

No. 64712-1-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

NATIONAL SURETY CORPORATION,

Respondent/Cross-Appellant,

v.

IMMUNEX CORPORATION,

Appellant/Cross-Respondent.

APPEAL FROM THE SUPERIOR COURT  
FOR KING COUNTY  
THE HONORABLE STEVEN GONZALEZ

2010 JUL 19 PM 4:59  
COURT REPORTER  
STEPHEN  
K

BRIEF OF RESPONDENT/CROSS-APPELLANT

BULLIVANT HOUSER  
BAILEY PC

EDWARDS, SIEH, SMITH  
& GOODFRIEND, P.S.

By: Jerret E. Sale  
WSBA No. 14101  
Deborah L. Carstens  
WSBA No. 17494

By: Catherine W. Smith  
WSBA No. 9542  
Howard M. Goodfriend  
WSBA No. 14355

1601 Fifth Ave., Suite 2300  
Seattle, WA 98101-1618  
(206) 521-6418

1109 First Avenue, Suite 500  
Seattle, WA 98101  
(206) 624-0974

Attorneys for Respondent/Cross-Appellant

## TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ASSIGNMENTS OF ERROR ON CROSS-APPEAL .....	2
III.	STATEMENT OF ISSUES ON CROSS-APPEAL.....	3
IV.	RESTATEMENT OF FACTS .....	3
	A. Immunex And Other Drug Manufacturers Were Sued For Fraudulent Overstatement of Wholesale Drug Prices. ....	3
	B. Immunex Notified National Surety That It Was Being Investigated For Fraud In 2001 And 2003, But Never Tendered Any Claims For Defense. ....	5
	C. In October 2006, On The Eve Of Settling Some Of The Claims, Immunex Demanded Reimbursement Of Defense Costs From National Surety. ....	7
	D. The Trial Court Confirmed That National Surety Had No Duty to Defend Or Indemnify, But Found That National Surety Would Nevertheless Be Responsible For Defense Costs Unless It Proved Prejudice At Trial. ....	9
V.	RESPONSE ARGUMENT .....	11
	A. The AWP Complaints Allege Immunex's Participation In A Fraudulent Scheme To Misstate The Wholesale Price Of Drugs, Not That Immunex Committed An Offense Of Discrimination That Could Be Within National Surety's Umbrella Coverage For Personal Injury Liability. ....	11

1.	Each Of The AWP Complaints Allege A Scheme To Fraudulently Overstate Prices, Not Price Discrimination.....	13
2.	Personal Injury Coverage For The Offense Of Discrimination Does Not Encompass Anticompetitive Behavior That Results In Differential Treatment.....	21
3.	The AWP Complaints Do Not Allege Discrimination Under The Wholly-Statutory Theory of Disparate Impact.....	27
B.	The Damages Alleged In The AWP Complaints Do Not Arise Out Of The Offense Of Discrimination.....	28
1.	“Arising Out Of” Means Originating From, Not Resulting In, Discrimination.....	29
2.	The AWP Plaintiffs’ Injuries Did Not Arise Out Of Discrimination Between Payors And Providers. ....	30
3.	The AWP Plaintiffs’ Injuries Did Not Arise Out Of Discrimination Among Providers.....	32
4.	The Plaintiffs’ Injuries Did Not Arise Out Of Discrimination Against The Elderly.....	33
VI.	ARGUMENT IN SUPPORT OF CROSS-APPEAL .....	34
A.	There Can Be No Obligation To Pay Defense Costs In The Absence of A Duty To Defend.....	34
B.	An Insurer That Owes No Duty To Defend Cannot Be Liable For Defense Costs Incurred By Its Insured Prior To Tender.....	40

C.	Prejudice To The Insurer Is Established As A Matter Of Law When An Insured Delays Tender Of A Claim For Years After Preliminary Notice Of Related Occurrences, All The While Controlling Defense And Settlement Without Consent Of The Insurer. ....	45
VII.	CONCLUSION .....	49

## TABLE OF AUTHORITIES

### FEDERAL CASES

<b><i>Browning v. Rohm &amp; Haas Tennessee, Inc.</i></b> , 16 F.Supp.2d 896 (E.D. Tenn. 1998), <i>aff'd</i> , 194 F.3d 1311 (6th Cir. 1999), <i>cert. denied</i> , 530 U.S. 1243 (2000).....	28
<b><i>Cooper v. IBM Personal Pension Plan</i></b> , 457 F.3d 636 (7th Cir. 2006).....	33
<b><i>Federal Ins. Co. v. Stroh Brewing Co.</i></b> , 127 F.3d 563 (7th Cir. 1997).....	22, 23
<b><i>F.T.C. v. Fred Meyer, Inc.</i></b> , 390 U.S. 341, 88 S.Ct. 904, 19 L. Ed. 2d 1222 (1968) .....	26
<b><i>In re Immunex Corp. Average Wholesale Price Litigation</i></b> , 201 F.Supp.2d 1378 (Jud. Pan. Mult. Lit. 2002).....	4, 5, 19
<b><i>Morris Electronics of Syracuse, Inc. v. Mattel, Inc.</i></b> , 595 F.Supp. 56 (N.D.N.Y. 1984).....	26
<b><i>Rose v. Wells Fargo &amp; Co.</i></b> , 902 F.2d 1417 (9th Cir. 1990).....	27
<b><i>Scott Pub. Co. v. Columbia Basin Publishers, Inc.</i></b> , 293 F.2d 15 (9th Cir. 1961), <i>cert. denied</i> , 368 U.S. 940 (1961).....	26
<b><i>Shiplot v. Veneman</i></b> , 620 F.Supp.2d 1203 (D. Mont. 2009), <i>aff'd</i> , 2010 WL 2354155 (9th Cir. 2010).....	27-28
<b><i>Time Oil Co. v. Cigna Property &amp; Cas. Ins. Co.</i></b> , 743 F.Supp. 1400 (W.D. Wash. 1990).....	42
<b><i>USX Corp. v. Adriatic Ins. Co.</i></b> , 99 F.Supp.2d 593 (W.D. Pa. 2000), <i>aff'd</i> , 345 F.3d 190 (3rd Cir. 2003), <i>cert denied</i> , 541 U.S. 903 (2004).....	2, 14, 22, 23

## STATE CASES

<b>Allstate Ins. Co. v. Peasley</b> , 131 Wn.2d 420, 932 P.2d 1244 (1997) .....	13
<b>Australia Unlimited, Inc. v. Hartford Cas. Ins. Co.</b> , 147 Wn. App. 758, 198 P.3d 514 (2008).....	29, 30
<b>Avemco Ins. Co. v. Mock</b> , 44 Wn. App. 327, 721 P.2d 34 (1986) .....	29, 30
<b>Buss v. Superior Court</b> , 16 Cal.4th 35, 65 Cal.Rptr.2d 366, 939 P.2d 766 (1997) .....	38
<b>Cannon, Inc. v. Federal Ins. Co.</b> , 82 Wn. App. 480, 918 P.2d 937 (1996), <i>rev. denied</i> , 131 Wn.2d 1002 (1997) .....	48
<b>Certain Underwriters at Lloyd's, London v. Valiant Ins. Co.</b> , 155 Wn. App. 469, 229 P.3d 930 (2010) .....	13
<b>Des Moines Area Dairy Queen Store Operators &amp; Owners, Inc. v. Wapello Dairies, Inc.</b> , 226 N.W.2d 9 (Iowa 1975) .....	26
<b>E-Z Loader Boat Trailers, Inc. v. Travelers Indem. Co.</b> , 106 Wn.2d 901, 726 P.2d 439 (1986) .....	27
<b>Griffin v. Allstate Ins. Co.</b> , 108 Wn. App. 133, 29 P.3d 777, 36 P.3d 552 (2001), <i>rev. denied</i> , 146 Wn.2d 1005 (2002) .....	35-36, 42-43
<b>Heringlake v. State Farm Fire and Cas. Co., Inc.</b> , 74 Wn. App. 179, 872 P.2d 539, <i>rev. denied</i> , 125 Wn.2d 1003 (1994) .....	24
<b>Kirk v. Mt. Airy Ins. Co.</b> , 134 Wn.2d 558, 951 P.2d 1124 (1998) .....	14-15, 44

<b>McDonald v. State Farm Fire and Cas. Co.</b> , 119 Wn.2d 724, 837 P.2d 1000 (1992) .....	13, 24
<b>Memorial Med. Ctr. v. Howard</b> , 975 S.W.2d 691 (Tex.App. 1998) .....	39
<b>Mutual of Enumclaw Ins. Co. v. USF Ins. Co.</b> , 164 Wn.2d 411, 191 P.3d 866 (2008) .....	37, 41, 46
<b>Mylan Laboratories Inc. v. American Motorists Ins. Co.</b> , __ S.E.2d __, 2010 WL 2484784 (W.Va. 2010) .....	1, 2, 14, 15, 22
<b>Northwest Prosthetic &amp; Orthotic Clinic, Inc. v. Centennial Ins. Co.</b> , 100 Wn. App. 546, 997 P.2d 972 (2000) .....	48
<b>Quadrant Corp. v. American States Ins. Co.</b> , 154 Wn.2d 165, 110 P.3d 733 (2005) .....	24
<b>Scottsdale Ins. Co. v. MV Transp.</b> , 36 Cal.4th 643, 31 Cal.Rptr.3d 147, 115 P.3d 460 (2005) .....	36-37
<b>Toll Bridge Authority v. Aetna Ins. Co.</b> , 54 Wn. App. 400, 773 P.2d 906 (1989) .....	29, 30
<b>Truck Ins. Exch. v. VanPort Homes, Inc.</b> , 147 Wn.2d 751, 58 P.3d 276 (2002) .....	15, 36-37, 43-45
<b>Unigard Ins. Co. v. Leven</b> , 97 Wn. App. 417, 983 P.2d 1155 (1999), <i>rev. denied</i> , 140 Wn.2d 1009 (2000) .....	41-42, 48
<b>Woo v. Fireman's Fund Ins. Co.</b> , 161 Wn.2d 43, 164 P.3d 454 (2007) .....	35, 37, 43, 45

## STATUTES

15 U.S.C. § 13 .....	26
15 U.S.C. § 1691 .....	28
29 U.S.C. § 621 .....	27

RCW 48.01.030 .....	37
RCW ch. 49.60.....	27

**RULES AND REGULATIONS**

CR 54.....	11
------------	----

**OTHER AUTHORITIES**

16 COUCH ON INSURANCE 3d § 226:123 (2005) .....	38
Marick, <i>An Insurer's Right to Recoup Non-Covered Defense Costs and Indemnity Payments</i> , NEW APPLEMAN ON INSURANCE: CURRENT CRITICAL ISSUES IN INSURANCE LAW (July 2007) .....	38-39

## I. INTRODUCTION

An insured tendered antitrust claims to its CGL umbrella policy insurance carrier after defending the claims itself for almost six years. The insurer, respondent National Surety, did everything right in protecting the potential interests of its insured, appellant Immunex – National Surety promptly told Immunex precisely why the claims were not covered by the policy, offered to pay defense costs from the date of tender under a reservation of rights, and commenced a declaratory judgment action to establish the parties' rights and obligations.

The trial court correctly determined that National Surety had no duty to defend claims that Immunex had fraudulently inflated average wholesale prices for prescription drugs in order to extract additional profits. The complaints asserting these claims were not within the scope of National Surety's coverage for personal injury arising out of discrimination, which does not encompass "broad-based economic practices which injure markets through the improper elimination of competition accomplished by purposeful manipulation of goods and services . . . ." ***Mylan Laboratories Inc. v. American Motorists Ins. Co.***, \_\_\_ S.E.2d \_\_\_, 2010 WL 2484784

(W.Va. 2010) (Appendix A 20)<sup>1</sup>, quoting **USX Corp. v. Adriatic Ins. Co.**, 99 F.Supp.2d 593, 625 (W.D. Pa. 2000), *aff'd*, 345 F.3d 190 (3<sup>rd</sup> Cir. 2003), *cert denied*, 541 U.S. 903 (2004).

However, the trial court then erred in holding that unless National Surety could prove “prejudice” from late notice at trial, it could be obligated to pay defense costs until the date the court confirmed the claims were not covered – a determination that was delayed years by the belated tender of the claims, and by Immunex’s insistence on a stay of this declaratory judgment action while it continued to control the defense of the uncovered claims. This court should affirm on Immunex’s appeal, and reverse and dismiss all claims against National Surety on its cross-appeal.

## II. ASSIGNMENTS OF ERROR ON CROSS-APPEAL

1. The trial court erred in entering its Order Denying Plaintiff’s Motion for Summary Judgment re Payment of Defense Fees and Costs and Granting Defendant’s Motion for Partial Summary Judgment re: Payment of Defense Fees and Costs. (CP 1358)

---

<sup>1</sup> The Supreme Court of Appeals of West Virginia issued its opinion in **Mylan** on June 18, 2010. The Westlaw version has not yet been paginated. This brief cites to the slip opinion, which is attached as Appendix A.

2. The trial court erred in entering its Order Denying Plaintiff's Alternative Motion for Summary Judgment re: Payment of Late Notice on August 25, 2009. (CP 1361)

### **III. STATEMENT OF ISSUES ON CROSS-APPEAL**

1. Whether an insurer has an obligation to pay defense costs in the absence of a duty to defend?

2. Whether an insurer that does not have a contractual duty to defend can be liable for defense costs incurred by its insured prior to tender of the uncovered claim?

3. Whether late notice of an uncovered claim is prejudicial as a matter of law, or whether an insurer who has no duty to defend must pay defense costs incurred up to the date the court determines there is no coverage unless it establishes at trial that late tender caused prejudice?

