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What To Know About Insurance Coverage For Antitrust Risks

By **Micah Skidmore** (September 23, 2024, 11:25 AM EDT)

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Last month, the U.S. District Court for the District of Columbia **ruled** that "Google is a monopolist" in the realm of internet search.[1]

The suit, U.S. v. Google, which prompted the opinion, is one of several high-profile proceedings brought by the U.S. Department of Justice and the Federal Trade Commission now pending against big technology firms.[2] And the decision has already prompted at least one civil action **brought by Yelp**.[3]

Outside the U.S., tech firms also face an increasingly hostile regulatory environment, particularly in the European Union.[4]

Apart from traditional Sherman Act claims, U.S. regulators have actively pursued other enforcement priorities and strategies in 2024, including:

- Banning noncompete agreements, although the U.S. District Court for the Northern District of Texas last month **set aside** the FTC rule as outside the agency's authority under the Administrative Procedure Act;[5]
- Cracking down on "interlocking directorates";[6] and
- Targeting price discrimination under the Robinson-Patman Act.[7]

Private litigation over similar anticompetitive conduct is also on the rise.[8] Regulators and private plaintiffs have also focused recently on so-called algorithmic collusion, which may only be expected to increase as firms increasingly rely on artificial intelligence applications for business operations.[9]

With all the activity and risk surrounding antitrust and unfair competition claims, businesses must not only be vigilant about compliance, but also in identifying and notifying potential insurance coverage when such claims arise. Specifically, here are three key considerations for corporate policyholders when faced with either public or private claims involving allegations of unfair competition or violations of antitrust laws.

General Liability Coverage

Commercial general liability insurance policies — a staple for virtually all domestic businesses — insure liability for bodily injury, property damage, and "personal and advertising injury."

"Personal and advertising injury" may include offenses such as discrimination and/or disparagement of another's business or products. Other conduct, including intellectual property claims involving another's advertisement, may also trigger a CGL policy's advertising injury coverage.

Particularly in the current regulatory environment, depending on individual facts and policy terms, claims involving violations of noncompete agreements and violations of unfair competition laws may provide a basis for policyholders to obtain a defense or even indemnity under a general liability policy.[10]

Even allegations of price discrimination may trigger a general liability policy's coverage for discrimination claims, where the policy does not specify or limit the type of discrimination covered.

For example, in Federal Insurance Co. v. Stroh Brewing Co., a brewery sought liability coverage for an underlying lawsuit brought by a wholesaler alleging price discrimination.[11] The liability insurer obtained summary judgment from the district court on the basis that the subject policy's personal injury coverage for discrimination did not include price discrimination, which is otherwise excluded from coverage.

On appeal, the U.S. Court of Appeals for the Seventh Circuit, in its 2007 decision, reversed upon finding that (1) "[w]hether th[e]differential treatment takes the form of not receiving a promotion to which one is entitled or of being required to pay a higher price for beer does not make it any the less 'discrimination'";[12] and (2) the policy's exclusion for personal injury "committed by or with knowledge or consent of the insured" cannot preclude coverage for the intentional tort of discrimination and was otherwise waived by the insurer.[13]

Accordingly, in the present regulatory environment, insurers and insureds should not foreclose the possibility of personal injury coverage for allegations of price discrimination or related unfair competition claims.

Cyber, Network Security and Privacy Liability Coverage

Most policyholders may intuitively think of cyberinsurance as responding only in the event of a data breach or similar incident involving the insured's network. While network security and privacy liability policies do provide coverage for risks arising from a data breach, some policies may also include terms broadly covering claims involving errors or omissions by the insured — or an outside IT provider — in the operation, maintenance and administration of the insured's data and computer network.

The NetGuard Plus form from Lloyd's of London, to cite one example, includes network security and privacy liability coverage extending to multimedia wrongful acts, including, among other things, "[a]ny form of defamation or other tort related to the disparagement or harm to the reputation or character of any person or organization, including libel, slander, product disparagements or trade libel." The plain language of this coverage may reasonably apply to unfair competition claims or claims for breach of a noncompete involving allegations of product or business disparagement.[14]

Cyber policies may also include some form of liability coverage for content included in the insured's website or other media. This nuance in policy terms is important because, particularly in the current enforcement environment, an underlying antitrust or unfair competition claim, including a price discrimination claim, may implicate the insured's handling of proprietary data and digital assets and/or content distributed through a public website or other digital media. Again, depending on individual facts and circumstances, traditional antitrust claims or more recent claims involving algorithmic collusion may trigger coverage under a cyber liability policy.

Directors and Officers, Errors and Omissions Liability Insurance

While many D&O and E&O policies include exclusions addressing antitrust or unfair trade practices, when faced with a claim or suit alleging anticompetitive conduct, policyholders should nonetheless consider whether some of the conduct alleged in the subject claim or suit might not be subject to the exclusion. For example, an exclusion addressing unfair trade practices may not include within its scope claims alleging anticonsumer conduct, which are often brought with unfair competition claims.

This was the case in James River Insurance Co. v. Rawlings Sporting Goods Co.,[15] where a sports equipment manufacturer sought a defense against an underlying class action alleging that the manufacturer misrepresented the weight of baseball bats sold to the public.[16] These claims were framed as violations of California's Unfair Competition Law, False Advertising Law and Consumer Legal Remedies Act.[17]

The manufacturer's D&O insurer, Starr Insurance, responded to notice of the suit by refusing coverage based on the policy's antitrust exclusion.[18] In deciding the cross-motions for summary

judgment in 2021, the U.S. District Court for the Central District of California narrowly construed the exclusion to apply to anticompetitive business practices, without barring coverage for violations of consumer-protection statutes.[19]

Other courts have issued similar rulings.[20] As a result, depending on the facts and policy terms at issue, a narrow construction of antitrust exclusions in D&O and/or E&O policies may justify insureds in seeking coverage for related, but distinct allegations and claims. Particularly, where claims under Section 8 of the Clayton Act do not require proof of anticompetitive behavior, policyholders facing allegations of interlocking directorates should carefully review potentially applicable D&O and E&O policies to determine if coverage may be available for defense or indemnity.

