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MAD COWS, OFFENDED EMUS, AND OLD EGGS: PERISHABLE PRODUCT DISPARAGEMENT LAWS AND FREE SPEECH

Lisa Dobson Gould

Abstract: In the wake of the 1989 controversy over Alar use on apples, several states enacted laws providing a civil cause of action to producers damaged by false statements disparaging the safety of their perishable food products. Commentators have suggested that these laws are unconstitutional and contrary to the First Amendment's free speech protections. This Comment argues that the majority of state laws either meet or exceed the constitutional protections established by the U.S. Supreme Court's defamation cases. However, these laws are unlikely to be used widely in the future because of their stringent proof requirements and because such suits often create greater public awareness of the disparaging statements the plaintiff seeks to redress.

Since 1991, twelve states have enacted statutes allowing producers of perishable food products to sue persons who disseminate false statements about the safety of their products.[1] Although commentators argue that these laws may violate First Amendment free speech protections,[2] no court has yet determined their constitutionality.[3]

To date, three product disparagement actions have been brought under the state statutes. In the first statutory product disparagement suit to reach trial, Texas ranchers sued Oprah Winfrey, her television show, and a guest who claimed that much of the American beef supply was likely infected with bovine spongiform encephalopathy, or "mad cow

1. *See infra* notes 39–40 and accompanying text.

2. *See, e.g.*, David J. Bederman et al., *Of Banana Bills and Veggie Hate Crimes: The Constitutionality of Agricultural Disparagement Statutes*, 34 Harv. J. on Legis. 135 (1997); Megan W. Semple, Comment, *Veggie Libel Meets Free Speech: A Constitutional Analysis of Agricultural Disparagement Laws*, 15 Va. Envtl. L.J. 403, 428 (1995–96); Julie J. Srochi, Comment, *Must Peaches Be Preserved at All Costs? Questioning the Constitutional Validity of Georgia's Perishable Product Disparagement Law*, 12 Ga. St. U. L. Rev. 1223, 1233 (1996); Eric M. Stahl, Comment, *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). The First Amendment applies to the States through the Due Process Clause of the Fourteenth Amendment. *See, e.g.*, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 749 n.1 (1976).

3. Publishers of environmental newsletters challenged the constitutionality of Georgia's statute before any plaintiffs had brought suit under the law, but the state court held that the issue was not yet ripe for review. *See* Action for a Clean Env't v. State, 457 S.E.2d 273, 274 (Ga. App. 1995).

disease."[4] Although the statute's constitutionality was raised, the judge did not directly decide the issue.[5] In a second case, emu ranchers sued Honda over an advertisement that jokingly called emu the "pork of the future."[6] In the third case, egg producers brought a counterclaim against a public interest group that sued the producers for allegedly re-packaging, re-dating, and selling eggs that were no longer safe for consumption.[7] The egg producers have since dropped their product disparagement claim.[8]

Although the perishable product disparagement laws derive from the common law tort of product disparagement, they were enacted primarily in response to the controversy generated by a 1989 television report on the use of the chemical Alar on apples.[9] Apple sales plummeted after the CBS television show "60 Minutes" reported that Alar, which was used on U.S. apples, was carcinogenic to humans.[10] Apple growers in Washington State sued CBS on a common law product disparagement claim, but lost their suit.[11] Both industry and legislative concern over the

4. Clarence Page, *'Veggie Libel' Laws Cast Chill over Free Speech*, Salt Lake Trib., Mar. 5, 1998, at A9, *available in* 1998 WL 4041336.

5. Instead, the judge dismissed the statutory cause of action, forcing the plaintiffs to move forward under a common law business disparagement claim. Texas Beef Group v. Winfrey, No. 2:96-CV-208-J, 1998 U.S. Dist. LEXIS 3559, at *19–20 (N.D. Tex. Feb. 26, 1998). The judge held that live cattle did not constitute perishable products and that the plaintiffs had not proven the alleged disparagement was "knowingly false," as required by the statute. *Id.* at *13–14 (noting that "knowingly false" standard "exceeded even the constitutionally required 'actual malice' standard . . . established in *New York Times*"). The Texas ranchers have appealed and filed a second suit against the same defendants in Texas state court. *See* Alan Guebert, *Who Is Paul Engler, and Why Is He Still Suing Oprah Winfrey?*, Peoria J. Star, May 12, 1998, at C2, *available in* 1998 WL 5764765.

6. *See* Tim Jones, *Oprah Verdict Could Tongue-Tie Her and Others*, Chi. Trib., Feb. 16, 1998, § 1, at 1; Page, *supra* note 4.

7. *See* Vindu P. Goel, *Suit Accuses Buckeye of Selling Old Eggs as Fresh*, Cleveland Plain Dealer, Mar. 8, 1998, at 15A, *available in* 1998 WL 4124200; *see also* Jones, *supra* note 6.

8. *See* Vindu P. Goel, *Buckeye Egg Farm Drops Suit Against Ohio Consumer Group*, Cleveland Plain Dealer, Jul. 7, 1998, at 2C, *available in* 1998 WL 4143512.

9. *See* Barry Schlachter, *Texas Suits Pose First Test of Laws Against 'Food Libel,'* Oregonian, Jan. 18, 1998, at A14; *see also* Bederman, *supra* note 2, at 135–36; 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, 22 (Summer 1994); Semple, *supra* note 2, at 403–04; Sue Anne Pressley, *Amarillo, Texas, Agog Over Oprah's Presence*, St. Louis Post-Dispatch, Jan. 19, 1998, at A4, *available in* 1998 WL 3314470.

10. Schlachter, *supra* note 9, at A14.

11. *See* Auvil v. CBS "60 Minutes," 800 F. Supp. 928 (E.D. Wash. 1992).

economic harm resulting from the Alar controversy led several states to create a statutory cause of action for perishable product disparagement.[12]

The tort of product disparagement consists of the publication of false statements of fact concerning the plaintiff's property or business that results in pecuniary loss to the plaintiff.[13] The U.S. Supreme Court has never addressed how product disparagement fits within the scope of First Amendment jurisprudence,[14] but many lower courts have applied the Court's First Amendment defamation requirements to product disparagement cases.[15] Commentators have suggested that product disparagement laws would not survive constitutional analysis because they do not conform to constitutional standards for defamation suits.[16]

This Comment argues that the majority of the state product disparagement laws are consistent with First Amendment protections developed within the context of defamation law and are therefore constitutional. Part I discusses the differences between the common law torts of product disparagement and defamation. Part II sets forth the requirements of the civil causes of action provided in states that have enacted perishable product disparagement statutes. Part III reviews the U.S. Supreme Court's First Amendment free speech jurisprudence, which has developed almost exclusively in the area of defamation law. Part IV analyzes the constitutionality of perishable product disparagement laws under the Supreme Court's First Amendment defamation standards and describes the proof requirements of the laws, which negate the need for additional protections. Part V notes that, while constitutional, state product disparagement laws are likely to be used only sparingly in future litigation because of the burdens they place on potential plaintiffs.

I. THE COMMON LAW ELEMENTS OF PRODUCT DISPARAGEMENT AND DEFAMATION

Product disparagement and defamation are similar, but distinctly different torts in terms of their historical development and required

12. *See* Bederman, *supra* note 2, at 135–36; Aaron Epstein, *'Oprah' Case to Test Food-Libel Law*, Seattle Times, Dec. 29, 1997, at A5.

13. *See Restatement (Second) of Torts* §§ 623A, 624 (1977); *see also* J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 27:103 (4th ed. 1997).

14. *See infra* notes 121–23 and accompanying text.

15. *See infra* note 66.

16. *See supra* note 2.

elements of proof under the common law.[17] Both common law torts required proof of a false negative statement concerning plaintiffs or their products that were disseminated to third parties.[18] One key distinction between the common law torts of disparagement and defamation is that disparagement protects plaintiffs' economic interests in property, while defamation protects plaintiffs' reputational interests and good name.[19] Further, product disparagement historically required plaintiffs to prove additional elements that defamation did not,[20] including fault by the defendant, falsity of the statement, and resulting pecuniary damages.[21]

A. Product Disparagement

Product disparagement is a subcategory within the broader common law tort of disparagement.[22] The earliest cases of disparagement arose in the late sixteenth century and, although recognized as loosely connected to defamation,[23] developed as a completely separate tort.[24] The elements of common law product disparagement included proof that: (1) the defendant published a statement of fact to a third party, (2) the statement

17. Since 1964, the U.S. Supreme Court has created additional proof requirements for the common law tort of defamation. *See infra* Part III.A.

18. *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, 914 (1989).

19. W. Page Keeton et al., *Prosser & Keeton on the Law of Torts* §§ 111, 128, at 777, 964 (5th ed. 1984).

20. It is possible that a plaintiff could have both a product disparagement and a defamation claim, such as when a defendant falsely disparages a plaintiff's products while implying that the poor quality of the products is due to the plaintiff's bad business practices or dishonesty. *See, e.g.*, Kollenberg v. Ramirez, 339 N.W.2d 176 (Mich. App. 1983) (holding that as long as damages do not overlap, where defamation and disparagement overlap plaintiff may bring suit for both). Modernly, the Supreme Court's First Amendment jurisprudence has added several proof requirements to defamation, making defamation much more similar to disparagement than it was under the common law. *See infra* Part III.A.

