

# Covering All Bases: Insurance Coverage for Increasing Antitrust Enforcement

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PRACTICES Insurance Recovery, Litigation

In August 2024, the United States District Court for the District of Columbia ruled that “Google is a monopolist” in the realm of internet search. *United States v. Google LLC*, 2024 U.S. Dist. LEXIS 138798, \*29 (Aug. 5, 2024). The suit, which prompted the opinion, is one of several high-profile DOJ and FTC proceedings now pending against big technology firms.<sup>1</sup> And the decision has already prompted at least one civil action brought by Yelp.<sup>2</sup> Outside the U.S., tech firms also face an increasingly hostile regulatory environment, particularly in the EU.<sup>3</sup>

Apart from traditional Sherman Act claims, U.S. regulators have actively pursued other enforcement priorities and strategies in 2024, including (1) banning noncompete agreements; although, the United States District Court for the Northern District of Texas recently set aside the FTC rule as outside the agency’s authority under the Administrative Procedures Act;<sup>4</sup> (2) cracking down on “interlocking directorates”;<sup>5</sup> and (3) targeting price discrimination under the Robinson-Patman Act (RPA).<sup>6</sup> Private litigation over similar anti-competitive conduct is also on the rise. See, e.g., *L.A. Int’l Corp. v. Prestige Brands Holdings, Inc.*, 2024 U.S. Dist. LEXIS 90210, \*1 (C.D. Cal. May, 20, 2024) (granting an injunction against eye drop wholesalers under the RPA). Regulators and private plaintiffs have also focused recently on so-called algorithmic collusion, which may only be expected to increase as firms increasingly rely on artificial intelligence applications for business operations.<sup>7</sup>

With all of the activity and risk surrounding antitrust and unfair competition claims, businesses must not only be vigilant about compliance, but also in identifying and noticing potential insurance coverage when such claims arise. Specifically, here are three key considerations for corporate policyholders when faced with either public or private claims involving allegations of unfair competition or violations of antitrust laws.

**General Liability Coverage.** Commercial general liability insurance policies—a staple for virtually all domestic businesses—insure liability for bodily injury, property damage, and “personal and advertising injury.” “Personal and advertising injury” may include offenses such as “discrimination” and/or “disparagement” of another’s business or products. Other conduct, including intellectual property claims involving another’s “advertisement,” may also trigger a CGL policy’s “advertising injury” coverage. Particularly in the current regulatory environment, depending on individual facts and policy terms, claims involving violations of noncompete agreements and violations of unfair competition laws may provide a basis for policyholders to obtain a defense or even indemnity under a general liability policy. See, e.g., *Sprint Lumber, Inc. v. Union Ins. Co.*, 627 S.W.3d 96, 111 (Mo. Ct. App. 2021) (finding a duty to defend underlying unfair competition claims under the “personal and advertising injury” coverage of a general liability policy); *Nat’l Fire Ins. Co. v. Omp, Inc.*, 2012 U.S. Dist. LEXIS 202370, \*23 (C.D. Cal. May 14, 2012) (finding a duty to defend underlying allegations that the policyholder disparaged a competitor in violation of a non-compete agreement). Likewise, even allegations of “price discrimination” may trigger a general liability policy’s coverage

for “discrimination” claims, where the policy does not specify or limit the type of “discrimination” covered. See, e.g., *Federal Ins. Co. v. Stroh Brewing Co.*, 127 F.3d 563, 568 (7th Cir. 1997) (finding a duty to defend underlying RPA claims alleging price discrimination).

**Cyber, Network Security & Privacy Liability Coverage.** Most policyholders may intuitively think of “cyber” insurance as responding only in the event of a data breach or similar incident involving the insured’s network. While network security and privacy liability policies do provide coverage for risks arising from a data breach, some policies may also include terms broadly covering claims involving errors or omissions by the insured (or an outside IT provider) in the operation, maintenance and administration of the insured’s data and computer network. Cyber policies may also include some form of liability coverage for content included in the insured’s website or other media. This nuance in policy terms is important because, particularly in the current litigation environment, an underlying antitrust or unfair competition claim, including a price discrimination claim, may implicate the insured’s handling of proprietary data and digital assets and/or content distributed through a public website or other digital media. Again, depending on individual facts and circumstances, traditional antitrust claims or more recent claims involving algorithmic collusion may trigger coverage under a cyber liability policy.

