

BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**MYLAN LABORATORIES INC., MYLAN
PHARMACEUTICALS INC., and UDL
LABORATORIES, INC.,**

Appellants / Plaintiffs Below,

APPEAL NO. 34402

vs.

**AMERICAN MOTORISTS INSURANCE CO.,
CONTINENTAL INSURANCE CO.,
WAUSAU INSURANCE CO., FEDERAL
INSURANCE CO., and GREAT AMERICAN
INSURANCE CO.,**

Civil Action No.: 07-C-69

Appellees / Defendants Below.

**APPELLANTS' OPENING BRIEF ON BEHALF OF
MYLAN LABORATORIES INC., MYLAN PHARMACEUTICALS INC.,
and UDL LABORATORIES, INC.**

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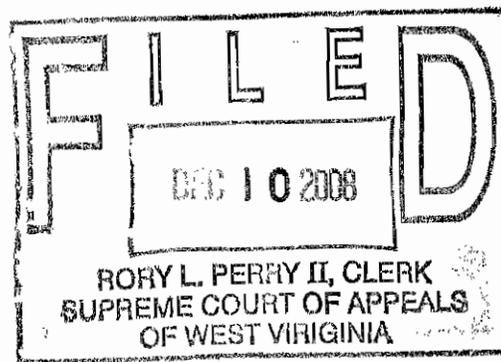


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I. INTRODUCTION

Mylan Laboratories Inc., Mylan Pharmaceuticals Inc. and UDL Laboratories, Inc. (collectively, “Mylan”) appeal the February 8, 2008 Order of the Monongalia County Circuit Court holding that the Defendant Insurers had no duty to defend two underlying sets of lawsuits (the “Order”). To reverse the Circuit Court’s order and find that Mylan was owed a defense in the ongoing AWP litigation or L&C suits, this Court need only find grounds for potential coverage in either or both sets of actions. Because the duty to defend is analyzed on a *potentiality* standard, the insured’s ultimate liability or non-liability is irrelevant. This is because the duty to defend is invoked by *allegations*. The allegations here, which Mylan has denied and continues to deny,¹ implicate the Defendant Insurers’ duty to defend Mylan.

II. STATEMENT OF THE CASE

This Court should reverse the Circuit Court’s order and find that Mylan was entitled to a defense in both the underlying AWP Actions and L&C Actions for the following reasons:

First, the Circuit Court’s order is inconsistent with settled West Virginia law in five distinct respects: (1) “There is no requirement that the facts alleged in the complaint specifically and unequivocally make out a claim within the coverage”;² (2) The broad and generic offenses of “discrimination,” “misappropriation of advertising ideas,” “misappropriation of style of doing business,” and “use of another’s advertising idea in your ‘advertisement’ ” cannot be limited to a singular, readily definable tort where each of these “categories of wrongdoing”³ covers a wide range of conduct, rendering them necessarily ambiguous and requiring their construction against the Defendant Insurers;⁴ (3) dictionary definitions may be referenced to discern how a lay person

¹*Aetna Cas. & Sur. Co. v. Pitrolo*, 176 W. Va. 190, 194, 342 S.E.2d 156, 160 (1986) (An insurance company is obligated to provide a defense “even though the suit is groundless, false, or fraudulent.”).

²*Tackett v. American Motorists Ins. Co.*, 213 W. Va. 524, 528, 584 S.E.2d 158, 162 (2003).

³*Curtis-Universal, Inc. v. Sheboygan Emergency Med. Services, Inc.*, 43 F.3d 1119, 1122 (7th Cir. (Wis.) 1994) (Posner) (“What is important is . . . whether that conduct as alleged in the complaint is at least arguably within one or more of the **categories of wrongdoing** that the policy covers.” (emphasis added)).

⁴*Hensley v. Erie Ins. Co.*, 168 W. Va. 172, 176, 283 S.E.2d 227, 229 (1981) (citation omitted) (“We also follow the general rule that: ‘An insurance policy which requires construction must be construed

would understand undefined policy provisions;⁵ (4) words of limitation not set forth in the policy should not be added to narrowly define the ambit and potential meaning of these offenses;⁶ and (5) where courts disagree as to the meaning of potentially ambiguous terms, any reasonable construction of the terms shall prevail, since disagreement between the courts about policy meanings evidences ambiguity and requires its construction against the Defendant Insurers.⁷

Second, the Circuit Court did not make findings of fact but simply referenced facts that it deemed pertinent to its conclusion. In ignoring the fact allegations upon which Mylan relied, however, the Circuit Court failed to determine if these facts could potentially give rise to coverage.⁸ The pertinent question, which the Circuit Court did not ask, is whether there is any factual scenario where a potential for coverage could arise – not the reverse.⁹

Third, underlying fact allegations, not labels of causes of action, are determinative in assessing the duty to defend under offense-based coverage.¹⁰ It is of no moment that the asserted

liberally in favor of the insured.’ ”).

⁵*Moore v. Life Ins. Co. of N. Am.*, No. 5:05CV169, 2007 WL 201068, at *3 (N.D.W. Va. Jan. 23, 2007) (“Because the . . . policy documents do not define the term ‘accident,’ this Court looks to *Black’s Law Dictionary* *Black’s Law Dictionary* 15 (8th ed.2004)”).

⁶*Keffer v. Prudential Ins. Co. of Am.*, 153 W. Va. 813, 816, 172 S.E.2d 714, 716 (1970) (“[T]he terms of an unambiguous insurance policy cannot be enlarged or diminished by judicial construction, since the court cannot make a new contract for the parties”).

⁷*Murray v. State Farm Fire & Cas. Co.*, 203 W. Va. 477, 485 n.5, 509 S.E.2d 1, 9 n.5 (1998) (“A provision in an insurance policy may be deemed to be ambiguous if courts in other jurisdictions have interpreted the provision in different ways. This rule is based on the understanding that ‘one cannot expect a mere layman to understand the meaning of a clause respecting the meaning of which fine judicial minds are at variance.’ C. Marvel, *Division of Opinion Among Judges on Same Court or Among Other Courts or Jurisdictions Considering Same Question, as Evidence That Particular Clause of Insurance Policy is Ambiguous*, 4 A.L.R.4th 1253, § 2[a] (1981).”).

⁸*Butts v. Royal Vendors, Inc.*, 202 W. Va. 448, 451, 504 S.E.2d 911, 914 (1998) (“ ‘[I]t is generally recognized that the duty to defend an insured may be broader than the obligation to pay under a particular policy.’ ”); *Tackett*, 213 W. Va. at 531 (subscribing to a potentiality standard and holding that an allegation will trigger coverage if it is “reasonably susceptible of an interpretation that the claim may be covered”).

⁹*Bruceton Bank v. United States Fid. & Guar. Ins. Co.*, 199 W. Va. 548, 555, 486 S.E.2d 19, 26 (1997) (“[I]ncluded in the consideration of whether [an] insurer has a duty to defend is whether the allegations in the complaint . . . are reasonably susceptible of an interpretation that the claim may be covered by the terms of the insurance policies.”).

¹⁰*Butts*, 202 W. Va. at 452, 453 (Complaint did not need to allege specific claim for defamation in order to trigger policy’s coverage for slander because “**labels used are immaterial.**” “[A]n insurer’s

claims include alleged statutory violations in class action complaints¹¹ or alleged violations of antitrust law.¹² Nor does it matter if underlying plaintiffs failed to assert each element of the claims that potentially fell within the enumerated offenses.¹³ In determining the duty to defend,

obligation to defend is 'broader than the obligation to provide coverage' and this obligation is not dependent on the precise use of terms within the complaint that would 'unequivocally delineate a claim which, if proved, would be within the insurance coverage.' ”).

Atlantic Mut. Ins. Co. v. J. Lamb, Inc., 100 Cal. App. 4th 1017, 1034, 123 Cal. Rptr. 2d 256, 268 (2002) (Croskey) (“The scope of the duty does not depend on the labels given to the causes of action in the third party complaint; instead it rests on whether the *alleged facts or known extrinsic facts* reveal a *possibility* that the claim may be covered by the policy.”).

¹¹Class action lawsuits asserting violations of the TCPA have been routinely held to trigger coverage. *Valley Forge Ins. Co. v. Swiderski Electronics, Inc.*, 223 Ill. 2d 352, 365, 860 N.E.2d 307, 315 (2006) (“The receipt of an unsolicited fax advertisement implicates a person’s right of privacy insofar as it violates a person’s seclusion, and such a violation is one of the injuries that a TCPA fax-ad claim is intended to vindicate.”).

¹²*St. Paul Fire & Marine Ins. Co. v. Medical X-Ray Center, PC*, 146 F.3d 593, 594-95 (8th Cir. (Minn.) 1998) (antitrust and interference claims by competing radiologists).

Federal Ins. Co. v. Stroh Brewing Co., 127 F.3d 563 (7th Cir. (Ind.) 1997) (discriminatory pricing practices in beer distribution).

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

Curtis-Universal, 43 F.3d 1119 (claim of conspiracy to exclude competing ambulance service from market entrance).

Lime Tree Village Community Club Ass’n v. State Farm Gen. Ins. Co., 980 F.2d 1402, 1406-07 (11th Cir. (Fla.) 1993) (claims of discrimination, slander of title and unreasonable restraint on trade).

Insurance Corp. of Ireland v. Board of Trustees, 937 F.2d 331, 333 (7th Cir. (Ill.) 1991) (claim of antitrust violations).

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

Tews Funeral Home v. Ohio Cas. Ins. Co., 832 F.2d 1037 (7th Cir. (Ill.) 1987) (claims for antitrust and unfair trade practices in conspiracy to maintain artificially high prices).

CNA Cas. of Cal. v. Seaboard Sur. Co., 176 Cal. App. 3d 598, 222 Cal. Rptr. 276 (1986) (slander, antitrust, and sham patent infringement claims alleged against competitors).

American Contract Bridge League v. Nationwide Mutual Fire Ins. Co., 752 F.2d 71, 75 (3d Cir. (Pa.) 1985) (claim of monopoly power and antitrust violations).

Ruder & Finn, Inc. v. Seaboard Cas. Co., 52 N.Y.2d 663, 422 N.E.2d 518 (1981) (claims of conspiracy to circulate anti-aerosol publicity intended to result in aerosol product boycott).

¹³*Pension Trust Fund v. Federal Ins. Co.*, 307 F.3d 944, 951 (9th Cir. (Cal.) 2002), citing *CNA Cas. of Cal. v. Seaboard Sur. Co.*, 222 Cal. Rptr. 276 (Cal. Ct. App. 1986), citing *Ruder & Finn Inc. v. Seaboard Surety Co.*, 422 N.E.2d 518 (N.Y. 1981) *approvingly* (“The court rejected the insurer’s argument that ‘two solitary, unsubstantiated words’ buried within ‘completely unrelated federal antitrust

the question is whether the policy is “sufficiently broad to encompass **the conduct** alleged in the complaint.”¹⁴

A majority of courts, including the Seventh Circuit applying Indiana law¹⁵ and an Illinois Court of Appeal, have found “personal injury” coverage for “discrimination” implicated in antitrust lawsuits, the latter including Sherman Act claims.¹⁶ This fact invokes West Virginia’s rule that when courts disagree as to the meaning of an undefined policy term, such a dispute evidences the term’s ambiguity and requires its construction against the Defendant Insurers.¹⁷

Fourth, the issue is whether the pertinent alleged facts could lead to potential liability within one of the enumerated “advertising injury” or “personal injury” offenses.¹⁸ Neither the theory of damages nor form of injury is a proper focus in analyzing offense-based coverage.¹⁹ As long as the alleged acts create liability and evidence a potential for coverage, that suffices. The predominant focus of the case is irrelevant; equally irrelevant is whether the alleged conduct was supposedly part of a campaign to “cover up” other tortious conduct.²⁰ Any dispute as to

cause of action, which was, itself, undisputedly *not* covered’ could not trigger the duty to defend. . . . The **defense duty**, it held, is **triggered even if an element of a covered action is omitted.**” (bold emphasis added; citations omitted)).

¹⁴*Swiderski Electronics*, 223 Ill. 2d at 369 (emphasis added).

¹⁵*Stroh Brewing Co.*, 127 F.3d 563.

¹⁶*Westchester Fire Ins. Co. v. G. Heileman Brewing Co., Inc.*, 321 Ill. App. 3d 622, 747 N.E.2d 955 (2001).

¹⁷*Murray*, 203 W. Va. 477.

¹⁸*Curtis-Universal*, 43 F.3d at 1122 (“What is important is not the legal label that the plaintiff attaches to the defendant’s (that is, the insured’s) conduct . . .”).

¹⁹*Curtis-Universal*, 43 F.3d at 1122 (“So, for example, if the complaint alleges facts that if proved would show that the insured had infringed the plaintiff’s copyright, the policy kicks in even if the complaint charges the insured only with **fraud** or intentional infliction of emotional distress.” (emphasis added)).

²⁰*Curtis-Universal*, 43 F.3d at 1122 (“Nor is the insurer allowed to escape from his duties of defense and indemnification by reference to the core or dominant character of the plaintiff’s allegations. That would violate the principle that if any of the conduct alleged in the complaint falls within the scope of the insurance policy, the insurer must defend. If [a covered offense] within the meaning of the insurance contract is alleged (not necessarily by name), it is irrelevant that it is a subordinate aspect of the plaintiff’s case.”).

whether the factual allegations are within coverage alone compels a defense.²¹

Fifth, all that is required is that the injury arise out of liability under one or more of the enumerated “advertising injury” offenses.²² It does not matter that the individual claimants, some of which may have asserted claims in class actions, are not seeking relief as direct victims of the alleged conduct covered by an offense so long as the injury constituting “advertising injury” “arises out of” that offense.²³ This is especially true here, as construing the vague and broad “arising out of” language to extend potential coverage for damages arising from alleged offenses should not be barred simply because the injury is indirect.²⁴

III. STANDARD OF REVIEW

“The standard of review of a circuit court’s entry of summary judgment is *de novo*. It is equally well-established that, as here, ‘[t]he interpretation of an insurance contract ... is a legal determination which, like the court’s summary judgment, is reviewed *de novo* on appeal.’ ”²⁵ Defendant Insurers concede that the appropriate standard of review is *de novo*.²⁶

²¹*American Cyanamid Co. v. American Home Assur. Co.*, 30 Cal. App. 4th 969, 975, 35 Cal. Rptr. 2d 920, 923 (1994) (“If the parties dispute whether the insured’s alleged misconduct is potentially within the policy coverage . . . , ‘the duty to defend is then *established*’ ”).

²²“Personal injury” coverage for “discrimination” [see §§ V(B) and VII(C) herein] and “bodily injury” [see § VII(B) herein] coverage depends on assertions of liability for the alleged conduct which directly injured the claimants.

²³*Knoll Pharm. Co. v. Automobile Ins. Co. of Hartford*, 152 F. Supp. 2d 1026, 1034, 1035, 1037 n.9, 1038-39 (N.D. Ill. 2001). See § V(C)(5)(b) herein.

²⁴*St. Paul Fire & Marine Ins. Co. v. Insurance Co. of N. Am.*, 501 F. Supp. 136, 138 (W.D. Va. 1980) (“ ‘[A]rising out of’ . . . has a well-defined meaning which is broad enough to include the incident which gave rise to the insured’s liability. ‘Arising out of’ are words of much broader significance than ‘caused by.’ They are ordinarily understood to mean ‘originating from,’ ‘having its origin in,’ ‘growing out of,’ or ‘flowing from,’ or in short, ‘incident to or having connection with.’ ”).

²⁵*Aluise v. Nationwide Mut. Fire Ins. Co.*, 218 W. Va. 498, 503, 625 S.E.2d 260, 265 (2005) (citation and internal quotation marks omitted).

²⁶“Mylan is correct that this Court’s review of the entry of summary judgment should be *de novo*. See *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994).” (Federal Opp’n to Pet. for Appeal 1-2.) AMICO/Continental do not dispute that *de novo* review is appropriate here; neither does Wausau.

IV. THE AWP ACTIONS

A. Statement of Facts

Mylan, a generic drug manufacturer, was sued along with numerous other pharmaceutical companies for pricing practices in fifty-five lawsuits referred to as the average wholesale price actions (“AWP Actions”).²⁷

37. Under a Rebate Agreement, the manufacturer of a generic drug is required to pay a rebate to each state in an amount equal to 11% of the Average Manufacturer Price (“AMPTM”) of each unit of the generic drug for which the state Medicaid program paid reimbursement. 42 U.S.C. § 1396r-8(c)(3). . . .

