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Antitrust And Advertising Injury: Hurdles For Defendants

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Within the past two months, the Seventh and Eleventh Circuits have addressed whether antitrust claims against an insured gave rise to a duty to defend by insurers under commercial general liability policies that provide coverage for "personal and advertising injury." Both Courts of Appeal arrived at the same conclusion: No. Together, these recent decisions illustrate the significant obstacles that a defendant in an antitrust lawsuit faces in seeking "advertising injury" coverage.

The case from the Eleventh Circuit, *Trailer Bridge, Inc. v. Illinois Nat'l Ins. Co.*, No. 10-13913, 2011 U.S. App. LEXIS 19230 (11th Cir. Sept. 19, 2011), was brought by an insured that had been sued, along with various other defendants, for allegedly conspiring to fix prices for cabotage services between the mainland United States and Puerto Rico in violation of the Sherman Act. The company had a policy with its insurer that covered "personal and advertising injury," which included "injury . . . arising out of . . . [t]he use of another's advertising idea in your 'advertisement.'" The plaintiffs in the underlying antitrust litigation alleged that the defendants, including the insured, made false statements about reasons for rate increases in their services, as part of an effort to fraudulently conceal their unlawful conduct. In particular, with respect to the insured, the antitrust plaintiffs asserted that its CEO had stated in an interview "that customer decisions were driven by '[p]rice in an all-inclusive sense, which starts with the freight rate,' implying that Defendants could not rig bids or set and increase rates, surcharges or fees, and therefore were not doing so . . . ." In other words, this statement allegedly was meant to "lull[ ] . . . the [antitrust] class into believing that the price increases were the normal result of competitive market forces" rather than anticompetitive conduct. In seeking "advertising injury" coverage, the insured asserted that this interview of its CEO amounted to an "advertisement" within the meaning of the insurance policy. Moreover, the insured asserted that the CEO's stated justification for price increases (i.e., market-driven pricing, as opposed to illicit conduct) had to have originated with the insured's competitors and therefore constituted the "advertising idea" of "another."

The district court disagreed. *Trailer Bridge, Inc. v. Ill. Nat'l Ins. Co.*, No. 3:09-cv-1135-J-20MCR, 2010 U.S. Dist. LEXIS 73970 (M.D. Fla. July 22, 2010). In a "thorough and well-reasoned order, which [the Eleventh Circuit] adopt[ed] as [its] own," *Trailer Bridge*, 2011 U.S. App. LEXIS 19230, at *5, the district court concluded that, for various reasons, the allegations in the underlying antitrust complaint did not constitute "advertising injury." First, the allegedly misleading statement made by the insured's CEO—in an interview "aimed at investors and

describing general market conditions"—was not an advertisement as defined by the policy. Second, the CEO's statement did not involve the use of an "advertising idea" that "belonged to another." Finally, the injury claimed by the antitrust plaintiffs was not caused by any alleged misappropriation of an advertising idea, but rather by claimed violations of the Sherman Act. *Id.* at *4. Because the allegations in the antitrust complaint were not potentially covered by the insurance policy, the district court found no duty to defend and granted the insurer's motion for summary judgment.

The case from the Seventh Circuit, *Rose Acre Farms, Inc. v. Columbia Casualty Co.*, No. 11-1599, 2011 U.S. App. LEXIS 22063 (7th Cir. Nov. 1, 2011), presented a similar set of circumstances as in *Trailer Bridge*. In *Rose Acre*, the insured—the second-largest egg producer in the country—had been sued for allegedly conspiring with the egg trade association, United Egg Producers, Inc. ("UEP") and with other egg producers to fix prices. The antitrust plaintiffs alleged *inter alia* that the UEP had implemented a certification program ostensibly as a result of "animal husbandry concerns," but actually as a "front and pretext for a naked price fixing agreement and an anticompetitive output restriction scheme." This program—which allowed producers who were in compliance with the guidelines to display a logo on their packaging and also market their eggs as "United Egg Producers Certified"—was supposedly a means of permitting the antitrust defendants to conceal their anticompetitive conduct. In its lawsuit against the insurer, the insured asserted that these allegations triggered a duty to defend under a "[p]ersonal and advertising injury" provision substantially similar to that at issue in *Trailer Bridge*.

As in *Trailer Bridge*, the district court disagreed with the coverage theory advanced by the insured. *Rose Acre Farms, Inc. v. Columbia Cas. Co.*, 772 F. Supp. 2d 994 (S.D. Ind. 2011). And the Seventh Circuit, in a sometimes-sarcastic opinion authored by Judge Posner, similarly rejected the insured's "convoluted" theory. *Rose Acre*, 2011 U.S. App. LEXIS 22063, at *3. Among the various reasons given, the Seventh Circuit pointed to exclusions in the policy that related to injury "caused by or at the direction of the insured with the knowledge that the act [triggering liability] would violate the rights of another" or that "aris[es] out of a criminal act committed by or at the direction of any insured," and held that these exclusions precluded coverage. *Id.* at *9.

