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January 23, 2009

Supreme Court of North Carolina
Clerk's Office
P.O. Box 2170
Raleigh, North Carolina 27602-2170

RE: *Harleysville Mutual Insurance Company v. Buzz Off Insect Shield, LLC, et al.*
File No. 272A08 / From North Carolina Court of Appeals No. COA 07-1002 /
From Guilford County No. 06 CVS 6714

Dear Clerk:

Enclosed for filing in the above-referenced matter are Motion of United Policyholders For Leave to File *Amicus Curiae Brief* and *Amicus Curiae Brief* of United Policyholders.

Thank you for your assistance in this matter. If you have any questions, please contact our office.

Very truly yours,

C. Douglas Maynard, Jr.

CDMjr:bb

Enclosures
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No. 272A08 EIGHTEENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

* *

HARLEYSVILLE MUTUAL INSURANCE COMPANY, **Plaintiff-Appellant,** **vs.** **BUZZ OFF INSECT SHIELD, LLC, and INTERNATIONAL GARMENT TECHNOLOGIES, LLC,** **Defendants-Appellees,** **and** **ERIE INSURANCE EXCHANGE, and ERIE INSURANCE COMPANY,** **Defendants-Appellees,**	From NORTH CAROLINA COURT OF APPEALS No. COA07-1002 From GUILFORD COUNTY No. 06 CVS 6714

* *

MOTION OF UNITED POLICYHOLDERS FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF

* *

Pursuant to Rule 28(i) of the North Carolina Rules of Appellate Procedure, United Policyholders respectfully petitions this Court for leave to file an *amicus curiae* brief in support of Defendant International Garman Technologies, LLC.

NATURE OF APPLICANT'S INTEREST

United Policyholders ("UP") is a not-for-profit corporation founded in 1991 as an educational resource for the public on insurance issues and insurance consumer rights. The organization is tax-exempt under Internal Revenue Code § 501(c)(3). UP is based in California but operates nationwide and is funded by donations and grants from individuals, businesses, and foundations and governed by an eight-member Board of Directors. UP contributes on an ongoing basis to the formulation of insurance-related public policy at both the national and state level.

UP exists because businesses and individuals rely on the insurance they buy to protect themselves, their property, and their livelihoods against the risk of loss, and insurance companies are in business to earn profits by assuming that risk. Insurance is a regulated industry because the financial security insurance policies provide is an integral part of the fabric of our society and economy. UP monitors the insurance sector, works with public officials, has a nationwide network of volunteers and affiliate organizations, publishes written materials, files *amicus* briefs in cases involving coverage and claim disputes and is a general information clearinghouse on consumer issues related to commercial and personal lines insurance products. UP provides disaster aid to property owners across the U.S. via educational activities designed to illuminate and demystify the claim process.

In this brief, UP seeks to fulfill the "classic role of amicus curiae by assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration." Miller-Wohl Co. v. Commissioner of Labor & Indus., 694 F.2d 203, 204 (9th Cir. 1982). This is an appropriate role for *amicus curiae*. As commentators have often stressed, an amicus is often in a superior position to "focus the court's attention on the broad implications of various possible rulings." R. Stern, E. Greggnian & S. Shapiro, Supreme Court Practice, 570-71 (1986) (quoting Ennis, Effective Amicus Briefs, 33 Cath. U.L. Rev. 603, 608 (1984)).

QUESTIONS OF LAW TO BE ADDRESSED

UP's brief will address the following questions of law: (1) whether, applying generally accepted insurance interpretation principles, the allegations in the underlying complaint give rise to a possibility that the claims would be covered under the insurance policies, thus triggering the duty to defend; and (2) whether failure to conform exclusions properly apply if the underlying complaint contains allegations that the policyholder disparages a competitor's products.

Respectfully submitted this the 23rd day of January, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that the undersigned has on this day served a copy of the forgoing **Motion Of United Policyholders For Leave To File An Amicus Curiae Brief** in the above-captioned action upon all parties by depositing a copy in the U.S. Mail , first-class postage prepaid, addressed as follows:

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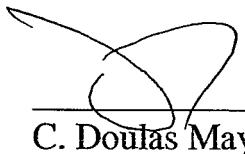
This the 23rd day of January, 2009



