

NO. 64712-1-1

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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NATIONAL SURETY CORPORATION,

Respondent/Cross-Appellant,

v.

IMMUNEX CORPORATION,

Appellant/Cross-Respondent.

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BRIEF OF APPELLANT IMMUNEX CORPORATION

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## I. INTRODUCTION

Appellant Immunex Corporation appeals from the April 14, 2009, and August 25, 2009, Orders of the trial court regarding the duty to defend and indemnify. In the April 14, 2009, Order, the trial court erroneously held that Respondent National Surety Corporation has no duty to defend Immunex, a pharmaceutical company, against certain underlying lawsuits filed against Immunex nationwide known as the Pharmaceutical Industry Average Wholesale Price Litigation (the “*AWP* Litigation” and the plaintiffs in that Litigation are the “*AWP* plaintiffs”). According to the trial court, the “personal injury” coverage in National Surety’s policies does not apply to any of the allegations contained in the *AWP* Litigation. The trial court’s ruling, however, was in error because the *AWP* Litigation creates a clear potential for coverage under National Surety’s “personal injury” coverage. CP 1022-24.<sup>1</sup>

One of the “personal injury” offenses enumerated in National Surety’s policies is “discrimination.” CP 630, 652, 654. Contrary to Washington law and the language of the policies, the trial court erroneously held that the allegations of differential treatment in the *AWP* Litigation could not even potentially constitute injury “arising out

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<sup>1</sup> In its August 25, 2009, Order, the Court held that, because there was no duty to defend, there could be no duty to indemnify. CP 1117.

of . . . discrimination.”

National Surety included the broad term “discrimination” in its policies without any definition or limitation of the term. Had National Surety wanted “discrimination” to have a specific meaning in its policies or to be limited to only certain types of discrimination, it was free to accomplish that goal by including an appropriate definition. It did not. National Surety also included the broad phrase “arising out of.” National Surety thus by its own draftsmanship left itself open to the risk that it would be called upon to cover a broad array of injuries that bear some loose connection to “discrimination.”

That risk became reality when Immunex here sought to enforce the clear language of National Surety’s policies and obtain National Surety’s assistance in Immunex’s defense of the *AWP* Litigation. In response, National Surety sued Immunex and sought a ruling from the trial court regarding its duty to defend. In violation of all applicable rules of insurance policy interpretation the trial court narrowly construed the coverage that National Surety drafted and sold to Immunex and ruled that the *AWP* Litigation did not trigger National Surety’s duty to defend. The Court did so despite a clear potential for coverage as explained below. In fact, not only did the trial court employ the incorrect standard to determine coverage under the policies, but it ignored Washington rules of policy

interpretation. Based on this erroneous view, the Court further denied Immunex any indemnification from National Surety. This Court, thus, should reverse the trial court's April 14, 2009, and August 25, 2009, Orders.

## **II. ASSIGNMENTS OF ERROR AND RELATED ISSUES**

### **A. Assignments of Error**

1. The trial court erred in entering the April 14, 2009, Order granting National Surety's Motion for Summary Judgment Re the Duty to Defend and denying Immunex's Motion for Partial Summary Judgment Re the Duty to Defend.

2. The trial court erred in entering the August 25, 2009, Order granting National Surety's Motion Re Indemnity.

### **B. Issues Pertaining to Assignments of Error**

Issue 1. Did the trial court apply too narrow a standard when interpreting the term "discrimination" in National Surety's policies? National Surety argued in its Motion for Summary Judgment Re the Duty to Defend that the *AWP* Litigation does not trigger its duty to defend because those lawsuits do not include claims of "discrimination." CP 347. Instead, according to National Surety, those lawsuits allege only "fraud." *Id.* The trial court appears to have agreed. To reach that conclusion required the trial court to ignore dictionary definitions of

“discrimination,” and, instead, derive and apply an unnecessarily narrow construction of the term. However, an underlying theme in the *AWP* Litigation of the alleged “fraud” scheme is, by way of example, that providers *pay less* and *WP* plaintiffs *pay more*. Those allegations regarding disparate pricing treatment of the *AWP* plaintiffs potentially constitute “discrimination” based on the commonly accepted dictionary definitions of that term (*i.e.*, to distinguish between things; differentiate). Because National Surety’s policies do not define “discrimination,” the trial court erred by disregarding the dictionary definitions cited by Immunex in determining the existence of a duty to defend.

Issue 2. Did the trial court impose a standard for triggering coverage that does not exist in National Surety’s policies, or the law? In its April 14, 2009, Order, the trial court adopted National Surety’s position and ruled that National Surety must defend Immunex *only if* the *AWP* plaintiffs “allege damages *caused* by discrimination.” CP 1023 (emphasis added). That approach simply read out of the policy the phrase “arising out of,” which has a broader meaning than the incorrect standard applied by the trial court. Under the standard employed by the trial court, there must be a direct link between discrimination and damage—but that is contrary to what the policies in fact say.

Issue 3. Did the trial court erroneously adopt National

Surety's view that, for coverage to apply, the *AWP* Litigation must state "a claim for discrimination as a violation of law?" CP 980. Such a conclusion is not in accord with Washington law or the actual language of National Surety's policies.

