

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 APPELLEE FEDERAL INSURANCE COMPANY

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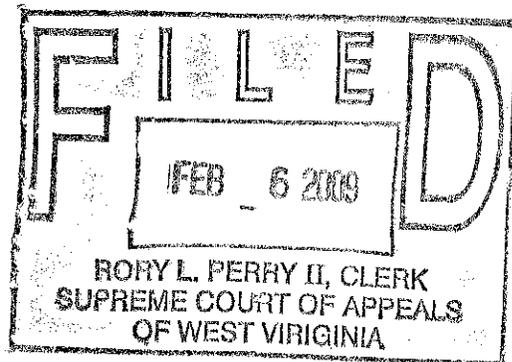


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BRIEF OF APPELLEE FEDERAL INSURANCE COMPANY

ISSUES PRESENTED FOR REVIEW

1. Whether the Circuit Court of Monongalia County, Honorable Robert B. Stone presiding, correctly concluded Federal Insurance Company (“Federal”) had no duty under the follow form Coverage A of its Umbrella Policies to defend Mylan Laboratories, Inc., Mylan Pharmaceuticals, Inc. and UDL Laboratories, Inc. (collectively, “Mylan”) against underlying lawsuits that did not allege “bodily injury” or “advertising injury” as those terms are defined in the primary policies.
2. Whether the Circuit Court correctly concluded Federal had no duty under the stand-alone Coverage B of its Umbrella Policies to defend Mylan against underlying lawsuits that did not allege “bodily injury,” “advertising injury,” or “personal injury” as those terms are defined in the Federal Umbrella Policies.
3. Specifically, with respect to its conclusion that Federal had no duty to defend under Coverage B of Umbrella Policies, did the Circuit Court correctly conclude the underlying lawsuits did not allege “discrimination” as that term is used in the definition of “personal injury” in the Federal Umbrella Policies, where the underlying lawsuits alleged only antitrust violations and fraud, and did not allege discrimination against the underlying plaintiffs based upon their immutable characteristics, such as race, sex, or age.

I. SUMMARY OF ARGUMENT

The Circuit Court correctly compared the allegations of the underlying complaints to the provisions of the Federal Umbrella Policies in determining that Federal owed no duty to defend Mylan in the underlying lawsuits. Judge Stone's February 8, 2008 Order granting, *inter alia*, Defendant/Appellee, Federal's Cross-Motions for Partial Summary Judgment on the Duty to Defend ("Judge Stone's Order") sets forth the appropriate standards under West Virginia law for construction of an insurance policy and resolution of an insurer's duty to defend. Judge Stone correctly applied that law to the undisputed terms of the Federal Umbrella Policies and the allegations of the underlying complaints.

Under follow-form Coverage A of the Federal Umbrella Policies, Federal is obligated to defend claims or suits only if the limit of underlying insurance has been "exhausted by payment of claims." The Circuit Court correctly concluded that the underlying lawsuits do not allege "bodily injury," "advertising injury," or "personal injury" as those terms are defined by the primary insurance policies issued by Wausau Insurance Company ("Wausau"). Since there is no coverage under the Wausau primary policies, the Circuit Court properly held that Federal cannot owe a duty under the follow-form Coverage A of the Federal Umbrella Policies to defend Mylan against the underlying lawsuits.

Under the stand-alone Coverage B of the Federal Umbrella Policies, Federal can have a duty to defend if the primary insurance does not apply, but the stand-alone Coverage B does apply. The term "bodily injury" is defined identically in Coverage B of the Federal Umbrella Policies and the Wausau primary policies, while the term "advertising injury" is defined more narrowly in Coverage B of the Federal Umbrella Policies than it is in the Wausau primary policies. Consequently, there is no circumstance where claims of "bodily injury" or "advertising

injury” would trigger the stand-alone Coverage B of the Federal Umbrella policies without also triggering the Wausau primary policies. Thus, the Circuit Court properly held that Federal cannot owe a duty under the “bodily injury” or “advertising injury” portions of Coverage B of the Federal Umbrella Policies to defend Mylan against the underlying lawsuits.

Although the term “personal injury” is defined more broadly in the stand-alone Coverage B of the Federal Umbrella Policies than it is in the Wausau primary policies, the Circuit Court correctly concluded the underlying lawsuits did not include allegations triggering the definition of “personal injury” in Coverage B of the Federal Umbrella Policies. Judge Stone properly found that the term “discrimination,” one of the enumerated offenses contained in the Coverage B definition of “personal injury,” is clear and unambiguous, and rejected Mylan’s unreasonable attempt to expand the term to include claims of so-called “disparate treatment, including economic discrimination.” He correctly limited the scope of that term to discrimination based upon immutable characteristics, such as race, sex, or age, which are not present in the underlying lawsuits. There are no claims for “discrimination,” of any kind, even arguably alleged in the underlying lawsuits, which allege only antitrust violations and fraud. Therefore, Judge Stone correctly held that Federal owes no duty to defend Mylan against the underlying lawsuits.

In any event, even if the underlying lawsuits did allege “discrimination,” which they do not, Judge Stone’s decision should be affirmed. According to Mylan, the only type of “discrimination” alleged in the underlying lawsuits is “disparate treatment” discrimination, which by definition is intentional in nature and, therefore, not insurable as a matter of public policy. Although Judge Stone did not reach this public policy argument because he found, as a threshold matter that the underlying lawsuits did not allege “discrimination” at all, Judge Stone’s Order may be affirmed for this additional reason, which was fully briefed and argued below.

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

Federal adopts and incorporates by reference American Motorists Insurance Company and Continental Insurance Company's Response to Mylan's Description of the Circuit Court's Ruling and Statement of the Case.¹

III. CONCISE RESPONSE TO MYLAN'S ASSIGNMENTS OF ERROR

Federal adopts and incorporates by reference American Motorists Insurance Company and Continental Insurance Company's Concise Response to Mylan's Assignments of Error, and Wausau Insurance Company's Response to Mylan's Assignment of Error.²

IV. STANDARD OF REVIEW

Federal does not dispute Mylan's contention that this Court's review of the entry of summary judgment is *de novo*. See *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994).

However, Mylan's suggestion that appellate review is hampered because no findings of fact were made by the Circuit Court is unfounded. As Mylan must know, the Circuit Court set forth extensive "factual findings sufficient to permit meaningful appellate review." Judge Stone's Order, pg. 2, quoting *Gentry v. Mangum*, 195 W. Va. 512, 466 S.E.2d 171 (1995). Indeed, Judge Stone's Order contains 25 pages of "Factual Findings" that are not legitimately disputed by the parties. See Judge Stone's Order, pgs. 3-28. Those Factual Findings were more than sufficient to permit the Circuit Court to enter summary judgment in favor of Federal, and are more than sufficient for this Court to review Judge Stone's Order and deny Mylan's appeal.

¹ See Brief of Appellees American Motorists Insurance Company and Continental Insurance Company, Section I.

² See Brief of Appellees American Motorists Insurance Company and Continental Insurance Company, Section II; Brief by Appellee Wausau Insurance Company, pgs. 1-2.

V. STATEMENT OF FACTS

Federal adopts and incorporates by reference Wausau Insurance Company's Statement of Facts.³ In addition, Federal includes the following in its Statement of Facts:

Federal issued to Mylan the following commercial umbrella liability insurance policies:

<i>Policy Number</i>	<i>Policy Period</i>	<i>Limits of Insurance</i>
7966-7027 CAS	9/1/97 to 9/1/98	\$10,000,000 excess of \$1,000,000
7966-7027 MTO	9/1/98 to 9/1/99	\$20,000,000 excess of \$1,000,000
7966-7027 MTO	9/1/99 to 9/1/00	\$20,000,000 excess of \$1,000,000
7966-7027 MTO	9/1/00 to 9/1/01	\$20,000,000 excess of \$1,000,000

Copies of the Federal Umbrella Policies are attached as Exhibits 1-4 to the Sonlin Affidavit. The Federal Policies contain the following terms and conditions:

Insuring Agreements

Coverage A - Excess Follow Form Liability Insurance

Under Coverage A, we will pay on behalf of the insured, that part of loss covered by this insurance in excess of the total applicable limits of underlying insurance, provided the injury or offense takes place during the Policy Period of this policy. The terms and conditions of underlying insurance are with respect to Coverage A made a part of this policy, except with respect to:

- A. any contrary provision contained in this policy; or
- B. any provision in this policy for which a similar provision is not contained in underlying insurance.

With respect to the exceptions stated above, the provisions of this policy will apply.

The amount we will pay is limited as described in Limits of Insurance.

Notwithstanding anything to the contrary contained above, if underlying insurance does not cover loss, for reasons other than exhaustion of an aggregate limit of insurance by payment of claims, then we will not cover such loss.

We have no obligation under this insurance with respect to any claim or suit settled without our consent.