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No. 272A08

EIGHTEENTH JUDICIAL DISTRICT

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HARLEYSVILLE MUTUAL INSURANCE COMPANY, **Plaintiff-Appellant,** **vs.** **BUZZ OFF INSECT SHIELD, LLC, and INTERNATIONAL GARMENT TECHNOLOGIES, LLC,Defendants-Appellees,** **and** **ERIE INSURANCE EXCHANGE, and ERIE INSURANCE COMPANY,** **Defendants-Appellees.**	From NORTH CAROLINA COURT OF APPEALS No. COA07-1002 From GUILFORD COUNTY No. 06 CVS 6714

* *

AMICUS CURIAE BRIEF OF UNITED POLICYHOLDERS

* *

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INTRODUCTION

United Policyholders ("UP") is a not-for-profit corporation founded in 1991 as an educational resource for the public on insurance issues and insurance consumer rights. The organization is tax-exempt under Internal Revenue Code § 501(c)(3). UP is based in California but operates nationwide and is funded by donations and grants from individuals, businesses, and foundations and governed by an eight-member Board of Directors. UP contributes on an ongoing basis to the formulation of insurance-related public policy at both the national and state level.

UP exists because businesses and individuals rely on the insurance they buy to protect themselves, their property, and their livelihoods against the risk of loss, and insurance companies are in business to earn profits by assuming that risk. Insurance is a regulated industry because the financial security insurance policies provide is an integral part of the fabric of our society and economy. UP monitors the insurance sector, works with public officials, has a nationwide network of volunteers and affiliate organizations, publishes written materials, files *amicus* briefs in cases involving coverage and claim disputes and is a general information clearinghouse on consumer issues related to commercial and personal lines insurance products. UP provides disaster aid to property owners across the U.S. via educational activities designed to illuminate and demystify the claim process.

In this brief, UP seeks to fulfill the "classic role of amicus curiae by assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration." Miller-Wohl Co. v. Commissioner of Labor & Indus., 694 F.2d 203, 204 (9th Cir. 1982). This is an appropriate role for *amicus curiae*. As commentators have often stressed, an *amicus* is often in a superior position to "focus the court's attention on the broad implications of various possible rulings." R. Stern, E. Greggnian & S. Shapiro, Supreme Court Practice, 570-71 (1986) (quoting Ennis, Effective Amicus Briefs, 33 Cath. U.L. Rev. 603, 608 (1984)).

FACTUAL BACKGROUND

UP adopts and incorporates the Statement of Facts set forth in the Brief of International Garment Technologies, LLC, ("IGT") as if set forth in full.

SUMMARY OF ARGUMENT

The Court of Appeals properly interpreted the insurance companies' failure to conform exclusions narrowly, and found a duty to defend IGT, where the insurance companies failed to clearly and unambiguously preclude any possibility of coverage. Specifically, the Court of Appeals' ruling should be affirmed because:

1. North Carolina courts apply the "comparison" test to determine whether allegations are potentially covered by an insurance policy's provisions.

2. S.C. Johnson & Son, Inc.'s ("S.C. Johnson") complaint alleged that IGT made false advertising claims and that such false advertising specifically mentioned an S.C. Johnson product by name.

3. The allegations contained in the underlying complaint disclose a possibility that IGT could be liable for a claim of product disparagement, which is covered by the insurance policies.

4. The insurance companies have a duty to defend IGT against the underlying complaint because the allegations in that complaint state a claim that could potentially be covered by the insurance policies.

5. If a policyholder is accused in part of mischaracterizing its own products in advertising, the failure to conform exclusion does not apply if the policyholder also allegedly disparages, even implicitly, its competitor's products.

ARGUMENT

I. THE INSURANCE COMPANIES OWE A DUTY TO DEFEND BASED ON A LIBERAL READING OF THE ALLEGATIONS IN THE UNDERLYING COMPLAINT.

A. Insurance Policies Should Be Interpreted Broadly And Any Doubt Or Ambiguity Should Be Resolved In Favor Of The Policyholder.

An insurance policy is different from other products because of the "special relationship" between the insurance company and the policyholder. See Eugene R. Anderson, *et al*, "Insurance Coverage Litigation" §11, at 2 (1st ed. 1997) (discussion of the special relationship and public trust accorded to insurance companies); see also Kenneth S. Abraham, "The Natural History of the Insurer's Liability For Bad Faith", 72 Tex L. Rev. 1295 (May 1994) (discussion of the historical origins and development of the duty of good faith). The special relationship consists of several different elements:

1. the duty of good faith and fair dealing inherent in every insurance policy owed by insurance companies to their policyholders.

