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Court Holds Antitrust Exclusion Bars Coverage for Unjust Enrichment and Consumer Protection Claims

By Kevin LaCroix on October 29, 2024

Many private company D&O insurance policies have a so-called antitrust exclusions that precludes coverage for claims alleging violations of the antitrust laws. However, these exclusions are written broadly and often seek to preclude a wide range of kinds of claims, beyond just claims alleging violations of the antitrust laws. A recent case from the Eastern District of California provides an illustration of the antitrust exclusion's coverage preclusive reach. The court, applying California law, held that the applicable policy's antitrust exclusion barred coverage for the unjust enrichment claim and consumer protection law violation claim filed as part of a larger antitrust lawsuit. The court's reasoning in concluding that the claims were precluded is interesting and provides some insight into the operation of the exclusion and its potential application to various kinds of claims.

The Court's August 22, 2024, opinion in the case can be found here. The Wiley law firm's October 14, 2024, post in its *Executive Summary* blog can be found **here**.

Background

Foster Poultry Farms is a chicken producer. It is one of several U.S. chicken producers named as defendants in the consolidated Broiler Chicken Antitrust Lawsuits. The plaintiffs in the antitrust lawsuit alleged four causes of action: violation of the Section 1 of the Sherman Act; violations of various state antitrust laws; violation of several state consumer protection and unfair competition laws; and unjust enrichment "by the receipt of unlawfully inflated prices and unlawful profits."

At the relevant time, Foster maintained a program of D&O insurance consisting of a layer of primary insurance and a layer of excess follow form insurance. Foster submitted the complaints in the antitrust litigation to its insurers. Both the primary insurer and the excess insurer denied coverage for the claim im reliance on the antitrust exclusion. Foster and the primary insurer later worked out a compromise in which the primary insurer agreed to pay a percentage of Foster's defense fees, up to an agreed-upon cap (the cap was less than the limits of liability of the primary policy).

The excess insurer filed an action seeking a judicial declaration that the antitrust exclusion precluded coverage for the entire antitrust litigation. In the coverage lawsuit, Foster did not dispute that the exclusion precluded coverage for the Sherman Act and state antitrust claims. Foster contended, however, that the antitrust exclusion did not apply to the separate causes of action in the underlying lawsuit for unjust enrichment and violations of the state consumer protection laws, and the separate allegations in the underlying lawsuit of fraud and false advertising. The parties filed cross-motions for summary judgment. The motions were ruled upon by Southern District of Texas Judge Lee Rosenthal, sitting by designation in the Eastern District of California.

Applicable Policy Language

The antitrust exclusion in the primary policy, to which the excess carrier followed form, excludes coverage for "any actual or alleged violation of any law, whether statutory, regulatory, or common law, respecting any of the following activities: antitrust, business competition, unfair trade practices or tortious interference in another's business or contractual relationships."

The Court's Opinion

In an August 22, 2024, opinion, Judge Rosenthal, applying California law, held that the antitrust exclusion applied to preclude coverage for all of the claims in the underlying litigation, including the unjust enrichment claim and the state consumer protection law violations claim, as well as the allegations of fraud and false advertising.

Judge Rosenthal said that Foster's arguments that the antitrust exclusion did not apply to the other claims "unpersuasive." He said that the unjust enrichment claim is "derivative of, and entirely dependent upon, the antitrust claims and underlying price-fixing allegations," noting that in support of the unjust enrichment claim the plaintiff had alleged that the defendants were "unjustly enriched by the receipt of unlawfully inflated prices and unlawful profits." The allegations in the unjust enrichment claims, he said, "are identical to the allegations underlying the excluded antitrust causes of action."

The state consumer protection law violation cause of action is, Judge Rosenthal said, "in this respect, no different from the unjust enrichment claims." The allegations in the consumer protection claims "are the same as the allegations underlying the claims for violations of the Sherman Act and the state antitrust statutes."

Judge Rosenthal also said that the same analysis applies to the separate allegations in the underlying litigation for fraud and false advertising. These claims are "exclusively allegations that the defendants omitted, concealed, and misrepresented material facts with the intent of hiding from the public their alleged conspiracy to fix the price of broiler chickens."

Judge Rosenthal acknowledged that the antitrust exclusion "could have been drafted to apply more clearly to the unjust enrichment, consumer protection, and deceptive trade practices claims." But he found no ambiguity that the antitrust exclusion applies to causes of action that "while not designated as 'antitrust causes of action,' are based entirely on allegations of anticompetitive conduct." He added that this application of the exclusion was consistent with the principle of California law that "allegations in the complaint, not the labels given to the causes of action, determine the duty to defend."

Discussion

Long-time readers know that in prior posts, I have sounded the alarm bell about the antitrust exclusion (as, for example, **here**). Antitrust exclusions are found in many, if not most, private company D&O insurance policies, as well as many kinds of professional liability insurance policies. But though these exclusions are referred to in shorthand terms as "antitrust exclusions," they usually sweep much more broadly, encompassing a broad variety of other kinds of claims as well – as was the case with the exclusion in this policy, which not only precludes coverage for antitrust claims, but also for other kinds of claims, including "business competition, unfair trade practices or tortious interference with another's business or contractual relationship."

Many of these enumerated additional kinds of claims are not at all what most people think of when the hear the word "antitrust," nor are they what most people would think of as being

precluded from coverage by an exclusion denominated as an “antitrust exclusion.”

The court in this coverage lawsuit found that the antitrust exclusion swept broadly to preclude coverage not just for claims denominated as antitrust claims, but also to other kinds of claims, even though these other causes of action were not expressly to be found among the “other” claims specified in the antitrust exclusion. In essence, Judge Rosenthal said what matters with respect to the preclusive reach of the antitrust exclusion is not the labels causes of action are given, but rather the nature of the underlying allegations. Because all of the claims, including even the claims not denominated as antitrust claims, were based “entirely on allegations of anticompetitive conduct,” all of the claims, including the ones not expressly alleging violations of the antitrust laws, are precluded from coverage by the antitrust exclusion.

The fact that the antitrust exclusion was held here to preclude all of the causes of action, and not just the claims denominated as antitrust claims, shows how the antitrust exclusion can operate as a kind of stealth coverage bar. It is particularly noteworthy here that the exclusion was held to bar coverage even as to causes of action that, as denominated, were not among the exclusions list of “other” claims that for which the exclusion bars coverage.

The reach of the antitrust exclusion, and its potential applicability to many kinds of claims not denominated as antitrust claims, matters because many private company D&O insurance claims involve causes of action for deceptive or trade practices, of violations of state consumer or business protection laws. The antitrust exclusion can come into play in a wide variety of kinds of claims, much more frequently that is often understood.

As it has developed over the years, at least some carriers will remove the antitrust exclusion upon request. Other carriers will upon request modify the exclusion to narrow its scope, or at least provide antitrust coverage subject to a sublimit or coinsurance. It may be that in many insurance placement transactions, there is no alternative for a particular insurance buyer than to get insurance with a full antitrust exclusion. Many buyers will want to seek and prefer other alternatives.
