Insurance Coverage for Lawsuits Involving Antitrust and Other Anticompetitive Practice Claims

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I. INTRODUCTION

Many businesses face claims of antitrust violations, anticompetitive conduct, unfair competition, and trade disparagement. Whether based on the antitrust laws or other statutory schemes, the suits frequently involve varying allegations. It is not unusual to see causes of action that contain allegations of injury or damage to property (without any greater specificity), for example, or allegations that could be construed as involving disparagement, even if no specific claim of libel, slander, or other form of disparagement is asserted. Businesses sometimes fail to consider that they may have a very valuable asset to protect them against the expense, and any settlements or judgments, incurred in such lawsuits—their comprehensive or commercial general liability (“CGL”) insurance policies.

Antitrust suits against corporations may be filed alleging a variety of antitrust and non-antitrust violations of law. The antitrust claims may involve, for example, purported price-fixing conspiracies, market allocations, predatory pricing, price discrimination, and monopolization. In addition, the Federal Trade Commission Act prohibits unfair methods of competition in interstate commerce and unfair or deceptive acts or practices in commerce. Most states have laws that mirror the Federal Trade Commission Act, as well as common law theories related to unfair competition, trade disparagement, and other unfair business practices. Claims brought pursuant to the Robinson Patman Act, a federal statute that prohibits price discrimination between two or more customers, also may be covered under CGL policies.

In the last few years, there has been a sharp increase in the number of federal antitrust suits filed in the United States. The increase is due to hard-charging regulators, a more aggressive plaintiffs bar, and the implementation of the Class Action Fairness Act, which is designed to move class actions from state to federal courts. Indeed, there has been a 42% increase in the number of federal antitrust suits filed in the first half of 2006 compared to the first half of 2005. According to Competition Law 360, in the first six months of 2006, 562 cases were filed, as compared to 396 over the same period in the last year. See Competition Law 360, Antitrust Case Filings Soar in 2006, Aug. 4, 2006, available at http://competition.law360.com/Secure/ViewArticle.aspx?id=8147. Antitrust class action complaints are also on the rise.

For corporations, this up-tick in high stakes antitrust litigation has resulted in significant litigation fees and settlements, and has placed an inordinate burden on the officers and employees charged with handling these matters. The pace of antitrust litigation and other claims alleging anticompetitive conduct is not expected to slow in the near future.

This white paper is intended to discuss insurance coverage issues for antitrust and other anticompetitive practice claims. Because of the many variations in policy language, it does not address all of the issues. This white paper also does not replace, and should not be relied on instead of, legal advice based on the specific policy language involved and an insured’s particular situation. However, it does provide a starting point and is intended to be an aid in considering what sometimes is a maze of factual and legal issues. This white paper may be considered advertising in some states.
Notwithstanding courts’ historical reluctance to find coverage for “pure” antitrust claims, the fact is that coverage often is afforded for lawsuits that involve a range of anticompetitive allegations, including antitrust allegations. Courts have recognized that even if the focal point of a lawsuit is on claims that are not even potentially covered under an insurance policy, the insured may be entitled to coverage simply because certain words in the complaint create a potential for coverage. Furthermore, courts, commentators, and insurance carriers themselves have recognized that CGL policies frequently obligate insurance carriers to defend and indemnify their insureds with respect to such lawsuits.

II. AN INSURANCE CARRIER’S DUTY TO DEFEND LAWSUITS ALLEGING ANTIMODETIVE CONDUCT

When allegations in the underlying lawsuit potentially fall within the policy’s coverage, there is a duty to defend. See, e.g., *Anthem Elecs., Inc. v. Pac. Employers Ins. Co.*, 302 F.3d 1049, 1054 (9th Cir. 2002); *Montrose Chem. Corp. v. Superior Court*, 6 Cal. 4th 287, 295-96, 24 Cal. Rptr. 2d 467 (1993). “Imposition of an immediate duty to defend is necessary to afford the insured what it is entitled to: the full protection of a defense on its behalf. . . . California courts have been consistently solicitous of insureds’ expectations on this score.” *Montrose*, 6 Cal. 4th at 295-96. Moreover, if any allegation in a complaint potentially is covered, an insurer must defend the entire action. See *Horace Mann Ins. Co. v. Barbara B.*, 4 Cal. 4th 1076, 1084, 17 Cal. Rptr. 2d 210 (1993).