### **IV. RESTATEMENT OF FACTS**

#### **A. Immunex And Other Drug Manufacturers Were Sued For Fraudulent Overstatement of Wholesale Drug Prices.**

The facts are undisputed. Drug manufacturers' "average wholesale price" (AWPs) are intended to be based on the actual wholesale prices paid by health care providers. AWPs are used to determine the rate at which health care providers will be

reimbursed for the drugs. Appellant Immunex allegedly submitted inflated AWP's to several publications that published the claimed AWP's without independent verification. These (inflated) published AWP's were then used to establish the reimbursement rates paid by health care benefit payors, and in some instance the co-payments made by patients insured by the payors. (CP 405-06)

The difference between what Immunex and other drug manufacturers actually charged health care providers and what providers charged the reimbursing benefit payors based on the AWP was known as the "spread." Immunex was not paid based on the AWP or the spread. But the greater the spread, the greater the health care providers' profit, and the greater their incentive to purchase and dispense a manufacturer's drugs. (CP 377-78)

Between 1997 and 2005, Immunex and many other drug manufacturers were named as defendants in at least 23 complaints, filed mostly by states and counties, claiming that the defendant drug manufacturers had fraudulently overstated the AWP's of prescription drugs, thereby increasing the cost of these drugs to plaintiff payors, who reimburse health care providers for the cost of these drugs ("the AWP suits"). (CP 361-62) Most AWP suits were consolidated in *In re Pharmaceutical Industry Average*

**Wholesale Price Litigation**, MDL Case No. 1456, first filed in the federal district court for the district of Massachusetts in December 2001 and on Immunex's motion consolidated as a multi-district class action on April 30, 2002. (CP 80, 361) See **In re Immunex Corp. Average Wholesale Price Litigation**, 201 F.Supp.2d 1378 (Jud. Pan. Mult. Lit. 2002).

The complaints by plaintiff health care benefit payors against Immunex and the other drug manufacturer defendants alleged a variety of claims, including RICO, state unfair trade and protection statutes, civil conspiracy, fraud, and breach of contract. (See, e.g., CP 376, 492, 520-21) None of the AWP complaints alleged "discrimination," and none alleged that Immunex had caused damage by selling drugs at different prices to differently-placed persons or entities. Instead, each complaint sought recovery based solely on fraudulent overstatement of AWP's. (See, e.g., CP 377, 493-94, 523-24, 559, 579)

**B. Immunex Notified National Surety That It Was Being Investigated For Fraud In 2001 And 2003, But Never Tendered Any Claims For Defense.**

On August 27, 2001, Immunex wrote to National Surety providing "notice of potential claims against the Insured" arising out of qui tam false claims complaints being investigated by DHHS,

Florida, Texas, and California. (CP 1047) This letter informed National Surety that subpoenas had been served upon Immunex between October 1997 and September 2000. (CP 1047-48) Even though at least two of the complaints for which reimbursement of defense costs is sought in this lawsuit had been filed by the date of this August 2001 letter, Immunex did not forward any of the pleadings in any of the AWP suits. Nor did Immunex request a defense from National Surety in this letter. (CP 1047-49)

National Surety acknowledged receipt of the letter on October 17, 2001. (CP 1051) National Surety asked Immunex to send copies of suit papers for a coverage analysis, and reserved its rights to respond once it was given a copy of any complaints. (CP 1051)

On June 15, 2002, Immunex merged with and became a wholly-owned subsidiary of Amgen.<sup>2</sup> (CP 1054) On February 14, 2003, eighteen months after National Surety had requested suit papers, Immunex provided a "status report" to National Surety, representing that it had not been served with and had not seen any of the complaints identified in the report. (CP 1054) Immunex did

---

<sup>2</sup> Appellant is referred to as Immunex in this brief.

not forward pleadings in any of the identified proceedings to National Surety, even though at least ten of the AWP suits for which Immunex now seeks reimbursement of defense costs had been filed by the date of this “status report.” (CP 1041-43, 1054-57, 1172) Immunex once again did not request a defense from National Surety. (CP 1054-55)

**C. In October 2006, On The Eve Of Settling Some Of The Claims, Immunex Demanded Reimbursement Of Defense Costs From National Surety.**

More than five years after Immunex first notified National Surety of the qui tam investigations, on October 3, 2006, Amgen tendered defense of the AWP suits to National Surety, under policies in effect between September 1, 2000, and September 1, 2002.<sup>3</sup> (CP 1059) In its October 2006 “tender” letter, Amgen announced that it was close to finalizing a settlement of the California litigation, and identified nine other lawsuits in which Immunex had been sued. The letter concluded: “we expect that [National Surety] will honor all of your duties to Immunex in connection with the underlying litigation, including your duties to pay for reasonable defense expenditures incurred, and to fund

---

<sup>3</sup> In this lawsuit, Immunex now claims coverage under National Surety policies dating back to 1997. (CP 1209)

reasonable settlement, such as that contemplated in *State of California.*" (CP 1059-60) (italics in original)

Immunex still did not provide National Surety with pleadings in any of the ten identified proceedings. Amgen stated that although it expected National Surety to fund the pending California settlement, it would not reveal the settlement terms or amount. (CP 1059)

National Surety responded on October 30, 2006, pointing out that none of the lawsuits had been tendered and asking that any suit papers be submitted for review. (CP 1062-63) Immunex finally forwarded copies of complaints, motions, and orders in some of the cases for which it now seeks reimbursement of defense costs on December 12, 2006, nearly five and a half years after National Surety had first requested them. (CP 1065)

During that entire time, Amgen had been defending Immunex in the AWP litigation, employing counsel of its own choosing at multiple law firms. After this October 2006 correspondence, the parties were involved in lengthy confidentiality negotiations before Amgen would provide information about either the Immunex claims for which it demanded indemnity and

reimbursement of defense costs, or the response of other Immunex insurers to claims for coverage. (See, e.g., CP 606-618)

On March 31, 2008, National Surety denied coverage, but offered to reimburse reasonable defense fees and costs from October 3, 2006, the date of the “tender” letter, subject to its right to recoup these amounts when a court determined that there was no coverage or duty to defend. (CP 1067-75) National Surety’s reservation of rights set out in detail several bases for denying coverage, including the basis the trial court later relied upon in concluding that National Surety had no duty to defend the AWP complaints. (CP 1071)

**D. The Trial Court Confirmed That National Surety Had No Duty to Defend Or Indemnify, But Found That National Surety Would Nevertheless Be Responsible For Defense Costs Unless It Proved Prejudice At Trial.**

National Surety commenced this action for a declaratory judgment in King County Superior Court on March 28, 2008, simultaneously with issuing its reservation of rights. (CP 1-9) Six weeks later, on June 13, 2008, the trial court stayed this action on Immunex’s motion. (CP 1025) Immunex claimed it was “inappropriate” for National Surety to attempt to establish whether it had a duty to defend the belatedly tendered AWP suits, and that

this declaratory judgment action would prejudice Immunex's control of the defense of those underlying lawsuits. (CP 590, 592) On December 16, 2008, the stay was lifted solely to permit the parties to present motions on the issue of National Surety's duty to defend. (CP 1025)

The trial court granted National Surety's motion for summary judgment confirming that it had no duty to defend on April 14, 2009. (CP 1025) The stay was again lifted on June 24, 2009, so that the court could determine whether National Surety was responsible for defense costs, whether National Surety had a duty to indemnify, and whether National Surety was prejudiced as a matter of law by late notice of the AWP suits. (CP 1028)

Despite finding no duty to defend, the trial court found that National Surety had an obligation to pay defense costs until April 14, 2009, the date of the court's determination that National Surety had no duty to defend, unless National Surety could prove at trial that it had been prejudiced by late notice of the AWP claims. (CP 1359) The trial court certified its order as a final judgment pursuant to CR 54(b). (CP 1118-20)

Immunex has appealed the trial court's order finding no duty to defend. National Surety cross-appeals the trial court's

determination that it may be liable for defense costs unless it establishes at trial that it was prejudiced by late notice.

## V. RESPONSE ARGUMENT

### A. **The AWP Complaints Allege Immunex’s Participation In A Fraudulent Scheme To Misstate The Wholesale Price Of Drugs, Not That Immunex Committed An Offense Of Discrimination That Could Be Within National Surety’s Umbrella Coverage For Personal Injury Liability.**

The trial court correctly rejected Immunex’s untimely assertion that National Surety had a duty to defend it against claims for fraudulently overstating its drug prices. The National Surety policies provide two types of coverage—excess (Coverage A) and umbrella (Coverage B). (CP 624) Immunex seeks reimbursement of defense costs under umbrella Coverage B for “personal injury” “arising out of” the “offense” of “discrimination.” (App. Br. 5)

The Insuring Agreement for Coverage B provides:

1. We will pay on behalf of any **Insured** those sums that any **Insured**:
  - a. Becomes legally obligated to pay as damages because of:

\* \* \*

- (2) **Personal Injury or Advertising Injury** that is caused by an offense committed during our Policy Period . . . .

(CP 630) The policies defined “personal injury” as:

**PERSONAL INJURY** under Coverage B, means injury other than **Bodily Injury** caused by one or more of the following offenses:

1. False arrest, detention or imprisonment;
2. Malicious prosecution or abuse of process;
3. Wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that the person occupies by or on behalf of its owner, landlord or lessor;
4. Oral or written publication of material that:
  - a. Slanders or libels a person or organization;
  - b. Disparages a person's or organization's goods, products or services; or
  - c. Violates a person's right of privacy; or
5. *Discrimination (unless insurance thereof is prohibited by law).*

(CP 647) (italics added) An endorsement to the Immunex policy in effect between September 1, 2001, and September 1, 2002, changed the policy to provide coverage for personal injury "caused by an offense arising out of your business but only if the offense was committed during our Policy Period." (CP 652) The endorsement also amended the definition of "personal injury" to mean "injury, including consequential **Bodily Injury**, arising out of one or more of the [specified] offenses, including "discrimination."

(CP 654)

The AWP complaints do not allege a type of differential treatment that amounts to "discrimination" under these policies, and that therefore could trigger National Surety's duty to defend, because "personal injury" "arising out of" the "offense" of "discrimination" does not encompass the allegations of anti-competitive conduct at issue here. Even if "discrimination" could be construed to mean nothing more than differential treatment, the AWP complaints do not trigger National Surety's duty to defend because they do not allege differential treatment between providers and payors, among payors, or against any protected class.

**1. Each Of The AWP Complaints Allege A Scheme To Fraudulently Overstate Prices, Not Price Discrimination.**

Insurance policies must be construed as a whole, giving effect to every policy provision. *Allstate Ins. Co. v. Peasley*, 131 Wn.2d 420, 424, 932 P.2d 1244 (1997); *McDonald v. State Farm Fire and Cas. Co.*, 119 Wn.2d 724, 734, 837 P.2d 1000 (1992); *Certain Underwriters at Lloyd's, London v. Valiant Ins. Co.*, 155 Wn. App. 469, 476, ¶18, 229 P.3d 930 (2010). "The insurance contract must be viewed in its entirety; a phrase cannot be interpreted in isolation." *Peasley*, 131 Wn.2d at 424. Immunex

focuses solely on the term “discrimination,” ignoring the language of the National Surety policies that provides coverage only for “personal injury” arising from the offense of discrimination.

In the context of personal injury coverage, the term “discrimination” does not extend to “broad-based economic practices which injure markets through the improper elimination of competition accomplished by purposeful manipulation of goods and services . . . .” ***Mylan Laboratories Inc. v. American Motorists Ins. Co.***, \_\_\_ S.E.2d \_\_\_, 2010 WL 2484784 (W.Va. 2010) (Appendix A 20); ***USX Corp. v. Adriatic Insurance Co.***, 99 F.Supp.2d 593, 625 (W.D. Pa. 2000), *aff’d*, 345 F.3d 190 (3<sup>rd</sup> Cir. 2003), *cert denied*, 541 U.S. 903 (2004). Instead, when read in context with the other types of offenses that may cause “personal injury,” “discrimination” necessarily refers to discrimination against individuals on such bases as gender, religion, and age. ***USX***, 99 F.Supp.2d at 624-25.

In ***Mylan***, the West Virginia Supreme Court ruled as a matter of law that an umbrella policy providing coverage for discrimination identical to that at issue here did not trigger the insurer’s duty to defend AWP suits. The policy at issue in ***Mylan*** afforded coverage for any suit alleging “personal injury,” which was defined to include

“injury, other than **bodily injury**, arising out of one or more of the following offenses . . . .” The listed offenses included “discrimination (unless insurance thereof is prohibited by law).” 2010 WL 2484784 at \_\_ (Appendix A 16).

As Immunex does here, Mylan argued that because the AWP complaints alleged that Mylan’s manipulation of the average wholesale price of its drugs resulted in price differentials among providers, the complaints alleged discrimination sufficient to trigger the insurer’s duty to defend. The West Virginia courts rejected this argument and held that the term “discrimination” “refers to the standard types of discrimination (e.g., race, handicap) and not, as asserted by Mylan, ‘any form of discrimination within the field of commerce,’ which is the definition of ‘economic discrimination.’” *Mylan*, 2010 WL 2484784 at \_\_ (Appendix A 16).

