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THE POLICYHOLDER ADVOCATE/IP COUNSELOR NEWSLETTER

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INSURANCE COVERAGE FOR IMPLICIT DISPARAGEMENT CLAIMS AFTER THE CALIFORNIA SUPREME COURT DECISION

SWIFT, A CASE FOR ALL SEASONS

- ♦ ***Hartford Cas. Ins. Co. v. Swift Distribution, Inc.***, 59 Cal. 4th 277 (2014)

Swift arguably includes legal analysis for every persuasion. For insurers, it emphasizes the “of and concerning” element for establishing liability within the scope of the common law torts that include injurious falsehood and trade libel. Policyholders appreciate its recognition of coverage for implicit disparagement and recognition of the role of inferences and extrinsic evidence in revealing coverage albeit not on the facts of this case.

The Court Recognized Implicit Disparagement as a Viable Basis for Potential Coverage

Acknowledging, however, that a number of courts have found that even in a false advertising/unfair competition suit, implicit disparagement may be implied. The court then referenced three distinct decisions: *E.piphany, Inc. v. St. Paul Fire & Marine Ins. Co.*, 590 F. Supp. 2d 1244 (N.D. Cal. (San Jose Div.) 2008); *Burgett, Inc. v. Am. Zurich Ins. Co.*, 830 F. Supp. 2d 953 (E.D. Cal. 2011) and to a lesser degree, *Michael Taylor Designs, Inc. v. Travelers Prop. Cas. Co. of Am.*, 761 F. Supp. 2d 904 (N.D. Cal. (S.F. Div.) 2011) *aff’d*, 495 Fed. Appx. 830 (9th Cir. 2012), whose facts are distinguished without specifically validating the inferences there adopted.

It predicated this recital with its note that “[n]evertheless, courts have found certain kinds of statements to specifically refer to and derogate a competitor's product or business by clear implication.” *Swift*, 59 Cal. 4th at 279.

How close to clear implication other fact scenarios analogous to those in *E.piphany*, *Burgett*, and *Michael Taylor* must be, is unclear but *Travelers Prop. Cas. Co. of Am. v. Charlotte Russe Holding, Inc.*, 207 Cal. App. 4th 969, 144 Cal. Rptr. 3d 12 (2012), *reh'g denied* (July 31, 2012) *rev'w denied* (Sept. 21, 2012), which the court disapproves, as it turned on a mere reduction in price, according to the court's reading of that decision, did not pass muster.

Policyholders take comfort from the court's reassertion of coverage for implicit disparagement and its reference to the *Scottsdale Ins. Co. v. MV Transp.*, 36 Cal. 4th 643, 31 Cal. Rptr. 3d 147, 115 P.3d 460 (Cal. 2005) case, which requires review, not only of the facts of the complaint, but inferences from them. Thus, *Swift*, 59 Cal. 4th at 287 stated:

“Moreover, that the precise causes of action pled by the third party complaint may fall outside policy coverage does not excuse the duty to defend where, under the facts alleged, reasonably inferable, or otherwise known, the complaint could fairly be amended to state a covered liability.” (*Scottsdale, supra*, 36 Cal. 4th at p. 654.) Thus, “[i]f any facts stated or fairly inferable in the complaint, or otherwise known or discovered by the insurer, suggest a claim potentially covered by the policy, the insurer's duty to defend arises and is not extinguished until the insurer negates all facts suggesting potential coverage.” (*Id.* at p. 655.)

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The court also concluded with an important reminder:

In general, doubt as to whether an insurer owes a duty to defend “must be resolved in favor of the insured.” (*Ringler, supra*, 80 Cal.App.4th at p. 1186.) . . . “[T]he insured must prove the existence of a *potential for coverage*, while the insurer must establish the *absence of any such potential*. In other words, the insured need only show that the underlying claim *may* fall within policy coverage; the insurer must prove it *cannot*.” (*Montrose, supra*, 6 Cal.4th at p. 300.)

Swift, 59 Cal. 4th at 287, 288.

