

Filed 10/29/12

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

HARTFORD CASUALTY INSURANCE
COMPANY,

Plaintiff and Respondent,

v.

SWIFT DISTRIBUTION, INC. et al.,

Defendants and Appellants.

B234234

(Los Angeles County
Super. Ct. No. BC442537)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Debre K. Weintraub, Judge. Affirmed.

Little Reid & Karzai, Eric R. Little, M. Catherine Reid and Najwa Tarzi Karzai for
Defendant and Appellant.

Tressler, David Simantob and Elizabeth L. Musser for Plaintiff and Respondent.

INTRODUCTION

The issue in this appeal is whether the “advertising injury” provision of an insurance policy required the insurer to provide a defense for its insured against a claim that the insured company’s advertisements disparaged another company’s products. In this case, Company A advertised its product, which resembled and had a name similar to the product sold by Company B. Company A’s advertisement, however, did not identify Company B’s product expressly and did not disparage Company B’s product. When Company B sued, Company A made a demand on its insurer to defend against that suit under an insurance policy provision that provided coverage for “advertising injury,” defined as injury arising out of publication of material that disparaged a person’s or organization’s goods, products, or services. Because the advertisement did not identify Company B’s product, and contained no matter derogatory to Company B’s title to its property, its quality, or its business, no disparagement occurred. Therefore the insurance policy did not provide a potential for coverage of this claim for damages because of advertising injury and the insurer did not owe the insured a duty to defend.

Specifically, in an underlying action, Gary-Michael Dahl (Dahl), who manufactured and sold the “Multi-Cart,” sued Swift Distribution, Inc., dba Ultimate Support Systems, Inc., Michael Belitz, and Robin Slaton (Ultimate), for patent and trademark infringement, unfair competition, dilution of a famous mark, and misleading advertising arising from Ultimate’s sale of its product, the “Ulti-Cart.” Ultimate tendered defense of Dahl’s action to its insurer, Hartford Casualty Insurance Company (Hartford), which refused to defend it in the *Dahl* action. In a subsequent action for declaratory relief against Ultimate, Hartford sought a declaration that it had no duty to defend or indemnify Ultimate in the *Dahl* action. The trial court granted Hartford’s motion for summary judgment and Ultimate appeals.

We find that Ultimate's advertisements did not expressly refer to Dahl's Multi-Cart and did not "disparage" Dahl's Multi-Cart product or business, and there was no coverage or potential for coverage for "advertising injury" under the Hartford insurance policy. Thus Hartford had no duty to defend Ultimate in the *Dahl* action, and the trial court correctly granted summary judgment for Hartford. We affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

Hartford issued a liability insurance policy to Swift Distribution, Inc. dba Ultimate Support Systems for the period January 29, 2009, to January 29, 2010. The Hartford policy's insuring agreement stated: "We will pay those sums that the insured becomes legally obligated to pay as damages because of . . . 'personal and advertising injury' to which this insurance applies. We will have the right and duty to defend the insured against any 'suit' seeking those damages. However, we will have no duty to defend the insured against any 'suit' seeking damages for . . . 'personal and advertising injury' to which this insurance does not apply."

The policy defined "personal and advertising injury" in several ways. One definition of "personal and advertising injury" was "injury . . . arising out of . . . [o]ral, 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[.]"

On January 26, 2010, Dahl filed an action against Ultimate, *Dahl v. Swift Distribution, Inc.* in U. S. District Court, Central District of California. The *Dahl* complaint alleged that Dahl owned a U.S. patent to a "convertible transport cart," which he had sold as the "Multi-Cart" collapsible cart since 1997. The Multi-Cart can be manipulated into eight configurations, and is used to move music, sound, and video equipment quickly and easily. The U.S. Patent and Trademark Office issued a patent to Dahl for the "Multi-Cart" mark. The *Dahl* complaint alleged that Ultimate impermissibly manufactured, marketed, and sold the "Ulti-Cart," which infringed patents and trademarks for Dahl's Multi-Cart and diluted Dahl's trademark. The complaint attached advertisements for the Ulti-Cart, which do not name the Multi-Cart, Dahl, or any other products other than the Ulti-Cart.