The duty to defend arises only when a complaint against the insured, construed liberally, alleges facts that could, if proved true, impose liability on the insured within the policy’s coverage. *Truck Ins. Exch. v. VanPort Homes, Inc.*, 147 Wn.2d 751, 760, 58 P.3d 276 (2002). When the claims alleged in the underlying complaint clearly are not covered under the terms of the policy, the insurer has no duty to defend. *Kirk v. Mt. Airy Ins. Co.*, 134 Wn.2d 558,

561, 951 P.2d 1124 (1998). Here, the allegations in the AWP complaints, even if proved true, would not trigger coverage under the National Surety policies because none of the complaints seeks damages for personal injury arising out of the offense of discrimination. Instead, as explained below, each of the complaints allege damages from Immunex's alleged participation in a scheme to fraudulently overstate AWP's:

**Kentucky** (App. Br. 9)

The Commonwealth of Kentucky asserted claims against Immunex for (1) violation of the state Medicaid fraud statute, (2) violation of the state false advertising statute, (3) violation of the state Consumer Protection Act, (4) common law fraud, and (4) negligent misrepresentation. (CP 808-14, ¶¶ 80-113) The allegations cited by Immunex establish that the Commonwealth is seeking damages because of "false and inflated" prices, and not because of discrimination. (App Br. 9, *quoting* CP 928, ¶ 73; CP 929-30, ¶ 79) Other allegations in the complaint confirm this fact:

- "[D]efendants have taken advantage of the enormously complicated and non-transparent market for prescription drugs to engage in an unlawful scheme to cause the Commonwealth of Kentucky and its citizens to pay inflated prices for prescription drugs." (CP 802, ¶ 1)

- “Since at least 1992, defendants have published false and inflated AWP’s for virtually all of their drugs.” (CP 804, ¶ 49)
- “All of the defendants have inflated their reported average wholesale prices to levels far beyond any real average wholesale price of their drugs and their subsidiaries’ drugs.” (CP 804, ¶ 52)

**Arizona** (App. Br. 10)

The State of Arizona asserted claims against Immunex for consumer fraud and racketeering. (CP 819-24, ¶¶ 569-85) The allegations cited by Immunex establish that the State is seeking damages because of the defendants’ “fraudulent and illegal manipulation of the AWP’s.” (App. Br. 10, *quoting* CP 935, ¶ 16) Other allegations in the complaint confirm that the claims originated in fraud, not discrimination:

- Defendants “have engaged in a scheme involving the fraudulent reporting of fictitious AWP’s for certain prescription pharmaceuticals, including but not limited to prescription pharmaceuticals covered by Medicare and Medicaid.” (CP 817, ¶ 6)
- Defendants “report to trade publications a drug price—the Average Wholesale Price (or ‘AWP’)—that for certain drugs is deliberately set far above the prices that these drugs are available in the marketplace.” (CP 817, ¶ 8)
- “AWP’s for the drugs at issue here bore little relationship to the drugs’ pricing in the marketplace. They were simply fabricated and overstated in furtherance of Defendants’ scheme to generate the profit spread to providers, PBMs and others and to increase Defendants’

profits at the expense of co-payors and payors.” (CP 818, ¶ 129)

**Illinois** (App. Br. 11)

The State of Illinois asserted claims against Immunex for (1) violation of the state Consumer Fraud and Deceptive Business Practices Act, (2) violation of the state Public Assistance Fraud Act, and (3) violation of the state Whistleblower Reward and Protection Act. (CP 830-34, ¶¶ 81-96) The allegations cited by Immunex establish that the State’s claims are based upon the defendants’ publication of “false and inflated wholesale prices.” (App. Br. 11, *quoting* CP 942, ¶ 73) Other allegations in the complaint confirm this fact:

- “[D]efendants have taken advantage of the enormously complicated and non-transparent market for prescription drugs to engage in an unlawful scheme to cause the State of Illinois and its citizens to pay inflated prices for prescription drugs.” (CP 827, ¶ 2)
- “All of the defendants have inflated their reported average wholesale prices to levels far beyond any real average wholesale price for their drugs.” (CP 828, ¶ 52)
- “Defendants have continuously concealed the true price of their drugs and continued to publish deceptive AWP’s and WACs [wholesale acquisition costs] as if the prices were real, representative prices.” (CP 829, ¶ 66)

**Mississippi** (App. Br. 11)

The State of Mississippi asserted claims against Immunex and others for (1) state Medicaid fraud, (2) deceptive trade practices, (3) false advertising, (4) crimes against sovereignty, (5) mail fraud, (6) restraint of trade, (7) common law fraud, and (8) unjust enrichment. (CP 841-47, ¶¶ 170-200) The allegations cited by Immunex establish that the State is seeking damages arising out of defendants' "fraudulent pricing and marketing of their prescription drugs." (App. Br. 11-12, *quoting* CP 945, ¶ 5) Other allegations in the complaint confirm the nature of the State's claims:

- "Defendants have taken advantage of the enormously complicated and non-transparent market for prescription drugs by engaging in an unlawful scheme to cause the State of Mississippi to pay inflated prices for prescription drugs." (CP 837-38, ¶ 5)
- "Defendants knowingly, willfully, and/or intentionally provided or caused to be provided false and extraordinarily inflated AWP's . . . ." (CP 839, ¶ 108)
- "Each of the Defendants intentionally and purposefully created and widened the 'spread' on their products by decreasing the actual acquisition cost and increasing the AWP of their products." (CP 840, ¶ 117)

**MDL Complaints**

Most of the AWP cases have been consolidated in *In re Pharmaceutical Industry Average Wholesale Price Litigation*,

MDL Case No. 1456, in federal court in the District of Massachusetts. Although not cited by Immunex, the complaint in that case also sets out the true nature of the claims against Immunex and the other drug manufacturer defendants:

- Defendants “have conspired with others in the pharmaceutical distribution chain, including physicians, hospitals, . . . pharmacy benefit managers, . . . and various publishing entities, to collect inflated prescription drug payments from Plaintiffs . . .” (CP 377, ¶ 2)
- The AWP’s reported by defendants “are deliberately false and fictitious and created solely to cause Plaintiffs and the Class members to overpay for drugs.” (CP 377, ¶ 3)
- The AWP’s “bore little relationship to the drugs’ pricing in the marketplace. They were simply fabricated and overstated in furtherance of Defendants’ scheme to generate the profit spread. . . .” (CP 406, ¶ 151)
- Defendants’ “pattern of fraudulent conduct in artificially inflating the AWP’s for their drugs” caused plaintiffs “to substantially overpay for those drugs.” (CP 406, ¶ 153)
- “By intentionally and artificially inflating the AWP’s, and by subsequently failing to disclose such practices to the individual patients, health plans and their insurers, the Defendant Drug Manufacturers engaged in a fraudulent and unlawful course of conduct constituting a pattern of racketeering activity.” (CP 446, ¶ 535)
- “[E]ach defendant has intentionally and repeatedly used deception, fraud, false pretense, false promise, misrepresentation, and/or concealment, suppression or omission of material facts in connection with the sale or advertisement” of its drugs. (CP 465, ¶ 592)

The MDL complaint also includes the following allegations specifically against Immunex:

- “Immunex engages in an organization-wide and deliberate scheme to inflate AWP’s.” (CP 424, ¶ 405)
- “Immunex has stated fraudulent AWP’s for all or almost all of its drugs . . . .” (CP 424, ¶ 405)
- “Immunex’s scheme to inflate its reported AWP’s and market the resulting spread to increase the market share of its drugs has resulted in excessive overpayments by Plaintiffs and the Class.” (CP 428, ¶ 417)

As a matter of law, none of the injuries alleged by any of the AWP complaints fall within the scope of coverage afforded under National Surety’s personal injury coverage for the offense of discrimination.

**2. Personal Injury Coverage For The Offense Of Discrimination Does Not Encompass Anticompetitive Behavior That Results In Differential Treatment.**

Immunex’s argument that “discrimination” includes any type of differential treatment would extend CGL “personal injury” coverage to any and all anticompetitive behavior. For instance, a company that adopts predatory pricing to force a competitor out of business engages in differential treatment, as does one that engages in a concerted refusal to deal with a supplier in order to obtain a vertical monopoly. But personal injury coverage does not

encompass anticompetitive behavior that *results* in, rather than *arises* from, differential treatment. Both the *Mylan* and *USX* courts correctly distinguished *Federal Ins. Co. v. Stroh Brewing Co.*, 127 F.3d 563 (7<sup>th</sup> Cir. 1997), the case principally relied on by Immunex below (CP 17), on precisely this ground. *Mylan*, 2010 WL 2484784 at \_\_\_ (App. A 17-18); *USX*, 99 F.Supp.2d at 624.

In *USX*, the insured, a railroad, tendered defense of actions filed against it by steel, dock, and trucking companies, contending the underlying complaints alleging claims of broad-based price discrimination prohibited by antitrust law were included within the policies' definition of "personal injury." *USX*, 99 F.Supp.2d at 623. The *USX* court noted that while the insured did, in fact, "discriminate" against some entities, the basis of liability was that the insured "knowingly and intentionally engaged with others in an illegal conspiracy." *USX*, 99 F.Supp.2d. at 627. Distinguishing *Stroh Brewery*, the district court held that "charging one person more than another for the same product" cannot be encompassed within any definition of "personal injury:"

The term ["discrimination"] is preceded by "false arrest, false imprisonment, wrongful eviction, detention [and] malicious prosecution" and is followed by "humiliation [and] libel, slander or defamation of character or invasion of rights of privacy, except that

which arises out of any advertising activities.” The terms preceding the phrase identify offenses against the individual for wrongful deprivation of liberty or interference with the right to peaceful possession of property and those that follow it identify common offenses which injure the character or reputation of an individual. . . .

[T]o suggest that hiding among these causes of harm to the person included in personal injury coverage is a form of discrimination which encompasses broad-based economic practices which injure markets through the improper elimination of competition accomplished by purposeful manipulation of goods and services reflects a highly implausible definition or meaning of that term.

**USX**, 99 F.Supp.2d at 624-25.

In **Stroh**, a Seventh Circuit panel held, 2-1, that an umbrella business liability policy that provided coverage for “discrimination” obligated the insurer to defend a lawsuit brought by a small beer wholesaler alleging that the insured brewery’s price structure discriminated against it in favor of larger wholesalers. Plaintiff “repeatedly alleged discrimination in its complaint” and the relevant Indiana statute prohibited “discrimination.” **Stroh**, 127 F.3d at 566. The Seventh Circuit majority rejected the insurer’s argument that “price discrimination” was a “term of art” not included within the policy’s coverage. **Stroh**, 127 F.3d at 567.

Here, by contrast, the AWP complaints do not allege that Immunex charged different prices to different classes of customers, but that its fraudulent statements to publishers allowed health care providers to do so. This conduct can in no sense constitute “discrimination” that caused “personal injury” under any definition of the term in the National Surety policies. There is nothing ambiguous about this coverage. A policy provision is ambiguous only if it is fairly susceptible to two different interpretations, each of which is reasonable. **Quadrant Corp. v. American States Ins. Co.**, 154 Wn.2d 165, 171, ¶¶11, 110 P.3d 733 (2005). In determining whether a provision is ambiguous, the court must look to the entire contract and give effect to every clause, **Heringlake v. State Farm Fire and Cas. Co., Inc.**, 74 Wn. App. 179, 185, 872 P.2d 539, *rev. denied*, 125 Wn.2d 1003 (1994), and an interpretation that fails to do so is not reasonable. **McDonald**, 119 Wn.2d at 734. Because Immunex’s interpretation of the term “discrimination” disregards pertinent policy language, it is unreasonable and cannot be adopted by the court to extend a duty to defend the AWP suits under the policies.

Even were the definition of discrimination sufficiently broad to encompass “any form of discrimination within the field of

commerce,” none of the AWP complaints allege that Immunex directly charged different prices to different classes of purchasers. Immunex asserts the AWP complaints allege two types of discrimination: (1) between health care benefit payors and health care providers; and (2) among providers. (App. Br. 28) But none of the complaints alleges that Immunex directly charged different prices to payors than it charged to providers. Immunex sold its products one time – to providers. The providers, in turn, sold the drugs to payors, charging a price based on the AWP. Immunex allegedly *reported* the AWP to publishers, but it did not *sell* drugs to payors based upon the AWP. The fact that Immunex’s fraudulent pricing scheme resulted in differential treatment among payors does not establish “discrimination” under any definition of the term.

Immunex contends that it is irrelevant that no complaint can be construed to allege that it treated payors and providers differently because those groups paid different prices for Immunex’s drugs as a result of Immunex’s conduct. (App. Br. 29) That payors and providers paid different prices is unremarkable, and not wrongful. Consumers ordinarily pay more for a product than do retailers; a price markup enables retailers to make a profit and stay in business, and there is no law prohibiting consumers

from paying a different (and presumably higher) price than retailers. See, e.g., **Morris Electronics of Syracuse, Inc. v. Mattel, Inc.**, 595 F.Supp. 56, 59 (N.D.N.Y. 1984) (recognizing that Clayton Act does not “mandate proportional equality between wholesale and retail customers”) (citing **F.T.C. v. Fred Meyer, Inc.**, 390 U.S. 341, 348-49, 88 S.Ct. 904, 19 L. Ed. 2d 1222 (1968)). Nor does any complaint allege that the drug manufacturer defendants acted wrongfully by selling wholesale at prices less than retail or by offering discounts to wholesalers.

Similarly, the fact that some providers may have paid more than other providers also is not wrongful in and of itself. “[A] seller may charge whatever the buyer will pay, and . . . the seller may charge different buyers different prices.” **Des Moines Area Dairy Queen Store Operators & Owners, Inc. v. Wapello Dairies, Inc.**, 226 N.W.2d 9, 12-13 (Iowa 1975); see also **Scott Pub. Co. v. Columbia Basin Publishers, Inc.**, 293 F.2d 15, 24 (9<sup>th</sup> Cir. 1961) (fact that defendant charged different prices to different advertisers does not establish illegal price discrimination), *cert. denied*, 368 U.S. 940 (1961). Price discrimination is illegal only when the effect of that discrimination “may be substantially to lessen competition or tend to create a monopoly.” Robinson Patman Act, 15 U.S.C. § 13.

The AWP complaints thus cannot be construed to trigger a duty to defend claims alleging the offense of discrimination even were the court to define the term to include more than “personal injury,” but also antitrust injury under a claim of price discrimination.

**3. The AWP Complaints Do Not Allege Discrimination Under The Wholly-Statutory Theory of Disparate Impact.**

Finally, none of the complaints can be read to seek recovery for age discrimination based upon a theory that Immunex’s fraudulent scheme had a “disparate impact” on the elderly. (App. Br. 28)<sup>4</sup> Age discrimination claims based upon disparate impact rather than disparate treatment are wholly statutory. See ***E-Z Loader Boat Trailers, Inc. v. Travelers Indem. Co.***, 106 Wn.2d 901, 909-10, 726 P.2d 439 (1986) (Washington Law Against Discrimination, RCW ch. 49.60); ***Rose v. Wells Fargo & Co.***, 902 F.2d 1417, 1424 (9th Cir. 1990) (Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*); ***Shiplot v. Veneman***, 620 F.Supp.2d

---

<sup>4</sup> The AWP complaints cannot trigger National Surety’s duty to defend any allegations of age discrimination for the additional reason that age discrimination claims would be within the coverage of primary policies available to Immunex, and thus would fall within excess Coverage A of the National Surety policies, not umbrella Coverage B. National Surety owed no duty to defend Immunex from claims falling within Coverage A. Immunex argues exclusively that the claims fall within Coverage B. (See CP 606)

1203, 1223-24 (D. Mont. 2009) (Equal Credit Opportunity Act, 15 U.S.C. § 1691(a)(1), *aff'd*, 2010 WL 2354155 (9<sup>th</sup> Cir. 2010); see also ***Browning v. Rohm & Haas Tennessee, Inc.***, 16 F.Supp.2d 896, 912 (E.D. Tenn. 1998), *aff'd*, 194 F.3d 1311 (6<sup>th</sup> Cir. 1999), *cert. denied*, 530 U.S. 1243 (2000). None of the allegations in the AWP complaints assert the violation of any statute prohibiting age discrimination.

