

BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

Appellants/Plaintiffs Below,

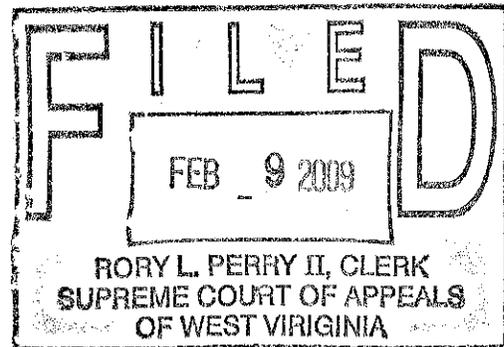
APPEAL NO. 34402

v.

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.



BRIEF OF APPELLEES AMERICAN MOTORISTS INSURANCE COMPANY
AND CONTINENTAL INSURANCE COMPANY

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**BRIEF OF APPELLEES AMERICAN MOTORISTS INSURANCE COMPANY
AND CONTINENTAL INSURANCE COMPANY**

The Appellants, Mylan Laboratories, Inc., Mylan Pharmaceuticals, Inc., and UDL Laboratories, Inc. (collectively “Mylan”), seek the reversal of a judgment entered by the Circuit Court of Monongalia County after the parties filed cross-motions for summary judgment. The Honorable Robert B. Stone held that Mylan was not entitled to certain insurance coverage for two groups of lawsuits. One of these groups (the “Average Wholesale Price Litigation” or “AWP Actions”) alleged that Mylan intentionally misrepresented the prices of its drugs and engaged in a fraudulent scheme to obtain inflated Medicare/Medicaid and insurance reimbursement. The other group (the “Lorazepam & Chlorazepate Litigation” or “L&C Actions”) alleged that Mylan intentionally pursued an anticompetitive strategy in violation of antitrust law to increase the profitability of two particular drugs. Judge Stone determined that these claims did not implicate the “advertising injury,” “bodily injury,” or “personal injury” coverage provided by several of Mylan’s insurers. Because his decision correctly applied well-established principles of law to facts that were not disputed, this judgment should be affirmed.

In the proceedings below, Mylan named multiple insurers as defendants. In order to avoid burdening the Court with duplicative briefing, the present Brief is jointly filed on behalf of two insurers, American Motorists Insurance Company (“AMICO”) and Continental Insurance Company (“Continental”), that were alleged to have a duty to defend the AWP Actions under their “advertising injury” coverage. As to these insurers, Mylan relied on policy language providing coverage for one particular offense – namely, “misappropriation of advertising ideas or style of doing business.” Mylan alleged that AMICO and Continental had coverage solely for the AWP Actions (not the L&C Actions) and that coverage existed solely under their

“advertising injury” coverage (and not for “personal injury,” “bodily injury,” or any other coverage).

For the reasons discussed herein, Judge Stone was correct in ruling that the AWP Actions did not include any claim that could impose liability for “misappropriation of advertising ideas or style of doing business.” The AWP Actions did not claim that Mylan wrongfully took an advertising idea or style of doing business that rightfully belonged to someone else. Rather, the suits alleged that Mylan engaged in an illegal fraudulent scheme – to which no company can claim a legitimate right – and the complaints raised no claim that any particular company originated the scheme and was deprived of any right to that concept. The AWP Actions were thus devoid of any claim involving “misappropriation” of an “advertising idea or style of doing business” and injury due to any such offense. Therefore, the AWP Actions did not meet the threshold requirements to trigger a duty to defend. The Circuit Court, after thoughtful analysis of voluminous briefs and extensive oral argument, properly granted summary judgment under these circumstances.

In addition, even if Mylan were correct that Judge Stone erred in ruling that the AWP Actions did not satisfy the threshold requirements for coverage, Mylan would be incorrect in arguing that this Court should simply reverse and “enter[] an order that a defense is due and thereby grant[] Mylan’s partial summary judgment motion re same.” Appellants’ Opening Brief (hereinafter “Opening Brief” or “Br.”), at 48. The defendant insurers raised additional defenses in the Circuit Court – including exclusions directly on point – that the Circuit Court did not reach in light of its threshold rulings. This Court therefore may affirm the Circuit Court’s ruling on these grounds or, at a minimum, remand the matter for consideration of these additional (and dispositive) coverage defenses.

I. RESPONSE TO MYLAN'S DESCRIPTION OF CIRCUIT COURT'S RULING AND STATEMENT OF THE CASE

In accordance with Rule 10(d), AMICO and Continental hereby call the Court's attention to certain inaccuracies and omissions in Mylan's statement of the case and description of the Circuit Court's ruling.

A. Mylan Inaccurately Describes The Circuit Court's Ruling

Mylan's Opening Brief asserts that "the Circuit Court did not make findings of fact" and only referenced facts that it deemed pertinent to its conclusions. Br., at 2. In reality, the Circuit Court's order set forth 25 pages of "Factual Findings." See February 8, 2008 Order Granting Defendants' Motions for Partial Summary Judgment on the Duty to Defend and Denying Plaintiffs' Cross-Motions for Summary Judgment on the Duty to Defend (hereinafter "Order"), at 3 - 28. This portion of the Order included specific findings with respect to the terms of the insurance policies at issue, as well as to the specific allegations made against Mylan in the AWP Actions and the L&C Actions. Mylan's claim to the contrary is flatly incorrect.

Mylan's Opening Brief also omits any discussion of the manner in which the Circuit Court decided the issues before it. After Mylan filed a motion for partial summary judgment in May 2007 with respect to the AWP Actions, the Circuit Court entered a scheduling order that set a timetable for the insurer defendants to file cross-motions for summary judgment and for all parties to engage in full briefing. After receiving voluminous briefing on the cross-motions, the Circuit Court on August 30, 2007 heard extensive argument from the parties and took the motions under advisement. It issued a letter opinion on October 22, 2007 and subsequently entered an Order dated February 8, 2008 that granted the defendants' motions and denied Mylan's motions.

In its ruling, the Circuit Court examined whether the claims in the AWP Actions could

impose liability within the coverage of the insurers' policies. It started with the threshold requirements for coverage as set forth in the policies' insuring agreements. With respect to the "advertising injury" coverage, it found that the AWP Actions did not satisfy multiple requirements for coverage.

The Circuit Court expressly noted that the insurers' motions had raised additional reasons why coverage did not exist for the claims at issue, including certain exclusions and conditions of the policies. Because it had determined that the claims against Mylan did not satisfy the threshold requirements for coverage under the policies' insuring agreements, Judge Stone's Order stated that "the Court need not address" these additional issues. *See, e.g.*, Order, at 31 (stating with respect to the AWP Actions that "the Court need not address the issue of whether the claims fall within any named exclusions provided for in the policies"); at 33 (stating with respect to the AWP Actions that "[t]he Court need not and does not reach the question of whether public policy prohibits insurance for discrimination"). In keeping with this approach, the Circuit Court did not reach the merits of these additional defenses.

B. Mylan Fails To Provide A Full And Accurate Description Of The Claims Made Against It In The AWP Actions

Surprisingly, although it accuses the Circuit Court of not paying attention to the allegations in the AWP Actions (which consisted of over 50 actions filed in jurisdictions around the country), Mylan spends little time in its own Opening Brief discussing the claims that were actually made against it. Because the Circuit Court's judgment did in fact rest on a careful consideration of these allegations, Mylan's cursory description of these claims fails to give an accurate statement of highly relevant facts. In particular, Mylan seeks to gloss over three significant aspects of the AWP Actions.

1. The AWP Actions Alleged Intentional Misrepresentation and a Fraudulent Scheme to Obtain Inflated Payments from Medicaid, Medicare, and Other Payors

First, Mylan says little about the central allegation in the AWP Actions -- that Mylan and the other defendants engaged in a fraudulent scheme to misrepresent drug prices and obtain inflated reimbursement from Medicaid, Medicare, and other payors.¹ By way of background for these claims, the complaints at issue described the market in which Mylan and other defendants sold their drugs as follows:

The drugs themselves are manufactured by enormous and hugely-profitable companies such as defendants. Defendants sell the drugs . . . to physicians, hospitals, and pharmacies. These . . . providers then, in essence, resell the drugs to their patients when the drugs are prescribed for, administered or dispensed to those patients. Most patients have private or public health-insurance coverage. When a patient has such insurance, the price that is paid for the patient's prescribed drug ultimately will be paid . . . by a private insurance company, a self-insured entity, or a government entity (in the case of Medicare and Medicaid programs) . . . More often than not, the payer will make the reimbursement payment directly to the provider, not the patient.²

The AWP Actions alleged that when Medicaid and other payors determined the amount of reimbursement they would pay to providers, they did so based on the "Average Wholesale Price" or "AWP."³ The Average Wholesale Price was defined as the average price paid by providers to

¹ Although the allegations in the AWP Actions are substantially similar, the time periods in which Mylan is alleged to have engaged in this scheme vary from complaint to complaint. Mylan did not show in the Circuit Court which insurance policy, if any, is applicable to which AWP Action.

² Complaint, *State of Illinois v. Abbott Labs.*, No. 05CH02474 (Cook County, Illinois Circuit Court) (hereinafter "Illinois Compl."), ¶40. The complaints from the underlying AWP Actions cited herein were submitted to the Circuit Court as exhibits to Mylan's Complaint and Motion for Partial Summary Judgment Regarding Duty to Defend Average Wholesale Price Litigation, and/or as exhibits to the Affidavit of Donald Sonlin in Support of Federal Insurance Company's Cross-Motions for Partial Summary Judgment on the Duty to Defend the L&C Lawsuits and the AWP Lawsuits.

³ See, e.g., Complaint, *State of Alabama v. Abbott Labs., Inc.*, CV-05-219 (Circuit Court of Montgomery County, Ala.) (hereinafter "Alabama Compl."), ¶100; [Corrected] Consolidated Complaint, *In re Pharmaceutical Industry Average Wholesale Price Litigation*, MDL No. 1456, Civil Action No. 01-CV-12257-PBS (D. Mass.) (hereinafter "MDL Compl."), ¶5; Illinois Compl., ¶47.

pharmaceutical wholesale suppliers such as Mylan.⁴ The AWP was published by several industry publishing services based wholly on information supplied by the drugs' manufacturers.⁵

According to the complaints, Mylan and the other defendants engaged in a scheme to submit intentionally false and inflated pricing information to the publishing services.⁶ They allegedly did so knowing that their false information would cause the services to publish similarly inflated AWP's for their drugs, and knowing that Medicaid and other payors would rely on the AWP to set the amount of reimbursement they paid to providers.⁷ The end result, according to the complaints, was the publication of "phony" AWP's that caused Medicaid, Medicare, and others to pay excessive amounts.⁸

The alleged purpose of this scheme was to create a difference -- or "spread" -- between the fraudulently created AWP (used by Medicaid and others when paying reimbursement) and the true, lower price that the defendants actually charged the providers.⁹ The defendants allegedly "marketed the spread" to providers by pointing out the difference between the drugs' actual cost and the inflated reimbursement the providers would receive, and thus the potential for significant profit.¹⁰ This practice, according to the complaints, offered providers who used the

⁴ MDL Compl. ¶5; Alabama Compl. ¶100; Illinois Compl. ¶46.