³ See Brief by Appellee Wausau Insurance Company, Section II.

If we are prevented by law from paying on behalf of the insured for coverage provided under this insurance, then we will indemnify the insured.

Coverage B - Umbrella Liability Insurance

Under Coverage B, we will pay on behalf of the **insured**, damages the insured becomes legally obligated to pay by reason of liability imposed by law or assumed under an **insured contract** because of **bodily injury, property damage, personal injury, or advertising injury** covered by this insurance which takes place during the Policy Period of this policy and is caused by an **occurrence**. We will pay such damages in excess of the Retained Limit Aggregate specified in Item 4 d. of the Declarations or the amount payable by other insurance, whichever is greater.

Damages because of **bodily injury** include damages claimed by any person or organization for care or loss of services resulting at any time from the **bodily injury**.

The coverage applies anywhere.

The amount we will pay is limited as described in Limits of Insurance.

Coverage B will not apply to any loss, claim or **suit** for which insurance is afforded under **underlying insurance** or would have been afforded except for the exhaustion of the limits of insurance of **underlying insurance**.

We have no obligation under this insurance with respect to any claim or **suit** settled without our consent.

If we are prevented by law from paying on behalf of the insured for coverage provided under this insurance, then we will indemnify the **insured**.

Defense and Supplementary Payments

Applicable to Coverage A and Coverage B

- A. We will have the right and the duty to assume control of the investigation, settlement or defense of any claim or **suit** against the **insured** for damages covered by this policy:
1. under Coverage A, when the applicable limit of **underlying insurance** has been exhausted by payment of claims; or
 2. under Coverage B, when damages are sought for **bodily injury, property damage, personal injury or advertising injury** to which no **underlying insurance** or other insurance applies.

Limits of Insurance

Applicable to Coverage A Only

- A. With respect to Coverage A and subject to paragraphs B.1., B.2. and B.3. above:

1. if the limits of **underlying insurance** have been reduced by payment of **loss**, this policy will drop down to become immediately excess of the reduced underlying limit; or
2. if the limits of **underlying insurance** have been exhausted by payment of **loss**, this policy will continue in force as **underlying insurance**.

The provisions of A.1. and A.2. above apply to injury or offense which takes place before the expiration of this policy or the underlying policy, whichever comes first.

Definitions

Applicable to Coverage B Only

Advertising injury means injury, other than **bodily injury** or **personal injury**, arising solely out of one or more of the following offenses committed in the course of **advertising** your goods, products or services:

1. oral or written publication of **advertising** material that slanders or libels a person or organization;
2. oral or written publication of **advertising** material that violates a person's right of privacy; or
3. infringement of copyrighted titles, slogans or other **advertising** materials.

Advertising means any paid: advertisement, publicity article, broadcast or telecast.

Bodily Injury means physical injury, sickness or disease to a person and, if arising out of the foregoing, mental anguish, mental injury, shock or humiliation, including death at any time resulting therefrom.

Occurrence means: ...

1. with respect to **bodily injury** or **property damage** liability, an accident, including continuous or repeated exposure to substantially the same general harmful conditions.
2. with respect to **personal injury** or **advertising injury**, a covered offense. All damages that arise from the same act, publication or general conditions are considered to arise out of the same occurrence, regardless of the frequency or repetition thereof, the number or kind of media used or the number of claimants.

Personal injury means injury, other than **bodily injury**, arising out of one or more of the following offenses committed in the course of your business, other than your advertising:

1. false arrest, detention or imprisonment;
2. malicious prosecution;

3. the wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person or persons occupy, by or on behalf of its owner, landlord or lessor;
4. oral or written publication of material that slanders or libels a person or organization;
5. oral or written publication of material that violates a person's right of privacy, or
6. discrimination (unless insurance thereof is prohibited by law).

In addition, the September 1, 2000 to September 1, 2001 policy contains the following endorsement deleting the "personal injury" coverage:

**Endorsement
Personal Injury Exclusion Coverage B**

THIS POLICY IS SUBJECT TO THE FOLLOWING ENDORSEMENT

Under "Exclusions", "Applicable to Coverage B Only", the following exclusion is added:

Personal Injury

Under Coverage B, this insurance does not apply to **personal injury**.

It is agreed that, with respect to Coverage B, all references in the policy to **personal injury** are deleted and no coverage is provided.

All other terms and conditions remain unchanged.

VI. ARGUMENT

A. Introduction

Judge Stone's Order should be affirmed. Judge Stone correctly found as a matter of law that Federal does not owe a duty to defend Mylan in the underlying AWP Actions and L&C Actions because the allegations of the underlying complaints do not create even a potential for coverage under (1) the "bodily injury" or "advertising injury" definitions in the Wausau primary policies; (2) the "bodily injury" or "advertising injury" definitions in the stand-alone Coverage B of the Federal Umbrella Policies; or (3) the "discrimination" offense in the "personal injury" definition in Coverage B of Federal's Umbrella Policies.

As set forth in the Appellee Briefs of Wausau, American Motorists Insurance Company, and Continental Insurance Company, the AWP Actions and the L&C Actions do not trigger coverage under the "advertising injury" and "bodily injury" sections of the primary policies at issue. For the same reasons, there is no "advertising injury" or "bodily injury" coverage available to Mylan under Coverage A or Coverage B of the Federal Umbrella Policies.

Mylan argues that the underlying complaints allege "discrimination" as that term is used in the "personal injury" definition in Coverage B of Federal's Umbrella Policies. As Judge Stone correctly found, the term "discrimination" unambiguously means only traditional types of discrimination, such as discrimination based on race, sex, or age. The underlying complaints do not allege "discrimination." In hopes of overcoming this fatal defect in its position, Mylan inaccurately describes the underlying lawsuits, exaggerates or misstates case law, relies on inapposite cases, and unfairly mischaracterizes both Federal's position and the Circuit Court's rulings. A comparison of the actual allegations of the underlying complaints to the language of the Federal Umbrella Policies, together with a fair reading of the relevant case law, however, demonstrates Judge Stone's Order is correct and should be affirmed.

Mylan contends that this Court is required to declare a policy term ambiguous when other jurisdictions disagree as to the term's meaning. This contention is contrary to West Virginia precedent, and typical of Mylan's cavalier attitude toward fairly stating existing law. Under West Virginia law, this Court may, in its discretion (but need not), conclude a policy term is ambiguous where other courts have construed that term in different ways. *Murray v. State Fire & Cas. Co.*, 203 W. Va. 477, 485, n.5, 509 S.E.2d 1, 9, n. 5 (W. Va. 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.") However, in *Murray*, the court declared a policy provision ambiguous only after noting 30 other jurisdictions where the term was deemed ambiguous, compared to just nine jurisdictions where the term was found unambiguous.

Here, by contrast, Mylan's overbroad interpretation of the critical policy term "discrimination" is not supported by a majority of other jurisdictions. As explained below, there are really only two other cases addressing the proper construction of the term "discrimination" when used in the definition of "personal injury," and those cases are split. This Court should thus decide for itself whether the policy language is ambiguous and not, as Mylan suggests, deem itself bound to find the policy language ambiguous simply because one other court has done so. Judge Stone found that the term "discrimination" unambiguously means only traditional types of discrimination, such as discrimination based on race, sex or age. This Court should likewise adopt that construction of the term "discrimination," which is the only reasonable construction of that term when read in context.

Finally, although one court, from another jurisdiction, applying Indiana law, adopted a broader construction of the term "discrimination," even that court construed the term only far enough to encompass claims of "price discrimination." There are no claims for price

discrimination asserted in the underlying lawsuits, nor even any facts alleged that could support a claim by the underlying plaintiffs against Mylan for price discrimination.

As there is no genuine issue of material fact, and Federal was entitled to judgment as a matter of law that it has no duty to defend Mylan, the Circuit Court correctly entered judgment in Federal's favor. Therefore, this Court should affirm Judge Stone's Order.

B. Unambiguous Policy Language Must Be Given Its Plain and Ordinary Meaning

Determination of the scope of coverage of an insurance contract, when the facts are not in dispute, is a question of law. *Tacket v. American Motorists Ins. Co.*, 213 W. Va. 524, 584 S.E.2d 158 (W.Va. 2003), citing *Tennant v. Smallwood*, 211 W.Va. 703, 568 S.E.2d 10 (W.Va. 2002).

The language in an insurance policy should be given its plain and ordinary meaning. *State Bancorp, Inc. v. U.S. Fidelity and Guaranty Ins. Co.*, 483 S.E.2d 228, 233 (W.Va. 1997). "Where the provisions of an insurance policy contract are clear and unambiguous they are not subject to judicial construction or interpretation, but full effect will be given to the plain meaning intended." *Id.*, citing *Keffer v. Prudential Ins. Co. of America*, 153 W. Va. 813, 172 S.E.2d 714, 715 (W.Va. 1970). "It is a fundamental principle of insurance law that 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." *State Automobile Mutual Ins. Co. v. Alpha Engineering Services, Inc.*, 208 W. Va. 713, 542 S.E.2d 876, 879 (W.Va. 2000).