2. the fiduciary duties insurance companies owe to their policyholders;

3. the public service nature of insurance;

4. the imbalanced bargaining position between an insurance company and its policyholder;

6. the present payment of money in exchange for a promise to pay the costs of a future event which may or may not occur; and

7 the financial motivation for the insurance company to delay or deny delivery of its promise.

See, e.g., Barry R. Ostrager & Thomas R. Newman, "Handbook On Insurance Coverage Disputes" 429 (5th ed. 1992) (pro-insurance commentators acknowledge that insurance companies owe a duty of good faith and fair dealing).

The policyholder purchases an insurance policy, pays premiums up front and expects insurance coverage when a claim is made. See HaySeeds, Inc. v. State Farm Fire & Cas., 352 S.E.2d 73, 79 (W. Va. 1986) (policyholders buy insurance –"not a lot of vexatious, time consuming, expensive litigation with [the insurance company]."") In return for paying a premium, the insurance company makes two general promises: (1) the insurance company's promise to defend lawsuits against the policyholder; and (2) the promise to pay, or indemnify, the policyholder for all covered claims against the policyholder.

Even though insurance companies are fiduciaries entrusted with duties of good faith and fair dealing, they are often less than cooperative when dealing with policyholders making claims for insurance coverage. Instead, the policyholder may be confronted by a financial colossus with unmatched expertise and resources in insurance coverage litigation. Indeed, as Liberty Mutual Insurance Company recognized:

> [the policyholder] is likely not as familiar with litigation and claims evaluation and disposition as is the insurance company
>
> ... [T]he insurer is a professional defender of lawsuits .. . Unlike the insured, an [insurance company] is not a novice as to matters involving litigation.

See National Union Ins. Co. v. Liberty Mut. Ins. Co., 696 F. Supp. 1099 (E.D. La. 1988) (No. 86-2000); see also Adolph Coors Co. v. American Ins. Co., 164 F.R.D. 507, 509 (D. Colo. 1993) (sanctioning Liberty Mutual for being a "major league team" in the game of 'hardball litigation.")

Indeed, the disparity in bargaining power, knowledge and resources between major insurance companies and their policyholders has led courts to recognize "the unique nature of contracts of insurance" and to further hold that "judicial regulation of insurance contracts is essential in order to prevent overreaching and injustice." Sparks v. St. Paul Ins. Co., 495 A.2d 406, 414 (N.J. 1985).

B. North Carolina Courts Should Read Allegations In Underlying Complaints Broadly, Focusing On Allegations Alone, Not On Underlying Plaintiffs' Characterization Of Claims.

The interpretation of an insurance policy is a question of law. See Duke Univ. v. St. Paul Fire & Marine Ins. Co., 96 N.C. App. 635, 637, 386 S.E.2d 762, 763, review denied, 326 N.C. 595, 393 S.E.2d 876 (1990). Like all other jurisdictions, North Carolina has clear rules of contract interpretation that apply to insurance contracts. Many of North Carolina's rules of interpretation are consistent with those in other jurisdictions. This Court's interpretation of the relevant insurance policy and its relation to the underlying complaint could have broad reaching implications in other jurisdictions if the Court's decision is not in line with generally accepted insurance interpretation principles.

In construing an insurance policy, the North Carolina courts, wherever possible, will interpret the policy in a manner which extends coverage. See Prime TV, LLC v. Travelers Ins. Co., 223 F. Supp. 2d 744, 749 (M.D.N.C. 2002), (citing Nationwide Mut. Fire Ins. Co. v. Allen, 68 N.C. App. 184, 314 S.E.2d 522 (1984)). Provisions in an insurance policy which grant coverage must be construed liberally so as to afford coverage to the policyholder whenever possible through reasonable construction of the policy language. See State Auto Prop. & Cas. Ins. Co. v. Travelers Indem. Co. of Am., 343 F.3d 249, 254 (4th Cir. 2003) (citing N.C. Farm Bureau Mut. Ins. Co. v. Stox, 330 N.C. 697, 702, 412 S.E.2d 318, 321 (1992)).

