BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

Plaintiffs Below/Appellants,

vs.

APPEAL NO. 34402

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

Defendants Below/Appellees.

REPLY BRIEF ON BEHALF OF APPELLANTS MYLAN LABORATORIES INC., MYLAN PHARMACEUTICALS INC., AND UDL LABORATORIES, INC.

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I. INTRODUCTION

The Appellees[1] seek to distance themselves from the fact allegations in the underlying complaints that are the basis for potential coverage and the duty to defend. They focus only on the antitrust and fraud claims,[2] but forget that Mylan's **statements** concerning "marketing the spread" (AWP) and its "fair pricing campaign" (L&C) create an independent potential for coverage as advertising ideas whose use was allegedly wrongful, **apart** from any express antitrust allegations. The labeled causes of action that Appellees emphasize do not eliminate the allegations of potentially covered conduct.

The Appellees criticize Mylan's alleged pricing conduct to avoid dealing with the underlying allegations that establish the potential for coverage. They seem afraid of dealing with the real coverage arguments because the Appellees cannot eliminate the potential for coverage under West Virginia law. So they ignore relevant fact allegations, cite inapposite cases and ask the Court to change policy language. Mylan has shown numerous alternative bases for a defense under coverage for "misappropriation of an advertising idea," "misappropriation of style of doing business," "use of another's advertising idea in your advertisement," "discrimination," and "bodily injury." The Appellees present no grounds for denying a defense because the parties suing under each of the pertinent coverage offenses factually assert liability in a way that is distinguishable from the cases upon which the Appellees rely. The Appellees have not shown conclusively that these coverages cannot apply and have established no exclusions to coverage.

II. COVERAGE FOR "MISAPPROPRIATION OF ADVERTISING IDEAS"

A. "Misappropriation" is Ambiguous in that It is Capable of Covering Two or More Contextually Reasonable Definitions

1. AMICO/Continental Fail to Properly Consider the *Murray* Rule

The undefined policy term "misappropriation" is ambiguous under West Virginia law

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[1]Appellees: American Motorists Insurance Co., Continental Insurance Co., Wausau Insurance Co., Federal Insurance Co., and Great American Insurance Co.

[2]"The terms 'marketing the spread' as used and/or alleged in the AWP Actions were just a description of the way Mylan took advantage of its *prior* fraudulent conduct. The terms 'fair pricing campaign' as used and/or alleged in the L&C Actions were merely terms used by Mylan in its public relations effort to place a positive spin upon its prior antitrust violations." (Wausau Appellate Br. 4-5.)

under the applicable legal standard set forth by this Court in *Murray*.[3]

> *Whenever* the language of an insurance policy provision is reasonably susceptible of *two* different meanings *or* is of such doubtful meaning that reasonable minds *might* be uncertain or disagree as to its meaning, it is ambiguous. [Emphasis added.]

Murray further held that a provision is reasonably susceptible of two or more meanings, and therefore ambiguous, if "courts in other jurisdictions have interpreted the provision in different ways." *Murray*, 203 W. Va. at 485 n.5. While a court is not *required* to find ambiguity if courts in other jurisdictions disagree, in practical terms it *necessarily* follows that a provision is reasonably susceptible to two different meanings or at the very least reasonable minds might disagree. So, a finding of ambiguity is inevitable.

AMICO/Continental attempt to limit *Murray* by suggesting that ambiguity cannot be based on a disagreement among courts unless a majority of jurisdictions find a policy provision ambiguous. *Murray* has no such requirement. The legal standard that *Murray* adopts requires a finding of ambiguity "whenever" a policy provision is reasonably susceptible "of two different meanings" or "whenever" reasonable minds "might be uncertain or disagree" as to its meaning. *Id.* at 482-83. The Court reasoned that if fine judicial minds disagree, an insurer cannot expect a layman to understand the meaning.[4]

It is not necessary that a "majority of courts" determine a provision is ambiguous for this liberal standard to be met. *Id.*[5] Other jurisdictions side with *Murray* and find that a disagreement among just a few courts,[6] even two,[7] is enough to find ambiguity. *Murray*

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[3]*Murray v. State Farm Fire & Cas. Co.*, 203 W. Va. 477, 482, 509 S.E.2d 1, 6 (1998).

[4]*Id.* at 485 n.5 ("A provision in an insurance policy may be deemed to be ambiguous if courts in other jurisdictions have interpreted the provision in different ways. This rule is based on the understanding that 'one cannot expect a mere layman to understand the meaning of a clause respecting the meaning of which fine judicial minds are at variance.' ").

[5]*See also Sullins v. Allstate Ins. Co.*, 667 A.2d 617, 623-24 and n.2 (Md. 1995) (Where just one court had found a particular policy provision ambiguous but a majority 12 had found it unambiguous, the Supreme Court of Maryland sided with the one and held conflicting judicial interpretations of the same language "certainly lends some credence to the proposition that the language is ambiguous and must be resolved against the drafter.").

[6]*Little v. MGIC Indem. Corp.*, 836 F.2d 789, 795-96 (3d Cir. (Pa.) 1987) (Where one court had found a particular policy provision ambiguous but two courts found it unambiguous and interpreted it differently

therefore supports a rule that a disagreement among just two courts about the meaning of a policy term is enough to find it ambiguous.

AMICO/Continental cannot contest that courts in other jurisdictions have disagreed as to the meaning of "misappropriation." *See, e.g.*, *State Auto Prop. & Cas. Ins. Co. v. Travelers Indem. Co. of Am.*, 343 F.3d 249, 257 (4th Cir. (N.C.) 2003) ("Finally, the term 'misappropriation' is necessarily ambiguous: Although it could refer specifically to the common law tort of misappropriation, it also could refer more generally to the wrongful acquisition of property. **Significantly, the courts in other jurisdictions are unable to agree on how to interpret the term "misappropriation."** (emphasis added)).

Nor can AMICO/Continental dispute that some courts have adopted "misuse" as a possible construction of misappropriation. *Applied Bolting Tech. Prods., Inc. v. United States Fid. & Guar. Co.*, 942 F. Supp. 1029, 1032 (E.D. Pa. 1996) ("Misuse" is a preferred dictionary definition for "misappropriation" that a layperson would use and thus a valid definition for coverage purposes.); *Atlapac Trading Co., Inc. v. American Motorists Ins. Co.*, No. CV 97-0781 CBM, 1997 WL 1941512, at *7 (C.D. Cal. Sept. 19, 1997) (Mislabeling mixed olive/canola oil as olive oil **is a misuse** that injures the public as well as competitors whose pricing may be disadvantageously undercut.). Mylan's "misuse" construction should be adopted because it is reasonable in the context of the instant case. Crucially, AMICO/Continental fail to cite any cases that discuss "misappropriation" in the appropriate context, or hold that "wrongful taking" is the *only* reasonable construction of misappropriation **regardless of context**.

2. "Wrongful Taking" Is Only One Possible Construction

AMICO/Continental attempt to get around *Murray* by arguing that "wrongful taking" is a

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than the one, the Third Circuit sided with the one and stated, "[T]hat different courts have arrived at conflicting interpretations of the policy is strongly indicative of the policy's essential ambiguity." The conflict " 'itself creates the inescapable conclusion that the provision in issue is susceptible to more than one interpretation.' " (citation omitted)).

[7]*Security Ins. Co. of Hartford v. Investors Diversified Ltd., Inc.*, 407 So. 2d 314, 316 (Fla. Dist. Ct. App. 1981) ("The insurance company contends that the language is not ambiguous, but we cannot agree and offer as proof of that pudding the fact that the Supreme Court of California and the Fifth Circuit in New Orleans have arrived at opposite conclusions from a study of essentially the same language.").

preferred construction or the broadest reasonable construction of misappropriation. But AMICO/Continental do not even try to argue that wrongful taking is the *only* construction, yet this is the test they must satisfy to force adoption of their "wrongful taking" standard. Indeed, numerous cases, including several AMICO/Continental cite in their brief, specifically hold that "misappropriation" is ambiguous,[8] as it is reasonably susceptible to more than one meaning.[9]

Even in the narrow context of intellectual property cases, where the alleged harm specifically encompasses a wrongful taking, courts disagree about the scope of "misappropriation."[10] AMICO/Continental **admit** the cases they cite "are not cases where the courts purport to simply present 'one possible meaning.' " (AMICO/Continental Br. 18.)

No case cited by AMICO/Continental determined that a "wrongful taking" is the **only** reasonable construction **under all circumstances, or even considered that issue.** AMICO/Continental infer that conclusion by string-citing cases where courts (mostly district courts outside this Circuit) purportedly define misappropriation as "wrongful taking" in "definitive terms." But all of these cases addressed an underlying intellectual property dispute, *where the alleged harm includes a wrongful taking.* Because a wrongful taking is presumed, the

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[8]*Winklevoss Consultants, Inc. v. Federal Ins. Co.*, 991 F. Supp. 1024, 1037 (N.D. Ill. 1998) ("[The plaintiff] maintains that the phrase 'misappropriation of advertising ideas or style of doing business' is ambiguous . . . . **This Court agrees that the language is susceptible of more than one reasonable interpretation.**" (emphasis added)).

[9]*State Auto*, 343 F.3d at 257 ("**Finally, the term 'misappropriation' is necessarily ambiguous**: Although it could refer specifically to the common law tort of misappropriation, it also could refer more generally to the wrongful acquisition of property. Significantly, the courts in other jurisdictions are unable to agree on how to interpret the term 'misappropriation.' **And perhaps most compelling, the insurance companies involved in this coverage dispute disagree on the interpretation to be accorded the term 'misappropriation' in this context**. . . . [S]uch an ambiguity must be resolved in favor of the policyholder." (emphasis added));

Amazon.com Int'l, Inc. v. American Dynasty Surplus Lines Ins. Co., 85 P.3d 974, 976 (Wash. Ct. App. 2004) ("Misappropriation of an advertising idea may be accomplished by the 'wrongful taking of another's manner of advertising' . . . .").

[10]*Lebas Fashion Imports of USA v. ITT Hartford Ins. Group,* 50 Cal. App. 4th 548, 565 (1996) ("misappropriation" found to be ambiguous in context of trademark infringement action: "There is nothing about the terms 'misappropriation of an advertising idea' or 'misappropriation of a style of doing business,' neither of which constitutes a recognized tort, which compels us to conclude one way or the other as to just how broadly or narrowly they should be read.").

courts do not have occasion to consider the scope of "misappropriation."[11]

For example, AMICO/Continental cite *Green Machine Corp. v. Zurich American Ins. Group*, 313 F.3d 837 (3d Cir. (Pa.) 2002) at length. Green Machine sought coverage for patent infringement claims arising out of the sale of concrete cutting saws. The court limited misappropriation to a "wrongful taking" without any discussion or even citation to support this conclusion. It had no occasion to consider alternative meanings for misappropriation, even if the policy language potentially included a broader meaning. **Because the alleged harm encompassed a wrongful taking, a wrongful taking was simply presumed.** The issue on which the case hinged was further downstream: whether misappropriation "involve[d] an advertising idea, not just a non-advertising idea that is made the subject of advertising. . . . In this case, there are no such allegations." *Id.* at 839. The other intellectual property cases AMICO/Continental string-cite are similarly limited. The courts had no occasion or need to look further than wrongful taking.[12]

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[11]Consider that the cases AMICO string-cites at pp. 19-20 of its brief to show "wrongful taking" is the "broadest" possible definition are limited to a context where suits are between competitors or intellectual property owners and alleged infringers: *Skylink Technologies, Inc. v. Assurance Co. of Am.*, No. 03 C 1735, 2004 WL 42365, at *7 (N.D. Ill. Jan. 6, 2004) (**copyright infringement, patent infringement**); *Sport Supply Group, Inc. v. Columbia Cas. Co.*, 335 F.3d 453, 465 (5th Cir. (Tex.) 2003) (**trademark infringement**); *Heritage Mut. Ins. Co. v. Advanced Polymer Technology, Inc.*, 97 F. Supp. 2d 913, 926 (S.D. Ind. 2000) (**patent infringement**); *Winklevoss Consultants, Inc. v. Federal Ins. Co.*, 991 F. Supp. 1024, 1038 (N.D. Ill. 1998) (**Illinois Trade Secrets Act, unfair competition**); *Frog, Switch & Mfg. Co. v. Travelers Ins. Co.*, 193 F.3d 742, 744 (3d Cir. (Pa.) 1999) (**theft of trade secrets, unfair competition, and reverse passing off**); *Continental Cas. Co. v. Corus Pharma, Inc.*, No. C06-0921RSL, 2008 WL 1805675 (W.D. Wash. April 21, 2008) (**patent infringement, theft of trade secrets**).

[12]*See Amazon.com Int'l*, 85 P.3d at 978 (holding that insurer had duty to defend **patent infringement** claim where nexus requirement was satisfied because "the infringement occurred in the advertising itself."); *American States Ins. Co. v. Vortherms*, 5 S.W.3d 538, 543 (Mo. Ct. App. 1999) (no duty to defend **misappropriation of trade secrets** action where "the alleged misappropriation has no connection to any advertising activity . . . . [A]ll of the damages claimed by Prest were traceable to the **wrongful** acts of **taking** and disclosure of PrestPlan . . . ."); *Union Ins. Co. v. Knife Co., Inc.*, 897 F. Supp. 1213, 1217 (W.D. Ark. 1995) (insurer's summary judgment motion denied regarding coverage for underlying **trademark infringement** action); *State Auto*, 343 F.3d at 257 (action for **wrongful utilization of trademark** – court found "the term 'misappropriation' is necessarily ambiguous."); *J.A. Brundage Plumbing & Roto-Rooter, Inc. v. Massachusetts Bay Ins. Co.*, 818 F. Supp. 553, 557 (W.D.N.Y. 1993) (insurer had duty to defend **trademark infringement** action because "this case . . . does allege 'advertising injury' arising out of advertising activities."); *Del Monte Fresh Produce, N.A., Inc. v. Transportation Ins. Co.*, 500 F.3d 640, (7th Cir. (Ill.) 2007) (class action based on **antitrust** allegations because "the allegations here specifically charge fraudulent conduct [so] there is no duty to defend under the policy.").

An opinion is only authority for those issues actually considered or decided.[13] AMICO/Continental's opposition cites cases where the "wrongful taking" construction was adopted, and then cross their fingers and hope this Court applies the same narrow construction. AMICO/Continental failed to take the extra step and explain *why* the context in which these cases were decided is sufficiently analogous to the instant case to justify limiting the scope of "misappropriation" to the construction adopted by those courts.