### III. STATEMENT OF THE CASE

#### A. The Policies

National Surety issued Umbrella and Excess Liability Insurance Policies (the "policies") to Immunex covering at least the periods from September 1, 1998, to September 1, 2002. CP 620-23. Those policies include Coverage A (the policies' "excess" insurance) and Coverage B (the policies' "umbrella" coverage). The primary difference between the two coverages is that, whereas Coverage A may provide excess coverage over and above that available through an underlying primary policy, Coverage B may "drop down" to pay for claims not otherwise covered by an underlying policy. *Christal v. Farmers Ins. Co.*, 133 Wn. App. 186, 195, 135 P.3d 479 (2006).

Pursuant to the "personal injury" coverage within Coverage B of National Surety's policies, National Surety must:

pay on behalf of . . . [Immunex] those sums that [Immunex] . . . becomes legally obligated to pay as damages because of . . . Personal and Advertising Injury that is caused by an offense . . . ."

CP 630, 652.

“Personal and Advertising Injury” is defined under the policies to mean:

injury . . . *arising out of* one or more of the following offenses: . . . Discrimination (unless insurance thereof is prohibited by law).

CP 654 (emphasis added).<sup>2</sup>

National Surety did not include in its policies definitions of the terms “offense” or “discrimination.”

**B. The Underlying AWP Litigation**

The *AWP* plaintiffs, consumer groups and state and local governments, generally allege in their pleadings that they are forced to rely upon pharmaceutical companies’ reported prices (the average wholesale price or “AWP”) when they pay for their drugs. CP 932, ¶ 5. Among other things, Immunex’s and the other defendants’ pricing practices are alleged to have resulted in the *AWP* plaintiffs paying different (higher) prices for their drugs than those paid by providers, such as hospitals, pharmacies and doctors, who do not pay based on the AWP.

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<sup>2</sup> The cited sections of Policy No. XYZ-000-9670-1909 covering the period from September 1, 2001, to September 1, 2002, are attached to Exhibit 13 to the Carstens Declaration submitted by National Surety with its motion. CP 630, 652, 654. As National Surety stated in its motion, this policy includes an amended “personal injury” definition. CP 346. As National Surety also acknowledges, however, the personal injury coverage in the earlier National Surety policies issued to Immunex provides the same scope of coverage as that contained by the 2001-02 policy. CP 346, fn. 26.

CP 934-5, ¶¶ 15, 16; CP 937-8, ¶ 155. This deferential pricing treatment allegedly results in part because the *AWP* plaintiffs were operating under a regulated reimbursement system while the providers were not. CP 932, ¶ 5; CP 933, ¶ 9. The *AWP* plaintiffs allege that the drug companies seized upon their vulnerability—their dependence upon what the companies allegedly report to be their actual average wholesale prices for various drugs—and used it to reap illegal profits by discriminating against these purchasers. CP 934-5, ¶¶ 15, 16.

The *AWP* plaintiffs consistently allege that they would have been able to enjoy the same competitive benefits that the providers enjoy (discounts, rebates and the like) if Immunex and the other drug companies had reported their actual average wholesale prices. CP 933, ¶ 9. However, according to the *AWP* plaintiffs, this is not what happened. CP 948, ¶ 126. Instead, they allege that only providers directly or indirectly reaped the benefits of actual market prices (actual prices after discounts and rebates). Those who allegedly paid based on *AWP*—e.g., the *AWP* plaintiffs, and others—did not. Thus, a predominant theme of the *AWP* Litigation is discrimination.

The alleged discrimination takes three different forms. First, Immunex's conduct is alleged to have had what is in effect a discriminatory impact on the *AWP* plaintiffs who are alleged not to enjoy

the benefit of the same discounts and rebates as providers (*i.e.*, doctors, hospitals and pharmacies). As a result, the *AWP* plaintiffs are alleged to have paid higher prices than those paid by the providers. CP 934-35, ¶ 15. Second, Immunex is alleged to have charged different prices among the providers: “pharmacies [allegedly] are given one price, hospitals another, and doctors yet another.” CP 927, ¶ 62. Third, Immunex’s pricing practices are alleged to have had a disparate impact on the elderly. CP 935, ¶ 18.

Regardless of the labels used by the *AWP* plaintiffs to describe their causes of action in that Litigation, these allegations of discrimination form part of the essential building blocks for the *AWP* plaintiffs’ ultimate damage claims. In other words, the *AWP* plaintiffs’ claims for relief are ultimately premised upon, among other allegations, these very allegations of disparate treatment in pricing practices.

Representative examples of allegations of discrimination in the *AWP* Litigation include the following<sup>3</sup>:

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<sup>3</sup> Of course, due to their volume, not all the allegations from all of the complaints filed in the *AWP* Litigation were attached to Immunex’s Motion for Partial Summary Judgment re Duty to Defend. Nor are they included as part of the Record on Appeal. The quoted paragraphs from some of the complaints filed in the *AWP* Litigation are intended to provide representative samples of the relevant allegations of injury “arising out of” “discrimination.”

