It’s Not Nice to Brag, But Is It Disparagement?
Recent Trends in Coverage for Implied Disparagement Claims under the Lanham Act

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Commercial General Liability (CGL) policies typically provide coverage for claims of “bodily injury,” “property damage” and “personal and advertising injury.” These policy provisions are the most common starting points for evaluating whether coverage exists for a particular matter. The 2007 Insurance Services Offices, Inc. (“ISO”) policy provisions\(^1\) for “personal and advertising injury” provide the insured with coverage for damages claimed by a third-party for injuries that fall within seven enumerated offenses, including “[o]ral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person’s or organization’s goods, products or services.”\(^2\)

When an insured is sued for publishing material that explicitly disparages another person’s or organization’s goods, products or services by name, the question of whether a “personal or advertising injury” offense has been alleged is relatively simple. Explicitly disparaging an entity or its goods, products or services by name would clearly constitute such an injury. But what about when the published material does not explicitly name the entity or its goods—it only makes reference to “Brand X” or “The Leading Maker of X”? Can that be considered disparagement that might be covered by Personal and Advertising Injury coverage? What about when the purported disparagement is even more oblique? What is the impact on coverage when the only statement made is about the insured’s own goods (e.g., “Product X is the best” or “Product X is the first/only product that does Y”)? Could such statements constitute disparagement of someone else’s goods, products or services? What about when the only thing asserted was that the insured has an intellectual property right? Could that be considered disparagement of another party who claims that they are the true owners of that same intellectual property right? Cases throughout the country are split on these “implied disparagement” issues under both state common law and the federal Lanham Act, 15 U.S.C. §§ 1114-1127.

It is commonly understood that a liability insurer’s duty to defend only arises when a lawsuit against the insured seeks damages that are potentially within the policy’s coverage.\(^3\) The determination of whether an insurer owes a duty to defend typically is made by comparing the allegations of the complaint with the terms of the insured’s policy.\(^4\) In the case of implied disparagement claims, the question becomes whether claims arising from promotional statements about the insured’s \textit{own product}, that do not name the competitor, but somehow suggest the competitor’s inferiority, will be deemed to fall within the insured’s policy’s CGL coverage. The analysis requires a close examination of the insuring agreements, the delineated policy exclusions, and the decisional law of the relevant jurisdiction as the existing caselaw demonstrates that these coverage questions are decidedly fact specific.


\(^2\) The 1986 ISO form provides coverage for “personal injury” separate from “advertising injury” and defines “advertising injury” as injury arising from “oral or written publication of material that slanders or libels a person or organization or disparages a person’s or organization’s goods, products or services.” ISO, CGL Form, CG 00 01 11 85, § V(1).

\(^3\) \textit{Gray v. Zurich Ins. Co.}, 65 Cal. 2d 263, 276-77 (1966).

\(^4\) \textit{Id.} at 276.
Courts addressing implied disparagement coverage disputes may begin their inquiry with the proposition that there can be no claim for slander or disparagement under the common law unless a false statement is made about the plaintiff. This proposition in turn may raise the question of whether the subject statement was made about the plaintiff by implication. In addressing that question, courts may look to whether those to whom the publication was made would understand that an implicit reference was made about the plaintiff. When the statement at issue makes no mention of any other party, even indirectly, courts may be reluctant to find coverage under the personal and advertising injury coverage.

As is the case with most coverage questions, the analysis does not end with the insuring agreement, as policy exclusions may apply. In addition to personal and advertising injury exclusions such as the Knowing Violation of Rights of Another and Material Published Prior to Policy Period exclusions, courts dealing with implied disparagement claims may also examine the application of the Quality or Performance of Goods – Failure to Conform to Statements (“Quality of Goods”) Exclusion, which typically bars coverage for claims “arising out of the failure of goods, products or services to conform with any statement made in your advertisement.” A Quality of Goods Exclusion typically encompasses allegations that an insured made false statements about its own products. Some courts have held that a Quality of Goods Exclusion bars coverage when an underlying claim is based on an insured having claimed superiority over the goods of others or has claimed an exclusive intellectual property right. Other courts have found that the exclusion does not act to exclude coverage.

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5 See e.g. BASF AG v. Great Am. Assur. Co., 522 F.3d 813, 820 (7th Cir. 2008).


7 See Sharpe Images, Inc. 2012 WL 3962747 at n.3 (many parties receiving advertisement would understand “the other guy” to mean the underlying plaintiff); JAR Laboratories, 2013 WL 1966386 at *5 (substantial segment of consumers would likely believe that insured’s statements about “leading prescription brand” were about the underlying plaintiff).

8 See e.g. Pro-Link Holdings Corp. v. Federal Ins. Co., 688 F. 3d 828 (7th Cir. 2012); Heritage Mut. Ins. Co. v. Advanced Polymer Techs., 97 F. Supp. 2d 913 (S.D. Ind. 2000) (“patent pending” assertion did not constitute disparagement) but see e.g. Liberty Mut. Ins. Co. v. OSI, 831 N.E.2d 192, 199 (Ind. App. 2005) (holding that because the subject statements created “confusion in the marketplace as to the ownership interest” the statements constituted disparagement).


At least one court has relied on the Material Published with Knowledge of Falsity ("Knowledge of Falsity") Exclusion, which bars coverage for “oral or written publication of material, if done by or at the direction of the insured with knowledge of its falsity.”

Another standard ISO exclusion that might be implicated is the Breach of Contract Exclusion, which bars coverage for “personal and advertising injury’ arising out of a breach of contract, except an implied contract to use another’s advertising idea in your ‘advertisement.’”

The Infringement of Copyright, Patent, Trademark or Trade Secret ("Intellectual Property") Exclusion may also be relevant to the analysis of whether an implied disparagement claim is covered. Intellectual Property Exclusions may exclude coverage for “personal and advertising injury” arising from “any violation of any intellectual property rights such as copyright, patent, trademark, trade name, trade secret, service mark or other designation of origin or authenticity.”

In addition to the more standard ISO insuring agreement and exclusions, policies may contain insurer-specific coverage forms that amend the policy in a way that impacts coverage, including adding exclusions or altering the scope of the advertising injury insuring agreement or the definitions of key policy terms.

In light of the multifaceted coverage questions raised by implied disparagement claims and the fact specific nature of the analysis, a summary of existing caselaw from the federal circuits and state courts is provided below to assist in evaluating implied disparagement claims.