44. . . . [T]he WAC [“Wholesale Acquisition Cost”], AWP [“Average Wholesale Price”] and other prices reported by each of the defendants directly and indirectly to the Commonwealth do not reflect, and have no correlation to, the actual prices charged to customers for pharmaceutical products in the market. **Rather these reported WAC and AMP prices are materially inflated.**²⁸

50. . . . Defendants often **market** their products by pointing out (explicitly and implicitly) that their drug’s spread is higher than that of a competing drug.

59. Defendants have further exacerbated the inherent complexities of the drug market by **utilizing marketing schemes** which conceal the true price of the drugs in several different ways.²⁹

107. **Defendants used undisclosed discounts, rebates and other inducements which had the effect of lowering the actual wholesale or sales prices charged to their customers as compared to the reported prices. . . .** As a result of these concealed inducements, Defendants have prevented third parties, including Alabama Medicaid, from determining the true prices it charges its customers.³⁰

B. Issues Presented

First, the fact allegations in the AWP Actions trigger a defense for Mylan because they

²⁷The AWP Actions are listed in Exhibit “1” to the Ondos Affidavit (“Ondos Aff.”) filed in support of Mylan’s Motion for Partial Summary Judgment re the AWP Actions.

²⁸*Commonwealth of Massachusetts v. Mylan Laboratories, et al.*, U.S.D.C., D. Mass., Case No. 03-11865 PBS, First Amended Complaint filed May 19, 2005 (“*Massachusetts Action*”) (Ondos Aff. Exhibit “4”) (emphasis added).

²⁹*State of Illinois v. Abbott Laboratories, et al.*, Circuit Court of Cook County, Illinois County Department, Chancery Division, Case No. 05-CH-02474 (“*Illinois Action*”) (Ondos Aff. Exhibit “4”) (emphasis added).

³⁰*State of Alabama v. Abbott Laboratories, et al.*, Circuit Court of Montgomery County, Alabama, filed January 26, 2005 (“*Alabama Action*”) (Ondos Aff. Exhibit “5”) (emphasis added).

evidence false advertising claims based on “marketing the spread” between the reported “average wholesale price” or the “sticker price” of pharmaceuticals and the actual discounted prices paid by purchasers other than Medicaid and Medicare.³¹

Mylan’s alleged advertising potentially fell within the Defendant Insurers’ offense-based “advertising injury” coverage for “misappropriation [misuse] of advertising ideas,” or “use of another’s [a branded pharmaceutical’s] advertising idea in your ‘advertisement’ ” where Medicare and Medicaid suffered economic discrimination because of the “marketing the spread” advertising campaign that Mylan adopted but did not originate.

Second, the Defendant Insurers’ “personal injury” coverage for “discrimination” is implicated by allegations of “differential treatment.” Mylan allegedly marketed the “spread” or “return to practice” profits but did not offer these discounts to third party payors.

V. ARGUMENT – THE AWP ACTIONS

A. The Coverage Here Is “Offense-Based” and Must Be Analyzed Accordingly

Contrary to the Circuit Court’s analysis, the underlying actions need not “specify a cause of action covered by a particular policy.” (Order 29.) Indeed, it is not necessary to find all elements of torts that fall within the ambit of the enumerated offenses. Only potential coverage under these offenses need be demonstrated.³² The West Virginia Supreme Court has recognized this proposition when addressing “personal injury” coverage for defamation,³³ as well as in discussing the character of offense-based coverage generally.³⁴

³¹*In re Pharmaceutical Industry Average Wholesale Price Litigation*, 230 F.R.D. 61, 67, 68 (D. Mass. 2005) (“[AWP] is akin to a sticker price for automobiles, setting the pricing baseline. . . . To knowledgeable industry observers, . . . the term ‘average wholesale price’ [AWP] is a misnomer: it is not a measure of prices frequently paid by retail or mail order pharmacies to wholesalers, nor is it some average of these.” (emphasis added)).

³²Other jurisdictions have agreed, as evidenced in a seminal decision by the Missouri Supreme Court. *McCormack Baron Mgmt. Servs., Inc. v. American Guar. & Liab. Ins. Co.*, 989 S.W.2d 168, 171 (Mo. 1999) (“The word ‘offense’ cannot be read to limit coverage only to a particular ‘cause of action’ or ‘claim.’ The word ‘offense’ simply does not have this meaning in either common usage or legal usage.”).

³³*Tackett*, 213 W. Va. at 533 (“[I]nsurance coverage for personal injuries is a rather broad concept.”).

³⁴*State Bancorp, Inc. v. United States Fid. & Guar. Ins. Co.*, 199 W. Va. 99, 108, 483 S.E.2d 228, 237 (1997), quoting *General Accident Ins. Co. v. West Am. Ins. Co.*, 42 Cal. App. 4th 95, 103, 49 Cal. Rptr. 2d 603, 606 (1996) (Because “ ‘[c]overage [] is triggered by the offense, not the injury or damage which a

The elements of “personal injury” and “advertising injury” are distinct from those for “bodily injury” or “property damage.” In a subsequent California case, citing *General Accident Ins. Co.* and specifying with more particularity the other consequences of offense-based coverage analysis, Judge Croskey explained why the Insurers’ myopic focus on the injury or damages, which need only arise out of the offense, misconstrues the applicable inquiry pertinent here.³⁵

B. “Personal Injury” – “Discrimination”

1. “Discrimination” May Be Defined As “Disparate Treatment” under Federal’s Policy

a. “Discrimination” Has Multiple Reasonable Meanings, Including “Economic Discrimination”

Despite these express allegations, Federal argues that there are “no discrimination claims made.” (Federal Opp’n to Pet. for Appeal 30.) Federal, however, misconstrues the standard for evaluating allegations in a duty to defend analysis and subsequently led the Circuit Court to apply the incorrect standard. The Defendant Insurers’ duty to defend must be evaluated based upon the facts, *not* the labels of causes of action.³⁶ It is thus immaterial that the allegations were not explicitly labeled “discrimination.”

The Circuit Court held that the underlying suits do not allege discrimination “as that term is defined in the Federal policies.” (Order 32.) The Circuit Court identified the very problem – “discrimination” is *not* defined in the policies. Federal similarly argued that with respect to “discrimination,” the “clear and unambiguous language [of the policies] should be enforced as written.” (Federal Opp’n to Mylan Pet. for Appeal 24.) But “as written,” Federal left the term

plaintiff suffers,’ ” personal injury coverage is implicated by a wide variety of claims.).

³⁵*J. Lamb, Inc.*, 100 Cal. App. 4th at 1032 (“Under the personal injury policy provision, ‘[c]overage ... is triggered by the *offense*, not the injury or damage which a plaintiff suffers.’ . . . Unlike coverage for bodily injury and property damage, which is ‘occurrence’ based, there is no requirement for personal injury coverage that there be an ‘accidental’ occurrence. All that is required is that the injury arise out of the conduct of the insured’s business. Thus, even an *intentional* tort . . . may be covered. **The triggering event is the insured’s *wrongful act*, not the resulting injury to the third party claimant.**” (bold emphasis added)).

³⁶*Butts*, 202 W. Va. at 452, 453.

undefined and ambiguous.

In evaluating “discrimination,” the Circuit Court held that discrimination is limited to “standard types” of discrimination – according to the Circuit Court, discrimination based on “human characteristics” like “race, age, and handicap.” (Order 32.) But basic rules of policy construction prove otherwise. Under both dictionary definitions³⁷ and federal appellate case law,³⁸ “discrimination” is not limited to discrimination based on human characteristics. Rather, discrimination encompasses all “disparate treatment,” including economic.

Four cases have addressed the scope of “discrimination” coverage nationally. Two of those cases found for the insured under the same policy language here,³⁹ the third⁴⁰ analyzed distinct policy language that, unlike here, had been jointly drafted by the insurer and insured and which as a result, did not require that it be interpreted against the insurer. The fourth and most

³⁷*West Virginia Fire & Cas. Co. v. Mathews*, 209 W. Va. 107, 112, 543 S.E.2d 664, 669 (2000) (Courts may look to standard English language dictionaries to determine the plain ordinary meaning of policy terms.); BLACK’S LAW DICTIONARY 420, 460 (5th ed. 1979) (“Discrimination” means “any form of discrimination within the field of commerce.”); BLACK’S LAW DICTIONARY 479 (7th ed. 1999) (“Discrimination” includes “differential treatment, esp. a failure to treat all persons equally while no reasonable distinction can be found between those favored and those not favored.”).

³⁸*State ex rel. Summerfield v. Maxwell*, 148 W. Va. 535, 543, 135 S.E.2d 741, 747 (1964) (“When this Court is presented with a question of first impression and finds that the constitutional and statute law of this state are silent upon it, the Court looks to the decisions of courts of last resort in other jurisdictions for guidance . . .”).

³⁹*Stroh Brewing Co.*, 127 F.3d at 567 (“Discrimination ‘simply means differential treatment.’ Whether that 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.’ See, e.g., *Oregon Waste Systems, Inc. v. Department of Env’tl. Quality*, 511 U.S. 93, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994)” (citation omitted));

G. Heileman Brewing Co., 321 Ill. App. 3d at 633 (The court affirmed the trial court’s ruling under Illinois law, in part, because potential coverage arose. “Westchester does not dispute that Rausser falls within the scope of its coverage for discrimination.” [Count One alleged that the plaintiffs entered into a contract with Heileman which granted them the exclusive right to distribute designated Heileman beer products in a defined geographical region. [Sherman Act § 1, Robinson-Patman Act § 13(d); California Unfair Practices Act § 17043; California Unfair Practices Act § 17045 [making a secret discriminatory payments]].).

⁴⁰*USX Corp. v. Adriatic Ins. Co.*, 345 F.3d 190, 216 (3d Cir. 2003) (The Third Circuit approved the District Court’s analysis without any further refinement. The District Court, interpreting a jointly drafted policy, determined that contextually its distinct policy language required its interpretation so as to limit personal injury coverage for discrimination to human characteristics).

recent case to address “personal injury” coverage for “discrimination” found that absent an express “civil or constitutional rights violation” exclusion there was no bar to coverage for a city’s “alleged violation of the developer’s constitutional rights under Section 1983 of the Civil Rights Act”⁴¹ as a form of discrimination.⁴²

In *Stroh Brewing Co.*, Federal, the umbrella insurer there too, was held under identical policy language to have a duty to drop down and defend a price discrimination lawsuit against the policyholder. “Personal injury” coverage for “discrimination” was implicated because the lawsuit included economic forms of “disparate treatment,” which coverage was not included in the primary policy.

Here, Federal concedes that there are multiple reasonable meanings for the term, such as “age discrimination,” “sex discrimination,” and “racial discrimination.” This is because “discrimination” is ambiguous. *Stroh Brewing* deemed it ambiguous,⁴³ finding that economic discrimination is included in “disparate treatment.” And it must be treated as ambiguous here also. Thus, any reasonable construction of the term by Mylan must apply. Mylan has no duty to offer the best, preferred or even the most reasonable construction of a policy term.⁴⁴

As long as Mylan’s “disparate treatment” construction of the ambiguous term “discrimination” is reasonable, it *must* be adopted. Federal contends that its policy language is not susceptible “without violence” to this construction of “discrimination” and is not an opinion of “reasonably intelligent people” who “honestly differ as to meaning.” (Federal Opp’n to

⁴¹*City of Collinsville v. Illinois Municipal League Risk Mgmt. Ass’n*, ___ N.E.2d ___, 2008 WL 4879161, at *5 (Ill. App. Ct. Aug. 27, 2008).

⁴²*Id.* (defining “discrimination” as “discrimination against an individual or group on any basis prohibited by the law of Illinois or of the United States of America”).

⁴³“Federal concedes that discrimination can be defined as differential treatment. . . . [E]ven if we [agreed with Federal’s position] . . . we would find that **the term ‘discrimination’ as used in the Heileman policy is ambiguous.** Thus we must interpret the term in favor of coverage and against Federal.” (Emphasis added.)

⁴⁴*MacKinnon v. Truck Ins. Exch.*, 31 Cal. 4th 635, 655, 73 P.3d 1205, 1218 (2003) (“[E]ven if [the insurer’s] interpretation is considered reasonable, it would still . . . have to establish that its interpretation is the *only* reasonable one. ‘[W]e are not required, in deciding the case at bar, to select one “correct” interpretation from the variety of suggested readings.’ ” (citation omitted)).

Mylan Pet. for Appeal 37.) But this contention ignores the fact that disagreement among courts regarding a policy term's meaning establishes its ambiguity under West Virginia law, thus requiring construction against the insurer. *Murray*, 203 W. Va. at 485 n.5. The Circuit Court followed Federal in ignoring this well-settled West Virginia rule. Here, some courts define "discrimination" as "economic discrimination," while others restrict it to discrimination based on human characteristics. Therefore, the term is ambiguous and must be construed against Federal.

b. "Disparate Treatment" Is a Reasonable Definition of "Discrimination"

Broad language in policies may be used to create broad coverage.⁴⁵ And Defendant Insurers' "discrimination" offense creates just that. The notion that discrimination encompasses "economic discrimination" is fully in accord with common usage and plain English definitions of the term. The Seventh Edition of Black's Law Dictionary, issued in 1999 (after Federal's September 1, 1997 policy), defines "discrimination" as "[d]ifferential treatment; esp., a failure to treat all persons equally when no reasonable distinction can be found between those favored and those not" *Id.* at p. 479. Nothing about this definition precludes its extension to forms of economic discrimination. Even the original drafters of the policy language conceded that "discrimination" could encompass "economic discrimination."⁴⁶

c. Contextual Analysis Does Not Mean the Court Rewrites the Policy for the Insurer's Benefit to Cover Individual, and Not Corporate, Claimants

In addition to "discrimination," Federal's pertinent "personal injury" coverage includes malicious prosecution, false arrest, wrongful eviction, written publication of material that violates a person's right of privacy, and slander and libel – all torts that corporations can assert or

⁴⁵*Bay Cities Paving & Grading, Inc. v. Lawyers' Mut. Ins. Co.*, 5 Cal. 4th 854, 868, 855 P.2d 1263, 1271 (1993) ("[A] word with a broad meaning or multiple meanings may be used for that very reason – its breadth – to achieve a broad purpose.").

⁴⁶*USX Corp. v. Adriatic Ins. Co.*, 99 F. Supp. 2d 593, 623 (W.D. Pa. 2000), *aff'd*, 345 F.3d 190 (3d Cir. 2003) ("The lead witnesses for the London defendants uniformly acknowledged that liabilities arising out of 'economic discrimination' were within the general scope of 'discrimination' coverage").

defend against.⁴⁷ Corporations in West Virginia can be sued for all of these.⁴⁸ So, the *USX* court's assertion that these same torts are offenses that only "injure the character or reputation of an individual"⁴⁹ is untenable under West Virginia law. Further, in West Virginia "the actions or omissions of its employees or agents can form the basis for a corporation's liability under the doctrine of *respondeat superior*," thus, a corporation like Mylan can potentially be held liable for *all* of the torts listed in the "personal injury" coverage part of the policy.⁵⁰

d. Mylan Did Not Jointly Draft the Federal Policy with Coverage for "Discrimination"

Unlike the standard form umbrella policy issued by Federal to Mylan, the policy in *USX* was jointly drafted. It was adopted from " 'the 1971 London umbrella wording' . . . modeled after the 1966 standard form commonly used in the North American market" (in contrast to Federal's standard form umbrella policy here). *USX*, 99 F. Supp. 2d at 602. Mylan's status as a publicly held corporation or allegedly sophisticated insured is immaterial where the policy is the

⁴⁷*State v. Zain*, 207 W. Va. 54, 61, 528 S.E.2d 748, 755 (1999) ("[T]he term 'person' is commonly understood to have a broader meaning than simply a human being. Indeed, a common dictionary definition of the term 'person' includes 'a body of persons, or a corporation, partnership, or other legal entity that is recognized by law as the subject of rights and duties.' *Webster's Third New International Dictionary of the English Language Unabridged* 1686 (1970).").

