Understanding Insurance Is Key To Limiting Antitrust Liability

By **Andrew Reidy, Joseph Saka and Ramy Simpson** (March 8, 2024)

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As 2023 witnessed an unprecedented surge in antitrust enforcement by the Federal Trade Commission and the U.S. Department of Justice, the Dec. 18, 2023, release of new merger review guidelines signals a clear intention to continue aggressive regulatory action in the years ahead.

In an era marked by escalating antitrust claims and investigations, businesses face unprecedented scrutiny. Regulatory bodies worldwide, bolstered by proactive state attorneys general and well-resourced plaintiffs firms, are intensifying enforcement, leading to a surge in antitrust litigation.

The financial stakes are high, with potential damages reaching billions, not to mention the significant costs of defense, operational disruptions and reputational damage. This landscape necessitates a strategic approach to mitigating antitrust liability, with insurance playing a pivotal role.

Identifying Potential Coverage

Several types of liability insurance policies may provide coverage for antitrust claims. The two main policies that may respond to lawsuits alleging antitrust claims are directors and officers liability insurance and commercial general liability policies. In addition, errors and omissions policies, also known as professional liability insurance, may cover antitrust claims in some scenarios, particularly for professional services firms.

Directors and Officers Insurance

D&O insurance policies are designed to protect the personal assets of directors and officers — and often the company itself, which is commonly referred to as Side C or entity coverage — from claims for wrongful acts arising out of managerial decisions.

For coverage for the entity, there is a critical distinction under D&O insurance policies for public and private entities. For publicly traded companies, D&O policies typically provide direct coverage to directors and officers, while the entity coverage is primarily limited to securities claims. On the other hand, D&O policies for private entities often extend entity coverage more broadly, encompassing a wide range of potential claims against the company itself.

This difference is pivotal in the context of antitrust claims. Given that antitrust lawsuits often target not only individual directors and officers but also the company as an entity, private companies may find themselves with a broader safety net under their D&O policies compared to their public counterparts.

Commercial General Liability Insurance

Commercial general liability insurance policies are intended to protect businesses against liability for bodily injury, property damage, and personal and advertising injury. The inclusion of advertising injury may be particularly relevant in the context of antitrust claims.

The advertising injury in CGL policies often extends to claims arising out of the use of another's advertising idea in a company advertisement, or infringing upon another's copyright, trade dress or slogan in an advertisement. Thus, if an antitrust lawsuit is linked to the company's advertising practices, such as false advertising, there may be grounds for coverage under the CGL policy.

There is also a crucial distinction to emphasize between the two fundamental forms of protection under liability insurance policies: defense coverage and indemnity coverage. The distinction between the two is important because courts generally construe an insurer's defense obligation broadly. Under the law of most states, if there are any allegations that are even potentially covered, the insurer may have the obligation to fund the defense of the entire lawsuit.

Further, under CGL policies, defense costs are typically paid outside of limits. Thus, the insurer may have an obligation to defend an entire lawsuit as long as the suit contains at least some covered allegations.

Potential Limitations to Coverage

Unsurprisingly, liability insurance policies contain exclusions and limitations that could affect the availability or extent of coverage for antitrust claims. Consider the following, but recognize that these exclusions may not apply depending on the specific factual allegations against the insured and policy language.

Antitrust Exclusions

These exclusions purport to bar coverage claims for antitrust violations. Despite this, one should not assume that they categorically exclude coverage for any lawsuit alleging antitrust violations.

Given the broad duty to defend, if there are non-antitrust claims asserted in the lawsuit, courts often find that coverage is available notwithstanding the existence of antitrust exclusions.[1] Thus, while an antitrust exclusion presents a potential hurdle to coverage, it does not automatically extinguish the insurer's defense obligation and may be subject to challenge depending on the circumstances.

Prior Acts or Prior Claims Exclusions

These exclusions bar coverage for claims arising from wrongful acts that occurred before a specified date, or claims that relate to wrongful acts asserted in a prior claim. However, if the lawsuit alleges conduct that is different or unrelated to the prior claim, courts may refuse to recognize such exclusions as a bar to coverage.

For example, in the April 2023 decision of Foster Farms LLC v. Everest National Insurance Co., the U.S. District Court for the Northern District of California court held that the policy's prior claim exclusion did not bar coverage for antitrust suits relating to the pricing of turkey because the wrongful acts alleged were different from the prior claim that involved the pricing of chicken.[2]

In reaching its holding, the court recognized the significant differences between the production of turkey and chicken, and the differences between the chicken market and the turkey market. The case highlights the detailed analysis that may be required in determining whether wrongful acts are considered related.

Professional Services Exclusion

The professional services exclusion bars coverage for claims arising from the insured's provision or failure to provide professional services. Insurance companies may assert this exclusion applies broadly, attempting to deny coverage for a wide range of claims by categorizing them as relating to professional services, even when the link is tenuous.

Policyholders are frequently able to successfully rebut such arguments, because courts tend to require a clear and direct connection between the claim and the actual rendering of professional services.[3]

The Definition of "Loss"

While not an exclusion, the definition of "loss" in D&O insurance policies may also affect the availability of coverage for antitrust claims. The definition typically includes amounts that the insured becomes legally obligated to pay as a result of a claim, such as damages, judgments, settlements and defense costs.