B. "Misappropriation of Advertising Ideas" Necessarily Includes Misuse of Advertising Ideas

1. "Misappropriation" Offenses Are Not Limited to a Singular Tort

AMICO/Continental's entire argument is premised on the false assumption that "wrongful taking" defines misappropriation in every context. But this approach would require the Court to add words of limitation to the policy, an approach that is contrary to West Virginia law. *Fleming v. Nationwide Mut. Ins. Co.*, 383 F.2d 145, 151 (4th Cir. (W. Va.) 1967) ("The universal rule . . . that terms of an insurance contract should be construed most liberally in favor of the insured should be invoked in the instant case to afford the assured coverage. **At the very least, the policy ought not be amended by the court to insert words of limitation that are simply not there.**" (emphasis added; citation omitted)). Taken to its logical conclusion, AMICO/Continental argue that the general term "misappropriation" should be stricken and replaced with a much narrower phrase, "wrongful taking." The revised policy would then only provide coverage for "[wrongful taking] of advertising ideas or style of doing business."

There is nothing about the term "misappropriation" that suggests it should be limited to a specific tort or singular meaning. This is because "[t]here is nothing about the terms . . . neither of which constitutes a recognized tort, which compels [the court] to conclude one way or the

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[13] *See ABM Industries, Inc. v. Zurich American Ins. Co.*, No. C 05-3480 SBA, 2006 WL 2595944, at *18 (N.D. Cal. Sept. 11, 2006) ("Plaintiffs cite to other cases in order to show that occurrences may arise from negligence. However, **these cases simply assume that the activities in question were an occurrence, without explaining how or why.** . . . These cases do not advance Plaintiffs' position. **It is a well-established rule that an opinion is only authority for those issues actually considered or decided.**" (emphasis added; citing *Rosen v. State Farm General Ins. Co.,* 30 Cal. 4th 1070, 1077, 135 Cal. Rptr. 2d 361, 70 P.3d 351 (Cal. 2003)).

other as to just how broadly or narrowly they should be read." *Lebas*, 50 Cal. App. 4th at 565. At footnote 31 AMICO/Continental argue that *State Auto Property & Casualty Ins. Co.* "found ambiguity only as to whether 'misappropriation' was limited to the common law tort of misappropriation." *State Auto* and similar cases cited by AMICO/Continental demonstrate that, even in the narrow context of intellectual property cases, courts have found "misappropriation" to be ambiguous, and have been unwilling to apply a single definition.

Even Federal Insurance Company has argued that "misappropriation" is broader than a "wrongful taking." In *Cincinnati Ins. Co. v. American Hardware Mfrs. Assn.*, 898 N.E.2d 216 (Ill. App. Ct. 2008), Federal defended its insured, a company that organized national hardware trade shows. After it paid all the defense fees, it took an assignment of rights and filed suit seeking contribution from Cincinnati Insurance Company. Federal argued the false advertising claim qualified as a **"misappropriation"** of advertising ideas or "style of doing business":

> Federal also asserted that, the numerous allegations by Reed that AHMA deceptively advertised its 2004 trade show by suggesting that it was the continuation of the trade show to which Reed claimed exclusive rights, separately implicated the covered offenses of "[m]isappropriation of advertising ideas or style of doing business" and "use of another's advertising idea in your 'advertisement' " under both Cincinnati policies.

Id. at 226. Federal argued misappropriation included "confusion in the marketplace" (caused by deceptively advertising that defendant's trade show was a continuation of the plaintiff's show).

2. Numerous Cases Are Premised on Misuse of Advertising Ideas

AMICO/Continental's argument that *Applied Bolting*[14] "merely noted that the insured had argued that misappropriation was synonymous with misuse" (AMICO/Continental Br. 21) is wrong. Although *Applied Bolting* did not apply the "misuse" construction, it is undeniable that the court accepted "misuse" as a possible construction of misappropriation. The court explicitly found coverage for the misuse of an advertising idea: "[T]he **policy covers** an underlying suit only when Applied is alleged to have **misused** an 'advertising idea.' " *Applied Bolting*, 942 F. Supp. at 1033 (emphasis added). The court, however, could not apply "misuse" *in that case*

[14]*Applied Bolting,* 942 F. Supp. 1029.

because the insured had not misused an advertising idea.[15]

AMICO/Continental incorrectly argue that *Atlapac*, 1997 WL 1941512, "contains no direct discussion of the meaning of 'misappropriation of advertising ideas' " and is contrary to California law.[16] But *Atlapac* explicitly found coverage for "misappropriation of advertising ideas and style of doing business" based on the misuse of an advertising idea:

> Tama is complaining of Plaintiff's false and **misleading use** of the term "pure olive oil" with blended oils. Tama was using the term "pure olive oil" to sell its 100% olive oil products. Tama complained that Plaintiff coupled the use of this term with lower prices, thus diverting sales from Tama to Plaintiff.

Id. at *7 (emphasis added). ***None*** of the cases AMICO/Continental cite contain any direct discussion of the meaning of "misappropriation" in the instant context. AMICO/Continental's reliance on *Clark Mfg., Inc. v. Northfield Ins. Co*, 187 F.3d 646, 1999 WL 451103 (9th Cir. (Cal.) 1999) (Table) is misplaced. It was a **patent infringement** case where the alleged harm necessarily encompassed a wrongful taking. *Published* California opinions hold that "misappropriation" is ambiguous, even in the context of an intellectual property case.[17]

Notably, AMICO/Continental do not even discuss other cases that support construing the ambiguous phrase "misappropriation" to include misuse.[18] AMICO/Continental do not dispute

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[15]*Id.* at 1033 ("I do not agree that Applied has misused an 'advertising idea.' While it may be true that Applied 'advertises' to potential buyers an 'idea' when it uses all DTIs made to ASTM F959-94a, the policy covers an underlying suit only when Applied is alleged to have misused an 'advertising idea.' ").

[16]AMICO/Continental Br. 21 n.32.

[17]*See, e.g., Lebas*, 50 Cal. App. 4th at 565 (Court found "misappropriation" ambiguous in context of trademark infringement action: "There is nothing about the terms 'misappropriation of an advertising idea' or 'misappropriation of a style of doing business,' neither of which constitutes a recognized tort, which compels us to conclude one way or the other as to just how broadly or narrowly they should be read.").

[18]*See Native American Arts, Inc. v. Hartford Casualty Ins. Co.*, 435 F.3d 729, 733 (7th Cir. (Ill.) 2006) ("NAA's complaints mirrored this language, alleging that Stravina effectuated many of its violations of the Indian Arts and Crafts Act by 'misappropriat[ing ... NAA's] advertising ideas and style of doing business.' NAA's advertisements stressed the authenticity of its goods; by falsely doing the same. Stravina's advertisements traded upon a reputation, history, and sales advantage that it did not deserve.");

American Simmental Ass'n v. Coregis Ins. Co., 282 F.3d 582 (8th Cir. (Neb.) 2002) ("fullblood" cattle advertising idea misused to describe inferior cattle);

Flodine v. State Farm Ins. Co., No. 99 C 7466, 2001 WL 204786, at *5 (N.D. Ill. Mar. 1, 2001) ("Southwestern style" advertising idea misused by falsely suggesting items Indian-made);

that dictionaries define "misappropriation" as "misuse"[19] or that West Virginia courts reference dictionary definitions to discern how to understand an undefined policy provision.[20]

C. Misuse of "Advertising Idea" is Not Limited under West Virginia Law to "An Idea About the Solicitation of Business or Customers"

AMICO/Continental argue "advertising idea" is limited to "an idea about the solicitation of businesses or customers." But Mylan cited cases where varied definitions of the "misappropriation of advertising ideas" "advertising injury" were expressly validated:

(1) Taking [or misuse of] the idea of another's invention as one's own idea or invention in the course of advertising;[21] **(2)** "[T]he idea of claiming a revolutionary new design as an enticement to customers";[22] **(3)** The theft of an advertising plan from its creator without payment;[23] **(4)** "Capitalizing upon the goodwill associated with Indian-made products is a marketing idea concerned with how to persuade consumers to buy certain goods."[24]

AMICO/Continental fail to even mention *any* of these alternative definitions, or show why they are not appropriate in the instant context, or explain why their own construction is the *only* appropriate one in the current context. AMICO/Continental simply assert that one court has

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Pennfield Oil Co. v. American Feed Indus. Ins. Co. Risk Retention Group, Inc., No. 8:05CV315, 2007 WL 1290138 (D. Neb. Mar. 12, 2007) ("FDA approved" advertising idea misused by falsely alleging insured's animal-drug-feed-additive was FDA approved for multiple uses.);

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

[19]*See* BLACK'S LAW DICTIONARY 1998 (6th ed. 1990) ("Misappropriation: the **unauthorized, improper or unlawful use** of funds or other property for purposes other than that for which intended . . . ." (emphasis added); *see also* RANDOM HOUSE UNABRIDGED DICTIONARY 1228 (2d ed. 1993) ("Misappropriate" means "**to put to a wrong use**; to apply wrongfully or dishonestly, as funds entrusted to one's care." (emphasis added)).

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

[21]*Lebas*, 50 Cal. App. 4th at 560 n.7.

[22]*Frog, Switch*, 193 F.3d at 749.

[23]*Lebas*, 50 Cal. App. 4th at 560 ("Lebas is correct in its assertion that the policy terms 'misappropriation,' 'advertising idea' and 'style of doing business' do not have a single, plain and clear meaning.").

[24]*Flodine*, 2001 WL 204786, at *11.

interpreted it narrowly as "an idea about the solicitation of businesses or customers."

AMICO/Continental argue that "marketing the spread" is a non-advertising idea that is made the subject of advertising. But this approach confuses the advertising idea *itself* with the misuse of that idea. The AWP complaints specifically allege that Mylan "marketed the spread." Marketing the spread is an "advertising idea" that was alleged to have been misused by Mylan so as to deprive the public of its fair access to properly priced pharmaceutical products.[25] Allegations that Mylan's conduct was wrongful establish coverage for misuse of an advertising idea. That conduct does not foreclose the existence of an "advertising idea."

D. AMICO/Continental Abandoned Their "Special Right and Legally Protected Interest" Construction of "Advertising Idea"

AMICO/Continental argued in their Opposition to Mylan's Petition for Appeal that an "advertising idea" must be one to which the underlying plaintiffs "claimed a special right and legally protected interest." (AMICO/Continental Opp'n to Mylan Pet. for Appeal 19.) Mylan's opening brief addressed this. (Mylan Opening Appellate Br. 22-24.)

Struggling to reconcile their "wrongful taking" definition with case law that more broadly construed "misappropriation," AMICO/Continental abandoned the argument. They conceded that their "special right and legally protected interest" construction is *not* the only reasonable construction of "advertising idea," especially as Mylan explains how its conduct would trigger a defense even under that narrow construction of "advertising idea" in its opening brief.

III. "MISAPPROPRIATION OF STYLE OF DOING BUSINESS" IS IMPLICATED

A. The "Misappropriation of . . . Style of Doing Business" Offense Is Not Limited to Misuse of "A Company's Comprehensive Manner of Operating"

AMICO/Continental's opposition fails to discuss Mylan's "particular mode of interacting with drug purchasers" or explain why that is not a style of doing business. AMICO/Continental's argument at pages 24-25 of their brief appears to be that since several

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[25] *Curtis-Universal, Inc. v. Sheboygan Emerg. Med. Servs., Inc.*, 43 F.3d 1119, 1124 (7th Cir. (Wis.) 1994) ("A word sometimes picks up meaning from its neighbors; and *all* the other terms in the list of wrongs insured under the rubric of 'advertising injury' concern **the misuse of information**, as befits the word 'advertising.' " (bold emphasis added)).

courts have adopted the "comprehensive manner of operating its business" construction, this limited meaning must be applied here. AMICO/Continental, however, fail to point out why their construction is the most appropriate under the instant facts, or why any other construction might not be adopted.

Numerous cases, including several AMICO/Continental cite, recognize that the offense of "style of doing business" is not a specific tort and can therefore encompass a broad range of constructions. None hold that AMICO/Continental's construction is the only construction under every circumstance. For example, *Hyman v. Nationwide Mut. Fire Ins. Co.*, 304 F.3d 1179, 1189 (11th Cir. (Fla.) 2002) adopted a much broader construction.

> Accordingly, **without defining the exact parameters of the phrase,** we conclude that "style of doing business" must include **the manner in which a company promotes, presents, and markets its products to the public.** [Emphasis added.]

Similarly, *Novell, Inc. v. Federal Ins. Co.*, 141 F.3d 983, 987 (10th Cir. (Utah) 1998) recognized several constructions but failed to adopt a specific one "because none of the above-described definitions provide relief to plaintiff." The court recognized that **not** all courts have adopted the "comprehensive manner of operating its business" construction.[26] *Novell* cited *Badger Medical* for the proposition that "style of doing business" could include "distinctive sales techniques."[27] Other cases decided after *Novell* have emphasized that the proper meaning of "misappropriation of style of doing business" is **not** limited to a single construction. *Frog, Switch* equated "style of doing business" with a "plan for interacting with consumers and getting their business." ("Similarly, ESCO alleged not that Frog copied a style of doing business – **a plan for interacting with consumers and getting their business** – but that Frog copied a

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[26]*Novell, Inc.*, 141 F.3d at 987 ("*Most* [courts] seem to agree the phrase 'style of business' . . . refers to a company's comprehensive manner of operating its business . . . .").

[27]*Atlantic Mut. Ins. Co. v. Badger Med. Supply Co.*, 191 Wis. 2d 229, 239-40 (Wis. Ct. App. 1995) (" 'Style of doing business' is a phrase used by the courts to refer to 'a company's comprehensive manner of operating its business.' **We agree with Badger that the phrase may include distinctive sales techniques.**" (emphasis added)).

particular product line that might be attractive to consumers.")[28] *Hoosier*[29] or *Elcom*[30] are not helpful because they simply apply the general rule without analysis. Neither purports to define the outer limits of the "misappropriation of style of doing business" offense.

B. "Misappropriation of a Style of Doing Business" Includes a "Particular Mode of Interacting with Drug Purchasers"

1. Mylan's Construction Is Reasonable

AMICO/Continental do not and cannot challenge that Mylan's **"particular mode of interacting with drug purchasers"** construction is reasonable in the instant context. They concede that "misappropriation of a style of doing business" is a broad, generic offense and that the Appellees could have limited this offense but elected not to do so.[31] By leaving this generic offense unmodified they left open the possibility that a broad range of claims is encompassed.[32]

AMICO/Continental also fail to address Mylan's proposed "particular mode of interacting with the drug purchasers" construction even though it is consistent with those developed by courts in similar contexts. It is undisputed that other courts have interpreted "style of doing business" to include "distinctive sales techniques"[33] as well as "a plan for interacting with consumers and getting their business."[34] Unsurprisingly, Mylan's "particular mode of interacting with drug purchasers" is similar, since it was developed in a similar context.

For example, the "distinctive sales techniques" construction *Badger Medical* adopted is based on the insured's alleged intentional inducement of a competitor's former employee "to breach the restrictive covenant [in a non-compete agreement] in order to obtain and control numerous customers served by" the employee while he worked for the competitor. *Badger*

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[28] *Frog, Switch*, 193 F.3d at 749-50 (emphasis added).