⁴⁸*See Morton v. Chesapeake & Ohio Ry. Co.*, 184 W. Va. 64, 68, 399 S.E.2d 464, 468 (1990) ("We have long acknowledged that a 'corporation may be held liable to respond in damages in an action for malicious prosecution.' ").

Fetty v. Huntington Loan Co., 74 S.E. 956, 956-57 (W. Va. 1912) ("A corporation is liable for a false arrest or malicious prosecution, procured by its agent in furtherance of the company's business, and within the scope of the agent's employment.").

State Bancorp, Inc. v. United States Fid. & Guar. Ins. Co., 199 W. Va. 99, 108-09, 483 S.E.2d 228, 237-38 (1997) (State Bancorp sued for claims, including wrongful eviction, resulting from its conduct during foreclosure proceedings against borrowers.).

Crump v. Beckley Newspapers, Inc., 173 W. Va. 699, 710-11, 320 S.E.2d 70, 81-82 (1984) (female coal miner alleged valid claim against newspaper corporation for invasion of privacy for publishing newspaper article that revealed private facts and placed her in false light.).

Rice v. Rose & Atkinson, 176 F. Supp. 2d 585, 591 (S.D.W. Va. 2001) (Under West Virginia law, "[a] corporation is not liable for libel published by its agent unless the agent was authorized to make the publication or his acts subsequently were ratified by the corporation.").

⁴⁹*USX Corp.*, 99 F. Supp. 2d at 625.

⁵⁰*Morton*, 184 W. Va. at 68.

same standard policy form issued to Stroh Brewing Company [Form 07-02-1535, Ed. 10/99].⁵¹

e. **Federal Could Have and Subsequently Did Issue a Policy to Mylan Covering Discrimination, Limiting It to Human Characteristics**

Like Federal, a number of insurers offered “personal injury” coverage for “discrimination” combined with a number of distinct “personal injury” offenses.⁵² In a subsequent policy issued to Mylan after the *Stroh Brewing* decision (in which Federal was the defendant) (09/01/00 – 09/01/01), Federal limited its coverage to discrimination based on human characteristics. Under “Definitions,” “Applicable to Coverage B Only,” subparagraph 6. of the section titled “**Personal Injury**” is deleted and replaced by “discrimination, harassment or segregation (unless insurance thereof is prohibited by law) based on protected human characteristics as established by law.”⁵³

This evidences that Federal could have readily adopted this language limiting discrimination to “human characteristics” in the earlier policy it issued to Mylan.⁵⁴ But it did not do so. It may not now ask this Court to rewrite its policy for its benefit.⁵⁵

⁵¹*Boeing Co. v. Fireman's Fund Ins. Co.*, 113 Wash. 2d 869, 883, 784 P.2d 507, 514 (1990) (“[I]t is irrelevant that some corporations have company counsel.”).

Martin Marietta Corp. v. Insurance Co. of N. Am., 40 Cal. App. 4th 1113, 1134-35, 47 Cal. Rptr. 2d 670, 683 (1995) (“[W]e depart from the normal rule of interpretation, that ambiguities are interpreted in favor of coverage, only where there is ‘evidence that the provision in question was jointly drafted; merely showing that policy terms were negotiated, and that the insured had legal sophistication and substantial relative bargaining power, is not enough.’ ”).

⁵²*J. Josephson, Inc. v. Crum & Forster Ins. Co.*, 293 N.J. Super. 170, 211, 679 A.2d 1206, 1227 (App. Div. 1996) (“Hartford’s policy here provides coverage for **personal injury** which it defines as follows: ‘[P]ersonal injury’ means injury . . . arising out of one or more of the following offenses . . . (4) discrimination or humiliation . . . but only with respect to injury to the feelings or reputation of a natural person” (emphasis added)).

⁵³[Federal Policy effective 09/01/00-09/01/01 – Form 07-02-1535 (Ed. 10/99) Endorsement]

⁵⁴*American Cas. Co. of Reading, PA v. Continisio*, 819 F. Supp. 385, 398 (D.N.J. 1993) (“Evidence of subsequent changes in contract language is relevant to whether the language at issue is ambiguous.”).

⁵⁵*Fireman's Fund Ins. Cos. v. Atlantic Richfield Co.*, 94 Cal. App. 4th 842, 852, 115 Cal. Rptr. 2d 26, 33 (2001) (“[A]n insurance company’s failure to use available language to exclude certain types of liability gives rise to the inference that the parties intended not to so limit coverage.”); *Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co.*, 976 F.2d 1037, 1042 (7th Cir. (Ill.) 1992) (A policy provided coverage when it did not include an exclusion found in another policy.).

2. **A Limited Construction of “Discrimination” Is Inconsistent with West Virginia Law, Which Has Broadly Construed “Personal Injury”**

Notably, the most recent discussion of “personal injury” coverage by this Court⁵⁶ has been widely followed by other Supreme Courts addressing the same issue – coverage for a blast fax allegedly violating the TCPA under the “personal injury” offense of “invasion of a person’s right of privacy.”⁵⁷ This court’s analytic approach in *Bowyer* now represents the majority rule, as the Eleventh Circuit implicitly acknowledged in certifying the same TCPA coverage issue to the Florida Supreme Court due to the absence of any state law on this issue.⁵⁸

3. **The Only Case Federal Relies Upon, *USX*, Is Premised on a Contextual Analysis Inconsistent with West Virginia Law**

Federal contends that the “*USX* court’s analytical approach is . . . wholly consistent with the well-accepted canon of construction *noscitur a sociis*.” (Federal Opp’n to Mylan Pet. for Appeal 36.) But the doctrine of *noscitur a sociis* (Latin: “it is known by its associates”⁵⁹) is of no benefit to Federal. The context relied upon by the *USX* court is wholly distinct from the context here because “personal injury” under the *USX* policy included mental injury, mental anguish, and shock.

Federal is right that the “*USX* court read the term ‘discrimination’ in context, taking into account the words that preceded and followed it in the list of offenses.” (Federal Opp’n to Mylan Pet. for Appeal 35.) But Federal ignores the key fact that the *USX* court’s contextual analysis rests on the proximity of the term “discrimination” to “humiliation” – a term completely

⁵⁶*Bowyer v. Hi-Lad, Inc.*, 216 W. Va. 634, 651, 609 S.E.2d 895, 912 (2004) (“We find nothing in the policy indicating that the word **publication** necessarily means transmitting the intercepted communications to a third party, as is required of material in the **defamation** context.” (emphasis added)).

⁵⁷*Terra Nova Ins. Co. v. Fray-Witzer*, 449 Mass. 406, 417-18, 869 N.E.2d 565, 574 (2007) (applying New Jersey law and quoting favorably both *Bowyer v. Hi-Lad, Inc.* and the Supreme Court of Illinois’ decision in *Swiderski*) (“The insurers’ reasoning that the content of the material, rather than its mere existence, must violate the right of privacy is **unpersuasive**. In effect, the insurers argue that the policy’s definition of injury should be read to say ‘[o]ral or written publication of material, *the content of which* violates a person’s right of privacy.’ ” (bold emphasis added)).

⁵⁸*Penzer v. Transportation Ins. Co.*, 545 F.3d 1303 (11th Cir. (Fla.) 2008).

⁵⁹BLACK’S LAW DICTIONARY 1087 (8th ed. 2004) (*Noscitur a sociis* is “a canon of construction holding that the meaning of an unclear word or phrase should be determined by the words immediately surrounding it.”).

absent from Federal’s policy. The *USX* court stated that “ ‘discrimination’ and its companion ‘humiliation’ are forms of disparate or demeaning treatment of persons . . . and such terms are indeed related to forms of ‘mental injury, mental anguish [and] shock’” *USX*, 99 F. Supp. 2d at 624-25.

USX’s contextual reading of “discrimination” was thus directly informed by its interpretation of “humiliation.” Here, where Federal’s policy does not list mental injury, mental anguish, shock *or humiliation*, *USX*’s contextual reading does not apply. Therefore, Federal’s assumption that the “discrimination” offense here must be based on “human characteristics” and be rooted in “feelings” is erroneous (Federal Opp’n to Mylan Pet. for Appeal 31), especially as the *USX* court conceded that the word “discrimination” was “reasonably susceptible of different constructions and capable of being understood in more than one sense” (*id.* at 609), including “some forms of broad-based price discrimination against commercial entities. . . .” *Id.* at 625.

4. Analogous Third-Party Payor Claims Have Been Found to Trigger a Defense Under “Personal Injury” Coverage Provisions

Certain consumers and third-party payors filed more than seventy lawsuits, most as class actions, against Knoll and other defendants regarding the sale and marketing of Synthroid. . . . These complaints contain allegations that the insured “concealed or suppressed information about cheaper bioequivalent drugs, falsely represented that there were no equivalents, and charged individual consumers and their insurers more than they would have been able to if the correct information had been known, in violation of federal antitrust and racketeering laws and state fraud statutes.”⁶⁰

5. Mylan Is Alleged to Have Committed Pricing Discrimination Involving “Disparate Treatment”

Mylan’s umbrella insurer, Federal, provides “personal injury” coverage for enumerated offenses such as “discrimination.” (Ondos Aff. ¶ 5.) The AWP complaints expressly allege price discrimination, alleging that Mylan “treat[ed] different purchasers differently” and “for the same drug, the pharmacies are given [by Mylan] one price, hospitals another and doctors yet another.” *State of Illinois* Action ¶ 62. Moreover, some physician and hospital purchasers were granted “preferred provider” status whereby they would “receive[] such a lower price”:

⁶⁰*Knoll Pharm. Co.*, 152 F. Supp. 2d at 1030.

35. Some of the ultimate physician or hospital purchasers, however, may be preferred providers from the manufacturers' perspective. The manufacturers compete for their business by offering a lower price for the pharmaceutical. The preferred provider receives such a lower price either through a chargeback (the provider purchases the product at the lower price from the specialty distributor or wholesaler who then "charges back" the amount of the price concession to the manufacturer) or a rebate (a price concession provided by the manufacturer directly to the provider).

36. Some physicians had significant marketing leverage because of the nature of their specialties, geographic location, and reputation. The doctor would pay a discounted price for the drugs, and seek the much higher reimbursement amount from the government and TPPs.⁶¹

The Circuit Court did not deny that Mylan was alleged to have committed price discrimination. The only reason the Circuit Court believed there was no price discrimination is "because the claimants in the underlying suits are not entities that would purchase Mylan products." (Order 32.) But the relevant issue addressed by the alleged statutory violations is pricing distinctions experienced by different parties. Critically, discrimination was recognized by the AWP court's decision, which contrasted physician and hospital purchasers who were preferred providers with those who were not, and noted that third party payors had yet another distinct pricing experience.⁶²

C. "Advertising Injury" Coverage for "Misappropriation of Advertising Ideas" or "Style of Doing Business"

1. The Three-Part Test for "Advertising Injury" Coverage Likely to Be Adopted by West Virginia

In accordance with the widely accepted majority rule⁶³ to determine the duty to defend,

⁶¹*In re Pharmaceutical Industry Average Wholesale Price Litigation*, 491 F. Supp. 2d 20, 35 (D. Mass. 2007).

⁶²491 F. Supp. 2d at 35 ("Some of the ultimate physician or hospital purchasers, however, may be preferred providers The preferred provider receives . . . a lower price").

⁶³*Hyman v. Nationwide Mut. Fire Ins. Co.*, 304 F.3d 1179, 1187 n.7 (11th Cir. (Fla.) 2002) (The widely adopted three-part test: "(1) [the] suit must have alleged a cognizable advertising injury; (2) [the infringing party] must have engaged in advertising activity; and (3) there must have been some causal connection between the advertising injury and the advertising activity.'"); *Cincinnati Ins. Co. v. Zen Design Group, Ltd.*, 329 F.3d 546, 553 (6th Cir. (Mich.) 2003) (same). See 2 ALLAN D. WINDT, INSURANCE CLAIMS AND DISPUTES, REPRESENTATION OF INSURANCE COMPANIES AND INSURED § 11:29, at 611, 624, 628 (and cases cited) (4th ed. 2001).

identical policy language is understood to include: (a) an advertising activity, (b) allegations that fit within one or more of the offenses that are alleged to constitute “advertising injury” such as “misappropriation of advertising ideas” or “misappropriation of style of doing business” or, under Wausau’s last policy (Ondos Aff. Exhibit “39”), “use of another’s advertising idea,” and (c) injury to the claimant(s) arising out of an offense “committed in the course of advertising [Mylan’s] goods, products or services” or, in Wausau’s last policy, “in your advertisement.”

2. The “Misappropriation of Advertising Ideas”

a. “Misappropriation of Advertising Ideas” Cannot Be Limited to Common Law Misappropriation

The phrase “misappropriation of advertising ideas” is not limited to the common law doctrine, as even the Defendant Insurers concede.⁶⁴ Nevertheless, they seek inconsistently to limit the scope of the “misappropriation” offense to that of common law misappropriation by implication, urging this Court to adopt the reasoning of two readily distinguishable trial court cases, *Sorbee*⁶⁵ and *Armament Systems*.⁶⁶ Each case, while not explicitly acknowledging that the court’s construction was based on transposing common law misappropriation elements, applied precisely that litmus test.

Sorbee, applying distinct Pennsylvania law, substituted the requirements for pleading a tort of common law misappropriation, which would require the advertising idea to be “novel,” “new” or “concrete,”⁶⁷ despite the fact that nothing in the policy supports such a limitation on its

⁶⁴*AMCO Ins. Co. v. Lauren-Spencer, Inc.*, 500 F. Supp. 2d 721, 730 (S.D. Ohio 2007) (“Much of the rationale of *Advance Watch* [the Sixth Circuit’s ruling limiting the ‘misappropriation’ offense to the common law doctrine of misappropriation] has often been severely criticized by other courts and represents the minority view. See *Pizza Magia Int’l, LLC v. Assurance Co. of Am.*, 447 F.Supp.2d 766, 772 (W.D.Ky.2006) (summarizing criticism of *Advance Watch* and declining to apply its holding to Kentucky law). Notably, Michigan courts have wholly rejected the Sixth Circuit’s *Advance Watch* construction of Michigan law . . .”).

⁶⁵*Sorbee Int’l Ltd. v. Chubb Custom Ins. Co.*, 735 A.2d 712, 714 (Pa. Super. Ct. 1999).

⁶⁶*Armament Sys. & Procedures v. Northland Fishing Tackle*, No. 01-C-1122, 2006 WL 2519225 (E.D. Wis. Aug. 28, 2006).

⁶⁷See *Riese v. QVC, Inc.*, No. CIV. A. 97-40068, 1999 WL 178545, at *3 (E.D. Pa. Mar. 30, 1999) (common law misappropriation limited to marketing technique that is “novel,” “new” and “concrete.”).

scope. *Armament Systems* assumed that misappropriation means “wrongful taking,” and then further limited coverage by claiming that the idea was too general to be possessed by the party using it. *Armament Systems*, like *Sorbee*, thus adopted the common law misappropriation standard without acknowledging that it had done so.

This approach is analogous to that employed in determining legal sufficiency under Rule 12(b)(6), which does not test whether there is a possibility of coverage but whether a valid claim is made upon which relief can be granted. Each improperly looks to the merits of the underlying action, in evaluating whether that suit could pass muster as a common law misappropriation claim.⁶⁸ Accordingly, both cases adopt analytic approaches inconsistent with West Virginia law.

b. “Misappropriation” Is Ambiguous Because It Can Mean “Misuse” As Well As “Wrongful Taking”

“Advertising idea” is ambiguous because it is “susceptible of more than one reasonable interpretation.”⁶⁹ There is no single meaning to these terms because “[t]here is nothing about the terms . . . neither of which constitutes a recognized tort, which compels [the court] to conclude one way or the other as to just how broadly or narrowly they should be read.”⁷⁰

Mylan agrees that common law misappropriation claims potentially fall within the scope of the “misappropriation” offense, but because it is ambiguous, it is **just one possible meaning**. Many of the cases cited by Continental and adopted in the Circuit Court’s order merely analyze a single possible definition of “misappropriation” that happened to be meaningful on the fact allegations of those particular cases.⁷¹ Indeed, frequently cited case authority,⁷² as well as

⁶⁸*Davis H. Elliott Co. v. Caribbean Utilities Co., Ltd.*, 513 F.2d 1176, 1182 (6th Cir. 1975).