Moreover, any doubt as to whether the insurance policy covers a claim must be resolved in favor of the policyholder. See e.g. Duke Univ. v. St. Paul Fire & Marine Ins. Co., 96 N.C. App. 635, 637, 386 S.E.2d 762, 763 - 64 (1990); Gore Design Completions, Ltd. v. Hartford Fire Ins. Co., 538 F.3d 365 (5th Cir. 2008); Hartford Cas. Ins. Co. v. Merchants & Farmers Bank, 928 So. 2d 1006, 1011 (Ala. 2005); Hartford Cas. Ins. Co. v. Litchfield Mut. Fire Ins. Co., 274 Conn. 457, 466, 876 A.2d 1139, 1145 (2005); North River Ins. Co. v. Broward County Sheriff's Office, 428 F. Supp. 2d 1284, 1288 (S.D. Fla. 2006).

As noted in the Appellate opinion, the duty to defend is part of the insuring agreement in the policy:

> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal and advertising injury" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages.

Harleysville Mut. Ins. Co. v. Buzz Off Insect Shield, L.L.C., 664 S.E.2d 317, 320 (N.C. App. 2008). 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 or advertising injury." See Waste Mgmt. of Carolinas, Inc. v. Peerless Ins. Co., 315 N.C. 688, 691, 340 S.E.2d 374, 377 (1986). Whether an insurance company has a duty to defend depends solely on the allegations contained in the underlying complaint. To determine whether a duty to defend

exists, this Court must employ the "comparison test," also known as the "eight corner" rule in other jurisdictions. See id. at 693, 340 S.E.2d at 378.

In the "comparison test" this Court must read the pleadings side-by-side with the insurance policy to determine whether any allegations in the complaint could potentially be covered. See id.. Under the general "eight corner" rule or "comparison test," courts around the country liberally interpret the language of the allegations to determine whether they potentially state a cause of action covered by the policy. See American Home Assur. Co. v. United Space Alliance, LLC, 378 F.3d 482, 487 (5th Cir. 2004); Quick v. Ronald Adams Contr., Inc., 861 So. 2d 278, 280-281 (La. Ct. App. 2003). Essential to the "comparison test," this Court's "ultimate focus" must be "on the facts pled, not how the claims are characterized." State Auto Property, 343 F.3d at 254 (citing Holz-Her U.S., Inc. v. United States Fid. & Guar. Co., 141 N.C. App. 127, 129, 539 S.E.2d 348, 350 (2000)).

In State Auto Property, the Fourth Circuit addressed the issue of whether an insurance company owed its policyholder a duty to defend in a lawsuit where the allegations in the underlying complaint could be considered allegations of "misappropriation," a covered claim. See State Auto Prop., 343 F.3d at 251. The insurance company argued that the underlying complaint related solely to the

policyholder's wrongful use of a trademark and had nothing to do with misappropriation as defined in the policy. See id. at 251, 256. Despite the underlying plaintiff's characterization of the claims as wrongful use of a trademark, the court reviewed the actual allegations and determined that they potentially fit within the policy's coverage for misappropriation. See id. at 257.

After reviewing all the allegations in the complaint, an insurance company may be relieved of the duty to defend only where the complaint "clearly demonstrates no basis upon which the insurer could be required to indemnify the insured under the policy." Hobbs Realty & Constr. Co. v. Scottsdale Ins. Co., 163 N.C. App. 285, 289-90, 593 S.E.2d 103, 106 (N.C.App.), writ of cert. denied, 599 S.E.2d 907 (N.C. 2004) (citing Fuisz v. Selective Ins. Co. of America, 61 F.3d 238, 242 (4th Cir. 1995)). However, where there is a reasonable argument that the allegations fall within the policy's coverage, there is a corresponding duty to defend the policyholder against those allegations. See Prime TV, LLC v. Travelers Ins. Co., 223 F. Supp. 2d 744, 749 (M.D.N.C. 2002).

As these rules make clear, it is important to take a broad view of the pleadings allegations. Although an underlying plaintiff may characterize its claims as false advertising, it is possible that the complaint contains allegations of disparagement that are covered by "personal and advertising injury" coverage.