1. ***Commonwealth of Kentucky v. Alpharma, et al., Case No. 04-CI-1487, Commonwealth of Kentucky, Franklin Circuit Court, Division 1:***

- “Defendants further obscure their true prices for their drugs with their policy of treating different classes of trade differently. Thus, for the same drug, pharmacies are given one price, hospitals another, and doctors yet another.” CP 927, ¶ 62.
- “By publishing, or causing to be published, false and inflated wholesale prices, and by keeping the prices for which they are actually selling their drugs secret, defendants have knowingly enabled providers of drugs to Medicaid recipients to charge Kentucky higher prices for these drugs than they could have charged had defendants not reported these false and inflated AWP, and have knowingly interfered with Kentucky’s ability to set reasonable reimbursement rates for their drugs.” CP 928, ¶ 73.
- “As a consequence, 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.” CP 928, ¶ 74.
- “Because Medicare Part B participants must pay 20% of the allowable cost, which is based on AWP, for their medications, and because defendants have published false and inflated AWP for their drugs, Medicare Part B participants are paying substantially more for their co-pay – either directly or through higher insurance premiums defraying the cost of this co-pay – then they would pay if defendants published their true wholesale prices.” CP 929-30, ¶ 79.

**2. *State of Arizona v. Abbott Laboratories, et al.*, Case No. CV 2005-018711, Superior Court of the State of Arizona, County of Maricopa:**

- “Pursuant to federal regulation and industry and State practice, reimbursement for prescription drugs is based primarily upon the reported AWP, and this is true for both Medicare and Medicaid reimbursement. Pursuant to industry practice, AWP is the reimbursement benchmark for the vast bulk of drugs paid for in the private sector as well.” CP 932, ¶ 5.
- “As a result of the fraudulent and illegal manipulation of AWP for certain drugs by the Defendants’ [sic] pharmaceutical manufacturers have reaped tens of millions of dollars in illegal profits at the expense of payors and consumers, including but not limited to Patients who are residents of the State of Arizona and who make co-payments based on inflated AWP. In particular, elderly Medicare participants bear a disproportionate burden of this scheme as they make payments or co-payments based on the fictitious AWP charges.” CP 935, ¶ 16.
- “The Defendant Drug Manufacturers’ pattern of fraudulent conduct in artificially inflating the AWP for their drugs (sometimes referred to herein as the “AWP Scheme”) directly caused co-payors and payors to substantially overpay for those drugs.” CP 936, ¶ 131.

**3. *State of Illinois v. Abbott Laboratories, et al.*, Case No. CH 02474, Circuit Court of Cook County, Illinois County Department, Chancery Division:**

- “[D]efendants 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.” CP 941, ¶ 62.

- “By publishing false and inflated wholesale prices, and by keeping their true wholesale prices secret, defendants have knowingly enabled providers of drugs to Medicaid recipients to charge Illinois false and inflated prices for these drugs, and interfered with Illinois’ ability to set reasonable reimbursement rates for these drugs.” CP 942, ¶ 73.
- “As a consequence, Illinois’ Medicaid program has paid more for prescription drugs than it would have paid if defendants had published their true wholesale prices.” CP 942, ¶ 74.
- “Defendants’ unlawful activities have significantly impacted Illinois and its citizens. Illinois has had to pay higher prices for drugs it reimburses through its Medicaid program. Illinois Medicare, Part B, 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.” CP 943, ¶ 80.

**4. *Mississippi v. Abbott Laboratories, et al.*,  
Case No. C2005-2021, Chancery Court of  
the First Judicial District of the State of  
Mississippi:**

- “The Defendants set the AWP’s for their products artificially high in order to attract providers and thus gain market share for their products, with the State picking up the tab. The Defendants have reinforced this tactic with other deceptive practices such as covert discounts, kickbacks and rebates to providers, and the use of various other devices to keep secret the prices of their drugs currently available in the marketplace. The Defendants’ fraudulent pricing and marketing of their prescription drugs have resulted in the Mississippi Division of Medicaid’s (“Division”) paying grossly

excessive prices for the Defendants' prescription drugs." CP 945, ¶ 5.

- "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 947, ¶ 117.
- "By marketing the "spread" on their products, the Defendants intended to induce providers to purchase their drugs, knowing that the larger "spreads" would allow the provider to pocket more money from the State in the form of higher Medicaid reimbursements." CP 947, ¶ 118.
- "[S]ome 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 of their drugs." CP 948, ¶ 126.

In short, the underlying complaints include numerous allegations of the broad and undefined concept of "discrimination" related to Immunex's pricing practices, such as: (1) the *AWP* plaintiffs do not enjoy the benefit of the same discounts and rebates as do providers and are therefore being treated differently (discriminated against) from providers under the *AWP* system; (2) Immunex also charged different prices among the providers; and (3) disparate impact on the elderly who are allegedly forced to pay higher co-pays for their prescriptions based on Immunex's pricing practices. The *AWP* plaintiffs thus seek relief from Immunex and others because of claimed injury that they allegedly suffered, which injury

allegedly arose out of, among other things, Immunex's allegedly discriminatory pricing practices.

**C. National Surety's Failed Promise to Defend**

In August 2001 while National Surety's policies were still in effect, Immunex first notified National Surety of the claims at issue in the *AWP* Litigation. CP 1047-49. In October 2001, National Surety acknowledged receipt of Immunex's notice. CP 1051-52.

In October and December 2006, Immunex wrote to National Surety, again notifying it of the *AWP* Litigation, attaching copies of all operative complaints that had been filed as of that date, and asking that National Surety participate in the Litigation. CP 1059-60; 1065. After a fifteen month dialogue about whether National Surety would provide coverage, on March 31, 2008, National Surety agreed to defend Immunex in the *AWP* Litigation, subject to a reservation of a claimed right to obtain reimbursement of the amounts paid "if it is determined by a court that there is no coverage or duty to defend and FFIC is entitled to reimbursement." CP 1067-84. However, to date, National Surety has not paid any defense costs incurred by Immunex in the *AWP* Litigation.