⁵ First Amended Complaint, *Commonwealth of Massachusetts v. Mylan Labs.*, Civil Action No. 03-CV-11865-PBS (D. Mass.) (hereinafter "Mass. Compl."), ¶31; MDL Compl. ¶85.

⁶ See, e.g., Complaint, *Thompson v. Abbott Labs., Inc.*, Case No. CGC-02-411813 (Super. Ct., City and County of San Francisco) (hereinafter "Thompson Compl."), ¶¶12, 73; Mass. Compl., ¶49.

⁷ See, e.g., MDL Compl., ¶¶9, 12.

⁸ Illinois Compl., ¶64; MDL Compl., ¶130.

⁹ See Illinois Compl., ¶49; MDL Compl., ¶9.

¹⁰ Illinois Compl., ¶50; Thompson Compl., ¶4; Alabama Compl., ¶108.

defendants' products an "illegal kickback,"¹¹ a "bribe,"¹² and an "unlawful," "improper," and "powerful financial incentive."¹³ These providers, in turn, were "able to increase demand for a defendants' drugs and to select that defendant's drugs over competing drugs."¹⁴ By these means, the defendants are alleged to have increased their own market share and profits at the expense of Medicaid, Medicare, and others.

The AWP Actions alleged that nearly 80 of the nation's leading pharmaceutical companies engaged in these fraudulent practices.¹⁵ The complaints state that misrepresenting and inflating AWP was "a far-reaching and widespread scheme in the pharmaceutical industry."¹⁶ Indeed, according to the allegations, the practice was so widespread that it was the "'standard' and 'typical' industry practice."¹⁷

2. The AWP Actions Were Brought on Behalf of States, Political Subdivisions, and Others Who Paid Drug Reimbursement

Second, it should be noted that the AWP Actions were brought on behalf of a variety of states, counties, and other payors. These plaintiffs alleged that they were harmed because they made payments to healthcare providers based on the inflated AWP – and were thereby overcharged by very substantial amounts – while Mylan and other defendants reaped increased profits. The AWP plaintiffs did not allege that "marketing the spread" was an idea that belonged

¹¹ First Amended Complaint, *State of Mississippi v. Abbott Labs., Inc.*, Civil Action No. 62005-2021 (Chancery Ct. of Hinds Co., Miss.) (hereinafter "Miss. Compl."), ¶9; Mass. Compl., ¶51.

¹² MDL Compl., ¶12.

¹³ MDL Compl., ¶12; Illinois Compl., ¶68.

¹⁴ Illinois Compl., ¶12.

¹⁵ See, e.g., MDL Compl., ¶¶34-73.

¹⁶ See Alabama Compl., ¶115.

¹⁷ See, e.g., Illinois Compl., ¶52; Miss. Compl., ¶8.

to them and was wrongfully taken. They did not allege it was an idea that was owned by a particular company, or could even be legitimately used by any company. To the contrary, the allegation underlying all of their claims was that the defendants' conduct in "marketing the spread" was illegitimate, improper, and illegal.

3. The AWP Actions Alleged a Concealed, Secretive Type of Marketing

Third, according to the allegations in the AWP Actions, while the defendants "marketed the spread" to providers, they did not disclose that information to the public. Rather, Mylan and the other defendants allegedly acted to conceal that information.

According to the complaints, Mylan and the other defendants allegedly engaged in schemes to "conceal the true price of their drugs" and "hide the true price" of their products, as well as ensuring that providers had incentives "to keep defendants' scheme secret."¹⁸ The underlying complaints also allege Mylan engaged in a variety of practices to conceal its fraudulent AWP reporting, including the use of differential pricing.¹⁹ Mylan's use of differential pricing allegedly prevented the underlying plaintiffs from discovering sooner that they were consistently reimbursing medical providers and pharmacies more than they should have for Mylan's products. Furthermore, the complaints state that the defendants "long have deliberately concealed that they marketed the spread" and "have deliberately concealed that the reason they cause false and inflated AWPs to issue is to create spreads between actual costs and

¹⁸ Illinois Compl., ¶¶59, 60, 65; Alabama Compl., ¶124; Mass. Compl., ¶33.

¹⁹ See, e.g. Illinois Compl., ¶62 ("Third, defendants further obscure the true prices for their drugs with their policy of treating different purchasers differently. Thus, for the same drug, pharmacies are given one price, hospitals another, and doctors yet another.").

reimbursement amounts.”²⁰ The defendants’ “fraudulent promotional, marketing and sales practices” were allegedly conducted systematically and “secretly.”²¹

C. Mylan Fails To Provide A Full And Accurate Description Of The Policy Provisions At Issue

In addition to omitting a full account of the claims in the AWP Actions, Mylan’s statement of facts does not provide a straightforward description of the insuring agreements at issue. The specific provisions contained in the AMICO and Continental policies are as follows:

b. This insurance applies to:

...

(2) “Advertising injury” caused by an offense committed in the course of advertising your goods, products or services;

but only if the offense was committed in the “coverage territory” during the policy period.

SECTION V - DEFINITIONS

1. “Advertising injury” means injury arising out of one or more of the following offenses:

- a. Oral or written publication of material that slanders or libels a person or organization or disparages a person’s or organization’s goods, products, or services;
- b. Oral or written publication of material that violates a person’s right of privacy;
- c. **Misappropriation of advertising ideas or style of doing business;**
- d. Infringement of copyright, title or slogan.

²⁰ MDL Compl., ¶13.

²¹ Mass. Compl., ¶1.

Order, at 3-5 (emphasis added).²² As noted earlier, with respect to AMICO and Continental, Mylan relies solely on the contention that the AWP Actions implicate the “misappropriation of advertising ideas of style of doing business” offense.

II. CONCISE RESPONSE TO MYLAN’S ASSIGNMENTS OF ERROR

Mylan’s Opening Brief lists five reasons why it contends the Circuit Court’s order should be reversed. Although not all of these reasons specify how Judge Stone allegedly erred, AMICO and Continental hereby provide a concise statement in response to Mylan’s points in accordance with Rule 10(d). These points will also be addressed in more detail in Part III.

First, Mylan asserts that the Circuit Court did not apply the proper standard for deciding an insurer’s duty to defend under West Virginia law. Br., at 1-2.²³ However, citing *Aetna Casualty & Surety Co. v. Pitrolo*, 176 W.Va. 190, 342 S.E.2d 156 (1986), *State Auto Mutual Insurance Co. v. Alpha Engineering Services, Inc.*, 208 W.Va. 713, 542 S.E.2d 876 (2000), and *Farmers & Mechanics Mutual Fire Insurance Co. of West Virginia v. Hutzler*, 191 W.Va. 559, 447 S.E.2d 22 (1994), the Circuit Court applied the standards set forth in this Court’s decisions. Specifically, Judge Stone recognized that “[t]he general rule in West Virginia is that an insurer’s duty to defend is tested by whether the allegations of the complaint are reasonably susceptible of an interpretation that the claim may be covered by the terms of the insurance policy” and that “[a]n insurer has a duty to defend an action against its insured only if the claim stated in the underlying complaint could, without amendment, impose liability for risks the policy covers.”

²² As found by the Circuit Court, AMICO issued policy number 3YM 851 972-01, effective July 1, 1991 to July 1, 1992, and policy number 3YM 851 972-02, effective July 1, 1992 to September 1, 1993; Continental issued policy number 15CBP06156061-94, effective September 1, 1993 to September 1, 1994, and policy number 15CBP06156061-95, effective September 1, 1994 to September 1, 1995.

²³ In the Circuit Court, AMICO and Continental urged that Pennsylvania law applied, but the court ruled otherwise. AMICO and Continental do not agree with this aspect of the Circuit Court’s ruling, but as non-aggrieved parties they have not sought leave to appeal. If the case is remanded, AMICO and Continental reserve their rights with respect to this issue.

Order, at 28-29; *see Pitrolo*, 176 W.Va. at 194, 342 S.E.2d at 160; *Alpha Eng'g Servs.*, 208 W.Va. at 716, 542 S.E.2d at 879.²⁴ These statements are accurate descriptions of West Virginia law and the Circuit Court thus applied the proper standards.²⁵

Second, Mylan claims that the Circuit Court did not make findings of fact. Br., at 2. As discussed earlier, this claim is false. Judge Stone made 25 pages worth of explicit findings on the critical points required by West Virginia law – the terms of the insurance policies and the claims that were actually made against Mylan in the AWP Actions – and gave careful consideration to these matters.

Third, Mylan suggests that the Circuit Court relied on “labels of causes of action” rather

²⁴ These standards also have been reiterated in the Court’s recent decisions. *See, e.g., Aluise v. Nationwide Mut. Fire. Ins. Co.*, 218 W.Va. 498, 507-08, 625 S.E.2d 260, 269-70 (2005) (citing *Pitrolo* and stating that “[a]s a general rule, an insurer’s duty to defend is tested by whether the allegations in the plaintiffs complaint are reasonably susceptible of an interpretation that the claim may be covered by the terms of the insurance policy”); *Bowyer v. Hi-Lad, Inc.*, 216 W.Va. 634, 651, 609 S.E.2d 895, 912 (2004) (stating that “[a]n insurance company has a duty to defend an action against its insured if the claim stated in the underlying complaint could, without amendment, impose liability for risks the policy covers”).

²⁵ Mylan selectively quotes part of a sentence from the Order and, ignoring the statement’s context, argues that the Circuit Court applied the wrong legal standard. *See* Br., at 7 (arguing that “[c]ontrary to the Circuit Court’s analysis, the underlying actions need not ‘specify a cause of action covered by a particular policy’”). However, the Order’s complete statement is as follows:

The general rule in West Virginia is that an insurer’s duty to defend is tested by whether the allegations in the plaintiffs’ complaint are reasonably susceptible of an interpretation that the claim may be covered by the terms of the insurance policy. An insurer has a duty to defend an action against its insured only if the claim stated in the underlying complaint could, without amendment, impose liability for risks the policy covers. The Court rejects Mylan’s assertions that, because complaints may be amended even following trial, coverage should be afforded despite the fact that the complaints in the underlying actions do not adequately specify a cause of action covered by a particular policy.

