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Commentary

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As discussed in my article, *Class Clown, Most Likely To Succeed, Biggest Flirt: How High School Yearbook Superlatives Can Influence Coverage for Implied Disparagement Claims*, New Appleman on Insurance: Current Critical Issues in Insurance Law No. 89 (Winter 2013), the California Supreme Court had a rare and enviable opportunity to deliver the seminal ruling on coverage for implied disparagement claims under the Disparagement Offense. Although the California Supreme Court's ruling in *Hartford Casualty Insurance Co. v. Swift Distribution, Inc.*, 59 Cal. 4th 277, 326 P.3d 253, 172 Cal. Rptr. 3d 653 (Jun. 12, 2014), was a step in the right direction and importantly corrected a radical misstep by the Court of Appeal in interpreting the Offense, it did not bring about the watershed moment insurers hoped for and did not so significantly limit the Disparagement Offense as policyholders feared it would.

In *Swift Distribution*, the California Supreme Court confronted a thorny issue troubling many other courts nationwide, namely, whether an implied disparagement claim falls within the scope of coverage provided by the Disparagement Offense. Notably, the Disparagement Offense found in Coverage B of standard commercial general liability policies applies to the oral or written publication of material that "disparages a person's or organization's goods, products, or services." Additionally, for purposes of this article, an implied disparagement claim will be defined as a claim where the claimant asserts a cause of action against a competitor/defendant, such as false advertising, intellectual property infringement, or unfair competition, that the competitor/defendant's statements about its own products had a negative pecuniary effect on the claimant's business or profitability.

Swift Distribution focused on coverage for the passing off/palming off subset of implied disparagement claims—claims that the insured deceived others regarding the creation, design, or development of the subject product. There, Dahl, the manufacturer and seller of the "Multi-Cart," sued Swift Distribution, Inc. ("Swift") for patent infringement, trademark infringement and dilution, unfair competition, and false advertising arising out of Swift's sale and advertising of the "Ulti-Cart." Dahl specifically alleged that

Swift's advertisements were intended to mislead or confuse the public about: (1) whether the Ulti-Cart was the same as or related to Dahl's Multi-Cart (even though the Ulti-Cart was merely a knockoff); (2) whether Dahl authorized the Ulti-Cart; (3) whether Swift designed or originated and was authorized to manufacture and sell the Ulti-Cart; and (4) whether Swift owned or had rights to the "MULTI-CART" trademark owned by Dahl. The parties agreed that Swift's advertisements never expressly referenced the Multi-Cart.

The lower courts held that none of Swift's statements at issue impliedly disparaged Dahl's Multi-Cart because they did not refer, even by reasonable implication, to Dahl or the Multi-Cart. The lower courts found significant the absence of any allegation in the underlying complaint of the following: (1) that Swift's advertisements falsely compared the Ulti-Cart and the Multi-Cart; (2) that Swift represented that it was the only producer of a product with the features available on the Multi-Cart; (3) that Swift represented that the Ulti-Cart was superior to the Multi-Cart; (4) that Swift represented that it owned, had the rights to, or produced the Multi-Cart; or (5) that Swift was the owner of the MULTI-CART trademark. Thus, the lower courts concluded that Hartford Casualty Insurance Company ("Hartford") had no duty to defend or indemnify Swift, under the commercial general liability policy at issue, in the underlying lawsuit.

In analyzing the central issue on appeal, the Supreme Court began with its first essential finding, namely, that the term "disparagement," as used in the Disparagement Offense, must refer to the common law tort, *i.e.*, making "a knowingly false or misleading publication that derogates another's property of business and results in special damages." The court found significant that the term "disparages" is located in the offense next to the terms "libel" and "slander." The Supreme Court continued with its second essential finding, that to disparage the claimant's product or business, the subject statement must, by express mention or clear implication, "specifically refer to" and "clearly derogate" the claimant's product or business. The Supreme Court reasoned that this requirement "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." The Supreme Court also discouraged courts from engaging in an unduly creative construction of or taking a radical deconstructionist approach to an insured's statements. The Supreme Court explained that the specificity requirements are critical to prevent "almost any advertisement extolling the superior quality of a company or its products" from becoming "fodder for litigation." Otherwise, as the Supreme Court warned, the value of commercial speech, "the free flow of commercial information," and "the informational function of advertising" will be greatly stifled.