21. *See* 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, 447 (1992).

22. *See* Keeton et al., *supra* note 19, § 128, at 963, 965–67. Product disparagement has gone by many names, including "slander of title," "slander of goods," "trade libel," "unfair competition," and more recently, "injurious falsehood." *See* William L. Prosser, *Injurious Falsehood: The Basis of Liability*, 59 Colum. L. Rev. 425 (1959).

23. *See* Prosser, *supra* note 22, at 425.

24. *Id.* at 429 ("Nothing is better settled . . . than that the action for injurious falsehood, notwithstanding the cognomen of 'slander of title,' is in no way derived or descended from, or related to, the defamation actions for libel and slander.").

was false, (3) the statement was understood to refer to the plaintiff's goods or services and to disparage their quality, (4) the defendant made the statement maliciously, and (5) the statement was a substantial factor in causing the plaintiff pecuniary loss (or special damages).[25]

While both torts required dissemination of a disparaging statement, product disparagement had more stringent proof requirements under the common law. Falsity was not presumed under common law disparagement; thus, the plaintiff had to prove an allegedly disparaging statement false.[26] Courts also generally required product disparagement plaintiffs to show some degree of fault, either by proving malice where a privilege existed or by proving an absence of any privilege to make the disparaging remark.[27] A privilege under the common law essentially provided a qualified excuse from liability.[28]

B. Defamation

Common law defamation encompasses the "twin torts" of libel and slander, both of which require the dissemination of false and negative statements concerning a plaintiff.[29] Defamation is commonly defined as a statement that "tends to hold the plaintiff up to hatred, contempt or ridicule, or to cause him to be shunned or avoided," or an injury to personal reputation that involves disgrace.[30] Unlike disparagement, defamation arose out of efforts by the secular and ecclesiastical courts of England to punish what was seen as a sin and was never viewed as a property-based crime under the common law.[31]

Prior to 1964, defamation was a strict liability tort and was relatively easy for plaintiffs to prove. Plaintiffs were not required to prove any fault on the part of a defendant with regard to the truth or falsity of a

25. 9 Stuart M. Speiser et al., *The American Law of Torts* § 33.2, at 1015–16 (1992); *see also Restatement*, *supra* note 13, §§ 623A, 624.

26. *See* Langvardt, *supra* note 18, at 916.

27. *See* William L. Prosser, *Handbook of the Law of Torts* 920–21 (4th ed. 1971); Langvardt, *supra* note 18, at 916; Prosser, *supra* note 22, at 429, 431.

28. One example of a qualified privilege under the common law was the privilege of "fair comment," which excused from liability comment about public officers or employees regarding matters of public concern. Prosser, *supra* note 27, at 819.

29. *See* Langvardt, *supra* note 18, at 907.

30. Prosser, *supra* note 27, at 739.

31. Keeton et al., *supra* note 19, § 111, at 772; R.C. Donnelly, *History of Defamation*, 1949 Wis. L. Rev. 99 (1949); Van Vechten Veeder, *The History and Theory of the Law of Defamation*, 3 Colum. L. Rev. 546 (1903).

statement.[32] As a result, defamation defendants could be held liable even if they had a good faith belief in the truth of their statements.[33] Moreover, common law defamation required no proof of actual damages, but allowed for presumed damages upon proof of defamation.[34] The only limit placed upon liability for common law defamation, other than the assertion of privilege,[35] was a requirement that the defamatory meaning and its reference to the plaintiff be conveyed to and understood by others.[36] None of the more stringent proof requirements of product disparagement regarding fault, falsity, and damages applied to common law defamation.[37]

II. STATE PERISHABLE PRODUCT DISPARAGEMENT LAWS

Twelve states reacted to the 1989 Alar controversy[38] by enacting laws codifying the common law tort of product disparagement.[39] Louisiana enacted the first of these statutes in 1991.[40] All but one of these state laws protect against harm caused by disparaging statements about a type of product, as opposed to statements directed against a specific producer's

32. Langvardt, *supra* note 18, at 909.

33. *Id.* at 909–10; *see also* Keeton et al., *supra* note 19, § 111, at 772–73.

34. *See* Langvardt, *supra* note 18, at 911.

35. *Id.* at 911–13.

36. *See* Prosser, *supra* note 27, at 773.

37. *See supra* notes 25–27 and accompanying text.

38. *See supra* notes 9–12 and accompanying text.

39. The twelve states are: Alabama, Arizona, Florida, Georgia, Idaho, Louisiana, Mississippi, North Dakota, Ohio, Oklahoma, South Dakota, and Texas. *See* Ala. Code §§ 6-5-620 to 6-5-625 (Supp. 1997); Ariz. Rev. Stat. Ann. § 3-113 (West Supp. 1997); Fla. Stat. Ann. § 865.065 (West 1997); Ga. Code Ann. §§ 2-16-1 to 2-16-4 (Supp. 1998); Idaho Code §§ 6-2001 to 6-2003 (1997); La. Rev. Stat. Ann. §§ 4501 to 4504 (West Supp. 1998); Miss. Code Ann. §§ 69-1-251, 69-1-253, 69-1-255, 69-1-257 (Supp. 1998); N.D. Cent. Code §§ 32-44-01 to 32-44-04 (Supp. 1997); Ohio Rev. Code Ann. § 2307.81 (Banks-Baldwin Supp. 1997); Okla. Stat. Ann. tit. 2, §§ 361b, 3010, 3011, 3012 (West Supp. 1998); S.D. Codified Laws §§ 20-10A-1 to 20-10A-4 (Michie 1995); Tex. Civ. Prac. & Rem. Code Ann. §§ 96.001 to 96.004 (West 1997). Unlike the other states, North Dakota requires a "false and defamatory" statement and calls its civil cause of action "defamation of agricultural products and management practices" rather than "disparagement." N.D. Cent. Code § 32-44-02. One other state, Colorado, does not provide a civil cause of action but does criminalize product disparagement that unfairly restrains trade or results in the "destruction" of perishable food products. *See* Colo. Rev. Stat. Ann. § 35-31-101 (West 1997).

40. *See* La. Rev. Stat. Ann. § 4501.

product.[41] Each of the twelve states provides a civil cause of action for producers and sometimes other parties involved in the distribution of perishable agricultural products that suffer damages resulting from the publication of false and damaging statements regarding the safety of their food products.[42]

Few of the statutes address explicitly which party bears the burden of proof on the elements of the cause of action. Only Idaho and Ohio appear expressly to place the burden on the plaintiff to prove all elements of a perishable product disparagement action.[43] Alabama's statute implies that the burden is on the plaintiff by discussing defenses not available to the disseminator of the disparaging statement, providing that "[i]t is no defense . . . that the actor did not intend, or was unaware of, the act charged."[44] Assuming that courts interpret the other nine statutes consistently with their common law precursor, plaintiffs also bear the burden of proof under these laws.[45]

Each statute varies to some degree on the elements of proof required, with Idaho's demanding the most stringent standards of proof. Only Idaho requires a plaintiff to prove each element of the action by "clear

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41. Idaho is the only state that requires that the disparaging statement refer to the plaintiff's product specifically, as opposed to the type of product generally. *See infra* note 47 and accompanying text.

42. Idaho, Louisiana, Mississippi, Oklahoma, South Dakota, and Texas allow only producers harmed by the disparaging statement to sue. Idaho Code Ann. § 6-2003(1); La. Rev. Stat. Ann. § 4503; Miss. Code Ann. § 69-1-255; Okla. Stat. Ann. tit. 2, § 3012; S.D. Codified Laws § 20-10A-2; Tex. Civ. Prac. & Rem. Code Ann. § 96.002(b). Georgia allows any person damaged by the disparaging statement, including the entire chain from grower to consumer, to sue. Ga. Code Ann. §§ 2-16-2(3), 2-16-3. Ohio allows producers, distributors, sellers, and associations representing such parties to sue. Ohio Rev. Code Ann. § 2307.81(B)(4)–(C). Alabama provides the cause of action to any person who produces, markets, or sells a perishable product, while North Dakota allows any "person engaged in growing, raising, distributing, or selling an agricultural product, or manufacturing the product for consumer use" to sue. Ala. Code § 6-5-622; N.D. Cent. Code § 32-44-01(1). Arizona allows producers, shippers, or associations representing producers or shippers to sue, while Florida allows any producer or association representing producers to sue. Ariz. Rev. Stat. Ann. § 3-113; Fla. Stat. Ann. § 865.065(3).

