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IN THIS ISSUE

This article will provide insurance practitioners with an overview of the insurance coverage issues arising from claims for product disparagement. The tort of product disparagement, addressing words or conduct that negatively reflects upon the condition, value or quality of a product or service, has become more frequent in modern litigation and, in turn, more courts are dealing with coverage disputes arising from those claims.

Insurance Coverage for Product Disparagement Claims – A Survey of Conflicting Case Law

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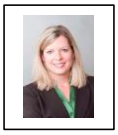

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Product disparagement is a tort to recover for words or conduct that tend to negatively reflect upon the condition, value or quality of a product, property or service. Insurance practitioners have seen an increasing number of coverage disputes arising under these claims. Jurisdictions are divided over what allegations trigger coverage for product disparagement under standard CGL forms. This article will address some of the issues that appear in these cases.

I. General Overview of Tort of Product Disparagement

Product disparagement is also known as trade libel, commercial disparagement, slander of goods, injurious falsehood, and disparagement of property. *See* McCarthy on Trademarks and Unfair Competition, § 27:100 (4th Ed.). Product disparagement is distinguishable from the tort of defamation. *Hurlbut v. Gulf Atl. Life Ins. Co.*, 749 S.W.2d 762, 766 (Tex. 1987). While an action for defamation protects the injured party's personal reputation, an action for product disparagement protects the economic interests of the injured party against pecuniary loss. *Id.*

The cause of action for product disparagement is based in state common law and varies state to state. However, in general, a prima facie case of product disparagement requires four elements: (1) the defendant made a false statement regarding the disparaged party's product or service; (2) the defendant published that false statement to a third party; (3) the defendant acted with malice and (4) the plaintiff sustained special damages. *Optinrealbig.com, LLC v. Ironport Sys., Inc.*, 323 F. Supp. 2d 1037, 1048 (N.D. Cal. 2004) (applying California law).

II. Coverage For Product Disparagement

Coverage issues for product disparagement are often found under the personal and advertising injury coverage of a commercial general liability policy. A standard CGL policy provides coverage, in part, for "[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." Thus, the first issue courts are faced with is whether the allegations in the complaint are sufficient to trigger an insurer's duty to defend. Jurisdictions are divided over what allegations trigger coverage for product disparagement. California courts have addressed the issue most often, culminating in a recent decision by the California Supreme Court.

California and Product Disparagement Coverage

In a closely watched case in California, *Hartford Cas. Ins. Co. v. Swift Distribution, Inc.,* the California Supreme Court held that an insurer did not owe a duty to defend claims of patent and trademark infringement under the disparagement offense of the "personal and advertising

injury" coverage of a standard CGL policy. 59 Cal.4th 277, 326 P.3d 253, 172 Cal.Rptr.3d 653 (2014), The insured sold a multi-use cart marketed for the loading and transport of musicians' equipment. A competitor, making a similar transport cart, sued the insured for patent and trademark infringement among other claims. The Supreme Court held that a claim for disparagement requires that the offending statement have a degree of specificity that distinguishes direct criticism of a competitor's product from other statements extolling the virtues of the defendant's product. The court noted that the specific reference requirement forestalls "vexatious lawsuits over perceived slights that do not specifically derogate or refer to a competitor's business or product". The court also held that customer confusion resulting from the similarity between the insured's and the customer's product does not by itself support a claim of disparagement. Thus, the mere possibility that customers might be deceived and hold the claimant responsible for defects was not enough to trigger the insurer's duty to defend.

Jurisdictions Recognizing Implied Product Disparagement

Illinois courts have also recognized implied product disparagement claims, but still require the underlying complaint allege all of the elements of product disparagement. In *Winklevoss Consultants, Inc. v. Federal Insurance Co.*, the insured software developer was sued by a competitor for allegedly misappropriating the competitor's trade secrets to develop a competing software product – a product that the insured later helped promote to some of the competitor's customers. 991 F. Supp. 1024, 1026 (N.D. Ill. 1998). The court noted that there was nothing in the complaint to suggest that the insured software developer said anything at all about the competitor or did anything other than promote its own product. *Id.* at 1040. "To assume that [the insured] made misleading and derogatory comments about [the competitor] would be to create nonexisting allegations." *Id.* Thus, the court found that the allegations in the original complaint did not trigger the insurer's duty to defend. *Id. See also JAR Laboratories LLC v. Great American E & S Insurance Company*, 945 F. Supp. 2d 937, 939 (N.D. Ill. 2013) (court found that underlying complaint featured a claim for product disparagement because the competitor's allegations could reasonably be read to identify the competitor explicitly, if not by name, by comparing the insured's product to "the prescription brand").

Florida courts also recognize implied product disparagement. In *Vector Products., Inc. v. Hartford Fire Insurance Company*, a competitor filed suit against the insured battery charger manufacturer for false advertising, unfair competition and deceptive trade practices law. 397 F.3d 1316 (11th Cir. 2005). The competitor alleged that the insured made material false representations in a commercial advertisement by suggesting that its brand was superior to the leading brand. *Id.* at 1318. Because the court held that the policies at issue were ambiguous as to

whether the insured had to mention the plaintiff's name in its' disparaging statement, the court held that the underlying allegations did give rise to the duty to defend. *Id.*at 1319.