Order, at 28-29 (citations to *Pitrolo*, *Alpha Engineering*, and *Hutzler* omitted). Thus, when read in context, the Circuit Court’s statement that a complaint must “adequately specify” a claim clearly refers back to this Court’s requirement of “allegations” that are “reasonably susceptible” of interpretation as a claim within coverage. Judge Stone properly rejected Mylan’s suggestion that the possibility that a complaint could be amended following trial would create a duty to defend. *See Alpha Eng'g Servs.*, 208 W.Va. at 716, 542 S.E.2d at 879 (duty to defend exists for claims that may “without amendment” impose liability within coverage).

than the “underlying fact allegations.” Br., at 2. But Mylan is unable to point to a single instance in which Judge Stone relied on a label of a claim in the AWP Actions. It also fails to cite a single factual allegation in the AWP Actions that Judge Stone failed to consider. As noted earlier, in deliberating on the parties’ cross-motions for summary judgment, the Circuit Court established a schedule that allowed the parties to submit multiple briefs and, as a result, Judge Stone had the benefit of voluminous briefing, including extensive discussion of the allegations of the underlying complaints. The Circuit Court also heard lengthy oral argument from the parties’ counsel on August 30, 2007. As a result, when the court issued its Order in February 2008, the Order included direct quotations from the AWP Actions and L&C Actions as the basis for its rulings. Under these circumstances, Mylan’s criticism of the Circuit Court is unfounded.

Fourth, Mylan contends that “any dispute” between the parties as to whether factual allegations are within coverage “alone compels a defense.” Br., at 4-5 & n.21. This contention does not reflect West Virginia law, which requires *the court* to examine the allegations and make the decision about coverage based thereon. Needless to say, one party in a coverage dispute cannot establish coverage simply by filing a complaint.²⁶

Fifth, Mylan argues that the Circuit Court erred in examining whether the AWP Actions involved any alleged injury due to a “misappropriation.” Judge Stone’s ruling, however, was consistent with the governing policy language, which specifies that “advertising injury” must be “caused by” a covered offense and the injury must “aris[e] out of” that offense. Because none of the plaintiffs in the AWP Actions alleged that they were injured by any misappropriation, the Circuit Court correctly held that this requirement for coverage was not met.

²⁶ See *Central Ill. Light Co. v. Home Ins. Co.*, 821 N.E.2d 206, 214 (Ill. 2004) (an insurance policy is not ambiguous “merely because the parties disagree on its meaning”); *Lapham-Hickey Steel Corp. v. Protection Mut. Ins. Co.*, 655 N.E.2d 842, 846 (Ill. 1995) (a policy term is not ambiguous simply because “parties can suggest creative possibilities for its meaning”).

III. ARGUMENT AND AUTHORITIES

As the Court knows, Mylan has filed a lengthy Opening Brief that includes 164 single-spaced footnotes. Substantial portions of this brief consist of string cites and discussions of out-of-state cases. But, notwithstanding its length and wealth of citations, Mylan's Opening Brief does not focus on the two aspects of this case that are decisive under West Virginia law. These aspects, of course, are the plain terms of the insurance policies at issue and the claims that were actually made against Mylan in the AWP Actions.

Mylan's effort to shift the focus elsewhere is no accident. The terms of the policies and the claims made against Mylan simply do not support coverage here. Consequently, as it did in the Circuit Court, Mylan presents elaborate arguments that the Court should apply canons of "construction" to the policy language. Mylan's Opening Brief invites this Court to find coverage by quite literally rewriting the terms of the policies and by relying on claims that are not contained in the AWP Actions. When presented with similar arguments, Judge Stone rejected this approach, instead focusing on the allegations of the AWP complaints and applying the terms of the policies according to their "legal and common use." Order, at 30-31. The Circuit Court's ruling was thus correct and, for the reasons discussed more fully below, should be affirmed.

A. The Circuit Court Correctly Held That The AWP Actions Are Not Within The Insurers' Coverage For "Misappropriation of Advertising Ideas"

As an initial matter, Mylan argues that the Circuit Court should have applied a lawyer-created "three-part test" to decide if advertising injury coverage existed for the AWP Actions. Mylan suggests (as it did below) that this test is "likely to be adopted in West Virginia" and that coverage should be decided on this basis rather than by looking at the actual provisions of the

policies. *See* Br., 16.²⁷ The Circuit Court correctly rejected this argument under West Virginia law, which requires that where the terms of a policy are unambiguous, a court's duty is to apply the terms as written without judicial "construction." *See Shamblin v. Nationwide Mut. Ins. Co.*, 175 W.Va. 337, 341, 332 S.E.2d 639, 642 (1985) ("Where provisions in an insurance policy are plain and unambiguous . . . the provisions will be applied and not construed.") (citation omitted). Accordingly, Judge Stone properly considered the actual terms of the policies.

Contrary to Mylan's suggestion, the "advertising injury" coverage at issue is not designed to cover any and all claims that may have some attenuated connection with the insured's advertising. The coverage, by its terms, applies only to certain enumerated "offenses." Moreover, the offense must be "committed in the course of advertising your goods, products or services" and the plaintiff's injury must "arise out of" the offense. All of these requirements must be met in order to establish coverage.

In the Circuit Court, Mylan claimed that the AWP Actions involved one of the enumerated offenses – "misappropriation of advertising ideas or style of doing business" under the AMICO and Continental policies. The plain language of these policies therefore required Mylan to prove the following to obtain coverage:²⁸

- **First**, the claims must involve a "misappropriation";
- **Second**, the misappropriation must involve an "advertising idea" or "style of

²⁷ *See* Plaintiffs' Opposition to Continental's Motion for Partial Summary Judgment on the Duty to Defend the AWP Lawsuits, at 4 (stating that "[t]he individual language components" of the policies need not be specifically addressed and "simply require a construction to ascertain whether their provisions are potentially implicated by the asserted claims").

²⁸ As the insured, Mylan bears the burden of establishing that the underlying claim is potentially within the policies' coverage. *See Kelly v. Painter*, 202 W.Va. 344, 349, 504 S.E.2d 171, 176 (1998) (Starcher, J., concurring); 14 Lee R. Russ & Thomas F. Segalla, *Couch on Insurance* 3d, § 200:15 ("An insured must prove the existence of a potential for coverage by showing that the underlying claim may fall within policy coverage in order to prevail in an action seeking declaratory relief on the issue of a duty to defend") (emphasis added).

doing business”;

- **Third**, the alleged injury must be one “arising out of” the misappropriation; and
- **Fourth**, the offense must be committed “in the course of advertising your goods, products or services.”

The failure to satisfy any one of these elements means that the coverage does not apply. Judge Stone correctly concluded that the required elements were not present and that the criteria for coverage were thus not satisfied.

1. **The AWP Actions Did Not Allege Any “Misappropriation”**

The phrase “misappropriation of advertising ideas” means “the **wrongful taking** of an idea concerning the solicitation of business and customers.” *Green Mach. Corp. v. Zurich-Am. Ins. Group*, 313 F.3d 837, 841 (3rd Cir. 2002) (emphasis added); *Frog, Switch & Mfg. Co. v. Travelers Ins. Co.*, 193 F.3d 742, 748 (3rd Cir. 1999); *Assurance Co. of Am. v. Rosenau*, No. Civ.A.04-3172, 2005 WL 857356, at *2 (E.D. Pa. Apr. 14, 2005). The “wrongful taking” element of its meaning has been repeatedly and widely recognized. *See, e.g., State Auto Prop. & Cas. Ins. Co. v. Travelers Indem. Co. of Am.*, 343 F.3d 249, 257 (4th Cir. 2003) (“[W]e conclude, for several reasons, that the term ‘misappropriation’ . . . refers generally to the wrongful acquisition of property”); *Heritage Mut. Ins. Co. v. Advanced Polymer Tech., Inc.*, 97 F. Supp. 2d 913, 926 (S.D. Ind. 2000) (the “broadest sense of misappropriation” means “to take wrongfully”); *Amazon.com Int’l, Inc. v. Am. Dynasty Surplus Lines Ins. Co.*, 85 P.3d 974, 976 (Wash. Ct. App. 2004) (“[M]isappropriation of an advertising idea may be accomplished by the ‘wrongful taking of another’s manner of advertising,’ by ‘the wrongful taking of an idea concerning the solicitation of business and customers, or by ‘the wrongful taking of the manner by which another advertises its goods or services’”) (citations omitted); *Am. States Ins. Co. v. Vortherms*, 5 S.W.3d 538, 543 (Mo. Ct. App. 1999) (“[A] misappropriation of an advertising

idea involves the wrongful taking of another's manner of advertising"); *Am. Employers' Ins. Co. v. DeLorme Publ'g Co., Inc.*, 39 F.Supp.2d 64, 76 (D. Me. 1999) ("[I]n the ordinary sense of these terms, misappropriation of an 'advertising idea' would mean the wrongful taking of the manner by which another advertises its goods or services") (citation omitted); *Union Ins. Co. v. Knife Co., Inc.*, 897 F. Supp. 1213, 1216 (W.D. Ark. 1995) (the "plain ordinary and popular meaning" of "misappropriation" is "wrongful taking"); *J.A. Brundage Plumbing & Roto-Rooter, Inc. v. Massachusetts Bay Ins. Co.*, 818 F. Supp. 553, 556 (W.D.N.Y. 1993) ("[I]n the ordinary sense of these terms, misappropriation of an 'advertising idea' would mean the wrongful taking of the manner by which another advertises its goods or services"), *vacated after settlement*, 153 F.R.D. 36 (W.D.N.Y. 1994); *Fluoroware, Inc. v. Chubb Group of Ins. Cos.*, 545 N.W.2d 678, 682 (Minn. Ct. App. 1996) ("[M]isappropriation of advertising ideas' has been defined as the wrongful taking of another's manner of advertising"); *Del Monte Fresh Produce N.A., Inc. v. Transportation Ins. Co.*, 500 F.3d 640, 646 (7th Cir. 2007) ("Misappropriation of an advertising idea occurs when the insured wrongfully takes a competitor's idea about the solicitation of business"), *reh'g denied*, No. 06-3365, 2007 U.S. App. LEXIS 24424 (7th Cir. Oct. 11, 2007).