But the terms also typically are defined to carve out certain costs, including fines, penalties and other amounts considered uninsurable under law. Given the nature of antitrust claims, insurers may assert that some of these carveouts limit coverage. Consequently, policyholders should pay close attention to how loss is defined in their insurance policies, and where possible, seek to broaden coverage and minimize potential limitations.

Other Defenses That Arise in Seeking Coverage

Beyond the exclusions, there are a number of other defenses that insurers rely on to defeat coverage for an antitrust claim.

Notice of Circumstances

D&O policies are typically issued on a claims-made basis. This means that the policy covers claims made against the insured during the policy period, regardless of when the alleged wrongful acts took place. Thus, the timing of the claim — not the timing of the alleged wrongful act — is what triggers coverage under a claims-made policy.

Once a claim is made, D&O policies require the policyholder to provide notice to the insurer. Providing notice is not difficult, but there are traps for the weary. The reporting requirement

often is tied to the assertion of a claim, which is a defined term in D&O policies. The definition may include not just a lawsuit, but also a demand letter, a request to toll statute of limitations, a demand for mediation or a government subpoena.

Thus, depending on the definition, there may be an obligation to provide notice even if the situation does not yet involve a formal lawsuit. Even before a claim comes in, companies should have a thorough understanding of the policy and what is required, and a plan in place to meet the notice requirements.

What if you are aware of a potential issue that does not yet constitute a claim? One potentially important concept under D&O policies and other claims-made policies is the "notice of circumstances provision." These provisions allow policyholders to provide notice of circumstances that may lead to a future claim.

If the anticipated future claim or a related claim is later made, it then is treated as having been made during the policy period when the circumstances were reported. In the context of antitrust claims, this can be particularly beneficial.

Antitrust matters sometimes involve lengthy investigations that can occur long before any formal claim or litigation is initiated. By providing notice of circumstances upon becoming aware of a potential antitrust issue, the policyholder may be able to lock in coverage under the current policy for any future claims arising from these circumstances.

Consent-to-Settle Provisions

Under consent-to-settle provisions in insurance policies, the insurer's consent typically is required before a policyholder can agree to any settlement.

For antitrust claims, consent issues can be particularly complex. Antitrust lawsuits may involve both covered and uncovered claims, such as insurable compensatory damages and uninsurable penalties, or covered antitrust claims and uncovered breach of contract claims. If a global settlement is reached without allocating between these covered and uncovered claims, the insurer may argue that the entire settlement is uninsurable or dispute the proportion of the settlement that should be covered.

To avoid these issues and maximize insurance recovery, policyholders should engage in open and timely communication with their insurers about potential settlements. The coverage ramifications should be considered during the settlement negotiation, not for the first time after the settlement is signed.

The Role of In-House Counsel

In-house counsel must take an active role in navigating insurance coverage issues by having a keen understanding of the company's risk profile and ensuring that the insurance coverage aligns with it. These proactive measures include the following.

Thorough Review and Understanding of Policy Wording

It is essential to closely review policy terms and conditions in the placement process to

understand the extent of coverage and any exclusions or limitations. Ensure that your legal team or attorney is involved in this process. It may seem obvious, but if you find your insurance policy does not adequately cover antitrust claims or that there are significant limitations, work with your broker to secure better terms or modify the existing ones.

Remember, particularly when it comes to D&O insurance and professional liability, policy terms are not always set in stone. Regularly review and adjust your policies as necessary to match your current risk profile.

Knowing Denial of Coverage Isn't Necessarily The Last Word

Insurance companies count on the fact that some businesses will take no further action after receiving a denial of coverage. Before simply accepting a denial, you should work with your coverage counsel to analyze the propriety of the denial and whether there are any steps to get the insurer to revisit the declination. In some situations, litigation may be the best option, but it's typically not the only one.

Before going down that road, for example, policyholders may have the insurance broker request a reevaluation based on additional facts, request a tolling agreement or seek a mediation.

Conclusion

In today's highly litigious environment, antitrust claims are a significant concern for corporations, and insurance can provide a crucial safety net against the financial risks associated with such claims.

Securing appropriate coverage is not a set-it-and-forget-it task. It requires constant vigilance and adjustment in response to evolving business practices and risk landscapes. Understanding and navigating the intricacies of insurance coverage should be a vital part of risk management efforts for antitrust claims.

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[1] Hanover Ins. Co. v. Paul M. Zagaris Inc., 714 F. App'x 735 (9th Cir. 2018); Major League Soccer LLC v. Fed. Ins. Co., 45 Misc. 3d 1211(A), 3 N.Y.S.3d 285, *3 (N.Y. Sup. 2014); Beyer v. Heritage Realty Inc., 251 F.3d 1155, 1158 (7th Cir. 2001); James River Ins. Co. v. Rawlings Sporting Goods Co., No. 19-cv-6658, 2021 WL 346418 (C.D. Cal. Jan. 25, 2021).

[2] Foster Farms LLC v. Everest Nat'l Ins. Co., No. 3:21-CV-04356-WHO, 2023 WL 3082327 (N.D. Cal. Apr. 24, 2023).

[3] Guaranteed Rate Inc. v. ACE Am. Ins. Co., No. 20C04268, 2023 WL 5965619, at *6-8 (Del. Sept, 14, 2023).