Nonetheless, The Court Determined That No Implicit Disparagement Was Alleged

The implication standard was not met in *Swift* because words like patent pending” combined with words like “innovative,” “unique,” “superior” and “unparalleled,” were insufficient in the court’s view to find that there was disparaging statements made by Ulti-Cart, the new upstart company sued by the claimant, Multi-Cart that implied the inferiority of Multi-Cart’s products. This, because those descriptions of the company “are most reasonably understood as generic assertions of the company’s excellence.” *Id.* at 298.

Accordingly, statements about the company, not its products, suggesting a different result would attend had they been product descriptors:

Contrary to Ultimate’s claims, these statements are not specific enough to call into question Dahl’s proprietary rights in his product or to suggest that the Ulti-Cart has any unique feature that is an “‘important differentiator’ between competing products.” (*E.piphany, supra*, 590 F. Supp. 2d at p. 1253.) Rather, the phrases at issue appear to be more “akin to ‘mere puffing,’ which under long-standing law cannot support liability in tort.” (*Consumer Advocates v. Echostar Satellite Corp.* (2003) 113 Cal.App.4th 1351, 1361, fn. 3 [8 Cal. Rptr. 3d 22].)

Id. at 298-99.

That statement, however, comes dangerously close to suggesting that the merits of the underlying case are germane to accessing potential coverage. As no specific claim for disparagement was asserted, however, the inferences which might support “implied disparagement” were in the court’s view inadequate to evidence potential coverage. Notably, the court does not explain why contrary inferences would not suggest at least a potential for coverage under the asserted facts. The court also did not

revisit its earlier pronouncements that the merits of the claim were not germane to coverage analysis, *Horace Mann Ins. Co. v. Barbara B.*, 4 Cal. 4th 1076, 1081, 17 Cal. Rptr. 2d 210, 846 P.2d 792 (1993) which stands for that clear proposition. *Swift*, 59 Cal. 4th at 287.

No Express Reference to How Insured’s Denigrating Statements Disparaged the Competitor’s Goods, Products or Services Was Requisite

The court also clarified the continued viability of *Atlantic Mut. Ins. Co. v. J. Lamb, Inc.*, 100 Cal. App. 4th 1017, 123 Cal. Rptr. 2d 256 (2002) where the court found disparagement implicated where the claimant’s president suing for patent infringement was sued in a counterclaim for tortious interference because it advised customers of the alleged defendant’s infringement of patent, that if they purchased from that customer, they would be sued by the claimant as well. This derogated the defendant’s alleged infringer’s legal title to sell products free and clear of claimant’s patent rights by derogating that title to intangible products necessarily disparaged its products, as well as arguably the company itself which was defamed by being the source of such questionable products.

Extrinsic Evidence, Which Revealed through Discovery Responses Known to the Insured, Must Be Evaluated in Determining the Duty to Defend

It re-emphasized, by citing *Nichols v. Great Am. Ins. Cos.*, 169 Cal. App. 3d 766, 773 (1985) that, “a ‘publication of matter derogatory to the plaintiff’s title to his property, or its quality, or to his business in general[]’ ” could evidence “implicit disparagement.” *Swift*, 59 Cal. 4th at 277. The court also clarified that facts beyond the complaint could give rise to potential coverage where extrinsic evidence was known to the insurer. It did not clarify that that was the line that definitively limited when extrinsic evidence was relevant, as it had no occasion to address that larger issue, especially in light of earlier case authority suggesting that facts available to the insurer sufficed. Nevertheless, the facts known were definitively to be considered, as it explained:

[A] duty to defend may be supported not only by the allegations in the complaint but also by facts alleged, reasonably inferable, or otherwise known to the insurer. Ultimate’s new product catalog was produced by Dahl in the underlying action and referenced in his complaint. Thus, the contents of the catalog were reasonably known to Hartford and should be

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considered in determining whether the *Dahl* action set forth a possible claim of disparagement.

Id. at 298.

Defense Counsel Must Be Vigilant in Addressing Coverage Issues that Came to Light Requiring a Defense

This aspect of the opinion is critical because it places defense counsel, who are communicating with the court regarding potential coverage pursuant to F.R.C.P. 26(f) in a federal court action, to look not only to the complaint allegations, but facts extrinsic in the complaint that may evidence coverage. A failure to reference these facts would necessarily impinge upon the insured's duty to communicate all information as part of its due diligence in locating pertinent policy information, which may require an understanding of how facts beyond the complaint give rise to a defense. A failure to address such claims until after the underlying action is resolved, is problematic under the law of California and that of many states.

