EXHIBIT 1

Sack on Defamation

Libel, Slander, and Related Problems

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"It's broccoli, dear."
"I say it's spinach, and I say the hell with it."[1]

§ 13.1 Injurious Falsehood

§ 13.1.1 *Introduction: Disparagement (Trade Libel) and Slander of Title*[2]

The term "injurious falsehood" is a relatively recent term used to describe two common-law torts: slander of title and disparagement of quality (or "trade libel"), which arose out of slander of title.[3] In both cases it is the plaintiff's interest in property, real or personal, tangible or intangible, that is protected. "Any type of legally protected property interest that is capable of being sold may be the subject of disparagement."[4] The usual elements of the tort are publication, falsity, malice, special damages, and lack of privilege.[5]

Slander of title has traditionally addressed statements casting doubt upon the fact or the extent of a plaintiff's ownership of property, most

1. E.B. White, caption for cartoon by Carl Rose, *The New Yorker*, Dec. 8, 1928.
2. For a general introduction to defamation-like torts and the constitutional principles that govern them, see section 12.1, *supra*.
3. *See, generally*, State Farm Fire & Cas. Co. v. Compupay, Inc., 654 So. 2d 944 (Fla. Dist. Ct. App. 1995); Colquhoun v. Webber, 684 A.2d 405 (Me. 1996). The term "disparagement" is also used generically, referring to "disparagement of title" or "disparagement of quality" (also at times called "trade libel"). The term "injurious falsehood" to describe the combination of these two torts is used in Prosser and Keeton on Torts § 128 (5th ed. 1984); RESTATEMENT (SECOND) OF TORTS § 623A (1977) and by a few courts: Acoustical Mfg. Co. v. Audio Times, Inc., 3 Media L. Rep. (BNA) 2057 (D.C. Super. Ct. 1977); Horning v. Hardy, 36 Md. App. 419, 373 A.2d 1273 (Ct. Spec. App. 1977); Payrolls & Tabulating, Inc. v. Sperry Rand Corp., 22 A.D.2d 595, 257 N.Y.S.2d 884 (1st Dep't 1965); Mink Hollow Dev. Corp. v. New York, 87 Misc. 2d 61, 384 N.Y.S.2d 373 (N.Y. Ct. Cl. 1976).
4. PROSSER AND KEETON ON TORTS § 128, at 965 (5th ed. 1984); *see also* Salit v. Rudin, 742 So. 2d 381, 387 (Fla. Dist. Ct. App. 1999).
5. *See, e.g.*, City of Tempe v. Pilot Props., Inc., 22 Ariz. App. 356, 527 P.2d 515 (1974); McNichols v. Conejos-K. Corp., 29 Colo. App. 205, 482 P.2d 432 (1971); Copeland v. Carpenter, 203 Ga. 18, 45 S.E.2d 197 (1947); Norton v. Kanouff, 165 Neb. 435, 86 N.W.2d 72 (1957); Shenefield v. Axtell, 274 Or. 279, 545 P.2d 876 (1976).

often real estate. The tort first arose, as the name implies, to redress the false oral disparagement of a person's ownership of land that prevented the sale or lease of the property.[6] More recently, slander of title has been expanded to apply to interests other than title and to property other than land.

The tort of disparagement of quality, or "trade libel," developed from slander of title. It provides compensation for false derogatory statements about the quality, rather than the ownership, of property, most often a product or service being sold.

Courts often refer solely to the particular branch of the tort that is at issue in the case before them. The kinship between the two is recognized, though, and principles developed as to one are sometimes applied to the other.[7]

Dean Prosser argued that the tort as it has developed is broader in scope than a joinder of the two individual torts would imply.[8] And the *Restatement* defines "injurious falsehood" broadly:

> One who publishes a false statement harmful to the interests of another is subject to liability for pecuniary loss resulting to the other if
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> (a) he 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, and
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> (b) he knows that the statement is false or acts in reckless disregard of its truth or falsity.[9]

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6. PROSSER AND KEETON ON TORTS § 128, at 965 (5th ed. 1984).
7. Sys. Operations, Inc. v. Scientific Games Dev. Corp., 555 F.2d 1131 (3d Cir. 1977).
8. *See* PROSSER AND KEETON ON TORTS § 128, at 967 (5th ed. 1984) ("[I]njurious falsehood, or disparagement, then, may consist of the publication of matter derogatory to the plaintiff's title to his property, or its quality, or to his business in general, or even to some element of his personal affairs, of a kind calculated to prevent others from dealing with him, or otherwise to interfere with his relations with others to his disadvantage."). Injurious falsehood has also been described as a "larger" tort than disparagement, encompassing "any non-defamatory statement, 'maliciously' made, which causes actual injury." Note, *The Law of Commercial Disparagement: Business Defamation's Impotent Ally*, 63 YALE L.J. 65, 74 n.50 (1953).
9. RESTATEMENT (SECOND) OF TORTS § 623A (1977). *See also* § 624, "Disparagement of Property—Slander of Title," and § 626, "Disparagement of Quality—Trade Libel," stating only that the principles of § 623A apply to each. *Accord* Neurotron, Inc. v. Med. Serv. Ass'n, 254 F.3d 444, 449 (3d Cir. 2001) (Pa. law); Gen. Elec. Co. v. Sargent & Lundy, 916 F.2d 1119, 1124 (6th Cir. 1990) (Ky. law).