43. Idaho Code Ann. § 6-2003(2); Ohio Rev. Code Ann. § 2307.81(C).

44. Ala. Code § 6-5-623.

45. *See supra* Part I; *see also* Systems Operations, Inc. v. Scientific Games Dev. Corp., 555 F.2d 1131, 1142 (3d Cir. 1977) (following "unanimous view of other jurisdictions that the plaintiff in a [common law] product disparagement action must bear the burden of proving the falsity of the disparaging communications"); Hurlbut v. Gulf Atlantic Life Ins. Co., 749 S.W.2d 762, 766 (Tex. 1987) ("More stringent requirements have always been imposed on the 'plaintiff seeking to recover for injurious falsehood in three important respects—falsity of the statement, fault of the defendant and proof of damage.'") (citation omitted).

and convincing evidence" and limits recovery to actual pecuniary damages.[46] Idaho also requires that the false disparagement be "of and concerning" the plaintiff's specific perishable food product and that 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."[47] Notably, the statute also provides that "[t]his statutory cause of action is not intended to abrogate the common law action for product disparagement or any other cause of action otherwise available."[48] These provisions make it unlikely that product disparagement actions will ever be brought under the Idaho law, given that it places a higher burden of proof on plaintiffs and allows for fewer recovery options than the common law action.[49] Each of the remaining eleven state statutes set forth varying proof standards on the key elements of fault, falsity, and damages.[50]

A. Fault

All but one of the twelve state laws expressly require some proof of fault on the part of the defendant. Only Alabama provides no express fault standard, but appears to allow negligence or ignorance to suffice as the standard of fault.[51] Five states require a level of fault falling somewhere between negligence and malice,[52] most frequently providing that the disseminator "knew or should have known" the statement to be false.[53] The remaining six states set the highest standard of fault: malice or a "knowingly false" statement.[54]

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46. Idaho Code § 6-2003(2)–(3) (1997).

47. Idaho Code §§ 6-2002(1)(a), 6-2003(4) (1997).

48. Idaho Code § 6-2003(6) (1997).

49. *See supra* Part I.

50. *See* Appendix, *infra*.

51. Alabama defines disparagement as "[t]he dissemination to the public in any manner of false information that a perishable food product or commodity is not safe for human consumption" and provides that "[i]t is no defense under this article that the actor did not intend, or was unaware of, the act charged." Ala. Code §§ 6-5-621, 6-5-623 (Supp. 1997).

52. The U.S. Supreme Court defines malice as the making of a harmful statement "with knowledge that it was false or with reckless disregard of whether it was false or not." New York Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964). Courts generally consider the "should have known" standard to be one of negligence, whereas willfulness probably falls somewhere between negligence and malice.

53. Florida defines disparagement as the "willful or malicious dissemination to the public in any manner of any false information" that the protected products are unsafe for human consumption, but also requires that the disseminator knew or should have known the statement to be false. Fla. Stat.

B. *Falsity*

All twelve state laws require the disparaging statement to be false.[55] Two of the twelve states allow for a presumption of falsity if the statement is not based upon reasonable and reliable scientific inquiry, facts, or data.[56] These statutes appear to place the initial burden of showing a lack of scientific basis on the plaintiff and, once that burden is met, shift the burden to the defendant to prove the truth of the statement.[57] Only Alabama and Georgia provide that statements will be "deemed false" if not based upon such scientific information, which appears to place the initial burden of showing a lack of scientific basis on the plaintiff, with no rebuttal opportunity for the defendant.[58] The other eight states neither deem nor presume falsity, but six states define a

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Ann. § 865.065(2)(a) (West 1997). Georgia requires that the false statement be disseminated willfully or maliciously, but does not specify whether the statement must be knowingly false. Ga. Code Ann. § 2-16-2(1) (Supp. 1998). Louisiana defines disparagement as "dissemination to the public in any manner of any false information that the disseminator knows or should have known to be false." La. Rev. Stat. Ann. § 4502(1) (West Supp. 1997). Ohio specifies that to recover damages, the plaintiff must establish "that the disseminator knew or should have known that the information was false." Ohio Rev. Code Ann. § 2307.81(C) (Banks-Baldwin Supp. 1997). Oklahoma similarly requires that "the disseminator knows or should have known [the statement] to be false." Okla. Stat. Ann. tit. 2, § 3012 (West Supp. 1998).

54. Arizona provides that the plaintiff must suffer damages "as a result of malicious public dissemination of false information" and that the person making the disparaging comment do so "for the purpose of harming a producer or shipper." Ariz. Rev. Stat. Ann. § 3-113 (A)–(B) (West Supp. 1997). Idaho requires that the false statement be made with "actual malice, that is, he knew that the statement was false or acted in reckless disregard of its truth or falsity." Idaho Code § 6-2002(1)(d) (1997). Mississippi defines disparagement as "dissemination to the public in any manner of any false information that the disseminator knows to be false." Miss. Code Ann. § 69-1-253(a) (Supp. 1998). North Dakota requires that the disseminator "willfully or purposefully" makes the false statement "knowing the statement to be false." N.D. Cent. Code § 32-44-02 (Supp. 1997). South Dakota and Texas allow for liability only when the disseminator "knows" the information is false. S.D. Codified Laws § 20-10A-1(2) (Michie 1995); Tex. Civ. Prac. & Rem. Code Ann. § 96.002(a)(2) (West 1997).

55. *See* Ala. Code § 6-5-621(1); Ariz. Rev. Stat. Ann. § 3-113(A)–(B); Fla. Stat. Ann. § 865.065(2)(a); Ga. Code Ann. § 2-16-2(1); Idaho Code § 6-2002(1); La. Rev. Stat. Ann. § 4502(1); Miss. Code Ann. § 69-1-253(a); N.D. Cent. Code § 32-44-02; Ohio Rev. Code Ann. § 2307.81(B)(1)–(2) (Banks-Baldwin Supp. 1997); Okla. Stat. Ann. tit. 2, § 3012; S.D. Codified Laws § 20-10A-1(2); Tex. Civ. Prac. & Rem. Code Ann. § 96.002(a)(2).

56. The two states, Louisiana and Mississippi, still require that the defendant "knows" (Mississippi) or "knows or should have known" (Louisiana) the statement to be false. La. Rev. Stat. Ann. § 4502(1); Miss. Code Ann. § 69-1-253(a).

57. La. Rev. Stat. Ann. § 4502(1); Miss. Code Ann. § 69-1-253(a).

58. Ala. Code § 6-5-621; Ga. Code. Ann. § 2-16-2(1). The Alabama statute also specifically provides that it is to be construed together with "all laws relating to fraud, criminal mischief, criminal tampering with property, interruption of or impairing commerce and trade, unlawful trade practices, and property damage." *See* Ala. Code § 6-5-625 (Supp. 1997).

"false statement" as one without basis in reasonable or reliable scientific data and require that the disseminator knew or should have known the statement to be false.[59] South Dakota does not define "false statement," but defines "disparagement" as "any information that the disseminator knows to be false and that states or implies that an agricultural food product is not safe for consumption."[60]

C. *Damages*

All the statutes require the plaintiff to be damaged by a false disparaging remark. None of the laws indicate that anything other than the common law requirement of pecuniary damage can satisfy this element.[61] Eleven states allow for recovery of damages and "other relief" not limited to compensatory damages, as allowed by law; only Idaho limits recovery to actual pecuniary damages.[62] Three states allow treble damages if the plaintiff can prove that the defendant intended to harm the plaintiff or made the statement with malice.[63]

III. SUPREME COURT FIRST AMENDMENT JURISPRUDENCE IN DEFAMATION LAW

The U.S. Supreme Court has never addressed how First Amendment standards apply to the tort of product disparagement.[64] However, the Court has developed a series of additional proof requirements based on First Amendment protections of free speech for common law defamation.[65] Many lower courts have applied these requirements to

59. Ariz. Rev. Stat. Ann. § 3-113(E)(1) (West Supp. 1997); Fla. Stat. Ann. § 865.065(2)(a); N.D. Cent. Code § 32-44-01(5)–(6) (Supp. 1997); Ohio Rev. Code Ann. § 2307.81(B)(2) & (C) (Banks-Baldwin Supp. 1997); Okla. Stat. Ann. tit. 2, § 3012; Tex. Civ. Prac. & Rem. Code Ann. § 96.003 (West 1997).

60. S.D. Codified Laws § 20-10A-1(2).

61. Ala. Code § 6-5-622 (Supp. 1997); Ariz. Rev. Stat. Ann. § 3-113 (West Supp. 1997); Fla. Stat. Ann. § 865.065 (West 1997); Ga. Code § 2-16-3 (Supp. 1998); Idaho Code § 6-2002(1)(e) (1997); La. Rev. Stat. Ann. § 4503 (West Supp. 1998); Miss. Code Ann. § 69-1-255 (Supp. 1998); N.D. Cent. Code § 32-44-02 (Supp. 1997); Ohio Rev. Code Ann. § 2307.81(C) (Banks-Baldwin Supp. 1997); Okla. Stat. Ann. § 3012 (West Supp. 1998); S.D. Codified Laws § 20-10A-2 (Michie 1995); Tex. Civ. Prac. & Rem. Code Ann. § 96.002(b) (West 1997).

62. *See supra* note 39.

63. N.D. Cent. Code § 32-44-02; Ohio Rev. Code Ann. § 2307.81(E) (Banks-Baldwin Supp. 1997); S.D. Codified Laws § 20-10A-3 (Michie 1995).