**B. The Damages Alleged In The AWP Complaints Do Not Arise Out Of The Offense Of Discrimination.**

The AWP suits claim damages caused by an illegal conspiracy to fraudulently misstate the average wholesale price of drugs. The damages claimed by the AWP plaintiffs also do not “arise out of” claimed wrongful acts of discrimination and thus are not covered by the National Surety policies.

An endorsement to the 2001-02 policy defines “personal injury” to include injury “arising out of” one or more specified offenses. The earlier policies defined “personal injury” as injury “caused by” one or more of the listed offenses. Immunex’s contention that this change excuses it from establishing that the personal injury alleged by the AWP claimants originated from a discriminatory act or practice is without merit. Plaintiffs’ claimed

injuries did not “arise out of” discrimination between payors and providers, or among various providers, or against the elderly.

**1. “Arising Out Of” Means Originating From, Not Resulting In, Discrimination.**

Amgen’s claim that “arising out of” “requires only a loose causal connection” disregards the language of the cases it relies on. (App. Br. 27) It is true that the three Washington cases Immunex cites to explain what the phrase “arising out of” does *not* mean state that “arising out of” has a broader meaning than “caused by” or “resulted from,” and does not mean “proximately caused by.” *Australia Unlimited, Inc. v. Hartford Cas. Ins. Co.*, 147 Wn. App. 758, 774, ¶ 34, 198 P.3d 514 (2008); *Toll Bridge Authority v. Aetna Ins. Co.*, 54 Wn. App. 400, 404, 773 P.2d 906 (1989); *Avemco Ins. Co. v. Mock*, 44 Wn. App. 327, 329, 721 P.2d 34 (1986) (all cited at App. Br. 27). These same cases make clear, however, that “arising out of” *does* mean “originating from,” “having its origin in,” “growing out of,” or “flowing from.” *Mock*, 44 Wn. App. at 327.

In *Australia Unlimited*, for example, the court held that allegations the insured copied the plaintiff’s trade dress with the intent to trade on the plaintiff’s goodwill “sought damages

originating from, growing out of, or flowing from [the insured's] advertising activities.” 147 Wn. App. at 774, ¶ 35. In **Toll Bridge Authority**, an accident occurring while a ferry was being unloaded “‘originated from’, ‘grew out of’, or ‘flowed from’ use or operation of the [ferry].” 54 Wn. App. at 404-05. And in **Mock**, a policy that excluded coverage for an accident “arising out of . . . starting an engine of *your insured aircraft* unless a pilot or mechanic is seated at the controls” did not cover an accident caused when the insured’s aircraft unexpectedly moved after he started his aircraft while no pilot or mechanic was at the controls even though the insured was able to enter the cockpit before it collided with another plane: “The collision certainly flowed from the manner of starting the engine.” 44 Wn. App. at 329.

In this case, however, none of the injuries alleged by the plaintiff payors conceivably originated from, grew out of, or flowed from any type of discrimination:

**2. The AWP Plaintiffs’ Injuries Did Not Arise Out Of Discrimination Between Payors And Providers.**

The plaintiffs are not complaining because payors paid more than providers, nor are they seeking damages based on this price differential. Instead, the injuries claimed by plaintiffs “arise out of”

the AWP scheme, in which Immunex and the other defendants are alleged to have fraudulently overstated the prices of their drugs.

Two of the complaints allege that payors paid a higher price than providers because providers allegedly received discounts and rebates that payors did not. (App. Br. 28, *citing* CP 933, ¶¶ 9, 10; CP 945, ¶ 5) But plaintiff payors claim not that they were entitled to the same rebates and discounts available to providers, but that the AWP's were overstated because Immunex allegedly *failed to disclose* these rebates and discounts. As the allegation cited by Immunex explains: "Those discounts are not used by the Defendant Drug Manufacturers in calculating the published AWP's, resulting in their inflation." (CP 933, ¶ 9; *see also* CP 948, ¶ 126: "some of the Defendants have hidden their real drug prices by providing incentives, such as free drugs, grants and gifts to providers as a means of reducing the overall price of their drugs while not accounting for these incentives when reporting the AWP's of their drugs.")

Nor can the remaining allegations cited by Immunex be read to allege injury originating from the fact that payors and providers did not pay the same price for drugs. Instead, those allegations assert that Immunex and the other defendants falsely inflated the

AWPs. (See CP 926, ¶ 49: “defendants have published false and inflated AWP’s for virtually all of their drugs;” CP 926, ¶ 52: “defendants have inflated their reported average wholesale prices to levels far beyond any real average wholesale price of their drugs;” CP 928, ¶ 73: defendants published or caused to be published “false and inflated wholesale prices;” CP 928, ¶ 74: “Kentucky’s Medicaid program has paid more for prescription drugs than it would have paid if defendants had published the prices they were receiving in the market place for their drugs.”)

**3. The AWP Plaintiffs’ Injuries Did Not Arise Out Of Discrimination Among Providers.**

Two of the AWP complaints cited in the opening brief allege that the defendants charged different prices to different providers. (App. Br. 9, 10-11, 29-30, *citing* CP 927, ¶ 62; CP 941, ¶ 62) While this price differential is one of many “marketing schemes” that allegedly helped defendants *conceal* their wrongdoing, the AWP plaintiffs do not allege that their injuries *originated from* the fact that different providers may have paid different prices. (See CP 805-07, ¶¶ 59-63; CP 940-41, ¶¶ 59-63 (describing defendants’ “affirmative concealment of their wrongdoing”))

#### 4. The Plaintiffs' Injuries Did Not Arise Out Of Discrimination Against The Elderly.

A single complaint alleges that the defendants' AWP fraud scheme "disproportionately burdens" elderly Medicare recipients. (App. Br. 10, *quoting* CP 935, ¶ 16) A second complaint notes that Medicare participants, "who are primarily elderly and disabled citizens, have had to pay higher co-pays for their prescriptions than if defendants had truthfully reported the wholesale prices of their drugs." (App. Br. 11, *quoting* CP 943, ¶ 80)

The fact that one group of people may have been affected more does not mean that the injuries alleged by the AWP plaintiffs "originated from" discrimination. Instead, the injuries allegedly sustained by Medicare recipients, like those allegedly sustained by each and every other payor, originated from defendants' claimed overstatement of the AWPs, *resulted in* a disproportionate burden on the elderly. *Cf. Cooper v. IBM Personal Pension Plan*, 457 F.3d 636, 642 (7<sup>th</sup> Cir. 2006) (rejecting claim of age discrimination in manner of pension funding: "Here, as so often, it is essential to separate age *discrimination* from other characteristics that may be correlated with age.") (emphasis in original). The injuries are not alleged to have originated in, grown out of, or flowed from the

difference in the payors' age (i.e., the "discrimination"), but as a consequence of the defendants' alleged fraud. The causal connection, no matter how "loose," goes the wrong direction.

This court should affirm the trial court's order that National Surety owed Immunex no duty to defend under its policies' personal injury coverage for discrimination because not only do none of the AWP complaints allege discrimination, but none of the allegations of the AWP complaints arise out of claimed differential treatment.

## **VI. ARGUMENT IN SUPPORT OF CROSS-APPEAL**

### **A. There Can Be No Obligation To Pay Defense Costs In The Absence of A Duty To Defend.**

Absent a duty to defend, an insurer has no obligation to pay defense costs. Here, National Surety cannot be liable for defense costs incurred by its insured because there is no duty to indemnify or defend the claims against Immunex. The trial court erred in finding that National Surety could be liable for defense costs incurred prior to the court's confirmation there was no coverage unless it can prove prejudice from late notice at trial.

National Surety had "the right and duty to . . . defend any **Insured** against any **Suit**, seeking damages . . . to which Coverage

B applies.” (CP 1094-95) National Surety has no other obligation to defend Immunex under the terms of the insurance contract. Once the trial court correctly determined that Coverage B did not apply to the claims asserted in the AWP complaints, it erred in creating an obligation for National Surety to reimburse defense costs that does not exist under the express terms of the policy.

There is no support in Washington law for the trial court’s conclusion that National Surety may be liable to reimburse defense costs even though it owed Immunex no contractual duty to defend. Once an insured provides notice and tenders a claim to its insurer, Washington law provides strong incentives for the insurer to provide a defense, even though it may question whether the claim falls within the terms of its policy. Because a defense is “one of the principal benefits of the insurance policy,” the insurer is encouraged to defend under a reservation of rights and promptly seek a declaratory judgment that it has no duty to defend, just as National Surety did here. *Woo v. Fireman’s Fund Ins. Co.*, 161 Wn.2d 43, 54, 164 P.3d 454 (2007).

If the insurer has a duty to defend, the insurer will be required to reimburse its insured for the reasonable defense costs that the insured was forced to incur on its own. See *Griffin v.*

**Allstate Ins. Co.**, 108 Wn. App. 133, 138-39, 29 P.3d 777, 36 P.3d 552 (2001), *rev. denied*, 146 Wn.2d 1005 (2002). In **Griffin**, this court held that the insurer “wrongly refused the Griffins’ tender of defense, thereby breaching the policy.” 108 Wn. App. at 138. In order to put its insured “in as good a position as he or she would have been in had the contract not been breached,” the court held that “[w]here an insurer’s breach is the failure to defend, damages may include the amount of expenses, including reasonable attorney fees the insured incurred defending the underlying action.” 108 Wn. App. at 138-39 (quotation omitted). See also **Truck Ins. Exchange v. VanPort Homes**, 147 Wn.2d 751, 761, 58 P.3d 276 (2002) (“Once the duty to defend attaches, insurers may not desert policyholders and allow them to incur substantial legal costs while waiting for an indemnity determination.”) (emphasis added).

But there is no basis in law or policy to require an insurer to reimburse its insured for defense costs where, as here, the insurer properly reserves its rights, files a declaratory judgment action, and a court determines as a matter of law that no duty to defend exists. An insurer cannot be required to pay defense costs it has no contractual obligation to pay. See **Scottsdale Ins. Co. v. MV Transp.**, 36 Cal.4th 643, 31 Cal.Rptr.3d 147, 154, 115 P.3d 460,

466 (2005) (“The insurer has not contracted to pay defense costs for claims that are not even potentially covered.”) (quotation omitted). If the insurer in good faith protects its insured’s interests by offering to pay defense costs under a reservation of rights until the coverage dispute is resolved, as National Surety did here, such conduct cannot change the terms of the insurance contract. The insured is not entitled to receive that which the insurer did not contract to provide and the insured did not pay premiums to receive. Yet that is precisely what Immunex demands here.

Imposing an obligation to reimburse the insured for defense costs in the absence of a duty to defend undermines the reciprocal duty of good faith imposed upon both insureds and insurers under Washington law. RCW 48.01.030. For instance, it would discourage an insured from promptly notifying and tendering the defense of claims to its insurer, and undermine the ability of an insurer to obtain a prompt resolution of the issue of coverage by filing a declaratory judgment action, contrary to *Mutual of Enumclaw Ins. Co. v. USF Ins. Co.*, 164 Wn.2d 411, 420-22, 191 P.3d 866 (2008), *Woo*, 161 Wn.2d at 54, and *VanPort*, 147 Wn.2d at 761.

There is no authority, anywhere, for the proposition that an insurer that does not have a contractual duty to defend can nevertheless be obligated to reimburse defense costs if it has not refused a tender of defense. In fact, most courts have held that the policy of encouraging an insurer to promptly provide a defense justifies giving an insurer who has defended under a reservation of rights an affirmative right to *recoup* defense costs from an insured, even in the absence of express contractual language. See, e.g., ***Buss v. Superior Court***, 16 Cal.4th 35, 65 Cal.Rptr.2d 366, 378, 939 P.2d 766, 778 (1997) (without a right of reimbursement, an insurer might be tempted to refuse to defend an action.) See generally 16 COUCH ON INSURANCE 3d § 226:123 (2005).

There is a split of authority regarding the circumstances under which an insurer may recoup defense costs, with some courts allowing reimbursement only where the policy expressly provides that right, others where there has been a judicial determination that there is no duty to defend, and others where there is a determination of no coverage, even though the insurer did initially have a duty to defend until that determination was made. Couch, § 226.123. See also, Marick, *An Insurer's Right to Recoup Non-Covered Defense Costs and Indemnity Payments*,

NEW APPLEMAN ON INSURANCE: CURRENT CRITICAL ISSUES IN INSURANCE LAW (July 2007) (collecting cases). This case, however, does not require the court to decide the circumstances under which an insured has an obligation to reimburse, and the insurer has the right to recoup, defense costs for an uncovered claim. Here, Immunex sought and the trial court imposed an unprecedented affirmative right by an insured to require an insurer to pay defense costs that the insured incurred in defending a lawsuit that its insurer not only had no legal obligation to defend, but of which it had for years no notice of its insured's claim it was obligated to defend.

An insurer's "duty to reimburse [defense costs] arises from an initial duty to defend." *Memorial Med. Ctr. v. Howard*, 975 S.W.2d 691, 693 (Tex.App. 1998). No court has required an insurer to reimburse its insured for defense costs in the absence of a duty to defend. The trial court erred in refusing to grant a declaratory judgment that National Surety had no affirmative obligation to reimburse Immunex for the defense of the AWP lawsuits.

