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US Supreme Court Rules Trademark Plaintiffs Cannot Recover Profits from Defendants' Affiliates, Overturns $43M Award in *Dewberry* Trademark Case

Client Alerts

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On February 26, 2025, in a unanimous opinion, the US Supreme Court vacated a $43 million trademark infringement award and ruled that trademark plaintiffs cannot recover profits from defendants' affiliates when those affiliates are not themselves named as defendants in the lawsuit.[1] The Supreme Court's decision vacated plaintiff Dewberry Engineers' award because it disgorged profits from defendant Dewberry Group's affiliates without those affiliates being parties to the suit.

While the decision adopts a narrow view of how an accounting of profits should be applied to related corporate entities, it leaves a number of open questions as to the applicability of the Lanham Act's "just sum" provision and will likely not significantly alter the landscape of damage awards in Lanham Act cases, as litigants can respond to this ruling by naming all related corporate entities as defendants in trademark cases.

Background

The case involved a dispute between two real estate developers over the rights to the "Dewberry" name. The Virginia-based firm Dewberry Engineers provided civil engineering, surveying, and real-estate development services across the southeastern United States and owns the "Dewberry" trademark.[2] The Georgia-based Dewberry Group was also a commercial real-estate company providing services in the southeastern United States but provided those services solely to other affiliated but separately incorporated companies.[3] Each Dewberry Group affiliate owned commercial property for lease, but Dewberry Group provided the financial, legal, operational, and marketing services needed to generate rental income from the properties they owned.[4] The income went on the affiliates' books, and Dewberry Group received agreed-upon fees.[5]

In 2006, Dewberry Engineers sued Dewberry Group (then Dewberry Capital) for trademark infringement, but the parties settled in 2007.[6] However, a decade later, Dewberry Group reneged

on the deal and resumed its use of the "Dewberry" name.[7] Dewberry Engineers sued Dewberry Group again for trademark infringement and unfair competition under the Lanham Act and won on liability at summary judgment.[8]

The District Court and Fourth Circuit Opinions

After a bench trial on damages, the District Court for the Eastern District of Virginia found that Dewberry Group's trademark infringement was "intentional, willful, and in bad faith."[9] The district court awarded profits to remedy the infringement pursuant to Section 1117(a) of the Lanham Act, which as relevant here permits an award of "defendant's profits" and provides that a court "shall assess such profits."[10] The district court found that defendant Dewberry Group's profits "show up exclusively on the [property-owning affiliates'] books."[11] The court decided to treat Dewberry Group and its affiliates "as a single corporate entity" for the purpose of calculating the profits award even though the plaintiff did not name those affiliates as defendants or seek to establish alter ego liability.[12] To do otherwise would allow "the entire Dewberry Group enterprise to evade the financial consequences of its willful, bad faith infringement."[13] The court thus totaled the affiliates' real-estate profits from the years Dewberry Group infringed and awarded plaintiff Dewberry Engineers nearly $43 million in damages.

On appeal, the Fourth Circuit affirmed, reasoning that the district court properly held the entire Dewberry Group enterprise to account for its use of infringing materials to generate corporate profits.[14] The Fourth Circuit emphasized that a district court's grant of profit disgorgement is subject to the principles of equity and thus is ultimately a matter of the court's discretion.[15] To prohibit the court from using its discretion to reach the profits of the defendant's affiliates would risk providing potential trademark infringers with "the blueprint for using corporate formalities to insulate their infringement from financial consequences" and run counter to Congress's "fundamental desire to give trademark registrants under the Lanham Act 'the greatest protection that can be given them.'"[16]

The Supreme Court's Opinion

In a unanimous opinion, the US Supreme Court overturned the Fourth Circuit's ruling and vacated the profits award, holding that a court can award only profits ascribable to the defendant itself.[17] Writing for the Court, Justice Elena Kagan wrote that "[t]he Engineers chose not to add the Group's property-owning affiliates as defendants" and thus the affiliates' profits were not part of the statutorily disgorgeable profits of defendant.[18] By treating Dewberry Group as one and the same as its affiliates, "the courts below approved an award including non-defendants' profits—and thus went further than the Lanham Act permits," the Court explained.[19] The Court has also invoked the corporate law principle that affiliated companies are not treated as a single corporate entity but

rather as "separate legal units with distinct legal rights and obligations."[20] Dewberry Engineers never tried to make the showing needed for veil-piercing and thus the Court did not consider whether veil-piercing might be appropriate here.[21]