Provisions in an insurance policy are not ambiguous simply because they are not defined in the policy of insurance.⁴ Instead, this Court should construe undefined policy provisions in “an ordinary and popular sense,” and in a way that ‘a person of average intelligence and experience’ would interpret them.” *Gower v. AIG Claims Services, Inc.*, 501 F.Supp.2d 762, 772 (N.D.W.Va. 2007) (citation omitted). This Court has stated that “[a]n insurance policy should never be interpreted so as to create an absurd result, but instead should receive a reasonable interpretation, consistent with the intent of the parties.” *Mulledy v. West Virginia Insur. Co.*, 201 W.Va. 195, 495 S.E.2d 566 (W. Va. 1997) (citation omitted).

Additionally, this Court is not required to find ambiguity in a policy because other jurisdictions have defined a policy term differently. Disagreement between other courts as to the meaning of a policy term does not make that term ambiguous as a matter of law, as Mylan suggests. Mylan’s Opening Brief, pg. 2. Instead, this Court has held only that a policy provision “may be deemed to be ambiguous if courts in other jurisdictions have interpreted the provision in different ways.” *Murray*, 203 W. Va. at 485, fn.5 (emphasis added). In *Murray*, this Court declared an earth movement exclusion was ambiguous because it was “reasonably susceptible to different meanings.” *Id.* at 485. Importantly, this Court noted 30 other jurisdictions have held such an earth movement exclusion ambiguous, while only nine jurisdictions have found the exclusion unambiguous. *Id.*, Appendix A. Even though this Court found the earth movement exclusion ambiguous, it went on to evaluate the exclusion under the doctrines of *ejusdem generis*

⁴ See *Ellis v. Farm Bureau Insur. Co.*, 2008 WL 5272811 (Mich. Dec. 19, 2008) (“although defendant [insurer] acknowledges that the dispositive terms of the policy are not defined in the policy...this by no means constitutes a concession that these terms are ‘ambiguous.’ ‘As this Court has repeatedly stated, the fact that a contract does not define a relevant term does not render the contract ambiguous’”) (citation omitted); *Spangle v. Farmers Insur. Exchange*, 166 Cal. App. 4th 560, 567 (Cal. App. Aug. 29, 2008) (“The fact that a term is not defined in the policies does not make it ambiguous”) (internal citation omitted); *Simon Wrecking Co. v. AIU Ins. Co.*, 350 F.Supp.2d 624, 636 (E.D. Penn. 2004) (under Pennsylvania law, “[t]he mere fact that a term used in the policy is not defined does not make the policy ambiguous”) (citation omitted).

and *noscitur a sociis*. *Id.* at 485. Only after performing its own, independent analysis did this Court conclude the earth movement exclusion should be construed in favor of the insured. *Id.*

In its Opening Brief, Mylan wrongly contends that, because simply the parties dispute the meaning of certain provisions in the insurance policies, an ambiguity exists, requiring Federal and the other insurers to defend. Mylan's Opening Brief, pgs. 5-6. Such an unprincipled rule would require an insurer to provide coverage any time the insured is unwilling to concede that no duty to defend exists. Mylan attempts to bolster its position through the creative use of ellipses to distort the reasoning and holding of a California Appellate Court. *Id.*, pg. 5, fn. 21. The quotation from the California Appellate Court, stated in its entirety, actually contradicts Mylan's position. The California Appellate Court stated as follows:

If the parties dispute whether the insured's alleged misconduct is potentially within the policy coverage, *and if the evidence submitted does not permit the court to eliminate either party's view, then factual issues exist precluding summary judgment in the insurer's favor. Indeed, the duty to defend is then established, absent additional evidence bearing on the issue.*

Amer. Cyanamid Co. v. Amer. Home Assur. Co., 30 Cal. App. 4th 969, 35 Cal.Rptr.2d 920 (Cal. App. 1994) (citation omitted) (italicized language omitted by Mylan from its Opening Brief). Here, Federal has submitted sufficient evidence, *i.e.* the insurance policies themselves and the allegations of the underlying complaints, to eliminate Mylan's unreasonable interpretation of the Federal Umbrella Policies.

C. The Duty to Defend Is Determined From A Comparison Of The Allegations In The Underlying Complaints To The Terms Of The Insurance Policies

The terms of the insurance contract define the scope of the insurer's duty to defend its insured. *Tackett v. American Motorists Ins. Co.*, 584 S.E.2d 158, 162 (W.Va. 2003). A liability insurer's duty to defend is tested by whether the allegations in the underlying complaint are reasonably susceptible of an interpretation that the claim may be covered by the terms of the

insurance policy. *State Automobile Mutual Ins. Co. v. Alpha Engineering Services, Inc.*, 542 S.E.2d 876, 879 (W.Va. 2000). 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. *Id.* If the causes of action alleged in the underlying complaint are entirely foreign to the risks covered by the insurance policy, then the insurance company is relieved of its duties under the policy. *Id.*, citing *Silk v. Flat Top Construction, Inc.*, 192 W.Va. 522, 525, 453 S.E.2d 356, 359 (W.Va. 1994); see also *State Bancorp, Inc. v. U.S. Fidelity and Guaranty Ins. Co.*, 483 S.E.2d 228, 233 (W.Va. 1997) (“a liability insurer need not defend a case against the insured if the alleged conduct is entirely foreign to the risk insured”).

As set forth in detail below, a comparison of the unambiguous language in the Federal Umbrella Policies to the allegations in the underlying L&P Lawsuits and AWP Actions demonstrates Federal owes Mylan no duty to defend, and the propriety of Judge Stone’s Order.

D. Coverage A Of The Federal Umbrella Policies Is Not Triggered Because The Wausau Primary Policies Are Not Exhausted

Judge Stone correctly concluded Federal owed no duty to defend or indemnify under Coverage A of the Federal Umbrella Policies because the primary policies issued by Wausau do not provide coverage for the claims at issue and, thus, are not exhausted. Specifically, Judge Stone concluded the L&C Actions and the AWP Actions did not allege “bodily injury” or “advertising injury” as defined in the Wausau primary policies. Where there is no coverage under the primary policies, Federal cannot possibly have a duty to defend under Coverage A of its Umbrella Policies.

The Federal Umbrella Policies have two parts. “Coverage A” is excess insurance, which follows-form, in pertinent part, to the primary policy. In other words, the scope of Coverage A is generally defined by the provisions of the primary policies, which in this case were issued by

Wausau. Federal can have a duty to defend under Coverage A only if the limit of underlying insurance has been “exhausted by payment of claims.” In contrast, “Coverage B” is a stand-alone coverage that imposes a duty to defend covered claims or suits “to which no underlying insurance or other insurance applies.” Unlike Coverage A, the scope of Coverage B is defined by the language contained in the Federal Umbrella Policies, without reference to the language of the primary policies.

Under Coverage A of the Federal Policies, Federal is obligated to defend covered claims or suits only when the limit of underlying primary insurance has been “exhausted by payment of claims.” Thus, Federal can have a duty to defend under Coverage A only after the primary policies are exhausted by payment of their limits in respect of covered claims. Since Wausau disclaimed coverage and paid nothing for the AWP Actions and the L&C Actions, and the Circuit Court concluded Wausau owes no duty to defend Mylan in the underlying lawsuits, Federal cannot possibly have a duty to defend Mylan under Coverage A. Judge Stone’s Order thus correctly finds Federal has no Coverage A duty to defend here.

E. The “Bodily Injury” And “Advertising Injury” Sections Of Coverage B Of The Federal Umbrella Policies Are Not Triggered

Federal’s Coverage B duty to defend can exist only if the primary insurance does not apply. If this Court reverses the Circuit Court’s ruling and finds any of the primary insurers are required to defend under the “bodily injury” or “advertising injury” sections of their policies, then Federal’s Coverage B duty to defend cannot possibly be triggered. In contrast, if this Court affirms Judge Stone’s rulings that the underlying lawsuits do not allege “bodily injury” or “advertising injury” as those terms are defined in the primary policies, then Federal could have a duty to defend under Coverage B, but only if the AWP Actions and the L&C Actions allege claims falling within the stand-alone Coverage B provisions of the Federal Umbrella Policies.