64. *See infra* notes 122–24 and accompanying text.

65. *See infra* Part III.A.

product disparagement cases.[66] Because of the lack of other precedent, the Court will likely look to its First Amendment jurisprudence on defamation when considering the constitutionality of perishable product disparagement laws.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press."[67] The U.S. Supreme Court has held that defamation laws may restrain free expression "for appropriate reasons."[68] However, the Court has acknowledged varying levels of protection for different categories of speech, affording the highest protection to speech critical of public officials or public figures.[69] The rationale behind this heightened protection is the premise that only the free flow of speech in the "marketplace of ideas" will lead to truth,[70] particularly in an area such as politics, where the line between truth and falsehood may be unclear.[71] Beyond this ultimate protection, the reaches of First Amendment protections for speech, particularly in the context of disparagement laws, are less clear and deserve further exploration.[72]

With its 1964 decision in *New York Times Co. v. Sullivan*,[73] the U.S. Supreme Court launched a series of decisions that modified the common law elements of defamation by setting forth new constitutional protections in the area.[74] These decisions balanced a plaintiff's right to reputational protection against the First Amendment's protection of free speech. Most importantly, the Court created new proof requirements

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66. *See, e.g.*, Unelko Corp. v. Rooney, 912 F.2d 1049 (9th Cir. 1990); Simmons Ford, Inc. v. Consumers Union of U.S., Inc., 516 F. Supp. 742 (S.D.N.Y. 1981); Amcor Inv. Corp. v. Cox Ariz. Publications, 764 P.2d 327 (Ariz. App. 1988); Blatty v. New York Times Co., 728 P.2d 1177 (Cal. 1986); Teilhaber Mfg. Co. v. Unarco Materials Storage, 791 P.2d 1164 (Colo. App. 1989).

67. U.S. Const. amend. I.

68. Elrod v. Burns, 427 U.S. 347, 360 (1976).

69. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 272–75 (1964); *see also Constitutional Law* 1196–98 (Geoffrey R. Stone et al. eds., 1996).

70. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

71. *New York Times*, 376 U.S. at 271–72.

72. *Compare* Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 Sup. Ct. Rev. 245, 255–57 (arguing that First Amendment provides ultimate protection for speech about education, achievements in philosophy and science, literature and arts, and discussion of public issues), *with* Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1, 26–28 (1971) (disagreeing with Meiklejohn's extension of First Amendment ultimate protection beyond explicitly political speech).

73. 376 U.S. 254.

74. *See* Langvardt, *supra* note 18, at 923.

within defamation law, which it viewed as necessary to protect against the chilling effect such suits might have on speech. Notably, these new requirements focused on the proof requirements differentiating defamation and product disparagement: fault, falsity, and actual damages. Additionally, the Supreme Court's analyses within the defamation context clarified the extent to which states may restrict commercial speech.

A. *Proof Requirements Added to Defamation by First Amendment Jurisprudence*

1. *Fault*

In *New York Times*, the Court held that the First Amendment protects the press from liability for defamatory statements about a public official unless the plaintiff proves that the defendant made the statement with actual malice.[75] The Court defined "actual malice" as knowledge of, or reckless disregard for, falsity.[76] *New York Times* thus altered common law defamation by requiring public official plaintiffs to prove a high level of fault on the part of the defendant—"actual malice"—by clear and convincing evidence.[77] Importantly, the Court for the first time focused on the nature of the plaintiff, specifically noting that the plaintiff's status as a public figure was the key reason for holding the plaintiff to a higher proof standard for fault. The Court's rationale for this previously unrecognized protection of defamation defendants was that "erroneous statement is inevitable in free debate," and therefore, "breathing space" was necessary to protect the public's freedom of expression in criticizing its own government.[78]

New York Times was soon followed by a series of decisions addressing the scope of First Amendment fault requirements for both public and private defamation plaintiffs. In *Curtis Publishing Co. v. Butts*, the Court extended the malice proof requirement to public figures other than government officials.[79] In its plurality opinion in *Rosenbloom*

75. 376 U.S. at 279–80.

76. *Id.*

77. In *New York Times*, the Court required proof with "convincing clarity." *Id.* at 285–86. The Court later termed this "clear and convincing proof." Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974).

78. *New York Times*, 376 U.S. at 271–72.

79. 388 U.S. 130, 164 (1967).

v. Metromedia, Inc., the Court briefly extended the malice requirement to private figure plaintiffs in cases involving issues of public interest.[80]

The *Rosenbloom* public interest focus was short-lived. In *Gertz v. Robert Welch, Inc.*, the Court rejected the *Rosenbloom* approach and created a lesser burden of proof for private figure defamation plaintiffs, giving no consideration to whether a matter of public interest was involved.[81] The Court noted that a rule falling somewhere between the actual malice standard of *New York Times* and the strict liability rule of common law defamation was more appropriate to private figure plaintiffs.[82] As a result, the Court established that, at a minimum, a private figure plaintiff must prove negligence on the part of a defamation defendant.[83] However, the Court left states free to set higher fault standards.[84] In so holding, the Court gave no consideration to whether the defendant's statement pertained to a matter of public interest or concern.[85] In *Gertz*, the Court stated that private figures should not be required to prove actual malice, even when the defendant's statement pertained to a matter of public concern, because free speech rights do not always outweigh the valid state interest in compensating victims of defamatory harm.[86]

The *Gertz* Court also defined two types of "public" defamation plaintiffs: one who acquires "such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts," and one who becomes a "limited purpose" public figure by "voluntarily inject[ing] himself or [being] drawn into a particular public controversy."[87] As compared to public plaintiffs, the Court noted that private figure plaintiffs should face a lower burden of proof because they have less access to media channels for counteracting false statements and have not voluntarily placed themselves in the public eye.[88] Since *Gertz*, the

80. 403 U.S. 29, 31–32 (1971).

81. 418 U.S. 323, 345–46 (1974).

82. *Id.* at 347.

83. *Id.*

84. *Id.*

85. The *Gertz* Court expressly disapproved of *Rosenbloom*'s public concern approach. *Id.* at 346.

86. *Id.* at 341, 352; *see also* Time, Inc. v. Firestone, 424 U.S. 448, 456 (1976) (discussing "appropriate accommodation between the public's interest in an uninhibited press and its equally compelling need for judicial redress of libelous utterances").

87. 418 U.S. at 351.

88. *Id.* at 344–45.

Court has indicated that who or what constitutes a "public figure" will be determined on a case by case basis.[89]

Despite these additional constitutional requirements, the Supreme Court has not always held defamation statutes containing no apparent or insufficient fault standards unconstitutional on their face. For example, in *Time, Inc. v. Hill*, the Court noted:

> The appellant argues that the statute should be declared unconstitutional on its face if construed by the New York courts to impose liability without proof of knowing or reckless falsity. Such a declaration would not be warranted [because t]he New York Court of Appeals . . . has been assiduous in construing the statute to avoid invasion of the constitutional protections of speech and press. We, therefore, confidently expect that the New York courts will apply the statute consistently with the constitutional command.[90]

This is consistent with the basic rule of statutory construction "that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality."[91] Thus, a statutory cause of action that lacks a sufficient fault standard may withstand constitutional scrutiny if the state's courts read such an element into the law.

2. Falsity

The Court has forbidden the common law presumption of falsity in defamation cases, at least where the false statements relate to issues of public concern. In *Philadelphia Newspapers, Inc. v. Hepps*, the Court clarified that a public figure plaintiff must prove the falsity of the statements at issue in order to prevail.[92] The Court noted that this requirement was essential to ensure that true speech on matters of public

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89. *See, e.g.*, Hutchison v. Proxmire, 443 U.S. 111, 135–36 (1979) (holding that researcher was not public figure by virtue of fact that he received public funds and published in professional journals); *Firestone*, 424 U.S. at 454 (holding that socialite going through scandalous divorce is not public figure).

90. 385 U.S. 374, 397 (1967) (citations omitted); *see also* Posados de P.R. Assoc. v. Tourism Co., 478 U.S. 328, 339 (1986) ("[I]n reviewing the facial constitutionality of the challenged statute and regulations, we must abide by the narrowing constructions announced by the Superior Court and approved *sub silentio* by the Supreme Court of Puerto Rico.").

91. Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (citation omitted).

92. 475 U.S. 767, 775 (1986). Hepps, a principal stockholder in a corporation of franchises, sued when the defendant newspaper published a series of articles linking him to organized crime. *Id.* at 769.

concern would not be deterred.[93] Thus, the Court indicated that the public concern theme rejected in *Gertz* in addressing fault is still a factor when it comes to falsity. Yet, unlike with malice, the Court has not ruled on whether falsity must be established by clear and convincing evidence.[94] Because the *Hepps* Court expressly limited its holding to private figure plaintiffs suing for defamation involving issues of public concern, it is unclear whether a private figure plaintiff suing on a private concern could still rely on a presumption of falsity.