[29] *Hoosier Ins. Co. v. Audiology Foundation of America*, 745 N.E.2d 300 (Ind. Ct. App. 2001).

[30] *Elcom Techs., Inc. v. Hartford Ins. Co. of the Midwest*, 991 F. Supp. 1294 (D. Utah 1997).

[31] *See Lebas*, 50 Cal. App. 4th at 566 n.13.

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

[33] *Badger Med.*, 191 Wis. 2d at 239-40.

[34] *Frog, Switch*, 193 F.3d at 750.

Medical, 191 Wis. 2d at 234. Mylan is also alleged to have engaged in wrongful conduct (that could also be described as "distinctive sales techniques") to attract new customers. Mylan allegedly used the mode of interacting with drug purchasers originally adopted by others and then applied by Mylan to "marketing the spread" between the price at which it sold drugs to direct purchasers such as physicians and pharmacies and what they received via reimbursement from Medicaid and Medicare.

Like the "distinctive sales techniques" and "plan for interacting with consumers and getting their business," Mylan's advertising of the "marketing the spread" concept created potential liability for express claims of unfair competition that include a misuse of a "particular mode of interacting with drug purchasers." This is true because courts " 'assume all reasonable inferences' . . . and resolve any doubt regarding the duty to defend in favor of the insured."[35]

2. A Duty to Defend Exists Even with a Narrow Construction of "Style of Doing Business"

Even if the Court adopts a narrower construction of "style of doing business" than Mylan proposes, Mylan is still owed a defense. In West Virginia, an insurer is required to defend its insured whenever facts in the complaint could potentially give rise to coverage. *Butts v. Royal Vendors, Inc.*, 202 W. Va. 448, 451, 504 S.E.2d 911, 914 (1998) (" '[I]t is generally recognized that the duty to defend an insured may be broader than the obligation to pay under a particular policy.' "); *Tackett v. American Motorists Ins. Co.*, 213 W. Va. 524, 531, 584 S.E.2d 158, 165 (2003) (subscribing to a potentiality standard and holding that an allegation will trigger coverage if it is "reasonably susceptible of an interpretation that the claim may be covered"). For purposes of determining an insurer's duty to defend, the pertinent question is whether *any* factual scenario exists where a potential for coverage could arise.[36] Whether particular acts constitute a

[35] *Fireman's Fund Ins. Co. v. Bradley Corp.*, 261 Wis. 2d 4, 19, 660 N.W.2d 666, 674 (Wis. 2003).

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

company's style of doing business is a factual issue.[37]

Since a jury could find that Mylan's acts constituted a "style of doing business" even under the unreasonably narrow construction AMICO/Continental propose, a potential for coverage exists and AMICO/Continental must defend their insured. This Court recently recognized that an insurer is required to provide a defense if there are factual issues not yet developed in the trial court which could possibly have an impact on the insurer's duty to defend.[38] So until this issue is resolved, AMICO/Continental's duty to defend continues.

IV. AWP Alleged an Offense "Committed in the Course of Advertising"

A. Advertising, Broadly Construed, Includes Promotional Statements

Advertising is interpreted in various ways. The Appellees' litany of mostly older, lower court cases are not precedential. The only Supreme Court decision supporting them, California's *Hameid*,[39] made glaring errors of fact in its purported survey of cases, something the Appellees studiously ignore.[40] The most recent Supreme Court decision on this issue is ignored by the Appellees. Wisconsin's *Acuity* found "advertising" "is susceptible to multiple reasonable interpretations and is therefore ambiguous."

> The standard broad definition [of advertising] is: "any oral, written, or graphic statement made by the seller in any manner in connection with the solicitation of business." [Finding this definition as reasonable as that touted by the Appellees, the Wisconsin Supreme Court observed] . . . [W]e conclude that the term is susceptible to multiple reasonable interpretations and is therefore ambiguous. . . . Consequently, we will apply the broad definition to the facts before us.[41]

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[37]*Elcom*, 991 F. Supp. at 1297 ("**Whether or not particular acts constitute a company's style of doing business varies with the facts of each case. Certain acts** by one company **might amount to** a **comprehensive manner of operating its business** while the same acts by another company may only be considered representations to the public about the company's product or service." (emphasis added)).

[38]*American Modern Home Ins. Co. v. Corra,* 671 S.E.2d 802, 808 n.9 (W. Va. 2008) ("Notwithstanding the decision in this case, the author of this opinion, in contrast to the majority of the Court, believes that **there are factual issues not yet developed in the trial court which could possibly have an impact on the ultimate issue of the insurer's duty to defend and indemnify in this case**. Therefore, although a majority of the Court does not presently share this view, the author believes that **the insurer should be required to provide a defense** to Mr. Corra." (emphasis added)).

[39]*Hameid v. National Fire Ins. of Hartford*, 31 Cal. 4th 16, 71 P.3d 761 (2003).

[40]Mylan Opening Appellate Br. 29 n.109.

[41]*Acuity v. Bagadia*, 750 N.W.2d 817, 828 (Wis. 2008).

B. Advertising Is Expressly Alleged As a Basis for Liability in the AWP Actions

Where the injury is "complete in the advertisement," requiring no further conduct,[42] the "committed in the course of advertising activities" test is readily satisfied.[43] The Appellees' assertion that all conduct creating liability was secret except for the solicitation to physicians is belied by the express allegations in the complaints ("**Defendants advertise this spread**").[44] The Appellees ignore the relevant allegations. While the inflated reimbursement mechanism was purportedly secret, **the mechanics of "marketing the spread" were widely known**, as alleged ("**the existence of a spread 'has not been a secret'** ").[45]

The Appellees' tactic of taking one view of the facts and siding with the claimants against Mylan in resolving that issue against Mylan, is improper in determining whether a defense duty exists. The viability of the underlying claim against the insured does not affect an insurer's duty to defend. Even "when the underlying action is a sham," the insurer may terminate its duty to defend only by "demur[ing] or obtain[ing] summary judgment on its insured's behalf . . . ."[46] In such a case, the dispute actually establishes the duty to defend.[47]

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[42]*Frog, Switch*, 193 F.3d at 750 n.8.

[43]*Elcom*, 991 F. Supp. at 1297 ("The statements made by Elcom in the advertising brochures attached as Exhibit 'C' to Phonex's complaint were an integral part of Phonex's . . . false advertising claims against Elcom. The very acts Phonex complained of were part of the way Phonex operated its business.").

[44]*See e.g., Albany* Action (Ondos Aff. ¶ 11, Exhibit "3"):

> 8. . . . . Defendants advertise this spread as a reason why those in the distribution chain should sell their drugs, a practice [that] is known as "marketing the spread."
>
> 126. Defendants' own marketing documents make clear that **they market the spread** and profitability based on reimbursement whether their products are single or multisource.

[45]*In re Pharmaceutical Industry Average Wholesale Price Litigation*, 230 F.R.D. 61, 70 (D. Mass. 2005) ("On January 1, 1998 . . . [r]eimbursement for generic drugs [like those manufactured and promoted by Mylan] was changed to the lower of (1) the median of the AWPs of all generic forms of a drug or (2) the AWP of the least expensive brand-name drug. 42 U.S.C. 1395u(o) . . . . The benchmarks for Medicare Part B reimbursement were based on AWP even though the Department of Health and Human Services and other agencies have disclosed over the years that pharmacies' and providers' acquisition costs were typically less than AWP. Moreover, various publications disclosed that physicians were able to purchase many of the Medicare Part B outpatient drugs at prices considerably less than AWP. In Dr. Berndt's words, the existence of a spread 'has not been a secret, at least to active observers and health care participants.' " *Id.* at 70, 71 (internal citations omitted).).

[46]*Horace Mann Ins. Co. v. Barbara B.*, 4 Cal. 4th 1076, 846 P.2d 792, 799 (1993).

[47]*American Cyanamid Co. v. American Home Assur. Co.*, 30 Cal. App. 4th 969, 975, 35 Cal. Rptr. 2d 920, 923 (1994) ("If the parties dispute whether the insured's alleged misconduct is potentially within the

V. WAUSAU FAILS TO EXPLAIN WHY ITS "USE OF ANOTHER'S ADVERTISING IDEA IN YOUR 'ADVERTISEMENT'" OFFENSE IS NOT IMPLICATED UNDER BOTH THE AWP AND L&C ACTIONS

A. Wausau Does Not Even Analyze Analogous False Advertising Cases

Wausau does not address the basis for coverage under its policy coverage for "use of another's advertising idea in your advertisement" because it cannot avoid the potential for coverage. Both the L&C and the AWP cases allege that Mylan's advertising caused the plaintiffs' harm. L&C alleges false advertising to justify price increases and AWP alleges marketing the spread as a basis for damages.

Wausau asserts there are no labeled causes of action for misstatements in advertisements and so treats such allegations as mere statements of historical information or background facts. But complaint allegations are not historical background; they are facts intended to support a claim for relief, however labeled. A duty to defend is determined by the complaint allegations and not by the labels given to causes of action.

This was eloquently explained by Judge Posner in the *Curtis-Universal* case.[48]

> The plaintiff's complaint, upon which the insurer's duty depends, need not even set forth the plaintiff's legal theories. See, e.g., Fed. R. Civ. P. 8(a); Fed. R. Civ. P. Form 9. What is important is not the legal label that the plaintiff attaches to the defendant's (that is, the insured's) conduct, but whether that conduct as alleged in the complaint is at least arguably within one or more of the categories of wrongdoing that the policy covers. [Citations omitted.]

It was also emphasized by Justice Croskey, a noted insurance coverage scholar, in *J. Lamb, Inc.*.

> Coverage . . . is not determined by the nature of the damages sought in the action against the insured, but by *the nature of the claims* made against the insured in that action. . . . "[c]overage ... is triggered by the *offense*, not the injury or damage which a plaintiff suffers."[49]

The analytic approach of both cases is consistent with West Virginia law.

Wausau seeks to distance itself from the fact allegations in the underlying complaints that

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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 the issue.' ").

[48] *Curtis-Universal*, 43 F.3d at 1122.

[49] *Atlantic Mut. Ins. Co. v. J. Lamb, Inc.*, 100 Cal. App. 4th 1017, 1032, 123 Cal. Rptr. 2d 256 (2002).

are the basis for potential coverage, conveniently characterizing allegations as "background" or "history" while considering only the labels applied by the underlying plaintiffs. Wausau fails to consider the coverage significance of Mylan's press releases explaining why the particular charges were in accord with the reimbursement system in effect for Medicare or Medicaid.

Wausau does not acknowledge the coverage potential of Mylan's public pronouncements. Those acts of advertising by Mylan are alleged to be wrongful and fell within Wausau's policy period. The advertising ideas were not originated by Mylan, so they constitute the use in its "advertisement" of the "advertising idea of another."

Failing to even address these points raised in Appellants' opening brief and urging this Court to look only at other aspects of the litigation that Mylan does not contend create a defense obligation, Wausau's argument offers nothing more than an explanation as to why indemnity might not be available if the matter had proceeded to adjudication against Mylan under certain grounds for relief. This inquiry is irrelevant to analysis of the duty to defend.

What Wausau characterizes as a "cover-up" are fact allegations of false advertising within Wausau's express coverage for "use of another's advertising idea in your 'advertisement' " that create a potential for indemnity and covered claims under its policy. The reason it does not respond to Mylan's arguments about why these statements create potential coverage is that it cannot distinguish those cases that find such allegations sufficient to compel a defense. It must therefore seek to look only at other aspects of the case, which it persuaded the Circuit Court were all that was germane to coverage, to avoid a defense.

The Circuit Court misperceived that its job was to try the facts about that aspect of the underlying case that it thought most likely supported the claimants' theories for recovery by addressing the "gravamen" or "true claims" of the case. This is precisely the kind of merit-based focus that has drawn criticism from thoughtful appellate jurists who have directed trial courts to follow proper coverage analysis. The task is not to try the underlying case, but to evaluate the potential for coverage implicit in factually asserted allegations. *See, e.g., Aurafin-OroAmerica, LLC v. Federal Ins. Co.*, 188 Fed. Appx. 565, 566 (9th Cir. (Cal.) 2006) ("To the extent that the

district court found that D & W's counterclaims alleged each element of libel, but that the facts did not support a libel claim as a matter of law, the district court applied the wrong legal standard and impermissibly considered the merits of the libel claim.").

B. The "Use of Another's Advertising Idea in Your 'Advertisement' " Offense Is Implicated Because There Is No Requirement that the Claimant be the Party to Whom Advertising Is Directed or that There is a Wrongful Taking of an "Advertising Idea" from Another

1. "Use of Another's . . . Idea" Requires No Misappropriation

Wausau overstates case law by suggesting that there is coverage only for competitors' suits for theft of "advertising ideas." Not so.[50] Nor is the existence of "competition" an element of the offense of "use of another's advertising idea." While Wausau would like to add limiting language to its policy to narrow its scope, it cannot do so and must live with the breadth of that language and its proper understanding under applicable West Virginia law.

Ohio Cas. Ins. Co. v. Albers Medical, Inc., No. 03-1037-CV-W-ODS, 2005 WL 2319820 (W.D. Mo. Sept. 22, 2005) found a duty to defend under the "use of another's advertising idea" policy offense when a drug maker sold generic products suggesting that it was providing the trademarked product (Lipitor). Emphasizing potential harm to the class of potential customers rather than the party suing, the court reasoned, at *3:

> There is potential coverage because Albers allegedly communicated something about its product to members of the public for the purpose of attracting customers. Albers also allegedly published notice to a specific market segment (i.e., those in the distribution chain for drugs, such as retail drug stores) that it had Lipitor for sale.

Although Wausau persuaded the Circuit Court that the "use of another's advertising idea in your 'advertisement' " policy language required a *taking* of an advertising idea, none of the cases it cited analyzed this policy language. Rather, they looked to the predecessor

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[50] *American Simmental Ass'n v. Coregis Ins. Co.*. 282 F.3d 582, 587 (8th[h] Cir. 2002) ("The plain and ordinary meaning of **'advertising idea'** generally **encompasses 'an idea for calling public attention to a product** or business, especially by proclaiming desirable qualities so as to increase sales or patronage.' *Advance Watch Co., Ltd. v. Kemper Nat. Ins. Co.*, 99 F.3d 795, 801 (6th Cir.1996)." (emphasis added)). In *Amazon.com, Inc. v. Atlantic Mutual Ins. Co.*, No. C05-00719RSM, 2005 WL 1711966 (W.D. Wash. July 21, 2005), the court found a defense for three families of patents for a "use of another's advertising idea in your 'advertisement' " as an idea that is advertising (i.e., an "advertising technique"), noting it could extend to an idea for advertising or an idea about advertising.