**B. An Insurer That Owes No Duty To Defend Cannot Be Liable For Defense Costs Incurred By Its Insured Prior To Tender.**

At a minimum, National Surety cannot be liable for the defense costs incurred prior to tender of some of the AWP suits in October 2006. Regardless whether National Surety may have an obligation to pay defense costs between Immunex's October 2006 tender and April 2009, when the trial court entered its declaratory judgment that National Surety had no duty to defend Immunex, no authority supports an insurer's obligation to pay defense costs prior to tender where, as here, there is no contractual duty to defend.

Immunex was obligated to provide prompt notice of a claim as an express condition of National Surety's obligation to provide a defense:

**F. DUTIES OF INSUREDS IN THE EVENT OF OCCURRENCE, CLAIM OR SUIT**

You must see to it that:

1. We are notified as soon as practicable:
  - a. Of any **Occurrence** which may result in a claim under this policy when the **Occurrence** is known to you . . . and
  - b. If a claim is made or **Suit** is brought against any **Insured**.

(CP 1103) In addition to requiring notice as a condition to National Surety's contractual duty to defend, the policy also imposed an obligation on Immunex to refrain from incurring "any expense, except first aid," to "assume no obligation" without the permission of the insurer, and to "cooperate with [the insurer] in . . . defense of any **Insured** against any **Suit**:

You must see to it that:

2. **Insureds:**

a. Cooperate with us in the investigation or settlement of any claim; or defense of any **Insured** against any **Suit**; . . .

d. Incur no expense, other than first aid; and

e. Assume no obligation;

without our consent.

(CP1103)

Even where the tendered claims fall within the scope of the policy, an insurer's contractual duty to defend cannot arise until it is asked to defend. See *USF*, 164 Wn.2d at 421 ("the duties to defend and indemnify do not become *legal obligations* until a claim for defense or indemnity is tendered.") (emphasis in original); *Unigard Ins. Co. v. Leven*, 97 Wn. App. 417, 426-27, 983 P.2d

1155 (1999) (“an insurer’s duty to defend does not arise unless the insured specifically asks the insurer to undertake the defense of the action.”), *rev. denied*, 140 Wn.2d 1009 (2000), *citing Time Oil Co. v. Cigna Property & Cas. Ins. Co.*, 743 F.Supp. 1400 (W.D. Wash. 1990).

In *Leven*, this court rejected the insured’s argument that because the carrier “had actual notice of the underlying claims, specific tender was not necessary,” *Leven*, 97 Wn. App. at 426, because:

[A]n insurer cannot be expected to anticipate when or if an insured will make a claim for coverage; the insured must affirmatively inform the insurer that its participation is desired.

*Leven*, 97 Wn. App. at 427. While an insurer that is ultimately held responsible for its insured’s defense within the policy may be “liable for fees and costs incurred before the insured tenders defense of a *covered* claim,” *Griffin*, 108 Wn. App. at 136 (emphasis added), no authority supports such liability for *uncovered* claims.

In *Griffin*, this court held that an insurer who had breached the duty to defend may be liable for fees and costs pre-dating the insured’s tender of the defense of a *covered* claim to its insurer. 108 Wn. App at 134. But *Griffin* was decided before the Supreme

Court's decisions that made clear that an insurer may defend under a reservation of rights while seeking declaratory judgment whether the tendered claim is covered. **VanPort**, 147 Wn.2d at 761; **Woo**, 161 Wn.2d at 54.

In **Griffin**, unlike here, the insurer had neither offered a defense under a reservation of rights nor sought a determination that it had no obligation to defend under its policy. Most importantly, the insurer did not challenge the determination that it had breached its duty to defend. This court held that because the duty to defend arises upon the filing of a complaint, the insurer was liable for pre-tender defense costs unless it could establish prejudice from its insured's breach of its contractual obligation to provide timely notice. **Griffin**, 108 Wn. App. at 141.

That is very different from the situation here, where the trial court held that National Surety may be liable for defense costs even in the absence of a duty to defend and even though National Surety offered to pay defense costs after tender under a reservation of rights. Here, Immunex defended and controlled the defense of the AWP litigation for over five years before tender, never accepted a defense from its insurer, and now seeks reimbursement of fees incurred in that pre-tender defense in the context of a declaratory

judgment proceeding confirming that National Surety had no duty to defend.

Our Supreme Court likewise considered a CGL insurer's wrongful refusal to defend negligence claims its insured had tendered shortly after they were brought in **VanPort**. The insurer waited almost four years before filing a declaratory judgment action. The insured's principals went bankrupt after incurring the burden of defending the insured. In noting that "[a]n insurer may be responsible for defense costs prior to tender," 147 Wn.2d at 760 n.5, the **VanPort** majority pointed out that the insurer could "defend under a reservation of rights while seeking a declaratory judgment that it had no duty to defend." 147 Wn.2d at 761. The **VanPort** Court confirmed, however, that where "that course of action is taken, the insured receives the defense promised and, if coverage is found not to exist, *the insurer will not be obligated to pay.*" 147 Wn.2d at 761, quoting **Kirk v. Mt. Airy Ins. Co.**, 134 Wn.2d 558, 563 n. 3, 951 P.2d 1124 (1990) (emphasis added).

The **VanPort** Court made these statements in a case where the insurer had breached its contractual duty to defend, and the issue in **Kirk** was the insurer's duty to indemnify in light of its bad faith in breaching the duty to defend. In the instant case, however,

National Surety took the correct course of action by offering Immunex a defense as soon as the claims were tendered and Immunex gave it suit papers sufficient to make a coverage determination, while properly reserving its right to contest whether those claims fell within its policy's coverage for discrimination, all as contemplated by both *VanPort* and *Woo*. National Surety then promptly sought a declaratory judgment, in which the trial court correctly held that it had no duty to defend. No authority supports requiring the insurer to reimburse its insured for pre-tender defense costs under these circumstances.

**C. Prejudice To The Insurer Is Established As A Matter Of Law When An Insured Delays Tender Of A Claim For Years After Preliminary Notice Of Related Occurrences, All The While Controlling Defense And Settlement Without Consent Of The Insurer.**

The trial court incorrectly accepted the insured's argument that Immunex's earlier notification to National Surety about the qui tam fraud investigations in 2001 and 2003 created an issue of fact whether National Surety was prejudiced by the late tender of the AWP suits in October 2006. As a matter of policy, just the opposite must be true – prejudice to the insurer is established as a matter of law when, as here, an insured selectively delays tender of a claim for years in order to control the defense and settlement of the

claims without the consent of its insurer. National Surety was prejudiced as a matter of law because Immunex's delay prevented it for over six years from obtaining a determination that the AWP claims were not covered.

As our Supreme Court recognized in *USF*, “[a]n insured may choose not to tender a claim to its insurer for a variety of reasons:

Like a driver involved in a minor accident, an insured may choose not to tender in order to avoid a premium increase. The insured may also want to preserve its policy limits for other claims, or simply to safeguard its relationship with its insurer. Whatever its reasons, an insured has the prerogative not to tender to a particular insurer.

164 Wn.2d at 422. As the Court held in *USF*, however, the one certain consequence of such “selective tender” is that an insurer to whom no tender has been made should have no obligation to defend or indemnify the claim. 164 Wn.2d at 421-22.

The Court in *USF* rejected the application of the “selective tender” rule to claims by an insured in the subrogation or first-party context. 164 Wn.2d at 421 n.8. This case demonstrates, however, why the rule must apply to establish prejudice as a matter of law where a liability insurer had been notified of a related occurrence, asked the insured to give it information necessary to make a coverage determination, but the insured does not provide that

information. The insured cannot then rely on its earlier notice to assert that the insurer was not prejudiced when it tenders the claim years later, after controlling the defense for years without the insurer's consent, contrary to the insured's clear obligations under the policy.

Indeed, Immunex continued to resist resolution of this coverage dispute even after this action was commenced. It sought and obtained a stay of the determination whether the claims were covered based upon its desire to continue to control the defense and settlement of the AWP litigation. (CP 590; see CP 1025) Yet at the same time Immunex was delaying the coverage determination, it asserted a right to payment of defense costs until the lack of coverage was confirmed by the court. Neither any rule that an insurer must pay defense costs until the lack of coverage is confirmed nor the rule that an insurer must prove prejudice can be construed to encourage both an insured's late notice and an insured's insistence on a delay of the determination of coverage. Yet that is the result here, where National Surety's potential liability for defense costs has been extended for years by Immunex's late notice and delay.

No reasonable minds could differ as to the prejudice to the insurer here, where National Surety was prevented from seeking a coverage determination years earlier by the late tender of the AWP suits. Actual prejudice includes “some concrete detriment resulting from the delay which harms the insurer’s preparation or presentation of defenses to coverage . . . .” ***Northwest Prosthetic & Orthotic Clinic, Inc. v. Centennial Ins. Co.***, 100 Wn. App. 546, 550, 997 P.2d 972 (2000) (emphasis added), quoting ***Cannon, Inc. v. Federal Ins. Co.***, 82 Wn. App. 480, 486, 918 P.2d 937 (1996), *rev. denied*, 131 Wn.2d 1002 (1997); see ***USF***, 164 Wn.2d at 430 n.13 (confirming that “*Northwest Prosthetic* would likely have come out the same way under the rule we set forth here”); see also ***Leven***, 97 Wn. App. at 427-31.

In ***Leven***, for instance, an insurer had no duty to defend an individual insured against environmental contamination proceedings when the insured did not inform the carrier of a 1990 letter naming him as a potentially liable party until 1997, on the eve of settling the claims. The insurer had commenced a declaratory judgment action in 1993, seeking a determination that it owed neither the insured nor corporations he controlled, the defense of which it had undertaken under a reservation of rights, a duty to

defend or indemnify. This court reversed the trial court's determination that the insurer had breached its duty to defend the individual insured and dismissed the insured's claims that it was entitled to reimbursement of fees incurred in his defense of the claims because the late notice had prejudiced the insurer in its defense of the insured as a matter of law.

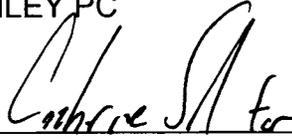
The insured's early notice *without* tender confirms prejudice as a matter of law. This too is the "extreme case" in which prejudice is established as a matter of law, and the trial court erred in finding there was any triable issue of fact on this issue.

## **VII. CONCLUSION**

This court should affirm the trial court's determination that National Surety owes Immunex no duty to defend the AWP claims, and, in addition, hold that there is no duty to indemnify Immunex from those claims. Immunex acknowledges that, if National Surety owes no defense, it can owe no duty to indemnify. (CP 1115-16) Because National Surety owes no defense in this case, National Surety cannot as a matter of law owe Immunex a duty to indemnify. This court should reverse the trial court's determination that National Surety might have a duty to defend these claims until the court confirmed there was no coverage.

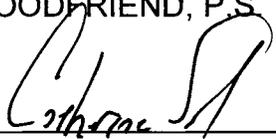
Dated this 19<sup>th</sup> day of July, 2010.

BULLIVANT HOUSER  
BAILEY PC

By: 

Jerret E. Sale  
WSBA No. 14101  
Deborah L. Carstens  
WSBA No. 17494

EDWARDS, SIEH, SMITH  
& GOODFRIEND, P.S.

By: 

Catherine W. Smith  
WSBA No. 9542  
Howard M. Goodfriend  
WSBA No. 14355

Attorneys for Respondent/Cross-Appellant

**DECLARATION OF SERVICE**

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on July 19, 2010, I arranged for service of the foregoing Brief of Respondent/Cross-Appellant, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Ronald J. Clark Bullivant Houser Bailey 888 SW 5th Avenue, Suite 300 Portland OR 97204-2089	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Email
Kirk A. Pasich Linda D. Kornfeld Cameron H. Faber Dickstein Shapiro LLP 2049 Century Park East, Suite 700 Los Angeles, CA 90067-3109	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Email
Jerret E. Sale Matthew J. Sekits Bullivant, Houser, Bailey PC 1601 Fifth Avenue, Suite 2300 Seattle WA 98101-1618	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Email
James R. Murray Dickstein Shapiro LLP 1825 Eye Street NW Washington, DC 20006-5403	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Email

**DATED** at Seattle, Washington this 19th day of July, 2010.

  
Tara D. Friesen

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**September 2009 Term**

---

**No. 34402**

---

**FILED**

**June 18, 2010**

released at 3:00 p.m.  
RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

**MYLAN LABORATORIES INC., MYLAN PHARMACEUTICALS INC. AND  
UDL LABORATORIES INC.,  
Plaintiffs Below, Appellants,**

**v.**

**AMERICAN MOTORISTS INSURANCE CO., CONTINENTAL INSURANCE CO.,  
WAUSAU INSURANCE CO. AND GREAT AMERICAN INSURANCE CO.,  
Defendants Below, Appellees,**

---

**Appeal from the Circuit Court of Monongalia County  
The Honorable Robert B. Stone, Judge  
Civil Action No. 07-C-69**

**AFFIRMED**

---

**Submitted: September 2, 2009**

**Filed: June 18, 2010**

Charles J. Crooks, Esq.  
Jackson Kelly PLLC  
Morgantown, West Virginia  
and  
David A. Gauntlett, Esq.  
*Pro hac vice*  
James A. Lowe, Esq.  
*Pro hac vice*  
Gauntlett & Associates  
Irvine, California  
Attorneys for Appellants

Marc E. Williams, Esq.  
J. David Bolen, Esq.  
Robert Edward Ryan, Esq.  
Huddleston Bolen LLP  
Huntington, West Virginia  
Attorneys for Appellees American  
Motorists Insurance Company and  
Wausau Insurance Company

Ronald A. Rispo, Esq.  
*Pro hac vice*  
Randy L. Taylor, Esq.  
*Pro hac vice*  
Weston Hurd LLC  
Cleveland, Ohio  
Attorneys for Appellee Wausau  
Insurance Company

Robert B. Allen, Esq.  
Pamela C. Deem, Esq.  
Allen Guthrie & Thomas, PLLC  
Charleston, West Virginia  
and  
Charles T. Blair, Esq.  
*Pro hac vice*  
Troutman & Sanders  
Washington, D.C.  
Attorneys for Appellee Continental  
Insurance Company

Thomas V. Flaherty, Esq.  
Flaherty, Sensabaugh & Bonasso  
Charleston, West Virginia  
and  
Todd S. Schenk, Esq.  
*Pro hac vice*  
Marcos G. Cancio, Esq.  
*Pro hac vice*  
Amber Coisman, Esq.  
*Pro Hac Vice*  
Tressler, Soderstrom, Maloney & Priess  
LLP  
Chicago, Illinois  
Attorneys for Federal Insurance  
Company

JUSTICE McHUGH, deeming himself disqualified, did not participate in the decision of this case.

