Washington Law Review

Volume 71 | Number 2

4-1-1996

Can Generic Products Be Disparaged? The "Of and Concerning" Requirement after Alar and the New Crop of Agricultural Disparagement Statutes

Eric M. Stahl

Follow this and additional works at: https://digitalcommons.law.uw.edu/wlr

Part of the Torts Commons

Recommended Citation
Eric M. Stahl, Notes and Comments, *Can Generic Products Be Disparaged? The "Of and Concerning" Requirement after Alar and the New Crop of Agricultural Disparagement Statutes*, 71 Wash. L. Rev. 517 (1996).
Available at: https://digitalcommons.law.uw.edu/wlr/vol71/iss2/8

This Notes and Comments is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact cnyberg@uw.edu.

Copyright © 1996 by Washington Law Review Association

CAN GENERIC PRODUCTS BE DISPARAGED? THE "OF AND CONCERNING" REQUIREMENT AFTER ALAR AND THE NEW CROP OF AGRICULTURAL DISPARAGEMENT STATUTES*

Eric M. Stahl

Abstract: Under the group libel principle, a statement broadly critical of a large group generally cannot give rise to a defamation claim; it is said that such a statement does not refer to, or is not of and concerning, any particular individual. This Comment addresses the extent to which the "of and concerning" requirement and group libel principle apply to claims of product disparagement, a tort similar to defamation but encompassing pecuniary injury, as opposed to damage to reputation, resulting from false statements. In particular, this Comment examines whether speech generally critical of a generic product can give rise to disparagement liability. Recent statutes provide for such generic disparagement claims by agricultural producers, and one court, in the litigation resulting from the Alar controversy, has held the group libel rule does not bar such claims. This Comment concludes that, in most circumstances, the "of and concerning" requirement cannot be satisfied without a specific reference to the allegedly disparaged product and that generic disparagement claims usually should be barred, for both policy and constitutional reasons.

A report, published nationwide, states that a procedure commonly used to treat navel oranges renders the fruit unsafe to eat. As a result of the report, sales of all oranges plummet; scores of orange growers lose their livelihood. The report, which did not identify any particular grower, is later proven false. Should the report's publisher be liable for the navel-orange growers' losses? What about losses to growers of other varieties of oranges, other citrus fruits, or other farm products, which were not mentioned in the report but which suffered declining sales in the report's wake?

Publishing, with the requisite level of fault, a false statement that injures another's economic interests constitutes the tort of disparagement.[1] Since 1981,[2] courts have stated that, generally, the constitutional principles that limit defamation claims also apply to claims

* *Editor's note*: A version of this Comment was recognized as the national winner of the 1996 Stephen G. Thompson Memorial Writing Competition in communications law.

1. Disparagement is similar in many respects to defamation, but the two torts are distinct and protect different interests. *See infra* part I.

2. Bose Corp. v. Consumers Union of United States, Inc., 508 F. Supp. 1249, 1270–71 (D. Mass. 1981), *rev'd on other grounds*, 692 F.2d 189 (1st Cir. 1982), *aff'd on other grounds*, 466 U.S. 485 (1984).

of disparagement.[3] However, while a defamatory statement must refer specifically to, or be "of and concerning," the plaintiff,[4] few courts have had occasion to apply this element to product disparagement claims. Those that have differ sharply over the specificity with which the disparaging statement must identify the plaintiff's property[5]—that is, whether the statement must refer directly to the particular plaintiff's product,[6] or whether it is enough that the plaintiff has an economic interest in the generic type of product the defendant disparaged.[7]

The role of the "of and concerning" requirement in disparagement cases is likely to receive growing attention.[8] A number of states recently have passed "agricultural disparagement" laws that provide agricultural producers with causes of action for statements that generally disparage the type of food product they grow, even if the statements make no specific reference to a plaintiff's own product.[9] These laws raise the issue of whether a strict "of and concerning" element is constitutionally required in disparagement claims.

This Comment addresses the conflict posed by "generic disparagement" claims between the interests of producers of generic products, who can be damaged by speech that does not refer to any specific individual or product, and the free-speech interests of the public in matters such as food safety. Part I discusses the extent to which the "of and concerning" element and other First Amendment principles of defamation law have been applied to the tort of disparagement. Part II summarizes the litigation resulting from the Alar controversy, in which a report critical of a chemical widely used on apples was held to be of and concerning all apples and apple growers, and criticizes the district court's approach to generic disparagement. Part III analyzes the recent

---

3. For example, in *Bose*, 508 F. Supp. at 1269–77, the district court required the plaintiff to show the defendant acted with the same heightened degree of fault, actual malice, as would have been required had the claim been defamation rather than disparagement.

4. *See Restatement (Second) of Torts* §§ 558, 564 cmt. g (1977).

5. The required specificity is well-settled in defamation law: Under "group libel" theory, a statement that refers generally to a large class, without identifying an individual, cannot give rise to an individual defamation claim. *See infra* part I.C.

6. *See, e.g.*, Blatty v. New York Times Co., 728 P.2d 1177 (Cal. 1986), *cert. denied*, 485 U.S. 934 (1988).

7. *See* Auvil v. CBS "60 Minutes", 800 F. Supp. 928 (E.D. Wash. 1992) (holding that report on cancer risk posed by Alar, then a chemical widely used on apples, was of and concerning all apples). The case is discussed *infra* part II.

8. *See* Bruce E.H. Johnson & Susanna M. Lowy, *Does Life Exist on Mars? Litigating Falsity in a Non-"Of and Concerning" World*, 12 Comm. Law. 1, 20–23 (1994).

9. *See infra* part III.

agricultural disparagement laws and concludes that the statutes' allowance of a finding of liability without any "of and concerning" showing is unconstitutional. Finally, part IV argues that generic disparagement claims are inconsistent with the constitutional protection of free speech in all but a narrow set of circumstances and offers a framework for identifying those circumstances.

I. THE "OF AND CONCERNING" REQUIREMENT IN DEFAMATION AND DISPARAGEMENT

A. *Common-Law and Constitutional Elements of Disparagement*

Although defamation and disparagement[10] both involve injury resulting from the publication of false statements, they developed as distinct torts.[11] The tort of disparagement provides a remedy for economic losses resulting from criticism of a plaintiff's business, product, or other property, whereas defamation law protects a plaintiff's interest in personal reputation.[12]

The elements of disparagement are: (1) publication (2) with some degree of fault (3) of a false statement (4) that is harmful to the plaintiff's interests and (5) that results in pecuniary loss to the plaintiff.[13] The

10. Some commentators classify injury to property interests resulting from false statements as the general tort of injurious falsehood. When the quality of the plaintiff's goods is disparaged, the particular form of injurious falsehood is known as slander of goods, trade libel, or product disparagement; when the false statement relates to ownership, the particular tort is slander of title. *See Restatement (Second) of Torts* ch. 28, *Injurious Falsehood (Including Slander of Title and Trade Libel)* (1977); 2 F. Harper et al., *The Law of Torts* § 6.1, at 262 (2d ed. 1986); W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 128, at 962–63 (5th ed. 1984).

11. Polygram Records, Inc. v. Superior Court, 216 Cal. Rptr. 252, 254–55 (Ct. App. 1985); Keeton et al., *supra* note 10, § 128, at 962.

For discussions of the historic relationship between the two torts, see Arlen W. Langvardt, *Free Speech Versus Economic Harm: Accommodating Defamation, Commercial Speech, and Unfair Competition Considerations in the Law of Injurious Falsehood*, 62 Temp. L. Rev. 903, 907–23 (1989); Lisa Magee Arent, Note, *A Matter of "'Governing' Importance": Providing Business Defamation and Product Disparagement Defendants Full First Amendment Protection*, 67 Ind. L.J. 441, 446–50 (1992).

12. Auvil v. CBS "60 Minutes", 800 F. Supp. 928, 932 (E.D. Wash. 1992); *Restatement (Second) of Torts* § 623A cmt. g (1977).