Under Kentucky law, in *Travelers Prop. Cas. Co. of Am. v. Hillerich & Bradsby Co., Inc.*, the court found that allegations of product disparagement against another party could trigger product disparagement coverage for the insured when there are allegations of a conspiracy. 598 F.3d 257 (6th Cir. 2010). In the original complaint, the plaintiff alleged that the defendants engaged in a conspiracy to misrepresent information related to the characteristics of the plaintiff's product. In the amended complaint, the plaintiff alleged that another defendant falsely disparage the effectiveness of the plaintiff's product in correspondence. The court held that the original complaint's solitary reference to a plan for misrepresenting information could not possibly raise a disparagement claim. *Id.* at 272-73. Instead, the court found that the allegations in the first amended complaint that explicitly referenced the other defendant falsely disparaging the plaintiff's products triggered the duty to defend. *Id.* at 273.

Other Approaches to Product Disparagement Coverage

Other jurisdictions have taken a more conservative approach to reviewing the underlying allegations in light of a potential product disparagement claim. In *KLN Steel Products Company, Ltd. v. CNA Insurance Companies*, the Texas Court of Appeals found that a competitor's suit did not trigger the insurer's duty to defend for product disparagement claims. 278 S.W.3d at 439. The competitor alleged that the insured copied the competitor's original design for a bed and claimed it as its own during a bidding war for a Navy contract. *Id.* at 433. The court found that the complaint did not allege that the insured disparaged or published any negative remarks about the bed or the plaintiff. *Id.* at 439. The insured's statements that it developed the bed did not disparage the bed or the plaintiff's business. *Id.*

Other courts have refused to read product disparagement into a complaint. In *Harleysville Mut. Ins. Co. v. Buzz Off Insect Shield, LLC*, the insurers were not required to defend the insured against a manufacturer's action even though it was alleged that the insured's advertisements falsely stated that its products were superior to the manufacturer's product. 692 S.E.2d 605, 609 (N.C. 2010). The insured processed clothing and added insect repellant to the apparel and the plaintiff was a manufacturer of personal and area insect repellants. The insured allegedly advertised that its products were equivalent or superior in performance to topical insect repellants. The court held that these allegations could not be considered product disparagement because the plaintiff never alleged the insured's false statements were about the plaintiff. *Id.* at 613. Instead, the plaintiffs alleged that the insured made false claims that its products worked just as well, if not

better than, the plaintiff's products. Because the only falsity allegedly found in the insured's advertisements was that its apparel was not of the quality claimed, this fell within a policy exclusion and thus there was no coverage. *Id.* at 623.

When applying Delaware law, the Third Circuit has also hesitated from reading product disparagement into a complaint even when the insured allegedly used advertisements that portrayed the underlying plaintiff in a negative light. In *American Legacy Foundation, RP v. National Union Fire Insurance Company of Pittsburgh, PA*, a tobacco company sued the insured for breach of contract. 623 F.3d 135, 137 (3d Cir. 2010). The tobacco company and the insured non-profit corporation had entered in an agreement where the tobacco company funded advertising campaigns created by the insured that demonstrated the negative impact of tobacco products. The tobacco company alleged breach of contract after the insured created a series of ads that were "brash, edgy, impertinent, and disrespectful." *Id.* The insured argued there was coverage because the ads amounted to disparagement, libel or slander. The court disagreed, noting that the tobacco company never challenged the truthfulness of the ads' contents which was a predicate for libel, slander or commercial disparagement. *Id.* at 145.

Under Colorado law, an insurer has a duty to defend the policyholder when the underlying allegations satisfy all the elements of product disparagement. *Thompson v. Maryland Cas. Co.*, 84 P.3d 496, 506 (Colo. 2004). In *Thompson*, the plaintiff in the underlying litigation alleged that the insured wrongfully sent a letter to a county planning department falsely claiming a preemptive right of first refusal for a particular piece of property that the plaintiff was planning to dedicate to the county. The court found that the underlying complaint adequately alleged all of the elements of a claim of disparagement. *Id.* at 507. The complaint alleged that the insured's letter was false; that it was published to a third party when the letter was sent to the county planning department; that it was derogatory because it interfered with the plaintiff's ability to finance, develop and sell its property; that the insured intended to cause harm and acted with malice; and that the plaintiff suffered special damages. Therefore, the court held that the complaint alleged that the insured had disparaged the plaintiff's services. *Id.* However, coverage was still precluded by the policy's knowledge-of-falsity provision. *Id.* at 508.

In some jurisdictions, actions brought by third parties indirectly injured by an insured's disparaging comments will not trigger product disparagement coverage. *See Nat'l Union Fire Ins. Co. of Pittsburg, Pa. v. Mead Johnson & Co. LLC*, 735 F.3d 539, 547 (7th Cir. 2013); *QSP, Inc. v. Aetna Cas. & Surety Co.*, 256 Conn. 343, 374 (2001). For example, the underlying plaintiffs in *QSP* were schools and youth groups who sued the insured publisher for anti-trust violations in the magazine fundraising market. 256 Conn. at 349. The plaintiffs alleged that the

insured eliminated or weakened the competition in the school fund-raising market by conducting anti-competitive and exclusionary acts. *Id.* at 347. The court found that the underlying allegations did not trigger the insurer's duty to defend, noting that the tort of commercial disparagement required that a statement that disparages a person's goods or services be made "of and concerning" the person stating the cause of action. *Id.* at 360. Because the plaintiffs were not the targets of the alleged commercial disparagement, the complaint could not give rise to a disparagement action. *Id.*

III. Conclusion

Insurance coverage decisions for alleged product disparagement claims will continue to vary from jurisdiction to jurisdiction. Insurance practitioners should be mindful of these recent decisions and keep a watchful eye for new and important developments in this changing area of insurance coverage law.

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