Courts construe the allegations in the underlying complaints liberally so that the duty does not depend on inartful drafting by the underlying claimant. See, e.g., *CNA Cas. v. Seaboard Sur. Co.*, 176 Cal. App. 3d 598, 609, 222 Cal. Rptr. 276 (1986) (“it is not the form or title of a cause of action that determines the carrier’s duty to defend, but the potential liability suggested by the facts alleged or otherwise available to the insurer”); *Pension Trust Fund for Operating Eng’rs v. Fed. Ins. Co.*, 307 F.3d 944, 951 (9th Cir. 2002) (“California courts have repeatedly found that remote facts buried within causes of action that may potentially give rise to coverage are sufficient to invoke the defense duty”); *U.S. Fid. & Guar. Co. v. Executive Ins. Co.*, 893 F.2d 517, 519 (2d Cir. 1990) (insurance “‘policy protects against poorly or incompletely pleaded cases as well as those artfully drafted’” (citation omitted)).

Similarly, coverage is not governed by any label attached to allegations. See *Gray v. Zurich Ins. Co.*, 65 Cal. 2d 263, 268, 54 Cal. Rptr. 104 (1966) (insurer’s duty not measured by technical, but rather by potential for coverage as revealed by facts alleged in complaint or otherwise known to insurer). Doubts regarding coverage are resolved in favor of the insured. *U.S. Fidelity*, 893 F.2d at 519 (“If the allegations of the complaint are ambiguous or incomplete, the insurer is nevertheless obligated to defend if the case is potentially within the coverage of the policy.”) (citation omitted).
As the Ninth Circuit has explained:

The CNA [Casualty v. Seaboard Surety Co.] court cited approvingly to Ruder & Finn v. Seaboard Sur., 52 N.Y.2d 663, 439 N.Y.S.2d 858, 422 N.E.2d 518 (1981), wherein a New York court determined that an insurance company had a duty to defend its insured against an antitrust action that included an allegation of “false disparagement.” See CNA, 176 Cal. App. 3d at 611-12. The court rejected the insurer’s argument that “two solitary, unsubstantiated words” buried within “completely unrelated federal antitrust cause of action, which was, itself, undisputedly not covered” could not trigger the duty to defend.

Pension Trust, 307 F.3d at 951 n.4 (citations omitted); see also Horace Mann, 4 Cal. 4th at 1081.

Therefore, it is important for insureds to consider the full breadth of coverage that may be available. The starting place is with CGL policies.

III. SOURCES OF COVERAGE UNDER CGL POLICIES

Standard form CGL policies long have covered claims asserting bodily injury and property damage. Because allegations of “bodily injury” typically are not found in many lawsuits alleging antitrust violations or other anticompetitive conduct, bodily injury coverage usually affords little protection.

The same often is true with property damage coverage. This coverage usually applies if there has been damage to tangible property, or a loss of use of tangible property. Allegations of specific damage or loss of use might not typically be found in most lawsuits alleging antitrust violations or other anticompetitive conduct. However, many complaints contain a nonspecific allegation of “injury to property.” If there are such allegations, given the breadth of an insurance carrier’s duty to defend, coverage should be considered.

CGL policies long have covered claims alleging “personal injury” and “advertising injury.” These coverages often are overlooked by insureds who face antitrust claims or other claims of anticompetitive conduct. They should not be.

CGL policies typically obligate insurance carriers to pay “those sums that the insured becomes legally obligated to pay as damages because of ‘personal and advertising injury’ . . . ” Commercial General Liability Insurance Policy Form, § I, Coverage B, ¶ 1.a (ISO Properties, Inc. 2000). The policies also typically obligate carriers to “defend any ‘suit’ seeking those damages.” Id. “Personal and advertising injury” is defined to include the “offenses” 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 . . . ,” “[t]he use of another’s advertising idea in [the insured’s] advertisement,” and [i]nfringing upon another’s
copyright, trade dress or slogan in [the insured’s] advertisement.” *Id.*, § V, ¶ 14. Some CGL policies also define “personal injury” to include “discrimination,” while older policies (and some policies issued today) also include “piracy” and “unfair competition” within the covered “offenses.”

Claims involving anticompetitive conduct often fall within coverage for personal and advertising injury, particularly when those claims involve allegations of disparagement—an “offense” expressly covered by personal and advertising injury provisions. Indeed, commentators, insurance carriers, and courts have recognized that coverage is afforded for anticompetitive conduct claims involving allegations—even minor allegations—of disparagement. Many courts also have recognized that under policies defining personal and advertising injury to include the offenses of “piracy,” “unfair competition,” or “discrimination,” coverage also may be afforded.

