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held that equitable tolling was unnecessary in a securities fraud case because the limitations period would not begin to run until a plaintiff knew or should have known that a fraud had been perpetrated.

In the present securities fraud case, the Seventh Circuit found that the limitations period does not begin to run until a plaintiff knows both that she has been misled and that defendant intended to make a false statement. Once both of these requirements are met, the statute begins to run. The court found this interpretation to be consistent with the Supreme Court's holding that the equitable tolling period was unnecessary in securities fraud cases.

The court determined that an objective test should be used to determine when the limitations period had begun to run in a fraud case. Based on this analysis in the present case, the statute would have began to run when Plaintiffs should have known of fraud, not when they actually became aware of it. The court concluded that since Defendants had not proved that the investors became aware of the fraud before Plaintiffs claimed they had, Defendants had not proved their affirmative defense that the limitations period had run.

Market, Not Fraud, Led to Stock Losses

As an alternative defense, Defendants produced a financial expert's report which showed that the drop in Defendants' stock price was consistent with the fluctuations of the entire stock market. Plaintiffs did not respond to this defense, leaving the court without a basis to question the report. Because the report indicated that the loss would have occurred even if Defendants had not committed fraud, the court affirmed the trial court's dismissal of the case. The court reasoned that because competitors' stock prices moved in a manner similar to Defendants'stock, market forces rather than fraud caused the decline in Defendants' stock prices. Therfore, the court held that Plaintiffs had not met their burden of proving fraud.

In conclusion, though the court dismissed Defendant's statute of limitations defense, it agreed with Defendant's market forces defense. The court held that absent proof that the losses were not a result of market forces, Plaintiff's fraud claim could not be supported.

Limitations in Trademark Agreements Are Not Trade Restrictions

by Linda A. Kerns

In ***Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50 (2d Cir. 1997)**, the owner of the PINE-SOL trademark, the Clorox Company ("Clorox") alleged that Sterling Winthrop, Inc. and Reckitt & Colman, Inc. ("Reckitt"), the former and current owners of the LYSOL trademark violated the Sherman Act. The United States Court of Appeals for the Second Circuit affirmed the judgment of the district court, holding that a trademark agreement which limited the use of the PINE-SOL trademark neither restrained trade nor created a monopoly.

Clorox develops and sells cleaning and disinfectant products for household use and has a thirty-seven percent share of the all-purpose household cleaning market. In 1990, Clorox purchased PINE-SOL, the oldest, best-selling pine-oil-based cleaner on the market. The PINE-SOL trademark has been used since 1945 and was federally registered in 1957.

Defendants also develop and sell household cleaning products. Sterling purchased the LYSOL mark in 1966 and sold it to the co-defendant in this litigation in 1994. Reckitt currently has approximately fifteen percent of the all-purpose household cleaning market. The LYSOL name has had federal trademark protection as a disinfectant cleaner since 1906. LYSOL spray disinfectant is the dominant disinfectant cleaner among products of its type, with only minimal competition from lesser-known brands.

LYSOL and PINE-SOL Litigation Dates Back to the 1940s

The litigation between the owners of these two product brands began in the 1940s. The owners of the LYSOL mark opposed the maker of PINE-SOL's original attempt to obtain federal trademark protection.

At the time, PINE-SOL was written without the hyphen as "PINESOL." The U.S. Patent and Trademark Office denied the registration, finding that a consumer could confuse the two trademarks due to their similarity.

The owners of the PINE-SOL mark ignored the Patent Office's decision and continued to use the trademark on their products. The owner of LYSOL responded by filing suit. The owners reached a settlement in 1956 and agreed to three major restrictions on the use of the PINE-SOL trademark, including:

(1) limiting the mark PINE-SOL to products that contained pine oil as the active ingredient;

(2) illustrating pine or evergreen trees on PINE-SOL products; and

(3) maintaining separation between "PINE" and "SOL" so that the PINE-SOL name would not be confused with LYSOL, which would always appear as one word.

In return, the agreement permitted PINE-SOL to be used as a "general household cleaner consisting primarily of pine oil" or a "pine oil cleaner, disinfectant and deodorant." The owners of PINE-SOL also were free to expand the use of the mark to products other than general household cleaners.

In 1965, the owners of the LYSOL trademark sued Cyanamid, who then owned the PINE-SOL trademark, for using the PINE-SOL mark on an aerosol spray disinfectant. In 1967, the parties came to a second agreement that the PINE-SOL mark could be used on various cleaning products but not on aerosol spray disinfectants.

In 1983, Cyanamid, PINE-SOL's owner, sued Sterling, LYSOL's owner, for selling a product called LYSOL PINE ACTION. The suit alleged a violation of the 1967 agreement, unfair competition, and trade dress infringement. In 1987, before the 1983 matter was resolved, Sterling then sued Cyanamid for marketing a non-aerosol pump spray disinfectant with the PINE-SOL trademark.