Mylan argues that Wausau has a duty to defend under the “advertising injury” coverage because the AWP Actions and the L&C Actions assert claims under certain of its policies for “misappropriation of advertising ideas” and “use of another’s advertising idea in your ‘advertisement.’” Mylan’s Complaint at ¶¶10, 15. Because the definition of “advertising injury” in Coverage B of the Federal Umbrella Policies does not include the enumerated offenses of “misappropriation of advertising ideas” or “use of another’s advertising idea in your advertisement,” Mylan does not even attempt to argue that Federal has a duty to defend the AWP Actions or the L&C Actions under the “advertising injury” section of Coverage B. In other words, there is no possibility that Federal’s “advertising injury” coverage would apply to the AWP Actions or the L&C Actions when Wausau’s “advertising injury” coverage does not apply.⁵ Accordingly, the duty to defend the AWP Actions under the “advertising injury” coverage either rests with Wausau or the other primary insurers (as Mylan contends), or it does not exist as was held by the Circuit Court.

⁵ Coverage B of the Federal Umbrella Policies includes the exclusions for Wrong Description of Price, Knowing Falsehoods, and Breach of Contract, which are in the Wausau primary policies. In addition, both the Wausau primary policies and Coverage B of the Federal Umbrella Policies include a Prior Publication Exclusion, which bars 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.” Here, the AWP Actions allege that Mylan’s fraudulent reporting of AWP’s began long before the beginning of the first Federal Umbrella Policy on September 1, 1997. See Exhibit 4 to Memorandum In Support of American Motorists Insurance Company And Federal Insurance Company’s Cross-Motion For Partial Summary Judgment on The Duty To Defend The AWP Actions (summarizing allegations of Mylan’s fraudulent conduct prior to September 1, 1997). Thus, Judge Stone’s Order can and should be affirmed on the alternative ground that the Prior Publication Exclusion applies, relieving Federal of any duty under the “advertising injury” coverage to defend Mylan against the AWP Actions. See *Ringler Assoc., Inc. v. Maryland Cas. Co.*, 80 Cal. App. 4th 1165, 1182, 96 Cal. Rptr. 2d 136, 150 (Cal. Ct. App. 2000); *Maxtech Holding, Inc. v. Federal Ins. Co.*, 202 F.3d 278 (9th Cir. 1999); *Federal Ins. Co. v. Learning Group Int’l, Inc.*, 56 F.3d 71 (9th Cir. 1995); *Scottsdale Ins. Co. v. Sullivan Properties, Inc.*, 2006 WL 505170 (D. Haw. 2006); *Interlocken Int’l Camp, Inc. v. Markel Ins. Co.*, 2003 WL 881002 (D.N.H. 2003); *Finger Furniture Co., Inc. v. Travelers Indem. Co. of Connecticut*, 2002 WL 32113755 (S.D. Tex. 2002); *Doskocil, Inc. v. Fireman’s Fund Ins. Co.*, 1999 WL 430755 (N.D. Cal. 1999), aff’d 41 Fed. Appx. 75 (9th Cir. 2002); *Applied Bolting Technology Products, Inc. v. U.S. Fid. & Guar. Co.*, 942 F.Supp. 1029 (E.D. Pa. 1996), aff’d 118 F.3d 1574 (3rd Cir. 1997).

Additionally, the scope of “bodily injury” coverage under Coverage B of the Federal Umbrella Policies⁶ is no broader than the “bodily injury” coverage under the Wausau policies, making it impossible for a situation to arise where there is no “bodily injury” coverage under the Wausau primary policies, but there is “bodily injury” coverage under Coverage B of the Federal Umbrella Policies. Therefore, Federal cannot possibly have a Coverage B duty to defend the L&C Actions under the “bodily injury” coverage. Either that duty rests with Wausau (as Mylan contends), or it does not exist as was held by the Circuit Court.

F. The “Personal Injury” Section Of Coverage B Of The Federal Umbrella Policies Is Not Triggered

1. Mylan’s “Personal Injury” Argument Involves Only Federal And Only Coverage B of the Federal Umbrella Policies

The Circuit Court correctly determined Federal’s Coverage A duty to defend cannot be triggered until the underlying insurance is exhausted by payment of covered claims, which has not occurred. Judge Stone’s Order, pg. 31. Thus, the Circuit Court correctly found that Federal could have a duty to defend, if at all, only under Coverage B. Under Coverage B, Federal can have a duty to defend only if no underlying insurance applies, but Coverage B does apply. Here, Coverage B of the 9/1/97 to 9/1/00 Federal Policies defines “personal injury” in terms of the following enumerated offenses:

⁶ Coverage B of the Federal Umbrella Policies applies only to “bodily injury” caused by an “occurrence.” “Bodily injury” is defined as “physical injury, sickness or disease to a person and, if arising out of the foregoing, mental anguish, mental injury, shock or humiliation, including death at any time resulting therefrom.” “Occurrence” is defined as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.” Coverage B of the Federal Umbrella Policies has an exclusion for Intentional Acts, which excludes coverage for bodily injury “which results from an act that is intended by the insured or can be expected from the standpoint of a reasonable person to cause bodily injury or property damage, even if the injury or damage is of a different degree or type than actually intended or expected.” The Federal Umbrella Policies also include endorsements, applicable to both Coverage A and Coverage B, which exclude bodily injury coverage for “any liability arising out of the products-completed operations hazard.” These provisions mirror the language in the Wausau primary policies.

Personal injury means injury, other than **bodily injury**, arising out of one or more of the following offenses committed in the course of your business, other than your advertising:

1. false arrest, detention or imprisonment;
2. malicious prosecution;
3. the wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person or persons occupy, by or on behalf of its owner, landlord or lessor;
4. oral or written publication of material that slanders or libels a person or organization;
5. oral or written publication of material that violates a person's right of privacy, or
6. discrimination (unless insurance thereof is prohibited by law).⁷

Wausau's relevant primary policies do not include "discrimination" among the enumerated "personal injury" offenses. Hence, Mylan argues that Federal has a duty to defend under the "personal injury" definition in Coverage B because the L&C Actions and AWP Actions assert claims for "discrimination" not covered by the Wausau primary policies, but covered by the Federal Policies. Mylan Complaint at ¶¶104-109. As Judge Stone concluded, Mylan's position is wrong.

2. There Are No Allegations Of "Discrimination" In The AWP Actions Or The L&C Actions

The Circuit Court properly concluded "the underlying suits in the AWP Litigation do not allege discrimination, as that term is [used] in the Federal Policies, [thus] Federal has no duty to

⁷ The Federal Umbrella Policy effective 9/1/00 to 9/1/01 was endorsed to delete all "personal injury" coverage. Presumably, Mylan does not seek "personal injury" coverage under this policy.

defend Mylan in the AWP litigation under the Federal [Umbrella] Policies.”⁸ Judge Stone’s Order, pg. 32. The Circuit Court also properly held that “no claim for ‘discrimination’ is alleged in any of the L&C complaints, as those suits were in fact comprised of uncovered anti-trust, monopoly and market-cornering claims” and, therefore, Federal has no duty to defend Mylan in the L&C Actions under the Federal Umbrella Policies. Judge Stone’s Order, pgs. 36-37.

Mylan claims that the AWP Actions and the L&C Actions are covered under the “discrimination” offense in the “personal injury” definition in Coverage B of the Federal Umbrella Policies. Yet, no discrimination claims, of any kind, are alleged in the AWP Actions or the L&C Actions, nor are there any facts alleged that could form the basis for a discrimination claim against Mylan.

The L&C Actions allege only antitrust violations, such as monopolization and attempted monopolization, which are wholly distinct from and require proof of different elements than claims for discrimination. Similarly, the AWP Actions allege only fraud, which is wholly distinct from and requires proof of different elements than claims for discrimination. Thus, Mylan’s argument fails at the outset, and the Circuit Court properly concluded that the L&C Actions and the AWP Actions do not trigger the “personal injury” definition under Coverage B of the Federal Policies.

⁸ Although this particular sentence in Judge Stone’s Order states, “as that term is *defined* in the Federal Policies,” there is no question Judge Stone intended to state, “as *used* in the Federal Policies.” (Emphasis added) Mylan nevertheless seizes upon this clerical error to suggest Judge Stone incorrectly believed, and thus based his ruling upon the mistaken conclusion that, the term “personal injury” is defined in the Federal Umbrella Policies. Mylan’s Opening Brief, pg. 8. Any fair reading of the entirety of Judge Stone’s Order reveals he knew the term “discrimination” is not defined in the Federal Umbrella Policies. Indeed, earlier on the very same page of Judge Stone’s Opinion where this clerical error appears, his understanding of this fact is made clear. See, e.g. Judge Stone’s Order, pg. 32 (“As *used* in the ‘Personal Injury’ section of the Federal policy, ‘discrimination’ refers to the standard types of discrimination” (emphasis added)).