3. *Damages*

The Court did not directly address the lack of a damages requirement under common law defamation until its 1974 decision in *Gertz v. Robert Welch, Inc.*[95] Because common law defamation allowed for both presumed and punitive damages, the Court noted that further limitation was required to avoid impermissible chilling of free speech.[96] Thus, the Court held that where a private figure plaintiff proved no more than negligence, the plaintiff could recover only damages for "actual injury" as opposed to presumed damages.[97] Additionally, private figure plaintiffs could obtain punitive damages only if they proved actual malice.[98]

The Court later restricted the *Gertz* punitive damages rule to defamation concerning public concerns in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*[99] In *Greenmoss*, the Court held that a private plaintiff could recover presumed and punitive damages without proving malice if the defamatory statement concerned an issue of purely private concern.[100] The Court stated that this type of defamatory speech can be curbed because "[t]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful

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93. *Id.* at 776–77.

94. *See* Auvil v. CBS "60 Minutes," 836 F. Supp. 740, 742 (E.D. Wash. 1993), *aff'd*, 67 F.3d 816 (9th Cir. 1995), *cert. denied*, 517 U.S. 1167 (1996).

95. 418 U.S. 323 (1974).

96. *Id.* at 349.

97. *Id.* at 349–50.

98. *Id.* at 350.

99. 472 U.S. 749 (1985).

100. *Id.* at 761. Greenmoss was a construction company that relied on presumed damages to its business reputation in suing Dun & Bradstreet for falsely reporting that Greenmoss had declared bankruptcy. *Id.* at 751–52. Despite this seemingly commercial setting, the Court viewed the defamation as concerning an issue of purely private concern. *Id.* at 761–63.

dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship by the press."[101] Thus, as with the falsity element,[102] the Court has indicated that the public or private nature of the issue is a consideration in assessing the damages requirements in a defamation case.

Another aspect of *New York Times* that relates indirectly to the allowance of presumed damages under common law defamation is the Court's recognition of the "of and concerning" requirement. In *New York Times*, the Court first enunciated the requirement that defamation plaintiffs prove that the statement was "of and concerning" themselves, meaning that the statement specifically referred to, or was interpreted by others as referring to, the plaintiff.[103] This added proof requirement can be linked to the Court's concern over the fact that defamation still allowed for presumed damages at that time.[104] In *Rosenblatt v. Baer*, the Court reiterated the "of and concerning" requirement for defamatory statements referring to multiple plaintiffs.[105] Both *New York Times* and *Rosenblatt* involved allegedly defamatory statements made about public officials generally, without specifically referring to the plaintiffs or their particular government positions.[106] Both plaintiffs sought presumed, rather than actual, damages.[107]

In *Rosenblatt*, the Court explained that the "of and concerning" requirement was necessary because otherwise government officials could bring personal defamation actions whenever anyone complained about the government generally.[108] However, this requirement did not necessarily bar a plaintiff's recovery if the defamatory statement referred

101. *Id.* at 760.

102. *See supra* Part III.A.2.

103. New York Times Co. v. Sullivan, 376 U.S. 254, 288–91 (1964).

104. It was not until *Gertz v. Robert Welch, Inc.* that the Court curbed the availability of presumed damages in defamation suits, noting that otherwise common law defamation would pose too great a danger to free speech. 418 U.S. 323, 349 (1974). In contrast, proof of actual damages would demonstrate that others interpreted a negative statement to be "of and concerning" a plaintiff. *See New York Times*, 376 U.S. at 277–78 (discussing need for greater safeguards for free speech in civil defamation action than in criminal action because former allowed for presumed damages and lesser burden of proof).

105. 383 U.S. 75 (1966).

106. Rosenblatt was a former county administrator of a ski area. *Id.* at 77. Sullivan was a state police commissioner. *New York Times*, 376 U.S. at 288.

107. *Rosenblatt*, 383 U.S. at 82; *New York Times*, 376 U.S. at 277.

108. The Court stated this would be "tantamount to a demand for recovery based on libel of government." *Rosenblatt*, 383 U.S. at 83.

to multiple individuals including the plaintiff.[109] Instead, the Court noted that "[e]ven if a charge and reference were merely implicit . . . but a plaintiff could show by extrinsic proofs that the statement referred to him, it would be no defense to a suit by one member of an identifiable group . . . that another was also attacked."[110] Under this rationale, proof of pecuniary damage would likely be appropriate "extrinsic proof" that a statement was understood to refer to a plaintiff. The Court has not used the "of and concerning" analysis since *New York Times* and *Rosenblatt*, both of which were decided before the Court recognized additional constitutional safeguards related to damages in *Gertz*.[111]

B. Commercial Speech/Non-Commercial Speech Distinction

Although the Court has created many new First Amendment-based protections for speech, it has refused to apply many of these protections where commercial speech is involved. The Court defines "commercial speech" as speech that primarily "does 'no more than propose a commercial transaction'"[112] and "relate[s] solely to the economic interests of the speaker and its audience."[113] In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, the Court noted that commercial speech is not afforded the same degree of protection under the First Amendment as noncommercial speech.[114] Thus, the Supreme Court has found that in balancing the First Amendment right to free speech against the right to protect one's reputation, commercial speech should receive less weight than other constitutionally guaranteed expressions.[115]

The Court has found commercial speech most amenable to state regulation when it is harmful or misleading.[116] The Court explained that the First Amendment's protection of commercial speech was premised

109. *Id.* at 81.

110. *Id.* at 81–82.

111. *See supra* notes 103–04 and accompanying text.

112. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 762 (1976) (citation omitted).

113. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 561 (1980).

114. 425 U.S. at 771–72 n.24.

115. *Central Hudson*, 447 U.S. at 562–63.

116. *Virginia State Bd. of Pharmacy*, 425 U.S. at 771–72 n.24 (noting that differences between commercial and non-commercial speech "suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information in unimpaired").

on its informational value to the public, so the government could always ban deceptive or misleading commercial speech.[117] As a result, the Court does not protect commercial speech that is deceptive or untrue.

This tolerance of state regulation results from the Court's view of two characteristics unique to commercial speech: objectiveness and hardiness.[118] The Court views commercial speech as inherently more objective than non-commercial speech because the commercial speaker is presumed to have wide knowledge of the subject upon which he or she speaks and, therefore, the ability to verify its accuracy.[119] The Court also considers commercial speech to be especially "hardy" because the profit motive of commercial speakers makes them unlikely to stop advertising in response to state regulation.[120] Moreover, the Supreme Court has consistently refused to extend First Amendment protections to false or misleading commercial speech.[121]

IV. PRODUCT DISPARAGEMENT LAWS DO NOT REQUIRE ADDITIONAL FREE SPEECH PROTECTIONS

The Supreme Court has never addressed whether the First Amendment standards for defamation apply to product disparagement. In *Bose Corp. v. Consumers Union*,[122] the Supreme Court assumed, without deciding, that First Amendment defamation standards applied to a product disparagement action in order to decide a judicial review question.[123]

117. *Central Hudson*, 447 U.S. at 563.

118. *Virginia State Bd. of Pharmacy*, 425 U.S. at 771–72 n.24.

119. *Id.*

120. Rawn Howard Reinhard, Note, *The Tort of Disparagement and the Developing First Amendment*, 1987 Duke L.J. 727, 736 (1987).

121. *See, e.g.*, *Central Hudson*, 447 U.S. at 563; *Virginia State Bd. of Pharmacy*, 425 U.S. at 771 ("Untruthful speech, commercial or otherwise, has never been protected for its own sake.... We foresee no obstacle to a State's dealing effectively with this problem.") (citations omitted).

122. 466 U.S. 485 (1984).

123. In *Bose*, the manufacturer of a loudspeaker system sued a consumer reports magazine over its statements that the manufacturer's product produced sound that "wandered about the room." *Id.* at 488. The district court ruled that the manufacturer was a "public figure" subject to the actual malice standard of *New York Times*, and held that the plaintiff had met that standard. *Id.* at 491–92. On appeal, the manufacturer did not contest the lower court's finding that it was a public figure and the First Circuit Court of Appeals reversed. *Id.* at 492. The Supreme Court granted certiorari solely to decide whether the standard of review used by the First Circuit was correct. *Id.* at 493. The Court stated that "[t]he Court of Appeals entertained some doubt concerning the ruling that the *New York Times* rule should be applied to a claim of product disparagement based on a critical review of a loudspeaker system. We express no view on that ruling. . . ." *Id.* at 513.

Without deciding whether *New York Times* applied in the case before it, the Court concluded that when *New York Times* did apply, appellate judges must independently review whether the record establishes actual malice with convincing clarity.[124]

Despite the Court's refusal to clarify First Amendment standards for product disparagement, commentators have argued that the Court's defamation jurisprudence should apply to perishable product disparagement cases.[125] These commentators have suggested that the statutes are unconstitutional, arguing that the statutes lack a sufficient fault standard,[126] do not require plaintiffs to prove falsity,[127] and do not require proof that the statements were "of and concerning" the plaintiff's product.[128]

Contrary to these arguments, analysis of the state laws' proof requirements demonstrates that the majority are either consistent with First Amendment protections developed for defamation or negate the need for additional protections. Both the nature of the product disparagement plaintiff and the nature of the disparaging speech will affect the standards of proof to which the plaintiff will be held under any First Amendment analysis. As a result, it is critical to distinguish between private and public plaintiffs and commercial and non-commercial speech when assessing the proof standards to which product disparagement plaintiffs must be held.