As Judge Posner remarked, antitrust liability is a major business risk, particularly for companies with significant shares in major markets. "It is hardly likely that parties to an insurance contract would seek to cover such a serious risk indirectly through an 'advertising injury' provision aimed at misappropriation and other intellectual-property torts." *Id.* at *7. Thus, it is perhaps not surprising that the district court in *Rose Acre* was unable to find any instance in which an underlying antitrust complaint had triggered a duty to defend for "advertising injury," even though others have tried. *See, e.g.*, *Champion Labs., Inc. v. Am. Home Assurance Co.*, No. 09 C 7251, 2010 U.S. Dist. LEXIS 65498 (N.D. Ill. June 30,

2010) (holding that price fixing allegations in underlying antitrust class action did not constitute "advertising injury" under commercial general liability policy). At the same time, the district court noted that "[t]his is not to say that such a situation is not theoretically possible." *Rose Acre*, 772 F. Supp. at 103.

Whatever theoretical possibility may still exist, an antitrust defendant claiming "advertising injury" coverage under a commercial general liability policy of the kind at issue in *Trailer Bridge* and *Rose Acre* must overcome the following hurdles:

First, the antitrust defendant must demonstrate that the allegations in the complaint actually put at issue advertising by the insured. In *Trailer Bridge*, for instance, the court found that statements by the insured's CEO, which were aimed at investors and described general market conditions, were not advertising. 2011 U.S. App. LEXIS 19230, at *4. And in *Rose Acre*, while the insured could point to some advertising that may have been involved, the Seventh Circuit noted that the insured's advertising was nowhere mentioned in the antitrust complaint itself. 2011 U.S. App. LEXIS 22063, at *5. *See also Champion Labs*, 2010 U.S. Dist. LEXIS 65498, at *15 (antitrust defendant's alleged communication not advertising because it was simply "to answer a specific customer's concern over the price increases").

Second, the antitrust defendant must demonstrate that the allegations in the complaint implicate an alleged *improper* use in its advertisement of an advertising idea of another. In *Rose Acre*, for instance, the Seventh Circuit noted that coverage for an "offense," defined as "the use of another's advertising idea" in the insured's own advertising, cannot extend to use of such ideas with the other's consent. 2011 U.S. App. LEXIS 22063, at *6. *See also Champion Labs*, 2010 U.S. Dist. LEXIS 65498, at *15 (insured's alleged use of outdated pricing spreadsheet of competitor did not amount to use of "advertising idea" of when spreadsheet was not directed at general public or specific market segment). Thus, in *Rose Acre*, there was no allegation that the insured's advertising on its own website improperly used another's idea, as opposed to its own ideas. 2011 U.S. App. LEXIS 22063, at *6.

Third, the antitrust defendant must demonstrate that the underlying plaintiffs sought to impose a legal obligation "because of . . . advertising injury." In *Trailer Bridge*, the antitrust plaintiffs, not surprisingly, sought antitrust damages—a fact that was insufficient to satisfy this prerequisite to "advertising injury" coverage. 2011 U.S. App. LEXIS 19230, at *4. *See also Champion Labs*, 2010 U.S. Dist. LEXIS 65498, at *15 ("[T]he plaintiffs' damages in the underlying lawsuit do not arise out of Champion wrongfully taking defendants' or plaintiffs' advertising ideas."). Indeed, the Eleventh Circuit questioned whether an "offense" could extend beyond the improper use by the insured of the advertising idea of the plaintiff in the underlying litigation, because otherwise the underlying plaintiff could not have recovered such damages. *Trailer Bridge*, 2011 U.S. App. LEXIS

19230, at *6. *See also Rose Acre*, 2011 U.S. App. LEXIS 22063, at *8-9 ("This history makes clear that coverage is limited to liability to the 'other' whose advertising idea is used by the insured without the 'other's permission.").

Finally, the antitrust defendant must be able to circumvent any exclusions that would be triggered by the complaint's allegations. In *Rose Acre*, for instance, the Seventh Circuit observed, "[p]articipation in a conspiracy to violate federal antitrust law is both deliberate and criminal, and [wa]s thus excluded" under the policy. 2011 U.S. App. LEXIS 22063, at *9.

Of course, whether a particular antitrust defendant can overcome these obstacles will depend on the specific facts of the underlying case and the policy language in question. Following the recent decisions by the Seventh and Eleventh Circuits, however, it is clear that these obstacles are significant.

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