⁶⁹*Westfield Ins. Co. v. Factfinder Marketing Research, Inc.*, 168 Ohio App. 3d 391, 400, 401, 860 N.E.2d 145, 152 (2006) (“Some courts have defined ‘advertising idea’ to mean ‘any idea or concept related to the promotion of a product to the public.’ . . . [*Advance Watch*’s] restrictive holding [limiting the ‘misappropriation’ offense to the common law tort of misappropriation] has been criticized as ignoring the ordinary meaning of the term ‘misappropriation.’ . . . [W]e resolve this ambiguity in the provision . . .”).

⁷⁰*Lebas Fashion Imports of USA, Inc. v. ITT Hartford Ins. Group*, 50 Cal. App. 4th 548, 565, 59 Cal. Rptr. 2d 36, 46 (1996) (emphasis added).

⁷¹*Winklevoss Consultants, Inc. v. Federal Ins. Co.*, 991 F. Supp. 1024, 1037 (N.D. Ill. 1998) (“[The plaintiff] maintains that the phrase ‘misappropriation of advertising ideas or style of doing business’ is

dictionary definitions,⁷³ support construing the ambiguous phrase “misappropriation” to include “misuse.”

So long as it is a reasonable, contextually viable definition, it need not be the most reasonable definition. The policy language does not require that the “advertising idea” be owned by another, much less a competitor of Mylan, nor need the advertising idea be original to Mylan. Mylan’s advertising activities need only misuse an “advertising idea.” As long as injury “arises out of” the advertising, the policy language is satisfied. See § V(C)(5)(b) herein.

AMICO and Continental’s contention that a case must explicitly limit its discussion to one possible definition ignores West Virginia law which finds that disagreement among the courts evidences “ambiguity.”⁷⁴ The fact that any particular court did not explore other possible meanings for the undefined term “misappropriation” than a “wrongful taking” does not render that myopic view as authority for a legal proposition. The Court has not evaluated the availability of multiple reasonable and contextually viable definitions for the undefined term “misappropriation.”⁷⁵ There is no reason to add words of limitation involving a “special right”

ambiguous This Court agrees that the language is susceptible of more than one reasonable interpretation.”).

⁷²*Applied Bolting Tech. Prods., Inc. v. United States Fid. & Guar. Co.*, 942 F. Supp. 1029, 1032 (E.D. Pa. 1996) (“Misuse” is a preferred dictionary definition for “misappropriation” that a layperson would use and thus a valid definition for coverage purposes.); *Atlapac Trading Co., Inc. v. American Motorists Ins. Co.*, No. CV 97-0781 CBM, 1997 WL 1941512, at *7 (C.D. Cal. Sept. 19, 1997) (Mislabeling mixed olive/canola oil as olive oil is a misuse that injures the public as well as competitors whose pricing may be disadvantageously undercut.).

⁷³BLACK’S LAW DICTIONARY 1998 (6th ed. 1990) (“Misappropriation: the unauthorized, improper or unlawful use of funds or other property for purposes other than that for which intended. . . . The term may also embrace the taking or use of another’s property for the sole purpose of capitalizing unfairly on the goodwill and reputation of property owner. *Lawyer Disciplinary Bd. v. Battistelli*, 206 W. Va. 197, 202-03, 523 S.E.2d 257, 262-63 (1999).”).

RANDOM HOUSE UNABRIDGED DICTIONARY 1228 (2d ed. 1993) (“Misappropriate” means “to put to a wrong use; to apply wrongfully or dishonestly, as funds entrusted to one’s care.”). This makes good sense as “[t]he term misappropriation can have various meanings.” *Lawyer Disciplinary Bd. v. Battistelli*, 206 W. Va. 197, 202, 523 S.E.2d 257, 262 (1999).

⁷⁴*Murray*, 203 W. Va. at 485 n.5.

⁷⁵*Del Monte Fresh Produce N.A., Inc. v. Transportation Ins. Co.*, 500 F.3d 640, 646 (7th Cir. (Ill.) 2007) (“Misappropriation of an advertising idea occurs when the insured wrongfully takes a competitor’s idea about the solicitation of business.”).

or “legally protected interest”⁷⁶ based on Defendant Insurers’ efforts to harmonize these cases and cannot be explained as validating a “wrongful taking” definition.

c. “Concepts Used to Publicize a Business” Is an Appropriate Interpretation of “Misappropriation of Advertising Idea”

Five (5) distinct reasons support a broader construction of the ambiguous “misappropriation of advertising ideas” offense than the Defendant Insurers’ contend is proper:

First, the “misappropriation” offense was at issue and the court did not purport to give an exhaustive definition of its scope. Rather, the court analyzed whether, as applied to the trade secret claims, that issue before it was implicated.

Second, the court failed to follow proper rules of policy construction. Indeed, it did them great violence. “Advertising” and “idea” are not an adjective modifying a noun, but a noun-noun compound. Therefore, the edifice upon which the entire court’s analysis relies is mistaken.

Third, the court in *Frog, Switch* followed the court’s ruling in *Winklevoss II*, which found a misappropriation offense ambiguous, and is joined by Judge Croskey’s seminal decision in *Lebas*, issued after a petition on rehearing and after considering numerous *amicus* briefs.

Fourth, the breadth of coverage itself is not a valid objection to the proposed construction.⁷⁷ A number of varied definitions of the “misappropriation of advertising ideas” “advertising injury” have been expressly validated by a number of courts. These include:

(1) Taking [or misuse of] the idea of another’s invention as one’s own idea or invention in the course of advertising;⁷⁸

(2) “[T]he idea of claiming a revolutionary new design as an enticement to customers”;⁷⁹

(3) The theft of an advertising plan from its creator without payment;⁸⁰

⁷⁶(AMICO/Continental Opp’n to Mylan Pet. for Appeal 19.)

⁷⁷*Bay Cities Paving & Grading, Inc.*, 5 Cal. 4th at 868.

⁷⁸*Lebas*, 50 Cal. App. 4th at 560 n.7.

⁷⁹*Frog, Switch & Mfg. Co. v. Travelers Ins. Co.*, 193 F.3d 742, 749 (3d Cir. (Pa.) 1999).

⁸⁰*Lebas*, 50 Cal. App. 4th at 560 (“*Lebas* is correct in its assertion that the policy terms ‘misappropriation,’ ‘advertising idea’ and ‘style of doing business’ do not have a single, plain and clear meaning.”).

(4) “Capitalizing upon the goodwill associated with Indian-made products is a marketing idea concerned with how to persuade consumers to buy certain goods.”⁸¹

Fifth, there is no contextual reason why the policy term “misappropriation” must be limited (as the Court’s analysis assumes) to wrongful taking from a competitor as opposed to the public, which suffers when goods are misdescribed as is alleged here.⁸² Indeed, public deception is as much a common theme as an express wrongful taking from a competitor. “Marketing the spread” is allegedly an “advertising idea” that can be misused so as to deprive the public of its fair access to properly priced pharmaceutical products, as well as a “wrongful taking” from the public of accurate information about goods, products and services.⁸³

d. Confusion As to the Source of Goods Has Readily Been Found to Support a Defense Where the Advertising Idea Was Not “Wrongfully Taken” But Merely “Misused”

There is nothing about the term “advertising idea” that necessarily limits it to “an idea about the solicitation of business and customers.” This is but one of many possible definitions that, in this context, the Court need not adopt.⁸⁴ Limiting “misappropriation” to a “wrongful taking” adds words of limitation not in the policy. Adoption of the “wrongful taking” definition of “misappropriation” rewrites the policy for the insurer’s benefit.⁸⁵ It is also inconsistent with the broad definition of advertising adopted by a number of courts⁸⁶ and the breadth of meaning

⁸¹*Flodine v. State Farm Ins. Co.*, No. 99 C 7466, 2001 WL 204786, at *11 (N.D. Ill. Mar. 1, 2001).

⁸²*State Auto Prop. & Cas. Ins. Co. v. Travelers Indem. Co. of America*, 343 F.3d 249, 257 (4th Cir. (N.C.) 2003).

⁸³*Curtis-Universal*, 43 F.3d at 1124 (“A word sometimes picks up meaning from its neighbors; and all the other terms in the list of wrongs insured under the rubric of ‘advertising injury’ concern **the misuse of information**, as befits the word ‘advertising.’ ” (bold emphasis added)).

⁸⁴*Farmers & Mechanics Mut. Ins. Co. of West Virginia v. Cook*, 210 W. Va. 394, 399, 557 S.E.2d 801, 806 (2001) (West Virginia courts go even further by requiring that insurers, in evaluating their duty to defend, must “look beyond the bare allegations” and actually “conduct a reasonable inquiry into the facts” to ascertain whether any claims are **potentially** covered by the policy.).

⁸⁵*Keffer*, 153 W. Va. at 816.

⁸⁶**Third Circuit** [*CAT Internet Services v. Providence Washington Ins. Co.*, 333 F.3d 138, 142 (3d Cir. (Pa.) 2003) (“We now hold that when a complaint alleges that an insured misappropriates and uses . . . ideas in connection with marketing and sales and for the purpose of gaining customers, the conduct constitutes ‘misappropriation of an advertising idea’ ”).];

suggested by linguistic analysis of the constituent terms comprising the “misappropriation of advertising ideas or style of doing business” offense.⁸⁷

e. **A Number of Cases Depended Upon Misuse of or “Capitalizing” upon a Concept Associating a Product with the Defendant in a Way That Attracted Business**

“Fullblood,” “pure olive oil,” “Indian made,” “FDA approved,” or promoting products using a “red and yellow” color scheme⁸⁸ are “advertising ideas” just like “marketing the spread” between AWP reimbursement and the cost of pharmaceuticals to physicians or pharmacies.

Fourth Circuit [*State Auto Prop. & Cas. Ins. Co. v. Travelers Indem. Co. of America*, 343 F.3d 249, 258 (4th Cir. (N.C.) 2003)];

Seventh Circuit [*Native American Arts, Inc. v. Hartford Cas. Ins. Co.*, 435 F.3d 729, 733 (7th Cir. (Ill.) 2006); *Skylink Techs., Inc. v. Assurance Co. of Am.*, 400 F.3d 982, 985 (7th Cir. (Ill.) 2005)];

Eighth Circuit [*American Simmental Ass’n v. Coregis Ins. Co.*, 282 F.3d 582, 587 (8th Cir. (Neb.) 2002)];

Eleventh Circuit (applying Florida law) [*Hyman v. Nationwide Mut. Fire Ins. Co.*, 304 F.3d 1179, 1188 (11th Cir. (Fla.) 2002) (“Initially, as it is commonly understood, advertising means the ‘action of calling something to the attention of the public.’ An ‘advertising idea,’ therefore, can be any idea or concept related to the promotion of a product to the public.” (citation omitted))].

⁸⁷Phrases consisting of an attributive adjective and a noun can be paraphrased as “a NOUN which is ADJECTIVE” but noun-noun compounds cannot: we can say “a baby who is sleeping” but not “a seat which is catbird.” A noun-noun compound such as “advertising ideas” is extremely vague grammatically. JUDITH N. LEVI, *THE SYNTAX AND SEMANTICS OF COMPLEX NOMINALS* (Academic Press 1978). As such, the phrase “advertising ideas” can have a number of meanings: (1) ideas **for** advertising; (2) ideas **containing** advertising; (3) ideas **which are** advertising; (4) ideas **made of** advertising; (5) ideas **from** advertising; (6) ideas **caused by** advertising; and (7) ideas **about** advertising. *Id.* Their interpretation in context is limited only by what a hearer might think a speaker meant by them. Pam Downing, *The Creation and Use of English Compound Nouns*, 53 *Language* 810-842 (1977); Eve & Herb Clark, *When Nouns Surface As Verbs*, 55 *Language* 767-811 (1979).

⁸⁸*American Simmental Ass’n v. Coregis Ins. Co.*, 75 F. Supp. 2d 1023, 1031 (D. Neb. 1999), *aff’d*, 282 F.3d 582 (8th Cir. 2002) (applying Montana law) (Cattle are allegedly “fullblood” American Simmental when they are not.).

Atlapac Trading Co., Inc. v. American Motorists Ins. Co., No. CV 97-0781 CBM, 1997 WL 1941512 (C.D. Cal. Sept. 19, 1997) (A mixed canola/olive oil blend is touted as “pure olive oil.”).

Flodine v. State Farm Ins. Co., No. 99 C 7466, 2001 WL 204786, at *5 (N.D. Ill. Mar. 1, 2001) (Goods not made by Indians are claimed to be “Indian-made”).

Pennfield Oil Co. v. American Feed Indus. Ins. Co. Risk Retention Group, Inc., No. 8:05CV315, 2007 WL 1290138 (D. Neb. Mar. 12, 2007) (Animal-drug-feed-additive not FDA approved as advertised.).

Granutec, Inc. v. St. Paul Fire & Marine Ins. Co., No. 5:96-CV-489-BO(2), 2008 WL 312146 (E.D.N.C. Jan. 16, 1998) (Branded pharmaceutical company’s red and yellow color scheme used by generic manufacturer to promote its identical gelcap product.).

Thus, like the underlying defendants in these cases, Mylan is alleged to have “misused” or “capitalized” upon an advertising idea made to attract business.

3. Defendant Insurers Demonstrate the Ambiguity of the “Misappropriation” Offenses by Positing Yet Another Construction

a. The Proposed “Special Right and Legally Protected Interest” Limitation Relies on a Misunderstanding of the Case Law

AMICO and Continental contend that an “advertising idea” must be one to which the underlying plaintiffs “claimed a special right and legally protected interest.” (AMICO/Continental Opp’n to Mylan Pet. for Appeal 19.) This contention is not supported by the case law they cite. Nor is it supported by the policy language they drafted. AMICO and Continental have taken three disparate rationales and wrested out a limitation to suit their evolving arguments. The problem is that the “special right and legally protected interest” limitation they devised rests on a misunderstanding of these cases.⁸⁹

First, AMICO and Continental state that *Flodine* involved a “special right” or “legally protected interest” because “plaintiffs claimed that defendants ‘took sales away from those who may rightfully capitalize on the fact that a product is Indian-made.’ ” (AMICO/Continental Opp’n to Petition for App. 19.) But they forget that the underlying plaintiff in *Flodine* was J.C. Penney, *not* the Indian tribe who could claim a special right to an “Indian-made” designation.⁹⁰ Plaintiff J.C. Penney could not “rightfully capitalize” on Indian-made products. All *Flodine* requires then, if anything, is that there be *someone* who might rightfully capitalize on the idea at issue – that person, however, need not be the underlying plaintiff.

Here, though Mylan has denied and continues to deny the allegations against it, the allegations as asserted suggest that there may be someone who could “rightfully capitalize” on the “marketing the spread” concept. According to the allegations, “all manufacturers seek to

⁸⁹*American Simmental*, 75 F. Supp. 2d 1023; *Flodine*, 2001 WL 204786; *Native American Arts*, 435 F.3d 729.

⁹⁰AMICO/Continental also mischaracterize the quotation from *Flodine*. The plaintiff did not claim this; this simply comprised part of the *Flodine* court’s reasoning.

increase demand for their products. Like direct-to-consumer advertising and other marketing efforts, manipulating and marketing the spread is a way to accomplish this.” *MDL Action* ¶ 17. If we accept these allegations, which we must for the purposes of determining the duty to defend, all pharmaceutical manufacturers can “rightfully capitalize” on the alleged “marketing the spread” idea. The alleged advertising idea of “marketing the spread” is not inherently wrongful: manufacturers must report pricing information which then goes into comprising the AWP; this creates a spread between the AWP and the price paid by doctors and pharmacies; and manufacturers then market this spread to potential purchasers. What *is* wrongful, according to the allegations, is the misuse of this advertising idea, i.e. manipulating pricing information to create a larger spread to market. *MDL Action* ¶ 12. Therefore, it is irrelevant that the underlying *plaintiffs* could not “rightfully capitalize” on the idea.

Second, the Defendant Insurers also rely on *Native American Arts* for their proposed limitation on “advertising idea.” But because this case analyzed different policy language,⁹¹ it cannot be used to support the specific proposition AMICO and Continental wish it to support.⁹²

In light of the distinct policy language, the court’s rationale turned on whether there was an *advertisement*. AMICO and Continental cannot extract the court’s analysis of “advertisement,” a defined term,⁹³ from a case that looked at different policy language and then apply that analysis to this case which involves the undefined term “advertising idea.”