**D. Procedural History**

On March 31, 2008, National Surety served on Immunex the instant action seeking a declaration that National Surety has no obligation

different rules of construction based on the [size of ] the policyholder”).

**b. Courts May Look to Dictionary Definitions to Determine the Proper “Liberal Construction” of Policy Terms**

Under Washington law, “[i]nsurance clauses are to be liberally construed to provide coverage whenever possible.” *Odessa School Dist. No. 105 v. Insurance Co. of America*, 57 Wn. App. 893, 897, 791 P.2d 237 (1990). Thus, where a term in a coverage provision is not defined, it should be broadly construed based on its “plain, ordinary and popular” meaning. *See, e.g., Boeing Co.*, 113 Wn.2d at 877. To determine the “plain, ordinary and popular” meaning of a term, Washington courts look to “the common perception of the common man.” *Id.* at 881. Standard English dictionaries provide a basis to ascertain this “common perception.” *See, e.g., id.* at 877-78 (court consulted dictionary definition of term “damages” where policies contained “no defining words about damages”); *Anderson & Middleton Lumber Co. v. Lumbermen’s Mut. Cas. Co.*, 53 Wn.2d 404, 408-09, 333 P.2d 938 (1959) (court determined that “sudden” break occurred within meaning of policy by consulting dictionary definitions); *Safeco Ins. Co. v. Davis*, 44 Wn. App. 161, 165, 721 P.2d 550 (1986) (court found that “[s]everal reasonable interpretations of ‘entitled’ are possible within the scope of the exclusionary language”). *See also Aetna Cas. & Surety Co. v. Pintlar Corp.*, 948 F.2d 1507, 1513

(9th Cir. 1991) (dictionary definitions provide “the lexicon of the ordinary person”).

**c. Where Policy Language is Ambiguous,  
the Policy Must be Strictly Construed  
Against the Insurer**

Washington courts stress that “any doubts, ambiguities and uncertainties arising out of the language used in the policy must be resolved in [the policyholder’s] favor.” *Phil Schroeder, Inc. v. Royal Globe Ins. Co.*, 99 Wn.2d 65, 69, 659 P.2d 509 (1983), *modified, Phil Schroeder, Inc. v. Royal Globe Ins. Co.*, 101 Wn.2d 830, 683 P.2d 186 (1984). A term is ambiguous if it is susceptible to two different but reasonable interpretations. *Kitsap County v. Allstate Ins. Co.*, 136 Wn.2d 567, 576, 964 P.2d 1173 (1998) (“An ambiguity in an insurance policy is present if the language used is fairly susceptible to two different reasonable interpretations.”). Indeed, when “a policy is fairly susceptible of two different interpretations, that interpretation most favorable to the insured must be applied, even though a different meaning may have been intended by the insurer.” *Ames v. Baker*, 68 Wn.2d 713, 717, 415 P.2d 74 (1966).

**2. Rules Governing the Duty to Defend**

Washington courts repeatedly have addressed the scope of a

liability insurer's duty to defend and the relationship between the duty to defend and the duty to indemnify. That extensive body of law establishes beyond argument the following principles:

- An insurer's duty to defend is broader than its duty to indemnify, *Hayden v. Mutual of Enumclaw Ins. Co.*, 141 Wn.2d 55, 64, 1 P.3d 1167 (2000), and is one of the main benefits of the insurance contract. *Safeco Ins. Co. v. Butler*, 118 Wn.2d 383, 392, 823 P.2d 499 (1992). The duty to defend may exist even when coverage is in doubt and ultimately does not develop. *See Overton v. Consol. Ins. Co.*, 145 Wn.2d 417, 435, 38 P.3d 322 (2002).

- The duty to defend arises at the time an action is first brought, and is based on the ***potential for liability***. *Truck Ins. Exch. v. VanPort Homes, Inc.*, 147 Wn.2d 751, 760, 58 P.3d 276 (2002) (emphasis added). "Only if the alleged claim is ***clearly not covered*** by the policy is the insurer relieved of its duty to defend." *Id.* (emphasis added).

- If the underlying complaint is "***subject to an interpretation*** that creates a duty to defend, the insurer must comply with that duty." *APA-Engineered Wood Assn. v. Glens Falls Ins. Co.*, 94 Wn. App. 556, 562, 972 P.2d 937 (1999) (emphasis added). If a "complaint is ambiguous, it will be ***liberally construed*** in favor of triggering the insurer's duty to defend." *Truck Ins. Exch.*, 147 Wn.2d at 760, 58 P.3d at

282 (2002) (emphasis added); *Woo*, 161 Wn.2d at 53.

