LAW JOURNAL NEWSLETTERS

The Corporate Counselor®

Volume 20, Number 10 • March 2006

ALM

Libeling Lawnmowers?

The Surprising Tort of Commercial Disparagement as Applied to 'Hard' Assets

By Brian H. Corcoran

Everybody owns some type of tangible physical asset. Something made of metal for instance, such as an automobile. Imagine that you don't own just any old car, but a restored Shelby Cobra, a true American classic. You obtained the car "pre-owned," at a bargain price, and then obliterated any savings made on the purchase by pouring significant dollars into the car's restoration. You love this car and derive great pleasure from it, having handpicked the model based on your extensive knowledge of cars and desire for the absolute best. You routinely show the car in vintage automobile shows and even occasionally race it, although you mainly use the car for pleasure.

Now imagine that you are informed that the automobile's original manufacturer, through its officers, has made public statements insinuating that the specific car you are driving is "no good" and that it should be junked because it was once in an accident and is, therefore, dangerous. You know this to be false; not only do you regularly drive the vehicle, but you had it restored perfectly and it is licensed as a vintage car. You are now concerned that the car's resale value has been destroyed, since the market for such cars is notably small, and "people talk." The comments that the manufacturer made about your car not only rankle you, they may have injured you financially as well.

Can you sue the car's manufacturer? Is it possible to defame an inanimate object such as a plane, or a house, or a painting? Surprisingly, the answer to this question is "yes." This very sort of claim, which is generically captured by the designation "commercial disparagement," has recently been pursued successfully at trial involving "hard" assets similar to a vintage automobile, such as a private aircraft. The tort of commercial disparagement falls generally within the penumbra of libel and slander-related claims, although it is overshadowed by the more commonly recognized version of the tort relating to personal claims (like those celebrities frequently bring against supermarket tabloids). Yet not only are claims based upon the libeling of an object a legitimate cause of action, they can result in verdicts for plaintiffs. A better understanding of this little-known tort is necessary if a company is to evade the risks it poses.

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The *Restatement of Torts* on Commercial Disparagement

Section 624 of the *Restatement of Torts* offers an outline that many jurisdictions have embraced as determinative on the topic of injurious falsehood. It states that liability arises for the: a) publication of a false statement disparaging another's property rights in land, chattels or intangible things; which b) the publisher should recognize as likely to result in pecuniary harm to the other through the conduct of third persons in respect to the other's interests in the property. Any kind of legally protected interest in land, chattels, or intangible things may be disparaged, so long as the interest is transferable and therefore salable or otherwise capable of profitable disposal. The form of publication may be as a statement of fact; a statement in the form of an opinion is not actionable as defamation unless it is held to imply the existence of undisclosed defamatory facts that justify the derogatory opinion. Finally, the statement must be published under such circumstances as would lead a reasonable person to expect that the third person who has acted or refrained from acting in reliance upon the statement would do so or that its publication might deter some third person from buying or leasing the property that is disparaged.

Having developed from the torts of libel and slander, and even taking one of its various names there from, the tort of commercial disparagement suffers from confusion with traditional defamation torts even though higher burdens of proof set it apart. Each type of tort requires a similar kind of proof with respect to the actionable statements, which must refer to the plaintiff or his or her goods, must have been communicated to a third party, and must be of a defamatory or disparaging nature. But plaintiffs in disparagement actions lack the presumption of damages characterizing certain varieties of personal defamation claims.

In disparagement cases, a plaintiff ordinarily must demonstrate "special damages," meaning specific pecuniary loss and/or lost sales flowing from the disparaging statements. One exception to this requirement is the demonstration of "loss of market." In the past, courts required plaintiffs to show specific lost sales. While there is a trend toward reducing the stringency of this requirement, many jurisdictions retain the requirement of specific lost sales and enforce it accordingly when evaluating a disparagement claim.

Another notable difference between the two torts is whether the pleader must show fault. The plaintiff in an injurious falsehood action also must show that the defendant recognized or should have recognized the statement would cause harm, although no similar proof of fault is required for a personal defamation claim to succeed (except where the "malice" requirement for public figure plaintiffs comes into play).

COMMERCIAL DISPARAGEMENT IN CASE LAW

Pro Golf Manufacturing, Inc. v. Tribune Review Newspaper Co.

Recent case law underscores the many challenges that face a claimant who believes he or she may have a viable commercial disparagement claim. The threshold difficulty of even categorizing what commercial disparagement is was at issue in a 2002 Pennsylvania Supreme Court case. Strange, wholly inaccurate statements published in newspaper articles were the subject of this lawsuit. Specifically, in 1997, the Tribune Review News-paper Company published an article stating that several historic buildings, including the one containing Pro Golf Manufacturing, Inc., a golf equipment business, were set for demolition. A few months later, the newspaper published another article, stating that the building containing Pro Golf had in fact been demolished. None of it was true; the building had not even been *scheduled* for demolition.

