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Illinois Federal Court Finds Insurer has Duty to Defend in Underlying Product Misrepresentation Class Action

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In *Harleysville Preferred Ins. Co. v. Dude Prods.*, No. 21 C 5249, 2022 U.S. Dist. LEXIS 229546, at *5 (N.D. Ill. Dec. 21, 2022), the Court addressed the duty to defend a class action filed on behalf of purchasers of a "flushable" toilet paper alternative known as Dude Wipes. The complaint alleged that Dude Products falsely markets Dude Wipes as "flushable" even though the product does not break apart or disperse in a reasonable period of time after flushing and result in clogs or other sewage damage. As a result, the plaintiff class claimed that they "suffered injury in fact and lost money or property".

Dude Products was insured under a commercial general liability policy and a commercial umbrella liability policy issued by Harleysville. Subsequent to tender of the class action, Harleysville initiated a declaratory judgment seeking a declaration that it has no duty to defend or indemnify Dude Products under either the CGL or the umbrella policies. After the close of the pleadings stage, both parties moved for judgment on the pleadings. Specifically, Harleysville contended (among other things) that (1) there was no property damage alleged, (2) the harm alleged in the class action did not arise from an "occurrence"; and (3) the "expected and intended injury" exclusion precluded coverage.

The Court began its analysis with a summarization of Illinois law on the duty to defend setting forth the oft-stated obligation to examine the underlying complaint and the language of the insurance policy and in doing so, "[b]oth the policy terms and the allegations in the underlying complaint are liberally construed in favor of the insured, and any doubts and ambiguities are resolved against the insurer." (citations omitted). As respects Harleysville's contention that there was no claim involving covered property damage, the Court noted that although the class action complaint did not specifically use the term "property damage," it included factual allegations of "clogs or other sewage damage." Contrary to Harleysville's assertion, the Court found these allegations to be sufficient to assert a physical injury to tangible property.

Turning to Harleysville's assertion that an occurrence was not alleged, the Court recognized those Illinois cases holding that damages that are the natural and ordinary consequences of faulty workmanship do not constitute an occurrence even if the insured did not intend or expect the result. The Court then contrasted those cases with cases in which Illinois courts have found that damage to something other than the insured's product itself can constitute an occurrence. Turning to the allegations of the complaint, the Court noted that although it was asserted that the insured intentionally misrepresented the "flushability" of its product, the complaint did not actually describe a direct causal connection between the intentional misrepresentation and the actual property damage. As noted by the Court, the allegations were that Dude Wipes were falsely advertised as flushable and that to the contrary, flushing the product results in clogging and sewer damage. There were, however, no allegations indicating that Dude Products intended this sort of damage by its advertisement or that such damage was a clearly foreseeable result. As a result, the Court held that the complaint sufficiently pled an "occurrence."

For similar reasons, the Court also found that the expected or intended injury exclusion did not apply. The Court emphasized that even though the complaint alleged that Dude Products intended the misrepresentations, it did not assert that clogged pipes and sewer damage are "normal outcomes" of using Dude Wipes, that Dude Products knew exactly how its products would harm the pipes, or that every Dude Wipe caused property damage. As such, the Court held that the complaint did not assert that Dude Products expected or intended the injury at issue and that the expected or intended injury exclusion does not apply to preclude coverage.

Having dispensed with Harleysville's assertions, the Court held that the class action complaint triggered Harleysville's duty to defend. As a result, the Court denied Harleysville's motion for judgment on the pleadings and granted judgment in favor of the insured.