13. *Restatement (Second) of Torts* § 623A (1977). At common law, the degree of fault was satisfied if the defendant published negligently in a manner that would deter a potential purchaser, or with "ill will" toward the plaintiff or with intent to harm the plaintiff economically. *Restatement of Torts* § 624 (1938). The *Restatement (Second)* definition requires both intent to injure and intent to falsify and notes that if constitutional developments in defamation law apply to disparagement, the fault element requires that: (1) the publisher intends to harm the plaintiff's pecuniary interests or recognizes or should recognize such harm is likely; and (2) the statement be published with

special damages must be proven, but at common law there was no explicit requirement, as there was in defamation claims, that the challenged statement be of and concerning the plaintiff or its property.[14] Thus, producers of an agricultural product who could show lost sales resulting from a published, maliciously false statement about that type of crop could claim disparagement.[15]

However, courts increasingly have viewed disparagement in light of the same First Amendment protections[16] that led to the constitutionalization of defamation law with *New York Times Co. v. Sullivan*.[17] In *Sullivan*, the Supreme Court suggested the "of and concerning" element of a defamation claim had a constitutional basis, holding it unconstitutional to construe "an otherwise impersonal attack

---

knowledge of its falsity or in reckless disregard of its truth or falsity. *Restatement (Second) of Torts* § 623A caveat and cmt. d (1977). *See also* Harper et al., *supra* note 10, § 6 1, at 265; Rawn H. Reinhard, Note, *The Tort of Disparagement and the Developing First Amendment*, 1987 Duke L.J. 727, 727–28, 749–51 (1987).

14. There are two ways to view this difference between disparagement and defamation. One is that an "of and concerning" element is redundant in disparagement because of the tort's other elements. Some argue the actual injury requirement for disparagement "serves to screen out product disparagement actions based on publications which the public did not understand to be 'of and concerning' plaintiff's product." Appellants' Reply Brief at 7, Auvil v. CBS "60 Minutes", 67 F.3d 816 (9th Cir. 1995) (No. 93-35963), *cert. denied*, 64 U.S.L.W. 3605 (U.S. Apr. 29, 1996) (No. 95-1372). It could also be argued the requirement that the defendant intended to harm the plaintiff likewise protects against disparagement claims that are not of and concerning the plaintiff. *See* Blatty v. New York Times Co., 728 P.2d 1177, 1187 (Cal. 1986) (Grodin, J., concurring and dissenting), *cert. denied*, 485 U.S. 934 (1988).

The other view is that disparagement's additional elements did not serve to supplant an "of and concerning" requirement but simply reflected the common-law understanding that disparagement should be more difficult to prove than defamation because economic interests were less valued than personal interests in reputation. Prior to the constitutionalization of defamation law, defamation plaintiffs also did not have to prove actual damages in most cases and had the further advantages of a presumption that the challenged statement was false and of strict liability as to the defendant's knowledge of falsity. *Restatement (Second) of Torts* § 623A cmt. g (1977); Reinhard, *supra* note 13, at 730–32.

15. The plaintiffs would have to show other reasonably likely causes were not to blame for their injuries. *Restatement (Second) of Torts* § 633 cmt. h (1977) suggests a plaintiff cannot show the injury resulted from the disparaging statement if the lost sales could be attributed to a general decline in the market. However, the *Restatement* does not appear to address the generic disparagement problem—that is, what happens when the general decline in the market is itself attributable to a disparaging statement.

16. *See Restatement (Second) of Torts* § 623A caveat and introductory cmt. (1977); Reinhard, *supra* note 13, at 746–58; *infra* note 30 and accompanying text.

17. 376 U.S. 254 (1964). The case is perhaps known best for its "actual malice" holding: that, to provide speech critical of government with the "breathing space" necessary to promote the "robust and wide-open" public debate envisioned by the First Amendment, *id.* at 270–72, public officials claiming defamation must prove the defendant acted with "actual malice—that is, with knowledge [the statement] was false or with reckless disregard of whether it was false or not," *id.* at 279–80.

on governmental operations" as defaming the official responsible for those operations.[18] The Court later explicitly stated that this "of and concerning" requirement grew directly from the First Amendment.[19]

The Supreme Court has never reached the question of whether the constitutional limits on defamation apply equally to disparagement. In *Bose Corp. v. Consumers Union of United States, Inc.*,[20] however, the Court accepted, without ruling on, a district court holding[21] that *Sullivan*'s actual malice rule[22] applied to disparagement claims.[23] Since *Bose*, numerous courts[24] and commentators[25] substantially have agreed that, because of the similarities between the two torts, disparagement claims "are subject to the same first amendment requirements that govern actions for defamation."[26]

B. *"Of and Concerning" Analysis in Disparagement Claims*

It would seem to follow that because the First Amendment requires the "of and concerning" element in defamation actions, the element therefore would be required in disparagement claims as well. However, only the California Supreme Court has reached this conclusion explicitly. In *Blatty v. New York Times Co.*,[27] the court concluded that the constitutional limitations on defamation law, including the "of and concerning" requirement, "are not peculiar to [defamation] actions but apply to all claims whose gravamen is the alleged injurious falsehood of a statement."[28] The court explained that "it is immaterial for First

18. *Id.* at 292.

19. Rosenblatt v. Baer, 383 U.S. 75, 81–82 (1966).

20. 466 U.S. 485 (1984).

21. 508 F. Supp. 1249, 1270–71 (D. Mass. 1981).

22. *See supra* note 17.

23. 466 U.S. at 513.

24. *See, e.g.*, Auvil v. CBS "60 Minutes", 800 F. Supp. 928, 933 (E.D. Wash. 1992); Blatty v. New York Times Co., 728 P.2d 1177 (Cal. 1986), *cert. denied*, 485 U.S. 934 (1988); cases cited *infra* note 30.

25. *See, e.g.*, Arent, *supra* note 11, at 457 (arguing "business defamation and product disparagement should be treated as the same tort" and subject to maximum First Amendment protection); Langvardt, *supra* note 11, at 937–38 (arguing the torts merit similar, though not identical, constitutional treatment).

26. Unelko Corp. v. Rooney, 912 F.2d 1049, 1058 (9th Cir. 1990), *cert. denied*, 499 U.S. 961 (1991).

27. 728 P.2d 1177 (Cal. 1986) (holding that newspaper's best-sellers list which omitted author did not disparage him because list did not name him, and thus was not of and concerning him), *cert. denied*, 485 U.S. 934 (1988).

28. *Id.* at 1182.

Amendment purposes whether the statement in question relates to the plaintiff himself or merely to his property broadly defined."[29]

Blatty's unequivocal application of defamation rules to disparagement cases is alluring for its predictability. Most other "constitutionalized" disparagement cases, however, have involved not the "of and concerning" element but rather one of the other constitutional limitations on defamation.[30] Given the scant precedent,[31] any argument that the "of and concerning" element is constitutionally required in disparagement claims should also rest on a showing that the ends the element serves in defamation law also must be served in disparagement claims. As will be shown,[32] this is the case, at least when the claim involves a large number of plaintiffs.

C. *The Group Libel Principle and Its Implications for Disparagement*

"Of and concerning" questions arise when the defamatory or disparaging statement does not refer explicitly to the plaintiff or, perhaps, to anyone in particular. To be of and concerning a plaintiff, a statement need not mention that plaintiff by name; it is enough that the statement's recipient reasonably understands that it refers to the plaintiff.[33]

When the statement refers to a large group, however, an individual cannot claim to be defamed absent evidence that the statement applied to

---

29. *Id.* at 1183.