**FIRST CIRCUIT**


In *Boston Symphony Orchestra* (BSO), BSO sought coverage from Commercial Union for a claim brought against BSO by actress Vanessa Redgrave. Ms. Redgrave had contracted with BSO to appear as a narrator in a series of performances of “Oedipus Rex.” BSO cancelled its contract with her after it received messages of protests relating to its engagement of Ms. Redgrave. BSO issued a statement announcing the cancellation of *Oedipus Rex*. Thereafter, Ms. Redgrave’s attorneys communicated with BSO demanding an apology and restoration of the

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14 See e.g. Bankwest v. Fidelity & Deposit Co. of Maryland, 63 F.3d 974, 980 (10th Cir. 1995) (adding a “catch all” exclusion for damages arising from the publication of “other defamatory or disparaging material”); Total Call Int’l, Inc. v. Peerless, Ins. Co., 181 Cal. App. 4th 161 (2010) (removing coverage for trade dress infringement and redefining “advertisement”).

15 These claims are driven by their facts and the laws in the applicable jurisdiction and are offered here to show the coverage landscape for implied disparagement across the country.
contract. Ms. Redgrave eventually filed suit against BSO, alleging that it had breached its contract with her and that the repudiation and breach of the contract had led others to refrain from hiring Ms. Redgrave for professional engagements. BSO tendered the complaint to Commercial Union. The Commercial Union policy provided coverage in part, for injuries “arising out of . . . the publication or utterance of a libel or slander or other defamatory [or] disparaging material.”

The court noted that the factual basis for Ms. Redgrave’s claim was her allegation that BSO’s breach “led others to refrain from hiring her for professional engagements.” The court noted that while that could be interpreted as an allegation that a number of specific engagements that normally have been offered to Ms. Redgrave were not in fact offered to her as a result of the breach of contract, the language was fairly susceptible to another interpretation. The court noted that Ms. Redgrave may have been alleging that BSO’s cancellation of Oedipus Rex and the circumstances was a statement about Ms. Redgrave that damaged her reputation and caused others not to hire her.

In determining whether or not the complaint against BSO triggered a duty to defend, the court noted that the phrase “other defamatory or disparaging material” in the policy was not defined. Commercial Union argued that the language refers to the torts of product disparagement and disparagement of property. BSO, on the other hand, contended that the term “disparaged” should be given its ordinary meaning. BSO asserted that “disparaged” means, among other things, “to lower in rank and estimation by actions or words,” or “to speak slightingly of.” The court said that the essence of Ms. Redgrave’s claim was that BSO’s breach of contract somehow spoke slightingly about her and damaged her reputation. Finding the language ambiguous, the court construed it against the insurer and held that Ms. Redgrave’s complaint was “reasonably susceptible” to stating a claim that would fall within the zone of covered injuries.


*Welch Foods* involved claims that the insured (Welch) implied that pomegranate juice was the primary ingredient in its white grape pomegranate blended juice product even though the product contained little or no pomegranate juice. Welch was sued by a rival, P.O.M., and in a separate class action lawsuit filed by a customer for the allegedly false advertising of the product. P.O.M. marketed 100% pomegranate juice and advertised the P.O.M. product as having nutritional health benefits.

Welch tendered the defense to Zurich. The Zurich policy provided coverage for personal and advertising injury, which was defined to include the following offense:

> Oral or written publication, in any matter, of material that slanders or libels a person or organization or disparages a person’s or organization’s goods, products or services.

Welch sought coverage under the theory that both the class action lawsuit and the P.O.M. lawsuit alleged that Welch disparaged P.O.M.’s products by falsely advertising that Welch’s product contained pomegranate juice and thereby damaged P.O.M.’s reputation. Welch further argued
the labeling and marketing of its pomegranate juice was “written publication” that disparaged its own product under the terms of the policy.

P.O.M.’s complaint did contain objections to specific Welch advertisements such as “a prominent display of pomegranates on the labels and packaging” and a “website where it advertises and markets the misleading Welch pomegranate juice.”

The court held that while the advertisements were written publications, they did not in fact disparage P.O.M. or its products. Rather than disparaging P.O.M. or its products, the comments Welch made simply misrepresented the contents of Welch’s own product. The court noted that the gravamen of the underlying claim was false advertising, not product disparagement and, therefore, the Zurich policy did not provide coverage.

SECOND CIRCUIT


In Elite Brands, the Plaintiff (Elite) sold and distributed cameras, binoculars, telescope and camera equipment, and accessories. Elite sought coverage under policies issued by OneBeacon Insurance Company for fees incurred in proceedings before the United States International Trade Commission (“ITC”). The policies at issue provided coverage for the following offense:

Oral or written publication of material that slanders or libels a person or organization or disparages a person’s or organization’s goods, products or services.

The ITC proceeding was commenced by Fuji Photo Film Company and asserted certain patent infringement claims. Elite was not a party to that original proceeding. After initiating the ITC proceedings, the ITC issued a general exclusion order prohibiting the unlicensed importation of certain lens-fitted film packages (“LFFPs” or “disposable cameras”) that infringed upon Fuji’s patents. In addition, the ITC issued cease-and-desist orders against the respondents to the ITC proceeding.

Approximately two years later, Fuji commenced an ITC formal enforcement proceeding against Elite and requested an advisory opinion as to whether Elite could import certain cameras. Fuji also requested that the administrative law judge impose a cease-and-desist order and monetary sanctions against Elite because of Elite’s importation and sale of cameras allegedly infringed Fuji’s patents.

Elite tendered the claim to OneBeacon and argued that Fuji’s proffers in the ITC proceeding raised the possibility of a covered advertising injury for disparagement, misappropriation or infringement.

The district court noted that the ITC complaint focused on alleged violations of the general ITC preclusion and cease-and-desist orders. The complaint did not refer to advertising injuries or
communications, actions or omissions constituting disparagement of Fuji’s products. The court, while noting the duty to defend is based on the allegations in the complaint, did agree to look outside the policies to consider Elite’s arguments to coverage. But even looking outside the complaint, the court still found there was no obligation to defend. With respect to the coverage for oral or written publication of material that disparages a person or organization’s goods, products or services, the court noted that none of the evidence or proposed findings relied upon asserted that Fuji complained of disparagement or similar injury arising from the oral or written publication of material by Elite. The court noted as follows: “A claim of disparagement is not supported by mere general statements of comparison, declaring that the defendant’s goods are the best on the market or are better than plaintiff’s . . . so long as they contain no specific assertions of unfavorable facts reflecting upon the rival product.” The court noted that even if Fuji’s proffers could be construed to suggest that the pricing or packaging of Elite products implicitly represented that its products were of equal or superior quality to Fuji’s, at a better price, its allegations were insufficient to support a reasonable possibility that such claim would be covered under the policy.