The court's job is to look beyond the plaintiff's characterization of claims and look to the allegations themselves to determine if any allegation could potentially be covered under the policy. Any doubt that an allegation could be considered disparagement, thus triggering the insurance company's duty to defend, must be resolved in favor of the policyholder. See e.g. English v. BGP Intern., Inc., 174 S.W.3d 366, 372 (Tex. App. Houston 14th Dist. 2005) (holding that insurance company owed duty to defend for claims of trespass after court focused on facts showing origin of damages rather than on particular legal theories pled); Brucia v. Hartford Acc. & Indem., 307 F. Supp. 2d 1079, 1082-83 (N.D.Cal. 2003) (stating that duty to defend depends not on technical legal cause of action, but on facts alleged); Fielder Rd. Baptist Church v. Guideone Elite Ins. Co., 139 S.W.3d 384, 388 (Tex. App/Fort Worth 2004) (holding that allegations must be interpreted liberally and focus for determining duty to defend should be on facts, not on specific legal theories); American Economy Ins. Co. v. Holabird & Root, 886 N.E.2d 1166, 1122-1123 (Ill. App. 1st Dist. 2008) (holding insurance company owed duty to defend and stating that "the threshold for pleading a duty to defend is low, any doubt with regard to such duty is to be resolved in favor of the insured") (citation omitted).

II. THE FAILURE TO CONFORM EXCLUSION DOES NOT APPLY.

A. Insurance Companies Bear The Burden Of Proving That A Policy Exclusion Applies To Preclude Coverage.

North Carolina courts have long held that the policyholder bears the burden to prove by a preponderance of the evidence that a loss falls within the coverage provisions of the insurance policy. Nationwide Mut. Fire Ins. Co. v. Allen, 68 N.C. App. 184, 188, 314 S.E.2d 552, review denied, 311 N.C. 761, 321 S.E.2d 142 (1984). Once the policyholder proves that a loss is potentially covered under the policy, however, the burden shifts to the insurance company to show that an exclusion or limitation of coverage clearly and unambiguously applies. Allen, 68 N.C. App. at 188, 314 S.E.2d at 554; Insurance Co. v. McAbee, 268 N.C. 326, 328, 150 S.E.2d 496, 497 (1966).

This Court has previously provided the following guidance for interpreting insurance policy exclusions:

> In interpreting the relevant provisions of the insurance policy at issue . . . [e]xclusions from and exceptions to undertakings by the company are not favored, and are to be strictly construed to provide the coverage which would otherwise be afforded by the policy.

Maddox v. Colonial Life & Accident Ins. Co., 303 N.C. 648, 650, 280 S.E.2d 907, 908 (1981); see also 2-6 Appleman on Insurance § 6.1 ("Most American courts apply a rule of construction that . . . exclusions and limitations of coverage are

construed narrowly . . . Where exceptions, qualifications or exemptions are introduced into an insurance contract, a general presumption arises that that which is not clearly excluded from the operation of the contract is included"); see also Harris, Jolliff & Michel, Inc. v. Motorists Mut. Ins. Co., 255 N.E.2d 302, 305 (Ohio Ct. App. 1970) (quoting same); Seaboard Sur. Co. v. Gillette Co., 476 N.E.2d 272, 275 (N.Y. 1984) ("whenever an insurer wishes to exclude certain coverage from its policy obligations, it must do so in clear and unmistakable language").

Insurance companies are not allowed to use and impose obscure exceptions to defeat the purpose for which the policy was procured. See Spears v. Shelter Mut. Ins. Co., 73 P.3d 865, 868 (Okla. 2003) ("unclear or obscure clauses in an insurance policy will not be permitted to defeat coverage which is objectively reasonably expected by a person in the position of the insured"). Courts will give a construction consistent with reason and common fairness in preference to enforcing a forfeiture. See 2-6 Appleman on Insurance § 6.1. Therefore, if an insurance company desires to limit its liability under a policy, it must employ language that clearly and distinctly reveals its stated purpose. Spears, 73 P.3d at 868.

B. The Failure To Conform Exclusion Does Not Apply When The Underlying Complaint Alleges That The Policyholder Disparages A Competitor's Product.

In order to exclude coverage based on the exclusion for the failure of goods to conform, or the failure to conform exclusion, insurance companies have the burden of demonstrating that the allegations against the policyholder specifically reference a failure of the policyholder's goods to rise to the level advertised. See DecisionOne Corp. v. ITT Hartford Ins. Group, 942 F. Supp. 1038, 1043 (E.D. Pa. 1996) (holding failure to conform exclusion inapplicable because competitor's false advertising claim made false and misleading comparisons with competitor's product and did not allege policyholder's product failed to rise to level advertised). Although the failure to conform exclusion has not been addressed by North Carolina courts, it has been interpreted narrowly by other jurisdictions in similar contexts. UP respectfully submits that this Court follow the overwhelming trend that narrowly construes this exclusion and affirm the Court of Appeals' ruling.