In *Basalite Concrete Products, LLC v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA.*, No. CIV. 2:12-02814 WBS, EFB, 2013 U.S. Dist. LEXIS 70597 (E.D. Cal. May 17, 2013), the court reiterated that:

"[T]he insurer's duty to defend arises whenever the third party complaint and/or the available extrinsic facts suggest, under applicable law, the possibility of covered claims."

While in *Basalite*, extrinsic evidence could not be considered because it was not tendered to the insurer until after the conclusion of the third party suit, where facts are made available to an insurer, and thus known to it, both the *Basalite* test as well as that articulated subsequently in *Swift* will be met.

THE "BREACH OF CONTRACT" EXCLUSION THAT SWALLOWED CHICAGO

♦ *GK Skaggs, Inc. v. Hartford Cas. Ins. Co.*, No. 12-56501, 2014 U.S. App. LEXIS 11161, at *4 (9th Cir. Cal. June 16, 2014)

The court cites *Travelers Prop. Cas. Co. of Am. v. Charlotte Russe Holding, Inc.*, 144 Cal. Rptr. 3d 12, 20-21 (Cal. Ct. App. 2012) for authority as to why there was no potential disparagement liability, despite the fact that that case had been previously vacated by the prior June 12, 2014 California Supreme Court ruling in *Swift*.

A Petition for Rehearing, premised on that and other grounds, led the court to demand an insurer response to the petition but ultimately, re-affirmance of the original opinion. Had a different opinion been issued, the court would have been subject to a new Petition for Rehearing. Thus, the problematic citation to *Charlotte Russe* continues, impacting the already questionable logic of this lightly-reasoned decision that is both non-precedential, as well as painfully lacking in specificity.

The Court Failed To Recognize Three Critical Errors Of Law In Its Decision

First, GKS asserted that it was entitled to distribute CCA Beer product in Wisconsin despite L&N's contrary assertions that it had sole distribution rights within that territory. These allegations meet the **corollary** to the "fairly apprised" test derived from *Gray v. Zurich Ins. Co.*, 65 Cal. 2d 263, 275 n.15 (1966) that requires that Hartford demonstrate there is **no conceivable theory that raises a single issue** which could bring the case within policy coverage. L&N's Lanham Act § 43(a) claim alleges that "GKS' marketing and sales of beers brewed by CCA in Wisconsin" "falsely implies an authority to sell those brands in Wisconsin." It can reasonably be inferred from these allegations that GKS made deprecating and belittling statements about L&N's services, causing it pecuniary damage.

Second, the Panel failed to consider inferences readily drawn from the fact allegations, including earlier correspondence from GKS to L&N such as GKS' December 29, 2005 letter to L&N. Although not discussed by the Panel, this letter was referenced in both the Central Beer September 24, 2006 termination letter and GKS' letter of January 15, 2007 terminating L&N's distributorship with CCA. This letter reveals that derogatory statements by GKS about L&N were distinctly actionable as part of the purported scheme to terminate L&N.

Third, the "breach of contract" exclusion cannot bar a defense as the term "arising out of" therein as part of an exclusion must be interpreted against its drafter, Hartford. The *Medill v. Westport Ins. Corp.*, 49 Cal. Rptr. 3d 570, 579 (Ct. App. 2006) case, wholly relied upon by the district court and this Panel, is readily distinguishable as it addressed narrower policy language for "a loss" under definitions that limited its scope in a manner not pertinent here.