- The purpose of insurance is to *insure*, and that “construction should be taken which will render the contract operative, rather than inoperative.” *Scales v. Skagit County Med. Bur.*, 6 Wn. App. 68, 70, 491 P.2d 1338 (1971).
- Factual allegations contained in the underlying complaint—not the labels placed on the enumerated causes of action—are what determine the duty to defend. *Kitsap County*, 136 Wn.2d 567 (theory underlying claims against insured, rather than name of cause of action alleged in underlying complaints, determined whether personal injury coverage existed for those claims). *See also APA-Engineered Wood Assn.*, 94 Wn. App. at 562 (“When deciding whether a complaint alleges facts which, if proved, would render the insured liable, we attempt to elevate substance over form. . . . coverage does not hinge on the form of action taken or the nature of relief sought, but on an actual or threatened use of legal process to coerce payment or conduct by a policyholder.”); *Pension Trust Fund v. Fed. Ins. Co.*, 307 F.3d 944, 951 (9th Cir. 2002) (“remote facts buried within causes of action that may potentially give rise to coverage are sufficient to invoke the defense duty”); *U.S. Fidelity & Guaranty Co. v. Executive Ins. Co.*, 893 F.2d 517, 519 (2d Cir. 1990) (insurance “policy protects against poorly or incompletely pleaded cases

as well as those artfully drafted” (citation omitted)).

As explained more fully below, the underlying complaints in the *AWP* Litigation allege that Immunex’s pricing policies had disparate impact on *AWP* plaintiffs and among providers. Accordingly, construing National Surety’s policies liberally and interpreting discrimination broadly, as an ordinary person would, the underlying *AWP* Litigation alleges potentially covered discrimination. Accordingly, the superior court erred in granting summary judgment and its decision should be reversed.

**B. The Trial Court’s Multiple Errors**

**1. The Trial Court Narrowly Construed the Term “Discrimination” in Violation of Applicable Rules of Insurance Policy Interpretation**

The term “discrimination” is included within an insuring provision of National Surety’s policies, the “personal injury” coverage provision. CP 647. Given that “discrimination” is included in an insuring provision, the trial court was obligated by applicable rules of policy interpretation to construe the term *liberally* “to provide coverage whenever possible.” *Odessa School Dist.*, 57 Wn. App. at 897. The trial court’s ruling did not comply with that standard.

As noted above, National Surety sold policies to Immunex that, by their terms broadly covered “discrimination,” but failed to include *any*

definition of the term. Dictionary definitions of “discrimination” thus provide guidance for deciding this appeal. *See* Section V(A)(1)(b), above.

Exemplar dictionary definitions make clear that “discriminate” has a commonly understood broad meaning that is helpful here. For example, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (2nd College ed.), defines “discriminate” as “to make a clear distinction; distinguish.” According to WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY (1991), “discriminate” means “to make a distinction.” WEBSTER’S II, DICTIONARY (3d ed.), says: “1. to distinguish between things: differentiate. 2. To act prejudicially.” WEBSTER’S NEW WORLD DICTIONARY (2nd College ed. 1980) defines the term as: “1. to constitute a difference between: differentiate . . . 3. to make distinctions in treatment; show partiality (in favor of) or prejudice (against).”

Black’s Law Dictionary also supports a conclusion that “discrimination” entails “differential treatment” at a most rudimentary level. Black’s generic definition of the term includes “2. Differential treatment; esp., a failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored.” BLACK’S LAW DICTIONARY 479-80 (7th ed. 1999).

In light of these dictionary definitions, a comparison of the allegations in the *AWP* Litigation with the plain language of the National

Surety policies demonstrates National Surety's duty to defend. The underlying allegations that Immunex did not treat all *AWP* plaintiffs and providers equally unambiguously constitute allegations of discrimination, which fall within the purview of the policies' "personal injury" coverage. As such, construing National Surety's discrimination coverage in a manner, "which will render the contract operative rather than inoperative" (*Scales*, 6 Wn. App. at 70), the trial court should have concluded that these allegations potentially trigger National Surety's duty to defend.

This conclusion is not unfair to National Surety, which subjected itself to the risk that it may be required to defend lawsuits broadly alleging discrimination when it decided not to define "discrimination" in its policies. In fact, it was National Surety's burden to draft "clear and unmistakable [policy] language." *Dairyland Ins. Co. v. Ward*, 83 Wn.2d 353, 359, 517 P.2d 966 (1974). "The [insurance] industry knows how to protect itself and it knows how to write exclusions and conditions." *Boeing Co.*, 113 Wn.2d at 887. National Surety chose not to protect itself by defining "discrimination" in its policies—presumably so that it could market (and accept premiums for) broad "personal injury" insurance at the point of underwriting. Had it wished to limit Immunex's coverage, National Surety easily and unequivocally could have done so. It did not.

Nonetheless, in violation of insurance policy interpretation

standards and applicable dictionary definitions, the trial court in essence rewrote National Surety's policies to do something National Surety chose not to do—narrowly define “discrimination.”

According to the trial court in its April 14, 2009, Order,

“‘Discrimination’ means more than a distinction or a difference.”

CP 1023. But, that is not what the policies say.<sup>4</sup> In fact, National Surety's parent company, Fireman's Fund, has an Umbrella Policy Form that, unlike the form used in National Surety's policies at issue here, actually narrowly defines discrimination. Fireman's Fund's Form expressly covers:

Discrimination when based solely on either disparate impact or vicarious liability . . . is prohibited by law). As used in this definition N, the term “discrimination” means the unlawful treatment of individuals based on race, color, religion, gender, age or national origin.

*Fireman's Fund Ins. Co. v. Fogo De Chao Churrascaria (Chicago), LLC*, 2008 WL 2840755, \*5 (June 4, 2008, N.D. Ill).