JUDGE BEANE, sitting by temporary designation

The Opinion of the Court was delivered PER CURIAM.

## SYLLABUS BY THE COURT

1. “Language in an insurance policy should be given its plain, ordinary meaning.” Syllabus Point 1, *Soliva v. Shand, Morahan & Co., Inc.*, 176 W. Va. 430, 345 S.E.2d 33 (1986), *overruled, in part, on other grounds by National Mut. Ins. Co. v. McMahon & Sons*, 177 W. Va. 734, 356 S.E.2d 488 (1987).

2. “Where the provisions of an insurance policy contract are clear and unambiguous they are not subject to judicial construction or interpretation, but full effect will be given to the plain meaning intended.” Syllabus, *Keffer v. Prudential Ins. Co.*, 153 W. Va. 813, 172 S.E.2d 714 (1970).

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.” Syllabus Point 1, *Prete v. Merchants Property Ins. Co.*, 159 W. Va. 508, 223 S.E.2d 441 (1976).

4. “The mere fact that parties do not agree to the construction of a contract does not render it ambiguous. The question as to whether a contract is ambiguous is a question of law to be determined by the court.” Syllabus Point 1, *Berkeley Co. Pub. Serv. v.*

*Vitro Corp.*, 152 W. Va. 252, 162 S.E.2d 189 (1968).

5. “It 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.” Syllabus Point 4, *National Mut. Ins. Co. v. McMahon & Sons*, 177 W. Va. 734, 356 S.E.2d 488 (1987), *overruled on other grounds by Potesta v. U.S. Fidelity & Guaranty Co.*, 202 W. Va. 308, 504 S.E.2d 135 (1998).

6. “[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.” Syllabus Point 3, in part, *Bruceton Bank v. U.S. Fid. and Guar. Ins.*, 199 W. Va. 548, 486 S.E.2d 19 (1997).

Per Curiam:

The appellants herein, Mylan Laboratories Inc., Mylan Pharmaceuticals Inc., and UDL Laboratories Inc. (hereinafter collectively referred to as “Mylan”), appeal the February 8, 2007 order of the Circuit Court of Monongalia County that held that the appellee insurance companies, American Motorists Insurance Co., Continental Insurance Co., Wausau Insurance Co., and Federal Insurance Co., have no duty to defend Mylan in certain civil actions brought against it. After careful consideration of the record, the parties’ arguments, and the applicable law, this Court affirms the circuit court’s order.

**I.**  
**FACTS**

Mylan, a manufacturer of generic drugs, was named a defendant in lawsuits brought in several states. These lawsuits can be divided into two classes: average wholesale price litigation (hereinafter referred to as “AWP” litigation), and Lorazepam and Clorazepate litigation (hereinafter referred to as “L&C” litigation).

The AWP litigation relates to the average wholesale price of prescription drugs manufactured, marketed, and sold by Mylan. Basically, physicians and other providers of

drugs are reimbursed by Medicare and other third-party payors based on the average wholesale price of the drug. Manufacturers periodically report the average wholesale price of drugs to publishers who list the prices as reported to them by the manufacturers.

The AWP litigation alleges that Mylan and others engaged in a scheme to fraudulently manipulate the average wholesale price of its drugs. As part of this scheme, Mylan reported inflated average wholesale drug prices which materially misrepresented the actual prices paid to Mylan for prescription drugs by drug providers such as hospitals, pharmacies, and physicians. As a result, drug providers were reimbursed significantly more money than they actually paid for Mylan-manufactured drugs. Moreover, Mylan used this scheme as a marketing ploy. Specifically, Mylan advertised the difference or “spread” in prices as a reason why those in the distribution chain should sell its drugs, a practice known as “marketing the spread.” In this way, Mylan increased its share of the generic drug market.

The plaintiffs in the AWP cases are patients who were prescribed Mylan-manufactured drugs, third-party payors, states, and counties responsible for reimbursing drug providers based on the reported average wholesale price of Mylan-manufactured drugs.<sup>1</sup> As

---

<sup>1</sup>An example of the allegations in the AWP litigation is found in a complaint filed against Mylan and others by the State of Illinois. Specifically, the complaint alleged, in pertinent part:

(continued...)

---

<sup>1</sup>(...continued)

First, defendants sell their drugs in a unique manner which hides the true price of their drugs. This scheme works as follows. Upon agreeing on a quantity and price of a drug with a provider, or group of providers, the defendants purport to sell the agreed-upon drugs to wholesalers with whom they have a contractual arrangement, at the WAC [wholesale acquisition cost] price. The WAC may be, and usually is, higher than the price agreed upon by the provider and the drug manufacturer. The wholesaler then ships the product to the provider, charging the provider the (lower) price originally agreed upon by the drug manufacturers and the provider. When the wholesaler receives payment from the provider, it charges the manufacturers the price for handling and any applicable rebates and discounts, and sends a bill to the manufacturer, called a “charge-back,” for the difference between the WAC and the price actually paid by the provider. These charge-backs (or shelf adjustments, or other economic inducements) are kept secret, so that it appears that the wholesaler actually purchased the drug at the higher WAC price. The effect of this practice is to create the impression that the “wholesale price” of the drug is higher than it really is.

Second, defendants further inhibit the ability of Illinois and other ultimate purchasers to learn the true cost of their drugs by insisting upon confidentiality provisions in their sales agreements with providers, terming them trade secrets and proprietary, to preclude providers from disclosing to others the prices they paid.

Third, defendants further obscure the true prices for their drugs with their policy of treating different purchasers differently. Thus, for the same drug, pharmacies are given one price, hospitals another, and doctors yet another.

Fourth, at least some defendants have hidden their real drug prices by providing free drugs and phony grants to providers as a means of discounting the overall price of their drugs[.]

(continued...)

of the date of the oral argument of this case before this Court, the AWP litigation was pending.

The second class of lawsuits in which Mylan was involved was the L&C litigation. These lawsuits originally were brought by the Federal Trade Commission in December based on alleged antitrust violations of Section 5(a) of the Federal Trade Commission Act. This litigation alleges that Mylan acquired an exclusive licensing agreement with the company which supplied the active pharmaceutical ingredients for two generic drugs manufactured by Mylan: Lorazepam and Clorazepate. The exclusive agreements prohibited the suppliers from selling these active pharmaceutical ingredients to any other generic drug manufacturer for a period of 10 years. Despite no significant increase in costs, the price charged by Mylan for Lorazepam and Clorazepate increased dramatically. Depending upon the size of the bottle, the price for Clorazepate increased by amounts ranging from 1,900 percent to 3,200 percent.<sup>2</sup> The price for Lorazepam tablets increased 1,900 percent to 2,600 percent.<sup>3</sup>

---

<sup>1</sup>(...continued)

<sup>2</sup>The price for a 500-count bottle of 7.5 mg clorazepate went from \$11.66 to \$377.00.

<sup>3</sup>The price for a 500-count bottle of 1 mg lorazepam increased from \$7.30 to \$191.00

The Federal Trade Commission litigation alleged eight causes of action against Mylan: (1) agreement in restraint of trade on Lorazepam; (2) agreement in restraint of trade on Clorazepate; (3) conspiracy to monopolize generic Lorazepam tablets market; (4) conspiracy to monopolize generic Clorazepate tablets market; (5) monopolization of generic Lorazepam tablets market; (6) attempted monopolization of generic Lorazepam tablets market; (7) monopolization of generic Clorazepate tablets market; and (8) attempted monopolization of generic Clorazepate tablets market. The original Federal Trade Commission complaint alleged in part that,

As a result of these substantial and unprecedented price increases for lorazepam and clorazepate tablets, many purchasers, including pharmacies, hospitals, insurers, managed care organizations, wholesalers, government agencies, and others, have paid substantially higher prices. Moreover, some patients have stopped taking lorazepam and clorazepate tablets altogether, or been forced to reduce the quantity they take, because they can not afford them.

Subsequently, thirty-two states jointly filed suit against Mylan and other defendants in a suite alleging violations of each state's anti-trust laws. Several third-party payors filed similar actions against Mylan. A global settlement was reached in most of these cases wherein Mylan agreed to pay over \$135 million. Two groups of plaintiffs opted out of the settlement and a verdict was rendered against Mylan in the amount of \$12 million.

The appellees herein are four insurance companies from whom Mylan purchased insurance policies. Specifically, American Motorists Insurance Company issued two policies to Mylan which were characterized by the circuit court as general liability policies with limits of \$1 million.<sup>4</sup> Continental Insurance Company issued two insurance policies to Mylan which were characterized by the circuit court as general liability policies with limits of \$1 million.<sup>5</sup> Wausau Insurance Company issued six policies to Mylan which were characterized by the circuit court as general liability policies of \$1 million.<sup>6</sup> Finally, Federal Insurance Company issued an insurance policy to Mylan which the circuit court characterized as an umbrella policy with limits of liability of \$10 million in excess of \$1 million during the policy term of September 1, 1997 to September 1, 1998, with the policy limits on the later issued policy of \$20 million in excess of \$1 million.<sup>7</sup>

---

<sup>4</sup>These two policies were Policy Number 3YM 851 972-01, effective dates July 1, 1991, to July 1, 1992, and Policy Number 3YM 851 972-02, effective dates July 1, 1992, to September 1, 1993.

<sup>5</sup>These were Policy Number 15CBP06156061-94, effective dates September 1, 1993, to September 1, 1994, and Policy Number 15CBP06156061-95, effective dates September 1, 1994, to September 1, 1995.

<sup>6</sup>These were Policy Number 0526-00-101388, effective dates September 1, 1995, to September 1, 1996; Policy Number 0527-11-101388, effective dates September 1, 1996, to September 1, 1997; Policy Number 0528-00-101388, effective dates September 1, 1997, to September 1, 1998; Policy Number 0529-00-101388, effective dates September 1, 1998, to September 1, 1999; Policy Number 0520-00-101388, effective dates September 1, 1999, to September 1, 2000; Policy Number 0521-00-101388, effective dates September 1, 2000, to September 1, 2001.

<sup>7</sup>This is Policy Number 7966-70-27 with effective dates of September 1, 1997, to  
(continued...)

The appellee insurance companies filed a declaratory judgment action in the Circuit Court of Monongalia County seeking a determination whether they have a duty to defend Mylan in the above-described litigation. Both Mylan and the appellees filed motions for summary judgment. By order dated February 8, 2007, the circuit court granted the appellees' motions for summary judgment and denied Mylan's motions for summary judgment. Mylan now appeals this order.

## II.

### STANDARD OF REVIEW

The circuit court's order on appeal is a grant of summary judgment in a declaratory judgment. Also, the circuit court's order is based on its construction of the language in certain insurance policies. Therefore, this Court's standard of review in this case is *de novo*. See Syllabus Point 3, *Cox v. Amick*, 195 W. Va. 608, 466 S.E.2d 459 (1995) (holding that "[a] circuit court's entry of a declaratory judgment is reviewed *de novo*."); Syllabus Point 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994) (holding that "[a] circuit court's entry of summary judgment is reviewed *de novo*."); Syllabus Point 2, *Riffe v.*

---

<sup>7</sup>(...continued)  
September 1, 1998; September 1, 1998, to September 1, 1999, to September 1, 2000; and September 1, 2001.

*Home Finders Associates, Inc.*, 205 W. Va. 216, 517 S.E.2d 313 (1999) (holding that “[t]he interpretation of an insurance contract, including the question of whether the contract is ambiguous, is a legal determination that, like a lower court’s grant of summary judgment, shall be reviewed *de novo* on appeal.”).

### III.

#### DISCUSSION

1. *American Motorists’, Continental’s, and Waussau’s Duty to Defend for an “Advertising Injury” in the AWP Litigation*

In its February 8, 2007 order that granted summary judgment to the appellees, the circuit court first found that the underlying actions in the AWP litigation do not allege an advertising injury or the use of another’s advertising idea as defined in the American Motorists, Continental, and Wausau policies. Thus, no coverage is triggered by the policies at issue and the appellees have no duty to defend Mylan in these actions.

The American Motorists, Continental, and Wausau policies all provide that they will defend suits alleging an “Advertising Injury.” The American Motorists and Continental Policies define “Advertising Injury” to include injury arising out of the “misappropriation of

advertising ideas or style of doing business.”<sup>8</sup> Wausau policy numbers 0526-00-101388 through 0520-00-101388 define “Advertising Injury” to include injury arising out of the “misappropriation of advertising ideas.”<sup>9</sup> Wausau policy number 0521-00-101388 defines

---

<sup>8</sup>The American Motorists and Continental policies at issue provide, in relevant part, as follows:

- b. This insurance applies to:
    - (1) . . .
    - (2) “Advertising Injury” caused by an offense committed in the course of advertising your goods, products or services;
- but only if the offense was committed in the “coverage territory” during the policy period.

\* \* \*

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

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

As noted above, the issue in this case concerns whether Mylan is alleged in the AWP litigation to have misappropriated advertising ideas or style of doing business.

<sup>9</sup>Wausau policy numbers 0526-00-101388 through 0520-00-101388 provide in relevant part:

- 1. “Advertising injury” means injury, other than “bodily injury” or “property damage” or “personal injury,” arising out of one or more of the following offenses

(continued...)

