Commentary

The Failure To Conform Exclusion:

How Will It Apply To The 'Virtual Tsunami' Of Green Marketing And Tide Of Greenwashing Litigation?

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We Are Riding A 'Virtual Tsunami' Of Green Marketing

Forty years ago, Kermit the Frog first sang "it's not easy being green." Those words still may ring true, but today, many companies have engaged in widespread marketing campaigns to convince consumers that their products are "green." When testifying before Congress, the Federal Trade Commission characterized the recent wave of green marketing as nothing less than a "virtual tsunami."[1] Litigation over the veracity of many green marketing claims is on the rise. Yet to be determined, however, are many insurance coverage implications for such litigation. A recent decision provides some insight.

Now, more than ever, consumers may pick and choose between products touted as "organic," "all-natural," or "eco-friendly." In a recent survey, 17% of U.S. consumers said that they were willing to pay more for environmentally-friendly products.[2] Eco-labeling also is on the rise. Eco-labeling is system that allows consumers to determine whether the product was grown, manufactured, processed or sold in a manner that avoided detrimental effects to the environment. Wal-Mart has announced that all of its suppliers must calculate and disclose the environmental impact of their products to allow the mega-retailer to calibrate and disclose such impact on a rating system to be disclosed in the products' label.[3] Other retailers are expected to follow Wal-Mart's example. Some manufacturers also have developed their own eco-labels, a practice that since has come under some fire (and subject of litigation) because it can imply third-party certification where in fact none exists.

The rapid growth of green marketing has led to growing concern over "greenwashing," a pejorative term used to describe the practice of disingenuously spinning one's product as environmentally-friendly. An example of greenwashing is where a manufacturer places on its bottle of environmentally-harmful cleaning chemicals an image of a forest to associate the product with nature. The label is used to imply that there is minimal environmental detriment from the product's use. As consumers become more environmentally-conscious, many will choose products perceived to be environmentally-friendly, even if they cost more, to do "their part" to promote environmental responsibility.

In the opening statement of a hearing on green marketing held before the U.S. House of Representatives

Committee on Energy and Commerce, Subcommittee on Commerce, Trade and Consumer Protection, Chairman Bobby L. Rush stated that he was "especially concerned that Americans with less disposable income to spend on 'green' goods are not getting the benefits they expect when they spend their hard earned money on these goods, which promise more and, often, cost more at the check-out line."[4] One consumer advocate opined that in excess of 90% of all advertising of products and services as environmentally-friendly are instances of greenwashing.[5]

Rising Litigation For Greenwashing

Litigation and federal enforcement actions involving greenwashing claims are on the rise. Since President Obama took office, the FTC, which prohibits false statements in advertising to prevent deception and unfairness in the marketplace, has initiated several enforcement actions against companies over their alleged deceptive environmental marketing.[6] The FTC did not file a single such action during the eight-year Bush administration. Earlier this year, the FTC also warned 78 companies, including retail giants Wal-Mart, K-Mart and Target, that they could be liable for greenwashing, and face enforcement actions under Section 5 of the Federal Trade Commission Act,[7] for their labeling of rayon fabric as bamboo-based.[8] James Kohm, associate director of the enforcement division at the FTC's consumer-protection bureau, stated that additional letters and enforcement actions may come.[9] The FTC also is revising its Guides for the Use of Environmental Marketing Claims ("Green Guides").[10] Although the Green Guides are not regulations that have the force of law, the FTC has stated that violation of them may result in an enforcement action.[11]

Consumer litigation over greenwashing also is rising. Since 2007, consumers have filed several lawsuits accusing companies of using false and misleading advertising about their products' environmental impact.[12] More lawsuits undoubtedly will come. Competitors also are expected to enter the fray by alleging claims under the Lanham Act, a federal statute that permits a company to seek recovery for damages caused by false statements made by its competitor about its product or the competitor's own product.[13] Recovery also may be had under the Uniform Deceptive Trade Practices Act and common law claims of unfair competition for damages caused by false advertisements.

With the rising tide of litigation, a second wave of litigation over defense and indemnity coverage under insurance for greenwashing claims can be expected to follow the "tsunami" of green marketing. To date, however, few courts have addressed coverage issues in the context of underlying greenwashing claims, including issues surrounding what types of greenwashing claims will be covered under traditional CGL policies.