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The Court's Analysis Should Not Be Deemed Applicable To Other Factually-Similar Cases In Light Of Its Deficient Analysis

First, *Swift*, as well as a recent published case from the New York Appellate Division presented to the court by 28(j) letter and at oral argument—*Natural Organics*, support finding potential coverage for implicit disparagement based on the authenticity of L&N's asserted rights to sole Central Beer distributorship in Wisconsin, and referenced internal allegations of deficient performance by GKS' agent, L&N. *Swift*, at *19, 27-28 (“[D]isparagement . . . mean[s] . . . misleading publication that derogates another's property or business . . . [A]n insured was ‘potentially liable for disparagement by implication’ when faced with a suit alleging it had made a false claim to be ‘the only owner’ of a particular trademark [D]erogation and specific reference may be satisfied by implication where the suit alleges that the insured's false or misleading statement necessarily refers to and derogates a competitor's product.”). *Natural Organics, Inc. v. OneBeacon Am. Ins. Co.*, 102 A.D.3d 756, 759 (N.Y. App. Div. 2013) (“Here, without reference to the contract, NPN can potentially establish the product disparagement by the press release which called into question the genuineness of the product and whether the remaining inventory was unauthorized.”).

Second, the Panel ignores a number of previous Ninth Circuit panel decisions which have broadly defined the circumstances where implicit disparagement may arise (consistent with the analysis of the Supreme Court in *Swift*) where, as here, the insured challenged claimant's assertion of sole rights claim under intellectual property claims. Although unpublished decisions are not binding, they may demonstrate that *en banc* review is needed to ensure uniformity within the circuit. See, Fed. R. App. P. 32.1. See, *Western Int'l Syndication Corp. v. Gulf Ins. Co.*, 222 F. App'x 589, 592 (9th Cir. (Cal.) 2007) (**no explicit false statement that claimant Apollo lacked broadcast rights to the Apollo Show**); *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Seagate Techns., Inc.*, 466 F. App'x 653, 655 (9th Cir. (Cal.) 2012) (**no explicit false statements that Convolv's technology was no better than Seagate's**); and *Michael Taylor Designs, Inc.*, 495 F. App'x 830, 831 (9th Cir. 2012) (**no explicit statement that goods, which Rosequist alleged were cheap synthetic knock-offs, were not from Rosequist**)

Third, the Panel ignores case law that the phrase “arising out of” must be narrowly construed against Hartford, where it is included in an exclusion requiring evidence of “direct and proximate causation” which the Order does not identify so that the breach of contract exclusion cannot bar a defense. See also, *North Counties Eng'g, v. State Farm Gen. Ins.*, 224 Cal. App. 4th 902, 933 (2014) (cited to the Panel in a 28(j) letter to which Hartford did not respond) (explaining that “[t]he more inclusive use of the phrase ‘arise out of’ . . . has been to **provide coverage, not limit it**”); *Charles E. Thomas Co. v. Transamerica Ins. Grp.*, 62 Cal. App. 4th 379, 380-84 (1998) (narrowly construing the “arising out of” language in an absolute pollution exclusion **against the insurer**); and *HS Services, Inc. v. Nationwide Mut. Ins. Co.*, 109 F.3d 642, 647 (9th Cir. (Cal.) 1997) (holding that “the defamatory remark at issue must have been a part of or **directly and proximately resulted** from the [excluded conduct].” (emphasis added)).

What The Panel Characterizes As Speculative Inferences Are Indistinguishable From Three Decisions Of The Ninth Circuit

The “of and concerning” requirement for implicit disparagement met by reasonable may readily be inferences like those adopted by the district court. When GKS allegedly impugned the efficacy of L&N's beer distribution activities with statements to its distribution partners, harming L&N's reputation and viability as a distributor, it necessarily asserted that it had the equivalent, if not superior distribution rights for CCA beer in Wisconsin to L&N.

This conduct is like that in *Western Int'l Syndication Corp. v. Gulf Ins. Co.*, 222 F. App'x 589 (9th Cir. (Cal.) 2007) where GKS's statements impacted L&N's ability to perform its duties as a distributor. There, the insured not only opposed the claimant's trademark registration applications, but also informed banks of its opposition, “solely for the purpose of disrupting the production financing of the [claimant's show] . . . placing a cloud on the [mark].” *Id.* It is also analogous to *Nat'l Union Fire Ins. Co. v. Seagate Tech., Inc.*, 466 F. App'x 653, 655 (9th Cir. (Cal.) 2012), where a statement of product equivalence was enough to infer implicit disparagement. Similarly, in *Michael Taylor Designs, Inc. v. Travelers Prop. Cas. Co. of Am.*, 761 F. Supp. 2d 904, 907 (N.D. Cal. 2011), *aff'd*, 495 F. App'x 830 (9th Cir. 2012), the inferences from conduct suggested a “bait-and-switch” scheme to sell “cheap synthetic knock-offs.”

