

Speak No Evil: A Look At Business Disparagement Claims

By Tonya Parker

As the marketplace becomes increasingly more competitive, so does the temptation to gain an advantage by disparaging one's competitors. Often, the disparaging comment is a single reference to the integrity of a competitor, its financial status, or the quality of the products/services it provides.

How often have you heard comments like: "they are crooks," "they overcharge" or "they sell inferior goods?" Under certain circumstances, these statements can form the basis of a business disparagement claim and subject the liable party to court costs, and actual and punitive damages. This article discusses what constitutes business disparagement under Texas law, and the damages that may be available to you, or imposed against you, if the line is crossed between merely asserting an opinion and making a disparaging comment.

In a business disparagement action, damages may be recovered when a disparaging comment is made about the products, services or character of a business, and the comment causes the business to suffer a financial loss. Texas courts require a plaintiff to establish the following elements in order to prevail on a claim for business disparagement:

Disparaging Comments

Disparaging words must be published verbally or in writing to a third party about the plaintiff's products/services, financial position, or the character of its business ("economic interests"), and such statements must be false. In a well-known case, *Proctor & Gamble Company v. Amway Corp.*, a federal court in Texas held that comments allegedly made by Amway Corp., that profits from the sale of Proctor & Gamble's products were donated to the Church of Satan, could be the basis of a business disparagement claim.

Employers can also be held liable for disparaging comments made by their employees, if the comment is made within the scope of the employee's authority and in furtherance of the employer's business. In another Texas case, *Dwyer v. Sabine Mining Co.*, a Texas Court of Appeals ruled that an employer could be held liable for disparaging statements made by its employee during an industry meeting, since the employer paid the employee's travel expenses and sent the employee as a corporate representative.

Malice

A plaintiff must also establish that the disparaging words were published with malice. For purposes of a business disparagement claim, a person acts with malice when he/she knows the statement in question is false, recklessly disregards the fact that the statement is false, acts with ill-will, intends to interfere with the plaintiff's economic interests, or repeats the statement of another without verifying the accuracy of a statement.

Privileged Communication

A defendant who holds a privilege to make a disparaging comment can avoid liability for damages caused by the statement. There are two types of privileges: absolute and qualified. Absolute privileges extend to state officials who make disparaging statements in the performance of their duties, and/or persons who make statements during court or other government proceedings. A qualified privilege may exist when a statement was made in good faith and related to a subject matter that is of significance to both parties, such as statements made in employee performance appraisals.

Damages

In an action for business disparagement, the following damages may be available depending upon the circumstances: economic damages for loss of a specific sale, loss of credit, loss of business, court costs (but no attorney's fees), and punitive damages (damages imposed to punish the . Given the damages that can be imposed for disparaging the business interests of another, a good general rule is to "speak no evil" when it comes to your competitors!

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