That National Surety did not use such language in the policies that it sold to Immunex evidences that the trial court erred

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<sup>4</sup> In fact, National Surety itself never argued in the trial court that its discrimination coverage in fact should be so narrowed.

in applying a narrow construction to “discrimination” when interpreting Immunex’s policies. *See, e.g., Willing v. Cnty. Ass’n Underwriters of Am., Inc.*, 2007 U.S. Dist. LEXIS 48543, \*16-17 (W.D. Wa. 2007) (“if defendants had intended to exclude coverage based on ‘incidents of ownership’ . . . they could have done so. In fact, [another insurer] sold [the insured] a policy after the relevant time period . . . that included just such an exclusion.”). As Washington courts time and again have observed:

Insurance policies are almost always drafted by specialists employed by the insurer. In light of the drafters’ expertise and experience, the insurer should be expected to set forth any limitations on its liability clearly enough for a common lay-person to understand; if it fails to do this, it should not be allowed to take advantage of the very ambiguities that it could have prevented with greater diligence.

*Hess v. North Pac. Ins. Co.*, 67 Wn. App. 783, 788 n.5, 841 P.2d 767 (1992); *Emter v. Columbia Health Servs.*, 63 Wn. App. 378, 384, 819 P.2d 390 (1991). The trial court thus was not entitled to effectively rewrite National Surety’s discrimination coverage to narrow the

circumstances in which it applies. See *Public Employees Mutual Ins. Co. v. Mucklestone*, 111 Wn.2d 442, 444, 758 P.2d 987 (1988) (trial court should not reform policy to impose exclusion that insurer “wishes it had drafted.”).

If National Surety intended to limit its discrimination coverage, National Surety, not Immunex, should suffer the consequences of National Surety’s failure to include clear alternative language expressing its claimed intent. *Boeing Co.* 113 Wn.2d at 887 (“The [insurance] industry knows how to protect itself and it knows how to write exclusions and conditions.”). The language that National Surety chose to include in its policies controls the parties’ relationship.

Because the conduct alleged in the *AWP* Litigation plainly falls within the dictionary definitions of “discrimination” (i.e., to distinguish between things; differentiate), National Surety’s policies cover the *AWP* Litigation. The trial court’s conclusion to the contrary thus is in error. Here, at the very worst for Immunex, the term is ambiguous—meaning **both** Immunex’s and the trial court’s interpretations are reasonable. However, even in that circumstance the term must be construed broadly, in favor of coverage. See *American Nat’l Fire Ins. Co. v. B&L Trucking & Const. Co.*, 134 Wn.2d 413, 435, 951 P.2d 250 (1998); *Queen City Farms v. Central Nat’l. Ins. Co.*, 126 Wn.2d 50, 83, 882 P.2d 703 (1994).

**2. The Trial Court Applied an Incorrect Policy Standard to Determine The Duty to Defend**

The trial court also in error appears to have concluded that regardless of the meaning of “discrimination,” coverage still is not triggered. According to the trial court, there was not a sufficiently close nexus between any allegations of discrimination and the *AWP* plaintiffs’ alleged injuries. Following this erroneous line of analysis, the trial court ruled that “[t]he *AWP* complaints do not allege damages caused by discrimination.” CP 1023. In other words, according to the trial court, to trigger coverage, the *AWP* plaintiffs were required to allege that they suffered “injury” *because of* “discrimination.” However, National Surety’s policies nowhere contain such a requirement. Instead, they require allegations seeking damages “arising out of” discrimination. CP 654.

Placing side by side the trial court’s adopted standard against the actual policy standard, makes clear the trial court’s error:

<u>Trial Court Standard</u>	<u>Actual Standard</u>
Damages	Damages
Because of	Because of
Discrimination	Injury
	Arising out of
	Discrimination
	Caused by an offense

Thus, the actual standard, as set forth in National Surety’s policies,

covers claims for damages ‘because of’ ‘injury’ ‘*arising out of*’ ‘discrimination’ (emphasis added). This “arising out of” language requires only a loose causal connection between the *AWP* plaintiffs’ claimed injury and “discrimination.” *See, e.g., Australia Unlimited, Inc. v. Hartford Cas. Ins. Co.*, 147 Wn. App. 758, 774, 198 P.3d 514 (2008) (“The phrase ‘arising out of’ . . . has a broader meaning than ‘caused by’ or ‘resulted from’ . . . ‘Arising out of’ does not mean ‘proximately caused by.’”); *Toll Bridge Authority v. Aetna Ins. Co.*, 54 Wn. App. 400, 404, 773 P.2d 906 (1989) (“The phrase ‘arising out of’ is unambiguous and has a broader meaning than “caused by” or “resulted from.”); *Avemco Ins. Co. v. Mock*, 44 Wn. App. 327, 329, 721 P.2d 34, 35 (1986) (“The phrase ‘arising out of’ is unambiguous and has a broader meaning than ‘caused by’ or ‘resulted from.’”).

In light of the broad “arising out of” language of the policies, the *AWP* plaintiffs need not allege that their injury was directly caused by “discrimination.” Instead, the duty to defend exists as long as the claimants allege injury potentially and loosely based at least in part upon “discrimination.” Thus, the trial court’s replacement of the “arising out of” standard with the narrow direct causation standard was error. Indeed, as set forth above, the trial court was not entitled to write something into the policies that was not there. *See American Nat. Fire Ins. Co.*, 134

Wn.2d at 427 (if insurer “intended solely to be liable on a pro rata basis it could have included that language in its policy.”); *Panorama Village Condo. Owners Ass’n Bd. of Dirs. v. Allstate Ins. Co.*, 144 Wn.2d 130, 141, 26 P.3d 910 (2001) (“The industry knows how to protect itself and it knows how to write exclusions and conditions.”).