Third, AMICO and Continental look to *American Simmental Ass’n* as further support for

⁹¹*Rosen v. State Farm General Ins. Co.*, 30 Cal. 4th 1070, 1076, 70 P.3d 351, 355 (2003) (“ ‘It is a well-established rule that an opinion is only authority for those issues actually considered or decided.’ ”).

⁹²The Hartford policy at issue in *Native American Arts* did not contain the “misappropriation” offense at issue here. Instead, the court’s analysis centered on the offense “copying, in your ‘advertisement,’ a person’s or organization’s ‘advertising idea’ or style of ‘advertisement.’ ” *Native American Arts*, 435 F.3d at 732. The policy defined “advertising idea” as “any idea for an *advertisement*.” *Id.* at 733. And the court based its decision on the applicability of a policy exclusion which stated that “an *advertisement* ‘does not include the design, printed material, information or images contained in, on or upon the packaging or labeling of any goods or products.’ ” *Id.*

⁹³“The policy defined ‘advertisement’ as ‘a dissemination of information or images that has the purpose of inducing the sale of goods, products or services through: (1) Radio; (2) Television; (3) Billboard; (4) Magazine; (5) Newspaper; or [(6)] Any other publication that is given widespread public distribution.’ ” *Native American Arts*, 435 F.3d at 732.

their proposed limitation. The district court in *American Simmental*, however, premised its decision on the fact that “under [American Simmental Association (ASA)] by-laws, plaintiffs allegedly had rights and interests with respect to the ASA and its property.”⁹⁴ There, plaintiffs were members of the ASA, a non-profit association that registers and promotes designation of the Simmental cattle breed.⁹⁵ Thus, plaintiffs’ rights were integrally connected to the ASA structure and its legal mandates; plaintiffs necessarily had an interest in the propriety of the ASA’s designation system.

Similarly here, the third party payor plaintiffs had a substantial economic interest in the propriety of the reimbursement system for Medicaid and Medicare. The plaintiffs in the *MDL* Action, for instance, are New York counties who, “in their roles as Local Social Services Districts, play an integral part in the administration of the Medicaid Program.” *MDL* Action ¶ 2. The plaintiffs here had rights and interests with respect to Medicaid/Medicare since through that structure, they were legally required to reimburse pharmaceutical costs and had an interest in the accuracy of the pricing information supplied by manufacturers to compose the AWP.⁹⁶ Even if the court accepts the “rights and interests” limitation proposed by AMICO and Continental then, it is readily satisfied by the present facts.

b. Words of Limitation Involving a “Special Right and Legally Protected Interest” Cannot be Added *Post Facto* to the Policies

Here, Defendant Insurers failed to define “advertising idea.” And they failed to limit the scope of the term to provide coverage only for ideas to which the plaintiff claims a “special right” or “legally protected interest.” If they wanted to limit coverage in this manner, they had to

⁹⁴*American Simmental*, 75 F. Supp. 2d at 1026.

⁹⁵*Id.*

⁹⁶“There are two components of the price Medicaid pays for prescription drugs. The first is the price initially paid by Medicaid to the provider – generally a dispensing pharmacy – for the drug. This price is determined by a formula contained in New York State law, and is based on wholesale price information provided by the manufacturers. N.Y. Soc. Serv. L 367-a(9). The second component is a rebate that drug manufacturers pay to the states pursuant to a federal statutory formula, 42 U.S.C. 1396r-8 (the ‘Medicaid Rebate Provision’), and pursuant to statutorily mandated Medicaid rebate contracts that each manufacturer executes with the Secretary of Health and Human Services ‘on behalf of the states.’” *MDL* Action ¶ 3.

have drafted appropriate language to effect that result.⁹⁷ Words of limitation cannot be added to the policy.⁹⁸ This Court must not indulge Defendant Insurers' efforts to add a limitation post facto and must instead interpret this term liberally in Mylan's favor.⁹⁹

4. The "Misappropriation of Style of Doing Business" Offense

a. "Misappropriation of a Style of Doing Business" Includes Taking a Mode of Interaction with a Particular Group

The Defendant Insurers could have chosen to limit this offense to claims of trade dress infringement or some analogous tort but they elected not to do so.¹⁰⁰ "Misappropriation" encompasses multiple reasonable meanings and connotations which include "the misuse of a manner and means of advertising goods or services." The term "style of doing business" includes as constituent elements "style" and "business," with the latter word modified by the adverb "doing" suggesting an active rather than passive use of the verb "to do." "Style" has been defined as "a particular, distinctive, or characteristic mode of action or manner of acting."¹⁰¹

By using the phrase "style of doing business" to define this offense, the Defendant Insurers thereby left open the possibility that this generic offense – not a specific tort – could encompass a broad range of claims. This approach has been routinely followed by insurers who wish to include coverage broad enough to include a number of distinct factual scenarios.¹⁰² Many courts below have refused to narrowly define the scope of this broad phrase.¹⁰³ A number of courts have adopted broad readings of "misappropriation of style of doing business" that are

⁹⁷*Atlantic Richfield Co.*, 94 Cal. App. 4th at 852.

⁹⁸*Keffer*, 153 W. Va. at 816.

⁹⁹*Bowyer*, 216 W. Va. at 651; *Hensley*, 168 W. Va. at 176.

¹⁰⁰*See Lebas*, 50 Cal. App. 4th at 566 n.13.

¹⁰¹RANDOM HOUSE UNABRIDGED DICTIONARY 1890 (2d ed. 1993).

¹⁰²*Bay Cities Paving & Grading, Inc.*, 5 Cal. 4th at 868.

¹⁰³*Novell, Inc. v. Federal Ins. Co.*, 141 F.3d 983, 987 (10th Cir. (Utah) 1998) ("We find it unnecessary to definitively construe the phrase 'style of doing business' . . ."); *Hyman*, 304 F.3d at 1189 ("[W]ithout defining the exact parameters of the phrase, we conclude that 'style of doing business' must include the manner in which a company promotes, presents, and markets its products to the public.").

analogous to the construction posited here.¹⁰⁴ Thus, “ ‘style of doing business’ refers to the mode of presenting a product to the public.”¹⁰⁵

b. Mylan Allegedly Misused a Marketing Concept Which Included a “Particular Mode of Interacting With Drug Purchasers”

Mylan allegedly used the mode of interacting with drug purchasers, originally adopted by others and then applied by Mylan, by “marketing the spread” between the price at which it sold drugs to direct purchasers such as physicians and pharmacies and what they received via reimbursement from Medicaid and Medicare. Mylan’s alleged advertising of the “marketing the spread” concept created potential liability for expressly pled claims of unfair competition that include a misuse of a “particular mode of interacting with drug purchasers.” The *County of Albany v. Abbot Laboratories, Inc.*, U.S. District Court, N.D.N.Y., Case No. 05-425 (April 5, 2005) (“*Albany Action*”) alleged:

8. Defendants provide **grossly inflated pricing information** to the publishing services, causing them in turn to publish similarly inflated AWP’s. Their purpose in doing so is to **create a large spread between the actual price that providers such as pharmacists pay to acquire drugs and the reimbursement that those same entities receive from Medicaid, Medicare and private third party payors.**

. . . The **spread is an incentive, in effect a bribe, to any in the distribution chain** – pharmacy chains, SBMs, insurers – who are able to increase demand for a defendant’s drugs and to **select the defendants’ drugs over competing drugs.** Through defendants’ **manipulation of AWP**, they induce the Medicaid program, **as well as Medicare and private payors**, to pay this unlawful incentive for the purchase of defendants’ products.

. . . .

¹⁰⁴*Hoosier Ins. Co. v. Audiology Foundation of Am.*, 745 N.E.2d 300, 308 (Ind. Ct. App. 2001) (“Here, ASHA clearly described both itself and AFA in its complaint, explained that both issue credentials, and further, complained specifically about the credential that AFA was issuing. Thus, we hold that AFA was entitled to coverage based on the policy provision of misappropriation of style of doing business.”);

Elcom Technologies, Inc. v. Hartford Ins. Co. of the Midwest, 991 F. Supp. 1294, 1297 (D. Utah 1997) (“In an attempt to prevent that confusion, Phonex began advertising the PHONEJAK as the only patented wireless telephone jack on the market. Phonex’s strategy of advertising the PHONEJAK in the manner that it did was part of Phonex’s style of doing business. When Elcom began making the very same claims about its product, it is a fair argument to make that Elcom usurped from Phonex that style of doing business.”).

¹⁰⁵*American Econ. Ins. Co. v. Reboans, Inc.*, 852 F. Supp. 875, 879 (N.D. Cal. 1994).

10. . . . Moreover, even absent competition, all manufacturers seek to increase demand for their products. **Like direct to consumer advertising** and other marketing efforts, **manipulating the spread is a way** to accomplish this. [Emphasis added.] (Ondos Aff. Exhibit “3.”)

Here, the reimbursement benefit to drug purchasers embodied in Mylan’s alleged “marketing the spread” advertising is no less a style of doing business that Mylan misused than is advertising patent rights that do not exist to obtain a distinct marketing advantage.

5. Other “Advertising Injury” Elements

a. Causal Nexus between “Advertising Injury” Offense and Advertising

(1) Mylan’s Conduct Constitutes Advertising under West Virginia Law

The AWP Actions allege that Mylan advertises its products by “marketing the spread” – the difference between the reported AWP for Mylan’s drugs and the actual price paid – claiming the difference is higher than that of a competing drug manufacturer’s spread. The *County of Albany* Action alleges:

8. . . . [Mylan’s] purpose in doing so is to create a large spread between the actual price that providers such as pharmacists pay to acquire drugs and the reimbursement that those same entities receive from Medicaid, Medicare and private third party payors. . . . Defendants **advertise** this spread as a reason why those in the distribution chain should sell their drugs, **a practice [that] is known as “marketing the spread.”**

126. Defendants’ own **marketing** documents make clear that they **market spread** and profitability based on reimbursement whether their products are single or **multisource**. [Emphasis added.] (Ondos Aff. ¶ 11, Exhibit “3.”)

Express allegations that Mylan “advertises” and “markets” the spread to physicians and pharmacies readily meet definitions of advertising¹⁰⁶ germane under West Virginia law and which the Defendant Insurers wholly ignore,¹⁰⁷ especially as two of the three referenced cases

¹⁰⁶*In re Pharmaceutical Industry Average Wholesale Price Litigation*, 230 F.R.D. 61, 71 (2005) (“[V]arious publications disclosed that physicians were able to purchase many of the Medicare Part B outpatient drugs at prices considerably less than AWP. . . . [T]he existence of a spread ‘has not been a secret, at least to active observers and health care participants.’ ”).

¹⁰⁷*Acuity v. Bagadia*, 750 N.W.2d 817, 828 (Wis. 2008) (“A standard narrow definition and a standard broad definition of ‘advertising’ have evolved in the common law. The standard narrow definition is: ‘widespread announcement or distribution of promotional materials.’ The standard broad definition is: ‘any oral, written, or graphic statement made by the seller in any manner in connection with the solicitation of business.’ All of these definitions are different in some respects, yet all are reasonable

are from the highest court in each forum.¹⁰⁸ Ambiguous terms such as “advertising” must be interpreted against the insurer.¹⁰⁹ Especially where the most recent decision of a state Supreme Court finds a broad definition reasonable, it must be adopted by this Court.¹¹⁰

(2) **The Causal Nexus Is between “Advertising” and an “Advertising Injury” Offense, As “Injury” Need Only “Arise out of” the “Advertising Injury” Offense**

The previously referenced allegations sufficiently evidence liability premised on the facts so as to trigger potential coverage under an “advertising injury” offense¹¹¹ where Mylan

interpretations of the term, ‘advertising.’ Accordingly, we conclude that the term is susceptible to multiple reasonable interpretations and is therefore ambiguous. . . . Consequently, we will apply the broad definition to the facts before us.” (citations omitted)).

Century 21, Inc. v. Diamond State Ins. Co., 442 F.3d 79, 83 (2d Cir. (N.Y.) 2006) (“[A] term as broad and multi-faceted as ‘marketing’ may be construed to include activities . . . that are ‘within the embrace’ of ‘advertising’”); *Factfinder Marketing Research, Inc.*, 860 N.E.2d at 153 (“MFI’s complaint does not use the words ‘advertising’ or ‘marketing.’ . . . MFI alleged that McGinnis’s use of its trade dress and trademarks . . . to a segment of the purchasing public, and it was this ‘advertising’ that is allegedly causing MFI’s damages, at least in part.”).

¹⁰⁸*State ex rel. Summerfield*, 148 W. Va. at 543 (Courts may look to the law of other jurisdictions when a state’s Supreme Court is silent on an issue.).

¹⁰⁹The *Hameid* court’s definition of “advertising,” as it relates to the scope of coverage, is based on a grave misinterpretation. The court held, “[W]e prefer the majority approach as stated in *Bank of the West* . . . and interpret the term ‘advertising’ as used in CGL policies to mean widespread promotional activities usually directed to the public at large.” *Hameid v. National Fire Ins. of Hartford*, 31 Cal. 4th 16, 24, 71 P.3d 761, 766 (2003). The court fails to note that the definition *Bank of the West* adopts (in dicta) relies on cases defining “advertising” as it relates to exclusionary language in the policy. *Bank of the West v. Superior Court*, 2 Cal. 4th 1254, 1276, 833 P.2d 545, 560 (1992).

This interpretation is inconsistent with West Virginia case law, which holds exclusionary language must be strictly construed against the insurer. *West Virginia Ins. Co. v. Lambert*, 193 W. Va. 681, 685, 458 S.E.2d 774, 778 (1995). Furthermore, *Hameid* contends that a majority of jurisdictions have considered the definition of “advertising” and adopted a similarly narrow interpretation. *Hameid*, 31 Cal. 4th at 24. This proposition is wildly inaccurate, as a majority of jurisdictions have adopted a broad definition of “advertising” as it relates to the scope of coverage.

David Gauntlett, *The Proper Definition of “Advertising” In An “Advertising Injury” Coverage Case – A Critique of the California Supreme Court’s Decision in Hameid v. National Ins. of Hartford*, 31 Cal. 4th 16, 1 Cal. Rptr. 3d 401, 71 P. 3d 761 (2003), 12 Mealey’s Litigation Report 1 (Oct. 6, 2003). (These jurisdictions include Texas, p. 5; New York, p. 5; Florida, p. 6; Illinois, p. 6.)

¹¹⁰*Murray*, 203 W. Va. at 485 n.5.

¹¹¹*J. Lamb, Inc.*, 100 Cal. App. 4th at 1032-33 (“**The triggering event is the insured’s wrongful act, not the resulting injury to the third party claimant.** Indeed, coverage will exist for a personal injury ‘offense,’ committed during the term of the policy, even if the injury occurs after the policy expires.” (bold emphasis added)).

allegedly advertised the spread.¹¹²

First, the “advertising injury” cases referenced by the Defendant Insurers deal with either patent infringement,¹¹³ copyright infringement,¹¹⁴ or unfair competition alleging improper behavior that violated various statutory provisions of state law.¹¹⁵ Those cases are not from West Virginia, not cited by the Circuit Court’s order, and are not relevant.

Second, each of the “causation” cases looks to a distinct underlying tort such as unfair competition,¹¹⁶ copyright,¹¹⁷ or patent infringement,¹¹⁸ finding that prior to 1996, when the patent statute was amended to make an “offer for sale” (which can be triggered by advertising alone) actionable, advertising conduct did not create liability under the pertinent “advertising injury” offense.

Third, the three-part test of “advertising injury” coverage requires that the causal nexus

¹¹²*Pension Trust Fund*, 307 F.3d at 951 (“The duty to defend does not usually turn on whether facts supporting a covered claim predominate or generate the claim. . . . **[R]emote facts buried within causes of action that may potentially give rise to coverage are sufficient to invoke the defense duty.** See, e.g., *Barnett v. Fireman’s Fund Ins. Co.*, 90 Cal.App.4th 500, 108 Cal.Rptr.2d 657 (2001)” (emphasis added)).

¹¹³*St. Paul Fire & Marine Ins. Co. v. Advanced Interventional Sys., Inc.*, 824 F. Supp. 583, 586 (E.D. Va. 1993) (ITC claims asserting patent violations); *A. Meyers & Sons Corp. v. Zurich Am. Ins. Group*, 74 N.Y.2d 298, 545 N.E.2d 1206 (1989).