A recent decision of the Supreme Court of North Carolina, *Harleysville Mutual Insurance Company v. Buzz Off Insect Shield, LLC*,[14] provides some insight as to what those issues will be and whether the "Quality or Performance of Goods — Failure to Conform to Statements" exclusion (the "Failure to Conform exclusion"), which is commonly found in CGL policies, will apply to prohibit coverage for greenwashing claims. *Buzz Off* addressed whether allegations of false advertising, regarding the efficacy of apparel treated with insect repellant, fell within the penumbra of CGL coverage for "personal and advertising injury." The case itself did not involve underlying claims of greenwashing. The coverage issues addressed by the North Carolina Supreme Court, however, are analogous and resemble the arguments likely to be made and how courts may decide them.

Ticked Off About Claims Regarding Buzz Off Apparel

The insureds, Buzz Off Insect Shield, LLC ("BOIS") and International Garment Technologies (referred to herein individually and collectively as "IGT"), processed clothing manufactured and marketed by others to add an insect repellant to the apparel. The process, called the "BOIS process," used the insect repellant permethrin to treat the apparel in such a manner so that the repellant bound to the fabric, making skin-applied bug spray unnecessary. IGT marketed the BOIS process by entering into agreements with well-known clothing manufacturers, including L.L. Bean and Orvis, under which IGT applied the BOIS process to the manufacturers' clothing, affixed the BOIS trademark "Buzz Off" to the newly treated apparel, and then returned the apparel to the manufacturers for sale.[15] IGT and BOIS promoted the treated apparel through various advertisements on its website. The apparel also was promoted through advertisements of the clothing manufacturers and retailers who sold it.[16]

S.C. Johnson & Son, Inc. ("SCJ"), which manufactures and sells various skin-applied insect repellant products under the trademark Off!, is a competitor of IGT. SCJ commenced a lawsuit against the insureds for their marketing campaign, alleging trademark infringement, false advertising, and unfair competition claims under the Lanham Act, and violation of the Illinois and the North Carolina Consumer Fraud and Deceptive Businesses Practices Acts.[17] According to the underlying complaint, the advertisements falsely touted the apparel by claiming that the apparel (1) "reduce[s] or eliminate[s] the need to apply an insect-repellent product on the skin," (2) "protects uncovered skin from mosquito bites," (3) prevents wearers from "receiv[ing] any mosquito bites," (4) "is equivalent to or superior in performance to topical insect repellents, such as those containing DEET," (5) provides protection against mosquito bites without "the 'hassle' of applying 'messy' insect-repellent products directly to the skin," (6) "is highly effective through 25 washings," and (7) "contains a version of a natural insecticide that is derived from chrysanthemum flowers."[18]

SCJ alleged that IGT's advertising campaign concerning the efficacy of its insect repellant-treated apparel was false and damaged it by diverting sales from it's Off! product line.[19] IGT's insurer Harleysville Mutual Insurance Company denied defense coverage for the SCJ lawsuit and filed a declaratory judgment action in North Carolina Superior Court, naming BOIS, IGT, and IGT's other insurer, Erie Insurance Company/Erie Insurance Exchange (collectively, "Erie"), as defendants.[20] The parties thereafter filed cross-motions for summary judgment on the duty to defend.

The Harleysville policy and the Erie policy each stated that the insurer "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."[21] The policies defined "personal and advertising injury" to include injury arising out of "[o]ral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services."[22] Each policy also possessed the Failure to Conform exclusion, which barred coverage for:

> "Personal and advertising injury" arising out of the failure of goods, products or services to conform with any statement of quality or performance made in your "advertisement."[23]

A central issue was whether the Failure to Conform exclusion applied to bar coverage for SCJ's allegations.

IGT argued that Harleysville and Erie owed defense coverage to IGT for SCJ's lawsuit. The North Carolina Superior Court agreed and granted IGT's partial motion for summary judgment. The North Carolina Court of Appeals affirmed, holding that (1) SCJ's allegations fell within the scope of the insuring agreement of each policy, and (2) the Failure to Conform exclusion did not apply.[24] A majority of a divided panel reasoned that the Failure to Conform exclusion did not apply because "[t]he crux of S.C. Johnson's allegations assert that statements IGT made during the course of advertisements disparaged S.C. Johnson's products."[25] Specifically, the court concluded that the SCJ complaint alleged that "IGT made false statements about S.C. Johnson's goods and the whole market of skin-applied topical insect repellants in IGT's advertising."[26] The dissenting judge on the panel expressed no opinion as to whether SCJ's claims fell within the definition of "personal and advertising injury," but concluded that the Failure to Conform exclusion barred coverage.[27]

The insurers appealed, and the North Carolina Supreme Court reversed. Reviewing the language of the Failure to Conform exclusion, the North Carolina Supreme Court held that the exclusion clearly and unambiguously prohibited coverage for false statements made by an insured about its own products. According to the Court, "the Failure to Conform exclusion envisions a scenario in which a plaintiff shows that an insured's product is, in realty, something different from what the insured has advertised. . . . Thus, this exclusion removes from coverage 'personal and advertising injury' proximately caused by a false statement an insured has made about its own product."[28] Because SCJ alleged that IGT had made false statements regarding the effectiveness of its repellant-treated apparel, the exclusion applied.