Even cases cited by Mylan recognize that "misappropriation of advertising ideas" means a "wrongful taking." See *Frog, Switch & Mfg. Co. v. Travelers Ins. Co.*, 193 F.3d 742, 748 (3rd Cir. 1999) (" . . . the broadest reading of misappropriating advertising ideas is that the insured wrongfully take an idea about the solicitation of business.") (citation omitted); *Winklevoss Consultants, Inc. v. Fed. Ins. Co.*, 991 F.Supp. 1024, 1038 (N.D. Ill. 1998) (stating that "the broadest reading of misappropriating advertising ideas is that the insured wrongfully took an idea about the solicitation of business"); *Lebas Fashion Imports of USA, Inc. v. ITT Hartford Ins. Group*, 59 Cal. Rptr. 2d 36, 43 n.8 (Cal. Ct. App. 1996) (stating that "we have little doubt that a

layman . . . would give the word [misappropriation] its common and ordinary meaning, that is, 'to take wrongfully'").

Under these principles, the courts have held that no duty to defend arises for claims that allege no wrongful taking of an advertising idea. In *Sorbee International Ltd. v. Chubb Custom Insurance Co.*, 735 A.2d 712, 715 (Pa. Super. Ct. 1999), for instance, the court held that the insurer had no duty to defend because nothing in the claims against its insured suggested that the claimant was "accusing [the insured] of stealing an original, novel advertising idea." *Sorbee* held that coverage would exist for an advertising idea that was "'novel and new,' and 'definite and concrete,' such that it is capable of being identified as having been created by one party and stolen or appropriated by another." 735 A.2d at 714. Where, in contrast, the idea is "so widespread" or "so general" that it is not an idea to which a party is alleged to have any right, the courts have found no duty to defend. See, e.g., *Armament Sys. & Procedures, Inc. v. Northland Fishing Tackle, Inc.*, No. 01-C-1122, 2006 WL 2519225, at *2-3 (E.D. Wis. Aug. 28, 2006).

It is axiomatic that in order for an idea to be wrongfully taken, it must rightfully belong to someone. As explained in the Circuit Court's Order, the underlying suits in the AWP litigation simply do not allege "misappropriation." The AWP Actions make no claim that Mylan wrongfully took an advertising idea that rightfully belonged to someone else. Instead, the complaints allege that Mylan, along with nearly 80 other companies, engaged in the practice of "marketing the spread." According to the complaints, the "spread" was an illegal fraudulent scheme – to which no company can claim a legitimate right. Indeed, at no point do the complaints raise a claim alleging that any particular company originated the idea of the "spread" or was deprived of any right to that concept. The complaints allege, to the contrary, that nearly 80 companies engaged in this practice and that it was so "widespread" in the pharmaceutical

industry as to be the “industry practice.” *See, e.g.*, Alabama Compl., ¶115; Illinois Compl., ¶52; Miss. Compl., ¶8. Thus, the AWP Actions are devoid of any claim of a wrongful taking of an advertising idea because there is no allegation that any idea was wrongfully taken from someone to whom it rightfully belonged.

Mylan’s Opening Brief does not contradict this fact. It points to no allegation whatsoever in any complaint to show that any wrongful taking of an advertising idea is alleged against Mylan.²⁹ Instead, Mylan attempts to argue that the phrase “misappropriation of an advertising idea” may be reasonably construed to mean nothing more than “misuse.” *Br.*, at 18. In support of its argument, Mylan asserts that “misappropriation of advertising ideas” is ambiguous and that the phrase can include a range of meanings, including “misuse.” *Id.* Mylan further argues that the cases cited in the Circuit Court’s Order and by the defendants in the proceedings below only identify “one possible meaning” of the phrase that is overly narrow. Mylan’s arguments are without merit.

As an initial matter, these authorities are not cases where the courts purport to simply present “one possible meaning.” The meaning of the phrase in *Green Machine Corp. v. Zurich American Insurance Group*, 313 F.3d 837, 841 (3rd Cir. 2002), for example, was stated in definitive terms:

Misappropriation of an advertising idea is the wrongful taking of an idea concerning the solicitation of business and customers. Misappropriation of a style of doing business is the wrongful taking of a company’s plan for interacting with consumers and getting their business. There are no such allegations in the

²⁹ Mylan’s Opening Brief asserts that Mylan “allegedly used the mode of interacting with drug purchasers, originally adopted by others and then applied by Mylan . . .” *Br.*, at 27. Despite its use of the word “allegedly,” Mylan does not – and cannot – cite any allegation in the AWP Actions making such a claim. The fact that Mylan must resort to adding allegations not in the complaints further demonstrates the unfounded nature of its claim for “advertising injury” coverage.

underlying action . . . Accordingly, the judgment of the District Court denying coverage will be affirmed.

Other cases addressing the issue likewise do not limit their discussion to “one possible meaning” of the phrase. *See, e.g., Del Monte*, 500 F.3d at 646; *Amazon.com Int’l, Inc.*, 85 P.3d at 976; *Vortherms*, 5 S.W.3d at 543; *DeLorme Publ’g Co., Inc.*, 39 F.Supp. at 76; *Union Ins. Co. v. Knife Co., Inc.*, 897 F. Supp. at 1216; *J.A. Brundage Plumbing*, 818 F. Supp. at 557; *State Auto Prop. & Cas. Ins. Co. v. Travelers Indem. Co. of Am.*, 343 F.3d at 257; *Fluoroware, Inc.*, 545 N.W.2d at 682.³⁰

In addition, contrary to Mylan’s contention that the Circuit Court defined “misappropriation of advertising injury” too narrowly, numerous courts have expressly determined that defining “misappropriation of advertising injury” to include the element of a wrongful taking constitutes the broadest possible definition. *See, e.g., Skylink Technologies, Inc. v. Assurance Co. of Am.*, No. 03 C 1735, 2004 WL 42365, at *7 (N.D. Ill. Jan. 6, 2004) (“Under the **broadest possible definition**, misappropriation could be construed to mean ‘the insured wrongfully took an idea about the solicitation of business.’”) (emphasis added); *Sport Supply Group, Inc. v. Columbia Cas. Co.*, 335 F.3d 453, 465 (5th Cir. 2003) (“Thus, even under the ‘**broadest reading**’ of the phrase ‘misappropriation of advertising ideas’ as ‘the wrongful[] taking of an idea about the solicitation of business . . . [the insured’s] alleged infringement of the MacGregor trademark does not constitute the ‘misappropriation of [an] advertising idea.’”)

³⁰ Mylan has purported to find it significant that three of these cases (*American Employers, Union Insurance*, and *J.A. Brundage*) refer to the term “misuse,” but Mylan fails to place these references in context. These cases stated that “misappropriation of an ‘advertising idea’ would mean the **wrongful taking** of the manner by which another advertises its goods or services [which] would include the misuse of **another’s** trademark.” *J.A. Brundage*, 818 F. Supp. at 557; *Union Ins.*, 897 F. Supp. at 1216; *American Employers*, 39 F. Supp. 2d at 76-77. (emphasis added) In this context, “misuse” refers to a situation where the insured has taken and is using property that belongs to another – namely, a trademark. These decisions fully support the appellees’ position that there is no “misappropriation of advertising ideas” unless the insured has wrongfully appropriated an advertising idea that rightfully belongs to another.

(emphasis added); *Heritage Mut. Ins. Co.* 97 F. Supp. 2d at 926 (“However, even if we adopt the **broadest sense** of misappropriation . . . we have . . . the following definition of ‘misappropriation of advertising ideas’: the insured wrongfully took an idea about the solicitation of business”) (emphasis added); *Frog, Switch & Mfg. Co.* 193 F.3d at 748 (3rd Cir. 1999) (“ . . . the **broadest reading** of misappropriating advertising ideas is that the insured wrongfully take an idea about the solicitation of business.”) (emphasis added) (citation omitted); *Winklevoss*, 991 F. Supp. 1024, 1038 (N.D. Ill. 1998) (“[T]he **broadest reading** of misappropriating advertising ideas is that the insured wrongfully took an idea about the solicitation of business”); *Continental Casualty Co. v. Corus Pharma, Inc.*, Case No. C06-0921RSL, 2008 U.S. Dist. LEXIS 32552, at *12 p.7, (W.D. Wash., April 21, 2008) (“the ‘misappropriation of advertising ideas’ can be accomplished in a number of ways, but it **always involves** the taking of ‘an idea for soliciting business or an idea about advertising.’”) (emphasis added).³¹

³¹ Mylan also claims that a number of courts have found that the term “misappropriation” is ambiguous. In actuality, *State Auto Property & Casualty Insurance Co.* found ambiguity only as to whether “misappropriation” was limited to the common law tort of misappropriation; it accordingly held that the term should not be applied that narrowly and should instead be applied as referring to “the wrongful acquisition of property.” 343 F.3d at 257. Likewise, *Winklevoss* declined to give “misappropriation” a meaning limited to the common law tort of misappropriation, but adopted the meaning of “to take wrongfully.” 991 F. Supp. at 1038. The court pointedly observed that it was prepared to “favor the insured by affording these terms their broadest possible meaning, but [would] not strain them to create obligations the parties never envisioned.” *Id.* Mylan is also incorrect in suggesting that, in *Frog, Switch*, the U.S. Court of Appeals for the Third Circuit found that the phrase “misappropriation of advertising ideas” was inherently ambiguous. 193 F.3d at 749. The various “viable meanings” referred to by Mylan are all premised on the notion that the insured “took” something that rightfully belonged to someone else. *Id.* (noting that the underlying complaint did not allege that the insured “took an idea . . . (the idea of claiming a revolutionary new design as an enticement to customers)”).