Ultimate made three demands upon Hartford to defend it the *Dahl* action under the Hartford insurance policy. Hartford denied coverage to Ultimate for the *Dahl* action and stated that Hartford had no duty to defend or indemnify Ultimate. Hartford filed a complaint for declaratory relief against Ultimate seeking a declaration that it had no duty to defend or indemnify Ultimate in the *Dahl* action.

While the Hartford complaint was pending, counsel for Ultimate notified counsel for Hartford that the court in the *Dahl* action granted Ultimate's motion for summary adjudication as to Dahl's two patent infringement claims. Subsequently counsel for Ultimate notified counsel for Hartford that the *Dahl* action had settled.

Hartford and Ultimate filed motions for summary judgment or in the alternative summary adjudication. The trial court entered an order granting summary judgment in favor of Hartford and denying Ultimate's motion. The judgment entered in favor of Hartford determined that Hartford had no duty to defend or indemnify Ultimate in the *Dahl* action. Ultimate filed a timely notice of appeal.

ISSUE

Ultimate claims on appeal that the *Dahl* action alleged facts that constituted the potentially covered offense of disparagement.

DISCUSSION

1. *Standard of Review*

Any party to an action may move for summary judgment on a cause of action or defense—a plaintiff contending that there is no defense to the action, a defendant contending that the action has no merit. (Code Civ. Proc., § 437c, subd. (a); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).)

The party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that it is entitled to judgment as a matter of law. A triable issue of material fact exists only if the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion. (*Aguilar, supra*, 25 Cal.4th at p. 850.) “[I]f a plaintiff who would bear the burden of proof by a preponderance of evidence at trial moves for summary judgment, he must present

evidence that would require a reasonable trier of fact to find any underlying material fact more likely than not.” (*Id.* at p. 845.)

A plaintiff moving for summary judgment has met its burden of showing that there is no defense to a cause of action if it has proved each element of the cause of action entitling it to judgment on that cause of action. Once the plaintiff has met that burden, the burden shifts to the defendant to show the existence of a triable issue of one or more material facts as to that cause of action or a defense thereto. The defendant may not rely upon the mere allegations or denials of its pleadings to show that a triable issue of material fact exists, but instead must set forth specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto. (Code Civ. Proc., § 437c, subd. (p)(1); *Aguilar, supra*, 25 Cal.4th at p. 849.)

The court must grant the motion if all the papers submitted show there is no triable issue as to any material fact—that no issue requires a trial as to any fact that is necessary under the pleadings and the law—and that the moving party is entitled to a judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c); *Aguilar, supra*, 25 Cal.4th at p. 843.)

2. *The Insurer’s Duty to Defend Against Third Party Claims Against the Insured*
Liability insurance imposes on the insurer both the obligation to indemnify the insured against third party claims covered by the policy and to defend such claims against its insured by furnishing competent counsel and paying attorney fees and costs. The duty to defend is generally determined from all the information available to the insurer when the defense is tendered, although later developments may also affect the insurer’s duty to defend. (*Howard v. American National Fire Ins. Co.* (2010) 187 Cal.App.4th 498, 519-520.)

The duty to defend is more broad than the duty to indemnify. The insurer must indemnify claims covered by the policy, but must also defend against a suit that potentially seeks damages within the coverage of the policy. The potential or possibility of coverage triggers the duty to defend. (*Howard v. American National Fire Ins. Co. supra*, 187 Cal.App.4th at p. 520.) The duty to defend arises when the insurer learns of facts giving rise to the potential for coverage. (*New Hampshire Ins. Co. v. Ridout*

Roofing Co. (1998) 68 Cal.App.4th 495, 505.) A determination whether the insurer owes a duty to defend is made in the first instance by comparing allegations of the complaint with policy terms. Facts outside the complaint may give rise to a duty to defend when they reveal a possibility that the policy may cover the claim. (*Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287, 295.) “The duty to defend is determined by reference to the policy, the complaint, and all facts known to the insurer from any source.” (*Id.* at p. 300, italics omitted.)

