

Harleysville Mutual Insurance Company vs. Buzz Off Insect Shield

Year: 2008

Court: North Carolina Supreme Court

Case Number: 272A08

The policyholder's ultimate liability has no bearing on the determination of whether an insurance company must defend the policyholder against a suit for "personal injury advertising injury." Whether an insurance company has a duty to defend depends solely on the allegations contained in the underlying complaint. Using the "comparison test" the court must read the pleading side-by-side with the insurance policy to determine whether any allegations in the complaint could possibly be covered. In order for the failure to conform exclusion to apply, courts have held that the underlying complaint must contain specific allegations that the policyholder's good fail to conform to the quality or performance advertised. Even if a policyholder is accused of mischaracterizing its own products in advertising, the failure to conform exclusion does not apply if the policyholder allegedly disparages, even implicitly, its competitor's products. Only where the underlying complaint alleges the policyholder misrepresented its own products and its misrepresentations did not implicitly disparage a competitors products have courts applied the failure to conform exclusion.

UP's brief was written pro bono by C. Douglas Maynard, Jr.

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