In so holding, the Court did not limit the exclusion's meaning to any particular context or scope based on the exclusion's "purpose." The Court specifically

rejected IGT's argument that the exclusion could not apply in the present context — and that the insurers' attempt to apply the exclusion created ambiguity — because the purpose of the exclusion was to prohibit products liability claims disguised as false advertising claims.[29] IGT urged that the event which triggers the exclusion is a failure of the insured's goods to measure up to the expectations of the consumer, not the competitive impact of the advertising campaign itself. IGT argued that there is a distinction between injury caused by a product's failure to perform as advertised — to which the exclusion should apply — and injury caused by the product's advertisement itself — to which the exclusion should not apply.[30] Because SCJ did not allege injury caused by the apparel's actual failure to repel insects, IGT urged, the exclusion did not apply.

Refusing to limit the exclusion's application based upon its perceived "purpose," the Court held that whether the alleged injury was caused by a false advertisement, as opposed to the product itself, was irrelevant. IGT's "distinction" was meaningless.

> As the policies in the case *sub judice* cover only that injury resulting from an "offense," the injury suffered must be actionable, meaning here, resulting from a false statement, to constitute "personal and advertising injury" as that term is used in the policies. As such, defendant IGT's construction of the language of the Failure to Conform exclusion is untenable and does not render the provision ambiguous. . . . The Failure to Conform exclusion envisions an insured's false advertisement that causes injury, and the exclusion removes from coverage potential "personal and advertising injury" suffered from a false advertisement, when the falsity "aris[es] out of the failure of goods . . . to conform with . . . statement[s] of quality or performance made in [the insured's] 'advertisement.'" [31]

Importantly, because the Court held that the Failure to Conform exclusion applied to competitive injuries caused by false advertising, and not just to injuries caused by the products themselves, the ruling — and the rulings of other courts alike in mind — likely will bring the exclusion into play in the context of underlying greenwashing claims. Typically, a plaintiff in a greenwashing case alleges injury caused by the insured's promotion of its product, not by the product itself. The FTC focuses upon the promotion of the product. An insured's competitor may allege injury from loss of business and unfair competition caused by false advertisements exaggerating a product's environmental attributes. Consumers may allege injury — especially as members of a class action — from the higher prices they paid for the product in return for an environmental attribute the product really did not possess. Thus, for an action brought because of an insured's unqualified claim that its product is "biodegradable," a court following the example of the North Carolina Supreme Court could hold that there is no defense or indemnity coverage for the allegations because of the Failure to Conform exclusion.

Is It Product Disparagement?

While courts may refuse to limit the exclusion's application based on the exclusion's "purpose," a counterargument likely to be made by insureds is that the promotion of its product really disparages other products, thus making the exclusion inapplicable. This is where the crux of many coverage disputes will lay. When confronted with the argument in other contexts, the determinative factor examined by courts appears to be whether the product comparison promotes the insured's products by falsely exaggerating its attributes, or by attacking the products of others. In instances where the alleged false advertising constitutes misleading comparisons with another's product, and not the failure of the insured's products to attain the level of performance advertised for the product, the Failure to Conform exclusion has been held not to apply.[32] On the other hand, where the insured is sued for advertising an attribute or a level of performance that is absent in the product, the exclusion has been held to apply.[33]

In decisions where product comparisons have been held to constitute disparagement, the courts reason that misleading comparisons may cast doubt on the quality of the competitor's product or the validity of claims made about competing products. In *Pennfield Oil,* for instance, Pennfield's competitor, Alpharma, Inc., alleged that Pennfield had falsely claimed that its animal-drug-feed-additive had been approved by the FDA for multiple uses for which it had not been approved. Alpharma, which was the only entity to have FDA approval for multiple uses of its additive,

alleged it had suffered damages from Pennfield's promotion. The court held that the Failure to Conform exclusion did not apply because Pennfield's promotions implicitly disparaged Alpharma's product and practices.[34]