**IV. COMMENTARIES AND INSURANCE CARRIER POSITIONS**

It long has been recognized that personal and advertising injury provisions provide extremely broad coverage for most business torts. As one publication stated more than 40 years ago, personal injury coverage covers “with very few exceptions the complete tort liability of the policyholder.” Northern California Chapter of CPCUs, *Umbrella Liability Coverage*, 13 C.P.C.U. Annals 243, 245 (Summer 1960) (citing “[m]aintaining a monopoly” as an example of an insured exposure). Similarly, two authors explained the scope of the coverage as follows 35 years ago:

> [N]othing . . . would require that “personal injury” be interpreted in a manner restricting coverage. The general reference to “other defamatory or disparaging material” in fact appears to create coverage for a wide range of economic injuries. For example, the plaintiff may allege that the defendant circulated a false rumor that he is a malingerer, thus preventing him from obtaining employment. This could be actionable defamation, but it is also an interference with a prospective advantage, and could be actionable on that distinct theory of recovery. Similarly, inducing a third person to breach a contract with the plaintiff, procuring his wrongful discharge from employment, stealing his customers, or his trade secrets, all may involve defamatory or disparaging utterances or the publication of private information.

Insurance carriers also have argued in favor of coverage for antitrust claims. For example, International Insurance Company took the following position in a dispute with another insurance carrier:

The language of the policy makes it abundantly clear that [the liability insurer] had the affirmative duty and obligation to defend any suit against its insured seeking damages for unfair competition issues arising out of advertising activity. The federal [antitrust] action sought this type of damages.


One of the CNA family of companies advanced a similar argument in another case. Specifically, CNA Casualty of California argued that “an antitrust violation is commonly considered unfair competition,” that there is no need “to strain the construction of the term ‘unfair competition’” to find coverage, and that insurance companies are wrong when they argue that antitrust claims are “per se” uninsurable. Reply Brief of Respondent CNA Casualty of California in Reply to Appellants Seaboard Surety Company and Insurance Company of North America and Opening Brief of Cross-Appellant CNA Casualty of California, at 21 & 31 (Aug. 15, 1984), in CNA Cas. v. Seaboard Sur. Co., 176 Cal. App. 3d 598, 222 Cal. Rptr. 276 (1986).

Another insurance company, Aetna Casualty & Surety Company, has acknowledged that courts have found coverage under CGL policies for antitrust claims. Aetna noted the existence of a line of cases “where the complaint pleads only a federal antitrust cause of action which is based upon facts which could arguably also be used to formulate a common law tort claim, if set out in a separate cause of action or later pleaded in an amended complaint.” Defendant’s Memorandum of Law in Opposition to Plaintiff’s Motion for Partial Summary Judgment, at 8 (Apr. 7, 1989), in Ethicon, Inc. v. Aetna Cas. & Sur. Co., 737 F. Supp. 1320 (S.D.N.Y. 1990). As Aetna acknowledged, “[u]nder this line of cases, a duty to defend may be found at least at the pleading stage, despite the absence in the pleading of an express cause of action in common law tort.” Id. In fact, Aetna referred to this as the “‘California rule.’” Id.

V. THE COURTS’ RECOGNITION OF COVERAGE

Given these commentaries and the arguments by insurance companies, it is not surprising that many courts have held that insurance carriers have duties to defend and indemnify their insureds against antitrust claims, claims of libel, slander and trade disparagement, and claims of unfair competition. For example, in CNA Casualty v. Seaboard Surety Co., 176 Cal. App. 3d 598, 222 Cal. Rptr. 276 (1986), the California Court of Appeal upheld coverage for claims of antitrust violations and misappropriations of trade secrets. The insured had been sued for antitrust violations and intentional interference with contractual relationships. The insurance carrier
defended the insured and then brought a lawsuit for contribution against three other insurance carriers. The court held that the claims against the insured were covered, explaining:

[The allegations] charged that [the insured] misappropriated, stole and misused property interests and trade secrets and made misrepresentations to the [claimants] “in an effort to further eliminate the competition of [claimants].” These charges are arguably within [the] coverage for piracy, unfair competition and idea misappropriation, particularly since these terms are undefined in [the] policy, and must therefore be construed against the insurance carrier. Similarly, . . . the provisions in the . . . insurance policies for libel, slander, or other defamatory or disparaging material potentially covered allegations . . . that [the insured] misrepresented “the business, property and rights possessed by [the claimants] to persons with whom [claimants] did business in an effort to disrupt and prevent” the business relationships between those persons and the [claimants].