Based on the foregoing, corporate insureds should be particularly careful to avoid unilaterally limiting coverage based on assumptions motivated by labels or historical norms applied to causes of action and policy provisions. The current posture of regulators and private plaintiffs, domestically and abroad, belie the boundaries and conventions imposed by past commercial conduct.

Consequently, insureds should consider general liability, cyber, and D&O and E&O coverages, among others, when faced with a claim for antitrust violations or other unfair competition allegations. Moreover, corporate risk managers should also be wary of new limitations and exclusions imposed during policy renewals or other insurance placements that could restrict coverage for the augmented risk of antitrust liability.

In a global economy beset by inflation and fiscal uncertainty, regulatory enforcement is here is stay. To ensure that the exposure from public and private antitrust, unfair competition and related claims is appropriately mitigated by liability insurance, corporate policyholders should consider in advance and be familiar with the policies and terms that will protect against this increasing risk.

Unfortunately, because claims for anticompetitive conduct may come in a variety of different ways, risk managers may need to source this coverage through a range of different policies. Likewise, in the event of a claim or suit involving unfair competition, corporate insureds and their counsel should carefully consider and not overlook the potential for coverage under general liability, cyber, D&O and E&O policies.

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[1] United States v. Google LLC , 2024 U.S. Dist. LEXIS 138798, *29 (D.D.C. Aug. 5, 2024).

[2] Cecelia Kang & David McCabe, U.S. Antitrust Case Against Google Is Just the Start, New York Times (May 3, 2024).

[3] Gerrit De Vynck, Google sued by longtime enemy Yelp after years of antitrust complaints, The Washington Post (Aug. 28, 2024), available at https://www.washingtonpost.com/technology/2024/08/28/google-yelp-lawsuit-antitrust-monopoly/).

[4] See, e.g., Alexis Keenan, EU keeps flexing its antitrust muscles with US tech giants, Yahoo Finance (Jun. 25, 2024), available at https://finance.yahoo.com/news/eu-keeps-flexing-its-antitrust-muscles-with-us-tech-giants-165948221.html.

[5] Ryan LLC v. FTC , 2024 U.S. Dist. LEXIS 148488, *3 (N.D. Tex. Aug. 20, 2024) ("The Court sets aside the Non-Compete Rule.").

[6] Federal Trade Commission, FTC Announces 2024 Jurisdictional Threshold Updates for Interlocking Directorates (Jan. 12, 2024), available at https://www.ftc.gov/news-events/news/press-releases/2024/01/ftc-announces-2024-jurisdictional-threshold-updates-interlocking-directorates.

[7] See, e.g., Josh Sisco, FTC preparing lawsuit over alcohol pricing, Politico (June 3, 2024), available at https://www.politico.com/news/2024/06/03/ftc-lawsuit-southern-glazer-wine-spirits-00161323; Leah Nylen, Lawmakers Urge FTC to Enforce FDR-Era Law Over Grocery Price Bias, Bloomberg (Mar. 28, 2024), available at https://www.bloomberg.com/news/articles/2024-03-28/ftc-is-urged-to-enforce-antitrust-law-over-grocery-price-discrimination.

[8] See, e.g., L.A. Int'l Corp. v. Prestige Brands Holdings, Inc., 2024 U.S. Dist. LEXIS 90210, *1 (C.D. Cal. May, 20, 2024) (granting an injunction against eye drop wholesalers under the RPA).

[9] Aaron Gregg & Eva Dou, Why is rent so high? The Justice Department blames a tech firm's algorithm, The Washington Post (Aug. 23, 2024).

[10] See, e.g., Sprint Lumber, Inc. v. Union Ins. Co., 627 S.W.3d 96, 111 (Mo. Ct. App. 2021) (finding a duty to defend underlying unfair competition claims under the "personal and advertising injury" coverage of a general liability policy).

[11] 127 F.3d 563, 564-65 (7th Cir. 1997).

[12] Id. at 567.

[13] Id. at 571 ("[C]hoosing to deny coverage based on non-coverage by the insuring clause, thus leaving the insured to fend for itself, bars the insurer from recourse to its exclusions. Thus, regardless of whether the exclusion would apply in another circumstance, Federal may not now rely on it.").

[14] See, e.g., Nat'l Fire Ins. Co. v. Omp, Inc., 2012 U.S. Dist. LEXIS 202370, *23 (C.D. Cal. May 14, 2012) (finding a duty to defend underlying allegations that the policyholder disparaged a competitor in violation of a non-compete agreement).

[15] 2021 U.S. Dist. LEXIS 20970, *11-12 (C.D. Cal. Jan. 25, 2021).

[16] Id. at, *2.

[17] Id.

[18] Id. at *3.

[19] Id. at * ("'[U]nfair trade practices' must also be similarly limited and therefore should not include false advertising by businesses targeted at consumers.").

[20] See, e.g., Big Bridge Holdings, Inc. v. Twin City Fire Ins. Co., 132 F. Supp. 3d 982, 988 (N.D. Ill. 2015) (distinguishing between "fraud-based consumer-protection claims" and "anti-competitive" business practices).