This finding naturally called into question the Court of Appeal's decision in *Travelers Property Casualty Co. of America v. Charlotte Russe Holding, Inc.*, 207 Cal. App. 4th 969, 144 Cal. Rptr. 3d 12 (2d Dist. 2012). There, various Charlotte Russe entities were sued for selling the claimants' high-end brand of jeans and knits at substantial discounts. The claimants alleged that the sales damaged their brand by suggesting their apparel was of an inferior quality. The Court of Appeal found that Charlotte Russe's publication of the sales prices could have falsely implied that the apparel were not premium, high-end goods, and thus, Travelers had a duty to defend per the Disparagement Offense. Yet, the Court of Appeal failed to explain why the prices, themselves, constituted a false statement. For instance, the claimant never alleged that Charlotte Russe was selling the apparel at prices different from those listed on the display signs. The Court of Appeal decided that flaw to be of no matter because it rejected the insurer's argument, supported by ample on-point and well-reasoned authority, that "disparagement" refers to the civil tort; and thus, found that there can be coverage under the offense if the underlying complaint fails to allege the essential elements of the tort of disparagement or trade libel.

The Court of Appeal in *Swift Distribution* disagreed with this reasoning and sharply criticized its sister court, noting that, "[r]educing the price of goods, without more, cannot constitute a disparagement; a price reduction is not an 'injurious falsehood directed at the organization or products, goods, or services of another. . . .' " The Supreme Court seconded this criticism, explaining 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." This criticism then led the Supreme Court to its clearest articulation of the standard for determining whether one competitor's statement about its product may impliedly reference a second competitor and/or its product: "Disparagement by

'reasonable implication' . . . requires more than a statement that may conceivably or plausibly be construed as derogatory to a specific product or business. A 'reasonable implication' in this context means a clear or necessary inference." However, the Supreme Court did not provide any further guidance or offer any examples as to how clear the inference must be or how a court should determine whether the inference is sufficiently clear to satisfy the reasonable implication requirement.

Nonetheless, in considering whether the underlying complaint set forth a cognizable claim that Swift's statements about the Ulti-Cart impliedly disparaged Dahl's Multi-Cart, the Supreme Court correctly found they did not. The Supreme Court found unpersuasive that consumer confusion between the two products established the existence of disparagement. Further, the Supreme Court rejected the general theory that palming off a claimant's product as an insured's product, without more, disparages the claimant's product. The Supreme Court similarly clarified that allegations that an insured copied or infringed a claimant's product, without more, do not constitute disparagement. Accordingly, it is improbable that courts subsequently applying California law should find that run-of-the-mill intellectual property infringement claims or passing off claims are properly cognizable under the Disparagement Offense.

Although *Swift Distribution* took a step in the right direction in developing a clearer and more consistent standard for determining what constitutes a covered implied disparagement claim, there is still more to be done. The Supreme Court certainly did not take any broad steps to reshape the legal landscape or provide a model approach. To that end, *Swift Distribution* is, indeed, a conservative, balanced decision. Notably, favorable to policyholders is the Supreme Court's acknowledgement that an insured's express reference to the claimant's product is not an absolute requirement for coverage under the Disparagement Offense. Also favorable is the court's acknowledgement that "A publication that claims a superior feature of a business or product as distinct from all competitors, such as a claim to be the 'only' producer of a certain kind of software or the 'only' owner of a trademark, may be found to clearly or necessarily disparage another party even without mention." It is, therefore, unclear whether other state supreme courts will find the guidance in *Swift Distribution* helpful. It also remains to be seen how other state supreme courts will attempt to navigate this uncertain area otherwise plagued by inconsistent rulings and the lack of a settled analytical framework. So, in parting, please remember that *Swift Distribution* is not the end of the journey for implied disparagement; in many ways, it is only the beginning. ■

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