¹¹⁴*Sentry Ins. v. R.J. Weber Co., Inc.*, 2 F.3d 554, 557 (5th Cir. (Tex.) 1993).

¹¹⁵*Bank of the West*, 2 Cal. 4th 1254; *International Ins. Co. v. Florists’ Mut. Ins. Co.*, 201 Ill. App. 3d 428, 559 N.E.2d 7 (1990).

¹¹⁶*Bank of the West*, 2 Cal. 4th at 1277 (“These claims, which were based on the inadequacy of disclosures to consumers and the illegality of the terms of the loans, do not have a sufficient causal connection with advertisements directed solely to insurance agents.”);

Florists’ Mut. Ins. Co., 201 Ill. App. 3d at 433 (The court found only that “an in-house rule prescribing conditions for processing floral arrangements that have been advertised in a particular way is not related to advertising activity such that an injury attributable to the rule can be considered an advertising injury.”).

¹¹⁷*R.J. Weber Co., Inc.*, 2 F.3d at 557 (“[The insured] does not identify any connection between Caterpillar’s claims, and Weber’s advertising activity.”).

¹¹⁸*Advanced Interventional Sys., Inc.*, 824 F. Supp. at 587 (“The ‘offense’ did not cover patent infringement even if inducement of patent infringement clause might meet the causal nexus.”); *A. Meyers & Sons Corp.*, 74 N.Y.2d at 303 (The complaint “alleges harm arising out of the ‘importation’ and ‘sale’ of products which infringed upon patents . . . not injury arising out of . . . ‘advertising activities’ ” where a sale not an advertisement created liability under the pertinent “advertising injury” offense).

must be between the offense “misappropriation of advertising ideas . . .” and the insured’s advertising activities.¹¹⁹

Fourth, the causal nexus element requires only a connection between the “advertising injury” offense and the insured’s advertising. The phrase “in the course of advertising,” as defined by the California Supreme Court in *Bank of the West*, 2 Cal. 4th 1254, is met by evidence of a causal connection between the “advertising injury” offense – unfair competition – and, in that policy form, “advertising activities.”¹²⁰ The Insurance Services Office (“ISO”), the drafter of the policy form at issue, noted that a causal nexus is required between the advertising of the insured’s services and liability under one of the enumerated “advertising injury” offenses – not between the advertising and the ultimate injury, which need only arise out of an offense.¹²¹

As long as the acts which cause the injury occur in the course of advertising, then the

¹¹⁹The Third Circuit’s affirmance of *Frog, Switch & Mfg. Co. v. Travelers Ins. Co.*, 20 F. Supp. 2d 798 (M.D. Pa. 1998) was on far more limited grounds and employed a distinct causal analysis in finding that the causal connection between misuse of trade secrets and advertising of the resultant product was “not enough.” *Frog, Switch*, 193 F.3d at 751 n.9 (3d Cir. (Pa.) 1999) (“[I]f an advertisement invaded a person’s privacy (causing an advertising injury), and the insured’s product also invaded a person’s privacy (causing an advertising injury), the advertisement would cause part of the total harm and would constitute a complete tort in itself.”).

¹²⁰*Bank of the West*, 2 Cal. 4th at 1276 (“We believe that the apparent majority rule, under which ‘advertising injury’ must have a causal connection with ‘advertising activities,’ best articulates the insured’s objectively reasonable expectations about the scope of coverage.”). The *Bank of the West* opinion places the phrase “advertising injury” in quotation marks, showing that it is quoting the phrase directly as defined in the policy. *Bank of the West* merely uses the phrase “advertising injury” as a collective reference for the policy offenses, instead of listing them individually. The court notes: “The other types of ‘advertising injury’ enumerated in the policy often do have a causal connection with advertising,” and then lists the policy offenses. *Id.* at 1276. When the *Bank of the West* court uses the term “advertising injury” in quotation marks, it refers collectively to the “advertising injury” offenses in the policy, not as a reference to “damages” or “harm” or the ultimate injury that must arise out of one of the enumerated offenses. See *National Union Fire Ins. Co. v. Siliconix, Inc.*, 729 F. Supp. 77, 79-80 (N.D. Cal. 1989), cited in the *Bank of the West* opinion (2 Cal. 4th at 1277), which uses the phrase “advertising injury” in the same way.

¹²¹The 1998 ISO “Explanation of Changes” states:

Revised Advertising Offenses:

... This insurance applies to “advertising injury” caused by an offense committed in the course of advertising your goods, products or services. . . . The change from the undefined term “advertising activities” to a defined term “advertisement” is intended to strengthen the necessary **causal connection between the covered offense and the insured’s advertisement**. [Mylan’s Req. for Judicial Notice in Supp. of Opp’n to Defs.’ Cross-Mot., Exhibit “C” at 17, 21.] [Emphasis added.]

causal nexus is satisfied.¹²² West Virginia law clarifies that “arise out of” means “connected with.”¹²³

Fifth, in order to establish the causation element of “advertising injury” coverage, the insured need only establish that it is *possible* that liability will be imposed for the insured’s “advertising activities.”¹²⁴ As the California Supreme Court observed in *Bank of the West*, 2 Cal. 4th at 1276, “ ‘Infringement of copyright, title or slogan’ typically occurs upon unauthorized reproduction or distribution of the protected material. (See 17 U.S.C. § 106.)” Three coverage decisions addressing potential coverage for copyright infringement claims also clarify that what is significant is the manner in which liability attaches under the pertinent offense.¹²⁵

¹²²*Frog, Switch*, 193 F.3d at 750 n.8 (To adopt another approach would “conflate[] the requirement of ‘advertising injury’ as defined in the standard policy with the requirement that the injury occur in the course of advertising, with the unfortunate result [of] . . . distort[ing] standard causation principles.”).

Simply Fresh Fruit, Inc. v. Continental Ins. Co., 94 F.3d 1219, 1221 (9th Cir. (Cal.) 1996) (“In other words, any of the policy’s **enumerated advertising injuries** must be *caused by* Simply Fresh’s or P & C’s **advertising** in order to satisfy *Bank of the West*’s nexus requirement.” (bold emphasis added)).

American Econ. Ins. Co. v. Reboans, Inc., 900 F. Supp. 1246, 1253 (N.D. Cal. 1995) (holding that “in the context of the Dunhill case, the American States policy covers: (1) injuries suffered by Dunhill, (2) arising out of Reboans’ infringement of a name or designation, (3) if the infringement was committed in the course of advertising by Reboans of goods it was offering for sale.”).

Peerless Lighting Corp. v. American Motorists Ins. Co., 82 Cal. App. 4th 995, 1007-08, 98 Cal. Rptr. 2d 753, 760 (2000), addressing *Bank of the West* and defining the third element, stated, “C. *The Policy Only Covers Offenses ‘Committed in the Course of Advertising’* . . . The real issue, as we see it, is whether Peerless committed the alleged offense (infringement of trade dress) in the course of advertising its goods or services.”

B.H. Smith, Inc. v. Zurich Ins. Co., 285 Ill. App. 3d 536, 539, 676 N.E.2d 221, 223 (1996) (applying New York law) (“Zurich’s duty to defend was triggered in this case because the Claiborne complaint alleged an injury constituting an enumerated offense which occurred in the course of Smith’s advertising activities.”).

¹²³*APAC-Atlantic, Inc. v. Protection Servs., Inc.*, 397 F. Supp. 2d 792, 798 (N.D.W. Va. 2005) (“ ‘[A]rising out of’ means causally connected with, not proximately caused by.” The “arising out of” policy language requires only that the injury “originate from,” “have origin in,” or “grow out of” one or more of the enumerated “advertising injury” offenses.).

¹²⁴*Sentex Sys., Inc. v. Hartford Acc. & Indem. Co.*, 882 F. Supp. 930, 945 (C.D. Cal. 1995), *aff’d*, 93 F.3d 578 (9th Cir. 1996) (“The case law, however, does not require the advertising activities to be the only cause of the advertising injuries. Nor is the insured required to conclusively establish causation at the duty to defend stage. In determining whether a causal connection exists, courts must still apply the ‘potential for liability’ standard. . . . See also *Bank of the West*, 2 Cal.4th at 1275-1276.” (citation omitted)).

¹²⁵*Bear Wolf, Inc. v. Hartford Ins. Co.*, 819 So. 2d 818, 820 (Fla. Dist. Ct. App. 2002) (“[D]isplaying a copyrighted work at a trade show . . . would constitute a display of ‘copyrighted work publicly’ under

(3) The Causal Nexus Is Satisfied Here

Here, the AMICO policy provides that the “injury” for which the insured is being sued must “arise out of” a covered offense, such as the expressly enumerated offenses of “misappropriation of advertising ideas or style of doing business.”¹²⁶

The offense must “occur in the course of” the insured advertising its goods, products or services, such as the policyholder’s wrongful use of a third party plaintiff’s plan or concept for communicating with clients and getting their business.¹²⁷ This requires that the offense bear a causal nexus to the insured’s advertising, not that there be a causal nexus between advertising and the ultimate injury, as the Circuit Court’s Order implies. (Order 34.)

A decade-old decision readily found that unfair competition claims premised on the misrepresentation that products were patented (when only the party suing the insured could make that claim) were causally related to advertising where those claims were part of the defendant insured’s marketing approach to distinguish its products from those of the party suing it.¹²⁸ The facts here are analogous to those in *Elcom*, as well as those asserting “false designations of

the federal Copyright Act, 17 U.S.C. §§ 106(5).”).

Ryland Group, Inc. v. Travelers Indem. Co., No. A-00-CA-233 JRN, 2000 WL 33544086, at *5 (W.D. Tex. Oct. 25, 2000) (“Specifically, KFA alleged that the advertising itself infringed on the copyrights owned by KFA because the advertisements contained ‘non-pictorial depictions’ of the wrongfully appropriated copyrighted architectural plans.”).

Interface, Inc. v. Standard Fire Ins. Co., No. 1:99-CV-1485-MHS, 2000 WL 33194955, at *3 (N.D. Ga. Aug. 10, 2000) (“According to CAF’s complaint, Interface infringes its copyrights every time it displays, produces, distributes or sells carpet bearing the infringing pattern. Under the Copyright Act, infringement occurs when ‘any of the exclusive rights of the copyright owner’ are violated. 17 U.S.C. § 501.”).

¹²⁶“ ‘Advertising Injury’ means injury arising out of one or more of the following offenses . . . Misappropriation of advertising ideas or style of doing business.” (Ondos AWP MSJ Aff. ¶ 2, Exhibits “8” and “36.”)

¹²⁷*Frog, Switch*, 193 F.3d at 749-50 (“a style of doing business – a plan for interacting with consumers and getting their business”).

¹²⁸*Elcom Technologies, Inc.*, 991 F. Supp. at 1297-98 (“The statements made by Elcom in the advertising brochures attached as Exhibit ‘C’ to Phonex’s complaint were an integral part of Phonex’s false marking and false advertising claims against Elcom. The very acts Phonex complained of were part of the way Phonex operated its business. Phonex’s style of doing business was to advertise its device as the only patented product on the market. Phonex’s claims that Elcom wrongfully represented to the public that Elcom held the patents to the technology constituted allegations that Elcom usurped Phonex’s style of doing business.”).

origin,”¹²⁹ as the alleged liability inherently results from advertising the spread.

b. Injury “Arising out of” “Advertising Injury”

In *Knoll Pharm. Co.*,¹³⁰ Judge Castillo reasoned that:

The policies at issue provide coverage for advertising and personal injuries “arising out of” certain offenses [S]uch language does not restrict coverage to slander, libel or disparagement *of the underlying plaintiff*. Therefore, the policies are ambiguous as to who must be directly injured by the offenses covered in the policies. Such ambiguous contract language must be construed . . . against Defendant Insurers. . . . [T]he term “arising out of” is “broad and vague, and must be liberally construed in favor of the insured.” Both Defendant Insurers’ and Knoll’s interpretations of the policy language are reasonable. . . . [T]he coverage extends to any injuries that have their origin in the offenses enumerated in Boots’ insurance policies. . . . By employing broad definitions of the other terms in the policies issued by Defendant Insurers, an **“offense” . . . may be alleged though the underlying plaintiffs are not the direct victims of the offenses.**¹³¹

The “arising out of” policy language does not require a “causal connection” between the “advertising injury” offense and the ultimate injury, much less proof that it proximately caused the third party claim.¹³² Courts “read the ‘arising out of’ language broadly for purposes of

¹²⁹*Fidelity & Guaranty Ins. Co. v. Kocolene Mktg. Corp.*, No. IP 00-1106-C-T/K, 2002 WL 977855, at *13 (S.D. Ind. Mar. 26, 2002) (“Courts have said of claims for . . . false designation of origin under the Lanham Act that ‘[s]uch claims inherently and necessarily implicate advertising activities.’”); *Frog, Switch*, 193 F.3d at 750 n.8 (concluding that causation can be found where “the injury [is] complete in the advertisement, requiring no further conduct.”).

¹³⁰*Knoll Pharm. Co.*, 152 F. Supp. 2d at 1034, 1035 (bold emphasis added; footnote omitted).

¹³¹*Knoll Pharm. Co.*, 152 F. Supp. 2d at 1037 n.9, 1038-39 (Castillo) (“[T]he focus is not on whether the underlying allegations support an independent theory of relief, but whether any of the allegations fall within a category of wrongdoing covered by the policy. . . . [T]he underlying injury arose out of an offense the insured committed while engaging in advertising or business activities. . . . **The allegations state that Boots’ misrepresentations, made in public statements and advertisements, caused damage to the underlying plaintiffs.** . . . [Although] the causal chain between the ‘misinformation’ and the higher prices [w]as long, ‘[it was] not so long that a rational jury might not accept it.’” (emphasis added)).

¹³²*Pension Trust Fund*, 307 F.3d at 951 (“Thus, California law does not require that the insured’s conduct proximately cause the third party claim in order to trigger the defense duty. In *CNA*, several insurance companies refused to defend the insured, WSBA, in an antitrust claim because none of the policies covered antitrust actions. . . . [T]he third party alleged that WSBA had ‘[k]nowingly misappropriated . . . property interests,’ had ‘[i]ntentionally issued [misleading] statements,’ . . . ‘for the purpose of . . . maintaining the monopoly position now enjoyed by [WSBA].’ The court found that the insurers owed a duty to defend because the allegations were ‘arguably within [WSBA’s] coverage’ for . . . **idea misappropriation** Although the complaint included these allegations to support an antitrust claim, the allegations nevertheless prompted a duty to defend” (emphasis added; citations omitted)).

affording coverage”¹³³ It is not necessary that the “offense” have an inherent nexus to advertising for the “arising out of” element to be satisfied.¹³⁴ This is especially true considering that the policies here contain no provision limiting coverage to actions in which the plaintiffs were directly injured. The variety of approaches to interpreting the “arising out of” policy language merely evidences its ambiguity,¹³⁵ requiring its construction against the insurer.¹³⁶

c. Damages Because of “Advertising Injury”

The Circuit Court contends that it is problematic that “none of the damage alleged in the AWP Action is due to an ‘advertising injury.’ ” (Order 30.) Damages need only be “because of” “advertising injury,”¹³⁷ which “advertising injury” depends on injury, which “injury” need only arise out of one of the “categories of wrongdoing”¹³⁸ – here, the “advertising injury” offense of either “misappropriation of advertising ideas” or “misappropriation of style of doing business” under AMICO, Continental, and the first policies issued by Wausau. “Marketing the spread” is allegedly wrongful conduct that could create liability, which would, in turn, support damages.

¹³³*Supreme Laundry Service, L.L.C. v. Hartford Cas. Ins. Co.*, 521 F.3d 743, 749 (7th Cir. (Ill.) 2008); see *West Am. Ins. Co. v. Bedwell*, 306 Ill. App. 3d 861, 867, 715 N.E.2d 759, 763 (1999), quoting *Maryland Cas. Co. v. Chicago & N.W. Transp. Co.*, 466 N.E.2d 1091, 1094 (Ill. App. Ct.1984) (“The phrase “arising out of” is **both broad and vague**, and must be liberally construed in favor of the insured; accordingly, **“but for” causation . . . has been held to mean “originating from,” “having its origin in,” “growing out of” and “flowing from.”**” (emphasis added)).

¹³⁴The *Bank of the West* Court notes, “The other types of ‘advertising injury’ enumerated in the policy often do have a causal connection with advertising,” and then lists the policy offenses. 2 Cal. 4th at 1276.

