

**COMPARATIVE ADVERTISING CLAIMS
OFTEN TRIGGER A DUTY TO DEFEND
UNDER COMMERCIAL LIABILITY
INSURANCE COVERAGE**

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INTRODUCTION

False advertising claims premised on product disparagement that potentially denigrate the products of others may trigger commercial general liability coverage as a form of disparagement.

LIABILITY FOR FALSE ADVERTISING WHERE PRODUCT COMPARISONS ARE AT ISSUE

False comparative advertising has been deemed legally sufficient to justify issuance of an injunction against the offending party so advertising. *Castrol, Inc. v. Quaker State Corp.* [977 F.2d 57, 62 (2d Cir. 1992)] (“We will presume irreparable harm where plaintiff demonstrates a likelihood of success in showing literally false defendant’s comparative advertisement which mentions plaintiff’s product by name.”). The same result may attend for side-by-side comparisons of products. *Johnson & Johnson-Merck Consumer Pharmaceuticals Co. v. Procter & Gamble Co.* [285 F. Supp. 2d 389 (S.D.N.Y. 2003), *judgment aff’d*, 90 Fed. Appx. 8 (2d Cir. 2003)] (Some of the challenged ads made side-by-side comparisons, giving rise to presumption that there was irreparable injury: led to the grant of a preliminary injunction.).

A false advertising claim, however, may not be sufficient to permit more than injunctive relief where a claim of equivalent performance is asserted without more. *Air Turbine Tech. Inc. v. Atlas Copco AB* [410 F.3d 701 (Fed. Cir. 2005)] (Summary dismissal of claim that defendant falsely advertised its industrial tool as equivalent to plaintiff’s product: failure to prove causation.). There is an exception for mere puffery which is exaggerated advertising, blustering and boasting upon which no reasonable buyer would rely. *See* § 43a, *Tobin Wolf & Schaper Mfg. Co. v. Lewis Marx & Co.* [203 U.S.P.Q. 856 (S.D.N.Y. 1978)] (Advertising a product as “new and novel” is mere puffery; it does not imply that defendant did not steal plaintiff’s design.).

Under § 43a of the Lanham Act, factual allegations which are general in character may still be actionable. Thus, the Fifth Circuit held that the advertising slogan used by a pizza purveyor of “Better Ingredients – Better Pizza” constituted non-actionable opinion-type puffery. When that slogan, however, appeared in advertising comparing specific ingredients with those of competitors, specific ingredient claims gave objective, quantifiable and fact-specific meaning to

the slogan, transforming it from opinion puffery into a factually based claim. *Pizza Hut, Inc. v. Papa John's International, Inc.* [227 F.3d 489 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 1355, 149 L. Ed. 2d 285 (U.S. 2001)].

This litany of possible actionable claims under § 43a of the Lanham Act does not define the universe of fact allegations that could give rise to potential insurance coverage. Indeed, it is critical to not analyze coverage based upon the likelihood that the claimant will succeed on the merits against the insured. To the extent claims are legally false, frivolous or groundless, they must be defended and the insurer's obligation is to do so until they can be eliminated from the case.

EARLY CASE LAW FOUND POTENTIAL COVERAGE FOR DISPARAGEMENT CLAIMS NESTED WITHIN FALSE ADVERTISING LAWSUITS

In *PCB Piezotronics, Inc. v. Kistler Instrument Corp.* [Case No. 96-CV-0512E(F), 1997 WL 800874 (W.D.N.Y. Dec. 31, 1997)], the court analyzed the coverage of the allegations of the claimant's fourth counterclaim, which asserted that an advertisement that PCB placed in the December 1995 and February 1996 issues of *P/PM Technology* "misrepresent[ed] the nature, characteristics and qualities of . . . [Kistler's] goods" [*Id.* at *2.]

Travelers, the insurer, argued that false advertising was not covered with any specific claims within the policy, but the court noted that disparagement was, as a form of personal injury and advertising injury, covered, where PCB's advertising "disparages a person's or organization's good, products or services." [*Id.* at *3.]

Rejecting the notion that the word "disparage" should be limited to the common law tort of product disparagement, the court reasoned,

Reading the Policy as a whole, it is clear that the parties did not intend that "disparage" would have a specialized legal meaning and instead intended that "disparage" would have its ordinary meaning, which is "[t]o speak of as unimportant or small," to "belittle," "[t]o reduce in esteem or rank." *The American Heritage*

Dictionary (2nd College Edition 1991). “Disparage,” given its ordinary meaning, clearly encompasses the allegations made in support of the fourth counterclaim.

[*Id.* at *3.]

The court reaffirmed this ruling while amending immaterial aspects of the order in response to a Fed. R. Civ. P. 59(e) motion [1998 U.S. Dist. LEXIS 6064 (W.D.N.Y. Apr. 23, 1998)]. The court permitted a statement pursuant to 28 U.S.C. § 1292(b) which offered an immediate appeal of the issue regarding the meaning of the word “disparage.” The matter was subsequently resolved on appeal.

Subsequent cases clarified that the common law meaning of “commercial disparagement” could not possibly limit the scope of the pertinent offense. In *Atlantic Mutual Ins. Co. v. J. Lamb Inc.* [100 Cal. App. 4th 1017, 1035 (2002)] (citation omitted) (Judge Croskey):

The term “disparagement” has been held to include statements about a competitor's goods that are untrue or misleading and are made to influence potential purchasers not to buy. Whether characterized as a trade libel or product disparagement, an injurious falsehood directed at the organization or products, goods, or services of another falls within the coverage of the Atlantic Mutual policy.