A. *State Product Disparagement Laws' Proof Requirements Are Consistent with First Amendment Defamation Jurisprudence*

Regardless of the approach it takes in analyzing the constitutionality of a state product disparagement law, the Supreme Court's analysis is

124. *Id.* at 514. In his dissenting opinion, Justice Rehnquist noted that "[i]t is ironic in the first place that a constitutional principle which originated in *New York Times Co. v. Sullivan* because of the need for freedom to criticize the conduct of public officials is applied here to a magazine's false statements about a commercial loud speaker system." *Id.* at 515 (Rehnquist, J., dissenting) (citation omitted).

125. *See* Bederman, *supra* note 2, at 154; Semple, *supra* note 2, at 429; Srochi, *supra* note 2, at 1247; Stahl, *supra* note 2, at 518–19.

126. *See* Bederman, *supra* note 2, at 154; Semple, *supra* note 2, at 429; Srochi, *supra* note 2, at 1241.

127. *See* Bederman, *supra* note 2, at 159; Semple, *supra* note 2, at 429, 438–39; Srochi, *supra* note 2, at 1241, 1247.

128. *See* Bederman, *supra* note 2, at 160; Semple, *supra* note 2, at 429; Srochi, *supra* note 2, at 1241; Stahl, *supra* note 2, at 531–32.

likely to be informed by its First Amendment defamation jurisprudence.[129] Both product disparagement and defamation involve harmful speech.[130] Moreover, the Court has engrafted constitutional requirements onto defamation that are identical to many of those already required under product disparagement.[131] The Court's focus in defamation actions on whether the plaintiff is a public or private figure is an imprecise fit in the disparagement context because the plaintiff's product rather than the plaintiff is the object of disparagement. Even so, lower courts consistently consider the nature of the plaintiff in deciding product disparagement cases.[132] In addition, consideration of the proof requirements of common law defamation and the nature of the speech being proscribed are useful in the context of product disparagement.

1. Fault

The fault standards of the twelve states vary, with all but one clearly requiring a fault standard consistent with the minimum set by the Supreme Court in *Gertz* for private figure plaintiffs.[133] Eleven states require at least negligence;[134] only Alabama provides no clear fault requirement.[135] Six states indicate that the courts have a choice of imposing either a negligence or a malice standard by requiring proof that the defendant either "should have known" or "knew" of the falsity of the

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129. *See, e.g.*, Bose Corp. v. Consumers Union, 508 F. Supp. 1249, 1270–71 (D. Mass. 1981); Arlen W. Langvardt, *Section 43(a), Commercial Falsehood, and the First Amendment: A Proposed Framework*, 78 Minn. L. Rev. 309, 364–65 (1993); Cynthia S. Heckathorn, Note, *Bose Corp. v. Consumers Union of the United States, Inc.: Extending the* New York Times *Privilege to Product Disparagement*, 44 U. Pitt. L. Rev. 1039, 1054 (1983).

130. *See supra* Part I.

131. *See supra* Parts I & III.A. The fact that the North Dakota cause of action is titled "defamation of agricultural products and management practices," even though it is similar in most respects to the other state "disparagement" statutes, also suggests that these laws are likely to be viewed as governed by the First Amendment standards for defamation. *See* N.D. Cent. Code chs. 32–44 (Supp. 1997).

132. Auvil v. CBS "60 Minutes," 836 F. Supp. 740, 742–43 (E.D. Wash. 1993), *aff'd*, 67 F.3d 816 (9th Cir. 1995), *cert. denied*, 517 U.S. 1167 (1996); Simmons Ford, Inc. v. Consumers Union, Inc., 516 F. Supp. 742, 746–50 (S.D.N.Y. 1981); *Bose Corp.*, 508 F. Supp. at 1270–71 (accepting application of *New York Times* to product disparagement and citing to other lower courts that have applied it); Blatty v. New York Times Co., 728 P.2d 1177, 1182–84 (Cal. 1986).

133. *See supra* notes 83–84 and accompanying text; Appendix, *infra*.

134. *See supra* Part II.A; Appendix, *infra*.

135. The Alabama statute instead addresses the defenses not available to a product disparagement defendant. *See supra* note 51.

statement.[136] Five states require a standard of fault that surpasses that required by *New York Times*, requiring that the statement be knowingly false without allowing reckless disregard to suffice.[137]

In states accepting either malice or negligence, it is likely that state courts would require proof of the malice in cases involving public figure plaintiffs[138] and non-commercial speech.[139] A fundamental rule of statutory construction is that courts should construe statutes so as to avoid unconstitutionality.[140] Moreover, in many states that have product disparagement statutes, courts have required defamation plaintiffs to prove malice whenever a case involves a matter of public concern regardless of the plaintiff's private or public status.[141] Given the propensity of lower courts to apply defamation precedent to disparagement,[142] it is likely that state courts would read additional First Amendment requirements into the state product disparagement laws, even if the Supreme Court would not.[143]

Some commentators misapply the Supreme Court's First Amendment jurisprudence and argue that the *New York Times* malice standard should apply to every product disparagement plaintiff because product safety is always a "public concern."[144] Many lower courts have also required product disparagement plaintiffs to prove malice whenever a case involves an issue of public concern and have broadly defined what

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136. *See supra* Part II.A; Appendix, *infra*.

137. *See supra* note 54; Appendix, *infra*.

138. *See, e.g.*, Unelko Corp. v. Rooney, 912 F.2d 1049, 1058 (9th Cir. 1990); Amcor Inv. Corp. v. Cox Ariz. Publications, 764 P.2d 327, 330 (Ariz. App. 1988); Teilhaber Mfg. Co. v. Unarco Materials Storage, 791 P.2d 1164, 1166–67 (Colo. App. 1989); *see also* Reinhard, *supra* note 120, at 733.

139. Non-commercial speech refers to all speech that does not meet the U.S. Supreme Court's definition of commercial speech: speech that does no more than propose a commercial transaction and which is solely in the speaker's economic interests. *See supra* notes 112–13 and accompanying text.

140. *See supra* note 91 and accompanying text.

141. *See, e.g.*, Medical Lab. Consultants v. American Broad. Cos., 931 F. Supp. 1487, 1492 (D. Ariz. 1996); Romero v. Thompson Newspapers, Inc., 648 So. 2d 866, 870 (La. 1995); A & B-Abell Elevator Co., Inc. v. Columbus/Central Ohio Bldg. & Constr. Trades Council, 651 N.E.2d 1283, 1295 (Ohio 1995); *see also supra* note 138.

142. *See supra* note 66 and accompanying text.

143. This is particularly likely in Arizona, where a federal district court expressly stated that common law disparagement is subject to the same First Amendment requirements as defamation. *See* Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach (*In re* American Continental/Lincoln Sav. & Loan Sec. Litig.), 884 F. Supp. 1388, 1396 (D. Ariz. 1995).

144. *See* Bederman, *supra* note 2, at 151–52; Semple, *supra* note 2, at 436.

constitutes a matter of public concern.[145] For example, one court held that an article about an allegedly defective windshield repellant was an issue of public concern and thus required the plaintiff to prove actual malice.[146] This "public concern" argument ignores the fact that the Supreme Court rejected a pure public concern focus and, instead, based its fault analysis on a case-by-case consideration of the public or private nature of the plaintiff.[147] While the Court has considered whether an issue of public concern was involved in addressing the elements of falsity and damages, it has rejected the public concern analysis when addressing the standard of fault.[148]

It would be incorrect to subject all product disparagement plaintiffs to the malice standard by arguing that producers of products become "public figures" by placing their products into the stream of commerce. This focus on the public/private status of the defamation plaintiff is more difficult to apply in the disparagement context because the plaintiff's product, rather than the plaintiff, is the target of the disparaging statement.[149] As a result, it is unclear whether the analysis should focus on the producer of the product as a public figure or on the product itself as a "public product." The latter approach treads dangerously close to reprising the public concern theme rejected in *Gertz*.[150] Thus, a focus on the status of the product disparagement plaintiff remains most consistent with the Court's precedent in the defamation context.

Even if the public/private figure analysis is used, many disparagement plaintiffs would qualify as private figures. This is largely because many product disparagement plaintiffs would not meet the public figure criteria set forth in *Gertz* by either (1) having pervasive fame or notoriety in all contexts, or (2) voluntarily injecting themselves or being drawn into a

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145. *See, e.g.*, Unelko Corp. v. Rooney, 912 F.2d 1049, 1056 (9th Cir. 1990); Dairy Stores, Inc. v. Sentinel Publ'g Co., 516 A.2d 220, 230 (N.J. 1986) (spring water disparaged). *But see* Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583, 592 (1st Cir. 1980) (holding that plaintiff's status as manufacturer does not require application of actual malice standard to criticism of boat safety).

146. *Unelko*, 912 F.2d at 1056.