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 goods fail to conform to the quality or performance advertised. See, e.g., Elcom Techs., Inc. v. Hartford Ins. Co., 991 F. Supp. 1294, 1298 (D. Utah 1997) (holding failure to conform exclusion inapplicable where underlying

complaint does not allege that quality of policyholder's product failed to rise to level advertised); DecisionOne, 942 F. Supp. at 1043 (because competitor's false advertising claim did not allege policyholder's product failed to rise to level advertised, failure to conform exclusion did not apply).

Even if a policyholder is accused in part of mischaracterizing its own products in advertising, the failure to conform exclusion does not apply if the policyholder also allegedly disparages, even implicitly, its competitor's products. See Pennfield Oil Co. v. American Feed Indus. Ins. Co. Risk Retention Group, Inc., No. 8:05CV315, 2007 U.S. Dist. LEXIS 21456, at *25 (D. Neb. Mar. 12, 2007) (holding failure to conform exclusion does not apply because competitor's alleged injury is due to policyholder's implicit disparagement of competitor's product and practices); PCB Piezotronics, Inc. v. Kistler Instrument Corp., No. 96-CV-0512E(F), 1997 U.S. Dist. LEXIS 20783, at *10 (W.D.N.Y. Dec. 30, 1997) (holding failure to conform exclusion inapplicable to competitor's counterclaim alleging policyholder's advertisement misrepresented nature, characteristics and qualities of competitor's goods); DecisionOne, 942 F. Supp. at 1043 (failure to conform exclusion did not apply where underlying complaint alleged that policyholder made false and misleading comparisons with competitor's product). The failure to conform exclusion, therefore, does not apply when the policyholder's representations arguably damage a competitor's reputation.

Only where the underlying complaint alleges the policyholder misrepresented its own products and its misrepresentations did not implicitly disparage a competitor's product have courts applied the failure to conform exclusion. See R.C. Bigelow v. Liberty Mut. Ins. Co., 287 F.3d 242 (2d Cir. 2002) (holding failure to conform exclusion applies where there were only allegations that policyholder's herbal teas were all natural when, in fact, they were artificially flavored and no disparagement is alleged). In that case, the court applied the failure to conform exclusion because the policyholder's mischaracterizations could not arguably have damaged its competitor's products.

This Court should also reject an expansive reading of the failure to conform exclusion. Applying blanket protection from coverage for all false advertising claims if an insurance policy contains a failure to conform exclusion is against the public policy of North Carolina and other jurisdictions. See Maddox, 303 N.C. at 650, 280 S.E.2d at 908 (holding "[e]xclusions from and exceptions to undertakings by the company are not favored, and are to be strictly construed to provide the coverage which would otherwise be afforded by the policy"); see also 2-6 Appleman on Insurance § 6.1 ("where exceptions, qualifications or exemptions are introduced into an insurance contract, a general presumption arises that that which is not clearly excluded from the operation of the contract is included"); Harris, Jolliff & Michel, 21 Ohio App.2d at 85, 255 N.E.2d at 305 (quoting same).

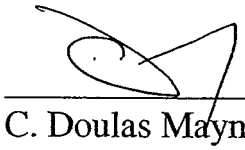
If an insurance company intends to limit coverage for all false advertising claims, insurance policy can and should state just that. See Seaboard, 64 N.Y.2d at 311, 476 N.E.2d at 275 ("whenever an insurer wishes to exclude certain coverage from its policy obligations, it must do so in clear and unmistakable language").

This Court should adopt the approach taken by the other jurisdictions that have interpreted failure to conform exclusions in similar contexts and hold that if an underlying complaint alleges that a policyholder disparages a competitor's product, even while also mischaracterizes its own product, the failure to conform exclusion does not apply to preclude coverage. To hold contrary would result in a forfeiture that is inconsistent with reason and common fairness and thus North Carolina law.

CONCLUSION

The Court of Appeals properly held that: (1) the allegations asserted in the underlying complaint give rise to a possibility that IGT's potential liability is covered under the insurance companies' policies; and (2) the failure to conform exclusion does not preclude coverage because the underlying complaint contains allegations that IGT's representations disparaged S.C. Johnson's products. Accordingly, this Court should affirm the Court of Appeals' holding.

Respectfully submitted this the 23rd day of January, 2009.



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I hereby certify that the undersigned has on this day served a copy of the forgoing **Amicus Curiae Brief of United Policyholders** in the above-captioned action upon all parties by depositing a copy in the U.S. Mail , first-class postage prepaid, addressed as follows:

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