The district court’s decision was upheld by the Second Circuit Court of Appeals. In the Court of Appeals’ decision, the court indicated that Elite was arguing that certain submissions by Fuji to the ITC constituted advertising. The court noted that even if it were to assume that advertising had occurred, there was still no alleged oral or written publication of material that disparaged a person’s or organization’s goods, products or services. Specifically, the Second Circuit noted that under New York law, a claim of disparagement must contain “specific assertions of unfavorable facts reflecting upon the rival product.” The court noted that no such assertions had been made.


In JMZ, the insured sought coverage for an underlying action brought by owners of several “Vertigo brand” clothing franchises for damages allegedly resulting from the insured’s sale of the brand to discount retail establishments. Allegedly, the Vertigo brand was to be only sold at exclusive franchise locations – sophisticated haute couture ladies’ apparel stores with marketing focused on its exclusivity, mystique and excitement. The claimants alleged that the insured began to widely distribute the Vertigo brand apparel to outlet retailers and discount stores in markets where the Vertigo franchises were located. It alleged that this was done with the full knowledge that the discount outlets would sell the same merchandise that was available at the exclusive franchise locations, but at significantly lower prices. It was alleged that the acts resulted in a loss of customers and destruction of good will and reputation.

The insured sought coverage under a Lumbermens’ policy that contained coverage for the following “personal injury” offense: “oral or written publication of material that slanders or libels a person or organization or disparages that person’s or organization’s goods, products or services.” The insured argued it was entitled to coverage because the underlying complaints alleged that the insured disparaged the Vertigo merchandise by placing in stores that sell goods of inferior quality – i.e., that the insured disparaged the Vertigo brand by association.
The court said that even after affording the insured every favorable inference the complaint simply did not allege that the Vertigo franchise owners suffered an injury arising out of any oral or written publication of disparaging materials by plaintiffs. “Rather than referring to oral or written publication of disparaging material, the complaint attributes injury to the alleged effect of the presence of [insured’s] lower priced goods in the market.”

The court also addressed coverage under policies issued by Federal Insurance Company and noted that the claims for coverage under the Federal policies also must fail because the Federal policies, while providing advertising injury coverage, were not triggered because there was no allegation that the insured engaged in any advertising activities which led to the injury.


In _Gartner_, the insured (Gartner) became involved with a company known as ECI. ECI considered itself one of the world’s leading vendors of software designed to help select technology vendors. Gartner created a subsidiary, DDI, which entered into an exclusive software licensing agreement with ECI. Gartner promised ECI that it would use its distribution and sales network to market and sell software produced by the subsidiary under license from ECI. Gartner also led ECI to believe that Gartner would provide all of the financial resources necessary for DDI to succeed. For the first three years, Gartner kept its promises. Then ECI alleged that Gartner began to “starve” DDI of the resources needed for continued growth and success. Relations between Gartner and ECI subsequently cooled. Thereafter, Gartner unveiled its own vendor selection software tool. When ECI demanded an explanation, Gartner told ECI that Gartner’s new software had nothing to do with ECI. ECI claimed that it realized that while Gartner was pushing for renegotiations of its licensing agreement, it was also covertly developing competing software wholly based on ECI’s software. Gartner allegedly tried to pressure ECI to accept a low-ball lump sum purchase of the ECI technology that Gartner claimed was obsolete. ECI sued Gartner, alleging various claims with respect to ECI’s intellectual property. ECI alleged that Gartner had secretly copied ECI’s software code to create a competing product to sell against ECI’s product, thereby depriving ECI of its royalties and other profits from its licensing venture with Gartner’s DDI subsidiary.

Gartner argued that ECI’s allegations could be construed to charge disparagement, thus coming within the personal and advertising injury provisions of the St. Paul policy. The policy provided coverage for the following offense:

_Making known to any person or organization written or spoken material that disparages the products, work or completed work of others._

Both the district court and the court of appeals held that ECI’s claims against Gartner did not fall within the above-stated offense because Gartner’s representation that ECI’s product was obsolete was only made to ECI. In other words, there is no allegation that Gartner’s communication was made to a third-party in order to trigger coverage. Rather, the statement about ECI’s product was made by Gartner to ECI in order to lure ECI into a fruitless licensing renegotiation.
In *Dollar Phone Corp.* v. *St. Paul Fire & Marine Ins. Co.*, 2012 WL 1077448 (E.D.N.Y. 2012), the insured (Dollar Phone) sought coverage under a St. Paul policy for a claim brought against it by IDT Telecom. Both Dollar Phone and IDT are providers of prepaid telephone card services. The complaint against Dollar Phone alleged that Dollar Phone defrauded its customers by failing to provide the number of minutes promised on their calling cards and in their advertisements. IDT asserted that by promising more minutes per dollar than IDT provided, Dollar Phone’s advertising implied that IDT cards were overpriced. The St. Paul policy at issue contained the following advertising injury offense:

> Making known to any person or organization covered material that disparages the business, premises, products, services, work or completed work of others.

Dollar Phone argued that the IDT complaint asserted a disparagement advertising injury offense covered by this particular coverage grant in the policy. The court noted that the central issue as to whether or not there was coverage is whether and to what extent the disparagement advertising injury offense provision in the St. Paul policy requires that the claim against the insured alleged that the offending advertisement made a specific reference to a competitor. The court concluded that the unambiguous meaning of disparage in the advertising injury portion of the policy requires either an allegation that the advertisement specifically referred to the competitor’s products or touted one’s own product as superior to those of its competitors. Because there were no such allegations in the IDT complaint that Dollar Phone’s advertisements either specifically referenced its competitor’s products or compared Dollar Phone’s cards to other phone cards, the court found coverage was not triggered.

The *Dollar Phone* court also addressed various exclusions to coverage which may have applied even if the IDT complaint could be construed as asserting an advertising injury offense of disparagement.

First the court examined the “quality of goods” exclusion. The exclusion stated as follows:

> We won’t cover advertising injury that results from the failure of your products, your work, or your completed work to conform with advertised quality or performance.

The court noted that the failure of Dollar Phone’s products to perform as promised was the entire basis of the New Jersey complaint and the alleged injuries. Assuming arguendo that advertising injury was alleged, the harm to the New Jersey plaintiff’s reputation was premised entirely on the inaccuracy of Dollar Phone’s promises as to the number of minutes their cards provided. The New Jersey complaint alleged that the misrepresentation of Dollar Phone’s product quality led consumers to assume that IDT’s products were inferior. And once the false claims were discovered, the reputation of the entire industry was damaged. The court noted that the alleged harm was precisely the type of harm contemplated in the plain language of the “quality of goods” exclusion.
The court also addressed the “wrong price description” and “false material” exclusions. However, the court found those two exclusions to not apply. The “wrong price description” exclusion eliminated coverage for advertising injury “that results from the wrong description of the price of your products, your work or your completed work.” The court noted that there was no allegation that consumers were charged more or less than the price advertised for the calling cards. Rather, the allegations were whether the number of minutes promised was provided in the calling cards.