30. *See, e.g.*, *Unelko*, 912 F.2d 1049 (holding that limits on defamation liability for statements of opinion and on matters of public concern also limit liability for disparaging statements); Quantum Elecs. Corp. v. Consumers Union of United States, Inc., 881 F. Supp. 753, 763 n.12 (D.R.I. 1995) (stating that limits on defamation liability for statements about public figures also limit disparagement liability and that defamation fault standard—actual malice—would apply to disparagement claim); Flotech, Inc. v. E.I. Du Pont de Nemours Co., 627 F. Supp. 358, 370 (D. Mass 1985) (suggesting "of and concerning" element is constitutionally required in disparagement claims, but relying primarily on "public figure" and "opinion" doctrines of defamation law to hold that chemical supplier's statement that its product was not useful ingredient in motor-oil additives did not disparage manufacturer of additive containing the ingredient), *aff'd*, 814 F.2d 775 (1st Cir. 1987); A & B-Abell Elevator Co. v. Columbus/Cent. Ohio Bldg. & Constr. Trades Council, 651 N.E.2d 1283, 1294 (Ohio 1995) (applying actual malice standard to disparagement claim); Dairy Stores, Inc. v. Sentinel Publishing Co., 516 A.2d 220, 226 (N.J. 1986) (holding that defamation defenses and privileges apply to disparagement claims).

31. It does not appear that any cases have failed to apply the "of and concerning" element to disparagement claims. Rather, the dearth of cases directly on point may indicate simply that in most disparagement actions it is obvious whom the statement was "of and concerning." Also, it shows that plaintiffs plead defamation instead of disparagement "to avoid the near impossible burden of proving special damages." Zerpol Corp. v. DMP Corp., 561 F. Supp. 404, 409 (E.D. Pa. 1983).

32. *See infra* notes 36–40 and accompanying text.

33. *Restatement (Second) of Torts* § 558, § 564 cmts. a, b, d, g (1977).

the individual in particular.[34] This rule, known as the group libel principle, means that the "of and concerning" element generally cannot be satisfied where a defamatory statement targets a sufficiently large class. Recovery usually has been limited to statements involving groups of twenty-five or fewer.[35]

The group libel principle has a constitutional rationale that is equally applicable to disparagement. The doctrine "was designed to encourage frank discussions of matters of public concern under the First Amendment guarantees," favoring the public's right to know over "incidental and occasional injury to the individual resulting from the defamation of large groups."[36] One court has stated that allowing individuals to claim defamation from statements directed at large groups could invite unwarranted lawsuits and stifle discussion of issues or groups "in the public eye," a prospect that the court held was unacceptably in conflict with the First Amendment.[37] The court cited an early case, which noted:

> It is far better for the public welfare that some occasional consequential injury to an individual arising from general censure of his profession, his party, or his sect should go without remedy than that free discussion on the great questions of politics, or morals, or faith should be checked by the dread of embittered and boundless litigation.[38]

Boundless litigation resulting from general speech about products has the same potential to stifle discussion of matters of great public

---

34. To prevail in a group libel claim, the plaintiff must prove "(a) the group or class is so small that the matter can reasonably be understood to refer to the member, or (b) the circumstances of publication reasonably give rise to the conclusion that there is particular reference to the member." *Restatement (Second) of Torts* § 564A (1977).

35. *Restatement (Second) of Torts* § 564A cmt. b (1977); Keeton et al., *supra* note 10, § 111, at 784. For examples of group libel cases, see Weatherhead v. Globe Int'l, Inc., 832 F.2d 1226 (10th Cir. 1987) (holding that class of 955 dog breeders could not claim defamation from article about inhumane conditions at certain unnamed puppy farms); Neiman-Marcus v. Lait, 13 F.R.D. 311 (S.D.N.Y. 1952) (holding that group of 25 salesmen was small enough to withstand motion to dismiss defamation claim, whereas their co-workers, a class of 382 saleswomen, were precluded by group libel principle from pursuing defamation claim against same author).

36. Brady v. Ottaway Newspapers, Inc., 445 N.Y.S.2d 786, 789 (App. Div. 1981); *accord* Gintert v. Howard Publications, Inc., 565 F. Supp. 829, 834–39 (N.D. Ind. 1983); Barger v. Playboy Enters., 564 F. Supp. 1151, 1153 (N.D. Cal. 1983), *aff'd*, 732 F.2d 163 (9th Cir.), *cert. denied*, 469 U.S. 853 (1984); Michigan United Conservation Clubs v. CBS News, 485 F. Supp. 893, 899–900 (W.D. Mich. 1980), *aff'd*, 665 F.2d 110 (6th Cir. 1981).

37. *Michigan United Conservation Clubs*, 485 F. Supp. at 900.

38. Ryckman v. Delevan, 25 Wend. 186, 198–99 (N.Y. 1840), *quoted in Michigan United Conservation Clubs*, 485 F. Supp. at 900.

importance.[39] In this respect, the "of and concerning" limitation that restricts group libel claims also is a constitutional limit on generic disparagement claims.[40]

The group libel rule has led one court to conclude that "an entire industry . . . cannot sue on grounds of defamation."[41] Prior to the Alar litigation,[42] an entire industry had never sought recovery on disparagement grounds. A few courts have applied the "of and concerning" requirement in situations analogous to "generic disparagement."[43] These cases, however, did not explicitly recognize that the injuries complained of were pecuniary, not personal, and therefore failed to address whether there was any need to treat disparagement differently from defamation. Thus, they did not squarely address the conflict raised by generic disparagement claims—the collision between the economic interests protected by disparagement law and the free-speech interests protected by the "of and concerning" requirement. The remainder of this Comment analyzes various attempts to address disparagement claims in which the referents of the disparaging statement are numerous and indistinguishable.

II. *AUVIL V. CBS "60 MINUTES"*: CLAIMING GENERIC DISPARAGEMENT OF APPLES

In the only true generic disparagement case that has been reported, involving the litigation resulting from the Alar controversy, a federal district court concluded that the "of and concerning" requirement would not bar each member of a large group of producers of a generic product

---

39. *See generally* Arent, *supra* note 11, at 463–68 (supporting the value of speech critical of products and business).

40. *See* Robert D. Sack & Sandra S. Baron, *Libel, Slander and Related Problems* 646–47 (2d ed. 1994); Brief *Amici Curiae* of Capital Cities/ABC, Inc., at 15, Auvil v. CBS "60 Minutes", 67 F.3d 816 (9th Cir. 1995) (No. 93-35963), *cert. denied*, 64 U.S.L.W. 3605 (U.S. Apr. 29, 1996) (No. 95-1372).

41. Ajay Nutrition Foods, Inc. v. FDA, 378 F. Supp. 210, 218 (D.N.J. 1974), *aff'd*, 513 F.2d 625 (3d Cir. 1975).

42. *See infra* part II.

43. *See, e.g.*, Mario's Enters. v. Morton-Norwich Prod., Inc., 487 F. Supp. 1308 (W.D. Ky. 1980) (holding that commercial stating "Mario's meatballs" caused indigestion did not refer to plaintiff's restaurant because the statement just as easily could have been about any of 391 restaurants with the same name); National Nutritional Foods Ass'n v. Whelan, 492 F. Supp. 374 (S.D.N.Y. 1980) (holding that general criticism of health food boom not enough to sustain claims by health food stores and industry group); Kentucky Fried Chicken of Bowling Green, Inc. v. Sanders, 563 S.W.2d 8 (Ky. 1978) (holding that criticism of national chain's food referred to group too large for local outlet to claim statement defamed it).

from claiming disparagement by a false allegation about the product generally.

