SEVENTH CIRCUIT HOLDS THAT INSURANCE COVERAGE FOR "PERSONAL AND ADVERTISING INJURY" DOES NOT INCLUDE ANTITRUST LIABILITY

On November 1, 2011, the U.S. Court of Appeals for the Seventh Circuit issued its decision in *Rose Acre Farms, Inc. v. Columbia Casualty Co.* addressing the important question of whether insurance coverage for "personal and advertising injury" — a standard insurance policy provision — extends to claims arising from alleged antitrust price-fixing conspiracies. In an opinion by Judge Posner, the Seventh Circuit held that the "personal and advertising injury" provision does not cover such antitrust claims. Indeed, the court held that the provision would not provide coverage "even if one could tease out of the antitrust complaint a charge that [the insured's] advertising was in furtherance of the alleged antitrust conspiracy."

The *Rose Acre* Decision

Rose Acre Farms, Inc. ("Rose Acre") is the nation's second-largest producer of eggs. Together with other egg producers, Rose Acre is a defendant in a number of class action lawsuits alleging that Rose Acre conspired to fix the price of eggs in violation of Section 1 of the Sherman Act. Rose Acre asked its liability insurers to defend it in the class action cases, arguing that the antitrust complaints sought damages for "personal and advertising injury" covered by Rose Acre's policies. Rose Acre's insurers refused and a lawsuit between Rose Acre and its insurer followed in the Southern District of Indiana.

Rose Acre's policies define "personal and advertising injury" as "injury . . . arising out of one or more of the following offenses," including "the use of another's advertising idea in your 'advertisement.'" Rose Acre attempted to link its advertising to the antitrust suit in what the Seventh Circuit described as a "convoluted manner." Rose Acre pointed principally to the fact that it participates in a trade association, the United Egg Producers, Inc. ("UEP"), that specifies certain animal husbandry guidelines. Rose Acre argued that it complied with those guidelines, marketed its eggs as "United Egg Producers Certified," and advertised its compliance with UEP guidelines on its website. In addition, Rose Acre's website described the company's allegedly humane animal-care practices.

Those advertising descriptions, Rose Acre claimed, might be thought "to throw consumers suspicious of the high price of eggs laid by free-roaming chickens off the scent," making them believe that the high prices resulted from Rose Acre's UEP-certified husbandry practices rather than from an antitrust conspiracy. As a result, Rose Acre argued that its advertising was arguably in furtherance of the alleged conspiracy and that Rose Acre was entitled to coverage pursuant to the "personal and advertising injury" provision of its insurance policies.

The district court rejected this argument and the Seventh Circuit affirmed. As an initial matter, the Seventh Circuit observed that the connection Rose Acre sought to draw between its advertising and the alleged antitrust conspiracy "is not alleged in any of the 353 paragraphs of the antitrust complaint." Rose Acre's argument was thus not supported by the underlying antitrust suits.

More fundamentally, even if Rose Acre's advertising were alleged to be in furtherance of the conspiracy, the court held that it would make no difference. As the court explained, the offense of "the use of another's advertising idea" in one's own advertising "cannot extend to using another's advertising idea with that other's consent." The court also reviewed the historical development of the "personal and advertising injury" provision and concluded that it was meant to cover actions seeking recovery for advertising misappropriation. Thus, as the court put it, "coverage is limited to liability to the 'other' whose advertising idea is used by the insured without the 'other's' permission." When the idea is used "with that someone's consent" — as was the case in Rose Acre's advertising — it is not misappropriation and, according to the Seventh Circuit, the provision does not apply.

In addition, the Seventh Circuit identified antitrust liability as a "major business risk, especially for one of the largest companies in a major market." The court therefore expressed skepticism that such an antitrust risk would be covered "indirectly" through a provision "aimed at misappropriation and other intellectual-property torts." Likewise, the court found that coverage for participation in an antitrust price-fixing conspiracy was excluded under the policies at issue because such participation is "both deliberate and criminal."

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If you have any questions about, or would like a copy of, the *Rose Acre* decision, please contact Christopher J. St. Jeanos (212-728-8730, cstjeanos@willkie.com), Jeffrey B. Korn (212-728-8842, jkorn@willkie.com), David M. Stoltzfus (212-728-8501, dstoltzfus@willkie.com), or the Willkie attorney with whom you regularly work.

Willkie Farr & Gallagher LLP is headquartered at 787 Seventh Avenue, New York, NY 10019-6099. Our telephone number is (212) 728-8000 and our facsimile number is (212) 728-8111. Our website is located at www.willkie.com.

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