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District Court Filters Out Preempted "Spring Water" False Advertising Claim

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Earlier this year, we covered a decision from the District of Connecticut finding state law false advertising claims against the bottled water company Poland Spring preempted by the FDCA. Flowing from that decision is the case we are covering today: *Frompovicz v. Niagara Bottling, LLC*, 2018 WL 4465879 (E.D. Pa. Sept. 18, 2018).

Plaintiff, a spring water extractor, on behalf of a putative class of spring water extractors and bottlers, sued the defendants under the Lanham Act and Pennsylvania state law for falsely advertising that its bottled water is "spring water" when it is allegedly "well water." In short, the different terms refer to how the water is collected: spring water flows naturally to the surface, whereas well water is pumped to the surface.

In an earlier decision, *Frompovicz v. Niagara Bottling, LLC*, 313 F. Supp. 3d 603 (E.D. Pa 2018), the court held that plaintiff's Lanham Act claims were not precluded by the FDCA, but dismissed the complaint on other grounds with leave to amend. The defendants—a water extractor and three water bottlers—then moved to dismiss the amended complaint on the grounds that (1) Plaintiff lacked a right to sue under the Lanham Act, and (2) Plaintiff's state law claims were preempted by the FDCA.

On the first point, the court, applying the well-known *Lexmark* test enunciated by the Supreme Court in a case bearing that name, held that plaintiff fell within the "zone of interest" implicated by the Lanham Act because he alleged that he suffered lost sales as a result of the alleged false advertising. *Lexmark*'s proximate cause test was easily satisfied as to the defendant that was a water extractor because it directly competed with the plaintiff and allegedly caused the plaintiff to lose sales to bottlers. The proximate cause analysis was more complicated as to the bottler defendants because they were plaintiff's consumers, not his competitors. The court ultimately found proximate cause as to two of the bottler defendants with whom plaintiff had pre-existing commercial relationships that purportedly suffered due to their decision to falsely label water purchased from the competing extractor. The Lanham Act claim against the third bottler defendant with whom plaintiff lacked a pre-existing commercial relationship was dismissed under the court's application of *Lexmark*.

On the second point, the court held that the state law claims were preempted by the FDCA. The FDA has defined "spring water" in regulations found at 21 C.F.R. § 165.110, so to the extent plaintiff's Pennsylvania law claim relied on a different definition of "spring water" than the FDA's definition, the claim was expressly preempted by the FDCA. Any remaining state law claims predicated on a violation of the FDCA were impliedly preempted because there is no private right of action to enforce the FDCA.

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