacturers and brand name manufacturers . . . is insufficient to violate the antitrust laws.'" The Second Circuit went on to hold that the allegations were sufficient under the Areeda & Turner six-part test, and

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[2] *See, e.g., Am. Prof'l Testing Serv., Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publications, Inc.*, 108 F.3d 1147, 1154 (9th Cir. 1997) (insufficient evidence of a dangerous probability of monopoly power).

[3] *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225 (1993).

[4] *Am. Prof'l Testing Serv.,* 108 F.3d at 1152.

[5] *Sanderson v. Culligan Intern. Co.*, 415 F.3d 620, 623 (7th Cir. 2005).

[6] P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 738a, at 278-79 (1978).

[7] *Am. Prof'l Testing Serv., Inc.,* 108 F.3d at 1152; *National Ass'n of Pharmaceutical Mfrs. v. Ayerst Labs.*, 850 F.2d 904, 916 (2d Cir.1988).

[8] *Ayerst Labs.*, 850 F.2d at 916 (citation omitted).

[9] *Id.*

that the case should proceed through discovery. Other courts have reached similar conclusions in a limited number of cases.[10]

III. BRINGING CLAIMS UNDER THE LANHAM ACT

Because of the challenge they face in bringing such claims under the Sherman Act, most plaintiffs alleging harm from false advertising or other misleading statements to the market have resisted the siren song of antitrust treble damages and instead sought relief under Lanham Act Section 43(a). One significant issue that has challenged the courts and potential plaintiffs, and gave rise to a split among the circuits, is the test for Section 43(a) standing. A second issue that arose recently is whether compliance with statutes regulating labeling and marketing in particular industries, such as the Food, Drug and Cosmetic Act ("FDCA"), can insulate the company from Lanham Act liability.

A. "Collateral Damage" is Sufficient for Lanham Act Standing: The Lexmark Decision

The Supreme Court recently resolved the circuit split over Lanham Act standing in a way that will undoubtedly result in more filings under the Act.[11] *Lexmark* arose from a Lanham Act counterclaim filed by Static Control in response to Lexmark's copyright infringement claims. Static Control manufactured replacement microchips needed in certain Lexmark toner cartridges for a refurbished cartridge to function. Static Control alleged that Lexmark violated the Lanham Act by misleading Lexmark printer owners and cartridge remanufacturers who were purchasing microchips from Static Control into believing that only Lexmark could legally replace the microchips in their cartridges.

The issue before the Court was whether, in reversing dismissal of Static Control's Lanham Act claim, the Sixth Circuit used "the appropriate analytical framework for determining a party's standing to maintain an action for false advertising under the Lanham Act." In deciding this issue, the Court first held that Static Control fell within the Lanham Act's "zone of interests." Noting that the test is not "especially demanding," and that "the benefit of any doubt goes to the plaintiff," the Court held that the language of the Act itself made clear that "to come within the zone of interests in a suit for false advertising under Section 1125(a), a plaintiff must allege an injury to a commercial interest in reputation or sales." The only limitation on this broad standard

[10] *See, e.g., Multiflex, Inc. v. Samuel Moore & Co.*, 709 F.2d 980, 992 (5th Cir.1983), *abrogated on other grounds by Deauville Corp. v. Federated Dept. Stores, Inc.*, 756 F.2d 1183, (5th Cir.1985) (affirming Section 2 violation when defendant told plaintiff's bankers and competitors that plaintiff's "products were inferior, that the company was closing down, and that the plant had been shut in anticipation of bankruptcy with Pinkerton security guards posted at the door"); *Caldon, Inc. v. Advanced Measurement & Analysis Grp., Inc.,* 515 F. Supp. 2d 565, 577 (W.D. Pa. 2007) (denying motion to dismiss attempted monopolization claim based on false and misleading statements by a competitor); *Addamax Corp. v. Open Software Found., Inc.*, 888 F. Supp. 274, 285 (D. Mass. 1995) (summary judgment denied where plaintiff accused defendant of sowing "fear, uncertainty and doubt" in order "to paralyze the industry and deter users from committing to other systems. . . in order to obtain collusive monoposony); *Davis v. S. Bell Tel. & Tel. Co.*, No. 89-2839-CIV-NESBIT, 1994 WL 912242, at *2, *7, *15 (S.D. Fla. 1994) (denying summary judgment on allegations of deception and misleading statements to maintain monopoly).

[11] *Lexmark International, Inc. v. Static Control Components, Inc.,* No. 12-873, *slip op.* (March 25, 2014).

noted by the Court was the well-established principle that Congress did not intend to provide consumers a cause of action under the statute.

Turning to appropriate proximate causation standard, the Court held that "a plaintiff suing under § 1125(a) ordinarily must show economic or reputational injury flowing directly from the deception wrought by the defendant's advertising; and that occurs when the deception of consumers causes them to withhold trade from the plaintiff." In applying this test, the Court found that Static Control had standing to bring its Lanham Act claim, notwithstanding that the record did not present "the classic" false advertising case in which the plaintiff alleges lost sales due to a competitor making false statements about the plaintiff's products or services or its own.

In doing so, the Court made clear that "when a party claims reputational injury from disparagement, competition is not required for proximate cause; and that is true even if the defendant's aim was to harm its immediate competitors, and the plaintiff suffered collateral damage." Elaborating on its holding, the Court held that "collateral" harm could be "direct," noting that if a carmaker makes false statements about the airbags used by a competing carmaker, both the airbag supplier and the carmaker could have Lanham Act standing.

