Coverage For "Disparagement": A Powerful Tool For Triggering The Duty To Defend In Business Disputes

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By the time a business dispute has evolved into litigation, the relationship between the parties has often become acrimonious. In addition to a claim for breach of contract, interference with economic relations or unfair competition, the plaintiff may also allege that the defendant made false or disparaging statements to third parties—customers, competitors, financiers—that harmed the reputation or business of the plaintiff. The existence of even a single allegation of such disparagement within a complaint is often sufficient to trigger a duty to defend by the insurer of the defendant business. If your business is on the receiving end of a lawsuit, it is critical to examine the lawsuit for such allegations of disparagement and to consider tendering the lawsuit to your general liability insurer to obtain a defense if such allegations exist.

A recent California Supreme Court decision confirms that an insurance company will have a duty to defend when those requirements are met. Virtually every business purchases commercial general liability (CGL) insurance as the foundation of its liability insurance program. The current version of the typical form used by insurers provides coverage for "personal and advertising injury" which is defined to include injury "arising out of . . . [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." While the typical policy defines "personal and advertising injury," it does not define the term "disparages" used within that coverage.

Given the lack of a definition, many courts will look to the common meaning of the word (i.e., the dictionary meaning). Merriam-Webster defines "disparage" as follows: "1: to lower in rank or reputation: degrade; 2: to depreciate by indirect means (as invidious comparison): speak slightingly about." Thus, a broad array of allegations may fit within this coverage for disparagement. Regardless of the names or nature of the claims in a lawsuit, the existence of allegations that the defendant made a disparaging statement can trigger an insurer's duty defend. The case of *Barnett v. Fireman's Fund Ins.* Co., 90 Cal. App. 4th 500 (2001), decided by the California Court of Appeal, illustrates this principle.

In *Barnett*, the plaintiff in the underlying suit pleaded causes of action for breach of fiduciary duty, intentional interference with contractual relations, breach of the implied covenant of good faith and fair dealing and fraud against Barnett, who was insured under a CGL policy issued by Fireman's Fund (FF). The complaint contained no cause of action for "disparagement," "libel" or "slander," but did contain allegations that Barnett had made false

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statements about the plaintiffs' methods of doing business. In particular, the plaintiff, MedPartners, alleged that Barnett had defamed and disparaged MedPartners falsely telling third parties that MedParnters' business practices were flawed and MedPartners was going out of business. Barnett contended that those allegations triggered coverage under FF's CGL policy and that FF had a duty to defend. FF denied coverage asserting that "the insurer has no obligation to defend unless the underlying complaint alleges all of the elements necessary to establish the enumerated defense" and that "the underlying action did not allege all of the elements necessary to state a cause of action for defamation, and therefore it had no duty to defend the underlying action." Id. The Court of Appeal rejected this argument and held that allegations of disparagement within the complaint triggered the duty to defend regardless of the labels the plaintiff used on the causes of action.

Recently, California Supreme Court, in *Hartford Casualty Insurance Company v. Swift Distribution, Inc.*, 59 Cal. 4th 277 (2014), analyzed the allegations of disparagement which are necessary in order to trigger the duty to defend under personal and advertising coverage. The Court concluded that allegations of "disparagement" for purposes of commercial liability coverage "(1) must specifically refer to the plaintiff's product or business, and (2) must clearly derogate that product or business." *Id.* at 291. In clarifying the test for "disparagement," the California Supreme Court reaffirmed the breadth of coverage for "disparagement" under the typical personal and advertising injury coverage in CGL policies.

So, if your business is sued and the plaintiff alleges that it was disparaged by you or your company in the course of the dispute, don't get mad. Instead, grab your CGL policy and consider tendering the complaint to your insurer with the goal of obtaining a defense.