147. *See supra* notes 81–86 and accompanying text; *see also* Vegod Corp. v. American Broad. Cos., 603 P.2d 14, 18 (Cal. 1980) (holding, in corporate defamation suit, that "[w]hile availability of goods for sale and their quality are matters of public interest, this is not the test. The public interest test was expressly rejected in *Gertz* . . . .") (citations omitted).

148. *See supra* Parts III.A.1–.3.

149. *See supra* Part I.

150. *See supra* notes 81–86 and accompanying text.

particular public controversy.[151] For example, a farmer who sells his or her products in a single community and does no advertising would not meet the *Gertz* criteria for a public figure if a nationwide controversy arose, particularly if the farmer did not initiate the controversy. Even with larger producers, if the plaintiffs are not household names and do not initiate the controversy out of which the disparaging statements originate, they could still fall outside the *Gertz* criteria for public figure plaintiffs.[152] If statutory product disparagement plaintiffs are viewed as private figures, the states have discretion to set the standard of fault for these causes of action at negligence.

Even if the malice standard of *New York Times* were applied to all product disparagement plaintiffs, state court interpretation could save those state laws providing for a lower standard. The Court has noted that if state courts interpret state law as consistent with constitutional requirements, great deference will be given to that interpretation.[153] Thus, the state perishable product disparagement laws that currently contain a negligence fault standard would not be automatically void should the Supreme Court decide to require all product disparagement plaintiffs to prove malice.

2. *Falsity*

Unlike its fault analysis, the Supreme Court has considered whether defamatory statements involved an issue of public or private concern when assessing the falsity requirement.[154] All twelve product disparagement statutes require the plaintiff to prove that the disparaging statement was false in order to prevail.[155] However, two statutes presume falsity if there is no scientific support for the statement,[156] and two other statutes deem the statement false when no scientific support exists.[157] Most of the states that do not have a presumption or deeming clause define a false statement as one not based on reliable scientific data or

151. *See supra* note 87 and accompanying text.

152. *Id*; *see also supra* note 89; Modern Prods., Inc. v. Schwartz, 734 F. Supp. 362, 364 (E.D. Wis. 1990) (holding that plaintiff producer of health food product disparaged by book publisher is not public figure).

153. *See supra* note 90 and accompanying text.

154. *See supra* Part III.A.2.

155. *See supra* note 55 and accompanying text.

156. *See supra* note 58 and accompanying text.

157. *See supra* note 56 and accompanying text.

inquiry.[158] The presumption or deeming of falsity raises the question of whether these states fall below the requirement that the plaintiff must bear the burden of proving falsity established in *Philadelphia Newspapers, Inc. v. Hepps.*[159]

The four states allowing a presumption or deeming of falsity do not fall below the *Hepps* standard because they still require the plaintiff to make an initial showing of falsity. The four states that presume or deem falsity do not initially place the burden of proving truth on the defendant, but rather create a mechanism for shifting the burden of proof.[160] The state presumptions or deeming provisions are also based on the same type of evidence a court would look to in drawing an inference of falsity.[161] Thus, it is likely that these burden shifting clauses do not conflict with the Supreme Court's requirement that the plaintiff bear the burden of proving falsity.

3. *Damages*

Unlike common law defamation, the state product disparagement statutes appear to require proof of pecuniary damages proximately caused by the defendant's disparagement.[162] As a result, there is no basis for requiring additional First Amendment protections related to the damages element for disparagement defendants. This is particularly true of the indirectly related "of and concerning" requirement the Court enunciated for public official plaintiffs in *New York Times* and *Rosenbloom.* First, it is unclear if this requirement applies to plaintiffs who are not public officials.[163] Second, it is obvious that consumers

158. *See supra* note 59 and accompanying text.

159. 475 U.S. 767 (1986); *see supra* notes 92–93 and accompanying text.

160. The states that provide only a presumption appear to require the plaintiff to show that no scientific evidence supports the statement, after which the burden of proof shifts to the defendant. The states that deem falsity after a showing of no scientific support do not appear to give the defendant a rebuttal opportunity, but they do require the plaintiff to prove that no scientific evidence supports the disparaging statement. *See supra* notes 55–58 and accompanying text.

161. *See, e.g.*, Auvil v. CBS "60 Minutes," 67 F.3d 816, 821 (9th Cir. 1995) (dismissing plaintiffs' common law disparagement case because they did not meet their burden of proving falsity, noting that plaintiffs "offered evidence showing that no studies have been conducted to test the relationship between ingestion of [Alar] and incidence of cancer in *humans*. Such evidence, however, is insufficient.... Animal laboratory tests are a legitimate means for assessing cancer risks to humans.").

162. *See supra* notes 61–63 and accompanying text.

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

understood a disparaging statement to be "of and concerning" a plaintiff's product where the plaintiff can demonstrate that the disparaging statement proximately caused pecuniary damage.[164]

At the time of the *New York Times* and *Rosenbloom* cases, which are the only cases addressing this requirement, defamation plaintiffs were able to move forward without proof of actual damages.[165] In response, the Court required evidence indicating that a defamatory reference was interpreted by others as referring to the plaintiff, noting that it would suffice if "a plaintiff could show by extrinsic proofs that the statement referred to him."[166] Pecuniary damages proximately caused by a disparaging statement are obvious extrinsic proof that others interpreted a disparagement as pertaining to a plaintiff's product. If customers do not interpret disparaging statements to refer to a producer's product, then the producer will be unable to prove that the disparagement caused his or her loss of business. As a result, the Supreme Court's previous concern over allowing recovery based on a disparagement not clearly directed at the plaintiff, where harm was presumed, is unwarranted in the context of the state laws because they all appear to require proof of pecuniary damages.

Moreover, all the state statutes clearly define what the disparaging statement must be "of and concerning"—a perishable product owned or distributed by an individual who is damaged by the disparaging statement.[167] Additionally, courts addressing common law claims have allowed generic disparaging statements about a class of products, rather than a specific person's product, where it was conceivable that third parties interpreted the statement as including a reference to the plaintiff's product.[168] For example, in *Auvil v. CBS "60 Minutes,"* the alleged

164. *See supra* note 104 and accompanying text; *see also* United Med. Lab., Inc. v. Columbia Broad. Sys., Inc., 404 F.2d 706, 708–09 (9th Cir. 1968) (finding economic effect on business of negative publicity probative of whether unidentified class member impugned).

165. *See supra* note 104 and accompanying text.

166. For full quote, see text accompanying *supra* note 110.

167. *See* Appendix, *infra*; *see also* Auvil v. CBS "60 Minutes," 800 F. Supp. 928, 935 (E.D. Wash. 1992) (holding that Washington apple growers stated common law disparagement claim against broadcaster of program on use of Alar on U.S. apples, because "broadcast was clearly 'of and concerning' [Alar]-laced apples").

168. *See* Cranberg v. Consumers Union, 756 F.2d 382, 389 (5th Cir. 1985) (noting that Texas law allows defamation claims to go forward even where plaintiff is not mentioned by name "on the grounds that a false publication concerning a business or product could tend to injure the reputation of the company's owner by subjecting him to financial injury"); *Auvil*, 800 F. Supp. 928 (allowing

disparagement was that Alar, a suspected carcinogen, was used on seventy percent of all apples and that consumers could not tell which apples were exposed to Alar.[169] The court held that these statements were "'of and concerning' all apples whether treated with Alar or not"[170] and noted that "not only were apples specifically referenced, but *all* apples were targeted as suspect even if Alar-free [and] Plaintiffs represent that only about 10% of Washington apples were treated with Alar during the relevant time frame."[171] This holding is consistent with the fact that, by definition, product disparagement must be "of and concerning" the product, rather than the plaintiff.[172]

To require producers harmed by disparaging statements to prove that the statements were "of and concerning" their specific product—for example, John Doe's eggs, rather than eggs in general—would unfairly deny a remedy to plaintiffs who could otherwise meet the stringent proof requirements of the state product disparagement laws. Under this rationale, a plaintiff meeting all proof requirements could recover for damages resulting from the disparagement that "plaintiff's apples kill humans," but could not if the statement was that "all apples kill humans," regardless of the pecuniary damages caused. This rationale could expose producers to potentially enormous uncompensated losses, and ignores the stringent proof requirements of product disparagement claims.[173]

The *Auvil* case demonstrates the potential enormity of damages that negative statements about products can cause. The court characterized the extreme damages allegedly caused by the "60 Minutes" broadcast as follows:

> [G]rowers and others dependent upon apple production sustained tremendous losses amounting to perhaps as much as $75 million dollars [sic]. Beyond immediate economic loss, growers forced into bankruptcy or work-out arrangements with lenders lost their homes and livelihoods. Those who survived intact saw their property

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common law disparagement claim by Washington State apple growers to move forward because court found that allegedly disparaging statement were "of and concering" the plaintiffs' products).

169. 800 F. Supp. at 934–35.

170. *Id.* at 935.

171. *Id.* at 935 n.4.

172. *Id.* at 934 ("[T]he fact that no grower was identified seems an idle point. Plaintiffs are not suing because they were defamed. They are suing because their product was disparaged.").

