How To Negotiate Better D&O Coverage For Antitrust Matters

By Geoffrey Fehling and Christopher Dufek
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Federal Trade Commission Chair Lina Khan stated recently that the agency will act with a "fierce sense of urgency" in policing competition and ramping up antitrust enforcement actions, even in risky cases, and against the backdrop of record M&A activity that is straining the agency's ability to review and challenge transactions.

If these promises hold true, many companies will likely turn to their directors and officers liability insurance policies for protection.

And even if claims activity is not driven by FTC enforcement, recent events — spurred by increased mergers and consolidation and the COVID-19 pandemic, among other factors — have led to allegations by private parties asserting unfair and deceptive trade practice violations, conspiracy, price fixing and similar unlawful conduct by competitors.

All of these developments can lead to increased directors and officers exposures. The availability and scope of D&O coverage for antitrust matters depends on many factors, including whether the insured entity is a public or primary company. Most public company policies, for example, provide coverage for the company — often called "Side C" or "entity" coverage — for securities claims.

But that limitation is not present in coverage for public company directors and officers — known as "Side A" and "Side B" coverage, depending on whether losses are indemnified by the company — which typically provide much broader protection for government investigations and enforcement actions. Entity coverage under private company policies is typically much broader and covers a wide range of claims against both the company and its directors and officers.

In all cases, there are several common questions corporate policyholders should ask when assessing potential coverage for antitrust matters, as policies are not one-size-fits-all and can be modified to add or strengthen coverage for antitrust claims.

Here are several key issues to consider when placing and renewing D&O coverage.

Beware of broad antitrust exclusions.

Public company forms may not afford entity coverage beyond securities claims, but even private company policies can contain broad antitrust exclusions that apply to claims based on or arising out of any actual or alleged price fixing, restraint of trade, monopolization or violation of the Sherman Act, Clayton Act or similar state or federal statutory or common law.

Any company, public or private, can face government scrutiny or be named in private antitrust lawsuits.

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Private companies in particular should not assume that the antitrust exclusion's reach is limited only to publicly traded companies. The scope of putative defendants in antitrust actions is also very broad and can implicate companies and individuals with only attenuated connections to the alleged anticompetitive behavior.

For example, private equity firms recently have been targeted in antitrust conspiracy matters due to alleged anticompetitive conduct by their portfolio companies, as seen in In re: Packaged Seafood Products Antitrust Litigation and In re: Liquid Aluminum Sulfate Antitrust Litigation.

Public and private companies alike may also be named in parallel lawsuits brought by civil litigants that echo allegations made by government agencies. In short, both public and private companies and their individual officers and directors are at risk of D&O exposures for antitrust matters.

When assessing potential D&O coverage for antitrust matters, the antitrust exclusion moniker can be misleading because the exclusion may be applied to a wide range of alleged wrongful conduct far beyond the traditional Sherman Act and similar statutory violations that come to mind when most people think of antitrust claims. The broad reach of antitrust exclusions arises most frequently in two ways.

First, beware of antitrust exclusions that apply to all claims arising out of prohibited anticompetitive conduct. This expansive causation language can expand the scope of the exclusion beyond traditional Sherman or Clayton Act claims to other kinds of claims that have only tangential relationships to the alleged anticompetitive conduct, even if the claim involves different parties or facts or occurred later in time.

Antitrust exclusions with "arising out of" triggers can have an outsized impact on coverage by being used to negate coverage for claims that do not allege antitrust violations but merely "arise out of" those violations.

Second, because some antitrust exclusions also apply to unfair trade practices, insurers may rely on the exclusion to bar claims under state unfair and deceptive trade practices statutes or even employment disputes involving general competition laws. Careful analysis of all conduct listed in the exclusion considering the company's likely exposures is imperative to understanding how the exclusion may be used to limit or deny coverage.

The good news is that many insurers will agree to remove an antitrust exclusion completely, sometimes subject to a sublimit or after payment of an additional premium. Policyholders may also be able to limit the exclusion to apply only to claims against the company — preserving coverage for individuals — or to carve out coverage for defense costs.