"misappropriation of an advertising idea" offense; the cases cited all addressed intellectual property tort claims where the breadth and scope of "misappropriation of advertising idea" was not before the court. *Albers* rejected this argument at *4:

> [T]he term "misappropriation" is not present in Albers' policy. The policy provides coverage if another's advertising idea is "used." "Used" does not have the same technical, defined meaning in the law as "misappropriation" . . . . Albers allegedly used Pfizer's idea for calling public/consumer attention to its product.

There is nothing about the language "use of another's advertising idea in your 'advertisement' " that would limit it to the taking of an advertising idea of the claimant suing the insured. This construction would require the addition of words not set forth in the policy, to wit, "use of the advertising idea of [*the claimant suing the insured*] in your 'advertisement.' " It is not for this Court to rewrite the policy language. Despite pointing this out in the Appellants' opening brief, Wausau does not explain why its analysis survives.

2. The Advertisement Need Not Cause Direct Injury

Wausau's argument is that the underlying complaints must allege that marketing the spread and the fair pricing campaign directly caused the underlying plaintiffs' alleged damages in order for there to be a defense obligation. It cites no authority for this proposition because there is none. Wausau fails to address the argument Mylan made on this point in its Opening Brief. (Mylan Opening Appellate Br. 35 (§ V(C)(5)(c)).)

The Appellees' briefing notably failed to confront the seminal analysis of Judge Croskey in *J. Lamb, Inc.*,[51] where he described and emphasized the analysis of offense-based policies articulated by earlier courts. His analysis clarified that it is the offense, not the injury or damages, that is the focus, and that the allegations, not the labels of causes of action, are the key to the duty to defend. The Appellees' failure to confront *Lamb*'s analytic approach – and *BASF*'s failure to appreciate the distinctions underlying that case – should make this Court wary of following that questionable decision.

The *BASF* opinion[52] gave lip service to but was inconsistent with Judge Posner's opinion

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[51] 100 Cal. App. 4th 1017.

[52] *BASF AG v. Great Am. Assur. Co.*, 522 F.3d 813 (7th Cir. (Ill.) 2008)

in *Curtis-Universal*. *BASF*'s suggestion that the insured should have bought express coverage for antitrust is based on incorrect assumptions about the insurance marketplace, failing to appreciate that numerous insurers presently write broad forms of coverage for unfair competition and reputational injury and multimedia/cyberspace policies that expressly exclude antitrust claims.[53] *BASF* sought to protect the insurer by adding exclusionary language not present in its policy under the guise of discerning the parties' mutual intent. The court focused on labels of causes of action rather than the actual allegations within the pleading. Such an approach substitutes a focus on injury and damages that is not applicable to offense-based policies. Had the *BASF* panel focused on the pertinent factual allegations in the complex underlying lawsuit, a different result would have attended under governing Illinois law.[54]

Appellees incorrectly argue that Mylan makes the same claims as those asserted in *BASF*. The common law offenses in *BASF* of libel, slander and disparagement are not at issue here.[55] *BASF*'s suggestion that every element of the libel, slander and disparagement claim must be asserted in order to trigger the benefits of indemnification is also not relevant in considering the duty to defend because a far broader standard applies.[56] It is the *fact allegations* of the complaint upon which offense-based coverage rests.[57]

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[53]*See* David A. Gauntlett and John L. Maxin, *Tort Claims and Insurance in Cyberspace: Is Your Company Covered?*, 19 ACCA Docket, The Journal of the American Corporate Counsel Association 19 (May 2001).

[54]*See Valley Forge Ins. Co. v. Swiderski Electronics, Inc.*, 860 N.E.2d 307, 369 (Ill. 2006) (The question in determining the duty to defend is whether the policy is "sufficiently broad to encompass **the conduct** alleged in the complaint." (emphasis added)). Despite this, the *BASF* panel ignored specific claims in the underlying class action complaint alleging direct injury to third parties (per Section 815 ILCS 510/2(a)(8) of the Illinois Deceptive Trade Practices Act) as a result of disparagement of the goods, services, or business of another by false or misleading representation of fact.

[55]*BASF*, 522 F.3d at 822 ("It seems extremely unlikely to us that the parties intended antitrust and racketeering claims to be covered – or even potentially covered – by a policy definition that sounds in libel, slander, and disparagement.").

[56]*Butts*, 202 W. Va. at 453 ("Under longstanding principles of insurance law, an insurer's obligation to defend is 'broader than the obligation to provide coverage' and this obligation is **not** dependent on the precise use of terms within the complaint that would 'unequivocally delineate a claim which, if proved, would be within the insurance coverage.' " (emphasis added)).

[57]*J. Lamb, Inc.*, 100 Cal. App. 4th at 1034 ("The scope of the duty does not depend on the labels given to the causes of action in the third party complaint; instead it rests on whether the alleged facts or known

Appellees' lengthy discussion of *BASF* underscores the fact that it followed analytic principles inconsistent with the better view of offense-based policy construction, as well as previously articulated West Virginia case law.[58] *BASF* improperly focused on labels of causes of action, not facts, and looked to injury and damage rather than the character of the offense in analyzing a duty to defend. It also presumed a narrow construction for a broad phrase like "arising out of" that was inconsistent with prior Illinois Supreme Court precedent.[59]

Wausau makes much of the fact that to date only two cases have directly addressed a scenario where class action claimants asserted various claims triggering potential coverage. In *Knoll Pharm. Co. v. Automobile Ins. Co.*, 152 F. Supp. 2d 1026 (N.D. Ill. 2001), whose coverage analysis is fully consistent with West Virginia law as well as a number of forward-looking jurisdictions, the court found that indirect disparagement or defamation of parties injured by disclosures regarding Knoll's marketing methods created potential coverage because the claimants asserted liability arising out of such conduct triggering the operative offenses. *BASF* reached a contrary result, believing that the term "arising out of" should be given a narrower construction. At most, this shows there may be two competing analyses for the meaning of the term "arising out of." Since West Virginia has embraced a broad construction of that phrase,

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extrinsic facts reveal a possibility that the claim may be covered by the policy."); *see Butts*, 202 W. Va at 453, citing *Bruceton Bank v. United States Fid. & Guar. Ins. Co.*, 199 W. Va. 548, 486 S.E.2d 19 (1997) (" '[I]ncluded in the consideration of whether the insurer has a duty to defend is whether the allegations in the complaint ... are reasonably susceptible of an interpretation that the claim may be covered by the terms of the insurance policies.' When there is any question about an insurer's duty to defend under an insurance policy, such question 'must be construed liberally in favor of an insured.' ").

[58]*See State Bancorp*, 199 W. Va. at 108, cited in Mylan's Opening Brief at 7 n.34, and Mylan's Petition for Appeal at 10 n.32 and 16 n.52. *State Bancorp* is consistent with *J. Lamb, Inc.*, 100 Cal. App. 4th at 1032 ("Unlike coverage for bodily injury and property damage, which is 'occurrence' based, there is no requirement for personal injury coverage that there be an 'accidental' occurrence. All that is required is that the injury arise out of the conduct of the insured's business. Thus, even an intentional tort . . . may be covered. The triggering event is the insured's *wrongful act*, not the resulting injury to the third party claimant."). Appellees ignored *State Bancorp* and *Lamb* despite numerous citations in Mylan's Opening Brief. See Mylan Opening Appellate Br. at 3, 7, 8, 12, 29, 44, 45, 47.

[59]*See Employers Ins. of Wausau v. Ehlco Liquidating Trust,* 708 N.E.2d 1122, 1130 (Ill. 1999) ("Where competing reasonable interpretations of a policy exist, the court is not permitted to choose which interpretation it will follow. Rather, in such circumstances, the court must construe the policy in favor of the insured and against the insurer that drafted the policy.").

Knoll Pharmaceuticals' approach can readily be preferred.[60]

C. Injury Arising from AWP Advertisements Is Alleged, Creating Potential Liability under Wausau's "Advertising Injury" Offenses

1. Suits Allege Injury Arising from Advertising

Both the L&C and AWP actions allege injury caused by Mylan's advertising statements. The L&C complaints allege that Mylan made false and misleading statements, those statements constituted "an unfair method of competition," and the plaintiffs were injured thereby. (Mylan allegedly advertised by **sending "information . . . to** numerous market participants including pharmacists, group purchasing organizations, Mylan's customers and **the general public** . . . provid[ing] **false and misleading information . . . to justify and sustain their price increase** . . . proximately **caus[ing] harm to plaintiffs**.")[61] Similarly, the AWP actions allege that Mylan's advertising idea of **"promot[ing] its drugs by marketing the spread"**[62] violated N.Y.

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[60]West Virginia recognizes that adopting a limited definition for a term such as "publication" or "arising out of" is improper and contrary to *BASF*'s analytic approach. *Bowyer v. Hi-Lad, Inc.*, 216 W. Va. 634, 652, 609 S.E.2d 895, 613 (2004). *Bowyer*'s adoption of the "broad meaning" of advertising material was adopted by the Illinois Supreme Court in *Swiderski* and the Massachusetts Supreme Court in *Terra Nova Ins. Co. v. Fray-Witzer*, 449 Mass. 406, 417-18, 869 N.E.2d 565, 574 (2007). Both cited *Bowyer*.

[61]The L&C actions allege that Mylan "engaged in a scheme to mislead market participants . . . . Mylan wrote to customers such as Group Purchasing Organizations claiming a severe shortage of raw material supplies, including, but not limited to Lorazepam. . . . This information was sent to numerous market participants including pharmacists, group purchasing organizations, Mylan's customers and the general public. . . . Even after the price increase Mylan provided false and misleading information to various market participants in a further attempt to justify and sustain their price increase. Mylan provided different explanations to different market participants . . . . Mylan's deceptive and misleading practices as outlined above . . . proximately caused harm to plaintiffs . . . . Defendants' monopolization of the Lorazepam Markets constitutes an unfair method of competition . . . . " (*Blue Cross* Action ¶¶ 104-110, 236-248.)

[62]The AWP actions allege that "[a]t all times relevant hereto, Mylan Group has known that it can promote its drugs by marketing the spread and selling its products at substantial discounts off WAC, while at the same time maintaining a false and inflated AWP. The Mylan Group has so marketed its products . . . . A[n] . . . example of Mylan's spread-marketing was highlighted in recently filed complaints. . . . [I]n 2000, the Mylan drug Atenolol . . . had an AWP of $74.00 yet was available for $1.60, representing a [significant] spread . . . ." (*MDL* Action ¶¶ 611, 618.)

Gen. Bus. Law § 349 et seq. (Unfair Trade Practices),[63] **and the plaintiffs were harmed** as a result.[64]

Mylan's advertisements justified its price increases and therefore fall within the "misappropriation" or "use of another's advertising idea" offenses. Injury need only "arise out of" an offense to trigger a defense duty. The AWP and L&C actions assert several *distinct* bases for liability; *one basis* in both the AWP and L&C cases was false advertising.

"Arising out of" is a broadly defined phrase in West Virginia and virtually every state. *See St. Paul Fire & Marine Ins. Co. v. Insurance Co. of N. Am.*, 501 F. Supp. 136, 138 (W.D. Va. 1980) (" '[T]he phrase "arising out of" is not ambiguous; it has a well-defined meaning which is broad enough to include the incident which gave rise to the insureds' liability.' 'Arising out of' are words of much broader significance than 'caused by.' They are ordinarily understood to mean 'originating from,' 'having its origin in,' 'growing out of,' or 'flowing from,' or in short, 'incident to or having connection with' ...."). The phrase does not require evidence of proximate causation. The breadth of this phrase is combined with the fact that the pertinent offenses here of "discrimination" or "use of another's advertising idea in your 'advertisement' " or "misappropriation of advertising ideas or style of doing business" is triggered by "the insured's *wrongful act*, not the resulting injury to the third party claimant."[65] Federal, for example improperly focuses on the ultimate injury to the user, which need only arise out of the discrimination but need not be caused by it. Ignoring its policy language and applicable law construing the policy terms, Federal's arguments fail.

2. Appellees' Cases Are Inapposite

Neither *BASF* nor *Great Am. Ins. Co. v. Riso, Inc.*, 479 F.3d 158, 162 (1st Cir. (Mass.)

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[63]Count VI of the *MDL* complaint alleges: "Defendants' conduct . . . constitutes deceptive acts or practices in that: . . . Defendants . . . have lied about the true wholesale pricing information and true Best Prices for their medications . . . ." (*MDL* Action ¶ 894.)

[64]Count VI of the *MDL* complaint alleges: "The wrongful conduct alleged in this Complaint [which includes marketing the spread] occurs and continues to occur in the ordinary course of defendants' business and has caused great harm to the Counties and the consumers who lived there."

[65]*J. Lamb, Inc.*, 100 Cal. App. 4th at 1032.

2007) requires a contrary result. Both cases address underlying fact allegations of disparagement which were potentially covered. However, there the suits were not brought by the parties who alleged injury because of disparaging statements. So the Seventh Circuit held that no potential Illinois common law disparagement claim could be found. No disparaging statement about the plaintiff was alleged.[66] There is no analogy between the claims of misuse of advertising ideas and styles of doing business here and the claims of disparagement in Appellees' cases, even assuming those decisions represent precedent worthy of emulation by West Virginia courts.

Unlike in *BASF*, the suits were brought by parties claiming injury from Mylan's advertising conduct (patients and payors). The allegations here do not assert some hypothetical, but instead allege facts that both the Circuit Court and the Appellees ignore. Here, the facts could create distinct liability satisfying even the requirements of *BASF*. This is in stark contrast to the cases upon which the Appellees rely where a potential exposure was limited to torts like defamation, disparagement and malicious prosecution. The AWP cases allege injury to co-paying consumers (for whose benefit the *parens patriae* claims were brought) and the third-party payors, injury caused by the misuse of the advertising idea of "marketing the spread" that allegedly caused significantly more to be paid for drugs. The parties harmed by this advertising are the plaintiffs. The L&C cases similarly allege injury to consumers (or persons denied drugs) and payors, allegedly caused by Mylan's false advertising to justify the high prices or shortages of drugs. Again, the parties harmed by the advertising are the plaintiffs.

Failing to focus on the aspect of Mylan's conduct that created potential coverage, the Appellees also miss the mark in seeking to distinguish the cases on which Mylan relies. The Appellees improperly focus on the ultimate "injury." But injury only needs to "arise out of" an offense – rather than the allegations (that Mylan engaged in false advertising) that, in turn, triggered potential liability for the "misappropriation" offenses.[67] *State Bancorp, Inc. v. United*

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[66] *BASF*, 522 F.3d at 820 ("We believe that the facts in the Synthroid complaints are simply insufficient to sketch a claim for the common-law offenses of libel, slander, or disparagement, which in Illinois all require that a false statement be made *about the plaintiff*." (emphasis in original)).

[67] *J. Lamb, Inc.*, 100 Cal. App. 4th at 1032.