In *Buzz-Off*, the North Carolina Supreme Court considered and rejected the argument that comparisons between the repellant-treated apparel and skin-applied repellant constituted disparagement.[35] There, the product comparisons included statements that:

> "Worry Free and Convenient-*Wearing BUZZ OFF apparel reduces the need to apply insect-repellent creams, lotions or sprays directly to the skin.* Although topical insect repellents may be effective, especially those containing DEET, many customers are wary of overuse. In addition, *applying repellents to the skin can be messy and frequent re-application is a hassle.*"[36]

> "Orvis just introduced a new line of clothing called BUZZ OFF that erases the need for other insect repellents."[37]

> "BUZZ OFF apparel has been shown to be highly effective through 25 washings. By contrast, insect repellents applied directly to the skin range in effectiveness and last from several minutes to several hours."[38]

> "BUZZ OFF apparel 'makes spray and lotion repellents obsolete.'"[39]

> "BUZZ OFF ™ gives you the protection of insect repellent spray without having to keep reapplying oily chemicals to your skin."[40]

> "BUZZ OFF Insect Shield builds a man-made version of a centuries-old insect repellent derived from the chrysanthemum plant directly into your clothes."[41]

Although IGT's comparisons cast the skin-applied products in a negative light, the Court concluded that "the alleged falsity of that portrayal lies solely in the alleged failure of defendants' products to be of the quality and as effective as defendants claimed."[42] Because SCJ's complaint focused upon the failure of IGT's apparel to perform as advertised, and not upon the effectiveness of SCJ's own products, the complaint was devoid of any claim of disparagement, and the exclusion applied. "Conspicuously absent" from the underlying complaint, the Court concluded, was any statement from SCJ that it intended to prove anything about the insureds' statements characterizing SCJ's products.[43]

Is the *Buzz Off* decision inconsistent with other decisions that have found disparagement in product comparisons, like in *Pennfield Oil*, and does it suggest the genesis of a split line of authority? Not really. The likely explanation is that the underlying complaints in each case treated the product comparisons differently. In *Buzz off*, SCJ focused its complaint in showing that the insureds' product did not perform as advertised. As succinctly stated by the North Carolina Supreme Court, "[i]n short, SCJ gave notice with its Amended Complaint that it intended to put defendants' products on trial, not its own."[44] In other cases, it may be that the underlying plaintiffs intended to show that their products were superior — *i.e.*, the insured's advertisements about the level of quality or performance of competing products had been false.

This important distinction is evident in *Superformance International*. There, the insured, Superformance, was sued for manufacturing, advertising and selling vintage automobiles under the name "Cobra," a trademark it was not licensed to use. Accepting Superformance's argument that the underlying complaint asserted a false advertising claim, the court concluded that coverage was barred under the Failure to Conform exclusion because the complaint alleged that Superformance had made misleading statements by suggesting "that the vehicles produced by Superformance are equivalent to the vehicles produced by [the underlying plaintiff], when in fact they are not."[45] Similarly, in *R.C. Bigelow*, the Second Circuit held that the exclusion barred coverage where Bigelow was alleged to have failed to indicate that its teas were artificially flavored and had mounted a marketing campaign "conveying the false and misleading impression that [its] teas were all natural."[46] The Court in *Buzz Off* believed that the case before it was like that in *R.C. Bigelow*. The product comparisons made by the insureds were used to promote the quality and performance of the insect repellant-treated apparel.

Moreover, although the insureds used such negative adjectives as "messy," "nasty," "greasy," and "unappetizing" to describe topical, skin-applied insect repellant, at no point in its complaint did SCJ allege that the adjectives falsely describe SCJ's products.[47]

Finally, it should be noted that in order for the exclusion to apply, the alleged false attribute also must pertain to the product's performance or quality. If the false attribute concerns another characteristic of the product, for example, the product's source, the exclusion will not apply because there is no failure to conform to quality or performance.[48] Although designations of authenticity or origin of a product can be indicators of quality, a least one court has held that such attributes "are primarily concerned with identifying the source or origin of goods, not how well the goods will perform."[49] This observation may seem obvious. The line between whether an attribute pertains to a product's quality or its source, however, can be a fine one. For instance, does the claim that a certain bottled water comes from a natural mountain spring convey a message about its source or its quality? If a bit of both, which should be considered when determining coverage and the Failure to Conform exclusion?