The false material exclusion barred coverage for an “advertising injury that results from false material that was made known by or for the protected person, and the protected person knew was false when it was made known.” The court noted that exclusion would apply when the allegations of the complaint assert claims that are based solely on intentional conduct. The court noted that if there is a reasonable possibility that liability could be premised on unintentional and unknowing conduct, the exclusion would not apply. The court noted that the New Jersey complaint alleged allegations of intentional conduct as well as allegations that could allow the plaintiff to recover based on a showing of negligence. Accordingly, the “false material” exclusion was not applicable.


The insured in *Natural Organics* was a manufacturer of health supplement products, including those sold under the trade name Nature’s Plus. An action was commenced against Natural Organics in which it was alleged that Natural Organics had wrongfully terminated its exclusive distributorship agreement with Nature’s Plus Nordic A/S (“NPN”) and issued a press release announcing the appointment of House of Nature (“HON”), a competitor of NPN, as the exclusive distributor for Nature’s Plus products in Norway, Denmark, Sweden and Finland. The complaint in the federal action asserted causes of action against Natural Organics for unfair competition pursuant to the Lanham Act on the basis that, through the press release, Natural Organics misrepresented to consumers that HON was the sole distributor for Nature’s Plus products in the Nordic region when NPN remained the sole distributor for those countries. It was alleged that the press release caused confusion, mistake and deceived consumers as to the affiliation, connection or association of Natural Organics, NPN, and HON, and as to the origin, sponsorship or approval of NPN’s and HON’s products, causing a diversion of trade from NPN and harm to its reputation and goodwill.

Natural Organics tendered the defense under a policy issued by OneBeacon that provided coverage for the following advertising injury offenses: “Oral or written publication of material that slanders or libels a person or organization” or “oral or written publication of material that disparages a person’s or organization’s goods, products or services.” The court determined that the allegations against Natural Organics fell within the policy’s coverage for “personal and advertising injury” arising from product disparagement. The court noted that the 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 court noted that the unfair competition claim did not necessarily arise out of Natural Organic’s alleged breach of contract and held that the breach of contract exclusion did not apply. The court noted that the press release was allegedly false and disparaging to NPN’s products
without regard to whether Natural Organics breached its agreement with NPN. The court noted that, without reference to the contract, NPN could potentially establish product disparagement by the press release which called into question the genuineness of the product and whether the remaining inventory was unauthorized. The court stated that with or without a breach of contract, the value of the disparaged product was allegedly diminished.

**THIRD CIRCUIT**


The underlying claim involved a suit by Bell Atlantic against Storage Technology Corporation (“STC”), a company that designed and manufactured information storage and retrieval subsystems to operate inside computers. In the lawsuit, STC counter-claimed against Bell Atlantic, alleging that Bell infringed STC’s microcode and maintenance software copyrights. The STC counterclaim also alleged that Bell only integrated STC’s customer service engineers for the purpose of acquiring trade secrets and other valuable information. STC accused Bell of inducing customers and former STC employees to break their confidentiality agreements and share STC’s secrets. STC also stated that Bell misrepresented to its customers that it made its own maintenance software, which induced some of STC’s former customers to switch to Bell. The misrepresentations to customers involved “the source, nature, characteristics, and the quality of its ability to maintain STC’s library equipment.” The statements also included representations that Bell would service STC equipment as well as STC could do so.

Bell Atlantic tendered the Counterclaim to Hartford. The Hartford policy provided coverage for advertising injury when the offense was committed in the course of advertising the insured’s goods, products or services. The advertising offenses were defined to include, in part, oral or written publication of material that slanders or libels a person or organization or disparages a person’s or organizations goods, products or services. The policy also contained several exclusions including the following exclusions:

1. Arising out of oral or written publication of material, if done by or at the direction of the insured with knowledge of its falsity;

2. Arising out of oral or written publication of material whose first publication took place before the beginning of the policy period.

It also excluded coverage for advertising injury arising out of “the failure of goods, products or services to conform with advertised quality of performance.”

The policy also provided personal injury coverage, which included the offense of:

Oral or written publication of material that slanders or libels a person or organization or disparages a person’s or organizations goods, products or services.

Hartford argued that the violations of the Lanham Act were not committed in the course of advertising, but arose out of copyright infringement. According to Hartford, the gravamen of the
claim was copyright infringement and theft of trade secrets, which were not covered under the policy. The court said that because Bell Atlantic allegedly made false and misleading comparisons to STC’s services, such that customers switched service providers, the allegations fell within the advertising injury definition of disparaging STC’s services.

The court held that the exclusion for the failure of goods, products or services to conform with advertised quality or performance was not applicable. The court noted that STC was not claiming that Bell Atlantic’s quality did not rise to the level advertised. Rather it was claiming that Bell made misleading and false comparisons with STC’s products and services. The court further noted the exclusion for oral or written publication of material, if done at the direction of insured with knowledge of its falsity, was not relevant. The court noted that while STC alleged that Bell acts were intentional, wanton and malicious, it also alleged the acts were reckless. The court noted that under Pennsylvania law recklessness is something more than negligence but something less than intentional conduct.


In Maglio, the insured sought coverage for an underlying lawsuit in which it was alleged that Maglio (the insured) impermissibly sold an inferior stromboli product under the claimant’s (Leonetti’s) brand name, Forte, after the parties had terminated their private label agreement (“Forte brand claim”).

Leonetti also claimed that Maglio sold its own brand of stromboli in boxes that reflected Leonetti’s product information, not the product information of the actual manufacturer, American Kitchen Delights (“Maglio brand claim”).

Leonetti sought relief under theories of tortious interference, unfair competition, trade libel, breach of contract, negligent misrepresentations and unjust enrichment. Coverage was sought by Maglio under a Charter Oak liability policy that contained the following enumerated offense:

Oral, 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, provided that a claim is made or suit is brought by a person or organization that claims to have been slandered or libeled, or whose goods, products or services have allegedly been disparaged.

Charter Oak agreed to provide a defense to the insured but reserved its rights on indemnity.