Mylan further cites *Lawyer Disciplinary Bd. v. Battistelli*, 206 W.Va. 197, 523 S.E.2d 257 (1999), which it incorrectly raised in the Circuit Court as establishing the ambiguity of the term “misappropriation.” *Battistelli* had nothing to do with “advertising injury” coverage or any type of insurance whatsoever; it accordingly made no finding that “misappropriation” was ambiguous in that context. It simply stated that in the context of the rules of attorney conduct, “[t]he term misappropriation can have various meanings” and includes not only the situation where an attorney steals client funds, but also the temporary use of those funds for the attorney’s own purpose, whether or not the attorney derives any gain or benefit therefrom. 206 W.Va. 197, 523 S.E.2d at 262-63. Because the issue addressed by

In contrast to this overwhelming authority, neither Mylan's Opening Brief nor its arguments below cited any authority finding "misappropriation" coverage when the claim is for "misuse" alone – without any claim of wrongful taking. Mylan refers the Court to *Applied Bolting Technology Products, Inc. v. United States Fidelity & Guaranty Co.*, 942 F.Supp. 1029 (E.D. Pa. 1996), which it represents as holding that "misuse" is a valid definition of "misappropriation" for coverage purposes. This representation by Mylan blatantly misstates the holding of *Applied Bolting*. In reality, the court merely noted that the insured had *argued* that "misappropriation" was synonymous with misuse and, in the initial part of its opinion, the court adopted that argument purely "for the sake of argument." 942 F.Supp. at 1033. The court immediately indicated that it did *not* agree with the insured's argument. *Id.* at 1033 n.4 (stating that "[s]teal would seem to be a more fitting synonym in this context"). It also noted that "the courts that have considered the meaning of 'misappropriation of advertising ideas' have defined it as 'the wrongful taking of the manner by which another advertises its goods or services.'" *Id.* at 1034. Thus, far from supporting Mylan's argument, *Applied Bolting* undermines it.³²

Finally, the correctness of the Circuit Court's approach was further demonstrated by the recent decision of the U.S. Court of Appeals for the Seventh Circuit in *Del Monte Fresh Produce, N.A., Inc. v. Transportation Insurance Co.*, 500 F.3d 640 (7th Cir. 2007). *Del Monte*

Battistelli involved the rule against "misappropriation of client funds," the meanings discussed by the court all involved property that rightfully belonged to someone else (*i.e.*, the client).

³² Aside from *Applied Bolting*, the only other case cited by Mylan on this point is an 11 year-old unpublished opinion from the Central District of California applying California law, *Atlapac Trading Co. v. American Motorists Insurance Co.*, No. CV 97-0781 CBM, 1997 WL 1941512 (C.D. Cal. Sept. 19, 1997). *Atlapac* contains no direct discussion of the meaning of "misappropriation of advertising ideas" and to the extent it suggests that "misappropriation" means something other than a "wrongful taking," this unpublished decision is contrary to California law. See *Clark Mfg., Inc. v. Northfield Ins. Co.*, 187 F.3d 646, 1999 U.S. App. LEXIS 14133 (9th Cir. June 24, 1999) ("misappropriation of an advertising idea' involves the 'wrongful taking of the manner in which another advertises its goods or services'" (citation omitted); *Lebas*, 59 Cal. Rptr. 2d at 43, n.8 (the "common and ordinary meaning" of misappropriation is "to take wrongfully").

emphasized that “[m]isappropriation of an advertising idea occurs when the insured **wrongfully takes** a competitor’s idea about the solicitation of business.” 500 F.3d at 646 (emphasis added). On this basis, it rejected the insured’s argument that “advertising injury” coverage existed for a series of class actions brought by consumers claiming that the insured had engaged in a fraudulent scheme that involved misrepresentations. The Seventh Circuit pointed out that “nowhere in the class action complaints” was the insured accused of taking an advertising idea from a competitor. *Id.* It accordingly held that the insured was not entitled to “advertising injury” coverage for “misappropriation of advertising ideas or style of doing business” under these circumstances. *Id.* (also stating that “[w]hether there is a duty to defend depends on the complaint, not on the insured’s belief that the complaint is mistaken”).

In short, Mylan is asking this Court to stretch the meaning of “misappropriation” far beyond its broadest reasonable reading in the context of advertising injury coverage.³³ Mylan in effect seeks to rewrite the policies to provide coverage for any “misuse” of an advertising idea rather than for “misappropriation” thereof. Indeed, on page 7 of its Opening Brief, Mylan resorts to quite literally rewriting the policies by asserting that they cover “misappropriation [misuse] of

³³ Mylan’s Opening Brief incorrectly suggests that disagreement among courts in any jurisdiction about the meaning of a policy term “establishes” ambiguity and “requires” its construction against the insurer. *See, e.g., Br.*, at 2, 11. This purported rule of construction has no application here – the courts have overwhelmingly agreed that “misappropriation” in this context unambiguously requires a “wrongful taking.” In addition, Mylan relies on *Murray v. State Farm Fire & Cas. Co.*, 203 W.Va. 477, 485 n.5, 509 S.E.2d 1, 9 n.5 (1998), but fails to recognize that *Murray* was addressing a policy term that had been found ambiguous by “the majority of courts.” In that circumstance, *Murray* simply noted that “a provision in an insurance policy *may* be deemed ambiguous if courts in other jurisdictions have interpreted the provision in different ways” (emphasis added). Thus, under West Virginia law, any determination of ambiguity is within the court’s discretion and is not dictated by decisions of other courts. *See also Federal Ins. Co. v. Pacific Sheet Metal, Inc.*, 774 P.2d 538 (Wash. Ct. App. 1989) (rejecting notion that a provision is *per se* ambiguous where courts disagree about its meaning and noting that there is “danger” in such a rule); *Lower Paxton Twp. v. U.S. Fid. and Guar. Co.*, 557 A.2d 393, 400 n. 4 (Pa. Super. Ct. 1989) (rejecting suggestion that ambiguity must be found “wherever judicial decisions considering a policy provision are in conflict, with no regard for our own analysis of the provision or of the wisdom of these decisions”).

advertising ideas.” Judge Stone correctly recognized that adding the bracketed term would alter the policy under the guise of judicial interpretation and would run counter to West Virginia law.

2. **The AWP Actions Did Not Allege Any Misappropriated “Advertising Idea or Style of Doing Business”**

For the foregoing reasons, the AWP Actions do not allege that Mylan wrongfully took the “spread” idea from someone to whom it rightfully belonged – and therefore do not involve any alleged “misappropriation.” In addition, even if Mylan had carried its burden of showing that “misappropriation” was alleged in the AWP Actions, it would still have been required to show that the alleged misappropriation involved an “advertising idea.” *See* Order, at 3-5. The courts have recognized that where, as here, the policy specifies the kind of “idea” that must be misappropriated, the policy cannot be interpreted as covering misappropriation of any idea “regardless of the nature of that idea.” *Applied Bolting*, 942 F.Supp. at 1033. Rather, coverage exists only if the misappropriated idea is an “advertising idea.” This term has been judicially defined as “an idea about the solicitation of business and customers.” *Green Mach.*, 313 F.3d at 839; *Frog, Switch & Mfg. Co.*, 193 F.3d at 748. Importantly, the courts have emphasized that the insured must show that the allegations against it “involve an advertising idea, **not just a non-advertising idea that is made the subject of advertising.**” *Frog, Switch & Mfg. Co.*, 193 F.3d at 748 (emphasis added).

Mylan claims that the “spread” constitutes an “advertising idea.” This characterization is belied by the AWP complaints. According to those complaints, Mylan and the other defendants engaged in a scheme to misrepresent the actual price of their products to certain publishers, knowing that Medicaid, Medicare, and others relied on information from those publishers to set the reimbursement that Medicaid and others would pay to health care providers who dispensed their products to patients. *See, e.g.*, MDL Compl., ¶¶9, 12. Having made these false

representations and thereby inflated the reimbursement for their products, the defendants allegedly offered their products to providers at a price below the AWP. Providers were thereby able to obtain reimbursement above the price they actually paid for the defendants' products. This difference between the product's actual price and the fraudulently inflated AWP was the "spread." See, e.g., Illinois Compl., ¶49; MDL Compl., ¶9.

Thus, under the AWP plaintiffs' allegations, the "spread" was a fraudulently created price differential. It allegedly was part of a scheme for making false representations to publishers in order to cause Medicaid, Medicare, and others to pay excessive and inflated amounts. The "spread" was alleged to have been created by the defendants' dealings with the publishers and Medicaid. To be sure, the AWP Actions alleged that once the defendants created the "spread," they informed providers about it and used it as a "kickback," a "bribe," and "an unlawful incentive" to providers. These allegations that Mylan "marketed the spread" in this fashion did not transform the "spread" into an advertising idea. At most, the AWP Actions involved "a nonadvertising idea that is made the subject of advertising" and therefore did not come within the insuring agreements of the AMICO and Continental policies. *Frog, Switch & Mfg. Co.*, 193 F.3d at 748.

Mylan also argues that "marketing the spread" should be deemed a "style of doing business" for coverage purposes. In support of this argument, it claims that a number of courts have construed this provision as referring simply to any "mode of presenting a product to the public." Br., at 27. But even the cases cited by Mylan recognize this provision is implicated only by claims involving misappropriation of a "comprehensive" manner of operating a business.³⁴ The Circuit Court properly rejected Mylan's argument because the AWP Actions

³⁴ See *Hyman v. Nationwide Mut. Fire Ins. Co.*, 304 F.3d 1179, 1188-89 (11th Cir. 2002) ("'[S]tyle of doing business' is routinely defined ... as 'unambiguously referring to a company's comprehensive

make no claims that come within the recognized meaning of this provision. *See, e.g., Applied Bolting*, 942 F.Supp. at 1034 (stating that “[t]he phrase ‘style of doing business’ refers to a company’s ‘comprehensive manner of operating its business’”) (citation omitted).

3. The AWP Actions Did Not Allege Any Injury Arising Out of an Offense

Even if the AWP complaints could somehow be construed as alleging that Mylan engaged in a “misappropriation” of an “advertising idea or style of doing business,” Mylan would still have the burden of showing that the plaintiffs’ injury is alleged to have arisen out of the misappropriation. This showing is required by the language of the AMICO and Continental policies, which state that “Advertising Injury” must be “**caused by an offense**” and that the plaintiff’s injury must “**aris[e] out of one or more of the following offenses**” (here, “misappropriation of advertising ideas or style of doing business”).

The Circuit Court correctly held that this requirement was not met. In the AWP Actions, the plaintiffs’ alleged injuries had nothing to do with misappropriation. The complaints alleged that Medicaid, Medicare, and others were injured because they overpaid reimbursement for the defendants’ products due to the inflated AWPs that defendants fraudulently created. From the perspective of the plaintiffs, their alleged injury arose from the fact that each defendant engaged in this scheme. It would not matter whether the defendant originated the scheme or simply took the idea from another defendant – the injury to the plaintiffs would be the same.

manner of operating its business.”) (internal quotes omitted); *Novell, Inc. v. Federal Ins. Co.*, 141 F.3d 983, 987 (10th Cir. 1998) (“style of doing business” widely agreed to mean “a company’s comprehensive manner of operating its business”) (citations omitted); *Hoosier Ins. Co. v. Audiology Found. of Am., et al.*, 745 N.E.2d 300, 308 (Ind. Ct. App. 2001) (adopting, along “with the vast majority of courts” view that “style of doing business is defined as a company’s comprehensive manner of operating its business”); *Elcom Techs., Inc. v. Hartford Ins. Co. of the Midwest*, 991 F.Supp. 1294, 1297 (D. Utah 1997) (stating that “[c]ourts have generally held that ‘style of doing business’ means a company’s ‘comprehensive manner of operating its business’”).