3. “Discrimination” Does Not Mean “Economic Discrimination”

In finding Federal owed no duty to defend Mylan under the “personal injury” coverage of the Federal Umbrella Policies, the Circuit Court expressly rejected Mylan’s argument, asserted here on appeal, that the term “discrimination” covers “economic discrimination.” The Circuit Court properly found, “[a]s used in the ‘Personal Injury’ section of the Federal policy, ‘discrimination’ refers to the standard types of discrimination (*e.g.* race, age, handicap) and not, as asserted by Mylan, ‘any form of discrimination within the field of commerce,’ which is the definition of ‘economic discrimination.’” Judge Stone’s Order, pg. 32. This holding is consistent with the plain and ordinary meaning of the term “discrimination” and the language of the insurance policy surrounding the term “discrimination.”

a. **The “Personal Injury” Offenses Relate To Injuries To The Liberty, Feelings, Or Reputation Of The Plaintiff, Not The Economic Interests Of The Plaintiff**

The “discrimination” offense appears in the definition of “personal injury” as part of a list of offenses directed at injuries to the liberty, feelings, or reputation of the plaintiff: false arrest, detention or imprisonment; malicious prosecution; wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person or persons occupy; publication of material that slanders or libels a person or organization; and publication of material that violates a person’s right of privacy. Thus, it is unreasonable to construe the term “discrimination,” as Mylan argues, to reach economic injuries to the plaintiff.⁹ When read in context, and not in a vacuum, the term “discrimination” is reasonably construed to

⁹ Federal does not, as Mylan’s Opening Brief suggests, argue that the “personal injury” offenses are limited solely to claims by natural persons. Mylan’s Opening Brief, pgs. 11-12. Rather, because all of the other “personal injury” offenses all relate to injuries to the liberty, feelings, or reputation of the plaintiff (whether the plaintiff is a natural person or a legal entity), Federal maintains that the term “discrimination” must also be construed as relating to the injuries to the liberty, feelings, or reputation of the plaintiff. This construction places “economic discrimination” outside the scope of coverage.

mean discrimination against a person based upon immutable characteristics, such as race, sex, age, religion, or national origin. Accordingly, Judge Stone's ruling is wholly consistent with a context-based construction of the term "discrimination."

b. A Term Is Not Ambiguous Merely Because It Is Not Defined In The Insurance Policy

The plain and ordinary meaning of the term "discrimination" in the "personal injury" definition in the Federal Umbrella Policies does not include "economic discrimination." Mylan contends that, simply because the term "discrimination" is undefined in the Federal Umbrella Policies, it is ambiguous and susceptible to multiple reasonable meanings, including "economic discrimination."¹⁰ Mylan's Opening Brief, pgs. 8-9.

The term "discrimination" is not ambiguous simply because it is not defined in the Federal Umbrella Policies. *See fn. 2, supra*. Rather, it is well established that language in an insurance policy should be given its plain and ordinary meaning. *State Bancorp, Inc. v. U.S. Fidelity and Guaranty Ins. Co.*, 483 S.E.2d 228, 233 (W.Va. 1997). If the Court were to accept Mylan's argument, then every insurance policy would be ambiguous unless every single word in the policy was expressly defined. Obviously, this would prove unworkable in the real world.

c. Mylan's Citations To Dictionary Definitions Are Misleading

Mylan's citation to dictionary definitions of "discrimination" also fails to support its claim that "discrimination" includes "economic discrimination." Mylan's Opening Brief, pg. 9, fn. 37. Contrary to Mylan's assertion, Black's Law Dictionary does *not* define "discrimination" to include "any form of discrimination within the field of commerce." *Id.* Rather, it is the term "economic discrimination" which is defined to include "any form of discrimination within the

¹⁰ In its Opening Brief, Mylan also argues that a "limited construction" of "discrimination" is inconsistent with West Virginia Law, pursuant to *Bowyer v. Hi-Lad, Inc.*, 216 W. Va. 632, 651, 609 S.E.2d 895 (2004). Mylan's Opening Brief, pg. 14. *Bowyer* is irrelevant to this matter because it involves this Court's interpretation and application of the term "publication." The *Bowyer* opinion does not include any discussion or analysis of the term "discrimination" with respect to personal injury coverage. Therefore, *Bowyer* is unhelpful.

field of commerce.” *USX Corp. v. Adriatic Insur. Co.*, 99 F.Supp.2d 593 (W.D. Penn. 2000), quoting *Black’s Law Dictionary*, 420 & 460 (5th ed. 1979). The Federal Umbrella Policies do not include the term “economic discrimination.”

d. Dictionary Definitions Of “Discrimination” Support The Circuit Court’s Ruling

Far from undermining the Circuit Court’s ruling, dictionary definitions of “discrimination” actually support it. For example, *Black’s Law Dictionary* defines “discrimination” as follows:

1. The effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex, nationality, religion, or handicap...2. Differential treatment; esp., a failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored.

Black’s Law Dictionary (8th ed. 2004), discrimination. Judge Stone’s Order holds, consistent with this definition, that the term “discrimination,” as used in the definition of “personal injury” in the Federal Umbrella Policies, means “the standard types of discrimination (e.g. race, age, handicap).”

e. Federal’s Subsequent Revision Of The “Personal Injury” Definition Does Not Evidence An Intent To Cover “Economic Discrimination” Under Its Earlier Policies

Mylan suggests that Federal must have intended for its earlier policies, which use the unmodified term “discrimination,” to cover “economic discrimination” because Federal later revised its policy language to state “discrimination, harassment or segregation (unless insurance thereof is prohibited by law) based on protected human characteristics as established by law.” Exhibit 4 to Sonlin Affidavit, Form 07-02-1535 Ed. 10/99) Endorsement. Actually, this policy revision evidences Federal’s intent to not provide coverage for economic discrimination in the first instance. Federal implemented this policy revision shortly after, and in direct response to,

the misguided holding in *Federal Ins. Co. v. Stroh Brewing Co.*, 127 F.3d 563 (7th Cir. 1997), where the court found the unmodified term “discrimination” could include “price discrimination.” If, as Mylan suggests, Federal had intended to cover “economic discrimination,” it would not have revised its policy language after the *Stroh Brewing* decision expanded the scope of coverage to reach a certain price discrimination, which is a form of economic discrimination.

f. *Stroh Brewing* Was Wrongly Decided; This Court Should Follow The Better-Reasoned Decision In *USX*

Mylan urges this Court to follow *Stroh Brewing*, a decision from the Seventh Circuit, which construed identical policy language to include price discrimination, *Federal Ins. Co. v. Stroh Brewing Co.*, 127 F.3d 563 (7th Cir. 1997). However, *Stroh Brewing* is not binding on this Court and was decided under Indiana law. It was also a split decision, with a forceful dissent written by Justice Flaum.

Furthermore, *Stroh Brewing* was harshly criticized in *USX Corp. v. Adriatic Ins. Co.*, 99 F. Supp.2d 593 (W.D. Penn. 2000), where the court thoughtfully explained:

The context in which the term “discrimination” is used once again sufficiently undercuts the plaintiffs’ attempt to rewrite the policy under the reasonable expectations doctrine and principles of insurance law regarding ambiguities. It may be as the majority stated in *Stroh Brewing* that “[t]ime was, ‘discrimination’ might have brought immediately to mind charging one person more than another for the same product.” To suggest, however, that the use of that term in defining “personal injuries” was intended to identify a distinct form of statutory liability created 85 years ago by the Sherman Act and commonly known as “antitrust liability” stretches the term beyond any natural and ordinary meaning to be gleaned from its use in context. The term is preceded by “false arrest, false imprisonment, wrongful eviction, detention [and] malicious prosecution” and is followed by “humiliation [and] libel, slander or defamation of character or invasion of rights of privacy, except that which arises out of any advertising activities.” The terms preceding the phrase identify offenses against an individual for wrongful deprivation of liberty or interfering with the right to peaceful possession of property and those that follow it identify common offenses which injure the character or reputation of an individual. Of course, “discrimination” and its companion “humiliation” are forms of disparate or

demeaning treatment of persons commonly accomplished through unjust economic treatment; and such terms are indeed related to forms of “mental injury, mental anguish [and] shock” as their contextual placement within the policy demonstrates. And price discrimination claims may well be analogous to this understanding in certain settings. But to suggest that hiding among these causes of harm to the person included in personal injury coverage is a form of discrimination which encompasses broad-based economic practices which injure markets through the improper elimination of competition accomplished by purposeful manipulation of goods and services reflects a highly implausible definition or meaning of that term. [citations omitted].

Id. at 624-625.

The Third Circuit affirmed the district court’s grant of summary judgment in favor of the insurer in *USX* and declared it was “in full agreement with the result the court reached and cannot add significantly to the opinion.” *USX Corp. v. Adriatic Ins. Co.*, 345 F.3d 190, 216 (3rd Cir. 2003). The Third Circuit emphasized “the significance of the reasonable expectations of the insured in ascertaining the meaning of the insurance policy” and concluded, “We think it plain that USX could not reasonably have expected when it obtained its insurance policies or at any later time to have the coverage it sought in this case for the consequences of its wrongful activities.” *Id.* (citations omitted). So too, Mylan could not have reasonably expected insurance for its antitrust violations and fraud. For these reasons, this Court should follow the reasoning of *USX* rather than *Stroh Brewing*.