§ 13.1.4.2 Comparison with Defamation

Commentators have argued against the analogy between defamation and injurious falsehood. Dean Prosser urged that injurious falsehood should be regarded merely as one form of intentional interference with economic relations, rather than as a branch of the more general harm to reputation involved in libel or slander.[39] He asserted that "a supposed analogy to defamation has hung over the tort like a fog."[40] And a District of Columbia judge characterized injurious falsehood as a "distinctively commercial tort."[41]

Meanwhile, courts have generally been alert to attempts to use new tort labels to avoid established protection for free expression. Non-defamation claims against speech "are governed by the principle that if a statement is protected, either because it is true or because it is privileged, that protection does not depend on the label given the cause of action."[41.1] It is useless to protect speech by preventing a money judgment for something called "libel," if the plaintiff can obtain the same money judgment simply by calling the tort by another name.

> Although the limitations that define the First Amendment's zone of protection for the press were established in defamation actions, they are not peculiar to such actions but apply to all claims whose gravamen is the alleged injurious falsehood of a statement. The fundamental reason that the various limitations rooted in the First Amendment are applicable to all injurious falsehood claims and

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39. *See* PROSSER AND KEETON ON TORTS § 128, at 964 (5th ed. 1984); *see also* Patel v. Soriano, 369 N.J. Super. 192, 848 A.2d 803, *cert. denied*, 182 N.J. 141, 861 A.2d 845 (N.J. 2004) (comparing the torts in some detail).

40. PROSSER AND KEETON ON TORTS § 128, at 963 (5th ed. 1984). *See also* Payrolls & Tabulating, Inc. v. Sperry Rand Corp., 22 A.D.2d 595, 257 N.Y.S.2d 884 (1st Dep't 1965). In fact, the Pennsylvania Supreme Court seems to have implicitly recognized the economic nature of the tort, holding that the injurious falsehood cause of action, unlike libel, did survive the plaintiff's death. Menefee v. Columbia Broad. Sys., Inc., 458 Pa. 46, 329 A.2d 216, 74 A.L.R.3d 290 (1974). Pennsylvania law, however, now holds that libel actions also survive. Moyer v. Phillips, 462 Pa. 395, 341 A.2d 441, 77 A.L.R.3d 1339 (1975).

41. Acoustical Mfg. Co. v. Audio Times, Inc., 3 Media L. Rep. (BNA) 2057 (D.C. Super. Ct. 1977).

41.1. Melaleuca, Inc. v. Clark, 66 Cal. App. 4th 1344, 1367, 78 Cal. Rptr. 2d 627, 642 (1998) (citations, internal quotation marks, and alteration omitted); *see also* TMJ Implants, Inc. v. Aetna, Inc., 498 F.3d 1175, 1200 (10th Cir. 2007) ("We believe that the Colorado Supreme Court would not recognize a product-disparagement claim relying entirely on expressions that could not support a defamation claim.").

> not solely to those labeled 'defamation' is plain: although such limitations happen to have arisen in defamation actions, they do not concern matters peculiar to such actions but broadly protect free-expression and free-press values.[42]

The court adverted to the ease with which litigants could plead causes of action other than defamation to evade First Amendment limitations—thereby "frustrat[ing] the[ ] underlying purpose" of the constitutional protection—if the constitutional limitations were not broadly applied regardless of the label affixed to the claim.[43] Other courts have ruled similarly, for example, that opinion that is not actionable as defamation does not become actionable by calling it "injurious falsehood,"[44] and that fault standards derived from defamation are applicable to injurious falsehood actions as well.[45]

The areas in which the analogy to defamation has caused the greatest debate are the availability of injunctive relief, the applicable statute of limitations, the applicability of conditional privileges, and the element of malice, all discussed below.[46] Other questions as to the parallel between defamation and disparagement—such as whether there is a "per se/per quod" distinction between disparagement on its face and by reference to extrinsic facts[47]—remain largely unexplored.

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42. Blatty v. N.Y. Times Co., 42 Cal. 3d 1033, 1042, 1043, 232 Cal. Rptr. 542, 547, 548, 728 P.2d 1177, 1182, 1183, 13 Media L. Rep. (BNA) 1928 (1986) (citations omitted), *cert. denied*, 485 U.S. 934 (1988). *See also* Jefferson County Sch. Dist. No. R-1 v. Moody's Investors Servs., Inc., 175 F.3d 848, 857, 27 Media L. Rep. (BNA) 1737 (10th Cir. 1999); J.H. Desnick, M.D., Eye Servs., Ltd. v. Capital Cities/ABC, Inc., 44 F.3d 1345, 23 Media L. Rep. (BNA) 1161 (7th Cir. 1995) (tabloid journalism is "entitled to all the safeguards with which the Supreme Court has surrounded liability for defamation. And it is entitled to them regardless of the name of the tort." (citation omitted)); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 919 F. Supp. 756 (D.N.J. 1996), *aff'd*, 131 F.3d 353 (3d Cir. 1997) (government entities, unable for First Amendment reasons to bring suit for libel, are also unable to bring suit for trade libel). To the same general effect *see* notes 168 (Securities Act claims), 179 (interference with contract claims), and 222, *infra* (intentional infliction of emotional harm claims), and sections 12.1.2 (generally) and 12.3.4, *supra* (false-light invasion of privacy claims).

43. *Blatty*, 42 Cal. 3d at 1045, 232 Cal. Rptr. at 549, 728 P.2d at 1184. *Accord* Unelko Corp. v. Rooney, 912 F.2d 1049, 1058, 17 Media L. Rep. (BNA) 2317 (9th Cir. 1990), *cert. denied*, 499 U.S. 961 (1991).

44. *See* section 13.1.4.4, *infra*.

45. *See* section 13.1.4.5, *infra*.

46. At sections 13.1.6, 13.1.7, 13.1.5.2, and 13.1.4.5, respectively.

47. *See* Unique Concepts, Inc. v. Manuel, 669 F. Supp. 185, 189 (N.D. Ill. 1987). *Cf.* section 2.8, *supra*.