The duty to defend is broad, but not unlimited. The nature and kinds of risks covered by the policy define its scope. (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 19.) The insurer need not defend where extrinsic facts eliminate the potential for coverage despite allegations in the complaint which suggest potential liability (*ibid.*), and where the third party complaint can by no conceivable theory raise a single issue which could bring it within the policy coverage. (*Montrose Chemical Corp. v. Superior Court, supra*, 6 Cal.4th at p. 300.)

In an action seeking declaratory relief on the issue of an insurer’s duty to defend, the insured must prove the existence of a potential for coverage, i.e. that the policy *may* provide coverage of the underlying claim. The insurer, by contrast, must establish the absence of a potential for coverage; it must prove that the policy *cannot* provide coverage of the underlying claim. (*Montrose Chemical Corp. v. Superior Court, supra*, 6 Cal.4th at p. 300.)

3. *Facts Known to Hartford*

Ultimate cited specific paragraphs of the *Dahl* complaint as containing elements of a claim of disparagement.

Unfair Competition Under the Lanham Act: Dahl’s claim for unfair competition under the Lanham Act (15 U.S.C. § 1125(a)) alleged that Ultimate advertised and offered for sale products that infringed two patents and the “Multi-Cart” mark owned by Dahl. The *Dahl* complaint alleged that Ultimate engaged in this advertising with intent to mislead the public as to the origin and ownership of rights in Dahl’s mark, and to mislead the public to believe that Ultimate’s products were the same as Dahl’s or were authorized

by or related to Dahl. The *Dahl* complaint alleged that Ultimate's advertising falsely made it appear that Ultimate designed, or was authorized to manufacture and sell, Ultimate's infringing products (the "Ulti-Cart," whose name and design was nearly identical to Dahl's "Multi-Cart"), and that Ultimate owned or had manufacturing rights to the patent and trademark-protected Multi-Cart.

Misleading Advertising: In a cause of action for untrue and/or misleading advertising, the *Dahl* complaint alleged that Ultimate violated Business and Professions Code sections 17500 and 17505 by falsely claiming to be the manufacturer, wholesaler, or importer, or to own or control the intellectual property, factory, or other source of supply, of the Multi-Cart and Dahl's mark. This cause of action alleged that these violations caused Dahl's potential clients to contact Ultimate to buy its infringing product. It further alleged that through the false designation of origin, Dahl's intellectual property, mark, and patents were being inaccurately associated with Ultimate.

Allegations in Dahl's Application for a Temporary Restraining Order: Dahl's application for a temporary restraining order alleged: (1) that Ultimate marketed a knock-off of Dahl's "Multi-Cart," and by dropping the "M" from "Multi-Cart," adopted a nearly identical name for its cart that created a likelihood of confusion with Dahl's "Multi-Cart" trademark; (2) that Ultimate's use of a near-identical mark was detrimental to Dahl's trade reputation and goodwill; (3) that if not enjoined by the court, Ultimate's use of the confusingly similar "Ulti-Cart" mark would cause confusion in the public and loss of sales and customers to Dahl; (4) that the infringing "Ulti-Cart" mark would be used to Dahl's detriment since he would have no control over the nature and quality of Ultimate's carts; (5) that any fault with those goods would adversely affect Dahl's future sales and would tarnish his name and reputation; (6) that industry and the consuming public recognized the "Multi-Cart" mark as associated with Dahl and as having a reputation for high quality and the patented design Dahl invented; and (7) that Ultimate's use of the "Ulti-Cart" mark and name would cause confusion or mistake, or would deceive the public as to the source of Ultimate's goods and services.

Dahl also responded to Ultimate's second set of interrogatories in the *Dahl* action. Dahl's responses essentially repeat the allegations of the complaint.

4. *Ultimate's Advertisements Did Not Disparage Dahl's Multi-Cart and Thus There Was No Coverage or Potential for Coverage for Advertising Injury Under the Hartford Insurance Policy*

To determine whether Hartford owes a duty to defend, we compare allegations of the *Dahl* complaint, Dahl's application for a temporary restraining order, and Dahl's responses to interrogatories to the terms of the Hartford insurance policy.