The question raised in *Pro Golf* that related to commercial disparagement involved the applicable limitations period to bring such a claim. Pennsylvania law provides a 1-year statute of limitations period for the defamation cause of action, while a 2-year statute of limitations applies to a "catch-all" tort category defined vaguely to include any action to recover damages for injury to person or property which is founded on negligent, intentional, or otherwise tortious conduct. In arguing that these false publications caused a pecuniary loss and loss of customers, Pro Golf asserted that its disparagement claim fit into the catch-all category, and thus merited the application of the longer limitations period. The defendant (which had succeeded in getting the claim dismissed at the trial court level, only to be reversed by an intermediate court) appealed to the highest state court, arguing that the 1-year period ought to apply because commercial disparagement claims are sometimes called "trade libel" or "slander of title," and therefore are subject to the 1-year period. Pro Golf insisted that applicable Pennsylvania precedent treated the disparagement claim as separate and distinct from defamation. Delineating the differences in proof and inquiring into the legislative intent behind the statutes at issue, Pro Golf urged that because the plain language of the 1-year statute was clear and did not mention commercial disparagement or injurious falsehood, the catch-all 2-year statute should apply instead.

The Pennsylvania Superior Court disagreed. Accepting the appellant's characterization of the tort of commercial disparagement as a variety of libel or slander, and offering a nod to its argument that the tort has a history of analogy to libel and slander, the court concluded that the 1-year statutory period did in fact apply. Pro Golf's labeling of the action as commercial disparagement did not remove the cause of action from the 1-year statute, the court said. Nor could the court find any legislative purpose in excluding commercial disparagement from that category.

The *Pro Golf* decision is interesting, particularly because it seems to ignore the plaintiff's showing of the apparent and significant differences between the two types of claims. It may be that the court was dogged by a suspicion that Pro Golf was merely trying to circumvent a 1-year limitations period by using a different vocabulary. However, this does not alter the fact that, whatever the similarities, the two torts are ultimately distinct — with different burdens and requirements. As an infrequently used, and infrequently understood, cause of action, the tort of commercial disparagement carries at its edges the ability to injure both its wielder and its target, because as difficult as it is to predict when the cause of action will succeed, it might be even more difficult to see a lawsuit using it coming.

Salon Slander: Refuted Authenticity of Artwork

Another case, litigated in a New York federal forum, illuminates the difficulties of proving special damages, the element that perhaps most distinguishes the tort of commercial disparagement from a personal claim for defamation. *Boulé v. Hutton* involved a retired dentist living in Paris with his wife, an art historian. The Boulés became art collectors with a particular attraction to Russian Constructivism pieces. In the early 1980s, they acquired, for a total of 1.5 million French Francs, 176 pieces of art by the Russian Suprematist artist and member of the 1920s group, "Affirmers of the New Art," Lazar Khidekel. Certain restrictions on the acquisition and exportation of Russian avant-garde art prevented them from learning the origin of the pieces, and their authenticity, accordingly, had not been confirmed.

Years later, Jean-Claude Marcadé, a French art historian and researcher, brought Mark Khidekel, the artist's son, to the couple's home in Paris. He expressed no skepticism about the authenticity of the pieces, and later agreed, for a fee, to sign certificates of authenticity for his father's works. The certificates included the statement: "I, Mark Khidekel, having examined the artwork shown to me … hereby confirm that it is the work of my father, Lazar Khidekel, and that it can be identified as a study." Four years later, Mr. Khidekel, along with his wife and the owner of a gallery, published in various forms, statements repudiating the authenticity of the entire collection. They sent "repudiation letters" to at least 25 galleries around the world and a separate declaration appeared in a 13-page *ARTnews* article. The couple was understandably concerned that such statements may have dramatically reduced the value of the entire Khidekel collection and damaged their reputation as art collectors. In the limited market for this particular type of art, it would be difficult not to have heard about the repudiation of the collection's authenticity.

Following this series of events, the collectors filed suit in the U.S. District Court in the Southern District of New York, alleging that the statements had disparaged their collected works in violation of the Lanham Act and state tort laws. In 2001, the trial court held that the Boulés had failed to prove by a preponderance of the evidence their claim for product disparagement because they were unable to demonstrate that the statements were false. Such proof, the court observed, would entail a demonstration that the works indeed were the creations of Lazar Khidekel; because the evidence was in equipoise, the couple had not sustained their burden of proving the essential element of falsity by a preponderance of the evidence. On appeal, the Second Circuit Court of Appeals remanded the case and ordered the trial court to determine, based on the proof presented, whether the statements regarding the authenticity of the paintings were false.