A. *The Alar Broadcast and the Resulting Disparagement Claim*

In 1989, the CBS newsmagazine *60 Minutes* broadcast a segment on Alar,[44] a chemical growth regulator sprayed on apples. Based largely on a report by the Natural Resources Defense Council (NRDC), the segment described health concerns—particularly the cancer risk to children—associated with the chemical's use on apples, and the slow government response to the problem.[45] The segment opened with a shot of a Red Delicious apple emblazoned with a skull and crossbones.[46] Apple growers were not identified in any meaningful way.[47] Following the broadcast, the apple market went into a temporary, though severe, tailspin: Sales and prices plummeted, and the industry lost millions of dollars.[48]

In response, eleven Washington apple growers, representing a self-styled class of 4700 growers in the state, sued CBS and NRDC for product disparagement. The network moved for dismissal or summary judgment on the grounds that the broadcast was not of and concerning any individual grower or the plaintiffs as a group. In *Auvil v. CBS "60 Minutes" (Auvil I)*,[49] the district court denied the motion, concluding it was sufficient for a disparagement claim that the telecast was "'of and concerning' all apples."[50] In a separate order relating to the earlier NRDC report, *Auvil v. CBS "60 Minutes" (Auvil II)*,[51] the court granted summary judgment to NRDC, reasoning that its written report was not about "apples per se" but about the cancer risk posed to children by Alar and other chemicals, and thus was not of and concerning the plaintiffs.[52] Fifteen months later, after protracted discovery,[53] the court granted

---

44. Alar is the trade name for daminozide. Auvil v. CBS "60 Minutes", 800 F. Supp. 928, 930 (E.D. Wash. 1992).

45. For a transcript of the broadcast, see *id.* at 937–41.

46. *Id.* at 930 n.2.

47. *Id.* at 933.

48. *Id.* at 930–31.

49. *Id.*

50. *Id.* at 935.

51. 800 F. Supp. 941 (E.D. Wash. 1992).

52. *Id.* at 943–44.

53. For an account of the discovery, see Johnson & Lowy, *supra* note 8, at 21–22.

CBS's second motion for summary judgment, finding the plaintiffs could not establish that the broadcast was false.[54]

The court of appeals affirmed that judgment but declined to decide whether the "of and concerning" requirement applies to product disparagement law.[55] The district court's approach therefore warrants analysis, because it stands as authority for future generic disparagement cases.

B. Auvil I*'s "Of and Concerning" Analysis*

The district court did recognize that the constitutional limits on defamation apply to disparagement claims.[56] In particular, the court acknowledged that in disparagement cases, the "of and concerning" requirement is a constitutional threshold, requiring the plaintiff to show "the offending language pertains directly to a particular individual or product whose identity can be ascertained from the text (and context) of the publication."[57]

However, the court reasoned, it does not follow that the "of and concerning" element should be applied to group disparagement in the identical manner that it is applied to group defamation. The court stated that "[t]he individual/group dichotomy is not meaningful when disparagement is at issue," at least not when the identity of the product targeted by the communication is clear.[58] Because the *60 Minutes* broadcast suggested that consumers could not tell which apples had been treated with Alar, the broadcast was "'of and concerning' all apples" and identified "every apple grower in the country."[59]

While the group libel doctrine clearly would bar such a broad class from suing for defamation,[60] the court in *Auvil I* declined to apply the doctrine to the Alar claim, holding that none of the rationales supporting the group libel principle was present.[61] In support of this conclusion, the court identified two policies underlying group libel. The first it termed

54. Auvil v. CBS "60 Minutes", 836 F. Supp. 740 (E.D. Wash. 1993), *aff'd*, 67 F.3d 816 (9th Cir. 1995), *cert. denied*, 64 U.S.L.W. 3605 (U.S. Apr. 29, 1996) (No. 95-1372).

55. 67 F.3d at 819 n.4.

56. Auvil v. CBS "60 Minutes" (*Auvil I*), 800 F. Supp. 928, 937 (E.D. Wash. 1992).

57. *Id.* at 933.

58. *Id.* at 934.

59. *Id.* at 935.

60. *See supra* part I.C.

61. *Auvil I*, 800 F. Supp. at 936.

"dilution": If a class is sufficiently large, no individual member is likely to suffer meaningful injury to his or her personal reputation from a defamatory statement. In contrast, in a disparagement claim, the court reasoned, the economic damage—the harm which the tort inflicts on each plaintiff—is real and not diluted; it "is merely distributed among a larger universe."[62] The second theory the court described is "identification": A defamatory statement about a large group is unlikely to be taken as identifying any particular individual. In the *Auvil I* disparagement claim, however, the court held it irrelevant that no individual producer was identified in the CBS broadcast because, in identifying all apples, the broadcast sufficiently identified each grower's product.[63]

C. *Flaws in* Auvil I*'s "Of and Concerning" Holding*

Auvil I properly recognizes that the "of and concerning" element is required in disparagement claims, but its conclusion that the *60 Minutes* broadcast was of and concerning all apples and apple growers is incorrect. The court's analysis is flawed in two respects. First, in finding actionable a general statement about a generic product, the court permitted the very type of group claim that the "identification" limitation, as a matter of policy, is supposed to prevent. Second, the court failed to recognize that the group libel principle has a constitutional basis in addition to its policy-based rationales.

1. Auvil I *Ignores Prudential Limits on Liability for Speech About Large Groups*

The "identification" theory on which the group libel principle partly rests is a policy-based bar on actions resulting from "an impersonal reproach of an indeterminate class."[64] Yet the *60 Minutes* broadcast was impersonal—it identified no particular apple or apple grower—and the *Auvil I* court itself suggested that liability might extend to an indeterminate class, namely "every apple grower in the country."[65] Therefore, the only way that the court can claim to be acting consistently with the identification rationale of the group libel principle is by asserting that it views a general statement about "apples" to be sufficiently specific to identify all apples, the "individual/group

62. *Id.* at 935–36.

63. *Id.* at 936.

64. Brady v. Ottaway Newspapers, Inc., 445 N.Y.S.2d 786, 788–90 (App. Div. 1981).

65. *Auvil I*, 800 F. Supp. at 935.

dichotomy"[66] notwithstanding. This contradicts what the court itself recognized is a policy against allowing liability for statements that do not identify any individual (or, in the disparagement context, any individual product).

By construing a general statement about a product to be of and concerning each unit or classification of that product, *Auvil I* demonstrates precisely why a more specific reference should be required. In concluding that the *60 Minutes* broadcast, which was about the risks posed by a chemical used on many apples, identified "all apples," the court relied on analysis that is as much chemical as legal. The broadcast targeted Alar, which the court noted physically merges with fruit when applied; thus, the court concluded, the broadcast was of and concerning apples and therefore, by derivation, apple growers.[67] Such attenuated reasoning has no logical limit. It means that the broadcast was of and concerning even those apples grown without Alar, because the broadcast stated that consumers could not be certain whether any apple they purchased was Alar-free.[68] Following this logic, if in the wake of the broadcast consumers had misperceived the danger and turned en masse toward organic produce, CBS would be liable not only to apple growers but to producers of all crops grown with chemicals. Requiring plaintiffs to demonstrate that a disparaging statement specifically identifies them serves as a prudential check on what otherwise could be limitless liability.

2. Auvil I *Ignores Constitutional Limits on Liability for Speech About Large Groups*

The second flaw in the *Auvil I* analysis is that it ignores the constitutional basis for the group libel doctrine.[69] Even if *Auvil I* is correct that applying group libel concepts to disparagement is "tantamount to counseling potential disparagors that they are home free if only they succeed in wreaking damage on a sufficient number of manufacturers,"[70] the court overlooked the effect of the alternative. Without some effective limit on group disparagement claims, valuable speech on issues such as product safety will be stifled as journalists,

66. *Id.* at 934.

67. *Id.* at 933–34.

68. *Id.* at 935.

69. *See supra* notes 36–40 and accompanying text.

70. *Auvil I*, 800 F. Supp. at 936.

scientists,[71] and others worry about being sued, not just by the actual subjects of their criticism, but by trade associations[72] and entire industries. The "of and concerning" requirement serves as a reliable guide, based on established constitutional principles, in helping courts determine how far to extend liability for disparaging speech.

Without such a guide, courts may rely on less credible means, such as the content of the speech itself, in deciding where to draw the line. The *Auvil* decisions demonstrate this danger. It is revealing that although the *60 Minutes* broadcast relied on data contained in the NRDC report,[73] the district court held the broadcast was of and concerning the apple growers[74] while the NRDC report was not.[75] The court in *Auvil II* noted that the NRDC report was highly technical, full of "two dollar words";[76] nowhere did it depict an apple "emblazoned with a skull and crossbones,"[77] as did *60 Minutes*.[78] A consumer's reaction to the report, the court stated, might be that "the use of pesticides is a topic responsible officials should be thinking about."[79] It is impossible to read *Auvil I* and *Auvil II* together without concluding that the court distinguished between the two for "of and concerning" purposes in part because the broadcast was specific and alarming, while the NRDC report was broad, dry, and difficult to understand.[80] This amounts to faulting *60 Minutes* for doing exactly what journalists are supposed to do: get to the point as saliently and concisely as possible. If Alar was indeed a health danger, it is preferable that consumers be startled into a boycott than lulled into passing thoughts that "someone really ought to do something."