The Hartford policy provided insurance coverage for “ ‘personal and advertising injury’ caused by an offense arising out of your business[.]” The policy defined “personal and advertising injury” to include “injury . . . arising out of . . . [o]ral, 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.”

This provision provides coverage for product disparagement, which is “an injurious falsehood directed at the organization or products, goods, or services of another” (*Atlantic Mutual Ins. Co. v. J. Lamb, Inc.* (2002) 100 Cal.App.4th 1017, 1035 (*Atlantic Mutual*)). Disparagement, or injurious falsehood, may consist of publication of matter derogatory to plaintiff's title to his property, its quality, or his business. (*Ibid.*) Tortious product disparagement involves publication to third parties of a false statement that injures the plaintiff by derogating the quality of goods or services. (*Total Call Internat., Inc. v. Peerless Ins. Co.* (2010) 181 Cal.App.4th 161, 169.)

The injurious falsehood must specifically refer to the derogated property, business, goods, product, or services either by express mention or reference by reasonable implication. (*Total Call Internat., Inc. v. Peerless Ins. Co.*, *supra*, 181 Cal.App.4th at p. 170, citing *Blatty v. New York Times Co.* (1986) 42 Cal.3d 1033, 1046 [“plaintiff must allege that ‘the statement at issue either expressly mentions him or refers to him by reasonable implication.’ ”]) Dahl's complaint, application for a temporary restraining order, and responses to Ultimate's discovery do not allege that Ultimate's advertisements specifically referred to Dahl by express mention.

Ultimate argues that Dahl's complaint alleged that Ultimate's use of "Ulti-Cart," a name similar to Dahl's "Multi-Cart," referred to Dahl and Dahl's product by reasonable implication. Dahl's complaint primarily alleged that because of its similarity to Dahl's "Multi-Cart," Ultimate's use of the "Ulti-Cart" name misled the public into believing that Ultimate's products were the same as Dahl's, were approved by Dahl, or were affiliated with Dahl's "Multi-Cart" products.

Even if the use of "Ulti-Cart" could reasonably imply a reference to "Multi-Cart," however, Ultimate's advertisement contained no disparagement of "Multi-Cart." As stated, disparagement involves "an injurious falsehood directed at the organization or products, goods, or services of another" (*Atlantic Mutual, supra*, 100 Cal.App.4th at p. 1035.) The injurious falsehood or disparagement may consist of matter derogatory to the plaintiff's title to his property, its quality, or to his business in general. (*Ibid.*) The advertisements for the "Ulti-Cart" did not include any of these derogations. Ultimate's advertisements referred only to its own product, the Ulti-Cart, and did not refer to or disparage Dahl's Multi-Cart. Dahl's complaint alleged that by using a product name (Ulti-Cart) that was very similar to Dahl's Multi-Cart product, Ultimate deceived the public that Ultimate was the originator, designer, or authorized manufacturer and distributor of its infringing products. This, however, was not disparagement. (*Atlantic Mutual, supra*, 100 Cal.App.4th at p. 1037; *Truck Ins. Exchange v. Bennett* (1997) 53 Cal.App.4th 75, 90; see also *Microtec Research v. Nationwide Mut. Ins. Co.* (9th Cir. 1994) 40 F.3d 968, 971-972.) Because Dahl did not allege that Ultimate's publication disparaged Dahl's organization, products, goods, or services, Dahl was precluded from recovery on a disparagement theory. (*Nichols v. Great American Ins. Companies* (1985) 169 Cal.App.3d 766, 774.) Thus Dahl alleged no claim for injurious false statement or disparagement that was potentially within the scope of the Hartford policy coverage for advertising injury.