On remand, the Southern District Court of New York held that the plaintiffs had in fact succeeded in two claims of unfair competition by disparagement, despite the admitted difficulty of measuring the extent of the damage from the defamatory statements. Although the court said that damage to the reputation of the entire Boulé collection was speculative, it was clear that the statements had destroyed the value of the 16 drawings for which Mark Khidekel had provided certificates of authenticity and as such, decided to calculate damages for those drawings only. While the Boulés did not offer what the court considered credible evidence of the market value of their Khidekel collection, they did offer evidence of the amount they had paid for their collection. They were, accordingly, awarded damages of $18,288.87, the cost of the 16 drawings for which certificates of authenticity were provided — about 9% of the price they had paid for their entire collection.

It is not readily evident that this formulation of damages accurately captures the extent of the plaintiffs' harm under the circumstances. It is true that the false statements occurred only *after* the Boulés' purchase of the paintings. Thus, the damage they suffered grew out of the difference between the amount they *could* have charged for the paintings with certificates of authenticity and the amount they could have charged *without* the certificates, along with the added negative impact of the denials of the works' authenticity. Such harm does not relate to the price the Boulés *paid* for the pieces originally — pieces that were obtained without any such certificates of authenticity. This strained calculation of damages demonstrates a fundamental difficulty of prosecuting an injurious falsehood/commercial disparagement claim: quantifying damages in the face of ambiguous circumstances involving hard-to-quantify questions of "value."

The Barron Aircraft *Case*

A recent lawsuit in Delaware state court, *Barron Aircraft LLC v. Dassault Aviation, et al,* demonstrates how all of the above factors can come into play.

In *Barron*, a European individual purchased a Dassault Falcon 200 — a business jet manufactured by Dassault's French parent. This particular Falcon 200 had been involved in an accident in 1994, in which the plane was partially submerged in brackish lake water for 39 hours before being removed. Several years later, an aircraft restoration company restored the Aircraft to "like new" condition. The restoration was successful, and the aircraft was issued a "Certificate of Airworthiness" by the FAA — an official designation certifying that the aircraft could be safely flown and was otherwise free of any and all structural problems that could have made it unsafe to operate.

Despite the aircraft's restoration, Dassault felt that the plane should never have been resuscitated — both because of the accident it had suffered, as well as other more general concerns about the restoration of its aircraft without express Dassault oversight. This attitude toward the aircraft in question was expressed by Dassault's general counsel and vice president in a 2001 presentation to a large audience of aviation professionals at a conference hosted by the Flight Safety Foundation. In a speech entitled "Re-Birth of a Wreck," Dassault singled out the incident of the aircraft's accident and subsequent restoration, explicitly stating, among other things, that Dassault was concerned about corrosion in the structure of the aircraft and the rivets (although the restoration process had conclusively determined there was absolutely no corrosion). The speech was covered in the July 2001 issue of a well-respected aviation magazine with worldwide circulation, *Aviation International News,* in an article entitled "Buyer Beware."

The owner of the aircraft thereafter filed suit against Dassault in Delaware state court, and the case was tried in October 2003. After a 3-week trial, which included expert testimony from both parties on the effect of Dassault's public statements on the market value of the aircraft, the jury was unable to reach a unanimous verdict and the judge declared a mistrial. However, an exit interview of the jury panel revealed that *10 out of 12 jurors* had agreed that Barron should prevail on its injurious falsehood claim against Dassault because of the false and reckless statements by Dassault's general counsel, which had in fact monetarily harmed the plaintiff.

The case was ultimately settled as the parties were preparing for the second trial. Instrumental in effecting this settlement, however, was the plaintiff's choice to add a second expert to its case. Barron propounded an additional expert report from an economist with an expertise in market research protocols and analyses. That expert designed and conducted a broad survey of business jet professionals to assess the impact of Dassault's statements in the business jet market, and concluded that the negative statements had effectively foreclosed the "vast majority" of the market for the resale of the Aircraft. Thus, the plaintiff provided evidence of "loss of market," even if it had been unable initially to convince all jurors that the aircraft was in fact worth less due to the negative comments of its manufacturer.

Conclusion

The tort of commercial disparagement exists as a little-known danger to commentators and competitors, nuanced in its complexities and mysterious in its application. For an asset owner that has been on the receiving end of negative comments, the claim provides a legitimate vehicle for redress worth considering. A toaster or lawnmower's reputation can be as worthy of protection, in the appropriate context, as the reputation of a movie star — and the manufacturers of such assets should take heed when they make comments about the items they produce.