States Fid. & Guar. Ins. Co., 199 W. Va. 99, 108, 483 S.E.2d 228, 237 (1997) ("Coverage . . . is triggered by the offense, not the injury or damage which a plaintiff suffers."). The allegations trigger the offense out of which injury may arise.

The L&C cases are analogous to those the Appellees seek to distinguish, since in L&C, but for Mylan's protestations of "fair pricing" in accord with the regulatory scheme that determined Medicaid/Medicare reimbursements, patients might have been able to have these drugs at lower prices.

Similarly, in the AWP actions, but for Mylan's alleged misstatements in advertising to those prescribing and dispensing drugs to patients, patients would not have suffered injury by paying higher co-payments when seeking reimbursement from the third party payors *parens patriae* plaintiffs. Mylan is like the insureds who sought a marketing advantage by advertising their rights to sell a breed of cow (*American Simmental*)[68] or Indian-made goods (*Native American Arts; Flodine*)),[69] claiming a product was "pure olive oil" (*Atlapac*),[70] or that an animal- and drug-feed-additive known as Bacitracin MD ("BMD") was FDA-approved for use (*Pennfield*).[71]

This Court need not reach the *BASF* issue since indisputably there are allegations of injury caused by the false advertising statements propounded in both the L&C and AWP actions according to the claimants' allegations. The AWP plaintiffs alleged money damages arising out of Mylan's advertising or "marketing the spread." The third party payors alleged they paid more in reimbursements or co-payments to medical providers who purchased from Mylan than they would have if Mylan and other drug industry defendants had not advertised to the providers that there was so much profitability in prescribing Mylan's products. "Plaintiffs quote dozens of documents from defendants demonstrating an aggressive marketing of the spread . . . ." *In re*

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[68]*American Simmental*, 282 F.3d 582.

[69]*Flodine*, 2001 WL 204786; *Native American Arts*, 435 F.3d 729.

[70]*Atlapac*, 1997 WL 1941512.

[71]*Pennfield Oil Co.*, 2007 WL 1290138.

Pharmaceutical Industry AWP Litigation, 230 F.R.D. 61, 75 (D. Mass. 2005). Mylan's advertising thus allegedly took advantage of the substantial spread between its actual prices and Average Wholesale Prices that drug companies allegedly incorrectly reported.

The L&C plaintiffs alleged injury or physical harm to consumers (bodily injury) for whose benefit the plaintiffs brought their suits as *parents patriae,* and discriminatory pricing that caused harm to medical consumers. Additionally, L&C payors reimbursing drug costs suffered money damages from allegedly higher prices Mylan charged arising out of misusing advertising ideas or style of doing business.

VI. "PERSONAL INJURY" COVERAGE FOR "DISCRIMINATION" IS IMPLICATED IN BOTH THE L&C AND AWP ACTIONS

A. Federal Must Prove "Discrimination" Cannot Include "Disparate Treatment"

1. Federal Merely Suggests One "Discrimination" Definition

Federal's policy provides in relevant part:

> **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 . . . because of . . . personal injury . . . covered by this insurance . . . .
>
> **Personal injury** means injury . . . arising out of one or more of the following offenses committed in the course of your business . . . .
>
> 6. **Discrimination** (unless insurance there is prohibited by law) . . . . [Emphasis added.]

Citing *Farmers Mutual Ins. Co. v. Tucker*, 213 W. Va. 16, 31, 576 S.E.2d 261, 276 (2002), Federal concedes: "[A]n insurance policy is 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." (Emphasis added.) (Federal Br. 29.)

The ambiguity of a policy term like "discrimination" is particularly implicated where, as here, the "reasonable minds" differing about it are judicial minds.[72] Because the *Stroh*[73] and

[72]*Murray*, 203 W. Va. at 485 n.5 ("A provision in an insurance policy may be deemed to be ambiguous if courts in other jurisdictions have interpreted the provision in different ways. This rule is based on the understanding that 'one cannot expect a mere layman to understand the meaning of a clause respecting the meaning of which fine judicial minds are at variance.' ").

USX[74] courts have disagreed about the meaning of "discrimination," this Court may and should find that this disagreement alone evidences the ambiguous character of "discrimination" and, on that basis, interpret "discrimination" in favor of the potential for coverage.[75]

To avoid this finding of ambiguity, Federal's burden is to prove that its preferred limited meaning of "discrimination" is the **only** reasonable one – not (as it asserts) that it is the most reasonable meaning.[76] But Federal did not meet its burden. It has failed to prove that "disparate treatment" or "price discrimination" are not reasonable meanings.[77]

2. *Stroh* is the Most Analogous Authority to West Virginia Law

a. Federal's Policy Language Is Substantively Similar

Stroh found that **Federal** had a duty to defend because its undefined policy offense of "discrimination" included "differential treatment," including "price discrimination."[78]

> "Price discrimination" . . . describes a form of the more general term, "discrimination." **Discrimination "simply means differential treatment."** *Indiana Wholesale Wine & Liquor Co., Inc. v. State ex rel. Indiana Alcoholic Beverage Comm'n,* 662 N.E.2d 950, 960 (Ind.Ct.App.1996). Whether that differential treatment takes the form of not receiving a promotion to which one is entitled or of being required to pay a higher price for beer does not make it any the less "discrimination." *See, e.g., Oregon Waste Systems, Inc. v. Department of Envtl. Quality,* 511 U.S. 93, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994) ("discrimination simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."); *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 27 S.Ct. 350, 51 L.Ed. 553, seriatim, 447-48 (1907) (discussing price differentials in rail fares as discrimination and referring to law making it "a misdemeanor to offer, grant, give, solicit, accept, or receive any rebate from published rates or other concession or discrimination."); *Richmond, Fredericksburg & Potomac R.R. Co. v. Department of Taxation,* 762 F.2d 375, 380 n. 4 (4th Cir.1985) ("In essence, discrimination is a 'failure to treat all persons equally where no reasonable distinction can be found between those

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[73]*Federal Ins. Co. v. Stroh Brewing Co.*, 127 F.3d 563 (7th Cir. (Ind.) 1997).

[74]*USX Corp. v. Adriatic Ins. Co.*, 99 F. Supp. 2d 593 (3d Cir. (Pa.) 2003).

[75]*MacKinnon v. Truck Ins. Exch.*, 31 Cal. 4th 635, 655, 73 P.3d 1205, 1218 (2003) ("[E]ven assuming the insurer's suggestions are reasonable interpretations are reasonable interpretations which would bar recovery by the claimants, we must nevertheless affirm the trial court's finding of coverage so long as there is any other reasonable interpretation under which recovery would be permitted in the instant cases.")

[76]*Id.* ("[E]ven if [the insurer's] interpretation is considered reasonable, it would still . . . have to establish that its interpretation is the **only** reasonable one." (emphasis added)).

[77]Federal Appellate Br. 29.

[78]*Stroh*, 127 F.3d at 567-68.

> favored and those not favored.' "); *Hocking Valley Ry. Co. v. United States,* 210 F. 735, 738 (6th Cir.1914) (describing "discrimination" as the giving of an advantage). **As these cases show, courts frequently define discrimination as differential treatment.** [Emphasis added.]

That is the interpretation Mylan now urges for the same offense in the substantively identical policy that **Federal** sold to Mylan.

b. Federal's Later-Changed Policy Language Implies the Broader Policy Meaning of "Discrimination" that Mylan Asserts for Federal's Previously Issued Policy

Federal spuriously suggests that its latter policy's limiting language was implicit in its former policy. Admitting that after *Stroh* was decided it revised its policy form to re-define "discrimination" in a way that expressly limits the term to "human characteristics" offenses, Federal insists this revision somehow proves it previously intended to limit "discrimination" coverage in its earlier policy issued to Mylan.[79] But this is illogical. If Federal had originally restricted the covered "discrimination" offense to "human characteristics" "discrimination," then Federal would not have needed to amend its standard policy language. Federal's admission first emphasizes the ambiguity of "discrimination" in its policy[80] and also that there is a potential for coverage under *Murray* and *MacKinnon.*

c. Federal's Argument for a Limited Definition of "Discrimination" Disregards West Virginia Law

Federal argues for changing policy language in order to limit its discrimination coverage. *Bowyer*, 216 W. Va. at 651, confirmed:

> "[i]t is well settled law in West Virginia that **ambiguous terms in insurance contracts are to be strictly construed against the insurance company and in favor of the insured. . . .**
>
> . . . "[a]ny question concerning an insurer's duty to defend under an insurance policy must be construed liberally in favor of an insured where there is any question about an insurer's obligations." [Emphasis added.]

Federal tries to distinguish *Bowyer* on the sole ground that it construed the policy offense of "publication," not "discrimination."[81] But this raises a distinction without a difference. In

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[79]Federal Appellate Br. 23.

[80]*American Cas. Co. of Reading, Pa. v. Continisio*, 819 F. Supp. 385, 398 (D.N.J. 1993) ("Evidence of subsequent change in contract language is relevant to whether the language at issue is ambiguous.")

[81]Federal Appellate Br. 21 n.10.

Bowyer, this Court construed "publication" against Federal pursuant to the same "well-settled" policy interpretation principles that require interpreting "discrimination" in Mylan's favor.

West Virginia law, in the *Bowyer* decision, joins the *Swiderski* court in not permitting words of limitation to substitute for actual policy language under the guise of interpretation. *Swiderski* revisited *Capital Associates*,[82] a case in which Judge Easterbrook failed to follow the proper analytical approach. This Court should follow the more enlightened views of *Swiderski* as articulated in *Bowyer* and reach an appropriately broad conclusion as to the coverage law's meaning and should not be guided by the narrow rhetoric of the *BASF* decision that is readily distinguishable in any event.[83]

3. *Stroh* Applies Here, Not *USX*

a. Mylan's Policy is Remarkably Similar to the Policy in *Stroh*

Citing *USX*, Federal claims that the "differential treatment" definition for "discrimination" adopted by *Stroh* and urged here by Mylan is unavailable because discrimination is limited to "human characteristics" offenses that only an individual, not an entity, could commit. Federal claims the doctrine of *noscitur a sociis* requires this limited reading of "discrimination" in accordance with the logic of *USX*. [84] Federal is wrong because the *USX* policy was structurally and substantively unlike the policy it issued to Mylan, whereas Mylan's policy was remarkably similar to that analyzed in *Stroh*. The *USX* policy section listing covered "personal injury" offenses buried the term "discrimination" within a one-sentence laundry-list definition of seventeen offenses.[85] The *USX* court broadly described each of the

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[82]*American States Ins. Co. v. Capital Associates of Jackson County, Inc.*, 392 F.3d 939 (7th Cir. (Ill.) 2004).

[83]*BASF* held that the underlying class action (under the Illinois Consumer Fraud Act) did not create potential coverage for "disparagement of another's goods or services" because the CFA "does not directly advance the interest **another business** has in preserving the reputation of its products that a disparagement action protects." *BASF*, 522 F.3d at 821 (emphasis added). The *BASF* panel ignored the fact that the underlying class action complaint specifically alleged violation of Section 815 ILCS 510/2(a)(8) of the Illinois Deceptive Trade Practices Act (a statute related to the CFA), providing that "[a] person engages in a deceptive trade practice" when the person "disparages the goods, services, or business **of another** by false or misleading representation of fact." (Emphasis added.)

[84]Federal Appellate Br. 26.

[85]*USX*, 99 F. Supp. 2d at 603. Of the 17 offenses within the "personal injury" definition of the policy in

offenses there at issue as "offenses which injure the character or reputation of an individual."[86] **Federal, having conceded this point, fails to factor it into its contractual analysis or discussion of *USX*.** However, a corporation like Mylan can potentially be held liable for **all** of the offenses listed in the "personal injury" coverage part of the policy.[87]

But the policy Federal sold Mylan differs from the *USX* policy. Its stated "personal injury" offenses[88] are more like those in the policy at issue in *Stroh*.[89] There, the offenses were "broken out" into sub-categories of offenses, as in Mylan's policy, instead of the lengthy single-line recitation of numerous offenses that bolstered *USX*'s *noscitur a sociis* analysis. Instead, "discrimination" in the Mylan policy is qualified only by the phrase "unless insurance thereof is prohibited by law." But this phrase is not specifically or uniquely applicable to individuals and does not avoid coverage for economic discrimination.

In *Stroh*, the proximity of "discrimination" and "humiliation" was properly held insufficient to eliminate "price discrimination" as a reasonable meaning for "discrimination" in the policy. In the Mylan policy, neither "humiliation" nor any other type of personal injury offense appears in proximity to "discrimination." The absence of any such term potentially qualifying "discrimination's" meaning eliminates any potential interpretation based on *noscitur a sociis* that "discrimination" in the Mylan policy is limited to "human characteristic" offenses.

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dispute in *USX*, only 5 could be committed by an insured against an entity third party.

[86]*Id.* at 624.

[87]*Morton v. Chesapeake & Ohio Ry. Co.*, 184 W. Va. 64, 68, 399 S.E.2d 464 (1990).

[88]The Federal policy issued to Mylan defines covered "personal injury" offenses as: "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)." Each of these numbered sub-sections appears in the policy on a separate line. Federal Appellate Br. 18.

[89]*Stroh*, 127 F.3d at 572 (J. Flaum dissenting) (defining "personal injury" in relevant part as "a. false arrest, false imprisonment, wrongful eviction, wrongful entry, wrongful detention or malicious prosecution; b. libel, slander, defamation of character, or invasion of the rights of privacy, unless arising out of advertising activities; c. discrimination or humiliation . . . .").

Federal makes a critical admission that eliminates its argument based on *USX*. **"Federal does not . . . argue that the 'personal injury' offenses are limited solely to claims by natural persons."**[90] This admission alone makes the *USX* case inapposite here. Not surprisingly, Federal does not discuss the consequences of its admission, to wit: its "discrimination" offense is applicable to non-personal discrimination including economic discrimination against both individuals and juridical entities.

Federal could have excluded price discrimination or limited the meaning of "discrimination" by adding language of exclusion or precisely defining the term.[91] It did not.

b. Federal's Policy Was Not Jointly Drafted

Federal argues that there is no evidence that Mylan did not participate in the policy's drafting.[92] But it is Federal's burden to prove that its policy was jointly drafted so as to avoid judicial construction of the policy against the insurer. The record is devoid of any such evidence.

B. Federal Cannot Explain Away the Fact that the AWP Pricing Complaints Expressly Allege Discrimination Premised on Disparate Treatment

The AWP actions address Mylan's promotion to medical clinics of the discount off the AWP pricing and of its "marketing the spread" between the acquisition costs for the AWP, and the cost of the drugs to physicians. Mylan therefore allegedly treats "different purchasers differently" and "for the same drug, the pharmacies are given [by Mylan] one price, hospitals another, and doctors yet another,"[93] as the district court adjudicating the AWP dispute found[94] and other claimants alleged.[95] Federal avoids evident coverage potential by focusing on labels of

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[90]Federal Appellate Br. 20 n.9.