5. *Cases Cited to Show Disparagement by Implication Do Not Apply*

A. *Travelers Property Casualty Co. of America v. Charlotte Russe Holding, Inc.*

The parties have cited the recent case of *Travelers Property Casualty Co. of America v. Charlotte Russe Holding, Inc.* (2012) 207 Cal.App.4th 969 (*Charlotte Russe*). In *Charlotte Russe*, the manufacturer of “People’s Liberation” brand apparel sued the insured retailer. The manufacturer claimed that the retailer, which had contracted to become the exclusive sales outlet for People’s Liberation apparel, breached its contract and damaged the People’s Liberation brand and trademark by marking down prices for the apparel. This advertising allegedly suggested to consumers that People’s Liberation products were of inferior quality. (*Id.* at pp. 972-973.) *Charlotte Russe* held that the allegations in the complaint could reasonably be interpreted to allege that the insured retailer disparaged the People’s Liberation brand, and that the advertising injury provision of an insurance policy provided coverage of, and the insurer had a duty to defend the insured against, this claim of disparagement. (*Id.* at p. 981.) We disagree. As discussed below, we believe such a conclusion has no objectively reasonable basis.

As a preliminary matter, we observe that the allegations in the *Dahl* complaint about Ultimate do not correspond to the facts in *Charlotte Russe*. The *Dahl* complaint did not allege that Ultimate implied, by steeply discounted pricing, that the Multi-Cart was of poor quality. Unlike in *Charlotte Russe*, Ultimate’s advertisements referred only to its own product, and did not refer to and therefore did not disparage Dahl’s product.

More importantly, we disagree with the theory of disparagement apparently recognized in *Charlotte Russe*. There the manufacturer alleged that the People’s Liberation brand was identified in the market as premium, high-end goods but the retailer’s steeply discounted prices implied that those products were not premium, high-end goods. The manufacturer “therefore pled that the implication carried by the [retailer’s] pricing was false.” (*Charlotte Russe, supra*, 207 Cal.App.4th at p. 979.) In spite of the requirements that there be a publication (*Shanahan v. State Farm General Ins. Co.* (2011) 193 Cal.App.4th 780, 789) that specifically refers to the plaintiff (*Total Call Internat., Inc. v. Peerless Ins. Co., supra*, 181 Cal.App.4th at p. 170), *Charlotte*

Russe held that this reduced pricing was enough to constitute disparagement, which triggered the duty to defend. We fail to see how a reduction in price—even a steep reduction in price—constitutes disparagement.¹ Sellers reduce prices because of competition from other sellers, surplus inventory, the necessity to reduce stock because of the loss of a lease, changing store location, or going out of business, and because of many other legitimate business reasons. Reducing the price of goods, without more, cannot constitute a disparagement; a price reduction is not “an injurious falsehood directed at the organization or products, goods, or services of another” (*Atlantic Mutual, supra*, 100 Cal.App.4th at p. 1035.) A price reduction may allegedly be injurious to the brand or its high-end, high-quality reputation, but it is not false and is thus not disparagement. Such an “injury” is a common experience in the everyday world of free market competition.

We also question whether the insured could have objectively reasonable expectations (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1265) that the insurer would provide a defense and indemnity coverage for a claim made against the insured for placing goods on sale at a reduced price. The insurance policy in *Charlotte Russe* provided coverage for “ ‘publication of material that slanders or libels a person or organization or disparages a person’s or organization’s goods, products or services.’ ” (*Charlotte Russe, supra*, 207 Cal.App.4th at p. 978, italics added.) As we have already noted, there was neither a publication nor a specific reference to the manufacturer’s products. For these reasons, we reject the analysis of *Charlotte Russe*.

¹ The manufacturer in *Charlotte Russe* may well have had a breach of contract claim against the retailer, but that is not relevant to the issue before us, which is the viability of the manufacturer’s claim that the retailer’s price competition activity constituted disparagement of the manufacturer’s product for purposes of determining insurance coverage. Even though there may be a valid cause of action against an insured, that does not give rise to an insurer’s duty to defend and indemnify unless the suit potentially seeks damages within the coverage of the insurance policy.