Conclusion

With the increasingly commonplace use of green marketing and the rise of litigation involving false or misleading claims involving the environmental attributes of products (*i.e.*, "greenwashing"), coverage litigation involving such claims is sure to follow. The *Buzz Off* decision highlights several coverage issues in connection with the Failure to Conform exclusion.

One issue is the role of the purported intent or purpose of the exclusion and the nature of comparisons made between the insured's products and any competing products. The North Carolina Supreme Court did not limit the application of the exclusion based on its perceived purpose. Thus, it held that the exclusion applied to damages resulting from the competitive impact of the allegedly false advertising itself, and not merely to damages caused by the failure of the product to perform as expected. Other courts may or may not agree.

A second issue is whether the product comparison enhances the quality or performance of the insured's product or disparages the products of others? Advertising one's product as "all natural" when it is artificially flavored, for instance, may trigger the exclusion. Claiming that one's product is healthier than other products, however, may not. One question to ask is whose product is to be placed on trial? If the insured's own product is the one on trial, the exclusion is more likely to apply.

A third issue is whether the purportedly false environmental attribute pertains to the product's quality or performance, or to the product's origin? A claim pertaining to the biodegradability of a wrapper for a cough drop, for example, would more likely fall within the ambit of exclusion than a claim pertaining to the cough drop's natural "flu-fighting" ingredients. The former claim pertains to performance — does the wrapper really biodegrade and how much? — while the latter claim seems to pertain more to the product's composition than efficacy.

Additional coverage issues no doubt will become prominent. In the meantime, however, the *Buzz Off* decision identifies important issues in connection with the scope and boundaries of the Failure to Conform exclusion for insurers and insureds alike to consider.

Endnotes

1. Prepared Statement of the Federal Trade Commission, on "It's Too Easy Being 'Green': Defining Fair Green Marketing Principles," before the Committee on Energy and Commerce, Subcommittee on Commerce, Trade and Consumer Protection for the Committee, U.S. House of Representatives, June 9, 2009 (hereinafter, "It's Too Easy Being Green"), at 1.

2. Vanessa O'Connell, "'Green' Goods, Red Flags: Rash of Earth-Friendly Claims Spurs Rising Number of lawsuits and FTC Actions," *Wall Street Journal*, Apr. 24, 2010 (hereinafter "'Green' Goods, Red Flags").

3. Miguel Bustillo, "Wal-Mart to Assign New 'Green' Ratings," *Wall Street Journal*, July 17, 2009. *See also* "Wal-Mart Announces Sustainable Product Index," July 16, 2009, available at <<http://walmartstores.

com/pressroom/news/9277.aspx>> (last visited Apr. 26, 2010). Wal-Mart's goal is to create a "comprehensive sustainability index" by which consumers may ascertain a product's environmental impact much the same way nutritional labeling today permits consumers to learn a food's nutritional value. *Id.*

4. Statement by the Honorable Bobby L. Rush, Chairman, Energy and Commerce Subcommittee on Commerce, Trade and Consumer Protection, Oversight Hearing: "It's Too Easy Being Green: Defining Fair Green Marketing Practices," June 9, 2009, at 2.

5. Testimony of M. Scot Case, Vice President, TerraChoice Group, Inc., Before the Subcommittee on Commerce, Trade and Consumer Protection, U.S. House of Representatives Committee on Energy and Commerce, June 9, 2009, at 3.

6. *See, e.g., FTC v. K-Mart Corporation*, No. 0823186 (2009); *FTC v. Tender Corporation*, No. 0823188; *FTC v. Dyna-E International*, No. 9336 (2010). Each action involved false claims regarding the biodegradability of the defendants' products.

7. 15 U.S.C. § 45 (2010).

8. "FTC Warns 78 Retailers, Including Wal-Mart, Target, and Kmart, to Stop labeling and Advertising Rayon Textile Products as 'Bamboo,'" FTC Press Release, February 3, 2010, available at <<http://www.ftc.gov/opa/2010/02/bamboo.shtm>> (last visited Apr. 26, 2010).

9. "'Green' Goods, Red Flags," *supra.*

10. *See* 16 CFR §260, *et seq.; see also* "FTC Reviews Environmental Marketing Guides, Announces Public Meetings," FTC Press Release, Nov. 26, 2007, available at <<http://www.ftc.gov/opa/2007/11/enviro.shtm>> (last visited Apr. 26, 2010).

11. 16 CFR §260.1 (Statement of Purpose).

12. "'Green' Goods, Red Flags," *supra.*

13. 15 U.S.C. § 1125(a)(1)(B) (2010).