[91]*Payne v. Weston*, 195 W. Va. 502, 507, 466 S.E.2d 161, 166 (1995) ("**We will not rewrite the terms of the policy**; instead, we enforce it as written." (emphasis added)).

[92]Federal Appellate Brief, p. 25.

[93]*Illinois* Action ¶ 62.

[94]*In re Pharmaceutical Industry Average Wholesale Price Litigation*, 491 F. Supp. 2d 20, 35 (D. Mass. 2007) ("Some of the ultimate physician or hospital purchasers . . . may be preferred providers . . . . The preferred provider receives . . . a lower price . . . .").

[95]*Thompson* Action ¶ 72:

> **Physicians are generally able to obtain drugs at prices much below the Medicare reimbursement level** because wholesalers and GPOs make the drugs available to physicians at considerably lower prices than the AWPs used to establish the Medicare payment.

causes of action rather than facts, in direct contravention of West Virginia law. Indeed, **Federal's analytic approach contravenes settled rules of law articulated by judges of national repute, who regularly write opinions focusing on insurance issues.**[96]

Federal's failure to follow these rules and settled rules of West Virginia jurisprudence for insurance coverage[97] is curious because it has urged precisely the opposite position when its own economic concerns were at stake.[98]

C. Differential Pricing for L&C Was Allegedly Discriminatory as Mylan Allegedly Chose Those Drugs Because They Are Used to Treat Patients with Chronic Medical Conditions, Thus Requiring Long-Term Use, as Opposed to Drugs Used to Treat Acute, Short-Term Conditions

The wrongful acts fall within the offense. Discrimination was asserted, a form of disparate treatment that involves economic discrimination. Injury arising out of that wrongful conduct triggered a defense duty. This follows as "the triggering event is the insured's wrongful act, not the resulting injury to the third party claimant." The injury of the ultimate consumer need only be a result, not the sole result of allegedly wrong conduct – here, discriminatory conduct. The motivation of the alleged discriminatory activity is immaterial.

The L&C actions alleged discrimination in the form of disparate treatment by allegedly focusing on two drugs, Lorazepam and Clorazepate, out of the array of possible drugs, leading to alleged injury of their users.[99] "Disparate treatment" is a form of "discrimination" and does not

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[96]*Curtis-Universal*, 43 F.3d at 1122 **(Posner)** ("What is important is . . . whether that conduct as alleged in the complaint is at least arguably within one or more under the categories of wrongdoing that the policy covers."); *J. Lamb, Inc.*, 100 Cal. App. 4th at 1034 **(Croskey)** ("The scope of the duty does not depend on the labels given to the causes of action of third party complaint; instead it rests on whether the *alleged facts or known extrinsic facts* reveal a *possibility* that the claim may be covered by the policy.").

[97]*Hensley v. Erie Ins. Co.*, 168 W. Va. 172, 176, 283 S.E.2d 227, 229 (1981) ("An insurance policy which requires construction must be construed liberally in favor of the insured."); *Tackett*, 213 W. Va. at 533 ("[I]nsurance coverage for personal injuries is a rather broad concept.").

[98]*Federal Ins. Co. v. Golden Eagle Ins. Co.*, No. 05cv1853-L(LSP), 2007 WL 1851677, at *5 (S.D. Cal. June 26, 2007) (As Federal argued therein: "Under the personal injury policy provision, coverage is triggered by the offense, not the nature of injury or damage which a plaintiff suffers. . . . The triggering event is the insured's *wrongful act,* not the resulting injury to the third party claimant.").

[99]"18. Lorazepam and Clorazepate are two of the approximately 91 generic drugs that Mylan currently manufactures and sells in tablet form. . . . Because Lorazepam is **used to treat chronic conditions** and is heavily prescribed for nursing home and hospice patients, Lorazepam users tend to **stay on the drug for long periods of time**. Clorazepate is used to treat anxiety and in adjunct therapy for nicotine and opiate

require a specific finding of price discrimination as an asserted basis for liability. Contrary to Federal's assumption, recovery against Mylan is not predicated on proof that it acted "because of some discriminatory animus against consumers with chronic medical conditions typically treated by those drugs."[100] Indeed, Mylan need not intend harm to the ultimate users of its products.

Federal seeks to mischaracterize this dispute by only focusing on what it claims are solely intentional conduct and intentional injury discrimination claims that it subsequently urges are not covered in light of public policy concerns. Federal thus sets up a "straw man" argument, which it then attacks. No exclusion references "intentional conduct." Further, Federal admits that Mylan's conduct was not intended to harm.[101] The selection process for the drugs Lorazepam and Clorazepate was based on economic considerations and Mylan's ability to assure their supply. This choice allegedly led to disparate treatment vis-à-vis the population of drugs to be selected and the users of those drugs, i.e., those on long-term care were those affected as opposed to those on short-term care. This conduct, which was the focus of the claims for liability in the L&C actions, meets the elements of the offense, i.e., "discrimination."

Federal fails to recognize that so long as injury "arises out of" the discriminatory conduct its policy language is satisfied. The plaintiffs are the *parens patriae* of individual patients, asserting monetary injury arising from the selection of these two drugs as the targeted pharmaceuticals for Mylan's assured supply program.

D. Public Policy Is Not Implicated by Disparate Treatment

Federal's public policy argument addresses employment discrimination claims for "disparate treatment" under Title VII of the Civil Rights Act of 1964 (and similar state statutes) based on race, color, religion, sex, or national origin.[102] But the AWP and L&C actions allege

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withdrawal."

[100]Federal Appellate Br. 34.

[101]Federal Appellate Br. 34 ("In early 1997, Mylan prepared 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.").

[102]Federal cites the following cases, all alleging intentional employment/housing discrimination based on

economic discrimination only. Public policy is not implicated because there are *no* allegations that Mylan discriminated based on any protected classifications and there is no public policy against insurance defense for allegations of economic discrimination. Nor are there any allegations that Mylan acted "for the purpose of inflicting injury and harm."[103]

The cases Federal cites discuss "disparate treatment" as implicating public policy only to the extent "disparate treatment" encompasses discrimination claims involving tortious conduct toward persons within a protected classification such as race, gender, or religion.[104] Federal's

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protected classifications (such as race, religion, gender) as support for its "public policy" argument:

Coleman v. School Bd. of Richland Parish, 418 F.3d 511, 514 (5th Cir. (La.) 2005) ("Coleman filed suit against the School Board alleging that she had been discriminated against and terminated on account of her race. She brought claims under Title VII of the Civil Rights Act, 42 U.S.C. §§ 1981 and 1983, and pleaded state law causes of action for breach of contract and abuse of rights.");

Solo Cup Co. v. Federal Ins. Co., 619 F.2d 1178, 1182 (7th Cir. (Ill.) 1980) ("Disparate treatment" claim brought by Equal Employment Opportunity Commission under Title VII litigation based on allegation by employee that "Solo's failure to promote her was sexually discriminatory.");

Ranger Ins. Co. v. Bal Harbour Club, Inc., 549 So. 2d 1005, 1008-09 (Fla. 1989) ("Florida has a long-standing policy of opposing religious discrimination. Pursuant to [the State constitution that bars religious discrimination] the legislature has passed numerous laws banning religious discrimination in various places. . . . Based on the foregoing, we hold that the public policy of Florida prohibits an insured being indemnified for a loss resulting from an intentional act of religious discrimination.);

Groshong v. Mutual of Enumclaw Ins. Co., 923 P.2d 1280, 1284-85 (Or. Ct. App. 1996) (Public policy precluded coverage for prospective tenant's housing discrimination claim where landlords' policy of not renting upstairs apartments to people with small children constituted "disparate treatment" discrimination.);

Save Mart Supermarkets v. Underwriters at Lloyd's of London, 843 F. Supp. 597, 606 (N.D. Cal. 1994) (Public policy not discussed. Court held that coverage for claim alleging "disparate impact" sex discrimination under Civil Rights Act of 1964 and the California Fair Employment and Housing Act are ***not*** barred by Cal. Ins. Code § 533.);

Rosenberg Diamond Dev. Corp. v. Wausau Ins. Co., 326 F. Supp. 2d 472, 473 (S.D.N.Y. 2004) ("The [underlying] suit alleged that Rosenberg [was] systematically engaging in racial discrimination in violation of Title VIII of the Civil Rights Act of 1968.").

[103]*Groshong*, 923 P.2d at 457 ("It is not sufficient that the insured's intentional, albeit unlawful, acts have resulted in unintended harm; the acts must have been **committed for the purpose of inflicting injury and harm** before . . . the public policy against insurability applies." (emphasis added)); *see also State v. Phoenix Mut. Life Ins. Co.,* 114 W. Va. 109, 109, 170 S.E. 909, 911 (1933) (Beneficiary of a life insurance policy murdered the insured); *Horace Mann Ins. Co. v. Leeber,* 180 W. Va. 375, 381, 376 S.E.2d 581 (1988) (The intentionally harmful tort of child molestation); *South Carolina Farm Bureau Mutual Ins. Co. v. Mumford,* 299 S.C. 14, 15-16, 382 S.E.2d 11, 12 (S.C. Ct. App. 1989) (The intentionally harmful act of vehicular suicide); *Pacheco v. Safeco Ins. Co.,* 116 Idaho 794, 801, 780 P.2d 116, 123 (1989) (No recovery of insurance proceeds when the insured committed arson); *Bayudan v. Tradewind Ins. Co.,* 957 P.2d 1061, 1069 (Haw. Ct. App. 1998) (intentional kidnapping and rape).

[104]*See, e.g., Solo Cup Co.,* 619 F.2d at 1185 ("A Title VII plaintiff may establish a violation under either

opposition ignores this critical distinction and simply concludes that the public policy bar applies without citing any factual support.[105]

Federal also ignores the fact that Mylan's construction of "discrimination" is not rooted in the narrow context of claims that implicate public policy concerns. The notion that discrimination encompasses "economic discrimination" is in accord with case law interpreting "discrimination" in a CGL policy,[106] common usage, and plain English definitions of the term. The Seventh Edition of Black's Law Dictionary defined "discrimination" as "[d]ifferential treatment; esp., a failure to treat all persons equally when no reasonable distinction can be found between those favored and those not . . . ." *Id.* at 479. The disparate or differential treatment aspects of the instant case, which implicate coverage for "economic discrimination," do not run afoul of public policy which only applies to specific forms of discrimination in specific contexts, as set forth above.

VII. "BODILY INJURY" COVERAGE IS IMPLICATED BY THE EXPRESS ALLEGATIONS OF THE L&C ACTIONS

A. The L&C Complaints Expressly Allege "Bodily Injury" Caused By Unintentional Consequences of Mylan's Actions

Wausau's policy provides coverage for "bodily injury" that is "caused by an occurrence," or an unintentional accident. (Wausau Appellate Br. 38.) The L&C complaints expressly allege "bodily injury" as an unintentional consequence of Mylan's price increases. There is no allegation that Mylan intended to inflict bodily injury. Individuals allegedly suffered damage to their health because of continuous exposure to a harmful condition, i.e., lack of medications.

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the 'disparate treatment' or the 'disparate impact' theory. . . . ' "Disparate treatment" ... is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin.' ").

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

[106] *Stroh*, 127 F.3d at 567 ("Discrimination 'simply means differential treatment.' Whether that differential treatment takes the form of not receiving a promotion to which one is entitled or of being required to pay a higher price for beer does not make it any the less 'discrimination.' *See, e.g., Oregon Waste Systems, Inc. v. Department of Envtl. Quality,* 511 U.S. 93, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994) . . . ." (citation omitted)).

And so, the alleged bodily injury was caused by an "occurrence" as defined under Wausau's policy. Mylan increased its prices for Lorazepam and Clorazepate; due to these price increases, some individual consumers of these pharmaceuticals were allegedly unable to pay for them.[107] The L&C actions allege that because these individuals had to reduce their medications or forego the medications altogether, they suffered damage to their health.[108]

With explicit statements like "injuring their health," the L&C allegations clearly set forth potential claims for "bodily injury." But Wausau argues that Mylan's demonstration of "potential 'bodily injury' . . . does not satisfy its burden to prove . . . the duty to defend is triggered." (Wausau Appellate Br. 40.) Wausau's contention misunderstands duty to defend principles. West Virginia, like many other jurisdictions, evaluates an insurer's duty to defend based on a potentiality standard – the allegations need only show a potential for covered claims.[109]

Wausau argues that Mylan has "admitted that it has never claimed that the L&C plaintiffs stated a cause of action for 'bodily injury.' " (Wausau Appellate Br. 40.) But express causes of action are irrelevant; potentiality is all that is required given the breadth of an insurer's duty to defend.[110] And so, it does not matter whether the L&C complaints labeled a cause of action as one for "bodily injury."

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[107]*States* Action ¶ 39 (Ondos Aff. Exhibit "14"); *FTC* Action ¶ 31 (Ondos Aff. Exhibit "13") ("As a result of these substantial and unprecedented agreements and price increases for Lorazepam and Clorazepate tablets, many purchasers, including . . . patients, consumers and others, have paid substantially higher prices. Moreover, some patients may have stopped taking Lorazepam and Clorazepate tablets altogether, or been forced to reduce the quantity they take, because they cannot afford them.").

[108]*States* Action ¶¶ 44, 48 (Ondos Aff. Exhibit "14"); *FTC* Action ¶ 35(c) (Ondos Aff. Exhibit "13") ("The acts and practices of the Defendants as herein alleged have had the purpose or effect, or the tendency or capacity, to restrain competition unreasonably and to injure competition within each State and throughout the United States in the following ways, among others: . . . Depriving consumers of access to needed pharmaceuticals and thereby injuring their health.").

[109]*Tackett*, 213 W. Va. at 533 (holding that because the "allegations **potentially** state a covered claim" under the policy, the insurer has a duty to defend).

[110]*Butts*, 202 W. Va. at 453 ("An insurer's obligation to defend is 'broader than the obligation to provide coverage' and this obligation is not dependent on the precise use of terms within the complaint that would unequivocally delineate a claim which, if proved, would be within the insurance coverage.").

B. The "Intended or Expected" Exclusion Does Not Bar a Defense

1. The Circuit Court Applied an Improper Test

The L&C complaints allege "bodily injury" caused by the **unintentional** consequences of Mylan's actions. Although Mylan intended to increase profits, there is no allegation that it intended to cause any "bodily injury." Mylan, however, never intended or expected such consequences. Wausau's policy excludes coverage for bodily injury "expected or intended from the standpoint of an insured." (Wausau Appellate Br. 43.) Wausau has contended throughout the litigation that "[f]or the same reasons there is no 'occurrence' alleged in the L&C Actions, the Expected/Intended Exclusion applies" because "Mylan knowingly and intentionally entered into exclusive agreements with API suppliers in order to gain complete control over the API market" and the L&C actions "allege intentional and knowing anticompetitive conduct." (Wausau Appellate Br. 44.) It led the Circuit Court to err in finding that coverage should be precluded since "Mylan's increasing of the prices of its drugs was an intentional act." (Circuit Court Order 35.)