**a. The *AWP* Plaintiffs’ fraud claims “arise out of” alleged discrimination**

At the heart of the *AWP* Litigation, the claimants allege that Immunex’s pricing activities are discriminatory. The *AWP* plaintiffs allege facts that support two forms of potential discrimination: (1) discrimination between the *AWP* plaintiffs and providers, and (2) discrimination among providers. The *AWP* plaintiffs also allege that Immunex’s pricing policies have had a disparate impact on the elderly. Therefore, the claims “arise out of” discrimination. No further causal connection is required to trigger the duty to defend.

***i. “Discrimination” between *AWP* plaintiffs and providers***

The *AWP* allegations demonstrate that the providers are alleged to have received the benefit of discounts and rebates that the *AWP* plaintiffs did not receive. CP 933, ¶¶ 9, 10; CP 945, ¶ 5. As a result, the *AWP* plaintiffs allege that they paid a higher price than that paid by providers because of Immunex’s pricing activities. CP 926-27, ¶¶ 49, 52; CP 928,

¶¶ 73, 74; CP 948, ¶126. These allegations assert differential treatment and, accordingly, allege discrimination. *See, e.g.*, WEBSTER’S II, DICTIONARY (3d ed.): “1. to distinguish between things: differentiate. 2. To act prejudicially.”

National Surety erroneously claimed in the trial court that no potential discrimination exists because Immunex did not *directly* sell its drugs to the *AWP* plaintiffs. CP 789. However, allegations of direct sales are not germane to the issue of whether the alleged *AWP* plaintiffs’ injuries “arise out of” the alleged discrimination. What is crucial is that Immunex’s allegedly preferential pricing policies are alleged to have potentially resulted in “discrimination” against the *AWP* plaintiffs. In other words, it is sufficient that the *AWP* plaintiffs allegedly paid more for drugs than the providers. CP 23-25. Thus, plaintiffs’ damages arise out of the alleged discrimination between *AWP* plaintiffs and providers.

*ii. Discrimination among the providers*

National Surety admitted that the *AWP* complaints allege that Immunex discriminated among providers by charging them different prices. CP 783-84. National Surety also admitted that such allegations “explain how the defendants managed to carry out their [fraudulent] scheme.” CP 783-84. Thus, even according to National Surety, the fraud

claims against Immunex potentially “arise out of,” among other things, these allegations of discrimination between providers. This is sufficient to trigger National Surety’s duty to defend.

That duty to defend exists *even though* the providers are not the *AWP* plaintiffs. Courts have rejected the argument that coverage extends only to suits brought by the party against whom the offense is allegedly made. *See, e.g., Martin Marietta Corp. v. Insurance Co. of North America*, 40 Cal. App. 4th 1113, 1134, 47 Cal. Rptr. 2d 670 (1995) (“INA essentially argues that, even if a claim would be covered if brought by an individual property owner, the claim is not covered if it is brought by the government. INA cites no policy language which would support this argument, and we see none. . . . Under the policy, it is not the identity of the plaintiff which determines coverage, but the allegations of the complaint.”); *State Farm Fire & Cas. Co. v. Martinez*, 26 Kan. App. 2d 869, 876, 995 P.2d 890 (2000) (underlying suit need not be brought by disparaged individual for coverage to apply). Thus, it is not necessary that the parties who have been discriminated against be the claimants for there to be coverage.

National Surety cannot avoid coverage by narrowly construing the *AWP* plaintiffs’ claims as being based solely upon an alleged fraudulent scheme. CP 791. “[N]otice pleading imposes a significant burden on the

insurer to determine if there are any facts in the pleadings that could conceivably give rise to a duty to defend.” *Australia Unlimited*, 147 Wn. App. at 772. Here, as illustrated above, the AWP pleadings contain facts that “could conceivably give rise to a duty to defend.”

**iii.        *Discrimination against the elderly***

In addition to the two types of discrimination described above, there is a third type of discrimination alleged in the *AWP* complaints—discrimination against the elderly. Indeed, National Surety’s claims handler has acknowledged as much in correspondence. CP 616. National Surety has claimed that those allegations do not trigger its “Coverage B” because Immunex’s primary policies cover “age discrimination,” among other explicitly mentioned forms of discrimination. However, the trial court had no basis to conclude that these allegations would fit within the purview of that explicit primary coverage. Thus, it is possible that the *AWP* plaintiffs allege discrimination against the elderly sufficient to trigger National Surety’s broad discrimination coverage, but not to trigger the primary insurer’s more narrow coverage.

**3.        *The Trial Court Appears to Have Ignored the Allegations of Differential Treatment in Erroneously Issuing its Order***

National Surety erroneously argued below that, even if the allegations in the *AWP* Litigation may rise to the level of

“discrimination,” that fact was irrelevant because “no plaintiff alleges facts that could constitute a discrimination claim.” CP 980-1. The trial court appears to have concurred in error. In fact, however, that conclusion was neither supported by applicable Washington law nor the express terms of National Surety’s policies. There is nothing in the policies that limits “personal injury” offenses to claims or causes of action.