This feature of the AWP Actions sets them apart from the situation where “advertising injury” coverage has been found to exist for a “misappropriation.” That situation involves claims by plaintiffs (such as competitors of the insured) who allege that an advertising idea belonged to them and that they were injured because the defendant took their idea. Here, in contrast, even if any allegation of misappropriation could be reasonably discerned (which it cannot), the AWP Actions would still lack any claim by the plaintiffs that they were injured by any misappropriation. The AWP Actions thus do not come within the AMICO and Continental insuring agreements for this independently dispositive reason.

Mylan repeatedly cites *Knoll Pharmacy Co. v. Auto Insurance Co.*, 152 F.Supp. 1026 (N.D. Ill. 2001) for the proposition that no “causal connection” is required “between the ‘advertising injury’ offense and the ultimate injury.” *Br.*, at 34. Surprisingly, however, Mylan never mentions that this district court decision was subsequently rejected by the governing appellate court (the U.S. Court of Appeals for the Seventh Circuit) in *BASF AG v. Great American Assurance Co., et al.*, 522 F.3d 813 (7th Cir. 2008) and many other courts.³⁵

In *BASF*, the court rejected the insured’s assertion that the complaints “did not need to assert every element of an offense delineated by the umbrella-insurance policies.” *BASF*, 522

³⁵ See also *Great Am. Ins. Co. v. Riso, Inc.*, 479 F.3d 158, 162-63 (1st Cir. 2007) (rejecting *Knoll* and refusing to apply a similarly expansive interpretation of “arising out of” policy language because such an approach could be “extended indefinitely” to include coverage for offenses never intended by the parties); *Purdue Frederick Co., et al. v. Steadfast Ins. Co., et al.*, 2005 N.Y. Misc. LEXIS 1449, at *6, 801 N.Y.S.2d 781 (N.Y. Sup. Ct. 2005) (finding that “*Knoll* takes the definition of ‘arising out of’ too far ... arising out of requires scrutiny of the ‘injuries sustained’ by these plaintiffs, ‘rather than the underlying offenses that [the insured] claims caused those injuries’”), *aff’d*, 836 N.Y.S.2d 28 (N.Y. App. Div. 2007); *QSP, Inc., v. Aetna Cas. and Surety Co.*, 773 A.2d 906, 926 (Conn. 2001) (“the arising out of language in an insurance policy refers to the injury suffered [by the claimants] and cannot be used to expand the list of enumerated offenses or broaden coverage to include even those remote injuries suffered by a tenuously connected plaintiff”); *Microsoft Corp. v. Zurich Am. Ins. Co.*, No. C00-521P, 2001 U.S. Dist. LEXIS 24670, at *21-22 (W.D. Wash. July 2, 2001) (there is no “advertising injury” where “[t]he Underlying Complaints do not set forth specific facts which could reasonably be construed to be analogous to any of the offenses enumerated in the disputed advertising injury clauses” and “the complainants were clearly not the victims of these offenses”).

F.3d at 823. Like Mylan, the insured in *BASF* attempted to advance a very broad interpretation of the phrase “injury arising out of” or “because of” an enumerated advertising offense, specifically “oral or written publication of material that slanders or libels a person or organization or disparages a person’s or organization’s goods, products or services.” *Id.* at 819-20. The underlying complaints at issue in *BASF* contained allegations that the insured and its employees “wrongfully asserted monopoly control over the market for thyroid medication, which resulted in consumers and health insurers paying higher prices” for the name brand medication Synthroid, rather than purchasing less costly alternatives. *Id.* at 817. The complaints alleged that the defendants maintained their monopoly, in part, by criticizing and suppressing a study done by a researcher, Dr. Dong, who found that the lower cost alternative medicines were just as effective as Synthroid and by marketing Synthroid as a superior drug. *Id.* The consumer and health insurer class members sought economic damages and did not seek damages on behalf of Dr. Dong or on behalf of other thyroid drug manufacturers. *Id.*

The court held that there was no coverage because the facts in the underlying complaints did not allege that the insured “made defamatory, libelous, slanderous, or disparaging statements about the *class members or their products.*” *Id.* at 820. (emphasis added). Although the insured argued that the complaints contained an “implicit” claim for disparagement, the court refused to allow the insured to “shoehorn . . . collateral claims” into coverage for slander, libel or disparagement on the basis.

The *BASF* court pointed out that the district court had relied almost exclusively on *Knoll* and termed that reliance “regrettable.” *Id.* at 823. It made clear that *Knoll’s* approach was overly “expansive” and that “following this approach would unmoor coverage determinations

from the factual allegations of the complaint.” *Id.* at 822³⁶ The Seventh Circuit emphasized that “abandoning focus on the complaint” in this manner would mean that the breadth of insurance coverage “could be extended indefinitely . . . [and] sweep within the breadth of the policy risks that the insurer did not and would not contract to cover – risks that were not considered when setting the premiums for the policy.” *Id.* This result, it cautioned, “would make insurance contracts less predictable and more costly for insurers, who would realistically pass the additional cost onto their insureds, making insurance more expensive for everyone.” *Id.*³⁷

West Virginia law likewise requires a focus on the facts alleged in the underlying complaint when determining whether an insurer has a duty to defend. *See* Part II, *supra*. And as in *BASF*, the Circuit Court correctly applied the plain language of the policies to the allegations in the complaint and held that Mylan could not demonstrate that any alleged advertising injury was “caused by” or “arose out of” misappropriation.

³⁶ *See William J. Templeman Co. v. Liberty Mut. Ins. Co.*, 735 N.E.2d 669, 676 (Ill. App. Ct. 2000) (“[I]t must be demonstrated that the facts alleged were sufficient to permit recovery for the potentially covered cause of action in the same proceeding”) (emphasis added); *Del Monte*, 500 F.3d at 644 (“In conducting this analysis, ‘it is the actual complaint, not some hypothetical version, that must be considered’”); *Hurst-Rosche Eng’rs v. Commercial Union Ins. Co.*, 51 F.3d 1336, 1342 (7th Cir. 1995) (“[The court] must focus on the allegedly tortious conduct on which the lawsuit is based”).

³⁷ In the Circuit Court, Mylan cited several cases (*Native American Arts, American Simmental Ass’n*, and *Flodine*) as supporting its position. The insurer defendants pointed out that, in addition to being inapposite for various reasons, the cases offered no support for Mylan because those cases (unlike the AWP Actions) involved underlying plaintiffs who claimed that defendants took sales away from those who could rightfully capitalize on certain products. Mylan’s Opening Brief claims 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,” and contends that *Flodine* therefore involved an underlying plaintiff who did not have a special right to capitalize on the product at issue. *Br.*, at 23. A careful reading of *Flodine* shows otherwise. The plaintiffs in the underlying litigation were an “Indian arts and crafts organization and . . . an Indian tribe” claiming that the defendant J.C. Penney had injured them in “their capacity as sellers of competing goods.” *Flodine v. State Farm Ins. Co.*, 2001 WL 204786 (N.D. Ill. March 1, 2001), at *2; *Flodine v. State Farm Ins. Co.*, 2003 U.S. Dist. LEXIS 4006 (N.D. Ill. March 18, 2003), at *5. J.C. Penney made a third-party claim against State Farm’s insured, alleging, *inter alia*, that the insured had violated the Indian Arts and Crafts Act and seeking recovery for any liability that J.C. Penney incurred to the underlying plaintiffs. The court noted that the claim sought to hold the insured “responsible for any injury alleged” by the tribe. 2001 WL 204786, at *6. Thus, *Flodine* indisputably involved underlying plaintiffs alleging that they had been wrongly deprived of a right to capitalize on a product – a claim that is not made in the AWP Actions.

4. **The AWP Actions Did Not Allege Any Offense “Committed in the Course of Advertising”**

In addition to specifying that a misappropriation must involve an “advertising” idea, the AMICO and Continental insuring agreements require that such an offense must be “committed in the course of advertising your goods, products, or services.” Order, at 3-5. The term “advertising” has been defined as “the widespread distribution of promotional material to the public at large.” *Teletronics Int’l, Inc. v. CNA Ins. Co./Transp. Ins. Co.*, 120 Fed. Appx. 440, 444 (4th Cir. 2005); *USX Corp. v. Adriatic Ins. Co.*, 99 F. Supp. 2d 593, 618 (W.D. Pa. 2000) (“[t]he overwhelming majority of reported cases have interpreted the plain and ordinary meaning of ‘advertising’ to mean the widespread distribution of promotional material to the public for the purpose of generating business”), *aff’d*, 345 F.3d 190 (3d Cir. 2003); *Hameid v. Nat’l Fire Ins. of Hartford*, 71 P.3d 761, 769 (Cal. 2003) (adopting “majority view,” which “defines ‘advertising’ to mean the widespread distribution of promotional materials to the public at large because it interprets the contractual term under its ordinary and popular meaning”); *Solers, Inc. v. Hartford Cas. Ins. Co.*, 146 F. Supp. 2d 785, 793 (E.D. Va. 2001) (“advertising . . . refer[s] unambiguously to the widespread distribution of promotional material to the public at large [and] excludes one-to-one solicitations from the definition” (citation omitted), *aff’d*, 36 Fed. Appx. 740 (7th Cir. 2002); *Select Designs, Ltd. v. Union Mut. Fire Ins. Co.*, 674 A.2d 798, 801-02 (Vt. 1996) (“we adopt the majority view” that advertising is “the widespread distribution of promotional material to the public at large”); *Monumental Life Ins. Co. v. United States Fid. & Guar. Co.*, 617 A.2d 1163, 1173 (Md. Ct. Spec. App. 1993) (“[T]he plain meaning of the term ‘advertising’ to a reasonably prudent person is *not* susceptible of more than one meaning, and encompasses only the ‘public’ sense of the word”); *Int’l Ins. Co. v. Florists’ Mut. Ins. Co.*, 559

N.E.2d 7, 10 (Ill. App. Ct. 1990) ("advertising" is "the widespread distribution of promotional material to the public at large").