B. FDCA Regulated Industries Lose "Preclusion" Safe-Harbor: The Pom Wonderful Decision

In *Pom Wonderful*,[12] the Supreme Court weighed in on the hard-fought and closely-watched legal battle between pomegranate juice supplier Pom Wonderful and Coca-Cola over Coke's prominent labeling of its juice-blend drink as "pomegranate blueberry," although the beverage in fact contained miniscule amounts of each. In doing so, the Court reversed an order of the Ninth Circuit holding that Coca-Cola's compliance with the FDCA in labeling its product insulated the company from Lanham Act liability.

Just as it did in *Lexmark,* the Court began its analysis by holding that the case presented a simple issue of statutory construction. The question addressed by the Court in *Pom Wonderful* was whether, in enacting the FDCA or the Lanham Act, Congress expressed an intent that the FDCA would occupy the entire regulatory field of food product labeling, to the exclusion of the Lanham Act, or whether it intended to permit Lanham Act claims against companies that complied fully with the FDCA.

In concluding that the FDCA did not preclude application of the Lanham Act, the Court relied on the fact that neither statute expressly reflected Congress's intent to allow companies to use FDCA compliance as a shield to Lanham Act liability, and that the statutes have co-existed for seventy years. The Court also relied on the fact that the focus of the statutes and the agencies tasked with enforcing them is different, observing that the purpose of the FDCA is to protect health and safety, while the Lanham Act was enacted to protect competition. Notably, in reaching this conclusion, the Court not only rejected Coca-Cola's arguments, but those of the U.S. government as well, which filed an *amicus* brief arguing that the Lanham Act is precluded "to the

[12] *Pom Wonderful LLC v. Coca-Cola Co.,* No. 12-760, slip op. (June 12, 2014).

extent the FDCA or FDA regulations specifically require or authorize the challenged aspects of [the] label."

IV. THE IMPLICATIONS OF *LEXMARK AND POM WONDERFUL:* MORE SECTION 43(A) CLAIMS—AND MORE QUESTIONS

By holding that Lanham Act standing is not limited to direct competitors, and extends to commercial actors who suffered "collateral damage," the Supreme Court made the Lanham Act available to all companies that can allege proximate harm resulting from a company's false or misleading labeling, advertising, or promotion. A company vulnerable to such a claim could potentially be sued by any direct competitor or—as with Static Control in *Lexmark*—a supplier to the competitor, provided that the potential plaintiff could satisfy *Lexmark's* proximate cause test.

Could a wholesaler or even retailer of the products that are the subject of false or misleading statements bring a claim? The language of the Court's decision suggests not, because the burden of proving "economic or reputational injury flowing directly from the deception" is "generally not made when the deception produces injuries to a fellow commercial actor that in turn affect the plaintiff." This issue, however, could be addressed definitively another day.

The implications of the *Pom Wonderful* decision for the food, beverage, pharmaceutical, and cosmetic industries could also be significant. For example, a pharmaceutical company that adheres to the letter of the regulations in the way it packages a product, drafts its inserts, and advertises, could *still* be sued under the Lanham Act for false or misleading statements. But the decision may extend well beyond those industries. Airlines, for example, are subject to regulations in the manner in which they advertise their fares. Yet, compliance with those regulations may not insulate them from Lanham Act liability. The same could be said for other regulated transportation companies (railroads, passenger buses, trucking), as well as companies in a wide range of industries, including financial services, telecom, tobacco, and healthcare. Enterprising plaintiffs may well invite the courts to determine whether Congress intended that those industry regulatory schemes displace regulation under the Lanham Act.

One final point regarding the breadth of Section 43(a) bears mention. The Lanham Act applies to any "commercial advertising or promotion" that is disseminated broadly enough to constitute "advertising" or "promotion" within a particular industry.[13] Accordingly, the Act does not just apply to the labeling and promotion of consumer products. Rather, it can also apply to B2B marketing and promotion, such as marketing to retailers, marketing by suppliers of raw ingredients to manufacturers, and even to bid proposals to government agencies. Accordingly, companies in a wide range of industries such as academic publishing, soft drink distribution, business and government software, and nutritional supplement ingredients, have been named in Lanham Act cases.

Furthermore, liability is not limited to conduct involving product labeling or advertising. Rather, promotional conduct as narrowly focused as a videotape sent to seven potential customers and even a single letter have been held to trigger Lanham Act liability. As a result, the

[13] *Gordon & Breach Sci. Publishers v. Am. Inst. Of Physics,* 859 F. Supp. 1521, 1535-36 (S.D.N.Y. 1994).

range of companies and industries that could feel the effects of the Court's Lanham Act decisions this term could be broad. And, in an age in which consumers are bombarded with advertising and promotions in the form of pop-up ads, paid search result placement, e-mail ads, social media site ads, spam, and other digital marketing messages, the impact of the Court's decisions on the number of Lanham Act filings could be that much greater.

V. CONCLUSION

In short, the courts have erected high hurdles for parties aggrieved by the false or misleading statements of their rivals (and others) to successfully seek relief under the Sherman Act. Instead, Lanham Act Section 43(a) has long provided a more navigable litigation path for most of those companies: and with the Court's decisions this term in *Lexmark* and *Pom Wonderful,* we should expect more companies to be taking that route in an effort to obtain relief from the harm they believe they suffered as a result of false or misleading statements to the marketplace by others.