Id. at 608 (citations omitted).

In California Shoppers, Inc. v. Royal Globe Insurance Co., 175 Cal. App. 3d 1, 221 Cal. Rptr. 171 (1985), the insured had been held liable for violating a California antitrust statute by selling “below-cost advertising ‘with the intent to injure [a competitor].’” Id. at 16. The insurance carrier contended that it did not owe a duty to its insured under its “advertising offense” provisions because the policy excluded coverage for claims “arising out of the wilful violation of a penal statute.” Id. The court of appeal disagreed, holding that the carrier had breached its duties to defend and indemnify its insured. The court first noted that the action against the insured was a civil antitrust action for a civil remedy. Id. at 32. It then ruled that even though a “purpose to harm” may have been presumed under the California antitrust statute, that did not mean that the insured had, in fact, acted with an intent to injure. Id. at 33-34. Indeed, given the facts before it, the court of appeal concluded that coverage should have been afforded. Id. at 34.

In Ethicon, Inc. v. Aetna Casualty & Surety Co., 737 F. Supp. 1320 (S.D.N.Y. 1990), the insured sought coverage under a CGL policy for claims under the Sherman Anti-Trust Act alleging that the insured had monopolized a market and lessened competition in the market. The court upheld coverage. The court ruled that a carrier “has a duty to defend an action containing allegations of covered common law claims and federal statutory claims arising from the same facts and allegations, despite the fact that the federal claim is not explicitly covered in the policy.” Id. at 1328. It explained, “if the underlying facts and allegations of [the] claims against [the insured] averred a pattern of activity which would, if pled as a common law claim, be covered under the policies at issue, then [the carrier] had a duty to defend that action (or reimburse for defense costs), even if the claim was labeled as one for federal antitrust injuries.” Id. at 1329. The court noted that “[t]here is no limitation in the policy to coverage only when the lawsuit at issue is
grounded in common law, nor is there an exclusion of statutory claims, the refused to “read such a limitation or exclusion into the policy.” Id. at 1331. The court also rejected the carrier’s argument that there was no coverage because the jury in the underlying suit had determined that the insured intended to monopolize the applicable market. The court explained that “the intentional nature of the act is not the determining factor in deciding whether coverage is available. Instead, the . . . focus [is] on whether the injuries compensated by the damage award were intentional.” Id. at 1334. The court noted that “[t]he act of monopolization is an attack on the marketplace, not necessarily against specific competitors. There is nothing . . . that indicates that [the insured] intended the specific injuries for which [the underlying claimant] was compensated.” Id. The court also rejected the argument that coverage should be lost because antitrust laws are penal in nature: “While it is true that criminal sanctions are available under portions of the antitrust laws, the [underlying] action was purely civil, was filed under the civil penalty provisions of the antitrust laws, and thus cannot be considered penal in nature.” Id. at 1335 n.14. Finally, the court rejected the argument that the policy would not provide coverage for the treble damage award against the insured:

There is no requirement of a showing of egregious conduct, or wilfulness of injury, in order for treble damages to be imposed. A showing of harm arising from a proven antitrust injury results automatically in the imposition of the trebling provision. Thus, . . . the Court finds that [Aetna] is liable to indemnify [the insured] for its entire loss after trebling, up to the limits of the applicable policies.

Id. at 1336.

Another federal court reached similar conclusions. In Flodine v. State Farm Insurance Co., No. 99 C 7466, 2001 U.S. Dist. LEXIS 2204 (N.D. Ill. Feb. 27, 2001), the court held that a carrier had a duty to defend its insured in a suit alleging, among other things, violations of deceptive business and trade practices acts arising from the marketing of “Southwestern-style” arts and crafts. The court reasoned that the statutory schemes “codify common-law unfair competition theories” and that the claims involved the wrongful misappropriation of a competitor’s “marketing advantage.” Id. at *36.

Furthermore, some courts also have found that a personal injury provision applying to “discrimination” covers lawsuits alleging discriminatory pricing. For example, in Federal Insurance Co. v. Stroh Brewing Co., 127 F.3d 563 (7th Cir. 1997), the insured had been sued under the Robinson-Patman Act for discriminatory pricing in beer distribution by offering a staggered price discount based on volume purchased. Id. at 565. The insurance carrier denied coverage, contending that the coverage in its policy’s personal injury provision for “discrimination” did not apply. Id. at 565-66. The Seventh Circuit disagreed. It found that “‘price discrimination’ is simply a particular form of discrimination.” Id. at 566. The court
noted that “the Robinson-Patman Act has long been recognized to forbid discrimination in a variety of forms.” Id. at 568. It also concluded that the insured had a reasonable expectation of coverage “[b]ecause the term ‘discrimination’ is not defined in the policy and because price discrimination suits such as [the underlying suit] are common in the beer industry.” Id. at 569.