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The Complaint Permitted Permits Ready Inferences of Derogatory Oral Communications Between GKS & Central Beer About L&N, Evidencing Implicit Disparagement

Despite L&N's allegation that GKS was the "middleman" between L&N and Central Beer/CCA, it is also reasonable to infer that, after termination, GKS's letter reiterated statements already made to Central Beer and CCA, causing Central Beer to not reconsider the termination.

There is no necessary inconsistency between individual acts by GKS that disparaged L&N and an alleged scheme to terminate L&N. Each distinct conduct thread was separately actionable as a claim of disparagement under the asserted Lanham Act claims. Indeed, statements impugning L&N can be reasonably deduced to have preceded GKS' December 28, 2005, letter to L&N:

Each of our attempts [to work together] was countered by Tikal with its disregard and unwillingness to cooperate with GK Skaggs as the Brewer's Master Distributor. We refer to our letter of December 29th 2005 whereby we outlined the conditions by which Tikal could continue to sell and distribute the Guatemalan Beers during a one-year extension.

Central Beer's knowledge about L&N's performance had to come from the "middleman" GKS, when the GKS letter: (1) implicitly repeated prior statements made to Central Beer & CCA; and (2) necessarily caused Central Beer not to reconsider its termination decision. The reference in Count VIII for "tortious interference" to "new marketing and reporting requirements" and "pretext" suggest that the termination letter was only the culmination of an ongoing dialogue that was adverse to L&N. This sentiment is reiterated in Count V, where "GKS' marketing and sales of beers ... falsely implies an authority to sell ... when in fact, [L&N] had the exclusive distribution rights." This allegation suggests that GKS and L&N were operating concurrently, thus necessarily *before* L&N was terminated.

As the district court concluded: "Allegations of falsity may be inferred in the underlying complaint to support an action for implied disparagement" because L&N alleged GKS made deprecating and belittling statements about L&N's products and services which allegedly caused it pecuniary damage. *Swift*, 2014 Cal. LEXIS 3765, at *10, citing *Scottsdale*, 36 Cal. 4th at 654 ("[T]he facts alleged, reasonably inferable, or otherwise known, [suggest]

the complaint could fairly be amended to state a covered liability.").

Nor are these inferences any greater than those this court recently recognized as adequate. As another panel of this court observed in an analogous case in *Burlington Ins. Co. v. CHWC, Inc.*, 2014 U.S. App. LEXIS 3941, at *4 (9th Cir. (Cal.) Mar. 3, 2014))" (emphasis added):

[H]ere the extrinsic facts at issue *do* relate to a claim pleaded in Martinez's complaint—namely, his negligence claim. Although as originally pleaded Martinez's negligence claim was predicated on the theory that he had been assaulted, the extrinsic facts available to Burlington revealed **the possibility that Martinez could amend his negligence claim** to allege theories of liability that would fall outside the assault-or-battery exclusion. Under well-settled California law, that possibility was enough to trigger Burlington's duty to defend.

To the extent there is any factual dispute about what occurred that would evidence disparagement, this alone triggers a defense. *Mirpad, LLC v. Cal. Ins. Guar. Ass'n*, 132 Cal. App. 4th 1058, 1068 (2005) ("If coverage depends on an unresolved dispute over a *factual* question, the very existence of that dispute would establish a possibility of coverage and thus a duty to defend.").