With respect to the underlying claims, the state court dismissed Leonetti’s causes of action for negligent misrepresentation and unjust enrichment. The remaining claims for unfair competition, trade libel and tortious interference proceeded to trial. After nine days of trial, the trial court declared a mistrial as to the Forte brand claim due to a hung jury. The Maglio brand allegations proceeded to verdict before the same jury under just one cause of action: unfair competition. The jury returned a general verdict against Maglio and awarded compensatory damages of $2 million and punitive damages in the amount of $555,000. The Forte brand claim was retried on a single count of unfair competition. On retrial the jury returned a general verdict against Maglio in the amount of $660,000.
With respect to the Maglio brand claim, the insured argued that a finding could have been made that Maglio disparaged Leonetti or its products because Maglio distributed an inferior stromboli in packaging that contained Leonetti’s product information. The insured argued that the allegations could have caused customers to think Leonetti had manufactured the inferior product. The insured asserted that the broad unfair competition charge encompassed Leonetti’s disparagement allegations. The court found that the Maglio brand claim was not covered because there was no evidence in the underlying trial record that showed that Maglio disparaged Leonetti or its products in its sale of Maglio’s brand stromboli; rather, Maglio merely misrepresented its own product. Moreover, the court noted that even if the claim had fallen within coverage, the knowledge of falsity exclusion defeated coverage. That exclusion precluded coverage for claims “arising out of oral or written publication of materials if done by or at the direction of the insured with knowledge of its falsity.” The court found that the trial record made it clear that Maglio’s broker and sales manager knew that the Maglio brand boxes did not accurately represent the product contained within them, and that Maglio misled the public by using those boxes.

With regard to the Forte brand claim, Maglio argued the claim was based on an injury arising out Maglio’s disparagement of Leonetti and its Forte brand, thus constituting an advertising or personal injury. The court noted that the jury in the Forte brand trial returned a general verdict against Maglio for unfair competition. The court also stated that the trial record demonstrated that counsel for Leonetti’s offered several theories of liability. The court stated that one of those, that Maglio made inaccurate and reckless statements to customers regarding Leonetti’s ownership of the Forte brand, sounded in disparagement. However, the court noted that other theories such as use of deceptive samples, did not sound in disparagement. The court found that Maglio could not demonstrate the extent to which the jury awarded damages based on Leonetti’s disparagement theory as opposed to any other theory. Absent such a showing, the court stated that Maglio would not be able to meet its burden at trial to show that the claim fell within the scope of coverage.

FOURTH CIRCUIT


The court held that “Advertising Injury” coverage was triggered because the Insured sent promotional materials that constituted disparagement, even though the underlying plaintiff was not referred to by name. Instead, the underlying Plaintiff was referred to only as the “other guys.” The court found that this was sufficient to find that the disparaging statements were “about the Plaintiff” because the materials were directed to customers of the Plaintiff who would “likely understand” that “the other guys” meant the underlying plaintiff. The court also relied on the fact that the advertising materials at issue “referenced to specific qualities and information about [the underlying] plaintiff.”

However, the court found that coverage was defeated by the exclusion for “advertising injury committed by the insured with knowledge of its falsity.” Because the Complaint alleged that the
Defendant’s actions were intentionally taken to harm the Plaintiff, the court held that the exclusion applied. The court noted that in many jurisdictions the exclusion would not defeat the duty to defend because the Defendant could be held liable even if it did not act with knowledge of the falsity of its statements. But, under North Carolina law, a court takes the allegations as true and does not consider “hypothetical versions of the Complaint.”


The court reasoned that reference to “topical insect repellants” and “bug spray with DEET” could be read to impliedly refer to the underlying plaintiff, a well-known manufacturer of those products. And the court noted that an entity’s false comparisons between it and a competitor’s products constituted “untrue statements about the competitor’s products.”

However, when the statement was that the products were equivalents, the falsity arises from the failure of the insured defendant’s products to perform as well as claimed, and thus were excluded under a “failure to conform” exclusion. Such exclusions, said the court, “encompasses allegations that an insured made false statements about its own products.” *Id.* at 28.


In *dicta*, the court called “tortuous” the assertion that claiming a patent that one did not have disparaged the real patent holder by implying that the real holder’s patent was not legitimate.

**FIFTH CIRCUIT**


In August 1995, James Henry, along with his wife and two corporate entities, Equipos Opticos de Reconocimiento, S.A. de C.V. and Reymsa, Inc. (collectively “Equipos”) filed suit against Recognition, Inc. (“Recognition”) in the United States District Court for the Northern District of Texas (“Federal Action”). Equipos’ third amended complaint asserted claims for breach of contract, usurpation of corporate opportunities, tortious interference with business relations, tortious interference with a contract, antitrust violations, fraud and fraudulent failure to disclose, conspiracy, intentional infliction of emotional distress, and breach of the duty of good faith and fair dealing. Recognition tendered the claim to St. Paul Guardian Insurance Company and St. Paul Fire & Marine Insurance Company (collectively “St. Paul”). St. Paul denied coverage and filed a declaratory judgment action. Recognition responded by filing a separate lawsuit against Equipos in state court (the “State Action”). The Federal Action was dismissed and the parties litigated their claims in state court. The parties mediated their claims and, on December 18, 1997, entered into a settlement agreement with respect to all claims. The next day, on December 19, 1997, Equipos filed its first amended answer and counterclaim, in which it deleted its claim for conspiracy and asserted additional claims for promissory estoppel and unjust enrichment. On December 27, 1997, Equipos filed a second amended answer and counterclaim including claims for business disparagement and defamation.
On competing motions for summary judgment, the court found that St Paul had no duty to defend Recognition in the Federal Action. It held that Equipos had to at least plead facts showing that Recognition made a defamatory statement to trigger coverage. While the Federal Action alleged that Recognition made several statements, it did not allege or assert facts that the statements were defamatory. The St. Paul court also held that St. Paul had no duty to defend Recognition against the State Action because the settlement was made prior to the filing of the amended pleadings, the State Action was never tendered to St. Paul and even though the amended pleadings alleged disparagement and defamation there were no factual assertions to support these claims. Accordingly, the court granted St. Paul summary judgment.

SIXTH CIRCUIT


Baum Research and Development Co., Inc. (“Baum”) asserted claims alleging antitrust violations and tortious interference with contract and other business relations against Hillerich & Bradsby Co, Inc. (“Hillerich”). Thereafter, Hillerich tendered the defense of the matter to Travelers Property & Casualty Company of America and Travelers Casualty & Surety Company (collectively “Travelers”). Travelers initially denied coverage, but agreed to defend Hillerich after a second amended complaint was filed. Travelers contributed to a settlement of the underlying lawsuit and reserved its right to seek reimbursement. Travelers then filed suit seeking reimbursement for the settlement.

