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State high court clears up confusion over disparagement

By Stephen L. Raucher

On June 12, the state Supreme Court resolved a dispute between two appellate divisions and clarified the scope of a commercial general liability (CGL) insurer's duty to defend an insured under the policy's personal and advertising injury coverage against a claim of disparagement — and, along the way, laid out the elements of the previously murky cause of action known as "disparagement." In *Hartford Casualty Insurance Co. v. Swift Distribution Inc.*, 2014 DJDAR 7443, the court held that a claim of disparagement requires a plaintiff to show a false or misleading statement that (1) specifically refers to the plaintiff's product or business and (2) clearly derogates that product or business. Absent a claim meeting these criteria, an insurer has no duty to defend a company under a CGL insurance policy providing coverage for disparagement.

Hartford Casualty brought an action for declaratory relief that it had no duty to defend or indemnify Swift Distribution, doing business as Ultimate Support Systems. Ultimate sells the Ulti-Cart, a multi-use cart marketed to help musicians with their equipment. Ultimate was sued by Gary-Michael Dahl, the manufacturer of the Multi-Cart, a similar transport cart. Dahl's complaint asserted that Ultimate's false and misleading advertisements were likely to cause consumer confusion or mistake, or to deceive the public that there was some sort of affiliation between the two products. Dahl's complaint also contained other allegations, including patent and trademark infringement, unfair competition, misleading advertising and breach of contract. Ultimate's CGL insurance policy covered "personal and advertising injury," including claims arising from "[o]ral, written, or electronic publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services." Ultimate argued that Hartford had a duty to defend against Dahl's lawsuit because it fell under the personal and advertising injury provision of the CGL policy.

In its analysis, the court first discussed the history of the claim of disparagement, noting that disparagement claims have been known by many names in California, including "commercial disparagement," "injurious falsehood," "product disparagement," "trade libel," "disparagement of property" and "slander of goods." The shifting names associated with disparagement have led counsel and courts into confusion over the years. In clarifying the requirements of disparagement, the court noted that "courts have required that the defendant's false or misleading statement have a degree of specificity that distinguishes direct criticism of a competitor's product or business from other statements extolling the virtues or superiority of the defendant's product or business."

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The first requirement in a disparagement claim is that the false or misleading statement must "specifically refer" to the plaintiff's product or business. Specific reference is satisfied either when the product is expressly mentioned or when it is referred to by reasonable implication. Thus, in practice, courts have found certain kinds of statements to specifically refer to a product by implication, even though the name of the product itself was not used. Specific reference was initially applied to disparagement claims involving the First Amendment, but eventually courts applied it to commercial disputes involving allegations of product disparagement. See *Total Call International Inc. v. Peerless Ins. Co.,* 181 Cal. App. 4th 161 (2010) (applying the specific reference requirement to a disparagement claim against a non-media defendant in a purely commercial dispute). The court noted that the specific reference requirement serves the important objective of forestalling vexatious lawsuits over perceived slights that do not specifically derogate a competitor's product.

The second requirement in a disparagement claim is that the false or misleading statement clearly derogates the competitor's product or business. There is also a degree of specificity required, as derogation must be shown by express mention or clear implication. For instance, the court noted, a publication claiming a superior feature of a business or product and claiming to be the only producer of a certain product may be found to disparage a party even without express mention. However, the court clarified that a simple reduction in price alone does not constitute disparagement, disapproving of *Travelers Property Casualty Company of America v. Charlotte Russe Holding Inc.,* 207 Cal. App. 4th 969 (2012). In *Charlotte Russe*, the Court of Appeal held that Charlotte Russe's sharp reduction in price of the plaintiff's product derogated the product because it suggested that the product was of inferior quality. The state Supreme Court disagreed, stating that "a mere reduction of price may suggest any number of business motivations; it does not clearly indicate that the seller believes the product is of poor quality."

The *Hartford* court concluded that there was no disparagement. It first held that even if the Ulti-Cart's design and product name may lead consumers to confuse the Ulti-Cart and the Multi-Cart, this does not constitute disparagement. Although there may be support for patent or trademark infringement or unfair competition (claims that were not covered under the CGL insurance), the advertisements did not derogate or malign Multi-Cart in any way. The court then looked at whether Ultimate's product catalog disparaged the Multi-Cart by stating that the Ulti-Cart has "patent-pending folding handles and levers" and that Ultimate designs and builds "innovative, superior products." The court found that although these phrases combined could suggest derogation by implication, this was not the situation in this case. The phrase "patent-pending" appeared on the page describing the Ulti-Cart, but the words "innovative" and "superior" appeared on pages providing a general description of the company, not the Ulti-Cart itself. Further, "superior" does not necessarily imply a derogatory comparison because it can also be used to describe something of great value. Thus, Hartford had no duty to defend Ultimate in the Dahl lawsuit.

By upholding the finding in *Hartford* of no coverage and disapproving *Charlotte Russe*, the Supreme Court essentially closed the door on future attempts to shoehorn more claims under the seemingly broad term "disparagement." Instead, the court took the unusual step of clearly defining a previously amorphous common law cause of action. The *Hartford* case should thus be required reading not only for insurance coverage lawyers, but for all business litigators.

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