14. *See* No. 272A08 (N.C. Apr. 15, 2010); __ S.E.2d __, 2010 N.C. LEXIS 344 (N.C. Apr. 15, 2010).

15. *Id.* at *3-4.

16. *Id.* at *4-5.

17. *Id.* at *5-7.

18. *Id.* at *5.

19. *Id.* at *6.

20. *Id.* at *8.

21. *Id.* at *14.

22. *Id.* at *15.

23. *Id.* at *14. There was no dispute that the publications at issue constituted an "advertisement," as defined by the policies.

24. *Harleysville Mut. Ins. Co. v. Buzz Off Insect Shield, LLC*, 664 S.E.2d 317, 322 (N.C. Ct. App. 2008).

25. *Id.*

26. *Id.*

27. *Id.* at 324-25. Based on this dissent, the insurers appealed to the North Carolina Supreme Court as a matter of right on the application of the Failure to Conform exclusion. The North Carolina Supreme Court did not address the issue of whether SCJ's claims fell within the scope of the policies' insuring agreements. *Buzz Off*, 2010 N.C. LEXIS 344, at *10, 18. ("We simply assume *arguendo* that SCJ sought to recover for 'personal and advertising injury' to which [the Harleysville and Erie polices] appl[y].").

28. *Buzz Off*, 2010 N.C. LEXIS 344, at *20-21.

29. *Id.* at 21-24.

30. *Id.* at 21-23.

31. *Id.* at *24.

32. *See Elcom Techs., Inc. v. Hartford Ins. Co. of the Midwest*, 991 F. Supp. 1294, 1298 (D. Utah 1997) (holding exclusion did not apply where underlying

false advertising claim did not allege that insured's products failed to perform as advertised); *DecisionOne Corp. v. ITT Hartford Ins. Group*, 942 F. Supp. 1038, 1043 (E.D. Pa. 1996) (holding exclusion did not apply where underlying complaint alleged insured had made "false and misleading" comparisons between itself and another, but did not allege that insured's quality did not attain level advertised); *see also Vector Prods., Inc. v. Hartford Fire Ins. Co.*, 397 F.3d 1316, 1318-19 (11th Cir. 2005)(duty to defend where comparisons suggest insureds product is superior to "leading brand."); *Knoll Pharm. Co. v. Auto Ins. Co. of Hartford*, 153 F. Supp. 2d 1026, 1038 (N.D. Ill. 2001) (duty to defend because insured's claim that its product "is superior to all other drugs that treat thyroid problems" is disparaging because it claims others' products are inferior). Neither *Vector Products* nor *Knoll Pharmaceutical* discussed the Failure to Conform exclusion. Both cases, however, demonstrate how product comparisons may be characterized as disparagement.

33. *R.C. Bigelow, Inc. v. Liberty Mut. Ins. Co.*, 287 F.3d 242, 246 (2d Cir. 2002) (holding exclusion applied where insured sued for allegedly falsely advertising its herbal teas were all natural when they were artificially flavored); *Superformance Int'l, Inc. v. Hartford Cas. Ins. Co.*, 203 F. Supp. 2d 587, 598 (E.D. Va. 2002) (holding exclusion applied where insured allegedly falsely advertised that vehicles produced by it were the equivalent to vehicles produced by its competitor).

34. *Pennfield Oil Co. v. Am. Feed Indus. Ins. Co. Risk Retention Group*, No. 8:05CV315, 2007 U.S. Dist. LEXIS 21456, at *25 (D. Neb. March 12, 2007).

35. *Buzz Off*, 2010 N.C. LEXIS 344, at *51-52.

36. *Id.* at *27 (emphasis in original).

37. *Id.* at 27-28.

38. *Id.* at *35.

39. *Id.* at *31.

40. *Id.* at *33.

41. *Id.* at *38.

42. *Id.* at *51.

43. *Id.* at *52.

44. *Id.* at *51-52.

45. *Superformance Int'l*, 203 F. Supp 2d at 598.

46. *R.C. Bigelow*, 287 F.3d at 247.

47. *Buzz Off*, 2010 N.C. LEXIS 344 at *50. Given the subjective meaning of the terms, the Court also questioned whether such descriptive terms were actionable statements of fact. *Id.* at *51.

48. *See Flodine v. State Farm Ins. Co.*, No.99C7466, 2001 U.S. Dist. LEXIS 2204, at *39-40 (N.D. Ill. March 1, 2001) (holding exclusion did not apply where insured allegedly falsely labeled products as authentic Native American products, which described source of goods, not quality).

49. *Id.* at *40. ■