The court noted that the original underlying complaint did use the term “disparage” several times and included factual elements that arguably included elements of a disparagement claim. Even if the original underlying complaint referred to a plan to “misrepresent information,” this did not trigger coverage without a specific allegation of publication. However, the court found that Travelers did have a duty to defend Hillerich against the first amended complaint as that pleading included a potential disparagement claim against another defendant and alleged that Hillerich was a conspirator. The court held that coverage was triggered because the claim of conspiracy would hold Hillerich liable for the acts of the other defendants.

With regards to indemnification, the court cited to an exchange between the underlying court and Baum’s counsel denying a motion for judgment as a matter of law in which the underlying court specifically stated that disparagement was not a part of Baum’s claim for tortious interference. The court found those comments were persuasive evidence that the underlying settlement did not include allegations of disparagement and Travelers was entitled to reimbursement for its contributions to the settlement.


Holloway Sportswear, Inc. (“Holloway”) manufactures and distributes sportswear. In 1994, Holloway retained Robert Zeeman (“Zeeman”) as its buying agent in Asia. In 1996, Zeeman began working for one of Holloway’s direct competitors. Upon learning of this relationship, Holloway stopped payment on a commission check and withheld other sums allegedly owed to
Zeeman. Zeeman filed suit against Holloway, including a cause of action titled “tortious interference with economic advantage.” Zeeman alleged that Holloway “interfered with the economic relationship between [Zeeman] and its manufacturing sources by unfairly and improperly contacting said customers, sources and contacts directly.” Holloway tendered the claim to Transportation Insurance Company (“Transportation”) which denied coverage. Holloway then filed a declaratory judgment action against Transportation.

Transportation filed a motion for summary judgment on its coverage obligations. Holloway argued that Zeeman’s claim for tortious interference with economic advantage could possibly be based on defamation or disparagement and thereby the claim triggered “personal and advertising injury” coverage. The Holloway court rejected this argument stating that because a tortious interference claim can be based on disparagement or defamation, it does not mean that the claim does allege “personal or advertising injury”. Pertinently, Holloway could point to no allegation in the underlying complaint which arguably alleged any disparaging or defaming statement. Accordingly, the court granted Transportation summary judgment and held that the duty to defend was not triggered.


In March of 2001, the majority of the members of the management board of Greektown Casino, LLC (“Greektown”) changed their agent of record for their life, medical and dental plans to Dennis Lanes & Associates (“Lane”). In May of 2001, the Sault Sainte Marie Tribe, partial owners of Greektown, agreed to retain Lane as its insurance agent for ten years in exchange for a loan. On November 3, 2006, Lane filed a lawsuit against Greektown and Kewadin Greektown Casino, LLC (“Kewadin”), the majority owner of Greektown. The Lawsuit alleged tortious interference with a contract against Kewadin and breach of contract against Greektown. Greektown and Kewadin tendered the lawsuit to Zurich American Insurance Company (“Zurich”), who had issued an insurance policy containing “personal and advertising injury” coverage. Zurich denied coverage contending that the underlying lawsuit did not allege “personal and advertising injury.”

Opposing a motion for summary judgment, Greektown and Kewadin argued that the underlying lawsuit did allege “personal and advertising injury” because the tortious interference claim against Kewadin implied that defamatory statements were made against Lane. The Greektown court reviewed cases from the Sixth Circuit and concluded that the mere recitation of terms such as “disparagement” or “misrepresentation” is not sufficient to bring the claim within the insuring agreement and that damages must be alleged because of the alleged disparagement. Accordingly, the court granted summary judgment to Zurich holding that Lane’s allegations in the underlying lawsuit did not qualify as “personal and advertising injury” because the underlying lawsuit did not seek recovery for defamation. Moreover, the court stated that an insured’s assertion that an individual may have “possibly” used defamatory language in connection with a tortious interference claim is not enough to trigger coverage.
Since 1998, Parkham Industrial Distributors, Inc. dba Onsite Waste Management Corp. and Immediate Response Spill Technologies (collectively “IRST”) had developed and sold products to remediate, contain and prevent oil spills and other hazardous hydrocarbon-based materials. In April 2005, Solidification Products, International, Inc. (“SPI”) filed suit against IRST alleging patent infringement, negligent misrepresentation, fraudulent misrepresentation and unfair trade practices. IRST tendered the claim to The Cincinnati Insurance Company (“CIC”) which denied coverage.

On cross-motions for summary judgment, IRST contended that the underlying lawsuits contained allegations that “potentially possibly or might” come within the coverage of the CIC policy. Specifically, IRST contended that CIC had a duty to defend because the complaint contained allegations which could constitute disparagement and come within “personal and advertising injury”. The Parkham court found that the complaint did not allege that IRST had made any comparisons or disparaging statements about SPI’s goods or services. The complaint did allege that IRST stated that it had proprietary rights in SPI’s technology (which SPI claims it did not grant). However, that could not constitute disparagement because nothing negative was said about the services. In addition, the court found that the policy contained an exclusion for advertising injury arising out of patent infringement that precluded coverage even if the statements were considered “personal or advertising injury”. Accordingly, the court granted CIC summary judgment.

In 1998, National Union Fire Insurance Company of Pittsburgh, PA (“National Union”) agreed to defend Alticor, Inc. (“Alticor”) against an underlying lawsuit pursuant to policy terms providing a defense for “personal injury” liability and coverage of “oral or written publication of material that slanders or libels a person or organization or disparages a person’s or organization’s goods, products or services. . . .” The lawsuit was referred to arbitration. At the arbitration, the arbitrator asked plaintiffs to clarify their pleadings by providing a list of the causes of action that remained in the case. The list included fraud, breach of contract, tortious interference with current and prospective business, implied breach of contract and express and implied warranties, violation of Texas’ Deceptive Trade Practices Act, breach of fiduciary duty, conspiracy and anti-trust violations. The list did not include defamation or disparagement. After receipt of the list, National Union withdrew coverage. Alticor then filed a declaratory relief action against National Union.

Examining both parties’ motions for summary judgment, the Alticor II court found “personal and advertising” injury coverage continued to exist even after the abandonment of the defamation and disparagement theories. First, the court found that abandonment of the claims did not affect the factual allegations of the claim which included the specific allegation that Alticor had made “defamatory and damaging statements.” Second, the underlying lawsuit still included claims for tortious interference and violation of the Texas Deceptive Trade Practices Act which were based
on the defamatory and disparaging statements. The court reviewed precedent and reasoned that
the duty to defend is triggered by claims of tortious interference when the underlying lawsuit
alleges the insured made statements depicting plaintiff’s goods or services as inferior.