“Advertising Injury” to include injury arising out of “use of another’s advertising idea in your advertisement.”<sup>10</sup>

---

<sup>9</sup>(...continued)

committed in the course of “your advertising activities”:

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

<sup>10</sup>Wausau policy number 0521-00-101388 provides in relevant part:

1. “Personal and advertising injury” means injury, including consequential “bodily injury”, arising out of one or more of the following offenses:
  - a. False arrest, detention or imprisonment;
  - b. Malicious prosecution;
  - c. The wrongful eviction from, wrongful entry into, or invasion of the right to private occupancy of a room, dwelling, or premises that a person occupies by or on behalf of its owner, landlord or lessor;
  - d. Oral or written publication of material that slanders or libels a person or organization or disparages a person’s or organization’s goods, products, or services;
  - e. Oral or written publication of material that violates a person’s right of privacy;
  - f. The use of another’s advertising idea in your “advertisement”; or
  - g. Infringing upon another’s copyright, trade dress or slogan in you “advertisement”.

In its summary judgment order, the circuit court determined, *inter alia*, that in order to trigger the duty to defend, the plaintiff's allegations of misappropriation have to involve the wrongful taking of the advertising idea or style of doing business of another. Upon examining the complaints in the underlying AWP litigation, the circuit court concluded that no such allegations were made.<sup>11</sup>

Mylan, in its brief to this Court, argues that the term "misappropriation" is ambiguous because it is susceptible of more than one meaning. According to Mylan, case law and dictionary definitions support the construction of the term "misappropriation" to include "misuse." Therefore, concludes Mylan, the policy language at issue does not require that the "advertising idea" misappropriated be owned by another, but only that Mylan misused an "advertising idea."

With regard to the general principles of construing the provisions of an insurance policy, this Court has indicated that "[l]anguage in an insurance policy should be given its plain, ordinary meaning." Syllabus Point 1, *Soliva v. Shand, Morahan & Co., Inc.*, 176 W. Va. 430, 345 S.E.2d 33 (1986), *overruled, in part, on other grounds by National Mut. Ins. Co. v. McMahan & Sons*, 177 W. Va. 734, 356 S.E.2d 488 (1987). "Where the provisions

---

<sup>11</sup>Having determined that the claims of the plaintiffs in the underlying AWP litigation fall outside of any coverage afforded by the relevant insurance policies, the circuit court declined to address the issue raised by the appellees of whether the claims fall within any named exclusions provided for in the policies.

of an insurance policy contract are clear and unambiguous they are not subject to judicial construction or interpretation, but full effect will be given to the plain meaning intended.” Syllabus, *Keffer v. Prudential Ins. Co.*, 153 W. Va. 813, 172 S.E.2d 714 (1970). Concerning whether terms in an insurance policy are ambiguous, this Court has explained that “[w]henver 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.” Syllabus Point 1, *Prete v. Merchants Property Ins. Co.*, 159 W. Va. 508, 223 S.E.2d 441 (1976). However, “[t]he mere fact that parties do not agree to the construction of a contract does not render it ambiguous. The question as to whether a contract is ambiguous is a question of law to be determined by the court.” Syllabus Point 1, *Berkeley Co. Pub. Serv. v. Vitro Corp.*, 152 W. Va. 252, 162 S.E.2d 189 (1968). If a court determines that a policy provision is ambiguous, “[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.” Syllabus Point 4, *National Mut. Ins. Co. v. McMahon & Sons*, 177 W. Va. 734, 356 S.E.2d 488 (1987), *overruled on other grounds by Potesta v. U.S. Fidelity & Guaranty Co.*, 202 W. Va. 308, 504 S.E.2d 135 (1998). Finally, “included 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.” Syllabus Point 3, in part, *Bruceton Bank v. U.S. Fid. and Guar. Ins.*, 199 W. Va. 548, 486 S.E.2d 19 (1997).

This Court has carefully considered all of the case law cited to us by the parties. After considering the arguments of the parties and supporting authority, this Court finds that the term “misappropriation” as used in the “Advertising Injury” context ordinarily means to take or acquire wrongfully. Several courts have reached this conclusion in “Advertising Injury” cases.<sup>12</sup> See *State Auto Property and Cas. v. Trav. Indem. Co.*, 343 F.3d 249, 257 (4<sup>th</sup> Cir. 2003) (“the term ‘misappropriation’ . . . refers generally to the wrongful acquisition of property”); *American Employ. Ins. Co. v. DeLorme Pub. Co.*, 39 F.Supp.2d 64, 77 (D.Me. 1999) (“The ordinary meaning of ‘misappropriate’ is not ambiguous or unclear. It means ‘[t]o appropriate wrongly;’ that is to wrongfully ‘take or make use of without authority or right.’” Citing *Webster’s New Collegiate Dictionary*, 98, 758 (9<sup>th</sup> ed. 1987)); *American Economy Ins. Co. v. Reboans, Inc.*, 852 F.Supp. 875, 881 (N.D.Cal. 1994) (“the word ‘misappropriation’ in its ordinary and popular sense [is] . . . a synonym for ‘to take wrongfully.’” *American States Ins. Co. v. Vortherms*, 5 S.W.3d 538, 543 (Mo.Ct.App. 1999) (“a misappropriation of an advertising idea involves the wrongful taking of another’s manner of advertising” (citation omitted)); *Fluoroware, v. Chubb Group of Ins. Companies.*, 545 N.W.2d 678, 682

---

<sup>12</sup>In “Advertising Injury” cases, the meaning of the term “misappropriation” generally arises when courts are addressing the issue of whether the term refers only to the common law tort of misappropriation which does not protect against injuries resulting from the wrongful use of a trademark or whether the term applies more broadly to the wrongful acquisition of any property. See *State Auto Prop. and Cas. Ins. Co. v. Travelers Indem. Co. of Am.*, 343 F.3d 249, 256 (4<sup>th</sup> Cir. 2003).

(Minn.Ct.App. 1996) (“‘misappropriation of advertising ideas’ has been defined as the wrongful taking of another’s manner of advertising”).<sup>13</sup>

Having concluded that the ordinary meaning of the term “misappropriation” is to take or acquire wrongfully, this Court must next determine whether the allegations in the AWP complaints are reasonably susceptible of an interpretation that the claim may be covered by the terms of the insurance policies. The allegations in the AWP litigation are that once Mylan created the spread in average wholesale prices, it marketed the spread to drug providers in order to give them an incentive to sell Mylan-manufactured drugs. We conclude that these allegations are not reasonably susceptible of an interpretation that they may be covered by an insurance policy providing coverage for misappropriating another party’s advertising idea or style of doing business.<sup>14</sup> For this reason, we affirm the circuit court’s grant of summary judgment on this issue.<sup>15</sup>

---

<sup>13</sup>Mylan cites this Court’s opinion in *Lawyer Disciplinary Bd. v. Battistelli*, 206 W. Va. 197, 523 S.E.2d 257 (1999) to support its argument that a reasonable definition of “misappropriation” is to “misuse.” However, our discussion in *Battistelli* concerned the misappropriation of client funds by an attorney and not insurance policy language concerning coverage for an “Advertising Injury.” Therefore, we do not find *Battistelli* instructive in the instant case.

<sup>14</sup>For the same reason, we find that the provision in the Wassau policy for coverage of “[t]he use of another’s advertising idea in your ‘advertisement’” does not provide coverage for the acts alleged in the underlying complaints.

<sup>15</sup>This Court also seriously doubts that informing drug providers of the price spread constitutes an “advertising idea.” “[T]o be covered by the policy, allegations of . . .  
(continued...)

2. *Federal's Duty to Defend in the AWP Litigation for "Personal Injury" defined as "Discrimination"*

Second, Mylan assigns error in the circuit court's conclusion that the claims in the AWP litigation do not allege personal injury or discrimination, and, therefore, the duty to defend is not triggered under Federal's Umbrella Policy.

Coverage B of the Federal policy provides, in relevant part, that Federal will defend any suit alleging "Personal Injury."<sup>16</sup> The policy defines "Personal Injury" as follows:

---

<sup>15</sup>(...continued)

misappropriation have to involve an advertising *idea*, not just a nonadvertising idea that is made the subject of advertising." *CAT Internet Serv. v. Providence Washington Ins.*, 333 F.3d 138, 142 (3<sup>rd</sup> Cir. 2003), quoting *Green Machine Corporation v. Zurich - American Insurance Group*, 313 F.3d 837, 839 (3d.Cir. 2002). The mere publication to drug providers of the price spread in the wholesale price of generic drugs does not constitute an advertising idea. Moreover, there appears to be no allegation in the complaints below of an "Advertising Injury" arising out of the wrongful taking or acquisition of an advertising idea. Instead, the injury alleged arises from the paying of inflated average wholesale prices.

<sup>16</sup>Federal's Coverage A excess liability coverage obligates Federal to defend suits only if the applicable underlying insurance in the Wausau policies has been exhausted. Having found that no provision in the Wausau policies cover the allegations in the AWP suits, only Federal's Coverage B umbrella coverage is potentially implicated in this case.

In addition, Federal can have no duty to defend Mylan in the underlying AWP litigation under the Coverage B "Advertising Injury" coverage for the same reasons that American Motorists, Continental, and Waussau have no duty to defend under the "Advertising Injury" coverage in their respective policies. Therefore, only the "Personal Injury" coverage in Federal's Coverage B is potentially implicated with regard to Federal's duty to defend.

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

1. false arrest, detention or imprisonment;
2. malicious prosecution;
3. the wrongful eviction from, wrongful entry into, 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).

The issue in this case concerns the definition of "Personal Injury" as "Discrimination." Specifically the question is whether the allegations in the AWP complaints allege discrimination as covered by the Federal policy. In finding that Federal had no duty to defend under the facts of this case, the circuit court reasoned as follows:

As used in the "Personal Injury" section of the Federal policy, "discrimination" refers to the standard types of discrimination (*e.g.* race, handicap) and not, as asserted by Mylan, "any form of discrimination within the field of commerce," which is the definition of "economic discrimination." *USX Corp. v. Adriatic Ins. Co.*, 99 F.Supp.2d 593, 624-25 (W.D. Pa. 2000) (finding that, when viewed in context with the other enumerated offenses in the definition of "personal injury," the meaning of "discrimination" is limited to differential treatment of a person based upon immutable characteristics such as race, sex, age, religion, or national origin). Thus, the dictionary definitions

relied upon by Mylan do not, in fact, support Mylan's interpretation of the term, which must be read in concert with the rest of the policy language and not in a vacuum.

Even if the Court were to adopt the reasoning of *Federal Ins. Co. v. Strohs Brewing Co.*, 127 F.3d 563 (7<sup>th</sup> Cir. (Ind.) 1997), as urged by Mylan, the AWP claims do not allege price discrimination because claimants in the underlying suits are not entities that would purchase Mylan products. Rather, the AWP claims allege fraud regarding the excessive funds Medicare, Medicaid, and third-party payors reimbursed to medical providers and pharmacies based on Mylan's alleged artificially inflated AWP listing.

It is Mylan's position that the term "discrimination" is ambiguous in that it is reasonably susceptible to more than one meaning. Consequently, says Mylan, the term should be construed against Federal. Mylan further asserts that a reasonable construction of the term "discrimination" is economic or price discrimination. According to Mylan, the AWP complaints below expressly allege that Mylan charged some drug providers lower prices than others. Mylan therefore concludes that the term "Discrimination" in the Federal policies should be read as providing coverage for economic discrimination as alleged in the underlying AWP complaints.

In support of its argument, Mylan relies primarily on the case of *Federal Ins. Co. v. Stroh Brewing Co.*, 127 F.3d 563 (7<sup>th</sup> Cir. 1997). In *Stroh Brewing*, G. Heileman Brewery Company, Inc. purchased an umbrella business liability insurance policy from Federal

Insurance Company. Subsequently, a wholesale beer distributor sued Heileman for alleged discrimination based on Heileman's pricing practices. One issue in the case was the applicability of the term "discrimination" under the definition of "personal injury" in the Federal policy. The definition of "personal injury" read as follows:

Personal Injury Means

- 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. humiliation or discrimination. . . .

127 F.3d at 570 n. 11. In finding that the term "discrimination" in the Federal policy applied to price discrimination allegations, the court cited several cases in which the term "discrimination" was found to refer generally to differential treatment. The court also cited the 1990 edition of *Black's Law Dictionary* which defined "discrimination" to mean price discrimination. The court then concluded:

Because the term "discrimination" is not defined in the policy and because price discrimination suits such as [the instant one] are common in the beer industry, it is not objectively unreasonable for Heileman to have believed that it was purchasing coverage for just such a suit [as the instant one]. This may be the case even though in the present day "discrimination" might bring first to mind differences in personal treatment.

127 F.3d at 569 (citations omitted).

In its decision below, the circuit court relied upon the case of *USX Corp. v. Adriatic Insurance Co.*, *supra*, affirmed by 345 F.3d 190 (3<sup>rd</sup> Cir. 2003). In *USX*, the plaintiffs advanced the theory that the term “discrimination” in an insurance policy should be construed to encompass economic and price discrimination. In rejecting this construction, the *USX* court explained:

The context in which the term “discrimination” is used once again sufficiently undercuts the plaintiffs’ attempt to rewrite the policy under the reasonable expectations doctrine and principles of insurance law regarding ambiguities. It may be as the majority stated in *Stroh Brewing* that “[t]ime was, ‘discrimination’ might have brought immediately to mind charging one person more than another for the same product.” *Stroh Brewing*, 127 F.3d at 564. To suggest, however, that the use of that term in defining “personal injuries” was intended to identify a distinct form of statutory liability created 85 years ago by the Sherman Act and commonly known as “antitrust liability” stretches the term beyond any natural and ordinary meaning to be gleaned from its use in context. The term is preceded by “false arrest, false imprisonment, wrongful eviction, detection [and] malicious prosecution” and is followed by “humiliation [and] libel, slander or defamation of character or invasion of rights of privacy, except that which arises out of any advertising activities.” The terms preceding the phrase identify offenses against the individual for wrongful deprivation of liberty or interference with the right to peaceful possession of property and those that follow it identify common offenses which injure the character or reputation of an individual. Of course, “discrimination” and its companion “humiliation” are forms of disparate or demeaning

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

99 F.Supp.2d at 624-625.

After careful consideration of the authorities cited above, we find the reasoning of the court in *USX* to be persuasive. “It is a fundamental rule of construction that in accordance with the maxim ‘*noscitur a sociis*’ the meaning of a word or phrase may be ascertained by reference to the meaning of other words or phrases with which it is associated.” *Wolfe v. Forbes, et al.*, 159 W. Va. 34, 44, 217 S.E.2d 899, 905 (1975) (citing 17 M.J. Statutes § 63 (1951) (other internal citations omitted). Similar to the policy language in the *USX* case, the term “personal injury” in the Federal policies is defined by offenses against the liberty, emotional well-being, reputation, or peaceful possession of property of the plaintiff as opposed to economic injury. These offenses include false arrest; malicious prosecution; wrongful eviction from, entry into, or invasion of the right of occupancy of one’s property; slander and

libel; and violation of the right of privacy. In this context, the term “discrimination” ordinarily would be understood to mean the type of discrimination based on personal characteristics actionable under federal Title VII or the State Human Rights Act. Even the court in *Stroh Brewing Co.* acknowledged that the term “discrimination” ordinarily is perceived to refer to discrimination based on an individual’s personal characteristic:

Say “discrimination” today and those around you may think of race or sex discrimination, usually in connection with a school or work setting. But that has not always been the case. Time was, “discrimination” might have brought immediately to mind charging one person more than another for the same product. That definition, although perhaps less in public consciousness, remains just as valid today.