¹³⁵(Appendix of Docketed Case in Supp. of Appellants’ Opening Brief); *Medmarc Cas. Ins. Co. v. C.R. Bard, Inc.*, Docket No. UNN-L-2435-05, at p. 3 (Superior Court of New Jersey, Union County: Law Division April 7, 2008) (“ ‘Arising out of’ is a ‘critical phrase’ in the interpretation of insurance contract[s] and is given an expansive interpretation in both coverage and exclusion provisions. . . . The *Southeast Missouri Hospital* amended complaint alleges a number of causes of action that can fairly be characterized as ‘originating from,’ ‘growing out of’ or having a ‘substantial nexus with’ Bard’s alleged disparagement of Rochester’s products.”).

¹³⁶*Murray*, 203 W. Va. at 485 n.5.

¹³⁷*Travelers Ins. Cos. v. Penda Corp.*, 974 F.2d 823, 830 (7th Cir. (Ill.) 1992) (“Because of . . . property damage” language covered litigation against insured where the plaintiff’s property was not damaged – his customer’s property was.).

¹³⁸*Curtis-Universal, Inc.*, 43 F.3d at 1122.

D. “Advertising Injury” Coverage for “Use of Another’s Advertising Idea in Your ‘Advertisement’ ”

1. “Misuse” Offense Cannot Be Limited to a Wrongful Taking

Coverage for “use of another’s advertising idea in your ‘advertisement’ ” (Wausau policy for 9/1/00 - 9/1/01) is not limited to a wrongful taking. There is nothing about the “use of another’s” policy language that would so limit its scope. The “advertising injuries” “caused by an offense, committed in the course of advertising of goods, products, and services” are the enumerated offenses that constitute “advertising injury.” They need only be committed during the policy period. It does not matter whether the ultimate injury is committed in “your advertising” because the policy language does not require this.

2. An “Advertising Idea” May Include the “Marketing the Spread” Advertising Concept

An objective evaluation of the “use of another’s advertising idea” offense reveals that it is actually broader than the prior “misappropriation” offense language since only **use** is required – the use **need not itself be wrongful** so long as the injury arises out of that use. “[T]here is nothing limiting ‘use of an advertising idea’ to a laundry list of theories or causes of action.”¹³⁹

So understood, this offense encompasses use of the “marketing the spread” advertising concept developed by Mylan’s competitors before Mylan allegedly adopted it to promote Mylan’s business. In *Albers Medical* the concept was the naming of its product as Lipitor when it was not;¹⁴⁰ for Mylan, it was allegedly characterizing its drugs as offering a better price spread on reimbursement from Medicare when the mechanism to achieve that result, “marketing the spread,” was challenged by the claimants – an alleged misuse of another’s idea for promoting

¹³⁹*Ohio Cas. Ins. Co. v. Albers Medical, Inc.*, No. 03-1037-CV-W-ODS, 2005 WL 2319820, at *4 n.5 (W.D. Mo. Sept. 22, 2005) (“The policy provides coverage if another’s advertising idea is ‘used.’ ‘Used’ does not have the same technical, defined meaning in the law as ‘misappropriation’ ‘Use’ is a common and ordinary term, capable of ready discernment. It’s [sic] reach is obviously much broader than that afforded to the legal definition of ‘misappropriation.’ . . . An ‘ “advertising idea” generally encompasses “an idea for calling public attention to a product or business, especially by proclaiming desirable qualities so as to increase sales or patronage.” ’ ” *Id.* at *4).

¹⁴⁰*Albers Medical*, 2005 WL 2319820, at *4 (“[B]y labeling a substance – regardless of its efficacy or actual chemical composition – as Lipitor . . . Albers allegedly used Pfizer’s idea for calling public/consumer attention to its product.”).

products in the marketplace.

3. “Of Another” Is Evident As Mylan Did Not Originate But Merely Used the Earlier Adopted “Marketing the Spread” Concept

The “of another” element is also readily satisfied from the allegations in the underlying complaint, as well as from findings of fact made by Judge Saris in the underlying AWP litigation. It is clear that the “marketing the spread” concept predates Mylan’s involvement and that it is but one of the alleged participants in this supposedly widespread industry practice that it did not originate.¹⁴¹

4. The “Of Another” Element Is Satisfied Because Mylan Did Not Originate the “Marketing the Spread” Concept

“Use of another’s advertising idea” requires only an idea “of another.” The language does not require that the idea “*rightfully belong*[] to someone else,” as AMICO and Continental contend. (AMICO/Continental Opp’n to Mylan Pet. for Appeal 16.) This offense has no such legitimacy requirement. Logically, the only way the “marketing the spread” concept would *not* be another’s is if Mylan had originated the concept. But Mylan did not. Nor do AMICO/Continental pretend it did. And by explicitly stating that “nearly 80 other companies[] engaged in the practice of ‘marketing the spread,’ ” AMICO/Continental concede the fact that Mylan did not originate this practice.

Mylan was not listed in the District Court’s 2003 Order.¹⁴² And in 1996, TAP Pharmaceutical was sued for its practice of “marketing the spread.”¹⁴³ TAP pled guilty and

¹⁴¹*In re Pharmaceutical Industry Average Wholesale Price Litigation*, 263 F. Supp. 2d 173, 179 (D. Mass. 2003) (“Overstatement in the reporting creates a ‘spread’ . . . between the actual cost of a drug to a health care provider, and the reimbursement paid to the provider by the federal government. It also inflates the co-payments made by consumers. Defendants actively market this ‘spread’ to providers, who are encouraged to buy drugs from defendants at the highly ‘discounted’ actual prices, and are urged to keep the reimbursement and co-payment spreads for themselves. This practice increases sales and a drug manufacturer’s market share of the drug.”).

¹⁴²*In re Pharmaceutical Industry Average Wholesale Price Litigation*, 263 F. Supp. 2d at 176 n.1 (D. Mass. 2003).

¹⁴³Dayna Bowen Matthew, *The Moral Hazard Problem with Privatization of Public Enforcement: The Case of Pharmaceutical Fraud*, 40 U. Mich. J. L. Reform 281, 309-310 (2007) (Former Vice President for Sales at TAP Douglas Durand sued TAP in 1996 and “alleged that TAP . . . marketed the spread between the discounted price physicians paid for Lupron and the inflated AWP it reported . . .”).

agreed to pay \$875 million.¹⁴⁴ Mylan could not have originated an alleged concept that another targeted pharmaceutical defendant was already using in 1996, prior to any alleged claim for wrongdoing against it.¹⁴⁵

5. “In Your ‘Advertisement’ ” Is Satisfied by Express Allegations that Mylan Advertised This Concept

There is no requirement that the injury be caused by advertising since the injury need only arise out of the offense which constitutes “advertising injury.”¹⁴⁶ While the 09/01/00 – 09/01/01 policy makes the causal nexus evident by emphasizing that the use of another’s advertising idea merely must take place “in the insured’s advertisement,” the same nexus is satisfied for the predecessor “misappropriation of advertising ideas” offense where the offense need only occur in advertising of your products. Here, where the advertising allegedly “materially contribute[d] to the injury of creating consumer confusion,” the nexus between the advertising idea and the “in your ‘advertisement’ ” policy provision is satisfied and need not involve proximate causation.¹⁴⁷

VI. THE L&C ACTIONS

A. Statement of Facts

Mylan was also named in a series of lawsuits respecting its supply and pricing of the drugs lorazepam and clorazepate (the “L&C Actions”).¹⁴⁸ The L&C Actions alleged that Mylan

¹⁴⁴*Id.* at 310.

¹⁴⁵“County Medicaid Programs spent over \$224 million for Mylan drugs from 1997-2004.” (*MDL Action* ¶ 608.)

¹⁴⁶*Central Mutual Ins. Co. v. StunFence, Inc.*, 292 F. Supp. 2d 1072, 1079 (N.D. Ill. 2003) (“Under a straightforward reading of the revised Primary Policy language, Central had a duty to defend StunFence if Gallagher claimed (as it did) that it suffered an injury that arose out of StunFence’s use of its ‘advertising idea.’ In that regard a trademark (a designation affixed to goods to identify their source) easily qualifies as an ‘advertising idea’ under the line of analysis exemplified by *Flodine* and *Winklevoss*.”).

¹⁴⁷*Lauren-Spencer, Inc.*, 500 F. Supp. 2d at 733 (“Both the Second . . . and the Third Circuit Court of Appeals have interpreted the ‘arising out of’ language as requiring the advertising to materially contribute to the injury of creating consumer confusion. But the advertisement does not need to be the only cause of the injury to trigger the duty to defend. . . . The [‘arising out of’] phrase indicates a requirement of a causal relationship but not one of proximate cause.”).

¹⁴⁸The Lorazepam and Clorazepate Litigation (“L&C Actions”) include: *State of Conn. et al. v. Mylan Laboratories, et al.*, Civ. No. 1:98-cv-03115 (TFH) (D. D.C.) (“*States Action*”); *Federal Trade*

sought to control the supply of key ingredients to manufacture lorazepam and clorazepate while falsely advertising its “fair pricing.”

FTC Action

The Federal Trade Commission (“FTC”) sued Mylan under Section 13(a) of the Federal Trade Commission Act, 15 U.S.C. § 53(a) (“FTC Act”), in the United States District Court, District of Columbia, as Case No. 1:98 CV 03114 (TFH) (“*FTC Action*”) (Ondos Aff. Exhibit “13”).

The FTC alleges that Mylan, along with other defendants, Cambrex Corporation, ProPharma Corp. SRL, and Gyma Laboratories of America, Inc., engaged in unfair methods of competition affecting commerce in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

States Attorneys General Action

Mylan was also sued in *State of Connecticut, et al. v. Mylan Laboratories, Inc. et al.*, United States District Court, District of Columbia, Case No. 1:98-cv-03115 (TFH) (“*States Action*”) (Ondos Aff. Exhibit “14”). Thirty-two states brought the action against the underlying defendants for violations of the Sherman Act, 15 U.S.C. §§ 1 and 2 and various state antitrust laws. The Attorneys General sued as *parens patriae* on behalf of natural persons, on behalf of their states’ general economies and in their sovereign capacity, and as injured purchasers or as reimbursers under state Medicaid and other programs.¹⁴⁹

The Wisconsin Third-Party Payor Action

On May 3, 1998, Mylan was sued in *United Wisconsin Servs., Inc. v. Mylan Labs, Inc.*, United States District Court, District for the District of Columbia, Case No. 1:99-cv-01082

Commission v. Mylan Laboratories, et al., Case No. 1:98 CV 03114 (TFH) (D. D.C.) (“*FTC Action*”); *St. Charles Hospital and Rehabilitation Center v. Mylan Labs, et al.*, Civ. No. 1:99-cv-00790 (D. D.C.) (“*Direct Purchaser Action*”); *United Wisconsin Services, Inc. v. Mylan Laboratories, Inc.*, Case No. 1:99-cv-01082 (D. D.C.) (“*Wisconsin Action*”); *Arkansas Carpenters Health & Welfare Fund v. Mylan Laboratories, Inc.*, Civ. No. 1:01-cv0039 (D. D.C.) (“*Arkansas Action*”); and *Health Care Services Corp. v. Mylan Laboratories Inc.*, Civ. No. 1:01cv02646 (D. D.C.) (“*Health Care Services Action*”).

¹⁴⁹The underlying defendants are the same as in the *FTC Action* except that the state complaint names an additional defendant, SST Corporation. The court entered an Order for Permanent Injunction in the *FTC Action* on February 9, 2008.

(“*Wisconsin Action*”) (Ondos Aff. Exhibit “16”). The suit was filed on behalf of third-party payors who paid for prescriptions for Lorazepam and Clorazepate, purchased between January 1, 1998 and December 31, 1999 by health benefit plan members residing in twenty states that have specific indirect purchaser statutes or case law permitting private parties to sue in this capacity.

The *Arkansas* Third-Party Payor Action

On January 25, 2001, third-party payors in thirty-one other states filed suit in the District for the District of Columbia, styled *Arkansas Carpenters Health and Welfare Fund v. Mylan Labs, Inc.*, No. 01-0159 (“*Arkansas Action*”), to settle claims that had been pending in related state court actions. (Ondos Aff. Exhibit “17.”)

These third-party payor plaintiffs had originally filed an action on December 23, 1998 in Tennessee state court, styled as *Middle Tennessee Teamsters Trust Fund v. Mylan Laboratories, Inc.*, District for the District of Columbia, No. 98-3833 (II).

The *Health Care Services* Action

On December 21, 2001, Mylan and other defendants were sued in *Health Care Services Corp. v. Mylan Laboratories, Inc., et al.*, United States District Court, District of Columbia, Case No. 1:01cv02646 (TFH) (“*Health Care Services Action*”), which asserted the same allegations as in the *FTC* and *States* Actions (from which the *Health Care Services* Action plaintiffs had opted out). (Ondos Aff. Exhibit “27.”)

98. . . . Mylan Senior Vice President Jackson sent a letter dated February 18, 1998 addressed, “**Dear Pharmacy Professional,**” which was sent to the Plaintiffs as well, stating: “**Due to the fiercely competitive nature of the generic drug industry, Mylan was faced with the difficult decision of increasing prices on [Lorazepam and Clorazepate] or discontinuing them from our product line**”

99. In the face of criticism over the huge profits it was reaping from its price increases for Lorazepam and Clorazepate, in July 1998, Mylan announced it was kicking off a “Campaign for Fair Pharmaceutical Competition.” At a news conference in Washington, D.C., CEO Puskar stated:

We’re not against fair patent protection and fair compensation for brand-name companies. *What we are against is their manipulation of U.S. law to unfairly extend patents, prevent competition and block consumer access to more affordable medicine.*

. . . .

100. On December 23, 1998, the day following the filing of the FTC Action, Patricia Sunseri, Mylan Vice President, responded in a press release:

As a Mylan executive, let me tell you the company's position on this issue.

First, Mylan has done nothing wrong. The company was faced with a tough decision over its Lorazepam and Clorazepate products: Either stop selling them or raise prices to stay in the market. We chose to stay in the market. Even after the price increases, our products cost LESS THAN HALF the brand prices -- that's a critical point the FTC has ignored. How would consumers have been helped if we simply left the market?

Second, *our exclusive agreement with one of our raw suppliers was intended to ensure an adequate and uninterrupted supply of raw material.* Mylan has faced interruptions in its raw supply for other products 18 times since 1994, a problem no company can endure without disrupting relations with its customers.

Third, such agreements are not unusual in the brand and generic industries, or any other industry for that matter.

Fourth, Mylan sells 40 percent of its 104 products at 10% or less of the prices charged by brand companies. Roughly one-third of our products sell for 1% of the brand price. In every case, we sell our products for less than half-price. And again, *we sold lorazepam and clorazepate at less than half the brand price AFTER our price increases.*

B. Issues Addressed

First, the allegations of "fair pricing" triggered potential insurance coverage under the same "advertising injury" offenses at issue for the AWP Actions.

Second, "personal injury" coverage for discrimination was also implicated by allegations of "disparate treatment" and "economic discrimination" due to Mylan's exclusive focus on these pharmaceutical products rather than a range of other products it sold.

Third, "bodily injury" coverage is implicated by the state Attorneys Generals' *parens patriae* claims that higher prices for Lorazepam and Clorazepate injured the health of individuals who could not afford and thus did not obtain these medications. These "bodily injury" claims both were "occurrences" and were not "expected or intended by the insured," as Mylan sought only to recapture its investment in these products, not to deter any consumers from their use.

VII. ARGUMENT – THE L&C LITIGATION

A. "Advertising Injury" Coverage

1. Misappropriation of Advertising Ideas

The L&C Actions include alleged statements by Mylan explaining that its “fair pricing” campaign is a way to continue to provide Lorazepam and Clorazepate at prices that were lower than those of branded pharmaceuticals. (Ondos L&C MSJ Aff. ¶¶ 12, 13.) The “fair pricing” campaign advertised Mylan’s commitment to ensuring the availability of Lorazepam and Clorazepate. “Fair Pricing” is an advertising concept that falls within the offense of “misappropriation of an advertising idea” where it is understood to include misuse of “any idea or concept related to the promotion of a product to the public.”¹⁵⁰

The Circuit Court failed to apply the potentiality rule in accord with West Virginia law, stating: “At most, the fair pricing campaign embarked upon by Mylan can be viewed as a ‘dissemination or disclosure of wrongful conduct’ as Mylan’s exorbitant increase in pricing is characterized in the L&C complaints.” (Order 34.) This analysis is deficient for the same reasons outlined in the above analysis of the AWP Actions.