Precedential, As Well As, Persuasive Authority, Which the Panel's Order Ignores, Supports Finding a Defense

J. Lamb Co., 100 Cal. App. 4th 1017, 1035 (2002) (a tortious interference coverage case where implicit disparagement arose), cited favorably in *Swift*, 2014 Cal. LEXIS 3765, at *10, addressed facts where "the policyholder contacted the competitor's customers and falsely accused the competitor's products of infringing his patent." Here, GKS' alleged pronouncements necessarily caused liquor sellers to question L&N's legal right to "exclusive" Wisconsin distribution rights for CCA beer evidence implicit disparagement in light of the logic of several cases, including one against Hartford, to which it offered no response in either briefing or when cited to the court by Street Surfing's 28(j) letter. *Hartford Fire Ins. Co. v. Vita Craft Corp.*, 911 F. Supp. 2d 1164, 1179 (D. Kan. 2012) ("Although sparse, the complaint alleges that Vita Craft and Imura 'engaged in and orchestrated a scheme to damage and injure TSI by spreading false rumors regarding one of TSI's licensees.' . . . [and] both . . . asserted that TSI suffered damages on that account . . ."). See also, *Natural Organics, Inc. v. OneBeacon Am. Ins. Co.*, 102 A.D.3d 756, 759 (N.Y.

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App. Div. 2013) (“[T]he statement that HON had been appointed the exclusive distributor of Nature’s Plus products in the Nordic region could imply that NPN’s inventory of Nature’s Plus products was unauthorized.”).

The “Breach Of Contract Exclusion” Cannot Bar A Defense As the Panel Court Erroneously Relied on Medill

The Panel’s breach of contract exclusion analysis improperly relies on *Medill v. Westport Ins. Corp.*, 143 Cal. App. 4th 819, 830 (2006) which addressed special language defining a “loss” under the policy. *Medill*, 143 Cal. App. 4th at 829 (“The policy restricts coverage to ‘loss,’ . . . ‘which the “insured” is legally obligated to pay for any “claim” or “claims” made against the “insured” during the “policy period” for “wrongful acts,”’ The definition of ‘loss’ then provides that ‘loss’ shall not include ‘**Damages “arising out of” breach of any contract, whether oral, written or implied, except employment contracts with individuals.**’ ” (emphasis added)).

Analyzing indemnity, not the duty to defend, the *Medill* court observed that “[i]n essence, the plaintiffs in the underlying bond litigation are seeking to recover damages for the failure of the Heritage entities to perform their contractual obligations to make repayments on the bonds.” *Medill*, 143 Cal. App. 4th at 829. The policy defined “arising out of,” as “based upon, arising out of, or in connection with.” *Id.* at 826.

In that limited context, the *Medill* court concluded that “the bond litigation in its entirety ‘arises out of’ breach of contract.” *Id.* It observed that, “[n]o aspect of the underlying bond litigation would exist without the alleged breaches of the loan agreements and indentures and the contractual obligations to pay on the bonds. . . . The bond litigation in its entirety ‘arises out of’ breach of contract.” *Id.* It found the conduct of officers who caused a corporation to breach its contracts unambiguously excluded, but at the same time cautioned:

The proper question is whether the [provision or] word is ambiguous in the context of *this* policy and the circumstances of *this* case. . . . The provision will shift between clarity and ambiguity with changes in the event at hand.

Id. at 831 (quotations omitted). Thus *Medill* limited its rule to its case alone; it is not a statement about the exclusion in general. Furthermore, *Medill*

neglected to consider a narrow reading of the exclusion outside of the ambiguity analysis.

That is very different from L&N’s tortious interference claims, which do not allege that GKS failed to perform its contractual obligations. As the district court acknowledged: “L&N alleged that it ‘had a contract right and reasonable expectation that it would earn profits on the continued distribution of [Central Beer’s] beers in the territory it developed.”” [GKS-00013] L&N further alleged that “GKS wrongfully and tortuously” induced Central Beer to terminate the distribution agreement. [GKS-00617, LNC ¶ 121]

Post-*Medill* authority clarifies that narrow construction of the “arising out of” language in a policy exclusion is not California law.