The AWP Actions alleged that Mylan and the other defendants "marketed the spread." According to the complaints, this activity involved advising individual providers of the fraudulently created "spread" for their drugs and the inflated reimbursement that the provider could obtain. The complaints also repeatedly alleged that although defendants revealed the "spread" to providers, they also worked to conceal from the public (including Medicaid, Medicare, and others) the true prices of their products – and that their AWP's were inflated.³⁸ The alleged scheme was carried out "systematically and secretly."³⁹ Thus, under plaintiffs' allegations, the defendants discussed the "spread" in solicitations of individual providers, but did not advertise the "spread" to the public at large. To the contrary, they allegedly took concerted action to conceal its existence from the public authorities.

The facts as alleged in the AWP Actions clearly do not fit within the definition of "advertising." The complaints explicitly alleged that the defendants did **not** disclose the "spread" to the public. Mylan presented no authority whatsoever for its argument in the Circuit Court that revealing a fraudulent scheme in one-on-one solicitation, while concealing the scheme from the general public, can be considered "advertising" for purpose of obtaining insurance coverage. Rather, the secretive and fraudulent scheme alleged against Mylan is entirely foreign to the notion of "advertising." As such, the AWP Actions failed to satisfy yet another required element for coverage.

³⁸ See, e.g., Illinois Compl., ¶¶59, 60, 65; Alabama Compl., ¶124; Mass. Compl., ¶33.

³⁹ Mass. Compl., ¶1.

B. The Circuit Court's Ruling Was Correct For Additional Reasons

Mylan's Opening Brief argues that if this Court concludes that the Circuit Court erred in determining that the AWP Actions did not meet the threshold requirements for coverage, the Court should simply "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." Br., at 48. This argument overlooks the fact that the defendant insurers, in addition to asserting that Mylan had not satisfied the threshold criteria, raised additional reasons why no duty to defend existed under the policies. The Circuit Court ultimately stated that because Mylan had failed to show that the AWP Actions fell within the scope of the policies' insuring agreement, it "need not" address the additional arguments. Order, at 31. Because these matters were fully presented and briefed in the Circuit Court, they provide additional grounds upon which the judgment below may be affirmed. See *Highway Props. v. Dollar Sav. Bank*, Syl. Pt. 5, 189 W.Va. 301, 431 S.E.2d 95 (1993) ("This Court may, on appeal, affirm the judgment of the lower court when it appears that such judgment is correct on any legal ground disclosed by the record, regardless of the ground, reason, or theory assigned by the lower court as the basis for its judgment"). This Court should not make a decision that "a defense is due" without considering all of the coverage issues that were raised in the Circuit Court.

1. Policy Exclusions Present Additional Reasons to Sustain the Circuit Court's Ruling

The policies issued by AMICO and Continental contain exclusions that bar coverage for Mylan's alleged "marketing the spread" scheme and its intentional price-fixing activities.⁴⁰ The

⁴⁰ Mylan claimed in its Petition for Appeal that the Circuit Court "implicitly reject[ed]" the Insurers' assertion that coverage for advertising injury was excluded by the policies. See Petition, at 3. As discussed earlier, this is untrue. The Circuit Court merely stated that it "need not" address the Insurers' exclusion arguments because Mylan had failed to show that the AWP Actions fell within the scope of the policies' insuring agreement in the first instance. See Order, 31. Having determined that

exclusions are so clearly applicable to preclude coverage to Mylan that it is not surprising that Mylan's lengthy Opening Brief does not contain one argument (nor does it cite to any specific allegation in the AWP Actions) that would defeat the application of the policies' exclusions.⁴¹

It is well settled law that insurers may rely on policy exclusions to preclude liability when coverage is established. *See Luikart v. Valley Brook Concrete & Supply, Inc.*, 216 W. Va. 748, 613 S.E.2d 896 (2005). Likewise, "if the terms of an exclusion are plain and not ambiguous, then no interpretation of the language is necessary, and a court need only apply the exclusion to the facts presented by the parties." *Alpha Eng'g Servs, Inc.*, 208 W. Va. at 716, 542 S.E.2d at 879 (2000). Clear and unambiguous exclusions are not subject to judicial construction or interpretation, but full effect will be given, to the plain meaning intended. *See Keffer v. Prudential Ins. Co.*, 153 W. Va. 813, 172 S.E.2d 714 (1970).

As shown below, several policy exclusions, including but not limited to the knowing falsehoods exclusion and the wrongful description of the price of goods exclusion, are applicable to bar coverage for Mylan even if the claims asserted in the AWP Actions triggered coverage under the policies for "advertising injury." Mylan has not proffered a single argument that rebuts the Insurers' position that the exclusions apply or shows that a particular exclusion is ambiguous.⁴²

Mylan's claims were not covered by the policies, there was no need for the Circuit Court to go further. Notably, Mylan does not repeat this baseless claim in its Opening Brief.

⁴¹ Having failed to address the applicability of the policy exclusions in its Opening Brief, Mylan is now precluded from raising the issue in its Reply Brief. *See State v. Huber*, 129 W. Va. 198, 206, 40 S.E.2d 11, 17 (1946) (stating that errors assigned for the first time in appellant's reply brief will not be considered).

⁴² In addition to the in-depth discussion of the exclusions set forth in this Brief, the insurers also raised additional exclusions as defenses to Mylan's coverage claims. The prior publication exclusion, which prohibits coverage for advertising injury "arising out of oral or written publication of material whose first publication took place before the beginning of the policy period," would exclude coverage for any material that was published before the policy period, regardless of whether the "material is literally

a. **The Wrong Description of Price of Goods Exclusion Is Applicable to Preclude Coverage for the AWP Actions**

The summary judgment motions filed by AMICO and Continental asserted that the AWP Actions fell squarely within their policy exclusion for the “wrong description of price.” This exclusion explicitly states that the policies do not cover any “advertising injury arising out of . . . (3) The wrong description of the price of goods, products or services.” See Affidavit of J. Hoefler, ¶5 attached as Exhibit 1 to Memorandum in Support of Continental Insurance Company’s Cross-Motion for Partial Summary Judgment on the Duty to Defend the AWP Lawsuits).

Here, the AWP Actions revolve around an allegation that Mylan and the other defendants wrongly described the price of their products to the industry publishing services that publish the AWP. As previously mentioned, the AWP Actions allege that Mylan engaged in this scheme with knowledge that the false information would cause the services to publish inflated AWP’s for their drugs. The end result, according to the complaints, was the publication of false AWP’s that caused Medicaid, Medicare, and others to pay excessive amounts for drugs.

restated in precisely the same words.” *Ringler Assocs., Inc. v. Md. Cas. Co.*, 96 Cal. Rptr. 2d 136, 150 (Ct. App. 2000). See also *Maxtech Holding, Inc. v. Federal Ins. Co.*, 202 F.3d 278, 1999 U.S. App. LEXIS 39978, at *6 (9th Cir. 1999); *Federal Ins. Co. v. Learning Group Int’l, Inc.*, 56 F.3d 71, 1995 U.S. App. LEXIS 12270, at *3-4 (9th Cir. 1995); *Scottsdale Ins. Co. v. Sullivan Properties, Inc.*, No. 04-00550, 2006 WL 505170 (D. Haw. Feb. 28, 2006). Here, the insurers have no duty to defend under any of the insurance policies that commenced after Mylan began its fraudulent reporting of AWP’s. The breach of contract exclusion would be applicable as well. The AWP Actions seek to recover for damages sustained by Mylan’s breach of various Rebate Agreements. See *Erie Ins. Prop. & Cas. Co. v. Pioneer Home Improvement, Inc.*, 206 W.Va. 506, 526 S.E.2d 28 (1999)(providing that the insurer had no duty to defend under a commercial general liability policy that did not indemnify for damages in an action for breach of contract). The Penal Statute Exclusion, which precludes coverage for Mylan’s willful violation of a penal statute or ordinance, is also applicable. Each complaint asserts that Mylan’s intentional acts violated federal statutes, including but not limited to 18 U.S.C. §1862(c) and 42 U.S.C. §1396r-8, as well as numerous state statutes.

The AWP complaints (including one of the few complaints relied upon by Mylan in its Opening Brief) are replete with allegations, such as the following examples, that the defendants wrongly described the prices of their drugs:

- “This scheme involves the publication by defendants of **phony** average wholesale **prices**,” Illinois Compl., ¶2;
- Defendants “provided or caused to be provided **false** and inflated **AWP, WAC, and/or Direct Price information** for their drugs to various nationally known drug industry reporting services,” Alabama Compl., ¶103;
- “[E]ach defendant reported an AWP which materially **misrepresented** the **actual prices** paid to Defendants by physicians and pharmacies for prescription drugs,” Thompson Compl., ¶23;
- “[T]he **WAC, AWP, 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, AWP and other prices were materially inflated,” Mass. Compl. ¶44,
- “[E]ach defendant has intentionally reported, or caused to be reported, to industry publications wholesale **price information** that it knew to be **false** and inflated,” MDL Compl., ¶122.

Likewise, the allegations in the AWP Action commenced by the State of California similarly state:

Medi-Cal drug reimbursement rates at all times relevant to this First Amended Complaint in Intervention have been based on price data as published by FDB or other price reporting services. **FDB gets this pricing information from the manufacturers of the various drugs, and then distributes it on a national basis.**

The manufacturers control the prices that are reported by FDB. For example, FDB asserts that all pricing information is supplied and verified by the products’ manufacturers and that there is no independent review of those prices for accuracy.... (¶¶ 33-34) (emphasis added).

According to the plaintiffs’ allegations, their claimed injury arises directly out of the defendants’ alleged misrepresentation of price - Medicaid, Medicare, and others paid reimbursement in the

amount of the falsely described prices.⁴³ Under these circumstances, there is no doubt that the AWP Actions are based on Mylan's wrong (indeed, allegedly fraudulent) description of price. These claims therefore fall directly within the ambit of this exclusion and preclude any "advertising injury" coverage under the AMICO and Continental policies.

This conclusion is supported by the decisions of the courts that have applied similar exclusions and held that no coverage exists for advertising that contains false or misleading cost or price information. *See, e.g., New Hampshire Ins. Co., v. Power-O-Peat, Inc.*, 907 F.2d 58 (8th Cir. 1990) (finding that the incorrect description or mistake in price of goods exclusion is clear and unambiguous); *Nautilus Ins. Co. v. ABN-AMRO Mortgage Group, Inc.*, No. H-05-2750, 2006 WL 3545034, at *9-10 (S.D. Tex. Dec. 8, 2006) (citing exclusion for "Wrong Description of Prices" as applicable to claim of "misleading advertisements, which understated the costs of ownership" of homes).

