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# Courts muddle scope of disparagement coverage

By Rachel Hobbs

Can mere *conduct* that is alleged to reflect poorly on a claimant or its product trigger trade libel or "disparagement" coverage? The law seemed clear that only a false and injurious *statement* can trigger disparagement coverage. However, some recent decisions suggest that an insured's conduct alone can trigger disparagement coverage if such conduct allegedly hurts the claimant's reputation.

As recognized in a recent decision co-authored by insurance law expert Justice H. Walter Croskey, these decisions defy established law and common sense. Moreover, if the decisions are followed, this will give rise to an unprecedented expansion of "personal injury" coverage and a corresponding increase in policy premiums.

As numerous courts have recognized, only *actionable* disparagement claims can trigger personal injury coverage. In *Total Call Internat., Inc. v. Peerless Ins. Co.*, 181 Cal. App. 4th 161 (2010), the court observed that only a claim alleging a false and injurious statement that specifically references and impugns the claimant or its product can trigger disparagement coverage. In *Aetna Cas. & Surety Co. v. Centennial Ins. Co.*, 838 F.2d 346 (1987) (applying California law), the court applied this rule in a trademark infringement case. It held that the insured's act of infringing the claimant's trademark by "passing off" the claimant's animal tags as its own did not trigger disparagement coverage. The court reasoned that copying a claimant's goods, except as to quality, may constitute unfair competition or trademark infringement, but not disparagement.

Nevertheless, recent decisions have injected confusion into the issue of what is sufficient to trigger disparagement coverage. In 2011, a federal district court handed down *Michael Taylor Designs v. Travelers Property Cas. Co. of America*, 761 F.Supp.2d 904 (2011). In *Michael Taylor Designs*, the insured displayed photos of the claimant's high-end wicker chairs in its online advertisements. The insured's alleged purpose in doing so was to lure customers to its showroom, where its salespeople "steered" customers to the insured's cheap knockoffs.

The claimant sued the insured for Lanham Act and trade dress violations. The court recognized that the insured's act of posting photos of the claimant's products on its website could not, in and of itself, trigger disparagement coverage because the required "statement" was lacking. Nevertheless, the court held that the insured's salespeople presumably made statements in steering customers to the insured's imitation products.

In 2012, the 2nd District Court of Appeal, Division One, handed down *Travelers Property Cas. Co. of America v. Charlotte Russe*, 207 Cal. App. 4th 969 (2012). The insured in *Charlotte Russe* was a clothing retailer who discounted the price for the claimant's high-quality clothing line. The insured argued that the price discounts triggered implied disparagement coverage. The court agreed, opining that not all of the elements of disparagement need to be alleged to trigger coverage. Rather, disparagement can be implied by conduct that casts doubt on the quality of the claimant's product and damages its reputation. Further, price discounts can imply that a manufacturer's products are of inferior quality. Accordingly, the court found that the price discounts triggered disparagement coverage.

Not long after *Charlotte Russe* came down, however, Division Three of the 2nd District Court of Appeal decided *Hartford Casualty Ins. Co. v. Swift Distribution*, 210 Cal. App. 4th 915 (2012). Justice Croskey co-authored the decision. The claimant manufactured an adjustable cart known as the "Multi-Cart." The insured marketed and sold a similar cart, calling it the "Ulti-Cart." The claimant sued for trademark infringement, arguing that the similar name confused consumers and damaged the claimant's reputation. Since the insured's policy contained the standard exclusion for trademark infringement, the insured argued that the complaint triggered disparagement coverage. The *Swift Distribution* court rejected the notion that the allegations at issue triggered disparagement coverage. It reasoned that even assuming the name "Ulti-Cart" could be construed as a reference to "Multi-Cart," there was nothing negative said about the claimant's product. Rather, the insured was attempting to deceive the public as to the source of its own product, which did not constitute disparagement as a matter of law.

The court roundly rejected the insured's reliance on *Charlotte Russe*. In so doing, the court held that *Charlotte Russe* was distinguishable because the insured was marketing and selling the claimant's product rather than merely its own. In addition, the *Charlotte Russe* decision was without any "objectively reasonable basis," because price discounts are a competitive reality — not disparagement.

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Although *Swift Distribution* did not expressly address the issue, allowing the insured to recast the trademark infringement claims as "disparagement" would have effectively read the standard trademark infringement exclusion out of the commercial general liability policy.

In any event, the circle of confusion was completed shortly after *Swift Distribution* was decided, when the 9th U.S. Circuit Court of Appeals affirmed *Michael Taylor Designs*. In so doing, the 9th Circuit cited to the same *Charlotte Russe* decision that Justice Croskey's panel rebuked. The 9th Circuit emphasized that there were "statements" by the insured's salespeople that brought the case within the ambit of disparagement coverage.

Even if there were false and injurious statements at issue in *Michael Taylor Designs* (the trial court only presumed the existence of such statements), many intellectual property claims would not involve such statements. Nonetheless, it is standard for intellectual property claimants to allege that the insured's infringing conduct damaged their reputation because the insured's product was inferior. As *Swift Distribution* recognized, such a claim does not involve a "statement" about the claimant — much less a "false and injurious" statement — as required for disparagement coverage. Accordingly, finding disparagement coverage in such a case would not conform to the insured's reasonable expectations or governing law.

Despite this, insureds are placing increased reliance on *Charlotte Russe* and *Michael Taylor Designs* for the proposition that mere reputational harm is sufficient to trigger disparagement coverage. If generally adopted, such a rule would hurt California business owners by causing an unwarranted increase in general liability policy premiums. Hopefully, future courts will see the wisdom and good sense of *Swift Distribution*, and will not let this happen.

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