Avoid surprises: Understand how the policy responds to investigations against the company and its directors and officers.

D&O policies that afford coverage for government investigations into antitrust matters may be unclear as to when that coverage attaches, particularly when investigations involve both the company and individuals.

For example, D&O policies may respond to investigations against individual directors and officers. But the requirement that those claims be against "insured persons" means that coverage disputes may arise in

investigations or enforcement actions brought solely against the company.

Compounding this issue is the fact that, in many investigations, the government does not identify individuals as targets, even if they are directly implicated in the company's alleged anticompetitive behavior and decision-making at issue.

Relying on underlying orders, subpoenas, regulator correspondence and similar documents to establish insurance coverage can be complicated if certain insureds are not expressly identified or if the true scope of the government's investigation is unknown. In some cases, untangling the black box to reveal the precise nature and scope of the government's investigation or potential exposures may not be possible.

However, understanding how the D&O policy's coverage for individuals and entities operates in investigations, enforcement actions and other regulatory matters at the time of policy placement or renewal will help avoid surprises when a claim arises.

Seek to narrow other exclusions that could limit coverage for antitrust matters.

D&O policies invariably include other exclusions beyond the antitrust exclusion, such as conduct and personal profit exclusions, that may be implicated in antitrust matters pursuing criminal charges or involving return of profits obtained through anticompetitive conduct.

Conduct exclusions bar coverage for claims arising out of fraudulent or criminal conduct or the willful or deliberate violation of law, while personal profit exclusions apply to claims based on insureds gaining personal profits or advantages to which the insured is not legally entitled.

Some form of these exclusions may be unavoidable, but they can usually be narrowed to preserve coverage for defense costs prior to a final administrative adjudication or final order.

One critical limitation is ensuring that they do not apply until the prohibited conduct is established by a final, nonappealable adjudication adverse to the insured. The adjudication should also be required to occur in the underlying proceeding, as opposed to in any proceeding, such as one for declaratory relief brought by an insurer.

Finally, conduct exclusions should be subject to a severability provision that prevents a final adjudication against one insured to bar coverage for all other insureds, irrespective of whether those insureds engaged in the prohibited conduct.

The likely reach of exclusions subject to final adjudication triggers also may differ between the nature of the underlying claim, since a private lawsuit may present settlement opportunities without any admissions of wrongdoing, but government enforcement actions may be more difficult to resolve without regulators requiring certain statements in documents that would have adverse consequences for insurance coverage.

Negotiate defense provisions that avoid impeding the policyholder's preferred litigation strategy.

Even if coverage is available for antitrust claims, the policy's defense provisions may present additional hurdles in responding to the government investigation or enforcement action. Unlike other kinds of liability policies, most D&O policies allow control of the defense to remain with the insureds, as opposed to a

traditional duty to defend where the insurer controls defense of the claim.

However, there are always exceptions, which can be driven by the insurer's standard policy form or the nature of the claim at issue. And many issues can still arise, even without a duty to defend, based on the insureds' duty to seek insurer consent, the duty to cooperate and similar defense-related obligations.

One common issue is ensuring that the policyholder can retain its preferred counsel and that they will be reimbursed in full for the firm's legal bills. If the D&O policy requires selection of insurer-approved panel counsel, policyholders should negotiate to include their preferred firms and ensure that there are no other provisions that could impede the ideal defense of antitrust claims, or any other claims.

Another defense issue is how the policy addresses claims where the interests of the company and its executives may diverge. In certain criminal investigations, for example, the company and individual officers and directors may want to retain separate counsel.

If that decision is driven by strategic or business considerations, rather than an actual conflict, the insurer may object to reimbursing defense costs from multiple firms. Analyzing and modifying defense provisions during the underwriting process is critical to avoid defense-related disputes that may result in a partially funded defense.

Understanding and addressing these key points will help policyholders maximize potential recovery when faced with exposures from antitrust claims.

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