B. *Federal and Out-of-State Decisions*

Ultimate cites a series of cases from federal courts and from the courts of other states. These cases do not bind California courts. (*Nagel v. Twin Laboratories, Inc.* (2003) 109 Cal.App.4th 39, 55; *US Ecology, Inc. v. State of California* (2005) 129 Cal.App.4th 887, 905.) These cases are also distinguishable or inapplicable.

In *Acme United Corp. v. St. Paul Fire & Marine Ins. Co.* (7th Cir. 2007) 214 Fed.Appx. 596, a competitor sued Acme for allegedly making false and disparaging statements about the competitor's products by stating on its product packaging that its scissors and paper trimmers were bonded with titanium, which made them superior to stainless steel scissors and paper trimmers which were not bonded with titanium. Acme's insurer denied coverage and disclaimed any duty to defend under the advertising injury liability provision of the policy, which indemnified the insured for damages for advertising that disparaged the products of others. (*Id.* at pp. 596-598.) *Acme United Corp.* concluded that the competitor's complaint sufficiently alleged that Acme's advertisements were directed at the competitor's products and that Acme disparaged the competitor's products through a false comparison. These allegations of advertising injury offense triggered the insurer's duty to defend Acme against the competitor's complaint. (*Id.* at pp. 600-601.) Dahl's complaint, by contrast, does not allege that Ultimate's advertisements falsely compared the Ulti-Cart to Dahl's Multi-Cart. Thus Dahl's complaint did not allege the disparagement by false comparison that occurred in *Acme United Corp.*

In *Liberty Mut. Ins. Co. v. OSI Industries* (2005) 831 N.E.2d 192, Thermodyne sued OSI and Beltec for advertising and selling a "Temperfect Oven," which contained flat aluminum plate shelving that Thermodyne claimed was unique and a trade secret. Thermodyne's lawsuit alleged that through an agent's statements, OSI and Beltec claimed ownership of the development of the Thermodyne oven and its flat aluminum plate shelving technology, which disparaged the Thermodyne Oven by creating confusion about which company, OSI/Beltec or Thermodyne, had the rights to and produced an oven with the unique technology. This triggered the insurer's duty to defend under the

advertising injury provision of the policy. (*Id.* at p. 199.) Dahl’s complaint does not allege that Ultimate made statements claiming ownership of unique technology of the Multi-Cart or that Ultimate had the rights to and produced the Multi-Cart. Thus Dahl’s complaint did not allege the disparagement by assertion of ownership of rights to another’s product that occurred in *Liberty Mut. Ins. Co.*

Ultimate cites *E.piphany, Inc. v. St. Paul Fire & Marine Ins. Co.* (N.D.Cal. 2008) 590 F.Supp.2d 1244 for the proposition that disparagement by implication is actionable under California law. (*Id.* at p. 1252.) In *E.piphany Inc.*, Sigma sued E.piphany, alleging that E.piphany falsely advertised its software products as “all Java” and “fully J2EE,” which gave its products an unfair and undeserved advantage over Sigma and other competitors which in fact did offer “all Java” and “fully J2EE” software. (*Id.* at pp. 1249-1250.) E.piphany sued its insurer seeking a declaration that the insurer had a duty to defend. *E.piphany, Inc.* found that Sigma’s complaint alleged that E.piphany falsely stated that it was the only producer of “all Java” “fully J2EE” software and that E.piphany suggested that its competitors’ technology was behind E.piphany’s technology. Thus the Sigma complaint alleged that E.piphany’s false claims about the superiority of its own products necessarily implied the inferiority of Sigma’s competing products. (*Id.* at p. 1253.) *E.piphany Inc.* held that the Sigma complaint contained disparagement allegations potentially covered by the insurer’s policy and thus triggered the insurer’s duty to defend. (*Id.* at p. 1254.)

As we have explained, the *Dahl* complaint did not allege that Ultimate disparaged Dahl’s products by implication. The *Dahl* complaint contained no allegations that Ultimate’s advertising falsely stated it was the only producer of a product with features also available on Dahl’s “Multi-Cart;” that Ultimate’s advertising suggested that its competitor’s technology was behind that of Ultimate; or that Ultimate made false claims about the superiority of the Ulti-Cart which necessarily implied the inferiority of Dahl’s competing product. Ultimate’s advertisements did not disparage another’s product, either expressly or by implication; they said nothing about a competitor’s product.

