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Supreme Court to Resolve Whether Trademark Strength Is a Question of Law or Fact

Key Takeaways

- The U.S. Supreme Court granted certiorari in *RiseandShine Corp. v. PepsiCo, Inc.*, setting the stage to decide whether trademark strength is a question of law, fact or a mixed question.
- The Court's decision will resolve a dispute over how courts evaluate trademark strength and could affect how trademark disputes are litigated, including whether judges or juries play a greater role in deciding the issue.
- Trademark owners should continue to monitor the case, as the Court's decision could reshape how trademark strength is evaluated in infringement litigation.

The U.S. Supreme Court has agreed to hear *RiseandShine Corp. v. PepsiCo, Inc.*, a trademark dispute arising from PepsiCo's 2021 launch of fruit-flavored canned energy drinks, MTN DEW RISE ENERGY. RiseandShine Corp. alleges that PepsiCo's branding infringed its RISE BREWING CO mark and a related design mark, both used since 2015, in connection with ready-to-drink canned coffee and tea beverages. RiseandShine's claim is based on a theory of "reverse confusion," which arises when consumers may mistakenly believe that the smaller, senior trademark user is sponsored by or affiliated with, or otherwise connected to the larger, junior user.

The Supreme Court will not directly decide whether PepsiCo infringed RiseandShine's trademarks. Instead, the Court granted certiorari to decide whether a trademark's strength, or degree of distinctiveness, is a question of fact or a question of law. The case is scheduled to be heard before the Supreme Court in its October 2026 session.

Competing Views of Trademark Strength At Issue

Trademark strength generally has two components: inherent (or conceptual) strength and acquired (or commercial) strength. Inherent strength concerns the mark's distinctiveness based on its relationship to the associated goods or services, while acquired strength concerns the extent to which consumers associate the mark with a particular source. Terms or designations are generally classified along a spectrum of inherent distinctiveness: (1) generic terms, which are never protectable; (2) descriptive terms,

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which are protectable only upon acquiring distinctiveness; (3) suggestive marks; (4) arbitrary marks and (5) fanciful marks, which are the most distinctive.

In its petition for certiorari, RiseandShine argues that "[t]he Second Circuit stands alone in considering [trademark strength] a question of law," whereas "[t]welve circuits consider trademark strength an issue of fact." According to RiseandShine, "analyzing how strong or weak the association is between a trademark ('RISE') and a product (coffee) is the type of fact-intensive issue involving consumer perception reserved for the trier of fact."

In opposition, PepsiCo contends that "trademark strength consists of […] acquired strength and conceptual strength." PepsiCo argues that "there is no circuit split on acquired strength, which all courts treat as factual" and that, "[i]n the Second Circuit, […] as in other circuits, a mark's level of distinctiveness is only the starting point for determining conceptual strength." PepsiCo also argues that the judgment is independently supported by other considerations, including the dissimilarity of the parties' marks and the alleged insufficiency of RiseandShine's evidence of acquired strength.

How the Trademark Strength Issue Reached the Supreme Court

The U.S. District Court for the Southern District of New York had initially granted a preliminary injunction barring PepsiCo from using or displaying its "RISE" mark. On appeal, the Second Circuit agreed that RiseandShine's "RISE" mark was suggestive but concluded that the term "Rise" has "strong logical associations" with coffee that diminish the mark's strength. The Second Circuit also held that the district court erred in finding that the parties' product packaging was confusingly similar. On remand, the district court relied on the Second Circuit's analysis and granted PepsiCo's motion for summary judgment on all claims, holding that RiseandShine's "RISE" mark was "inherently weak as a matter of law." In the subsequent appeal, RiseandShine argued that the district court "impermissibly analyz[ed] the strength-of-mark factor as a question of law" and "disregard[ed] material facts regarding the mark's acquired strength." The Second Circuit rejected those arguments.

In an amicus curiae brief, the Solicitor General recommended that "the petition for a writ of certiorari should be denied" and argued that the Second Circuit was "incorrect" in treating inherent strength as a "pure question of law." Instead, the Solicitor General described inherent strength as an "inquiry [that] is best viewed as presenting a 'mixed question of law and fact' […] in which the factual component predominates." The government recommended that the Court deny review because it was "far from clear whether the court's error was outcome-determinative in this case." The Supreme Court nevertheless granted certiorari.

What the Supreme Court's Ruling Could Mean for Trademark Litigation

If the Court adopts RiseandShine's position, juries and trial courts would play a larger role in determining trademark strength, and summary judgment may become less available when consumer-perception evidence is genuinely disputed. That approach could narrow differences among the circuits, but it also may make outcomes more dependent on the specific evidentiary record and the factfinder.

By contrast, if the Court adopts PepsiCo's position, de novo appellate review would promote greater consistency and earlier resolution by permitting courts of appeals to apply a uniform legal standard within their circuit. Depending on the breadth of the ruling, however, the Second Circuit could remain an outlier, potentially encouraging forum shopping when a dispute could properly be filed in more than one jurisdiction.

We will continue to monitor the case as it develops. For more information, contact Jacek Wnuk or your preferred Polsinelli attorney.

Aaron Milner also contributed to this alert.