The term “offense” is not defined in National Surety’s policies. Dictionary definitions thus again may be consulted. *See, e.g., Boeing Co.*, 113 Wn.2d at 877-78; *Anderson & Middleton Lumber Co.*, 53 Wn.2d at 408-09; *Safeco Ins. Co.*, 44 Wn. App. at 165. Dictionaries define “offense” much more broadly than a “claim” or “cause of action.” For example, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (10th ed.) defines “offense” as “a breach of a moral or social code: sin misdeed.” According to a dictionary definition cited by the Washington Supreme Court in *Kitsap County*, “offense” means “sin, transgression, misdeed.” 136 Wn.2d at 582-3. Thus, the dictionary definition of “offense” does not limit the term to just claims or causes of action, rather it encompasses enumerated forms of misconduct or “misdeeds.” Had National Surety intended to define “offense” to mean a “claim” or “cause of

action,” it certainly could have done so. However, it did not.

Indeed, the meaning of “offense” cannot be limited to a claim or cause of action. At least two of the enumerated “offenses” in the policies cannot even be pled as “causes of action” under Washington law. For example, “wrongful entry” and “the use of another’s advertising ideas in your Advertisement” (CP 654) are not causes of action but phrases describing misdeeds. *See, e.g., Kitsap County*, 136 Wn.2d at 587 (“We are satisfied that a tort of ‘wrongful entry’ has never been acknowledged in Washington.”). Two of the enumerated offenses cannot even be pled as causes of action. This mandates the conclusion that there is coverage when, as here, a complaint includes factual allegations of conduct that fit within the purview of the enumerated offenses (i.e., discrimination) even though a claim or cause of action has not been alleged. Indeed, any conclusion to the contrary would render coverage for these offenses illusory.

Moreover, according to applicable law as noted above, coverage is not triggered by the titles used by underlying plaintiffs in their complaints. Instead, courts must focus on the nature of the allegations to determine coverage. *See, e.g., Kitsap County*, 136 Wn.2d at 580.

In *Kitsap County*, the insurers contended that because the plaintiffs in the underlying suits did not allege that the County committed any of the precise offenses enumerated in the personal injury coverage provisions, there was no coverage. The court rejected the insurers' position, stating:

While there is apparently no published decision from a court in this state which addresses whether personal injury coverage is dependent on the theory underlying the claim or the nature of the injury that is alleged, we are inclined to agree with the courts in other jurisdictions that in determining whether personal injury coverage exists we must look to the type of offense that is alleged.

*Id.* at 580.

The *Kitsap County* court went on to find coverage with respect to the cause of action identified as trespass because the allegations of that claim fit within the policies' "personal injury" definition of wrongful entry. The court stated:

It would seem apparent from the above definitions that the plain, ordinary, and popular meaning that an average purchaser of insurance would ascribe to the phrase "other invasion of the right of private occupancy" would include a trespass on or against a person's right to use premises or land that is secluded from the intrusion of others. Indeed, this view of the phrase would be consistent with a definition of trespass found in BLACK'S LAW DICTIONARY

.....

*Id.* at 590.

In light of *Kitsap County* and its progeny and the plain language of National Surety's personal injury coverage, the *AWP* Litigation need not include a claim or cause of action labeled

“discrimination.” Rather, the *AWP* plaintiffs need only seek damages arising out of allegations of conduct that fits within the broad dictionary definition of “discrimination.” They do. Discriminatory “conduct,” not a “claim” for discrimination, is all that is required for there to be coverage. Accordingly, the court erred in concluding that there was no coverage.

C. **In the Event that this Court Reverses the Trial Court’s April 14, 2009, Order, Immunex Should Be Allowed to Reassert Its Indemnity Claims Against National Surety**

As noted above in Section III(D), on July 17, 2009, National Surety filed a Motion Re Indemnity seeking an Order from the Court that National Surety owes no duty to indemnify Immunex with respect to the underlying *AWP* Litigation. Because of the Court’s earlier ruling finding in favor of National Surety on the duty to defend, Immunex stipulated that it would not oppose National Surety’s Motion Re Indemnity. The Stipulation also provides that Immunex’s agreement to withdraw its indemnity claim is expressly conditioned upon the April 14, 2009, Order being finally upheld on appeal. CP 1116.

On August 25, 2009, the Court issued its order granting National Surety’s Motion Re Indemnity based on the Court’s April 14, 2009, Order. CP 1117. Pursuant to the terms of that Order, in the event the April 14,

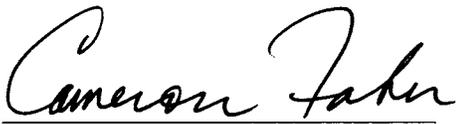
2009, Order is reversed or in any manner vacated by this Court, the Court should also vacate the August 25, 2009, Order and instruct the trial court to reinstate Immunex's claims for indemnity against National Surety.

## VI. CONCLUSION

For all the foregoing reasons, the Court should reverse the trial court's April 14, 2009, and August 25, 2009, Orders.

DATED: May 11, 2010

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NO. 64712-1-1

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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NATIONAL SURETY CORPORATION,

Respondent/Cross-Appellant,

v.

IMMUNEX CORPORATION,

Appellant/Cross-Respondent.

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DECLARATION OF SERVICE

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DIVISION I  
SEATTLE, WA

**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:

On May 11, 2010, I arranged for service of the foregoing BRIEF OF APPELLANT to the Court and to the parties to this action as follows:

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Dated at Los Angeles, California, this 11th day of May, 2010.

  
Sandra Beardsley