But even if an insured engages in an allegedly "intentional act," further inquiry is necessary. The proper test in West Virginia is two-fold: "under an intentional acts exclusion, 'a policyholder may be denied coverage only if the policyholder (1) committed an intentional act *and* (2) expected or intended the specific resulting damage' . . . . Both an intentional act and an intended or expected consequence must be present before the exclusion operates to void coverage."[111] So, the "mere act of doing an intentional act by the insured does not relieve the insurer where the resultant injuries were unintended."[112]

Indeed, as the California Supreme Court recently clarified:

> "The plain meaning of 'expected' does not include 'should have known.' Rather, the word comprehends actual belief in the probability of a future event"]). . . .

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[111] *Cook*, 210 W. Va. at 400, quoting *State ex rel. Davidson v. Hoke*, 207 W. Va. 332, 339, 532 S.E.2d 50, 57 (2000).

[112] *Tackett*, 213 W. Va. at 535.

. . . .

. . . Evidence the State *should* have known flooding was likely, and *should* have taken additional measures against it, is insufficient to prove, as an undisputed fact, that a waste discharge due to flooding was expected and therefore nonaccidental. (*Shell Oil Co.*, *supra*, 12 Cal.App.4th at p. 746, 15 Cal.Rptr.2d 815.)[113]

Under this test, the injuries suffered by some claimants who were deprived of the L&C medications were neither "expected nor intended."

2. Intentionality of Resulting Injury Must Be Subjectively Evaluated

Wausau's express policy language requires that intentionality be evaluated from the "standpoint of the insured." (Wausau Appellate Br. 43.) Under the policy language Wausau drafted, the insured must have subjectively intended to inflict bodily injury for the exclusion to apply; **whether the insured should have foreseen resulting bodily injury is immaterial.** West Virginia courts evaluating the "expected or intended" exclusion "must use a subjective rather than objective standard for determining the policyholder's intent." *Cook*, 210 W. Va. at 400.

But, ignoring its own policy language, Wausau persuaded the Circuit Court to use an objective, rather than the requisite subjective standard. Wausau misleadingly argues that "any reasonable person would necessarily expect" the resulting injury and so, "Mylan could not possibly have had a reasonable expectation of insurance for the damage." (Wausau Appellate Br. 44.)

First, Wausau mischaracterizes the "reasonable expectations" doctrine in an effort to find support for a non-existent doctrine. Wausau has improperly injected "reasonable" and "expectation" language in its argument to create an objective standard (i.e., "any reasonable person would necessarily expect"). But reasonable expectations only provide that insureds' "reasonable expectations . . . regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations."[114]

Second, Wausau tries to transform a subjective standard into an objective, "reasonable

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[113]*State of California v. Allstate Ins. Co.*, ___ Cal. Rptr. 3d ___, 2009 WL 579415, at *9, *12 (Cal. 2009), citing *Shell Oil Co. v. Winterthur Swiss Ins. Co.*, 12 Cal. App. 4th 715, 755, 15 Cal. Rptr. 2d 815 (1993).

[114]*Leeber*, 180 W. Va. at 381.

person" standard. West Virginia does not allow this as the proper inquiry is only whether "the loss was 'expected or intended *by the insured*' ":[115] **Wausau has no evidence that Mylan subjectively intended to inflict bodily injury.**

Wausau relies on *State Bancorp* for its contention that this exclusion applies. (Wausau Appellate Br. 44.) Yet, the *State Bancorp* court did not engage in any analysis of the exclusion; it only stated that there are several approaches to determining the degree to which an insured must have intended the injury.[116] More importantly, that court found the exclusion applicable only because it was "clear that the [underlying plaintiffs'] complaint alleges that the appellees specifically intended for their acts to injure the [underlying plaintiffs] in the manner in which [they] were injured." Wausau cannot point to any such allegations because **no** L&C allegation suggests that Mylan subjectively intended to cause any injury to individuals' health.[117]

Then, relying upon *Leeber*, Wausau implies that an intent to injure can be inferred. (Wausau Appellate Br. 44.) The *Leeber* court's holding, however, is limited to sexual misconduct. The court there held that the insured's intent to injure can be inferred in the context of sexual misconduct liability insurance because sexual misconduct specifically is "so *inherently* injurious" and inflicts bodily injury. *Leeber*, 180 W. Va. at 379. Obviously, the same is not true here.

Wausau's suggestion that because Mylan allegedly engaged in the intentional act of

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[115]*Cook*, 210 W. Va. at 400 ("**[C]ourts should not examine an intentional acts exclusion with an 'objective' standard in mind – whether the resulting injury or damage was reasonably foreseeable to a reasonable person is largely irrelevant.** 'The question to ask is, "Did this policyholder expect or intended the injury or property damage?" ' *State ex. Rel. Davidson v. Hoke*, 207 W. Va. at 339, 532 S.E.2d at 57. . . . [A] subjective standard for determining the policyholder's intent 'is supported by the fact that the "neither expected nor intended" language is followed by the phrase "*from the standpoint of the insured.*" ' " (emphasis added)).

[116]*State Bancorp*, 199 W. Va. at 107 n.9 ("We recognize that courts have taken different approaches when determining how specifically the insured must have 'intended' the resulting injury. . . . However, in the case before us, we need not delve into the type of intent that is necessary for the 'intentional injury' exclusion to apply . . . .").

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

unrestrained competition, it must have also intended to deprive consumers of needed medications and intended to injure their health posits a logical fallacy. Every injury is ultimately traceable to some act of free will – if Wausau's argument is accepted, this exclusion will bar coverage in every case, rendering its insurance coverage illusory.

VIII. NO OTHER EXCLUSIONS ASSERTED BY THE INSURERS BAR A DEFENSE

A. Appellees' "Wrong Description of Price" Exclusion Does Not Apply

1. "Advertising Injury" Did Not Arise Out of a Wrong Price Description

AMICO/Continental and Wausau's policies contain an exclusion barring coverage for advertising injury "arising out of . . . [t]he wrong description of the price of goods, products or services." (AMICO/Continental Appellate Br. 33; Wausau Appellate Br. 42.) But Mylan did not wrongly describe the price of its goods; any contrary suggestion misconstrues the allegations. The AWP actions involve an alleged practice of "marketing the spread," whereby "[d]efendants often market their products by pointing out (explicitly and implicitly) that their drug's spread is higher than that of a competing drug." (*Illinois* Action ¶ 50.) That is, Mylan allegedly advertised the differential (or "spread") between the actual price and the AWP. This "spread" existed. And so, Mylan's alleged statements about the spread were correct; it was merely "pointing out" a spread that was not false or "wrong" under the exclusion.

Mylan's AWP reporting cannot be logically construed as "wrong," either. The AWP "is a price derived from self-reported manufacturer data for both branded and generic drugs. There are no requirements or conventions that the AWP reflect the price of any actual sale of drugs by a manufacturer."[118] Because an AWP is not rooted in any "actual" price, Mylan cannot be said to have "wrongly described" prices.

2. The Exclusion's Applicability Is Not Established

Appellees AMICO/Continental and Wausau assert the exclusion while providing virtually no support. (AMICO/Continental Appellate Br. 33; Wausau Appellate Br. 42.)

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[118] *D.M. Gencarelli*, "Average Wholesale Price for Prescription Drugs: Is There a More Appropriate Pricing Mechanism?" National Health Policy Forum Issue Brief No. 775, George Washington University (2002).

Wausau offers as support only a curt statement and a string cite of inapt cases. (Wausau Appellate Br. 42.) Some of the cases do not reach the issue of exclusions at all.[119] The other cases do address exclusions – but not this exclusion. *Superformance*, *Lovedy*, and *Hobson* address the exclusion for injury arising out of the "failure of goods, products or services to conform with any statement of quality or performance made in [the insured's] advertisement."[120] But that exclusion is unrelated to price and applies only to injury arising out of consumer "dissatisfaction with a product or service," i.e., where the product's quality or performance does not live up to its advertised quality/performance.[121]

Power-O-Peat, cited by AMICO/Continental, addresses the exclusion for "incorrect description or mistake in advertised price of good [sic], products or services."[122] The court looked at the exclusion's plain language and found that it excludes only "incorrect description of goods" (i.e., quality or performance) and "mistake in advertised price of goods." *Id.* at 58-59. It does not exclude "incorrect description of price."

AMICO/Continental offer scant additional support for their contention. They argue that "[t]he AWP complaints (including one of the few complaints relied upon by Mylan in its Opening Brief) are replete with allegations . . . that the defendants wrongly described the prices of their drugs." (AMICO/Continental Appellate Br. 34.) And they argue that the " 'core claim' and essence of the AWP Actions is [] a claim for injury arising from the wrong description of the

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[119]*Bigelow v. Liberty Mut. Ins. Co.*, 287 F.3d 242, 249 (2d Cir. (Conn.) 2002) (In analyzing a policy that did not contain a "wrong description of price" exclusion, the court held that the allegations implicated coverage "without implicating any of the policy exclusions.");

Applied Bolting, 942 F. Supp. at 1036 n.7 (Where the insurer relied on the "first publication" exclusion and the "failure of goods to conform" exclusion, the court concluded: "I do not reach the issue of whether that exclusion applies, as this matter can be fully resolved (in [the insurer's] favor) on other grounds.");

Skylink Techs., Inc. v. Assurance Co. of Am., 400 F.3d 982 (7th Cir. (Ill.) 2005) (no exclusions referenced).

[120]*Superformance Int'l, Inc. v. Hartford Cas. Ins. Co.*, 203 F. Supp. 2d 587, 598 (E.D. Va. 2002); *American Western Home Ins. Co. v. Lovedy*, No. 4:06-cv-8, 2006 WL 3740874, at *11 (E.D. Tenn. Dec. 15, 2006); *Hobson v. Robinson*, No. 1:02CV94-D-B, 2005 WL 1660267, at *4 (N.D. Miss. July 8, 2005).

[121]*Hobson*, 2005 WL 1660267, at *4.

[122]*New Hampshire Ins. Co. v. Power-O-Peat*, 907 F.2d 58, 58-59 (8th Cir. (Minn.) 1990).

price of Mylan's products." (*Id.* at 35 n.43.) But AMICO/Continental grossly misconstrue the duty to defend. Even if the complaints are "replete with allegations" – allegations which Appellees, as discussed above, mischaracterize – this is not enough. And the "core claim and essence" of the actions is irrelevant.[123]

As previously discussed, the facts pertinent to the duty to defend are not limited to those that the Circuit Court selected at the Appellees' behest. Instead, the pertinent facts for coverage include all allegations that evidence a potentially covered claim. Thus, the allegations of false advertising in the AWP claims trigger coverage that does not depend on any alleged misstatement of a price. So, the "wrong description of price" exclusion cannot bar a defense.

AMICO/Continental have to negate all *potential* for coverage and prove that the exclusion applies in all possible worlds.[124] Appellees have not met their burden.

B. Wausau's "Products Completed Operations" Exclusion Does Not Apply

1. Bodily Injury Was Not Alleged to Arise Out of Claimants' Use of Mylan's Products Off Premises

Wausau's policy excludes "all bodily injury . . . occurring away from premises [the insured] own[s] or rent[s] and arising out of [the insured's] product or [the insured's] work." (Wausau Appellate Br. 45.) Wausau claims that this exclusion applies to the bodily injury alleged in the L&C actions "since such 'bodily injury' occurred away from Mylan's premises and arose out of Mylan's products." (*Id.*)

The alleged "bodily injury" did not arise out of Mylan's products. In fact, the "bodily

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[123] *Curtis-Universal*, 43 F.3d at 1122 ("The plaintiff's complaint, upon which the insurer's duty depends, need not even set forth the plaintiff's legal theories. See, e.g., Fed. R. Civ. P. 8(a); Fed. R. Civ. P. Form 9. What is important is not the legal label that the plaintiff attaches to the defendant's (that is, the insured's) conduct, but whether that conduct as alleged in the complaint is at least arguably within one or more of the categories of wrongdoing that the policy covers." (citations omitted)).

[124] *J. Lamb, Inc.*, 100 Cal. App. 4th at 1039 ("[A]n insurer that wishes to rely on an exclusion has the burden of proving, through conclusive evidence, that the exclusion applies in all possible worlds.").

See also Bowyer, 216 W. Va. at 652 ("It is well settled in this jurisdiction that '[a]n insurance company seeking to avoid liability through the operation of an exclusion has the burden of proving the facts necessary to the operation of that exclusion.' ").

injury" was allegedly caused because individuals had no access to Mylan's pharmaceuticals. L&C plaintiffs alleged that individuals suffered "bodily injury" because they were *not* taking prescribed medications manufactured by Mylan – not because a defective Mylan product injured them off premises, as required by Wausau's exclusionary language.

2. The "Products Completed Operations" Exclusion Bars Coverage Only for Injury Arising from Defective Products

"Products completed operations" refers to a narrow type of risk expressly covered by a "products completed operations" provision or expressly excluded by a "products completed operations" exclusion. The exclusion is intended to bar coverage only for poor workmanship or defective products.[125]

> The risk intended to be insured is the possibility that the goods, products or work of the insured, once relinquished or completed, will cause bodily injury . . . for which the insured may be found liable. The insured, as a source of goods or services, may be liable as a matter of contract law to make good on products or work which is defective. . . . [T]his may even extend to an obligation to completely replace or rebuild the deficient product or work.[126]

So, the injury must be directly tied to *use* of a deficient product. If individuals had allegedly suffered injury by ingesting a pill produced by a Mylan manufacturing blunder, this exclusion might apply. But no L&C complaint alleges any deficiency in Mylan's products.

The allegations are clear: claimants accused Mylan of "depriving consumers of access to needed pharmaceuticals and thereby injuring their health." (*States* Action ¶ 48 (Ondos Aff. Exhibit "14"); *FTC* Action ¶ 35(c) (Ondos Aff. Exhibit "13").) Claimants' use of "thereby" shows the alleged "bodily injury" was the result of *non-use* of pharmaceuticals, not the *use* of deficient Mylan products. So the "products completed operations" exclusion cannot apply.

Similarly, AMICO/Continental have not shown that the "breach of contract" or "penal statute" exclusion applies here.[127]

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[125] *Erie Ins. Prop. & Cas. Co. v. Pioneer Home Improvement, Inc.*, 206 W. Va. 506, 511, 526 S.E.2d 28, 33 (1999) ("CGL policies of insurance do not provide protection for poor workmanship; instead, these policies protect an insured from liability due to personal injury or personal injury or property damage to others caused by the insured's negligence.").

[126] *Id.*

[127] AMICO/Continental use footnotes to reference the Breach of Contract and Penal Statute exclusions.

