Insurer's 'Unfair Competition' Exclusion Defense to Product Liability Suit Overcooked, For Now, As Pressure Cooker Manufacturer's Insurance Claim Proceeds

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A California federal district court recently denied an insurer's motion to dismiss a manufacturer's insurance coverage suit on the grounds that an "unfair competition" exclusion barred coverage for a suit that alleged violations of the Colorado Consumer Protection Act. The court allowed the suit to proceed because the exclusion did not clearly, explicitly, and unambiguously apply to the product liability suit alleged against the manufacturer. The decision in Arovast Corporation v. Great American E&S Insurance Co., No. SACV 21-596- CJC (C.D. Cal. Aug. 2, 2021) highlights the broad range of activities that can be found in "unfair competition," "antitrust," and similar exclusions and how they can be cited as grounds to deny coverage in a variety of contexts beyond the anti-competitive claims those labels may suggest to most policyholders.

The Product Liability Suit

A minor in Colorado sued a manufacturer of a pressure cooker for injuries sustained due to an alleged failure of a safety mechanism. The plaintiff asserted claims for strict liability, negligence, breach of express warranty, breach of implied warranty of fitness for a particular purpose, breach of implied warranty of merchantability, and violations of the Colorado Consumer Protection Act, which imposes liability for deceptive trade practices when a business "represents that goods . . . are of a particular standard, quality or grade . . . if [it] knows or should know they are of another."

The manufacturer tendered the claim to its general liability insurer, Great American, under a policy that provided coverage for both bodily injury and property damage liability (Coverage A) and personal and advertising injury liability (Coverage B). Great American denied coverage based on an exclusion for "Claim or Suit Alleging Violation of Laws Concerning Unfair Competition or Similar Laws."

The exclusion, which was added to the policy by endorsement, eliminated coverage under Coverage B for any suit that alleges "personal and advertising injury" arising out of any alleged violation of "any statutes, common law, or other laws or regulations concerning unfair competition, antitrust, restraint of trade, piracy, unfair trade practices, or any similar laws or regulations," as well as any "personal or advertising injury" alleged in a suit that also alleges any actual, alleged, or threatened violation of those same laws or regulations. This "unfair competition" exclusion, the insurer argued, barred coverage for any

liability lawsuit alleging bodily injury and property damage when the lawsuit also alleged a deceptive trade practices claim.

Great American's Motion to Dismiss the Coverage Suit

The manufacturer sued Great American in California federal court, alleging that the insurer owed a duty to defend and indemnify it in the underlying lawsuit and that the denial of the claim breached the policy and the covenant of good faith and fair dealing. Great American moved to dismiss the claims for breach of contract and punitive damages, which the court denied because the exclusion did not clearly and unambiguously demonstrate that any product liability alleging bodily injury lawsuit is automatically excluded if it also alleged a deceptive trade practices claim.

In rejecting Great American's position, the court stated:

The exclusion on which Great American relied is in an endorsement on page 69 of the policy. The heading of the endorsement references "Unfair Competition or Similar Laws," not "deceptive trade practices." The manufacturer "reasonably expected" that a product liability suit alleging bodily injury and property damage would be covered under Coverage A of the policy, even if the suit also alleged a claim for deceptive trade practices, acknowledging the manufacturer's position that "[a]lmost any products liability claim could involve a claim of deceptive marketing of the product which alleged caused injury." The bolded, introductory provision in the endorsement "describing what portion of the policy the exclusion applies to does not reference Coverage A, but rather only an exclusion to Coverage B." Great American's parent company "advised the California Department of Insurance in filings for the Endorsement that the Endorsement was not meant to narrow the scope of coverage provided by the [Commercial General Liability] form." While the court noted that evidence adduced at summary judgment may show that an "unfair competition" exclusion does bar the underlying product liability suit, the exclusion was not sufficiently clear, explicit, and unambiguous to allow the insurer to prevail at the motion-to-dismiss stage.

Takeaways

Exclusionary language like the "unfair competition" endorsement is construed narrowly against the insurer that drafted the policy and in favor of coverage. Correctly applying that standard, the Arovast court reached the right conclusion—the plain language of the exclusion at issue did not reference "deceptive trade practices" (or define "similar laws"); the endorsement expressly stated that it modified a different type of coverage (Coverage B – Personal and Advertising Injury) than what was at issue in the underlying product liability suit (Coverage A – Bodily Injury and Property Damage); and the insurer's parent company had represented to state regulators that the endorsement did not narrow the scope of coverage provided. The denial of Great American's motion was especially appropriate in light of the high burden it faced to prevail on a motion to dismiss.

The court's analysis was also consistent with other decisions rejecting similar attempts by insurers to bar coverage for consumer protection claims under "antitrust," "unfair competition," or similar exclusions. See, e.g., James River Ins. Co. v. Rawlings Sporting Goods Co., Inc., No. CV 19-6658-GW-MAAX, 2021 WL 346418, at*8 (C.D. Cal. Jan. 25, 2021) (holding that an "Anti-Trust Exclusion" in D&O policy referencing "unfair trade practices" did not apply to consumer protection claims). Thus, even if Great American moves for summary judgment based on a more developed record, it may not be able to meet its high burden to

demonstrate that the exclusion clearly, explicitly, and unambiguously applies to the claim, as required under California law.

The decision also highlights a broader issue for policyholders that may be surprised to receive a denial letter relying on an "unfair competition" or similar anti-competition exclusion to bar coverage for suits alleging consumer protection claims, even where the suits contain numerous other causes of action that fall squarely within the policy's coverage grants. "Antitrust" exclusions may be cited by insurers in a range of other claims. For example, an insurer may argue that antitrust exclusions bar cyber coverage where a hacker was motivated by industrial espionage and data was stolen for anticompetitive purposes. A private company D&O policy's antitrust exclusion also may be written broadly enough to capture employment-related antitrust liability or even tortious interference claims. Policyholders should not assume that provisions labeled as anti-competition exclusions do not reference other kinds of conduct.

In Arovast, the problematic exclusion at issue was added to the policy by endorsement, but in many instances unfair competition exclusions are included in standard liability coverage forms. Policyholders should carefully evaluate all exclusions, including those added or modified by endorsements, that may be interpreted broadly to apply well beyond federal or state laws regulating unfair competition. While it may not be possible to eliminate the exclusion entirely, policyholders should attempt to carve out full or limited coverage for consumer protections and similar claims.

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