[T]he alleged wrongs . . . constituted legally cognizable claims whether or not a contract ever existed.”). In each, the district court followed *State Farm Mut. Auto. Ins. Co. v. Partridge*, 10 Cal. 3d 94, 109 Cal. Rptr. 811, 514 P.2d 123 (1973), rejecting the insurer’s argument that *Cont’l Cas. Co. v. City of Richmond*, 763 F.2d 1076 (9th Cir. (Cal.) 1985) requires a broad reading of “arising out of” when found in exclusions, and that any wrong constituting breach of contract necessarily “arises from” that breach. “[T]he alleged wrongs committed ... constituted legally cognizable claims *whether or not a contract ever existed.*” *Id.* at 12 (emphasis added). “Construing the policy in [the insured’s] favor, the exclusionary clause narrowly, and resolving ambiguities in favor of the insured, [the] claims do not fall within the breach of contract exclusion.” *Id.* In *Career Sys. Dev. Corp. v. Am. Home Assur. Co.*, No. C 10-2679 BZ, 2011 U.S. Dist. LEXIS 103999, at *5 (N.D. Cal. Sept. 14, 2011) (“Because liability for [publishing defamatory] statements would constitute the separate tort of defamation and have no relation to any contract between the parties, the ‘breach of contract’ exclusion does not apply.

Tower Ins. Co. of New York v. Capurro Enterprises Inc., No. C 11-03806 SI, 2012 WL 1109998, at *12 (N.D. Cal. Apr. 2, 2012)

Hartford’s policy, unlike that in *Medill*, does not define “arising out of.” As that phrase should be interpreted in favor of coverage, as a recent published California Court of Appeal decision, the Panel’s Order, does not address conclusively established. *North Counties Eng’g.*, 224 Cal. App. 4th at 933.

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Analogous Cases Have Readily Concluded that Arising Out Of Does Not Bar a Defense for Distinct Reputation Injury Claims As Here

According to *North Counties Eng'g, v. State Farm Gen. Ins.*, 224 Cal. App. 4th 902, 933 (March 13, 2014): “Arising out of” means “directly arising out of,” or “directly and proximately result[ing] from.” *Charles E. Thomas Co. v. Transamerica Ins. Grp.*, 62 Cal. App. 4th 379, 383-84 (1998); *HS Services, Inc. v. Nationwide Mut. Ins. Co.*, 109 F.3d 642, 647 (9th Cir. (Cal.) 1997) (“We hold that to ‘arise out of’ a termination of employment, the defamatory remark at issue must have been a part of or directly and proximately resulted from the termination.”). So another unpublished California Court of Appeals case states:

Thus, an act of defamation, which also breaches a contract, is covered if defamation otherwise gives rise to liability under the provisions of an insurance policy. (emphasis added))

PaineWebber Real Estate Sec. Inc. v. Fireman's Fund Ins. Co., No. A063060, 1997 WL 33919954, at *11 (Cal. Ct. App. Jan. 3, 1997); see also *Emp'rs Ins. of Wausau v. Granite State Ins. Co.*, 330 F.3d 1214, 1220 n.8 (9th Cir. (Cal.) 2003) (“Granite correctly notes that we may consider unpublished state decisions, even though such opinions have no precedential value.”).

Even Under the Broader “But For” Construction of “Arising Out Of” the “Breach of Contract” Exclusion is Inapplicable

Even the broader “but for” causation test is only applicable where the disparaging conduct creates liability linked to the breach of contract exclusion. Neither GKS’ promotion of Central Beer products in Wisconsin nor statements denigrating L&N’s claimed exclusive territorial rights or pre-termination disparagement of Central Beer depend on proof of liability for a contract breach.

The coverage evidencing implicit disparagement for “unfair competition” (Count V) and “tortious interference” (Count VIII) would independently exist regardless of whether or not any contract was breached both in the Wisconsin territory and because of GKS’ statements to Central Beer.

Denying reconsideration of its favorable implicit disparagement ruling after *Hartford Casualty Ins.*

Co. v. Swift Distribution, Inc., 59 Cal. 4th 277 (2014), the court found the following allegations sufficient, even though they were no less specific in inferring denigrating statements than L&N’s assertions against GKS:

“Millennium's actions have evidenced its intent to do harm to Ameritox in the marketplace at any cost, and Millennium has instructed its sales reps to do the same.” . . . Millennium “engaged in a concerted plan to ‘attack’ Calloway . . . through its marketing efforts.”