In *Alticor I*, Nitro Distributing, Inc. (“Nitro”), a tool company in Missouri, filed suit against
Alticor, Inc. (“Alticor”) alleging claims for anti-trust violations, tortious interference with
prospective business relations and civil conspiracy. The complaint alleged that Alticor
“undermined and/or disparaged” Nitro and made “misrepresentations” regarding “the tool and
function” business. Alticor tendered the claim to National Union Fire Insurance Company of
Pittsburgh, PA (“National Union”) which denied coverage and then filed a declaratory judgment
action.

On cross-motions for summary judgment, the court held that even though the complaint
mentioned “disparagement” and “misrepresentation” it did so only in the context of the anti-trust
claims and there were no factual allegations from which one could conclude that the underlying
lawsuit contemplated a claim for slander, libel or product disparagement. The court concluded:
“The many pages and paragraphs of the complaint say much about anti-trust allegations. They
say nothing about product disparagement because no claim for product disparagement has been
alleged.” Accordingly, the court granted National Union’s motion for summary judgment.

*The Cincinnati Ins. Co. v. Interlochen Center For The Arts, 2003 U.S. Dist. LEXIS 13288
(W.D. Mich. 2003).*

On September 10, 2001, Interlochen Center for the Arts (“Insured”) brought suit against
Interlochen International Camp, Inc. dba Interlochen Center for Experiential Learning
(“Interlochen”) alleging claims for trademark infringement. Interlochen filed a counterclaim
against the Insured alleging claims for trademark cancellation, unfair competition, violation of
New Hampshire’s Deceptive Trade Practices Act, dilution of trademark under New Hampshire
common law, and common law unfair competition. The Insured tendered the claim to The
Cincinnati Insurance Company (“CIC”). CIC accepted coverage under a reservation of rights
and then filed a declaratory judgment action against the Insured seeking reimbursement.

The court found that the core of the counterclaim was about trademark or trade dress
infringement and therefore outside the scope of coverage. The Insured conceded that some of
the claims did arise out of trademark and trade dress infringement claims but argued the
remaining claims were covered. The court disagreed finding that these claims too arose out of
trade dress and trademark infringement. Accordingly, the court granted summary judgment for
CIC and ordered the Insured to reimburse CIC.
SEVENTH CIRCUIT


The underlying Plaintiff (Fiskars) alleged that the Insured made misrepresentations about the plaintiffs’ stainless steel paper cutting products by claiming in advertising that that its own products were superior because they were purportedly bonded with titanium. The Insured never referred to the underlying plaintiff by name; its only reference was to “stainless steel scissors” to which it compared its own products. Because Acme’s advertisement did not name Fiskars or any of Acme’s other competitors, the district court concluded that Fiskars did not allege an “advertising injury offense” and that St. Paul did not owe Acme a duty to defend. The Seventh Circuit reversed that holding finding that allegations in the underling complaint that the misrepresentations were directed at Fiskars and attempted to deprive it of market share were sufficient to establish that the disparagement was “about” the underlying plaintiff.

_Pro-Link Holdings Corp. v. Federal Ins. Co., 688 F. 3d 828 (7th Cir. 2012)._  

The court found that there was no advertising injury when the only representation made was that the insured made representations that it owned a right to a patent. The court distinguished the _Nvidia_ case (discussed below) where the insured had explicitly told others that the underlying plaintiff had no license or right to sell the product at issue. In _Pro-Link_, the insured did not mention or refer to the underlying plaintiff when it falsely claimed a patent right. The court held that it was “too great a stretch” to find an implicit defamation claim in what was merely an ownership dispute” concerning a patent.

_BASF v. Great Am. Ins. Co., 522 F. 3d 813 (7th Cir. 2008)._  

The court held that there was no coverage under an umbrella policy covering liable or slander based on a consumer’s suit alleging that Insured had misrepresented that its drug was the equivalent of a competitor. Because the underlying suit was not brought by a competitor, the claims could not be considered libel or slander because such claims, said the court, require that the false statement be made about the plaintiff. _Id. _at 820.


The court held that when the insured company selling over the counter lidocaine patch said it was “equivalent to” the “leading prescription brand”, such a statement impliedly defamed the underlying plaintiff. Even though the underlying plaintiff was not specifically named, the court found that it would be understood that reference to “leading prescription brand” referred to the underlying plaintiff. The court held that falsely claiming superiority over competitors products is considered disparagement if the product is not in fact superior. The court also stated that a “statement equating one’s competitor’s product with an allegedly inferior one is indistinguishable from, and no less disparaging than, a statement describing one’s own product as ‘superior.’” Thus, the court found that the underlying suit based on Lanham Act claims alleged an advertising injury.
The court analyzed whether any exclusions would apply. The policy contained an Intellectual Property (IP) exclusion for violations of laws . . . concerning unfair competition, unfair trade practices, and other unfair similar practices.” The court acknowledged that the Lanham Act protects against “unfair competition.” However, according to the court, in context, the IP Exclusion did not apply to every claim asserting some sort of unfair competition. Rather, it said it only applied when the claim involved intellectual property rights. This was based on the fact that (i) the text of the exclusion referenced in the “catch-all” provision “any other intellectual property right” and (ii) the heading for the exclusion referenced intellectual property rights (“Exclusions: Claim or Suit Alleging Infringement of Intellectual Property.”) The court held that the catch-all provision clearly indicated that proceeding subsections referenced intellectual property rights.

The court also rejected the notion that the Quality of Good exclusion barred coverage. That exclusion barred coverage “arising out of the failure of goods, products or services to conform with any statement made in your advertisement.” The court rejected the reasoning of Buzz Off that such an exclusion would operate to bar coverage in these circumstances, finding that the comparison did more than make a statement about its own product; the comparison made an affirmative derogatory statement about the underlying plaintiffs’ product.


The court held that (under either California or Illinois law) there was duty to defend under “personal injury” coverage which included injury “arising out of . . . oral or written publication of material that libels or slanders a person.” The Insured had made statements to others that the underlying Plaintiff had no legal right to sell its software products. The Underlying Plaintiff filed suit claiming it had a valid license to sell the products. The court held that under Illinois law, assertions that a company is infringing on the intellectual property rights of another impliedly stated a claim for defamation. According to the court, such assertions impugn the integrity, honesty and business ethics of the seller and thus constitute defamation. The court rejected the contention that the assertions of infringement were merely a form of trade libel. Because the statement involved the seller’s reputation, it did not merely impugn the quality of goods.