⁴³ In the Circuit Court, Mylan itself called attention to an order entered in one of the AWP Actions that stated as follows:

This massive nationwide multi-district class action involves the **pricing** of pharmaceutical drugs reimbursed by Medicare, private insurers, and patients . . . **Plaintiffs' core claim** is that the **published AWPs for defendants' drugs are fictitious** because they do not reflect the true average sales price ("ASP") to providers . . . Many pharmaceutical companies unscrupulously took advantage of that flawed AWP system by establishing secret mega-spreads between **the fictitious reimbursement price they reported** and the actual acquisition costs of doctors and pharmacies.

In re Pharm. Indus. Average Wholesale Price Litig., 491 F.Supp. 2d 20, 29-31 (D. Mass. June 21, 2007). The "core claim" and essence of the AWP Actions is thus a claim for injury arising from the wrong description of the price of Mylan's products.

b. The Knowing Falsehoods Exclusion Is Applicable to Preclude Coverage for the AWP Actions

AMICO and Continental have repeatedly raised the exclusion in their policies barring coverage for claims “arising out of oral or written publication of material, if done by or at the direction of the insured with knowledge of its falsity” (the “Knowing Falsehoods Exclusion”).

The Knowing Falsehoods Exclusion is valid and enforceable under West Virginia law, and relieves an insurer of its duty to defend its insured when the allegations in the underlying complaint make clear that the insured knew its allegedly wrongful statements were false. *See Cmty. Antenna Servs. v. Westfield Ins. Co.*, 173 F. Supp. 2d 505, 513 (S.D. W. Va. 2001) (applying West Virginia law) (“injuries arising out of knowing misrepresentation are not covered under the CGL policy”); *State Bancorp, Inc. v. U.S. Fid. & Guar. Ins. Co.*, 199 W.Va. 99, 109, 483 S.E.2d 228, 238 (1997) (positing that the insurer had no obligation to defend a defamation claim where the allegations in the underlying complaint established that the alleged act – the issuance of a letter containing the allegedly defamatory statements – was intentional); *see also Atlantic Mut. Ins. Co. v. Terk Techs. Corp.*, 763 N.Y.S.2d 56, 60-61 (N.Y. App. Div. 2003) (holding that the Knowing Falsehoods Exclusion can obviate a duty to defend where the underlying allegations establish knowing and intentional conduct); *see also Nutrisystem, Inc. v. National Fire Ins. of Hartford*, No. Civ. A. 03-6932, 2004 WL 2646598 (E.D. Pa. Nov. 19, 2004) (stating that the insured had actual knowledge of falsity its statements, as part of a conspiracy to drive the plaintiffs out of business, which triggered the Knowing Falsehoods Exclusion and relieved the insurer of its duty to defend).

Every single AWP Action alleges that Mylan knowingly and intentionally defrauded Medicaid and Medicare by reporting false pricing information of its drugs to third-party publishers. Every single AWP Action alleges that Mylan knew that Medicaid, Medicare, and

other payors relied on the published compendia to set its reimbursement rate for Mylan's drugs. In addition, the complaints assert that Mylan knew that the "marketing the spread" concept involved the oral or written publication of its false pricing information for use by providers. The complaints do not contain any allegations Mylan negligently or unknowingly caused the false information to be published.

The Complaint filed by the State of Florida, which is strikingly similar to every other complaint, describes how Mylan knowingly and intentionally provided the publishers with inflated pricing information:

The Defendants knowingly and intentionally made false representations of prices and costs for certain of their drugs to the Florida Medicaid Program. The Defendants reported, and caused First DataBank to report, prices for the Subject Drugs that substantially exceeded the market prices known to the Defendants from their own business information. The Defendants knew that reporting false, inflated AWP and WAC prices for the Subject Drugs would cause Florida Medicaid Program's estimates of the acquisition costs of the Subject Drugs to substantially exceed any reasonable estimates of the acquisition costs of those drugs. (¶ 27).

The State of South Carolina asserted that:

Defendant has continuously concealed the true price of their drugs and continued to publish deceptive AWPs and WACs as if they were real representative prices. (¶33).

Although Mylan failed to dispute the applicability of the policies' exclusions in its Brief, it did set forth arguments that the Knowing Falsehoods Exclusion was inapplicable in its opposition to the Insurers' motion for summary judgment in the Circuit Court. Mylan claimed that the exclusion was inapplicable because it did not actually publish the compendiums of pricing information, but merely supplied the information to third-party publishers. This is a distinction without a difference. The policies exclude coverage for the publication of knowingly false material (written or oral) *done by or at Mylan's direction*. Thus, the fact that Mylan did not

actually publish the fraudulent pricing information, but instead provided the fraudulent information to a third-party with knowledge that it would be published, does not enable Mylan to avoid the effect of the exclusion.

Mylan also argued before the Circuit Court that the exclusion does not apply because some of the AWP Actions only allege Mylan provided “improper,” “manipulative,” or “artificially inflated prices” to publishers instead of knowingly false information – as if there is a difference between providing publishers with “knowingly false information” and providing publishers with “improper or artificially inflated prices.” Once again, Mylan’s attempt to avoid the application of the exclusion must fail. The exclusion prohibits coverage for publication of false statements made with Mylan’s knowledge. Obviously, if Mylan provided the publishers or providers with manipulated, improper or artificially inflated prices, it did so with knowledge that its prices were false. In sum, even if the claims in the AWP Actions had implicated AMICO’s and Continental’s coverage obligations under the policies’ insuring agreements, the Knowing Falsehoods Exclusion is applicable and eliminates any insurance coverage for these claims.⁴⁴

⁴⁴ Numerous courts have already examined the AWP complaints filed against Mylan and the co-defendants. Judge Patti B. Saris, who is overseeing the Multi-District Litigation, stated that:

The gravamen of the fraudulent scheme alleged ... is that defendant manufacturers send publishers their AWPs (or their WACs)... Defendants know that class members will make reimbursement payments based on those prices. In fact, plaintiffs allege ... AWPs are neither the true average prices charged by wholesalers nor the price measure “expected” by the market Instead, defendants (or wholesalers) sell a drug to retailers at a net price often significantly below the expected “AWP minus 16% to 33%” threshold by utilizing hidden discounts, off-invoice rebates, free samples, education grants, and other promotional means that are not reflected in the list price. Defendants do so to increase their market share or sales, at a cost to the end-payor. Under plaintiffs’ theory, class members have been defrauded by intentionally false misrepresentations as to AWP that permit retailers and intermediaries like PBMs to retain the benefits of price reductions. Plaintiffs allege that the scheme led to huge profits for drug companies and doctors at the expense of insurers and their beneficiaries.

2. Public Policy Considerations Mandate That Mylan is Not Entitled to Insurance Coverage

Public policy considerations also compel an affirmance of the Circuit Court's decision. The AWP Actions claim that Mylan engaged in intentionally fraudulent conduct to increase its market share. Mylan is now seeking to be reimbursed by its insurers for the fines, verdicts and settlements that it may be forced to pay.

West Virginia public policy prohibits insurers from insuring intentional wrongful acts. "It is a fundamental rule of the common law that no man shall be permitted to profit by his own wrong." *State v. Phoenix Mut. Life Ins. Co.*, 114 W. Va. 109, 113, 170 S.E.2d 909, 911 (1933); *see also Horace Mann Ins. Co. v. Leeber*, 180 W. Va. 375, 380, 376 S.E.2d 581, 586 (1988) (stating that it is against the public policy of West Virginia to permit insurance coverage for a purposeful or intentional tort, meaning a tort involving the intent to act and to cause some harm). Virtually every other jurisdiction across the United States also precludes insurance coverage for intentional acts as violative of public policy. *See White v. Smith*, 440 S.W.2d 497 (Mo. Ct. App. 1969) (positing that Missouri public policy dictates that a liability insurance policy does not afford coverage for damage intentionally inflicted by the insured); *Aetna Cas. & Sur. Co. v. Super. Ct.*, 23 Cal. Rptr. 2d 442 (Ct. App. 1993) (stating that California public policy prohibits an insurer from providing coverage for willful conduct); *Pub. Servs. Mut. Ins. Co. v. Goldfarb*, 442 N.Y.S.2d 422 (1981) (positing that public policy prohibits indemnification where an insured

* * *

Significantly, plaintiffs have wisely noted that they are pressing only the theory that defendants intentionally made fraudulent misrepresentations of AWP....Defendants [the pharmaceutical companies] point to no state where the intentional, fraudulent acts alleged would be permitted under the consumer protection statute.

In re: Pharm. Indus. Average Wholesale Price Litig., 230 F.R.D. 61, 69, 77 (D. Mass. 2005).

intentionally caused the resulting injuries); *S.C. Farm Bureau Mut. Ins. Co. v. Mumford*, 382 S.E.2d 11, 13 (S.C. Ct. App. 1989) (South Carolina public policy that prohibits persons from insuring themselves against their own intentionally harmful acts); *Blackman v. Wright*, 716 A.2d 648 (Pa. Super. Ct. 1998) (It is violative of Pennsylvania public policy to provide insurance coverage for intentional acts.); *Farmland Mut. Ins. Co. v. Scruggs*, 886 So. 2d 714 (Miss. 2004) (Mississippi public policy prohibits corporations from insuring themselves against acts prohibited by law.); *Ranger Ins. Co. v. Bal Harbour Club, Inc.*, 549 So. 2d 1005, 1007 (Fla. 1989) (Florida public policy provides that one should not be able to insure against one's own intentional misconduct.); *Pacheco v. Safeco Ins. Co.*, 780 P.2d 116, 123 (Idaho 1989) (Idaho public policy would not allow recovery under a contract of insurance where the insured started his own fire); *Bayudan v. Tradewind Ins. Co.*, 957 P.2d 1061 (Haw. Ct. App. 1998). Courts rely on public policy to preclude insurance coverage for inherently wrongful acts. *See Aetna Cas. & Sur. Co. v. Super. Ct.*, 23 Cal. Rptr. 2d 442 (Ct. App. 1993).

Public policy dictates that Mylan is not entitled to insurance coverage. The AWP Actions concern Mylan's alleged fraudulent and intentional conduct in scheming to increase its market share by reporting false and inflated pricing information to publishers. Reversing the Circuit Court here would not only be inconsistent with West Virginia's longstanding public policy, but it would allow corporations to escape responsibility for intentionally wrongful actions. This would be unjust, and beyond the scope of coverage under the AMICO and Continental policies. As such, coverage should be barred.

IV. CONCLUSION

For the foregoing reasons, AMICO and Continental respectfully request that the Court affirm the Circuit Court's judgment in this matter.

Respectfully submitted,



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