In 1987, the parties settled both the 1983 and 1987 disputes. The 1987 agreement included the following provisions:

(1) disinfectant products with the PINE-SOL mark were restricted to two products per geographic area;

(2) the original PINE-SOL product could be promoted primarily as a cleaner but not as a disinfectant;

(3) PINE-SOL products were limited to all-purpose, generic cleaners.

Additionally, under the agreement, Sterling permitted Cyanamid to market a "multi-purpose pump spray household cleaner with disinfecting properties," and Cyanamid permitted Sterling to market and sell LYSOL PINE ACTION CLEANER.

Clorox Obtained Rights to PINE-SOL and Challenged Prior Trademark Agreements

In 1990, Clorox purchased the rights to PINE-SOL with the full knowledge that the PINE-SOL trademark remained subject to the existing 1987 agreement. The current case is the most recent dispute in the longstanding battle between the owners of the PINE-SOL and LYSOL trademarks. Clorox filed the present lawsuit in 1992 to contest the preliminary injunction which barred a television advertisement for a Clorox PINE-SOL product. Sterling alleged that Clorox violated the 1987 agreement because the advertisement emphasized the disinfectant qualities of PINE-SOL.

Clorox alleged that the 1987 agreement served no legitimate trademark purpose because there is no longer the same likelihood of confusion between LYSOL and PINE-SOL as there might have been in the 1940s. Clorox claimed that the 1987 agreement violated the Sherman Antitrust Act since it restrained trade and perpetuated a monopoly by LYSOL's owners in the cleaner-disinfectant market. According to Clorox, limiting the use of the PINE-SOL mark prevented Clorox from competing effectively in a difficult market.

District Court Granted Sterling's Summary Judgment Motion

Sterling moved for summary judgment in the present suit. In 1996, the district court granted summary judgment, reasoning that "Clorox had shown 'no competitive limitation on the owner of the PINE-SOL market [sic]; no price fixing; no division of markets territorial or product; no group boycott; or concerted refusals to deal with a competitor,'" the typical types of conduct which usually violate federal antitrust laws. Clorox appealed the judgment, alleging restraint of trade and perpetuation of a monopoly.

Clorox Alleged Restraint of Trade

The appellate court used a "rule of reason" analysis in assessing Clorox's restraint of trade claim. Under the "rule of reason," the plaintiff must prove an antitrust injury. The antitrust issue in the present case was "whether the restraints in the agreements are reasonable in light of their actual effects on the market and their pro-competitive justifications." To determine whether restraints on competition in the agreement violate the rule of reason, and therefore would potentially harm consumers, courts consider the following:

(1) whether the plaintiff has shown that the restraint has an adverse effect on competition;

(2) whether the defendant established a "pro-competitive, redeeming virtue" for the restraint on trade; and

(3) where the defendant established a pro-competitive reason for the restraint, whether the plaintiff has proved that there are alternative, less restrictive means available to the defendant than the restraints in the agreement.

The court began its "rule of reason" analysis by considering whether Clorox had shown that the restraints on the parties in the 1987 agreement had an adverse effect on competition. In trying to show that the 1987 agreement was an unlawful restriction on competition, Clorox argued the "megabrand theory." Under this theory, companies need to rely on established brand names in order to introduce new products into the market due to the high costs and risks associated with introducing new products. However, this theory did not persuade the court for three reasons. First, the Clorox name itself is a "megabrand." Second, the use of the PINE-SOL brand would not automatically guarantee success. Finally, Clorox failed to prove that large companies are incapable of competing in the markets allegedly dominated by the LYSOL mark.

In particular, the court noted that both the 1987 and 1967 agreements did not prevent Clorox from using the PINE-SOL name to compete in the household cleaner and disinfectant market. The agreements only required that Clorox market its products primarily as cleaners and secondarily as disinfectants. The court reasoned that antitrust laws only aim to promote competition, not guarantee companies the right to easy and unencumbered advance into a market. In other words, antitrust laws are designed to protect market competition, not competitors themselves. Additionally, the court noted that a trademark is non-exclusionary since it only confers the rights to a name, not an idea or product. Because of the non-exclusionary nature of trademarks, it is rare that a disadvantageous trademark agreement raises antitrust concerns. Since the 1987 agreement only limited Clorox's use of the PINE-SOL mark, and not Clorox's ability to compete with the LYSOL brand, the court concluded that the 1987 agreement did not restrict competition, as it did not restrict any competitor's ability to enter the market allegedly dominated by LYSOL. Therefore, the agreement did not constitute a violation of the Sherman Antitrust Act under a "rule of reason" analysis.

The Court Also Rejected Clorox's Monopoly Allegations

In addition to the antitrust claim, Clorox also alleged that the 1987 agreement furthered a monopoly allegedly held by the defendant in disinfectant cleaning markets. In response, the court outlined the two elements of a monopoly claim:

(1) "the possession of monopoly power in the relevant market," and

(2) "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."

For the same reasons relied upon to reject the restraint of trade claim, the court also held that Clorox failed to prove either of these elements. The court affirmed the judgment of the district court, yet noted in its opinion that this probably will not be the "last . . . stage of the ongoing fight between the owners of the LYSOL and PINE-SOL marks."