Dewberry Engineers argued that the lower courts' decisions were justified under the "just sum" provision of the Lanham Act, which provides that "[i]f the court shall find that the amount of the recovery based on profits is either inadequate or excessive the court may in its discretion enter judgment for such sum as the court shall find to be just, according to the circumstances of the case."[22] The Court rejected that argument as untenably rewriting the lower court decisions, explaining that they did not actually rely on this provision and instead simply chose to treat Dewberry Group and its affiliates as a single corporate entity.[23]

In a concurring opinion, Justice Sotomayor emphasized that principles of corporate separateness do not require a court to close its eyes to "practical realities" in calculating a defendant's profits. She suggested that there may be ways courts can consider the accounting arrangement between a defendant and its affiliates to calculate a defendant's profits, such as where a defendant effectively assigns some portion of its revenue to its affiliate in advance.[24] "Courts must be attentive to corporate business realities for our Nation's trademark laws to function, and the Lanham Act gives courts the power and duty to do so," Sotomayor wrote.[25]

Dewberry's **Implications**

As the Court itself noted, the *Dewberry* decision leaves a number of open questions.[26] The Supreme Court did not ultimately address whether the "just sum" provision of the Lanham Act might have permitted considering the affiliates' profits if Dewberry Engineers had properly pursued that theory.[27] Nor did the court address whether a court can look behind a defendant's tax or accounting records to consider a defendant's true financial gain even without relying on the just sum provision or whether veil-piercing remains an available option.[28]

Nevertheless, *Dewberry* underscores the importance of naming the proper corporate entities as defendants in trademark infringement suits. In the wake of this decision, litigants should carefully assess whether any portion of profits reasonably attributable to the infringement are realized by any corporate affiliates, even if they are not the primary actors engaged in the infringing use of the mark. If a plausible showing can be made of disgorgeable profit realized by corporate affiliates, they should be added as named defendants to any lawsuit so a full accounting of profits may be recovered. This is particularly critical where a corporate defendant appears to have reallocated profits to affiliated entities to shield its own exposure to a damages award. Where a litigant may not have a viable direct infringement claim against an affiliated entity because that entity is not itself using the mark at issue in commerce, litigants should consider other established avenues to pursue the entity's assets, such as corporate veil-piercing or potentially bringing a contributory infringement

claim against the affiliate. Conversely, corporations should take care in determining how profits are accounted for by affiliates so as to avoid subjecting them to trademark litigation in which they are not appropriate defendants.

Footnotes

[1] *Dewberry Group Inc v. Dewberry Engineers Inc. ("Dewberry")*, No. 23-900., slip op. (Feb. 26, 2025).

[2] *Dewberry* at 1; *Dewberry Eng'rs Inc. v. Dewberry Grp., Inc.*, 77 F.4th 265, 274 (4th Cir. 2023).

[3] *Dewberry* at 2.

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Dewberry Eng'rs, Inc. v. Dewberry Grp., Inc.*, No. 1:20-CV-00610, 2021 WL 5217016, at *1 (E.D. Va. Aug. 11, 2021).

[9] *Dewberry Eng'rs, Inc. v. Dewberry Grp., Inc.*, No. 1:20-CV-00610, 2022 WL 1439826 (E.D. Va. Mar. 2, 2022).

[10] *Id.*; 15 U.S.C. § 1117(a).

[11] *Dewberry Eng'rs, Inc.*, 2022 WL 1439826 at *9.

[12] *Id.*

[13] *Id.*

[14] *Dewberry Eng'rs Inc.*, 77 F.4th at 265.

[15] *Id.* at 293.

[16] *Id.*

[17] *Dewberry* at 1.

[18] *Dewberry* at 1–2.

[19] *Id.*

[20] *Dewberry* at 5 (quoting *Agency for Int'l Development* v. *Alliance for Open Society Int'l Inc.*, 591 U. S. 430, 435 (2020)).

[21] *Id.*

[22] 15 U.S.C. § 1117(a).

[23] *Dewberry* at 5.

[24] *Dewberry* at 2 (Sotomayor, J., concurring).

[25] *Id.* at 3–4. (Sotomayor, J., concurring).

[26] *Dewberry* at 8.

[27] *Id.*; *see also* 15 U.S.C. § 1117(a).

[28] *Dewberry* at 8.

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