While the discussions are by no means uniform, other courts also have upheld coverage under personal injury and advertising injury provisions. They have done so in a wide range of settings for antitrust claims and other alleged business torts, even where the policies have not expressly mentioned an antitrust claim as a covered “offense.” The breadth of these decisions shows how important this coverage may be to an insured. The decisions include:

- **American Contract Bridge League v. Nationwide Mutual Fire Insurance Co.**, 752 F.2d 71, 75 (3d Cir. 1985) (claims of monopoly power and antitrust violations by bridge player for suspension from play);

- **Bankwest v. Fidelity & Deposit Co.**, 63 F.3d 974, 981 (10th Cir. 1995) (claim for interference with bank lines of credit);

- **Curtis-Universal Inc. v. Sheboygan Emergency Medical Services, Inc.**, 43 F.3d 1119 (7th Cir. 1994) (claim of conspiracy to exclude competing ambulance service from market);

- **Federal Insurance Co. v. Stroh Brewing Co.**, 127 F.3d 563 (7th Cir. 1997) (claim of discriminatory pricing practices in beer distribution);

- **Insurance Corp. of Ireland, Ltd. v. Board of Trustees of Southern Illinois University**, 937 F.2d 331, 333 (7th Cir. 1991) (claim of antitrust violations for university’s refusal to let faculty members practice at hospital);

- **Lime Tree Village Community Club Ass’n, Inc. v. State Farm General Insurance Co.**, 980 F.2d 1402, 1406-07 (11th Cir. 1993) (claims of discrimination, slander of title, and unreasonable restraint on trade in marketing of residential real property);

- **Ruder & Finn Inc. v. Seaboard Casualty Co.**, 52 N.Y.2d 663, 422 N.E.2d 518 (1981) (claims of conspiracy to circulate antiaerosol publicity intended to result in aerosol product boycott and drive claimant out of business);

- **St. Paul Fire & Marine Insurance Co. v. Medical X-Ray Center, P.C.**, 146 F.3d 593, 594-95 (8th Cir. 1998) (claims of antitrust and interference by competing radiologist);
- *Tews Funeral Home, Inc. v. Ohio Casualty Insurance Co.*, 832 F.2d 1037 (7th Cir. 1987) (claims of antitrust and unfair trade practices in conspiracy to maintain artificially high prices for funeral services and products);

- *Tire Kingdom, Inc. v. First Southern Insurance Co.*, 573 So. 2d 885 (Fla. Dist. Ct. App. 1990) (claims of antitrust violations, Lanham Act violations, unfair trade practices, misleading advertising, disparagement, and defamation in tire industry); and


VI. CONCLUSION

Insureds faced with lawsuits involving claims of antitrust violations and other business torts should consider notifying their insurance carriers and seeking a defense and indemnity under their CGL policies. These policies may provide full coverage not only for the costs and fees incurred in the defense of these claims, but also for settlements and judgments. If insureds pursue their coverage in a timely manner, they may find that their CGL policies provide a substantial financial benefit.
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Kirk A. Pasich is a partner in Dickstein Shapiro LLP’s Insurance Coverage Practice and serves on the Firm’s Executive Committee. He has been named by Lawdragon as one of the nation’s 500 “Leading Lawyers” (2005 and 2006). According to Chambers USA: America’s Leading Lawyers for Business (2005), Mr. Pasich “is an unmistakable feature of California’s insurance landscape” and is “the policyholder lawyer most likely to come up with a new argument or perspective concerning policy language.” Mr. Pasich conducts an active trial and appellate practice, representing insureds in a wide range of complex insurance coverage matters. He has represented insureds in procuring coverage for antitrust lawsuits and other lawsuits alleging anticompetitive practices. He has negotiated large insurance recoveries for his clients, including recoveries of $100 million and more, and has served as lead trial counsel in jury trials in which his clients have obtained verdicts that ranked among the ten largest verdicts of the year in California. Mr. Pasich also is the author or co-author of several books, including Casualty and Liability Insurance, and the author of more than 400 articles regarding insurance issues. He may be reached at pasichk@dicksteinshapiro.com.