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### TEXAS FEDERAL COURT FINDS FACTUAL ALLEGATIONS TRUMP LEGAL THEORIES FOR COVERAGE PURPOSES

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The U.S. District Court for the Western District of Texas recently held in *Great American Ins. Co. of New York v. American College of Allergy, Asthma & Immunology, et al.*,<sup>[i]</sup> that factual allegations in the complaint require that a general liability insurer defend an association of board-certified allergists in a suit alleging anti-competitive business practices, even though none of the complaint's causes of action triggered coverage.

#### Background

*Great American* involves allegations of anti-competitive practices by the American College of Allergy, Asthma & Immunology ("ACAAI"), an association of board-certified allergists. The Academy of Allergy & Asthma in Primary Care and United Biologies, LLC d/b/a United Allergy Services (collectively, "UAS") sued ACAAI alleging that it and other defendants conspired to restrict competition in the market for allergy testing and allergy immunotherapy. Specifically, UAS alleged that ACAAI criticized UAS's allergy treatments in communications with insurance companies and health providers. UAS asserted various causes of action for conspiracy, antitrust violations, and tortious interference.

ACAAI was insured under a general liability policy issued by Great American Insurance Company ("Great American"). Great American brought suit against ACAAI seeking a declaration that it does not owe a defense for the UAS lawsuit. The parties moved for summary judgment.

Great American argued that the UAS lawsuit did not seek damages for "personal and advertising injury," as required to trigger coverage under the policy. Rather, as Great American argued, UAS only pled four causes of action against ACAAI — three claims alleging antitrust violations and one claim for tortious interference with contract. According to Great American, the policy excludes coverage for antitrust claims and the tortious interference claim did not come within the scope of the "personal and advertising injury coverage." ACAAI argued that the UAS lawsuit did indeed contain allegations of "personal and advertising injury" because the original complaint alleged that ACAAI told health care providers that UAS's allergy treatment practices were of poor quality or fraudulent. The complaint further alleged that ACAAI and others targeted UAS because it was treating allergy-related symptoms but did not have a board certification.

#### Holding

The court held that none of the four causes of action in the complaint, by themselves, triggered coverage. The three antitrust counts and one tortious interference count were either outside of coverage or otherwise excluded. However, the court found that the UAS lawsuit triggered coverage for "personal and advertising injury" because of general allegations of "oral, written or electronic publication of material that slanders or libels a person or organization or disparages a person's organization's goods, products or services." The court held, therefore, that coverage was triggered for disparagement and slander based on ACAAI's alleged statements about UAS, even though UAS did not specifically plead a cause of action for libel, slander or business disparagement. The court focused on the factual allegations, rather than the asserted legal theories, and held that ACAAI had met its burden of establishing a duty to defend. As the court explained, an "insured need only show that a reasonable reading of the plaintiff's allegations would allow evidence of a claim that is covered by the policy, not that the claim itself be clearly enunciated within the pleadings." For these reasons, the court granted ACAAI's motion for summary judgment and denied Great American's motion.

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## Implications

*Great American* illustrates the importance of carefully reviewing and considering all of the allegations in a complaint. Insurers often rely on the legal theories and causes of action in evaluating and denying coverage. However, as *Great American* demonstrates, the insured need only show a potential that the alleged conduct is covered. When any of the alleged conduct raises such a potential for coverage, the insurer becomes obligated to defend the entire suit, even where the causes of action pled in the complaint are excluded or otherwise uncovered, as was the case in *Great American*.

### Note

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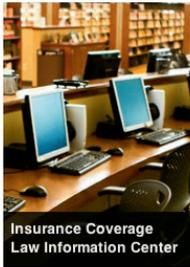
[i] No. SA-15-CV-457-XR (W.D. Tex. April 15, 2016).

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