Hoping to distinguish *USX*, Mylan falsely claims that the policy language was construed against the insured in *USX* because, unlike the Federal Umbrella Policies, the insurer and the insured jointly drafted the policy in *USX*. Mylan’s Opening Brief, pg. 9. This suggestion is misleading, at best. The *USX* court specifically noted at the outset of its opinion that the insurance policies were “in all material respects, based upon a standard insurance form known as ‘the 1971 London umbrella wording.’ This form was modeled after the 1966 standard form commonly used in the North American market.” 99 F. Supp.2d at 602. Hence, it does not

appear *USX* was involved in drafting the policy language. Moreover, it does not appear the *USX* court placed any significance on whether the policy was jointly drafted when deciding “discrimination” does not include “price discrimination.” In any event, Mylan offers no factual support for its suggestion that it had no involvement in drafting the Federal Umbrella Policies.

Mylan also mistakenly claims that, in *USX*, one of the insurers, Lloyd’s, conceded that “economic discrimination” claims “were within the general scope of ‘discrimination’ coverage.” Mylan’s Opening Brief, pg. 11, fn. 46. It is totally unclear what, if anything, the Lloyd’s underwriters in *USX* conceded; the written opinion merely states that the insured, *USX*, argued such a concession was made, but the court never agreed with this statement. 99 F.Supp.2d at 623. In any event, any potential concessions by the Lloyd’s underwriters in *USX* were ultimately deemed unpersuasive by the *USX* court, and have absolutely no persuasive value in the present case, which involves Federal.

Mylan would have this Court read the term “discrimination” in a vacuum, without reference to the surrounding policy language. As explained above, though, the context in which the term “discrimination” appears demonstrates that the term refers only to injury to the liberty, feelings, or reputation – not the economic interests -- of the plaintiff. The *USX* court engaged in precisely this type of contextual analysis, taking into account the words that preceded and followed the term “discrimination” in the list of offenses within the definition of “personal injury.” 99 F. Supp.2d at 624-25. The *USX* court noted that the terms preceding and following “discrimination” “identify offenses against the individual for wrongful deprivation of liberty or interference of the right to peaceful possession of property and ... common offenses which injure the character or reputation of an individual.” *Id.* at 624. When viewed in context, then, the *USX* court correctly held the term “discrimination” must also refer to injury to the liberty, feelings, or

reputation of the plaintiff.

The case principally relied upon by Mylan, *Stroh Brewing*, did not consider the “context” of the word “discrimination” within the insurance contract, based upon its conclusion that the insurer did not raise the point on appeal. 127 F.3d at 567 fn. 5, 573, fn. 1. Here, by contrast, Federal did raise the issue, and the Circuit Court properly considered the context in which the term “discrimination” is used in the Federal Umbrella Policies.

West Virginia law is fully consonant with the view that context matters when construing policy language. See e.g., *Glen Fall Insur. Co. v. Smith*, 217 W. Va. 213, 222, 617 S.E.2d 760, 769 (2005) (“Defining a term in an insurance policy with reference to the context in which it is used is consistent with West Virginia law which requires that a policy be read as a whole, giving meaning to each term.”) Although never expressly stated in the opinion, the *USX* court’s analytical approach is wholly consistent with the canon of construction *noscitur a sociis*, which is also well-accepted under West Virginia law. “It is a fundamental rule of construction that, in accordance with the maxim *noscitur a sociis*, the meaning of a word or phrase may be ascertained by reference to the meaning of other words or phrases with which it is associated.” *Wolfe v. Forbes et al.*, 159 W. Va. 34, 217 S.E.2d 899, 900 (W.Va. 1975); see also *Change, Inc. v. Westfield Ins. Co.*, 208 W. Va. 654, 542 S.E.2d 475, 478-79 (W.Va. 2000); *Murray v. State Fire & Cas. Co.*, 203 W. Va. 477, 509 S.E.2d 1, 9 (W. Va. 1998); *TIG Specialty Ins. Co. v. Koken*, 855 A.2d 900, 914 (Pa. Comm. Ct. 2004).

Mylan attempts to distinguish the *USX* court’s contextual analysis by noting that the term “humiliation” was found in proximity to “discrimination” in the policy at issue in *USX*, whereas “humiliation” does not appear near “discrimination” in the Federal Umbrella Policies. Mylan’s Opening Brief, pg. 14. This is truly a distinction without a difference. In considering the context

in which “discrimination” was used in the policy in *USX*, the court observed, “[t]he term is preceded by ‘false arrest, false imprisonment, wrongful eviction, detention [and] malicious prosecution’ and is followed by ‘humiliation [and] libel, slander or defamation of character or invasion of rights of privacy, except that which arises out of any advertising activities.’” 99 F.Supp.2d at 624. All of these terms, except for humiliation, are found in some form within the definition of “personal injury” and in close proximity to the term “discrimination” in the Federal Umbrella Policies. All of these terms, not just “humiliation,” lend context to the term “discrimination.” Accordingly, Mylan’s attempt to distinguish *USX* is unavailing.

Of note, the *USX* court did **not**, as Mylan falsely asserts, concede that the word “discrimination” was “reasonably susceptible of different constructions ... including ‘some forms of broad-based price discrimination against commercial entities.’” Mylan’s Opening Brief, pg. 15, *quoting USX*, 99 F.Supp.2d at 609, 625. Instead, the *USX* court was merely “assuming *arguendo* ... that the term [discrimination] is ambiguous and reasonably capable of encompassing some forms of broad-based price discrimination against commercial entities” in order to show that the underlying claims for anti-competitive market-exclusion activities would still not be covered. *Id.* at 625. Mylan’s blatant misrepresentation of the *USX* opinion on this point is indicative of the fatal flaws in the merits of its argument.

g. Mylan Has Misrepresented The State Of The Case Law Construing The Term “Discrimination”

Perhaps trying to overcome the forceful logic of *USX*, Mylan misrepresents the state of the law on the critical issue here in dispute, claiming, “[f]our cases have addressed the scope of ‘discrimination’ coverage nationally” with different results. Mylan’s Opening Brief, pgs. 9-10. Mylan claims two courts interpreted “discrimination” to include “price discrimination,” while one court limited “discrimination” to human characteristics and a fourth court found that there

was coverage for Section 1983 claims under “discrimination.” *Id.* In reality, there is only one case supporting Mylan’s position, *Stroh Brewing, supra*, which should not be followed the reasons stated above.¹¹ At the same time, there is one case taking the opposite view, *USX, supra*.

Mylan relies on *Westchester First Ins. Co. v. G. Heileman Brewing Co., Inc.*, 747 N.E.2d 955 (Ill. App. Ct. 2001), as the second case to allegedly support its interpretation of “discrimination.” Mylan’s Opening Brief, pg. 9, fn. 39. *G. Heileman* is not on point because the insurer in *G. Heileman* did not raise the argument that its coverage for discrimination did not apply to price discrimination claims. Thus, the court never discussed the proper construction of the term “discrimination.”

The unpublished decision of *City of Collinsville v. Ill. Mun. League Risk Management Assoc.*, 2008 WL 4879161 (Ill. App. 4 Dist. Aug. 27, 2008), also relied upon by Mylan, is equally inapplicable. Mylan’s Opening Brief, pg. 10, fn. 41. In *City of Collinsville*, the Illinois Appellate Court determined that the “personal injury” coverage section of a municipal insurance agreement -- which expressly provided coverage for “discrimination against an individual or group on any basis prohibited by the law of Illinois or of the United States of America” and “damages sought in a civil suit brought under one or more of the following civil rights statutes: United States Code Title 42 Sections 1981, 1982, 1983, 1985, or 1986” -- was triggered by a Section 1983 lawsuit alleging violations of the underlying plaintiffs’ constitutional rights. *Id.* at *6. It is wholly unsurprising, and irrelevant, that a court found Section 1983 civil rights violations triggered this unique policy, which expressly covered Section 1983 claims. Importantly, there is no discussion of “price discrimination,” or “disparate treatment, including

¹¹ In *Stroh*, the court concluded there was coverage under the umbrella business liability policy because the underlying allegations included “price discrimination,” which the Seventh Circuit considered a “particular form of discrimination.” 127 F.3d at 566. The court did not, however, construe discrimination to include all “economic forms of ‘disparate treatment’” as Mylan alleges. *Id.*; cf. Mylan’s Opening Brief, pg. 10.

economic discrimination,” anywhere in the *City of Collinsville* opinion. Therefore, this case does not support Mylan’s position.