As in *Millennium*, Hartford does not consider any inferences about statements that GKS may have made. It takes little imagination to infer from the fact allegations in Count V that GKS, Central Beer’s master distributor, persuaded liquor stores that it had those rights in Wisconsin. See *Liberty Mutual Ins. Co. v. OSI Indus., Inc.*, 831 N.E.2d 192, 199 (Ind. Ct. App. 2005) (“Liebermann's statements disparaged the ‘Thermodyne Oven’ by creating confusion about the product and the technology”), *Natural Organics, Inc. v. OneBeacon Am. Ins. Co.*, 102 A.D.3d 756, 759 (2013) (statements that led to questions as to whether “the remaining inventory was unauthorized” evidenced implicit disparagement).

So too, Hartford’s Petition for Rehearing Opposition falsely contends that the district court did **not** find disparagement. **Not so.** It stated: “**allegations of falsity may be inferred in the underlying complaint to support an action for implied disparagement.**”

Incapable of distinguishing *Michael Taylor Designs, Inc. v. Travelers Prop. Cas. Co. of Am.*, 761 F. Supp. 2d 904 (N.D. Cal. (S.F. Div.) 2011), Hartford mistakenly claims disparagement from “alleged . . . statements to customers.” **Not so.** As *Swift*, *Id.* at 297 stated, “the allegation that customers would be ‘steered’ to imitation products ‘fairly implies some further statements, presumably oral, were being made by MTD personnel”

Hartford’s inadequate analysis of inferences is like that in *Millennium* – both justify the district court’s criticism that, “‘[h]ear no evil, see no evil, speak no evil’ is no defense for shirking a cognizable duty.” *Id.* at *7.

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THE “ARISING OUT OF” LANGUAGE HAS NO BOUNDARIES, EVEN WHEN INCLUDED IN AN EXCLUSION

- ♦ *Vogue Int’l v. Hartford Cas. Ins. Co.*, U.S.D.C., C. D. Cal., Case No. 2:14-cv-03570-PA (MRWx).

A recent decision by Judge Anderson of 8/14/14, which purported to apply *Swift*, but neglected to address *Millennium*, looked to no inferences from the allegations merely characterizing the inferences narrowly that consumers would be deceived into thinking that plaintiff’s product was the only source of Organic Moroccan Argan Oil and therefore superior to the claimant’s product, but not acknowledging that the allegations that that product was promoted in salons in conjunction with Moroccan Oil, albeit at a lesser price point, also reasonably led consumers to either believe that it was a better priced competitive product or an additional Moroccan oil sponsored product, which was organic. In either event, it would impact the claimant’s products, having the “bait and switch” substitute preferred, because it was perceived as higher value if a competitor, or leading consumers, to prefer a competitor without realizing that it came from same.

While acknowledging that the term “and” evidenced advertising as well as product packaging, which was outside the scope of the narrower definition of “advertisement” under Hartford’s policy, it

overbroadly interpreted the “arising out of” exclusion as if it covered trademark cancellation claims which could not under any guise be an infringement nor violation of the intellectual property rights of the claimant, but only as articulated “unfair competition for the marketplace confusion about the source of origin.

None of it even remotely within the scope of the limited intellectual property exclusion, nor does the court’s citation to *Cont’l Cas. Co. v. City of Richmond*, 763 F.2d 1076, 1080 (9th Cir. (Cal.) 1985) survive *Tower Ins. Co. of New York v. Capurro Enterprises Inc.*, No. C 11-03806 SI, 2012 U.S. Dist. LEXIS 46443 (N.D. Cal. Apr. 2, 2012)’s proper reference and citation to the California Supreme Court’s seminal decision in *Hartford*, which was reaffirmed last year by the California Supreme Court in *State of California*.

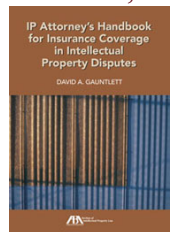
Looking to the damages, which need only be because of injury “arising out of” the operative defense, and connecting damage to the nature of trademark and trade dress infringement, but then extending without explanation that to claims of unfair competition cancellation of trademark registration, which in no way depend upon and necessarily arise out of trademark and trade dress infringement, the court misconstrued the applicable exclusionary language.

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