In an equally thoughtful exposition to this issue, Judge Castillo and other thoughtful jurists from the Northern District of Illinois opined that

Federal makes much of the fact that the Lynchval district court dismissed Lynchval’s claim for common law product disparagement . . . , arguing that this dismissal rid the complaint of all allegations that may have fit the covered offense of disparagement. This is incorrect for two reasons. First, the allegations that we have found to create the potential for coverage

do not even appear in Count XII; rather, they appear for the first time in Count IX, the false advertising claim. . . . While Count XII was dismissed, Counts IX, X and XII (and their accompanying factual allegations) remain in the complaint. Second, the policy offense of “disparagement” is not synonymous with common law commercial disparagement. *See Sun Elec.*, 1995 WL 270230, at *4 (rejecting insurer’s argument that the allegations did not fit a covered offense because they did not meet all the elements of a commercial disparagement claim; “the inquiry is not whether the allegations in the complaint support an independent theory of relief . . . but whether any portion of the allegations comprising the claims which are stated in the complaint fall within one or more of the categories of wrongdoing that the policy covers.”) . . . *Amerisure*, 1998 WL 210948, at *7 (rejecting as “misplaced” the insurer’s contention that “a duty to defend does not arise unless the underlying complaint alleges facts which constitute the offense of commercial disparagement under Illinois law”). The SASC still includes factual allegations that Winklevoss made false negative comparative statements about Lynchval’s goods, causing Lynchval to lose sales. It does not matter that these allegations may not meet the technical requisites for stating a commercial disparagement claim.

Winklevoss Consultants, Inc. v. Federal Ins. Co. [11 F. Supp. 2d 995, 1000 (N.D. Ill. 1998)].

DISPARAGEMENT MAY ALSO BE IMPLICATED WHERE THE STATEMENT IN AND OF ITSELF IS NOT DISPARAGING BUT, AS UNDERSTOOD BY THE CLAIMANT’S CUSTOMER, IT IS, AND IT IS ALLEGED TO BE SO

In *Acme United Corp. v. St. Paul Fire & Marine Ins. Co.* [Case No. 05-C-384-C, 2006 WL 297728 (W.D. Wis. Feb. 7, 2006)] Judge Crabb, applying Wisconsin law, which limits its

analysis of coverage to the four corners of the complaint, determined that where one manufacturer, Fiskars, did not allege that its competitor Acme advertised public disparaging statements regarding Fiskars, there was no disparagement within the policy. The court recognized that fact allegations in the pleadings suggested that titanium scissors and paper trimmer blades were portrayed as being better than stainless steel products, thereby discrediting this class of products. The court found that such a discrediting of a particular class was not sufficiently referential to implicate the disparagement coverage. It distinguished the facts in *Vector Products, Inc. v. Hartford Fire Insurance Co.* [397 F. 3d 1316, 1319 (11th Cir. (Fla.) 2003)] where the advertisements stated that “Vector’s product is superior to the ‘leading brand.’ ” The “leading brand” is not identified, but nevertheless, the court found that the insured came close to identifying the specific competitor by referring to it as the “leading brand.” The court, however, found that in the case before it, the comparison to stainless steel products came no closer to identifying a competitor than any other manufacturer’s stainless steel scissors and trimmers.

In reversing this decision, the Seventh Circuit, in *Acme United Corp. v. St. Paul Fire & Marine Ins. Co.* [Case No. 06-1704, 214 Fed. Appx. 596, 2007 WL 186247 (7th Cir. (Wis.) Jan. 9, 2007)], stated:

The district court’s coverage analysis was incomplete, however, because it looked only to the text of Acme’s advertisements and did not consider whether Fiskars’ other allegations in the underlying complaint alleged that Acme disparaged Fiskars’ products.

[*Id.* at *4.]

It found that considering these, the disparagement was evidence and noted that Fiskars also alleged that “Acme made the Scissors False Advertisement and Trimmer False Advertisement *intending to divert trade away from Fiskars*, which has occurred.” [*Id.* at *4.] Thus, where a particular product is claimed to be the best in its class, and other products are not

specifically referenced, but the claimant sues, contending that other manufacturers of the same or a similar product are necessarily denigrated by such statement and that its product is particularly impacted, this should suffice to trigger disparagement coverage. This is because the facts for purposes of coverage analysis include the potential indemnity exposure that arises if the claimant's understanding of how consumers perceive the statements turns out to be true.

Until such time as that possibility is eviscerated, a defense exists because potential liability within the scope of the coverage of the policy exists. Any other approach would look too much at the underlying liability based only on the statements of the insured and not the potentiality evident from the claims of the litigant suing the insured, i.e., in effect, prejudging the merits.

CONCLUSION

False advertising claims may thus, whether articulated in forms of unfair competition, statutory or common law, nest factual allegations of disparagement which trigger a defense. Indeed, such claims may also be part and parcel of alleged allegations of interference which depend on underlying tortious conduct. They also can be conjoined with antitrust litigation claims and, through the defense they provide, permit the entire antitrust litigation lawsuit to fall within the scope of coverage.