4. The Circuit Court Adopted The Only Reasonable Construction Of The Term “Discrimination”

Assuming for the sake of argument that the term “discrimination” is theoretically “susceptible to two or more interpretations,” as Mylan suggests, the Circuit Court was not required, as Mylan asserts, to find the policy language ambiguous and adopt a construction that would afford coverage for the underlying lawsuits. Mylan’s Opening Brief, pgs. 8-10. As stated in *Farmers Mut. Ins. Co. v. Tucker*, 213 W. Va. 16, 576 S.E.2d 261, 266 (W.Va. 2002), “an insurance policy is considered to be ambiguous if it can *reasonably* be understood in two different ways or if it is of such doubtful meaning that *reasonable* minds might be uncertain or disagree as to its meaning.” *Id.* at 266 (emphasis added). A policy term is ambiguous only when it is “subject to more than one *reasonable* interpretation.” *Tankovits v. Del Suppo, Inc.*, 2005 WL 995464 at *5 (4th Cir. April 29, 2005) (Pennsylvania law) (emphasis added). Moreover, “a court must not distort the meaning of the language or resort to a strained contrivance in order to find an ambiguity.” *Id.*

A policy term is ambiguous only if it is susceptible, “without violence,” to two or more interpretations. *Id.*; see also *USX*, 99 F. Supp. 2d at 609 (a policy term is ambiguous only if, when read in context, “reasonably intelligent people” would “honestly differ as to its meaning”). The only reasonable understanding of the term “discrimination,” and the only interpretation that does no “violence” to the policy language when viewed in the context of the “personal injury” definition as a whole, is the one adopted by the Circuit Court: discrimination based upon immutable human characteristics such as race, sex, age, religion, or national origin.

Mylan asks this Court to look at dictionary definitions for guidance in policy construction. Mylan's Opening Brief, pg. 9. However, this Court is not required to consider every possible definition, but only reasonable and contextually appropriate definitions. When viewed in context and not in a vacuum, the only reasonable and contextually appropriate dictionary definition of the term "discrimination" is differential based upon immutable human characteristics such as race, sex, age, religion, or national origin. *See USX*, 99 F.Supp.2d at 609 ("Determining whether specific policy language is susceptible of different reasonable constructions is not to be done in a vacuum.") (citation omitted).

Therefore, when read in the context of Federal Umbrella Policies and not in a vacuum, the term "discrimination" cannot possibly mean "economic disparate treatment discrimination," as Mylan contends. It can reasonably mean only what Judge Stone held it to mean: "the standard types of discrimination (*e.g.* race, age, handicap)."

5. The L&C Actions And The AWP Actions Do Not Allege Price Discrimination

Even if this Court adopted Mylan's overly broad definition of "discrimination" to include "price discrimination," which it should not for the reasons asserted above, Federal would have no duty to defend because the L&C Actions and the AWP Actions do not allege price discrimination. *See* Judge Stone's Order, pg. 32. They allege only antitrust violations and fraud.

In *Stroh Brewing*, where the Seventh Circuit held that claims of "price discrimination" fell within the "personal injury" offense of "discrimination," the court adopted the following definition of "price discrimination":

Exists when a buyer pays a price that is different from the price paid by another buyer for an identical product or service. Price discrimination is prohibited if the effect of this discrimination may be to lessen substantially or injure competition, except where it was implemented to dispose of perishable or obsolete goods, was

the result of differences in costs incurred, or was given in good faith to meet an equally low price of a competitor.

127 F.3d at 568, quoting BLACK'S LAW DICTIONARY 467 (6th Ed. 1990). The underlying lawsuit in *Stroh Brewing* expressly alleged price discrimination, namely that the insured "is selling and has sold beer, a commodity, of identical grade and quantity at the same time at different prices to different customers." 127 F.3d at 565. In contrast, the L&C Actions do not allege that Mylan targeted the underlying plaintiffs with higher prices for Lorazepam and Clorazepate, or that Mylan offered those products to others at prices lower than it charged the underlying plaintiffs, in order to injure or lessen competition. Instead, in order to increase its profits, Mylan allegedly overcharged **all** purchasers of those products after it had blocked its competitors from obtaining the APIs necessary to manufacture their products.

For example, the FTC Complaint alleges that Mylan used the market power created by its exclusive license agreements with API suppliers to raise prices for Lorazepam and Clorazepate to "State Medicaid programs, wholesalers, retail pharmacy chains, and other customers." Sonlin Affidavit, Exhibit 5 at ¶28. As a result, "pharmacies, hospitals, insurers, managed care organizations, wholesalers, government agencies, and others, have paid substantially higher prices." *Id.* at 30. The FTC did not complain that certain market segments received preferential pricing for Lorazepam and Clorazepate in order to gain monopoly power; rather, the FTC complained that Mylan was using its monopoly power to charge **all** market segments illegally higher prices. This behavior is an antitrust violation, not price discrimination. Thus, there are no claims for or allegations of price discrimination in the L&C Actions, and *Stroh Brewing*, even if applied here, proves unhelpful to Mylan's position.

Nor do the AWP Actions satisfy the *Stroh Brewing* definition of "price discrimination," even though, as Mylan contends, some of those lawsuits allege that Mylan was offering "some

physicians and hospital purchases... 'preferred provider' status whereby they would 'receive[] such a lower price...." Mylan's Opening Brief, pg. 15. Even accepting this distortion of the allegations of the underlying complaints as accurate, there is still no basis for concluding that the AWP Actions assert claims for price discrimination. The plaintiffs in the AWP Actions are Medicare, Medicaid, and third-party payors, who do not purchase Mylan's products. They simply reimburse, at the reported AWPs, medical providers, hospitals and pharmacies who do purchase Mylan's products (and, allegedly, they paid too much in reimbursement due to Mylan's fraudulently inflated AWPs). Consequently, Mylan was not offering its products, at any price, to Medicare, Medicaid, and third-party payors, making it impossible to fairly characterize the AWP Actions as claiming price discrimination. The allegations in the AWP Actions regarding differential pricing, which Mylan contends constitute price discrimination, are actually included as just one of the many ways that Mylan disguised and prevented Medicare, Medicaid, and third-party payors from detecting Mylan's fraudulent practices. See, e.g., State of Illinois Complaint, Sonlin Affidavit, Exhibit 48, ¶¶ 57-66. Critically, the AWP Actions fail to allege Mylan's differential pricing practices lessened substantially or injured competition, which is an essential element of any price discrimination claim; those lawsuits allege merely that such practices prevented earlier detection of Mylan's fraud.

Simply put, the underlying lawsuits were not brought by certain classes of consumers of Mylan's products who believed they were the victims of price discrimination, and thus the underlying lawsuits did not seek to vindicate the plaintiffs' rights to equality in pricing. Rather, the L&C Actions were brought to vindicate the right of the public as a whole to competitive pricing for Lorazepam and Clorazepate and their substitutes, while the AWP Actions were

brought to vindicate the rights of Medicare, Medicaid, and third-party payors to truthful reimbursement rates for drugs supplied by Mylan to medical providers.

Finally, contrary to Mylan's assertion, there are no analogous third-party payor claims that have been found to trigger a defense under "personal injury" coverage provisions. *Cf.* Mylan's Opening Brief, pg. 15. Mylan cites to *Knoll Pharm. Co. v. Auto. Ins. Co. of Hartford*, 152 F.Supp.2d 1026 (N.D. Ill. 2001), to support its contention that third-party payor claims can trigger coverage under the "personal injury" section of the Federal Umbrella Policies. Mylan's Opening Brief, pg. 15. In *Knoll*, however, the district court held that the "advertising injury" and "personal injury" coverage was triggered by allegations of defamation and disparagement included in complaints brought by certain third-party payors. Here, Mylan makes no argument for defamation or disparagement coverage. Thus *Knoll* is inapplicable and should be disregarded by this Court. More importantly, Mylan has failed to alert this Court to *BASF AG v. Great Amer. Assur. Co.*, 522 F.3d 813 (7th Cir. 2008), which effectively reversed *Knoll*. In *BASF*, a companion case to *Knoll*, the Seventh Circuit held that the underlying complaints in question did not allege claims within the personal injury or advertising injury coverage. *Id.* at 820.

6. The L&C Actions Do Not Allege Discrimination Against Consumers With Chronic Conditions

Mylan argues the L&C Actions allege price discrimination (or some more generalized, unspecified "economic discrimination") against consumers with chronic conditions because Mylan allegedly decided to seize monopoly control over the API markets for Lorazepam and Clorazepate and then dramatically increase their prices because Lorazepam and Clorazepate "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." Mylan's Opening Brief, pg. 47. Mylan's characterization of the L&C Actions is grossly inaccurate, if not outright misleading. None of

the L&C Complaints alleges Mylan obtained exclusive licenses for the APIs for Lorazepam and Clorazepate because of some discriminatory animus against consumers with chronic medical conditions typically treated by those drugs. Rather, the L&C Actions allege Mylan directed its anticompetitive efforts at drugs with APIs in limited supply, such as Lorazepam and Clorazepate, because, logically, it is easier to acquire monopoly power over the market for such drugs.