C. The "First Publication" Exclusion Does Not Apply

1. Wausau Attempts to Apply the Exclusion on the Basis of Mylan's Alleged "Fraudulent Reporting of AWPs"

The policy covers advertising injury arising out of "misappropriation of advertising ideas or style of doing business." Fraudulent reporting of AWPs is **not** the advertising idea at issue in this case. Wausau's attempt to broaden the scope of the exclusion by redefining what is actually covered under the policy should be rejected.

Alleged misstatements in Mylan's advertising – not fraudulent reporting of AWPs – is the focus of Mylan's "advertising injury" coverage argument for the AWP actions.

2. Distinct Advertising Ideas Create Distinct Coverage

a. Mylan First Spread-Marketed Atenolol and Rinatine during 1997-1998 and 2000-2001 Policy Periods Respectively

The MDL complaint alleges the drug Atenolol was first spread-marketed by Mylan during the 1997-1998 policy period.

> The County Medicaid Programs spent over $224 million for Mylan drugs from 1997-2004. A particularly egregious example of Mylan's **spread-marketing** was highlighted in recent complaints. Illinois, Wisconsin and Kentucky allege that in 2000 the Mylan drug Atenolol (25mg, 100s) (NDC Code 00378-0218-01) (a

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Those do not apply. (AMICO/Continental Appellate Br. 32-33 n.42.) The case they cite does not mention a "breach of contract" exclusion. *Erie Ins. Prop. & Cas. Co. v. Pioneer Home Improvement, Inc.*, 206 W. Va. 506, 526 S.E.2d 28 (1999). In *Pioneer,* a breach of contract claim did not fall within the products and completed operations coverage. *Id.* at 511-12,. There was no breach of contract exclusion in the policy. Here, there are numerous counts in the underlying actions that are separate from any breach of contract claims.

The Penal Statute Exclusion does not apply because the statutes at issue do not require "willfulness"; these statutes can be unintentionally violated. The Florida False Claims Act, for example, can be satisfied by reckless disregard. Similarly, allegations that Mylan violated the federal Medicaid rebate provision, 42 U.S.C. § 1396r-8, state that Mylan "knew . . . or should have known" of the violation, suggesting a negligence standard. *Park Univ. Enters. v. American Cas. Co.*, 314 F. Supp. 2d 1094, 1103 (D. Kan. 2004), *aff'd*, 442 F.3d 1239 (10th Cir. (Kan.) 2006) ("Should have known" is a term connoting negligence, not "intention," and certainly not willfulness.). *See also Pharmacists Mut. Ins. Co. v. Scyster*, No. 06-1334, 2007 WL 1317149, at *4 (4th Cir. (S.C.) May 7, 2007) ("Given the ease of inadvertent violation, the leap from a bare violation to a conclusion of willfulness is too speculative. . . . [The insurer] could write an exclusion applicable to any illegal act, but it did not do so, and the narrower exclusion that it wrote covering willful illegal acts should not be treated as identical to the broader exclusion the insurer chose not to write."). A number of the statutes Mylan allegedly violated are remedial, not penal. For instance, courts have consistently deemed New York General Business Law § 349 to be remedial under New York law. *Oxman v. Amoroso*, 659 N.Y.S.2d 963, 968-69 (N.Y. City Ct. 1997) ("GBL 349 is a broad, remedial statute.").

subject drug) had an AWP of $74.00 yet was available at $1.60, representing a spread of 4525%.[128]

There are no allegations that Mylan spread-marketed Atenolol or any other drug prior to the initial policy period incepted 1997, as Wausau knows.[129]

The Florida *Ven-A-Care* complaint alleges Mylan first spread-marketed the drug Ranitidine in 2000 through the use of several subordinate ideas including "using the spread as a financial inducement" and "paying additional rebates and discounts to customers." Spread-marketing of Ranitidine occurred throughout the relevant policy period (12/20/2000, 2/22/2001, 4/20/2001, 6/19/2001, 8/19/001).[130]

The Florida *Ven-A-Care* complaint alleges Mylan first marketed the spread for Ranitidine in October 2000 by "**using the spread as a financial inducement** to increase sales of the subject drugs; and **paying additional rebates and discounts to customers** effectively reducing the customers' acquisition cost for these drugs without reporting these discounts and rebates to First DataBank."[131] These allegations easily meet the *Taco Bell* standard.[132] Even if the marketing the spread concept occurred prior to the policy periods, the subordinate ideas of marketing the spread for the particular drugs did not occur until **after** each **distinct** policy incepted.[133]

b. Prior Publication Must Cause Identical "Advertising Injury"

At page 43 of its brief Wausau string-cites cases to argue that the "material" that is

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[128]*MDL* Action ¶¶ 608, 618.

[129]*Wausau Business Ins. Co. v. Fisher Printing Co., Inc.*, No. 07 C 3732, 2008 WL 2704874, at *3 (N.D. Ill. July 8, 2008) ("If an infringer uses different copyrighted or trademarked material on separate occasions, he commits a set of 'fresh wrongs' each time, and each occasion represents a separate publication, not simply a repetition of an earlier infringement.").

[130]*Florida Ven-A-Care* Action ¶¶ 40, 41.

[131]*Florida Ven-A-Care* Action ¶¶ 40, 41.

[132]*Taco Bell Corp. v. Continental Cas. Co.*, 388 F.3d 1069, 1073, 1074 (7th Cir. (Ill.) 2004) (Prior publication exclusion did not apply where "basic idea" of psycho Chihuahua in commercials was used prior to the policy period because "subordinate" idea of the "Chihuahua's poking its head through a hole at the end of the commercial" did not occur until after the policy period incepted.")

[133]*Bay Elec. Supply, Inc. v. Travelers Lloyds Ins. Co.*, 61 F. Supp. 2d 611, 619 (S.D. Tex. 1999) ("Travelers argument [that the first publication exclusion applies] fails for at least two reasons highlighted by Plaintiffs. First, no cause of action against Bay or FAE arose until ACB registered its trademarks in 1997, well after the inception of Traveler's coverage for FAE.").

"published" need only be "substantially the same." These cases were decided in the context of "publication" offenses, where the focus is naturally on the "publication" of "materials." For example, *Ringler* explicitly states that its "construction of the exclusion language [is being made] in light of defamation law." *Ringler Assocs. Inc. v. Maryland Cas. Co.*, 80 Cal. App. 4th 1165, 1181, 96 Cal. Rptr. 2d 136, 150 (2000). So, far from setting forth a universal standard, *Ringler* and the other "publication" offense cases Wausau cites are limited to their particular context.

The exclusion does not apply even if Mylan had engaged in "marketing the spread" of Atenolol and Ranitidine before the policies incepted (and there is no such evidence). Any prior marketing must be injurious.[134] Where, as here, there was no pre-policy conduct respecting these drugs, that standard cannot be met.

There could be no injury "identical to those allegedly suffered by [the claimant] from the latter publications."[135] Here, the injurious post-policy conduct was necessarily "different with respect to the clients and/or perspective (sic) clients contacted."[136] Mylan's "marketing the spread" for Atenolol was to different individuals, pharmacies, doctors, and purchasers than for other drugs. Wausau identifies no evidence to dispute this.[137] Moreover, as is true for the "knowledge of falsity" exclusion, to the extent an issue of fact exists as to whether exclusionary language applies, that compels finding a defense rather than the reverse as Wausau wrongly

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[134]*See Maddox v. St. Paul Fire & Marine Ins. Co.*, 179 F. Supp. 2d 527, 530 (W.D. Pa. 2001) ("The alternative reasonable interpretation – requiring the prior publication to cause the same injury as the later publication – is suggested both by the context of the language and the way others have interpreted it.").

[135]*Transportation Ins. Co. v. Pennsylvania Manufacturers' Ass'n Ins. Co.*, No. 06-05430, 2008 WL 4916030, at *6 (E.D. Pa. Nov. 14, 2008) ("[T]he first publication exclusion would apply here only if the publications alleged in the Pohl Complaint occurring prior to [policy inception] caused [advertising] injuries that were **identical** to those allegedly suffered by Pohl from the latter publications that the Pohl Complaint alleges occurred during the course of Defendant's Policy coverage." (emphasis added)).

[136]*Id.* ("In the Court's view, the publications that occurred beginning in August of 1999 and the ones that occurred after the start of the Defendant's policy period are different offenses for the purposes of the first publication exclusion because they are different in time and, presumably, also different with respect to the clients and/or perspective clients contacted.").

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

assumes.[138]

D. The "Knowledge of Falsity" Exclusion Does Not Apply

1. The Exclusion Applies Only to "Oral or Written Publication of Material" Based Offenses

Equally applicable to the "first publication" exclusion, contextual analysis supports finding the "knowledge of falsity" exclusion is not applicable to the "use of another's advertising idea in your 'advertisement' " offense. Wausau's 2000-2001 policy lists seven separate categories of personal and advertising injury offenses, but *only two* of the categories require oral or written publication of material.[139] But the "first publication" exclusion provides that "advertising injury" should only bar coverage "arising out of oral or written publication of material" whose first publication took place before the beginning of the policy. The exclusion applies only to the operative offenses arising out of "oral or written publication of material," none of which are implicated in this case. Applying the exclusion to the other offenses would improperly add words of limitation to the policy. *Morris v. Fireman's Fund Ins. Co.*, 384 P.2d 465, 468 (N.M. 1963) ("[W]e are not at liberty . . . to insert words that they have not used.").

2. L&C and AWP Actions Allege Conduct that Does Not Require "Knowledge," Much Less "Knowledge of Falsity"

The "knowledge of falsity" exclusion does not apply because proof of knowledge of falsity is not a requirement for Mylan to be held liable on each cause of action in all of the underlying complaints.[140]

In the L&C action, Count IX of the *Blue Cross* complaint includes a claim under 15

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[138] *Jewelers Mut. Ins. v. Milne Jewelry Co.*, No. 2:06-CV-243 TS, 2006 WL 3716112, at *2 (D. Utah Dec. 14, 2006) ("Precisely because there remains a factual issue in the underlying action, and because Defendants could still be liable on that issue, Defendants' duty to defend continues."); *American Cyanamid*, 30 Cal. App. 4th at 975 ("If the parties dispute whether the insured's alleged misconduct is potentially within the policy coverage . . ., 'the duty to defend is then *established* . . . .' ").

[139] Those are (1) Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organizations goods, products or services, and (2) Oral or written publication of material that violates a person's right of privacy.

[140] *Ohio Cas. Ins. Co. v. Cloud Nine, LLC*, 464 F. Supp. 2d 1161, 1168-69 (D. Utah 2006) ("[T]he causes of action asserted against the Cloud Nine Defendants do not necessarily require that, in order to find liability, the defendant have knowledge of falsity . . . . 15 U.S.C. § 1125(a) (setting forth elements of false designation of origin); Utah Code Ann. § 13-11a-3 (defining deceptive trade practices) . . . .").

U.S.C. § 45(a), which prohibits use of "unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce." But Mylan only allegedly engaged in "unfair methods of competition," not "deceptive acts or practices." (*Blue Cross* Action ¶ 245 ("Defendants' monopolization of the Lorazepam Markets constitutes an **unfair method of competition** in or affecting commerce . . . ."). The statute does not require knowing conduct where deceptive acts or practices are not alleged.[141]

Similarly, the AWP actions allege several claims where knowledge of falsity is not a necessary element. For example, Count II of the *MDL* complaint alleges violation of New York's Social Services Law (Failure to Comply with State Medicaid Rebate Provision). Mylan allegedly "knew, or by virtue of [its] position, **should have known**, of the falsity of the pricing information submitted" and that Mylan is liable "as a result of [its] **inaccurate** reporting of Best Price . . . ." (*MDL* Action ¶¶ 862, 863.) This distinct scienter standard[142] forecloses application of the exclusion.

Moreover, a plethora of case authority directly rejects any finding that the "knowledge of falsity" exclusion can ever bar a defense[143] because application of the exclusion depends upon factual determinations in the underlying action.[144] No matter what false, frivolous, or groundless

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[141]*American Home Assur. Co. v. United Space Alliance, LLC*, 378 F.3d 482, 488 (5th Cir. (Tex.) 2004) ("[E]ven where allegations involve false statements, if liability can be imposed without proving that the false statements were made with the knowledge that they were false, the 'knowledge of falsity' exclusion will not apply to preclude coverage."); *Albers Medical*, 2005 WL 2319820, at *5 ("[While] [i]t is true the Pfizer Action alleges intentional wrongdoing[,] it is not true that it alleges **only** intentional wrongdoing. Pfizer's claims do not depend upon a showing of intentional wrongdoing. Stated another way, intent is not an element Pfizer must prove in order to prevail in the Pfizer Action. A showing of intentional wrongdoing may be necessary to entitle Pfizer to certain types of relief, but it is not a necessary component of its claim.").

[142]*Park Univ. Enters.*, 314 F. Supp. 2d at 1103 (D. Kan. 2004) (" 'Should have known' is a term connoting negligence, not intention.").

[143]*Transportation Ins. Co.*, 2008 WL 4916030, at *7 ("Defendant asserts, without recourse to pointing to a single fact in the record, that the Pohl complaint alleges that G & B intended to harm Pohl, as opposed to alleging that G & B may have been merely negligent, careless, or reckless in its conduct. . . . The salient point here, however, is that at the stage of the litigation when Defendant denied G & B coverage – the very beginning, prior to conducting any factual discovery whatsoever into the Pohl Complaint – neither of the knowledge exclusions was applicable because such facts tending to support either conclusion had not yet been developed.").

[144]*Pennfield Oil Co.*, 2007 WL 1290138, at *9 ("Determination of the applicability of [the 'knowledge of

allegations are made, an insurer must defend.

IX. CONCLUSION

Because potential coverage existed under the Appellees' policies, a duty to defend arose in the AWP and L&C actions. This Court should therefore reverse the Circuit Court's order and enter an order that a defense is due under the Appellees' policies sold to Mylan and directing the Circuit Court to enter an order of partial summary judgment in favor of Mylan and against the Appellees and directing further proceedings consistent with the Court's decision.

Dated: March 13, 2009.

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falsity'] provision must await further factual development in the underlying action. . . . [T]he record in the FDA proceedings shows that there is at least a colorable argument that Pennfield's allegedly false representations were either made without knowledge of falsity or were not false."); *Central Mut. Ins. Co. v. StunFence, Inc.*, 292 F. Supp. 2d 1072, 1081-82 (N.D. Ill. 2003) ("[I]nsurer may refuse to defend only if it is clear from the face of the pleading that *all* of the allegations in the Underlying Action fall outside of the policy's actual or potential coverage." (emphasis in original)).

CERTIFICATE OF SERVICE

I, Charles J. Crooks, do hereby certify that I caused the foregoing **"APPELLANTS' REPLY BRIEF ON BEHALF OF MYLAN LABORATORIES INC., MYLAN PHARMACEUTICALS INC., and UDL LABORATORIES, INC."** to be served upon the following counsel, via U.S. Mail to each, this 13th day of March, 2009.

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