127 F.3d at 564. Finally, we believe that it is significant that the term “discrimination” appears in the “personal injury” section of the Federal policy. Given this fact, it is difficult for this Court to believe that Mylan reasonably believed when it purchased the Federal policies that it was purchasing coverage for injuries arising from the marketing of a fraudulent pricing scheme.<sup>17</sup>

---

<sup>17</sup>With regard to its dictionary definition, “discrimination” has come to mean primarily unfair treatment based upon personal characteristics, generally immutable, such as race, age, sex, nationality, or religion. For example, the 1990 edition of *Black’s Law Dictionary*, which appears to have been the current edition for a portion of the coverage period of the Federal policy at issue herein, defined “discrimination” as:

(continued...)

In its brief to this Court, Mylan proffers several reasons why this Court should not adopt the reasoning in *USX*, none of which we find valid. For example, Mylan argues that *USX* is not persuasive because in that case, the policy language at issue was jointly drafted. In contrast, says Mylan, Federal's policy is a standard form policy issued by Federal to Mylan. We note, however, that the policies in *USX* were "in all material respects, based upon a standard insurance form known as 'the 1971 London umbrella wording.'" *USX Corp.*, 99 F.Supp.2d at 602.

Mylan also relies for support on the fact that Federal subsequently issued a policy

---

<sup>17</sup>(...continued)

In constitutional law, the effect of a statute or established practice which confers particular privileges on a class arbitrarily selected from a large number of persons, all of whom stand in the same relation to the privileges granted and between whom and those not favored no reasonable distinction can be found. *Unfair treatment or denial of normal privileges to persons because of their race, age, sex, nationality or religion.* A failure to treat all persons equally where no reasonable distinction can be found between those favored and those not favored.

*Black's Law Dictionary* 467 (6<sup>th</sup> ed. 1990) (emphasis added and citation omitted).

The 1999 edition of the dictionary, which appears to have been the current edition for a portion of the coverage period of the subject Federal policies, had as its first definition of "discrimination," "[t]he effect of or established practice that confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex, nationality, religion, or handicap." *Black's Law Dictionary* 479 (7<sup>th</sup> ed. 1999). This is also the first definition in the most recent edition of the dictionary except that the term "handicap" is replaced with the term "disability." See *Black's Law Dictionary* 534 (9<sup>th</sup> ed. 2009).

in which it limited the definition of “discrimination” to personal characteristics. According to Mylan, this indicates that Federal could have adopted the language limiting the term “discrimination” earlier had it chosen to do so. Mylan asserts that Federal should not now ask this Court to rewrite the policy language at issue. We do not find this argument to be persuasive. Federal asserts in its brief that it implemented the policy revision after, and in direct response to, the court’s holding in *Stroh Brewing Co.* According to Federal, if, as Mylan suggests, Federal had intended to cover economic discrimination, it would not have revised its policy language after the *Stroh Brewing* decision expanded the scope of coverage to encompass economic discrimination.

In addition, Mylan argues that the court’s reasoning in *USX Corp.* is inapposite to the instant facts because unlike the policies in *USX Corp.* the Federal policies in this case do not join the term “discrimination” with “humiliation” under the definition of “Personal Injury,” which was integral to the court’s rationale in *USX Corp.* We disagree. Despite the absence of the term “humiliation” in the Federal policy, the fact remains that the other definitions of “personal injury” in the Federal policy all denote offenses against the liberty, emotional well-being, reputation, or peaceful possession of property of the individual. Again, this indicates to this Court that the term “Discrimination” should be given its ordinary meaning of referring to the offense of discriminating against an individual based on the individual’s personal characteristics.

Mylan further contends that the fact that courts have disagreed about the meaning of the word “discrimination” in insurance policies indicates that the term is ambiguous. In support of this contention, Mylan cites a footnote from this Court’s opinion in *Murray v. State Farm Fire and Cas. Co.*, 203 W. Va. 477, 509 S.E.2d 1 (1998), in which this Court indicated that “[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.’” 203 W. Va. at 485 n. 5, 509 S.E.2d at 9 n. 5, (citing C. Marvel, *Division of Opinion Among Judges on Same Court or Among Other Courts or Jurisdictions Considering Same Question, As Evidence That Particular Clause of Insurance Policy is Ambiguous*, 4 A.L.R.4th 1253, § 2[a] (1981)). Mylan’s reliance on a footnote is misplaced. This Court has held that “[N]ew points of law . . . will be articulated through syllabus points as required by our state constitution.” Syllabus Point 2, in part, *Walker v. Doe*, 210 W. Va. 490, 558 S.E.2d 290 (2001). Also, “language in a footnote generally should be considered obiter dicta which, by definition, is language ‘unnecessary to the decision in the case and therefore not precedential.’” *State ex rel. Medical Assurance v. Recht*, 213 W. Va. 457, 471, 583 S.E.2d 80, 94 (2003) (citing *Black’s Law Dictionary* 1100 (7<sup>th</sup> ed. 1999)).

Based on the above, we conclude that the term “discrimination” as used in the Federal policy is not ambiguous. To the contrary, the term ordinarily means differential treatment based on a personal characteristic, generally immutable, such as race, age, sex, nationality, religion, or disability. Having so concluded, this Court must next determine whether the allegations in the AWP litigation are reasonably susceptible of an interpretation that the claims may be covered by the term “Discrimination” in the Federal policies. We find that they are not. While there are claims that some drug providers may have been sold drugs at a lower price than others, there are no allegations that this difference in treatment was based on race, age, sex, nationality, religion, or disability. Therefore, we affirm the circuit court’s grant of summary judgment on this issue.<sup>18</sup>

*3. Waussau’s Duty to Defend Mylan in the L&C Litigation  
for “Advertising Injury” and “Bodily Injury” under its Policies*

In its third assignment of error, Mylan challenges the circuit court’s finding that coverage for an “advertising injury” or “bodily injury” under the Waussau policies is inapplicable to this case, and thus Wassau had no duty to defend Mylan in the L&C litigation.<sup>19</sup>

---

<sup>18</sup>Federal can have no duty to defend Mylan in the AWP litigation under its Coverage B “Advertising Injury” coverage for the same reasons that American Motorists, Continental, and Waussau have no duty to defend under their “Advertising Injury” coverage discussed above.

<sup>19</sup>Apparently, Mylan alleged below that American Motorists and Continental had  
(continued...)

As noted above, Wausau policies 0526-00-101388 through 0520-00-101388 define “Advertising Injury” to include injury arising out of the “misappropriation of advertising ideas.”<sup>20</sup> Mylan notes that in the L&C litigation below, it was alleged that Mylan initiated a “Campaign for Fair Pharmaceutical Competition” in order to confront criticism over and explain the profits it was making from its price increases for Lorazepam and Clorazepate. According to Mylan, the allegation in the complaints with regard to its fair pricing campaign triggered potential insurance coverage under the same “advertising injury” offenses at issue in the AWP actions. Mylan further avers that its fair pricing campaign is an advertising concept that falls within the offense of “misappropriation of an advertising idea” which should be understood to include the misuse of an idea related to the promotion of a product to the public.

We reject Mylan’s argument. This Court found above that the term “misappropriation” ordinarily means to take or acquire wrongfully. The allegations in the L&C litigation that Mylan conducted a “Campaign for Fair Pharmaceutical Competition” to confront criticism over the profits it was reaping from its price increases for Lorazepam and

---

<sup>19</sup>(...continued)  
coverage solely for the AWP Actions and that coverage existed solely under their “advertising injury” coverage and not for “personal injury,” “bodily injury,” or any other coverage.

<sup>20</sup>Wausau policy number 0521-00-101388 defines “Advertising Injury” to include injury arising out of “use of another’s advertising idea in your ‘advertisement.’” Mylan has failed to show that there are any allegations in the L&C litigation that Mylan’s fair pricing campaign included the use of another’s advertising idea.

Clorazepate is not susceptible of an interpretation that the claim may be covered for misappropriating another party's advertising idea. Accordingly, we affirm the circuit court's grant of summary judgment on this issue.

Next, Mylan opines that the circuit court erred in finding that Waussau has no duty to defend Mylan in the L&C litigation for damages arising from a "bodily injury" under the Waussau policies. The term "bodily injury" is defined in Waussau policy numbers 0526-00-101388 through 0521-00-101388 as "bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time."

According to Mylan, the complaints in the L&C litigation expressly allege that Mylan's actions caused bodily injury. In support of this contention, Mylan quotes the following language from complaints in the L&C litigation:

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 clorazepam tablets altogether, or been forced to reduce the quantity they take, because they cannot afford them.

The acts and practices of the Defendants as herein alleged have had the purpose or effect, or 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. (Footnotes omitted).

In finding that claims against Mylan in the L&C litigation are susceptible of being covered by an insurance policy providing coverage for “bodily injury,” the circuit court found that “bodily injury” is not alleged in the L&C litigation:

Rather, the L&C suits involve economic injury, in that Mylan increased the price of Lorazepam and Clorazepam by 1,900 - 2000% following its entry into the exclusive licensing agreements with ingredient suppliers. The only contention that comes close to one asserting covered “bodily injury” is Mylan’s speculative assertion that some consumers may not have been able to afford their medications due to the price hikes by Mylan. However, as no such specific claims for bodily injury are alleged in any of the underlying complaints, the “Bodily Injury” coverage in the Waussau Policies is not triggered.

We agree with the circuit court. The reference to injured health quoted above is simply too brief and speculative to trigger coverage for a “bodily injury” under the Waussau policies. The plaintiffs in the L&C litigation are not persons alleging bodily injuries as a result of Mylan’s conduct. Rather, these plaintiffs allege economic injury. As such, the complaints filed in the L&C litigation are not susceptible of an interpretation that the claims may be covered for “bodily injury.” Therefore, we affirm the circuit court’s order on this issue.

*4. Federal's Duty to Defend Mylan in the L&C Litigation for  
"Personal Injury" defined as "Discrimination"*

Finally, Mylan asserts error in the circuit court's finding that the underlying claims in the L&C litigation do not allege personal injury or discrimination, and thus the duty to defend Mylan is not triggered under Federal's Umbrella policy. Mylan argues that for the reasons previously asserted in its discussion of the AWP actions, coverage for "discrimination" includes forms of disparate treatment like economic discrimination. Specifically, the allegations in the L&C actions implicate coverage for "discrimination" in that plaintiffs paid too much for only two drugs, Lorazepam and Clorazepate. Mylan allegedly selected these drugs because they are used to treat patients with chronic medical conditions, thus requiring long-term use, as opposed to drugs used to treat short-term conditions. According to Mylan, its alleged focus on L&C drugs, out of all other drugs, was discriminatory.

As this Court concluded above, the term "discrimination" included under the definition of "personal injury" in Coverage B of the Federal umbrella policies ordinarily means differential treatment based on a personal characteristic, generally immutable, such as race, age, sex, nationality, religion, or disability. Mylan has failed to show that there are allegations in the complaints in the L&C litigation that are reasonably susceptible of an interpretation that the claims may be covered as a "personal injury" under the definition of that term in the

Federal umbrella policy. For this reason, this Court affirms the circuit court's grant of summary judgment on this issue.<sup>21</sup>

#### IV.

#### CONCLUSION

For the reasons set forth above, this Court affirms the February 8, 2007 order of the Circuit Court of Monongalia County which ruled that American Motorists, Continental, Waussau, and Federal have no duty to defend Mylan, pursuant to certain insurance policies, in the underlying AWP and L&C litigation.

**Affirmed.**

---

<sup>21</sup>In its brief to this Court, Mylan makes two other arguments that we feel compelled to briefly address. First, Mylan states that the circuit court did not make findings of fact but simply referenced facts that it deemed pertinent to its conclusions. According to Mylan, in ignoring the fact allegations in the complaints below upon which Mylan relied, the circuit court failed to determine if these facts could potentially give rise to coverage. We find this argument to be invalid. The circuit court's 38-page order contained sufficient facts to support its legal reasoning and to provide this Court with a meaningful review.

Second, Mylan posits that any dispute as to whether the factual allegations are within coverage alone compels a defense. For this proposition, Mylan cites *American Cyanamid Co. v. American Home Assur. Co.*, 30 Cal.App.4th 969, 975, 35 Cal.Rptr.2d 920, 923 (1994) ("If the parties dispute whether the insured's alleged misconduct is potentially within the policy coverage . . . 'the duty to defend is then established[.]'"). However, this is not the law of this Court. Rather, before a duty to defend arises, the allegations in the complaint must be *reasonably* susceptible of an interpretation that the claim may be covered by the terms of the insurance policy. *Bruceton Bank v. U.S. Fid. and Guar. Inc.*, *supra*.