These allegations cannot be dismissed simply because they are not the gravamen of the action,¹⁵¹ which focuses on pricing manipulation. Mylan’s statements to the public about the reasons for its price increases constitute actionable conduct, distinct from the earlier complaints about its pricing practices, thus invoking a duty to defend.¹⁵² Otherwise, claims of alleged wrongdoing by, for example, the White House in Watergate or Martha Stewart in the securities litigation against her would have been dismissed since the claims addressed only a “cover-up.”

2. Misappropriation of Style of Doing Business

¹⁵⁰*Factfinder Marketing Research, Inc.*, 860 N.E.2d at 152; *see Murray*, 203 W. Va. at 485 n.5.

¹⁵¹*Curtis-Universal*, 43 F.3d at 1122 (“Nor is the insurer allowed to escape from his duties of defense and indemnification by reference to the core or dominant character of the plaintiff’s allegations.”); *Swiderski Electronics*, 223 Ill. 2d at 363 (There is a duty to defend, “**even if only one** of several theories of recovery alleged in the complaint falls within the potential coverage of the policy.” (emphasis added)).

¹⁵²*Sun Electric Corp. v. St. Paul Fire & Marine Ins. Co.*, No. 94-C-5846, 1995 WL 270230, at *5 (N.D. Ill. May 4, 1995) (Castillo) (“[T]he complaint ‘need not allege or use language affirmatively bringing the claims within the scope of the policy’ Envirotec alleged that Plaintiffs published statements claiming that: (1) SCI is more experienced than its competitors Although these allegations were offered to prove claims other than commercial disparagement, . . . the applicable law requires St. Paul to defend plaintiffs even if a portion of the allegations, construed liberally and read as a whole, fall within the covered provisions of the policies. **A claim for relief is not essential; only the allegations in the complaint must fall within the covered provisions.**” (emphasis added)).

As in its discussion of the AWP litigation, the Circuit Court referenced but did not analyze this distinct offense for potential coverage. The L&C allegations suggested that Mylan implemented a business methodology constituting a “style of doing business.” The L&C allegations assert that Mylan was engaged in a “misuse of the style of doing business,” i.e., Mylan allegedly manipulated a pricing scheme and engaged in false advertising.

3. Advertising and the Causal Nexus to the “Advertising Injury” Offense

The L&C Actions referred to conduct manifested in press releases that were widely disseminated to the public. This amounts to advertising under any possible definition. *Health Care Service Action* ¶ 100 (Ondos Aff. Exhibit “27.”)

The Circuit Court suggested that there must be a “nexus between [‘advertising injury’] and the ‘advertising activity,’ ” which it claimed requires a “causal connection between the activity and the injury.” (Order 34.) Yet, the policy language only requires a causal connection between advertising and the offense at issue. Here, those “advertising injury” offenses are “misappropriation of advertising ideas” and “misappropriation of style of doing business.” Both offenses readily encompass a “fair pricing” campaign, thus establishing the requisite nexus.

Mylan’s alleged misuse of a “fair pricing” campaign occurred in the course of advertising. The claimants allege that Mylan sought to cover up its exclusive license to purchase the key ingredients for Lorazepam and Clorazepate by claiming that it was engaged in “fair pricing” since its pricing reflected higher ingredient prices in the market and fierce competition. Falsely advertising “fair pricing” is a form of unfair competition. The press releases asserting “fair pricing” of the L&C products were part and parcel of this advertising. These allegations then are a “misdescription” or “misuse” of an “advertising idea,” i.e., that Mylan’s pricing was fair and was driven by market pressures, not by improper exclusive licensing to purchase the key ingredients for lorazepam and clorazepate.

The claimants in the L&C Actions allege that liability arises from the content of Mylan’s widely disseminated communications to potential customers. (Ondos L&C Aff. ¶¶ 12-13, 20.) The same fact allegations that satisfy element one (advertising) also satisfy element three – a

causal nexus between the “advertising injury” offense and advertising.

B. “Bodily Injury” Coverage

1. Bodily Injury

Wausau’s policy also provides coverage for “bodily injury” that is “caused by an ‘occurrence.’ ” (Ondos L&C Aff. ¶ 2.) The Circuit Court suggested that no “[bodily injury] claims are alleged in the L&C suits.” (Order 35.) Yet, the L&C Actions expressly allege that Mylan’s actions caused bodily injury.

Various individual consumers of lorazepam and clorazepate were allegedly unable to pay for their drugs due to Mylan’s price increases:

As a result of these substantial and unprecedented agreements and price increases for lorazepam and clorazepate tablets, many purchasers, including . . . patients, consumers and others, have paid substantially higher prices. Moreover, some patients may have stopped taking lorazepam and clorazepate tablets altogether, or been forced to reduce the quantity they take, because they cannot afford them.¹⁵³

The L&C Actions further alleged that because people could not afford the drugs, they suffered damage to their health, thus inflicting bodily injury:

The acts and practices of the Defendants as herein alleged have had the purpose or effect, or the tendency or capacity, to restrain competition unreasonably and to injure competition within each State and throughout the United States in the following ways, among others:

Depriving consumers of access to needed pharmaceuticals and thereby injuring their health.¹⁵⁴

The Actions clearly allege that individuals suffered damage to their health due to Mylan’s price increases.¹⁵⁵ The plaintiffs in the L&C Actions, who must pay for increased lorazepam and clorazepate pharmaceutical costs, sought relief as *parens patriae* on behalf of the impacted

¹⁵³States Action ¶ 39 (Ondos Aff. Exhibit “14”); FTC Action ¶ 31 (Ondos Aff. Exhibit “13”).

¹⁵⁴States Action ¶¶ 44, 48 (Ondos Aff. Exhibit “14”); FTC Action ¶ 35(c) (Ondos Aff. Exhibit “13”).

¹⁵⁵*Taylor-Hurley v. Mingo County Bd. of Educ.*, 209 W. Va. 780, 785, 551 S.E.2d 702, 707 (2001) (West Virginia courts have discretion to draw inferences from facts.); *State Bancorp*, 199 W. Va. at 104 (“[T]here is no requirement that the facts alleged in the complaint against the insured specifically and unequivocally delineate a claim which if proved, would be within the insurance coverage.”).

individuals who use these drugs.¹⁵⁶

It does not matter that the “gravamen” of the complaint is for “economic injury.”¹⁵⁷ The crucial question is whether the claims against Mylan are reasonably susceptible of falling within the policy coverage.¹⁵⁸ To reach the conclusion it did, the Circuit Court would need to find that there were no circumstances under which the fact allegations of bodily injury could create potential liability for the same. The fact that the underlying plaintiffs did not specify the damage inflicted upon individual’s health in their claims for relief does not negate Wausau’s defense duty. Since Mylan allegedly injured the health of individuals, there was a possibility that Mylan might owe damages for those injuries. This is enough to trigger Wausau’s defense duty under “bodily injury” coverage.

2. The “Expected or Intended” Limitation

Wausau contends that the “expected or intended” exception applies here. (Wausau Opp’n to Mylan Pet. for Appeal 21-22.) The exclusion provides that the insurance “does not apply to: (a) Expected or intended injury, ‘Bodily injury’ . . . expected or intended from the standpoint of the insured.”¹⁵⁹ The Circuit Court suggested that coverage was precluded because “Mylan’s increasing of the prices of its drugs was an intentional act.” (Order 35.)

But Wausau and the Circuit Court overlook the fact that this exclusion only applies when the insured commits an intentional act *and* the resulting injury was expected or intended. *Tackett*, 213 W. Va. at 535. The “mere act of doing an intentional act by the insured does not relieve the insurer where the resultant injuries were unintended.” *Id.*

The express policy language requires that the intentionality of the injury be evaluated

¹⁵⁶In the *States Action*, for instance, the Attorneys General of thirty-two states filed the action as *parens patriae*, “a doctrine by which a government has standing to prosecute a lawsuit on behalf of a citizen.” BLACK’S LAW DICTIONARY 1144 (8th ed. 2004). This Action alleged that Mylan’s purportedly wrongful actions resulted in injury to the health of those citizens the Attorneys General represent.

¹⁵⁷*Pitrolo*, 176 W. Va. at 194 (An insurance company is obligated to provide a defense “even though the suit is groundless, false, or fraudulent.”).

¹⁵⁸*State Bancorp*, 199 W. Va. at 104.

¹⁵⁹Wausau Policy No. 0527-00-101388. (Ondos L&C Aff. ¶ 2.)

from the “standpoint of the insured.” For the exclusion to apply, Mylan would have had to subjectively intend the injuries to occur. Wausau presented no evidence of this. Instead, Wausau tried to eschew its burden¹⁶⁰ by instructing the court to use an objective standard rather than the requisite subjective standard.

Wausau argues that “any reasonable person would necessarily expect” the resulting injury and thus, that coverage is precluded given the “reasonable expectations” doctrine. (Wausau Opp’n to Mylan Pet. for Appeal 22.) This conclusion mischaracterizes the “reasonable expectations” doctrine and tries to transform a subjective standard into an objective, “reasonable” person standard. The doctrine of reasonable expectations simply provides that insureds’ “reasonable expectations . . . regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations.” *Horace Mann Ins. Co. v. Leeber*, 180 W. Va. 375, 381, 376 S.E.2d 581, 587 (1988). This doctrine is unrelated to the subjective standard that must be applied here.¹⁶¹

There is no allegation in the L&C complaints that Mylan subjectively intended to cause the purported injury to individuals’ health.¹⁶² It is a logical fallacy to suggest that because Mylan is alleged to have intentionally restrained competition, it must have also intended to deprive consumers of needed medications and in so doing, intended to injure consumers’ health. This extenuated assumption would require that every injury be barred from coverage by this exclusion since every injury is ultimately traceable to some act of free will by the insured.

Wausau relies on a misunderstanding of the two cases it presents as support. Wausau

¹⁶⁰*Smith v. Sears, Roebuck & Co.*, 191 W. Va. 563, 565, 447 S.E.2d 255, 257 (1994) (“An insurance company seeking to avoid liability through the operation of an exclusion has the burden of proving the facts necessary to the operation of that exclusion.”).

¹⁶¹*Cook*, 210 W. Va. at 400 (“When an intentional acts exclusion uses language to the effect that insurance coverage is voided when the loss was ‘expected or intended by the insured,’ courts must use a subjective rather than objective standard for determining the policyholder’s intent.”).

¹⁶²*Columbia Cas. Co. v. Westfield Ins. Co.*, 217 W. Va. 250, 254, 617 S.E.2d 797, 801 (2005) (Deaths by suicide of inmates were not deliberate, intentional, expected, desired or foreseen by insured, Randolph County Commission. Thus, they constitute an “accident” as “weight should be given to the perspective of the insured [and] . . . doubts regarding insurance coverage [resolved] in favor of an insured.”).

cites *State Bancorp, Inc. v. United States Fid. & Guar. Ins. Co.*, 199 W. Va. 99, 107 as support for its contention that the exclusion should apply here. (Wausau Opp'n to Mylan Pet. for Appeal 21.) Yet, it misleadingly parsed the court's opinion. The *State Bancorp* court did not engage in any analysis of the exclusion. It simply stated that there are several approaches to determining the degree to which an insured must have intended the injury.¹⁶³ Here, however, the complaints did not allege that Mylan specifically intended its acts to injure individuals' health. Thus, *State Bancorp* is inapplicable.

The other case relied on by Wausau, *Horace Mann*, 180 W. Va. at 381, is also inapposite. (Wausau Opp'n to Mylan Pet. for Appeal 21-22.) By citing to *Horace Mann*, Wausau wants to suggest that an insured's intent is inferred. But the court's holding is limited to sexual misconduct. The *Horace Mann* court held that the insured's intent to injure can be inferred in the context of sexual misconduct liability insurance because sexual misconduct specifically is "so *inherently* injurious" and directly inflicts bodily injury. *Id.* at 379. The same does not hold true here.

C. "Personal Injury" Coverage for "Discrimination" Is Implicated

For the reasons previously asserted in Mylan's discussion of the AWP Actions, "discrimination" includes forms of disparate treatment like "economic discrimination." The allegations in the L&C Actions implicate "personal injury" coverage for discrimination as claimants allegedly paid too much for only two drugs, lorazepam and clorazepate. Mylan allegedly selected these drugs because they are used to treat patients with chronic medical conditions (thus requiring long-term use), as opposed to drugs used to treat acute (short-term) conditions.¹⁶⁴

¹⁶³199 W. Va. at 107 n.9 ("We recognize that courts have taken different approaches when determining how specifically the insured must have 'intended' the resulting injury. . . . However, in the case before us, we need not delve into the type of intent that is necessary for the 'intentional injury' exclusion to apply, because under any of the above tests . . . [i]t is clear that the [underlying plaintiffs'] complaint alleges that the appellees specifically intended for their acts to injure the [underlying plaintiffs] in the manner in which [they] were injured.").

¹⁶⁴*States* Action ¶ 18, *FTC* Action ¶ 15 ("Lorazepam and clorazepate are two of the approximately 91 generic drugs that Mylan currently manufactures and sells in tablet form. . . . Because lorazepam is used

All that is required to trigger a defense under Federal's policy language is that the injury allegedly arise out of the discrimination. The injury to ultimate consumers need only be a result, not the *sole* result, of allegedly wrongful conduct – here, discriminatory conduct. The motivation behind the alleged discriminatory activity is immaterial. Mylan's alleged focus on L&C drugs, out of all other drugs, was discriminatory.

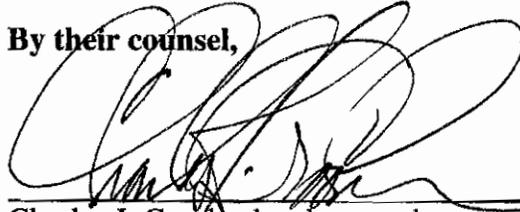
VIII. RELIEF REQUESTED

For all the reasons referenced above, a duty to defend arose in the AWP and L&C Actions. This Court should therefore reverse the Circuit Court's order, entering an order that a defense is due and thereby granting Mylan's partial summary judgment motion re same.

Dated: December 9, 2008

**MYLAN LABORATORIES INC., MYLAN
PHARMACEUTICALS INC., and UDL
LABORATORIES, INC.**

By their counsel,



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Mylan Laboratories Inc., Mylan Pharmaceuticals Inc. and UDL Laboratories, Inc.

to treat chronic conditions and is heavily prescribed for nursing home and hospice patients, lorazepam users tend to stay on the drug for longer periods of time.”).

BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**MYLAN LABORATORIES INC., MYLAN
PHARMACEUTICALS INC., and UDL
LABORATORIES, INC.,**

Appellants / Plaintiffs Below,

APPEAL NO. 34402

vs.

Civil Action No.: 07-C-69

**AMERICAN MOTORISTS INSURANCE CO.,
CONTINENTAL INSURANCE CO., WAUSAU
INSURANCE CO., FEDERAL INSURANCE
CO., and GREAT AMERICAN INSURANCE
CO.,**

Appellees / Defendants Below.

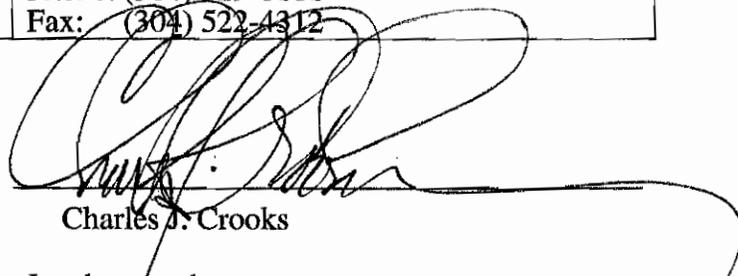
CERTIFICATE OF SERVICE

I, Charles J. Crooks, do hereby certify that I caused the foregoing “**APPELLANTS’
OPENING BRIEF ON BEHALF OF MYLAN LABORATORIES INC., MYLAN
PHARMACEUTICALS INC., and UDL LABORATORIES, INC.**” to be served upon the
following counsel, via U.S. Mail to each, this **9th day of December, 2008**.

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