The court held that there was a duty to defend under “personal injury” coverage that included injury “arising out of . . . oral or written publication of material that libels or slanders a person.” The insured had made a false statement that it had “absolute ownership interest” in a product. Without much discussion, the court held that because such statements created confusion in the marketplace as to the ownership interest that was alleged to have actually have been held by the underlying plaintiff, the statements constituted disparagement.

The court rejected the insurers’ argument that coverage was barred by the exclusion for “willful violation of a penal statute.” While the complaint did implicate the Illinois Consumer Fraud Act and the Trade Secrets Act, there was also potential coverage under the common law defamation claims and those counts were not subject to the exclusion thus requiring a duty to defend.

The Insured claimed coverage under advertising injury coverage when it was sued by the underlying plaintiff based in part on statements made by the insured in its advertising that it had a “patent pending” in a product for which the underlying plaintiff claimed it owned. The underlying plaintiff claimed that the insured’s “patent pending” assertion placed a “cloud on ownership” and created an injury in terms of a “loss of the clearly understood title” to the product. The insured argued that these allegations fell within the advertising injury coverage of its policy.

The court disagreed. It found that “patent pending” indicated no legal right and thus could not have said to have disparaged the underlying plaintiff’s product, even by implication. The court also noted that the underlying plaintiff was not referred to either directly or indirectly, also indicating that there was no disparagement made against that plaintiff. However, the court did state in *dicta* that if the insured had represented that it actually owned a patent the result could have been different. Such a representation, said the court, would have been an implied disparagement since it would indicate that the underlying plaintiff’s products were infringing the one and only valid patent on the product.

EIGHTH CIRCUIT


Robinson sold odor eliminating camouflage products and was sued by consumers for false advertising under California’s consumer protection statutes. Robinson sought coverage for the resulting settlement costs under its Westfield CGL policies. Although the relevant insuring agreement provided coverage for “personal and advertising injury,” the district court granted Westfield’s motion for summary judgment that the policy did not cover the underlying lawsuits based on policy exclusions and particularly held that the disparagement claims were not covered because they were brought by consumers rather than competitors. The Eighth Circuit affirmed the district court’s ruling.


Pennfield’s competitor, Alpharma, sued Pennfield for alleged false advertising and promotion of one of its products as approved for certain uses by the FDA. Alpharma contended Pennfield’s representations were false because Alpharma was the only entity with FDA approval for multiple uses. The complaint alleged, among other claims, violations of the Lanham Act and Nebraska Uniform Deceptive Trade Practices Act. Pennfield sought coverage under its American Feed CGL policies’ “advertising injury” provisions. The court found the complaint alleged implicit disparagement of Alpharma’s products and therefore, fell within the “advertising injury” policy provisions sufficient to trigger the insurer’s duty to defend.

Tria, a seller of laser-hair removal device, sued a competitor for false advertising. The competitor counterclaimed against Tria for false advertising and trademark infringement. Tria sought coverage from its insurers, National Fire, under a policy providing coverage through January 1, 2010, and a subsequent Travelers policy. Both policies provided coverage for disparagement as part of coverage for “advertising injury.” The court found that Tria’s claims that its product was “the first and only” laser hair removal device cleared by the FDA for home use, constituted implied disparagement of the competitor’s product, which initially triggered coverage. However, the court also found that Tria could not show that the superiority claims occurred during the National Fire policy period. Under the Traveler’s policy, the court concluded the insurer had no duty to defend based on the Intellectual Property Exclusion that listed certain enumerated intellectual property claims and “any other ‘advertising injury’ alleged in any claim or ‘suit’ that also alleges any such infringement or violation.”


The Ninth Circuit affirmed the grant of summary judgment to insured, holding that the insurer breached its duty to defend Taylor against allegations of trade libel, where the original complaint alleged that Taylor’s showroom salesmen made statements to customers falsely implying that the competitor’s high-end wicker chairs were of poor quality. Because the original complaint did not expressly allege trade libel, the insurer had refused to defend. The competitor amended the complaint to include an express cause of action for trade libel, in addition to trade dress infringement. The insurer stepped in to defend the amended allegations. After settling with the competitor, the insured sued the insurer for bad faith based on the failure to defend from the inception of the action. Citing Charlotte Russe (discussed below), the Ninth Circuit held that the allegations of the original complaint “made it conceivable that Rosequist could state a claim for trade libel.”


The California appeals court reversed summary judgment granted to insurer and found that allegations by a competitor that Charlotte Russe disparaged the competitor’s goods by offering competitor’s premium brand products at deep discounts led potential purchasers to believe the competitor’s good were not “premium.” On that basis, the court concluded that there was a potential for coverage under Charlotte Russe’s policies personal injury coverage and therefore a duty to defend the Charlotte Russe parties in the underlying litigation.


Sigma sued E.piphany alleging that E.piphany falsely advertised certain software products as “all Java” and “fully J2EE” which suggested that its competitors’ products did not offer “all Java” or “fully J2EE” software when, in fact, they did. E.piphany sued its insurer, seeking a declaration
that the insurer had a duty to defend. The court held that the disparagement allegations in the Sigma complaint were potentially covered and therefore triggered the insurer’s duty to defend.

**TENTH CIRCUIT**


In a decision applying Utah law, the Tenth Circuit affirmed the district court’s grant of summary judgment in favor of the insurer. In the underlying lawsuit, SCO Group sued Novell alleging Novell made false and misleading statements about ownership of UNIX copyrights. SCO also alleged that Novell’s misrepresentations about the copyright ownership slandered SCO’s title and rights to its UNIX copyrights and damaged SCO’s reputation with its customers. The parties agreed the insurer had no duty to defend SCO’s slander of title claim because defense of slander of title claims was expressly excluded under the policy. However, Novell maintained that the facts alleged implicitly asserted a claim for defamation, which was covered under the policy. The court specifically distinguished the defamation claims as alleged from “an implied claim of product disparagement” and held it was “too great a stretch” to find an implied defamation claim in what it determined was “merely an ownership dispute concerning copyrights.”

**ELEVENTH CIRCUIT**


The underlying complaint alleged that the Insured made statements in its advertising that the insured’s product, a battery charger, was superior to the “leading brand.” The insurer argued that there was no trigger for coverage for “advertising injury” because the underlying plaintiff was not mentioned by name in the Insured’s ads. The court rejected that argument, holding that the policy was “ambiguous as to whether the insured must mention a plaintiff’s name in an advertisement in order to give rise to a duty to defend a false advertising claim.” The court held further that such an ambiguity had to be resolved in favor of the insured. Thus, the court held that coverage was triggered. It certified a question to the Florida Supreme Court about whether a “knowing and intentional” exclusion would apply; the lawsuit was resolved prior to a decision from the Florida Supreme Court.