



## INSIGHTS

### Insurer Owes Duty To Defend In Toilet Wipe Property Damage Case: Takeaways From Harleysville Preferred Ins. Co. V. Dude Products, Inc.

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In *Harleysville Preferred Ins. Co. v. Dude Products, Inc.*, the U.S. District Court for the Northern District of Illinois [considered whether a general liability insurer](#) had a duty to defend a putative consumer class action in which there were no specific causes of action for property damage. The court found that the insurer, Harleysville Preferred Ins. Co., had a duty to defend based on allegations of property damage in the underlying complaint that gave rise to the alleged consumer claims. In doing so, the court in this December 2022 decision touched on and reaffirmed several critical tenets of insurance coverage law.

Dude Products was sued in a putative class action in which the underlying plaintiffs asserted causes of action for alleged violations of several states' consumer fraud statutes. The matter involved the marketing and selling of Dude Wipes, a line of flushable toilet paper alternatives. The plaintiffs asserted that the products were falsely marked because they do not break apart or disperse in a reasonable time and result in clogs and other sewer damage.

Harleysville, one of Dude Products' general liability insurers, denied its defense obligations and then instituted a declaratory judgment action against Dude Products in the Northern District of Illinois. Harleysville sought to avoid its defense obligations on the following grounds: 1) the underlying action did not allege a claim for property damage, 2) the underlying action did not allege an occurrence, 3) the named plaintiffs did not allege any product purchase or damage within the Harleysville policy period, and 4) that coverage was barred based on the expected or intended injury and impaired property exclusions.

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The court rejected each of Harleysville's arguments and held that Harleysville has a duty to defend, Harleysville breached that duty to defend, and as a result, Dude Products is entitled to actual damages. Along the way, the court addressed and reinforced the following basic principles of insurance law.

## **Causes of Action and Labels Do Not Matter; Allegations Do**

Because this was a duty to defend case, Dude Products was not required to prove actual coverage. Rather, Dude Products was only obligated to show the mere potential or possibility of coverage. In holding that the underlying complaint alleged property damage sufficient to trigger Harleysville's duty to defend – even though there was not a single count for property damage alleged – the court noted that, under Illinois law, courts give little weight to the legal labels a party uses to characterize a complaint's underlying allegations when the allegations can reasonably be read to fall within coverage. Because the underlying plaintiffs' consumer causes of action were based on numerous allegations, including that the products at issue caused injury in the form of, among other things, sewer damage, the court rejected Harleysville's argument that the complaint had to have a specific property damage cause of action to trigger the duty to defend.

Instead, the court found the allegations of injury due to property damage more than sufficient to trigger the duty to defend.

This sends the message to policyholders that it is important when analyzing a complaint for coverage to not fall into the trap of focusing solely on the causes of action explicitly alleged. Instead, when completing an analysis, policyholders must focus on the allegations that give rise to the cause of action and use them to develop your potential for coverage or duty to defend argument.

## **Putative Class Allegations Must Be Considered**

In its attempt to avoid its duty to defend, Harleysville also relied on the fact that the named plaintiffs alleged they purchased the products in question well after the policy period expired. Harleysville argued there could be no conceivable way the named plaintiffs suffered property damage during the policy period as required under the policy.

In its analysis, however, Harleysville ignored certain class allegations of property damage that potentially reached back to the policy period, and claimed that they should not be considered in the court's analysis. The court rejected this argument. In doing so, the court held that the putative class allegations must be considered in determining the duty to defend, and that the court need not limit its review to the individual named class plaintiffs' specific allegations.

Thus, when analyzing a class action complaint for coverage, policyholders should be guided by all of the underlying complaint's allegations and not limit review to only the named plaintiff's specific allegations. If the putative class plaintiff allegations show there is a potential for coverage, then there must be a duty to defend.

## **The Existence of an Occurrence and the Application of the Expected or Intended Injury Exclusion Depend on**

## **Whether the Policyholder Intended Harm, not on Whether the Policyholder Intended to Engage in the Act that Caused the Harm**

Because the underlying complaint was replete with allegations of intentional conduct, Harleysville contended that the required occurrence (or accident) was not present and that the expected or intended injury exclusion applied to bar coverage. The court disagreed. The court reasoned that even though there were many allegations that Dude Products intentionally misrepresented the nature and quality of its products, there were no allegations indicating that Dude Products intended any damage to third-party property or that such damage was a clearly foreseeable result.

The court held that not only was there an occurrence, but that the expected or intended injury exclusion did not apply. In its analysis of the exclusion, the court also found determinative that the underlying causes of action did not require proof of any knowing or intentional conduct.

Accordingly, when confronted with an underlying complaint that alleges intentional conduct, all is not lost. In determining the duty to defend, the policyholder would be well-served to look for allegations that are inconsistent with any theory that the policyholder intended to cause injury or that injury was the naturally foreseeable result of the allegedly wrongful conduct. Mere allegations of intentional conduct alone are not sufficient to relieve an insurer of its duty to defend. Moreover, if the alleged causes of action do not require showing knowing or intentional conduct, insurers will be hard-pressed to argue they should be able to avoid their defense obligations.

## **Duty to Indemnify Is Not Ripe Until Underlying Action Has Been Resolved**

In seeking its dispositive ruling, Harleysville also sought a declaration that it had no duty to indemnify. The court flatly rejected this argument, holding the law is clear: When there is a duty to defend, the indemnity determination is not appropriate until the underlying litigation has been terminated. Of course, had the court found no duty defend because there was not even the potential for coverage, that would have conclusively resolved the insurers' indemnification obligations as well because where there is no duty to defend (based on the lack of coverage potential) there can be no duty to indemnify. Thus, once a policyholder secures a duty to defend, any indemnity determinations should be dismissed without prejudice or stayed, lest the insurer try and establish facts through discovery in the coverage action that would prejudice the policyholder's interests and/or defense in the underlying action.

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