---

71. *See* Michael Kent Curtis, *Monkey Trials: Science, Defamation, and the Suppression of Dissent*, 4 Wm. & Mary Bill Rts. J. 507, 537–38 (1995) (arguing that permitting liability for disparagement claims such as that made in the Alar litigation "supports an industry orthodoxy" and distorts scientific dialogue).

72. The National Agricultural Chemicals Association paid much of the *Auvil* plaintiffs' legal expenses. *Alar*, Pesticide & Toxic Chem. News, Sept. 16, 1992, *available in* Westlaw, PTCHEMN, 1992 WL 2684949. Some of the new agricultural disparagement statutes provide causes of action for trade associations. *See, e.g.*, Ariz. Rev. Stat. Ann. § 3-113A (Supp. 1995); Fla. Stat. Ann. § 865.065(3)(a) (West 1994).

73. *Auvil I*, 800 F. Supp. at 930.

74. *Id.*

75. Auvil v. CBS "60 Minutes" (*Auvil II*), 800 F. Supp. 941 (E.D. Wash. 1992).

76. *Id.* at 942, 944.

77. *Id.*

78. *Auvil I*, 800 F. Supp. at 930 n.2.

79. *Auvil II*, 800 F. Supp. at 944.

80. The court acknowledged in *Auvil II* that "[i]t is not the function of the judiciary to grade the social or artistic merits of speech," yet it noted the technical quality of the NRDC report, condemning by comparison the *60 Minutes* broadcast. *Id.* at 942.

III. THE NEW CROP OF AGRICULTURAL DISPARAGEMENT STATUTES

A. *The Statutes: Permitting Liability for Generic Disparagement*

Preventing such an alarmed consumer response in the future is precisely what supporters of recent agricultural disparagement legislation hope to achieve.[81] Passed in the wake of the Alar controversy[82] to protect agriculture,[83] these statutes generally provide a cause of action for any producer of a farm product who is injured by disparaging information about that product.

Numerous states have adopted[84] or considered[85] agricultural disparagement statutes. In no reported case has any cause of action provided by an agricultural disparagement statute been asserted. The new laws, however, have attracted widespread media attention—much of it ridicule over what has been termed "veggie-hate" legislation.[86] Other commentators have expressed concern over the laws' potential to deter or

---

81. *See, e.g.*, Michael Paulson, *Belittling Farm Crops Could Cost Big Bucks Under Senate Bill*, Seattle Post-Intelligencer, Jan. 28, 1994, at A1 (quoting Washington State Food Processors Council spokesperson as saying adoption of an agricultural disparagement bill by the Washington Legislature would "send a big message to the people that start these things . . . . I would hope this would have a chilling effect on the sometimes very irresponsible journalism and reporting.").

82. The first of these bills was adopted in 1991. 1991 La. Acts 972 (codified as La. Rev. Stat. Ann. §§ 3:4501–4504 (West Supp. 1995)).

83. *See, e.g.*, Okla. Stat. Ann. tit. 2, § 3010 (West Supp. 1996) ("The Legislature hereby finds . . . it is beneficial to the citizens of this state to protect the vitality of the agricultural economy by providing a legal cause of action for producers . . . to recover damages for the disparagement of any perishable agricultural food product.").

84. Ala. Code §§ 6-5-620 to -625 (Supp. 1994); Ariz. Rev. Stat. Ann. § 3-113 (Supp. 1995); Colo. Rev. Stat. Ann. §§ 35-31-101 to -104 (West Supp. 1995); Fla. Stat. Ann. § 865.065 (West 1994 & Supp. 1996); Ga. Code. Ann. §§ 2-16-1 to -4 (Supp. 1995); Idaho Code §§ 6-2001 to -2003 (Supp. 1995); La. Rev. Stat. Ann. §§ 3:4501–4504 (West Supp. 1996); Miss. Code Ann. §§ 69-1-251 to -257 (Supp. 1995); H.B. 352, 121st Gen. Assembly (Ohio 1996) (enacted Feb. 7, 1996; to be codified as Ohio Rev. Code § 2307.81); Okla. Stat. Ann. tit. 2, §§ 3010–3012 (West Supp. 1996); S.D. Codified Laws Ann. §§ 20-10A-1 to -4 (1995); Tex. Civ. Prac. & Rem. Code Ann. §§ 96.001–.004 (West 1996).

85. Agricultural disparagement bills that have been considered but not adopted include H.B. 1098, 54th Leg. (Wash. 1995); A.B. 558 (Cal. 1995); S.B. 311, 136th Gen. Assembly (Del. 1992); S.B. 234, 89th Gen. Assembly (Ill. 1995); H.F. 106, 76th Gen. Assembly (Iowa 1995); H.B. 949, 179th Gen. Assembly (Pa. 1995); S.B. 160 (S.C. 1995).

86. *See, e.g.*, Gary Stein, *Legislators Prove They Are Bananas*, Sun-Sentinel (Ft. Lauderdale, Fla.), Mar. 28, 1994, at 1B ("And I can just see the conversation in prison. 'What are you in for?' 'Triple axe murder. How about you?' 'I referred to sweet potatoes as "nauseating junk." I'm a repeat offender.'").

punish speech critical of food products, particularly news reporting on food safety.[87]

Most of the recent statutes alter the common-law elements of disparagement[88] in several ways favorable to plaintiffs and fail to apply the limitations constitutionally required in defamation claims.[89] By omitting an explicit requirement that a false statement be of and concerning the plaintiff, all but one[90] of the agricultural disparagement laws permit broad, *Auvil*-type generic disparagement claims. Growers—and, in some states, sellers,[91] shippers,[92] trade associations,[93] or anyone in "the entire chain from grower to consumer"[94]—can recover for damages

87. *See, e.g.*, Johnson & Lowy, *supra* note 8, at 22; Andrew Cohen, *"Veggie Hate Laws" Appear Rotten to Core*, Rocky Mountain News (Denver, Colo.), Nov. 10, 1995, at 6A.

88. *See supra* note 13 and accompanying text. *See generally House Bill 593; Product Disparagement*, Op. Idaho Att'y Gen. (unpublished opinion dated Feb. 28, 1992, on file with the *Washington Law Review*) (analyzing a disparagement bill resembling those adopted in other states and declaring much of it unconstitutional).

89. For example, some of the statutes permit liability with a lesser fault showing than was required either at common law or under New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and its progeny. *See* Johnson & Lowy, *supra* note 8, at 22; *see, e.g.*, La. Rev. Stat. Ann. § 3:4502(1) (West Supp. 1996) (a false statement is actionable if "the disseminator knows or should have known" of the falsity); Ala. Code §§ 6-5-621(1), -623 (Supp. 1994) (making agricultural disparagement a strict liability tort by declaring "[i]t is no defense . . . that the actor did not intend, or was unaware of, the act charged").

Also, most of the statutes presume false any information not based on "reliable, scientific facts," or some similar formulation; defendants may be required to prove the truth of their statements by offering—and convincing a factfinder of the "reliability" of—the scientific basis for their assertions. *See, e.g.*, Fla. Stat. Ann. § 865.065(2)(a) (West 1994 & Supp. 1996).

