

COVERED OR NOT: HAS HARTFORD V. SWIFT OPENED A FASTER LANE FOR INTELLECTUAL PROPERTY AND INSURANCE MEDIATION?

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The California Supreme Court recently issued its long-awaited coverage decision in *Hartford Casualty Ins. Co. v. Swift Distribution, Inc.*, 59 Cal. 4th 277 (2014). The Court, applying California state law, upheld the trial court's granting of Hartford Casualty Insurance Company's (Hartford) motion for summary judgment, ruling it had no duty to defend or indemnify a claim tendered by its insured under the advertising injury provision of a general liability policy. In so doing, the California Supreme Court resolved a split of authority in the California appellate courts regarding the specificity of allegations required to trigger an insurer's duty to defend or indemnify claims for advertising injuries. The commercial general liability policy at issue included a provision for coverage of advertising injury.

The California Supreme Court took the case "to clarify the principles governing the scope of a commercial general liability insurer's *duty to defend* [emphasis added] an insured against a claim alleging disparagement." Its holding "that a claim of disparagement requires a plaintiff to show a false or misleading statement that (1) specifically refers to the plaintiff's product or business and (2) clearly derogates that product or business" by "express mention or by clear implication" clarifies the law on what is necessary to establish a claim of implied disparagement but fails to provide other than a passing mention of the duty to defend. Rather, having defined what allegations had to be stated to state a covered claim for implied disparagement under "advertising injury," and having found those allegations missing, the Court jumped to the conclusion that there was no duty to defend.

How is this holding likely to impact the settlement of the underlying cases, especially those that usually arise as infringement of intellectual property rights? The answer is that if we take the Court's language at

face value, parties will be more willing to address the real meat of the case, the infringement issues. This is because unless the plaintiff has clearly pled an advertisement that disparages the defendant's product, the implied disparagement claim will fall by the wayside inasmuch as it is no longer a basis for insurance coverage.

First, let's take a quick look at the underlying case to set this in perspective. Swift, Hartford's insured, doing business as Ultimate Distribution (Ultimate), was sued by Gary-Michael Dahl (Dahl), the manufacturer of the Multi-Cart. Ultimate manufactured, marketed and sold the Ulti-Cart, which looked and operated a lot like the Multi-Cart, a collapsible multi-use cart marketed to help musicians load and transport their equipment. The Dahl suit, which was at heart a patent and trademark infringement case, also alleged false designation of origin and damage to business, reputation, and goodwill. Swift's advertising of its product promoted the positive aspects of its own product, using words such as "innovative" and "superior," and did not mention Dahl's product, although the similarities between the products and the similarity in name could arguably have led the customer to believe that the advertising was claiming that Ultimate's product was being touted as superior to Dahl's Multi-Cart.

Swift tendered the Dahl action to its commercial general liability (CGL) carrier, Hartford, asserting that Dahl's claims against it could be interpreted as constituting disparagement by implication, thereby triggering a duty to defend under the Hartford policy. Hartford denied coverage on the grounds that the suit did not allege that Ultimate had disparaged Dahl or the Multi-Cart, and filed a complaint for declaratory relief.

Implied disparagement claims are often added to such intellectual property cases because the heart of

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the case, trademark and patent infringement, was not covered by the existing CGL policy, whereas implied disparagement had found its way into the “advertising injury” aspect of the CGL’s coverage. Implied disparagement is one of those torts that previously had a great deal of elasticity. Arguably, any claim in my product description that made my product sound better than your product (nearly identical and allegedly infringing) “disparaged” your product by comparison. As Justice Baxter asked Ultimate’s counsel during oral argument before the Court, “If I say that my wife is the best wife in the world, does that disparage Justice Chin’s wife?”

As long as implied disparagement claims were easily pled and arguably covered, they became key to coverage, requiring a plaintiff to keep those claims alive until the end of the case. In cases where the focus properly should be on infringement of intellectual property rights, and where focus on such rights in the context of mediation could lead to settlement or narrowing of issues, the presence of an implied disparagement claim interfered with settlement discussions. One or both parties may have held the belief that the implied disparagement claim was in fact groundless, but as long as it was the only hope for insurance coverage, the claim had to remain in the case. If, following *Swift*, implied disparagement is no longer a key to insurance coverage, defense counsel (and plaintiffs’ counsel to the extent it is relying on insurance coverage) are more likely to try to resolve such claims earlier.

Unfortunately, while the Court did a fine job of clarifying the elements of a cause of action for disparagement and implied disparagement (a statement must specifically refer to the plaintiff’s product or business by clear implication or expressly mention or derogate that product or business), that normally would not be the end of the examination as to whether a duty to defend existed. Prior to *Swift*, it was well accepted that insurers must defend any lawsuit in which there is a *possibility* of coverage, even if the complaint itself is silent, unless their own investigation conclusively determines that there is in fact no possibility of coverage (*Montrose Chemical Corporation v. Canadian Universal Ins. Co.* (1993) 6 Cal. 4th 287). The Court in *Swift* seems to be saying that unless the elements are specifically pled, no duty to defend exists, even if there is a possibility that there were elements that might give rise to coverage.

Be that as it may, for the present at least, the value of implied disparagement claims as a vehicle for potentially obtaining coverage in intellectual property infringement cases has decreased. That should clear out the underbrush that has previously delayed the mediation and resolution of intellectual property dis-

putes, as well as insurance coverage disputes arising from those cases. ■

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