In *Michael Taylor Designs, Inc. v. Travelers Prop. Cas. Co. of America* (N.D.Cal. 2011) 761 F.Supp.2d 904, a furniture manufacturer, Ivy Rosequist, sued Michael Taylor Designs, Inc. (MTD) for breach of contract and violation of the Lanham Act. Rosequist's complaint alleged that MTD distributed promotional materials containing photographs of Rosequist's furniture, but displayed cheap, synthetic knock-offs of Rosequist's products in its showroom, which misled and confused customers about the origin of those products and diluted and tarnished Rosequist's trade dress. (*Id.* at pp. 907-908.) MTD sued the insurer seeking a declaration that the insurer had a duty to defend the trade dress infringement claim alleged in the original complaint.

The issue was whether the Rosequist complaint contained a claim for "disparagement" under the policy, which promised coverage where the insured "disparaged" the another's goods, products, or services. (*Id.* at p. 910.) Rosequist's complaint created a possibility of a covered claim for disparagement by alleging that defendant advertised Rosequist's products, did not sell Rosequist's products, and "steered" customers to imitation products. The term "steered" implied further statements by defendant's personnel that the imitation products were the Rosequist furniture shown in defendant's promotional materials. (*Id.* at pp. 911-912.)

The *Dahl* complaint alleges no comparable conduct by Ultimate. It does not allege that Ultimate displayed photos of the Multi-Cart in advertisements and then steered customers to purchase the Ulti-Cart, or led customers to believe the Ulti-Cart was Dahl's own product. Thus even under the analysis of *Michael Taylor Designs, Inc.*, the *Dahl* complaint did not allege disparagement and did not create a possibility of coverage under the advertising injury provision of the Hartford insurance policy.

Finally, Ultimate cites *Burgett, Inc. v. American Zurich Ins. Co.* (E.D.Cal. 2011) 830 F.Supp.2d 953 as clarifying an insurer's duty to defend a claim of disparagement by implication. In *Burgett*, Persis International and Richards (Persis) sued Burgett for falsely representing to another company, Samick, that it had valid and enforceable rights to the "SOHMER" trademark, which Persis alleged that it owned. The Persis complaint alleged that by entering into a licensing agreement with and accepting compensation from

Samick, and by holding itself out to Samick and the world as rightful owner of the SOHMER trademark, Burgett induced and was contributorily liable for Samick's acts of trademark infringement and unfair competition. Burgett's insurer, Zurich, declined to defend Burgett in the Persis action, asserting that the personal and advertising injury provision did not provide coverage and that the trademark exclusion excused Zurich from defending the action. (*Id.* at pp. 957-958.)

The *Burgett* court found that Burgett represented to Samick that it was the only holder of the SOHMER trademark (which implied that Burgett's right to use the SOHMER trademark was superior to that of Persis), represented that Persis did not have the rights to the SOHMER trademark, and created a likelihood of confusion or misunderstanding about the source, sponsorship, or approval of Persis's goods. *Burgett* held that the Persis complaint alleged sufficient facts to establish the potential for coverage of its claim of disparagement by implication, which triggered Zurich's duty to defend Burgett in the Persis action. (*Id.* at pp. 963-964.)

The *Dahl* complaint, by contrast, did not allege that Ultimate represented itself as the only holder of the Multi-Cart trademark, implied that Ultimate had a right to use the Multi-Cart trademark that was superior to that of Dahl, or represented that Dahl did not have rights to the Multi-Cart trademark. Thus the *Dahl* complaint did not allege disparagement by implication, and no potential for coverage triggered Hartford's duty to defend Ultimate in the Dahl action.

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to plaintiff Hartford Casualty Insurance Company.

CERTIFIED FOR PUBLICATION

KITCHING, J.

We concur:

KLEIN, P. J.

CROSKEY, J.