Furthermore, all but the Idaho and Colorado statutes define the tort not as publishing a false "statement," but as "dissemination" of false "information." This could make expression of scientific theories actionable. *See* Op. Idaho Att'y Gen., *supra* note 88, at 4, 8. Some commentators contend such scientific expression is entitled to the same protection as political speech. Curtis, *supra* note 71, at 531–34, argues that complex criticism—including the hypothesis that Alar is carcinogenic—deserves heightened protection because such speech, even if proven false, may still be valuable in advancing scientific or political understanding. *See also* Martin H. Redish, *Product Health Claims and the First Amendment: Scientific Expression and the Twilight Zone of Commercial Speech*, 43 Vand. L. Rev. 1433, 1443 (1990).

Fla. Stat. Ann. § 865.065(3)(b) and S.D. Codified Laws Ann. § 20-10A-3 (1995) also depart from common-law disparagement by providing for automatic punitive damages in certain cases.

90. The exception is Idaho Code §§ 6-2001 to -2003 (Supp. 1995). *See infra* notes 103–05 and accompanying text.

91. Ala. Code § 6-5-622 (Supp. 1994).

92. Ariz. Rev. Stat. Ann. § 3-113A (Supp. 1995).

93. Ariz. Rev. Stat. Ann. § 3-113A; Fla. Stat. Ann. § 865.065(3)(a); H.B. 352, 121st Gen. Assembly (Ohio 1996) (enacted Feb. 7, 1996; to be codified as Ohio Rev. Code § 2307.81).

94. Ga. Code. Ann. § 2-16-2(3) (Supp. 1995). *Cf.* Colo. Rev. Stat. Ann. § 35-31-104(b) (West Supp. 1995) (providing for restitution to "any victim" of a knowingly false statement made about a food product).

caused by disparaging information disseminated about a food product, with no requirement that the information identify the plaintiffs or their specific output.[95]

B. *Constitutional Questions Raised by the Statutes' Lack of Any "Of and Concerning" Requirement*

The constitutionality of the new statutes has not yet been tested.[96] A claim under one of the new agricultural disparagement statutes, however, should for a number of reasons[97] reveal the laws to be inconsistent with the constitutional protections of free speech that have developed over the last three decades.[98] The absence of an "of and concerning" requirement in itself makes the statutes vulnerable to a constitutional challenge for the same reason group libel claims are constitutionally barred: to protect free discourse on matters of public concern.[99]

To illustrate, consider the hypothetical in the introduction to this Comment. Under most of the statutes, a false report that disparages navel oranges and leads to a general decline in all agricultural sales could give rise to a claim by all navel orange growers. Such potentially limitless liability poses a greater deterrent to speech on public matters than is permissible under the First Amendment.[100] In addition, while the statutes generally require that to sustain a disparagement claim the plaintiff must produce "such products" as are disparaged,[101] the statutes provide no guidance as to how the term "such products" should be construed. Thus, liability in the hypothetical may not be limited to navel orange growers. In one sense, a report about navel oranges is by definition also about

95. *See, e.g.*, S.D. Codified Laws Ann. § 20-10A-2 (1995) ("Any producer of perishable agricultural food products" has a cause of action for damages resulting from disparagement of "any such perishable agricultural food product."). Most of the other statutes similarly require, before recovery is permitted, that a plaintiff produce or have an interest in "such" food product that has been disparaged.

96. In the only reported case involving any agricultural disparagement statute, a Georgia appellate court upheld dismissal, on the grounds that no justiciable controversy existed, of a declaratory judgment suit brought by two environmental watchdog groups against the state. Action for a Clean Env't v. State, 457 S.E.2d 273 (Ga. Ct. App. 1995), *cert. denied*, 1995 Ga. LEXIS 1012 (Sept. 5, 1995).

97. *See supra* note 89 for possible grounds, in addition to the absence of any "of and concerning" requirement (discussed *infra* text accompanying notes 99–102), upon which the agricultural disparagement statutes might be found unconstitutional.

98. *See supra* part I.A.

99. *See supra* notes 36–40, 69–72 and accompanying text.

100. *See supra* notes 36–40, 69–80 and accompanying text.

101. *See supra* note 95.

citrus fruit (albeit merely a type of citrus fruit as opposed to all citrus fruit). It is possible to read the agricultural disparagement statutes as permitting producers of citrus fruit in such a case to recover as well.[102]

The only new agricultural disparagement law to apply the same constitutional limitations that apply to defamation is the Idaho statute.[103] Not only does the statute explicitly require that the disparaging statement be "of and concerning the plaintiff's specific perishable agricultural food product,"[104] it defines the required level of specificity: "The disparaging factual statement must be clearly directed at a particular plaintiff's product. A factual statement regarding a generic group of products, as opposed to a specific producer's product, shall not serve as the basis for a cause of action."[105] In barring generic disparagement claims in this manner, this language constitutionally addresses the "of and concerning" requirement.

Outside of Idaho, the question still remains: How specific must a reference be in order to give rise to a constitutional disparagement claim? If *Auvil I* and the new statutes incorrectly suggest that a statement about "apples" is of and concerning all apples, at what point is a statement sufficiently of and concerning a particular plaintiff's product?

IV. WHEN GENERIC DISPARAGEMENT CLAIMS MAY BE CONSTITUTIONAL

A. *Free Speech Versus a Special Vulnerability to Injury*

These questions amount to asking when disparagement liability for a general reference may be permitted without inhibiting discourse in a constitutionally impermissible manner. Because generic products are indistinguishable, real economic injury to their producers can result from statements that do not identify the products with the level of specificity

---

102. Liability may extend to even more bizarre lengths in Alabama, which requires no direct connection between the plaintiff and the type of product that is disparaged: "Any person who produces, markets, or sells a perishable food product" who "suffers damage as a result of another person's disparagement of perishable food products" has a cause of action. Ala. Code § 6-5-622 (Supp. 1994). Conceivably every injured farmer and food seller in the state could claim disparagement from a report that referenced only navel oranges.

103. Idaho Code §§ 6-2001 to -2003 (Supp. 1995). The statute requires a strict "of and concerning" showing and proof that the defendant acted with actual malice regarding the falsity of the statement, bars punitive damages, places the burden of proof on the plaintiff, and limits liability to false factual statements.

104. Idaho Code § 6-2002(1)(a).

105. Idaho Code § 6-2003(4).

needed to satisfy the "of and concerning" requirement in other contexts. Under what circumstances, if any, should this enhanced susceptibility to injury from general statements outweigh the constitutional basis for the group libel principle—that is, assuring that speech on issues of public concern is not deterred?

Conventional "of and concerning" analysis does not address this generic disparagement problem. A defamatory statement is of and concerning a plaintiff if the statement's recipient reasonably understands that it refers to the plaintiff.[106] In most non-generic disparagement claims, this test can be easily adopted without regard for the distinction between defamation and disparagement, and between a plaintiff personally and a plaintiff's product. If a disparaging statement's recipient reasonably understands the statement to refer to the plaintiff's product, it is of and concerning the plaintiff's product. In generic disparagement claims, however, the distinction between a plaintiff individually and that plaintiff's product cannot be overlooked: Although a statement about "Smith's apples" is of and concerning both Smith and her apples, it does not follow that a statement about "apples," with no reference to any individual or individual's product, is of and concerning Smith's apples. Furthermore, whereas defamatory statements referring to large groups generally are not of and concerning any individual,[107] some generic disparagement claims may present circumstances in which the group libel rule does not bar a finding that a general statement is of and concerning specific products. The remainder of this Comment will consider a framework for identifying those circumstances.

B. *Goals of a Generic Disparagement Framework*

A framework for determining when a general statement is of and concerning all types of a product must uphold constitutional principles and protect the public's interest in valuable speech such as that examining food safety. At the same time, it also should identify the narrow circumstances in which generic disparagement claims are in theory[108] constitutionally permissible—that is, when the potential for chilling speech on matters of public concern is slight and the potential for

106. *See supra* note 33 and accompanying text.

107. *See supra* notes 34–35 and accompanying text.