**Directors & Officers/Errors & Omissions Liability Insurance.** While many D&O and E&O policies include exclusions addressing “antitrust” or “unfair trade practices,” when faced with a claim or suit alleging anti-competitive conduct, policyholders should nonetheless consider whether some of the conduct alleged in the subject claim or suit might not be subject to the exclusion. For example, an exclusion addressing “unfair trade practices” may not include within its scope, claims alleging anti-consumer conduct, which are often brought with unfair competition claims. See, e.g., *James River Ins. Co. v. Rawlings Sporting Goods Co.*, 2021 U.S. Dist. LEXIS 20970, \*11-12 (C.D. Cal. Jan. 25, 2021) (“[U]nfair trade practices’ must also be similarly limited and therefore should not include false advertising by businesses targeted at consumers.”); *Big Bridge Holdings, Inc. v. Twin City Fire Ins. Co.*, 132 F. Supp. 3d 982, 988 (N.D. Ill. 2015) (distinguishing between “fraud-based consumer-protection claims” and “anti-competitive” business practices). Depending on the facts and policy terms at issue, a narrow construction of antitrust exclusions in D&O and/or E&O policies may justify insureds in seeking coverage for related, but distinct allegations and claims. Particularly, where Section 8, Clayton Act Claims do not require proof of anti-competitive behavior, policyholders facing allegations of interlocking directorates should carefully review potentially applicable D&O and E&O policies to determine if coverage may be available for defense or indemnity.

In a global economy beset by inflation and fiscal uncertainty, regulatory enforcement is here to stay. To ensure that the exposure from public and private antitrust, unfair competition and related claims is appropriately mitigated by liability insurance, corporate policyholders should consider in advance and be familiar with the policies and terms that will protect against this increasing risk. Unfortunately, because claims for anti-competitive conduct may come in a variety of different ways, risk managers may need to source this coverage through a range of different policies. Likewise, in the event of a claim or suit involving unfair competition, corporate insureds and their counsel should carefully consider and not overlook the potential for coverage under general liability, cyber, D&O and E&O policies.

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<sup>1</sup> Cecelia Kang & David McCabe, *U.S. Antitrust Case Against Google Is Just the Start*, NEW YORK TIMES (May 3, 2024).

<sup>2</sup> Gerrit De Vynck, *Google sued by longtime enemy Yelp after years of antitrust complaints*, THE WASHINGTON POST (Aug. 28, 2024), available at

<https://www.washingtonpost.com/technology/2024/08/28/google-yelp-lawsuit-antitrust-monopoly/>).

<sup>3</sup> See, e.g., Alexis Keenan, *EU keeps flexing its antitrust muscles with US tech giants*, YAHOO FINANCE (Jun. 25, 2024), available at <https://finance.yahoo.com/news/eu-keeps-flexing-its-antitrust-muscles-with-us-tech-giants-165948221.html>.

<sup>4</sup> *Ryan LLC v. FTC*, 2024 U.S. Dist. LEXIS 148488, \*3 (N.D. Tex. Aug. 20, 2024) (“The Court sets aside the Non-Compete Rule.”).

<sup>5</sup> Federal Trade Commission, *FTC Announces 2024 Jurisdictional Threshold Updates for Interlocking Directorates* (Jan. 12, 2024), available at <https://www.ftc.gov/news-events/news/press-releases/2024/01/ftc-announces-2024-jurisdictional-threshold-updates-interlocking-directorates>.

<sup>6</sup> See, e.g., Josh Sisco, *FTC preparing lawsuit over alcohol pricing*, POLITICO (June 3, 2024), available at <https://www.politico.com/news/2024/06/03/ftc-lawsuit-southern-glazer-wine-spirits-00161323>; Leah Nysten, *Lawmakers Urge FTC to Enforce FDR-Era Law Over Grocery Price Bias*, Bloomberg (Mar. 28, 2024), available at <https://www.bloomberg.com/news/articles/2024-03-28/ftc-is-urged-to-enforce-antitrust-law-over-grocery-price-discrimination>.

<sup>7</sup> Aaron Gregg & Eva Dou, *Why is rent so high? The Justice Department blames a tech firm’s algorithm*, THE WASHINGTON POST (Aug. 23, 2024).