173. *See* Langvardt, *supra* note 18, at 957–58; *see also infra* note 174 and accompanying text.

values nosedive. Entire communities dependent upon the apple market were thrown into depression.[174]

The *Auvil* plaintiffs were unable to prove common law disparagement because they could not meet their burden of proof on falsity.[175] However, the case demonstrates the stringency of disparagement's proof elements and why the cause of action is necessary for those who can meet the elements.[176] To require product disparagement plaintiffs to prove a specific reference to their ownership of the disparaged product would create a dangerous loophole for competitors or others wishing to use false statements to harm producers or product markets.[177]

B. *The Commercial Speech Distinction Suggests Reduced Protection in Many Product Disparagement Cases*

Product disparagement by definition will involve damage to commercial interests, such as the vendibility of a producer's products, even where the speech is non-commercial. In this respect, the Supreme Court's creation of separate categories for commercial and non-commercial speech argues in favor of viewing product disparagement as distinct from, rather than similar to, defamation. Most of the defamation cases resulting in expanded First Amendment protections arose in the context of government officials suing disseminators of critical statements. Yet, the extreme deference to free speech on political issues, even where that criticism may contain false statements, does not logically extend as far in the context of product disparagement. False speech relating to perishable products is more likely to do harm than good, and statements about the safety of food products are more amenable to proof of falsity than are political views.

174. *Auvil*, 800 F. Supp. at 930–31.

175. Auvil v. CBS "60 Minutes," 836 F. Supp. 740, 741 (E.D. Wash. 1993), *aff'd*, 67 F.3d 816 (9th Cir. 1995), *cert. denied*, 517 U.S. 1167 (1996).

176. This argument extends to the majority of state product disparagement laws because those laws retain the common law proof requirements of product disparagement. *See supra* Parts I.A & II. The fact that a statutory cause of action is just as difficult to prove as a common law action was demonstrated in *Texas Beef Group v. Winfrey*, wherein the judge threw out the statutory product disparagement claim. No. 2:96-CV-208-J, 1998 U.S. Dist. LEXIS 3559, at *19–20 (N.D. Tex. Feb. 26, 1998).

177. *See* Langvardt, *supra* note 18, at 957; Cass R. Sunstein, *Even Beef Can Be Libeled*, N.Y. Times, Jan. 22, 1998, at A29.

Although there are strong arguments that free speech about consumer safety issues should be unlimited, the public arguably has a stronger interest in ensuring that statements about product safety, particularly those used in the advertising context, are grounded in fact. As the Supreme Court has noted:

> Obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a State's dealing effectively with this problem. The First Amendment, as we construe it today, does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely.[178]

Knowingly false statements of fact, particularly those made solely to promote the speaker's economic interests, do not promote a public interest.

The recent cases brought under state product disparagement laws demonstrate that commercial and non-commercial speech are equally likely to be the subjects of state product disparagement claims. For example, in the two suits under the Texas product disparagement law, cattle ranchers sued Oprah Winfrey and others over non-commercial statements about U.S. beef, and emu ranchers sued Honda for statements made in an advertisement.[179] Because of the distinct constitutional protections afforded non-commercial as opposed to commercial speech,[180] the context in which the disparaging statements are made must be an important aspect of any constitutional analysis. As a result, where commercial speech is the subject of a state product disparagement suit, courts should afford such speech no more protection from state restriction than it has received in the defamation context.[181]

Whether the disparaging speech is made in a commercial or non-commercial setting, the laws do not create a previously unavailable weapon against speech about consumer safety issues, as commentators have suggested.[182] "Generic" disparagement suits were brought before

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178. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771–72 (1976) (citations omitted).

179. *See supra* notes 4–6 and accompanying text.

180. *See supra* Part III.B.

181. *See supra* Part III.B.

182. *See* Bederman, *supra* note 2, at 168.

these states codified the common law tort.[183] Additionally, the only statutory claim to reach trial went to the jury on a claim other than the statutory cause of action.[184] Repealing these laws will not necessarily free potential disparagement defendants from unwanted litigation.

V. STATE PRODUCT DISPARAGEMENT LAWS MAY BE A DOUBLE-EDGED SWORD FOR POTENTIAL PLAINTIFFS

Plaintiffs bringing statutory disparagement actions face not only the stringent proof requirement noted above, but also the potential for ongoing negative publicity exceeding that generated by the disparagement. As the defense attorney for CBS in *Auvil v. CBS "60 Minutes"*[185] noted, "The plaintiff in a well-publicized libel suit always has a lot more to lose than to gain. . . . What they're doing is re-ringing the bell, reminding the public of the possibility of danger."[186] The *Texas Beef Growers* case also produced more detailed public information on the cattle industry's past practice of feeding animal byproducts to cattle than the television show that generated the suit.[187] The double-edged nature of such suits is demonstrated by the "McLibel" trial in England, where McDonalds sued vegetarian activists for libel.[188] McDonalds won a judgment only after enduring a trial that lasted nearly three years and cost it over ten million dollars.[189] Despite this "win," the English news media focused almost exclusively on the few statements that the court had found not libelous.[190] This is not a promising track record for potential plaintiffs under the state product disparagement laws.

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183. *See, e.g.*, Auvil v. CBS "60 Minutes," 836 F. Supp. 740 (E.D. Wash. 1993), *aff'd*, 67 F.3d 816 (9th Cir. 1995), *cert. denied*, 517 U.S. 1167 (1996).

184. *See supra* note 5 and accompanying text.

185. 836 F. Supp. 740.

186. *Oprah Takes the Bull by the Horns*, U.S. News & World Rep., Jan. 26, 1998, at 15, 15 (quoting Bruce Johnson).

187. *Compare* Chip Chandler, *Trial's 3rd Week Reaches Its End with Stern Warning From Judge* (visited Feb. 12, 1998) <http://www.amarillonet.com/stories/020/98/022-3273.001shtml>, *with Oprah's Report on Mad Cow Disease, Show Transcript*, Apr. 15, 1996 (visited Feb. 12, 1998) <http://www.environlink.org/mcspotlight/media/television/opran_transcript.html>.

188. Ralph T. King, Jr., *U.K. Court Says Activists Libeled McDonalds*, Asian Wall St. J., June 20, 1997, at 2.

189. *The McLibel Trial: Ronald Rides Again*, The Guardian, June 20, 1997, at 7, *available in* 1997 WL 2387156.

190. *See supra* note 188; *see also* Sarah Lyall, *Her Majesty's Court Has Ruled; McDonald's Burgers Are Not Poison*, N.Y. Times, June 22, 1997, at D7. ("[W]hile awarding the burger giant

VI. CONCLUSION

The statutory product disparagement laws are no more likely to restrict speech on food safety concerns than are constitutionalized defamation laws. Requiring that statements of fact be based on some degree of scientific or other reliable evidence promotes the public's access to critical *and* accurate consumer information. Because the majority of product disparagement statutes have proof requirements consistent with those required by the First Amendment in the defamation context, it is unnecessary to create additional protections for those laws. Mandating higher proof requirements would deny a remedy to producers damaged by knowingly false statements about the quality of their products. Given the limited use of the product disparagement statutes to date, and their limited potential for future use, there is little basis for fearing that these statutes will be used widely to chill free speech.

$96,000 in damages, the court also said the chain was responsible for cruelty to animals, exploiting children through its advertising, and depressing wages in the British fast-food industry.").

APPENDIX: ELEMENTS OF STATE CAUSES OF ACTION FOR PERISHABLE FOOD PRODUCT DISPARAGEMENT[191]

State	Fault Standard	Possible Plaintiffs	Bearer of the Burden of Proof	Damages
AL	No express fault standard; may deem falsity	Producers, marketers, or sellers	Not stated	Actual damages and other (not limited to compensatory)
AZ	Malice or with intent to harm	Producers, shippers, or their associations	Not stated	Actual damages and other
FL	Willful or malicious dissemination and knew or should have known false	Producers or their associations	Not stated	Actual damages and other
GA	Willful or malicious dissemination; may deem falsity	Anyone damaged, from grower to consumer	Not stated	Actual damages and other
ID	Actual malice and negligent disregard for harm to plaintiff	Producers whose specific product has been disparaged	Plaintiff, by clear and convincing standard	Actual pecuniary damages only
LA	Knew or should have known false; may presume falsity	Producers	Not stated	Actual damages and other
MS	Knowingly false; may presume falsity	Producers	Not stated	Actual damages and other
ND	Willful or purposeful dissemination and knowingly false	Producers, distributors, manufacturers	Not stated	Actual damages and other; treble damages where maliciously disseminated

191. *See supra* Part II.

State	Fault Standard	Possible Plaintiffs	Bearer of the Burden of Proof	Damages
OH	Knew or should have known false	Anyone damaged, from growers to sellers	Plaintiff	Actual damages and other; treble damages if done with intent to harm
OK	Knew or should have known false	Producers	Not stated	Actual damages and other
SD	Knowingly false	Producers	Not stated	Actual damages and other; treble damages if done with intent to harm
TX	Knowingly false	Producers	Not stated	Actual damages and other