108. Even when such a claim is constitutional under the framework to be proposed here, a court may nevertheless bar it. Just as the group libel rule has non-constitutional as well as constitutional justifications, courts are free to decide as a matter of policy to bar broad disparagement claims. *See supra* notes 35–40, 61–72 and accompanying text.

widespread injury to all producers of a type of generic product is high. Given the potentially innumerable parties and huge damages resulting from generic disparagement claims, the framework should limit liability to those egregious circumstances in which producers damaged by deliberately false statements should not be denied a remedy simply because "their product . . . has many producers instead of only a few."[109]

The framework proposed here does not seek to define precisely when a statement is "too generic" to be of and concerning any individual product. Rather, it describes the factors a court should consider in deciding whether a relatively greater or lesser level of specificity is required to satisfy the "of and concerning" requirement.

C. *Determining the Specificity Needed to Satisfy the "Of and Concerning" Requirement*

A starting point for such a framework is the *Restatement (Second) of Torts'* limitation on disparagement liability to cases in which the defendant "intends for publication of the statement to result in harm to interests of the other having a pecuniary value, or either recognizes or should recognize that it is likely to do so."[110] The question that must be addressed in determining whether a general statement is of and concerning a generic producer's product is: Whose interests must the defendant intend to harm, and how directly must the statement identify them?

One possible answer is that to be of and concerning each product in a generic class of products, the defendant must identify or intend for his statement to reflect directly on every product in the class; if the defendant disparages "oranges" but has no particular orange grower "in mind," his statements are not of and concerning any orange grower's product.[111] At the other extreme, a generically disparaging statement referring to no product in particular could be of and concerning the entire class no matter what the defendant subjectively intends; it could simply be held that the defendant should have known that by referring to a

109. Appellants' Reply Brief at 9, Auvil v. CBS "60 Minutes", 67 F.3d 816 (9th Cir. 1995) (No. 93-35963), *cert. denied*, 64 U.S.L.W. 3605 (U.S. Apr. 29, 1996) (No. 95-1372).

110. *Restatement (Second) of Torts* § 623A (1977). *See supra* note 13 and accompanying text.

111. A literal application of this could bear out the admonition in *Auvil I* that "potential disparagors . . . are home free if only they succeed in wreaking damage on a sufficient number of manufacturers." Auvil v. CBS "60 Minutes", 800 F. Supp. 928, 936 (E.D. Wash. 1992).

product generically, the statement would injure each producer of that product.[112]

The goal of this framework—assuring public discourse is not deterred while recognizing that generic producers can be vulnerable to general statements—can be achieved without resorting to either of these polar positions. To satisfy constitutional concerns, the "of and concerning" requirement must be strictly construed in most instances, but a generic disparagement claim may be permissible if certain conditions are met. Courts should consider the following factors in determining the level of specificity needed to satisfy the "of and concerning" element.

1. *Distinguishing Allegedly Disparaged Products and Products Referred to in the Statement*

As a threshold requirement, a statement that identifies a particular breed, brand, genus, or type of product should not be held to be of and concerning some other classification of that product.[113] The more removed a plaintiff's product is from the actual subject of the allegedly disparaging statement, the less likely it is the statement was intended to harm the plaintiff or was objectively about the plaintiff. Applying this to the hypothetical orange growers, if a statement refers only to navel oranges, growers of other varieties of oranges or other foods should not be able to sustain a disparagement claim, even if they suffered damages as a result of the statement.

There are two reasons for this. The first is prudential: It is an axiom of tort law that defendants are not necessarily liable for all damage attributable to them. At some point logic, administrative efficiency, a judicial sense of fair play, and other policy concerns combine to set some limit, in the form of proximate causation, on the extent of liability.[114] The second reason for using the "of and concerning" element to limit liability in this manner is constitutional. Were journalists and other commentators

112. Most of the agricultural disparagement statutes take this approach, providing a cause of action with no intent-to-harm element. *See, e.g.*, Ariz. Rev. Stat. Ann. § 3-113E(1) (Supp. 1995) (requiring no intent to harm, merely intentional dissemination of information defendant "knows or should have known to be false").

113. If the statement identifies a specific individual or product, it cannot logically be of and concerning another individual even if the other is damaged. Yet under the new agricultural disparagement laws, liability in such cases appears possible: "Joe Blow could sue [a] newspaper if it ran a false story about Jane Blow's apples." Cohen, *supra* note 87, at 6A.

114. *See, e.g.*, Palsgraf v. Long Island R.R.. 162 N.E. 99, 101–05 (N.Y. 1928) (Andrews, J., dissenting); Wex S. Malone, *Ruminations on Cause-In-Fact*, 9 Stan. L. Rev. 60, 61–62, 97–98 (1956).

to fear liability not only from their subjects but from any other party that might come to be affected by their statements, few would risk speech on any product at all.[115]

2. *Statements Targeting Treatment or Processing, Not the Product Itself*

A more specific reference should be required to satisfy the "of and concerning" requirement when the allegedly disparaging statement targets the way some of the products are processed than when the statement is about the product itself. The statement "apples cause cancer" is intuitively more of and concerning apples than is the statement "apples treated with Alar cause cancer." When the product itself is disparaged, individual producers can do nothing to separate their product from the criticism. This is not so when the target is a method of treatment; a producer could, for example, cease using the method in question or advertise that its products are free of the criticized additive. Although the harm resulting from criticism directed at a pervasive agricultural practice sometimes may be, as a practical matter, just as severe as criticism leveled at the product itself, the real target of such statements is still the treatment and not the product. Furthermore, the public's interest in assuring safe business practices and a safe food supply warrants the highest level of protection for speech on issues involving manufacturing and agricultural practices.[116]

Applying this analysis to the hypothetical orange growers, the fact that the false statement was about a procedure used to treat navel oranges rather than about the fruit itself would be a factor supporting application of a strict "of and concerning" requirement to any disparagement claim. A broad, generic disparagement claim by navel orange growers—some of whom may not even use the procedure in question—would probably be barred. Suppose, however, the criticized procedure was the use of a generic pesticide made by thirty producers. The fact that the pesticide itself was implicated would, assuming the other elements of the tort were met, weigh in support of a disparagement claim by all of the pesticide's manufacturers.

115. *See supra* notes 69–72 and accompanying text.

116. *See* Arent, *supra* note 11, at 445 (arguing speech critical of products and businesses deserves full First Amendment protection to "encourage investigation and exposure of product defects and unethical business practices").

3. *Defendants Seeking a Competitive Advantage over Plaintiffs*

Generally, commercial speech is thought to be "hardy" enough to withstand the possible chilling effect of reduced First Amendment protection.[117] Commercial speech is constitutionally protected, but in some contexts to a lesser degree than non-commercial speech;[118] for example, the First Amendment does not protect misleading commercial speech from government suppression.[119] The constitutional protection that is afforded to commercial speech rests in some measure on the value such speech has to the consuming public.[120] This value is reduced when the speech is "solely in the individual interest of the speaker and its specific business audience,"[121] or when a false claim about safety is advertised "for the purpose of persuading members of the reading public to buy the [advertiser's] product."[122] For these reasons, self-serving disparaging statements made about a competitor should not receive the highest level of First Amendment protection.[123] A relatively less specific reference constitutionally could satisfy the "of and concerning" requirement when a defendant makes a disparaging statement to gain a competitive advantage over the plaintiff.

---

117. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 762–63 (1985); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 n.24 (1976). The commonly accepted definition of commercial speech is speech that does "no more than propose a commercial transaction." Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973). The precise distinction between commercial and non-commercial speech strikes some as elusive. *See* Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech*, 76 Va. L. Rev 627, 638–48 (1990).

118. *Virginia Pharmacy*, 425 U.S. at 770–72.

119. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 566 (1980); *cf.* U.S. Healthcare, Inc. v. Blue Cross, 898 F.2d 914, 932 (3d Cir.), *cert. denied*, 498 U.S. 816 (1990) (holding that "the subordinate valuation of commercial speech is not confined to the government regulation line of cases" but applies as well to defamatory commercial speech involving matters of private concern). For criticism of this holding, see Arlen W. Langvardt, *Section 43(a), Commercial Falsehood, and the First Amendment: A Proposed Framework*, 78 Minn. L. Rev. 309, 378–83 (1993).