For example, the FTC and the State Attorneys General alleged that Mylan sought “from its API suppliers, long-term exclusive licenses for the DMFs of certain APIs selected by Mylan *because of limited competition.*” Sonlin Affidavit, Exhibit 5 at ¶19; Exhibit 6 at ¶28 [emphasis added]; see also Exhibit 5 at ¶20 (“In determining the drugs on which to seek exclusive licenses, Mylan considered drugs with relatively few ANDAs and DMFs on file with the FDA, because such drugs had fewer competitors at the API and tablet levels.”). The other L&C Complaints are no different. *See, e.g., Id.*, Exhibit 10 at ¶56 (“Unlike most other generic products, Lorazepam and Clorazepate are unusual in that there are only two API Suppliers throughout the world As a result, it was relatively easy for Mylan to execute its plan to buy up the API supply in order to eliminate competitors and drive up prices.”), ¶63 (“In early 1997, Mylan prepared an analysis to evaluate which of its 91 products’ API Suppliers were also suppliers to its competitors and determined that Lorazepam and Clorazepate were particularly susceptible to the kind of exclusive deals with API Suppliers that would enable it to monopolize the market nationwide.”).

Without citing any case law, Mylan claims that Federal’s duty to defend the L&C Actions is triggered if the “injury allegedly arose of the discrimination. The injury to ultimate consumers need only be a result, not the sole result, of allegedly wrongful conduct -- here, discriminatory conduct.” Mylan’s Opening Brief, pg. 49. Applied here, Mylan’s theory seems to be that coverage applies as long as someone, not necessarily the underlying plaintiff, suffered

discrimination that led, in some circuitous way, to some form of injury to the underlying plaintiff. This strained theory must be rejected.

As just explained, Mylan had no discriminatory animus toward those with chronic conditions, and decided upon its anticompetitive course of conduct for reasons wholly separate from the identity of the users of its products. Further, price discrimination occurs only when different prices are charged to different purchasers for “an identical product or service.” *Stroh Brewing*, 127 F.3d at 568, quoting BLACK’S LAW DICTIONARY 467 (6th Ed. 1990). The L&C Actions allege all purchasers of Lorazepam and Clorazepate were overcharged. If a manufacturer charges all of its customers too much for certain of its products due to monopoly power, but charges competitive prices for other of its products, there is no price discrimination, just an antitrust violation. Even under Mylan’s unreasonably broad policy construction, then, there is no coverage for the L&C Actions because there was no discrimination against anyone.

Furthermore, Mylan’s overly expansive construction of the policy language has been repeatedly and recently rejected. *See e.g. BASF AG v. Great Amer. Assur. Co.*, 522 F.3d 813 (7th Cir. 2008) (declining to adopt “sweeping definition of ‘arising out of’” a covered offense; the underlying plaintiff must be victim of the enumerated personal injury offense); *see also Great Am. Ins. Co. v. Riso, Inc.*, 479 F.3d 158, 162 (1st Cir. 2007) (same). The policy language, when properly construed, requires discrimination against the underlying plaintiff, not some third party who is not making a claim against Mylan.

Accordingly, the Circuit Court properly concluded the allegations of the L&C Actions do not allege “discrimination,” even if that term were misconstrued to include so-called “disparate treatment, including economic discrimination.”

G. Disparate Treatment Discrimination Is Intentional And Thus Not Insurable As A Matter Of Public Policy

Federal has no duty to defend even if this Court somehow finds that the AWP Actions and the L&C Actions make claims for “discrimination.” Generally speaking, there are two types of discrimination: disparate treatment and disparate impact. *Morris Memorial Convalescent Nursing Home, Inc. v. West Virginia Human Rights Commission*, 189 W. Va. 314, 431 S.E.2d 353, 356 (W.Va. 1993); *Winn v. Trans World Airlines, Inc.*, 484 A.2d 392, 401 (Pa. 1984). The former is necessarily intentional, while the latter is not. *Id.*

Although West Virginia courts have not yet addressed this issue, many courts have held that insurance coverage for disparate treatment discrimination, *i.e.* intentional discrimination, is against public policy and not permitted. *See, e.g., Solo Cup Co. v. Federal Ins. Co.*, 619 F.2d 1178, 1186-88 (7th Cir. 1980); *Save Mart Supermarkets v. Underwriters at Lloyd's London*, 843 F. Supp. 597, 606 (N.D. Cal. 1994); *Ranger Ins. Co. v. Bal Harbour Club, Inc.*, 549 So.2d 1005, 1008-9 (Fla. 1989); *Groshong, et al. v. Mutual of Enumclaw Ins. Co.*, 923 P.2d 1280, 1284-85 (Or. Ct. App. 1996); *see also Coleman v. School Bd. Of Richland Parish*, 418 F.3d 511, 521 (5th Cir. 2005) (intentional acts exclusion did not make discrimination coverage illusory because, while disparate treatment discrimination is intentional, disparate impact discrimination is not intentional). This public policy can extend even to relieve an insurer of the duty to defend when only claims of disparate treatment discrimination are asserted. *Rosenberg Diamond Devel. Corp. v. Wausau Ins. Co.*, 326 F. Supp.2d 472 (S.D.N.Y. 2004). Consistent with this well-recognized public policy against insurance for disparate treatment discrimination, the Federal Umbrella Policies define “personal injury” to include “discrimination (*unless insurance thereof is prohibited by law*)” (emphasis added).

Mylan contends that the AWP Actions and the L&C Actions allege “disparate treatment, including economic discrimination.” Mylan’s Opening Brief, pgs. 8, 11. Federal disputes that the AWP Actions and the L&C Actions allege discrimination of any kind. But if they do, they allege only intentional “disparate treatment” discrimination, as admitted by Mylan. Mylan’s claim under the “personal injury” coverage of the Federal Umbrella Policies is, therefore, barred by public policy. Judge Stone did not reach this argument since he found as a threshold matter that the underlying lawsuits do not allege discrimination; but this argument provides an alternative basis to affirm Judge Stone’s Order. *See Highway Properties v. Dollar Savings Bank*, 189 W.Va. 301, 431 S.E.2d 95 (1993) (“The Court, on appeal, may 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.”).

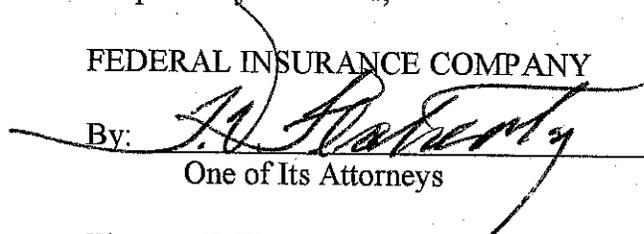
VII. CONCLUSION

For these reasons, the Circuit Court properly determined Federal Insurance Company owes no duty to defend Mylan under Coverage A and Coverage B of the Federal Umbrella Policies in the AWP Actions and L&C Actions. Therefore, Federal respectfully requests that this Court deny Mylan's appeal, affirm Judge Stone's February 8, 2008 Order, and grant any further relief this Court deems proper.

Dated: February 6, 2009

Respectfully submitted,

FEDERAL INSURANCE COMPANY

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IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

APPEAL NO. 081073

MYLAN LABORATORIES INC., a Pennsylvania corporation; MYLAN PHARMACEUTICALS INC., a West Virginia corporation; UDL LABORATORIES INC., an Illinois corporation,

Petitioners/Appellants,

vs.

Civil Action No: 07 C 69

AMERICAN MOTORISTS INSURANCE CO., an Illinois corporation; CONTINENTAL INSURANCE CO., an Illinois corporation; WAUSAU INSURANCE COMPANY, a Wisconsin corporation; FEDERAL INSURANCE CO., an Indiana corporation; GREAT AMERICAN INSURANCE CO., an Ohio corporation; and OHIO CASUALTY INSURANCE CO., an Ohio corporation,

Respondents/Appellees.

CERTIFICATE OF SERVICE

I, Thomas V. Flaherty, counsel for Federal Insurance Company, do hereby certify that I have served the foregoing *Brief of Appellee Federal Insurance Company* upon counsel of record this 6th day of February, 2008, by depositing true copies in the United States mail, postage prepaid, addressed as follows:

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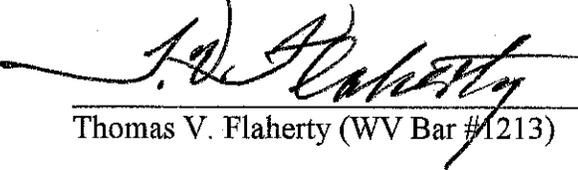
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