THOUGHT LEADERSHIP

News

REMINDER: DUTY TO DEFEND IS BASED ON FACTS, NOT LEGALESE

Newsbrief
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In a case involving the CGL policy's Coverage B for personal and advertising injury, a federal judge in the Western District of Texas meticulously applied the eight-corners rule to determine whether a complaint alleged a potentially covered cause of action against the insured. In *Great American Insurance Co. v. American College of Allergy, Asthma & Immunology*, CA. No. SA-15-CV457-XA, 2016 WL 1532261 (W.D. Tex. Apr. 15, 2016) (slip copy), one allergy clinic had sued another, alleging a variety of anti-competitive practices. The critical question for determining Great American's duty to defend the suit was whether the alleged facts, construed liberally, presented a matter that could be potentially covered under the CGL policy. The core of Coverage B is the definition of "personal and advertising injury," which consists of a list of specifically enumerated offenses that includes "publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services."

Most of the allegations against the insured were plainly not covered. But the complaint alleged, among other things, that the defendant sent correspondence to insurance companies and medical professionals critical of the claimant's practices and stating or suggesting they were of poor quality and fraudulent. The court read the complaint as a whole, and concluded the factual allegations in several paragraphs, read together, fell within the above definition. Although the legal causes of action alleged in the complaint did not expressly include libel, slander, or disparagement, the ***facts*** alleged allowed evidence of such a claim to be reasonably inferred. Therefore, the entire suit must be defended.

The court also rejected an attempt by Great American to convert its policy into a *de facto* eroding-limits policy based on a sublimit for antitrust claims. The court pointed out that any attempt to limit the amount of attorney fees to be expended in satisfying the duty to defend must be explicitly stated in the policy. This policy contained standard language stating that expenses the insurer incurred would be ***in addition to*** the limits of insurance.

Editor's Note: In this textbook application of the eight-corners rule, the court reminds us that no magic words are required to allege a cause of action or trigger the duty to defend – only enough facts to allow the cause of action to be inferred by a "reasonable reading" of the complaint. Here, the court carefully walked the line between construing the pleadings liberally, which the eight-corners rule requires, and "imagin[ing] factual scenarios which might trigger coverage," which it forbids.