120. *Virginia Pharmacy*, 425 U.S. at 763–65; Langvardt, *supra* note 11, at 939 n.217.

121. *Greenmoss*, 472 U.S. at 762.

122. National Comm'n on Egg Nutrition v. FTC, 570 F.2d 157, 159, 163 (7th Cir. 1977) (upholding bar on false advertisements that stated "no scientific evidence" linked egg consumption with heart disease), *cert. denied*, 439 U.S. 821 (1978).

123. *See* Langvardt, *supra* note 11, at 968–69 (arguing lesser degree of fault should be required to prove disparagement when statement is made about competitor); Reinhard, *supra* note 13, at 738 (arguing disparagement of rival's property merits no First Amendment protection). *But see* Arent, *supra* note 11, at 474 (contending that basing level of First Amendment protection on parties' status as competitors "would chill some valuable speech and diminish the effect of competition between firms").

Thus, a less specific reference to the grower-plaintiffs would tend to satisfy the "of and concerning" element if the party disparaging the safety of oranges was not a news reporter but rather a representative of the apple industry whose intent was to convince consumers to switch from oranges to apples.

4. Allegedly Disparaging Statements Addressing Matters of Public Concern

The constitutional rationale for the group libel rule turns on protecting speech on matters "in the public eye."[124] Therefore, in applying this rationale to generic disparagement claims, greater protection—in the form of requiring a more strictly construed "of and concerning" element—is warranted when the statement refers to matters of public concern.

Some lower courts have stated that speech about products, such as consumer reporting, is of sufficient public interest to warrant heightened First Amendment protection.[125] Unfortunately, the Supreme Court "has failed to provide meaningful standards or other significant guidance" to distinguish public concerns from private disputes.[126] One commentator has attempted to provide such guidance, describing several considerations that are particularly relevant to generically disparaging statements.[127] According to this view, speech about products is more likely to be of public concern if it "pertains to an essential of life" such

124. Michigan United Conservation Clubs v. CBS News, 485 F. Supp. 893, 900 (W.D. Mich. 1980), *aff'd*, 665 F.2d 110 (6th Cir. 1981). "It is speech on 'matters of public concern' that is 'at the heart of the First Amendment's protection.'" *Greenmoss*, 472 U.S. at 758–59 (citations omitted).

125. *See, e.g.*, Quantum Elecs. Corp. v. Consumers Union of United States, Inc., 881 F. Supp. 753, 764 (D.R.I. 1995) (" [B]y its nature, consumer reporting involves matters of particular interest to the public."); Dairy Stores Inc. v. Sentinel Publishing Co., 516 A.2d 220, 239–40 (N.J. 1986) (Garibaldi, J., concurring). *But see* Turf Lawnmower Repair, Inc. v. Bergen Record Corp., 655 A.2d 417, 427 (N.J. 1995) (noting that consumer reporting on "local businesses that involve everyday products or services" may not involve legitimate public interest), *cert. denied*, 116 S. Ct. 752 (1996).

126. Langvardt, *supra* note 11, at 964. Whether speech relates to a matter of public concern "must be determined by [the expression's] content, form, and context." Connick v. Myers, 461 U.S. 138, 147–48 (1983). A credit report that had limited circulation and was "solely in the individual interest of the speaker and its specific business audience" was not a matter of public concern. *Greenmoss*, 472 U.S. at 761–63. A celebrity divorce was also a private dispute. Time, Inc. v. Firestone, 424 U.S. 448, 454 (1976). *See also* Snead v. Redland Aggregates Ltd., 998 F.2d 1325, 1330 (5th Cir. 1993) (allegation that rail company appropriated another company's car design concerned a private matter), *cert. denied*, 114 S. Ct. 1587 (1994); Unelko Corp. v. Rooney, 912 F.2d 1049, 1056 (9th Cir. 1990) (broadcaster's statement that plaintiff's product "didn't work" addressed matter of public concern), *cert. denied*, 499 U.S. 961 (1991).

127. Langvardt, *supra* note 11, at 966–68. Langvardt describes seven factors in all.

as food,[128] or "to a matter of public safety or public health."[129] The determination further turns on the extent to which the public uses the product.[130] A plaintiff also may make its product a matter of public concern by advertising it extensively or inviting critical reviews.[131]

Under this "public concern" factor, for example, a disparagement claim brought by a large group of orange growers would more likely be permissible if based on a false statement that oranges have a shorter than expected shelf life than if based on a false report that oranges are unsafe to eat. The first statement is primarily of interest to those in the business of selling the fruit and, therefore, is not as deserving of the protection afforded matters of public concern. The latter concerns all consumers and, therefore, merits requiring the plaintiffs to show the statement referred more specifically to their oranges.

D. Scope of the Framework

It must be emphasized that these factors address only the relative level of specificity necessary to satisfy the "of and concerning" element when producers of generic products are economically injured by statements that do not refer to their products directly. It would be incorrect, for example, for a plaintiff claiming to be the specific, though unnamed, target of a competitor's false advertisement to argue the "of and concerning" requirement should be relaxed because the advertisement was published to gain a competitive advantage. Nor could a defendant assert his statement that "Jane uses DDT on her oranges" is not of and concerning Jane's oranges because it addresses the way the fruit is treated, not the oranges themselves.

What sort of group disparagement claim, therefore, might be constitutionally permitted? Applying the framework here to the orange hypothetical, all navel orange growers who sustain economic injury from a false report might claim disparagement if: 1) the report referred to navel oranges generally, as opposed to a particular brand or those grown in a specific location; 2) the report concluded that something inherent in all navel oranges, rather than the way some of them are processed,

128. *Id.* at 966.

129. *Id.* at 966–67. This factor requires "examination of the seriousness, likelihood, and immediacy of the danger that would have been created if the defects had actually existed." *Id.* at 967. *See also Quantum Electronics*, 881 F. Supp. at 764.

130. Langvardt, *supra* note 11, at 967.

131. Steaks Unlimited, Inc. v. Deaner, 623 F.2d 264, 273–74 (3d Cir. 1980); *Quantum Electronics*, 881 F. Supp. at 764–65.

renders them unsafe to consume; 3) the false report's publisher was in competition with the navel orange industry, perhaps a grower of another variety of oranges; and 4) the report implicated the safety of the fruit, as opposed to its economic viability or some other characteristic of lesser public interest. If some but not all of these conditions were present, a court would weigh each factor and determine whether finding that the "of and concerning" requirement was satisfied with something less than a direct, specific reference to the plaintiff's products was justified. Admittedly, these are narrow, perhaps unlikely, circumstances,[132] but if the traditional understanding of the "of and concerning" requirement is to be expanded at all, the limits described here are appropriate.

V. CONCLUSION

Producers of indistinguishable goods can be injured by non-specific, disparaging statements about the type of good they produce. In finding generic disparagement claims generally permissible, however, the *Auvil I* decision and the recent agricultural disparagement laws threaten to unconstitutionally deter discourse on matters of public concern and to extend liability beyond traditionally recognized limits. The "of and concerning" requirement and the group libel rule should be applied to bar most disparagement actions for speech that does not specifically identify a particular plaintiff's product.

The new disparagement statutes address economic protectionist concerns that do not outweigh the constitutional interests in barring broad generic disparagement claims. Only where the speech in question poses a true risk of injury to all producers of a type of product, in a manner that does not implicate constitutional concerns about deterring important speech, may a generic disparagement claim be allowed. This should occur only when some extreme circumstance justifies finding that the "of and concerning" requirement is satisfied with a less specific reference than is normally required.

---

132. Nevertheless, the framework proposed here is more generous in its treatment of generic references than is the analogous area of trademark law. Generic terms are not entitled to any trademark protection. Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 194 (1985). *See also* 15 U.S.C. § 1064(3) (1995) (providing for cancellation of trademark registration if mark has become the generic name for the good); Ralph H. Folsom & Larry L. Teply, *Trademarked Generic Words*, 89 Yale L.J. 1323, 1323–27 (1980).