

PUBLICATION

Defending and Indemnification are Separate Duties

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Sometimes insurance companies try to blur the line between the duties to defend and indemnify its insured under a commercial general liability insurance policy. However, these separate duties must continue to be analyzed separately.

Insurance companies attempt to merge these separate duties into one issue so that if there is no duty to defend, then there is no duty to indemnify. This argument is reasonable from an insurance company prospective because they would like to avoid participating in litigation as early as possible.

However, the United States Court of Appeals for the 5th Circuit recently determined that an insurer's duty to defend is distinct from the duty to indemnify and the two issues must be determined separately.

The Court first addressed whether there was a duty to defend.

In *Ewing Construction Co., Inc. v. Amerisure Insurance Co.*, 684 F. 3d 512 (5th Cir. 2012), the 5th Circuit noted that a duty to defend is determined by looking first at the facts pled in the underlying litigation and then the insurance policy. In *Ewing*, the contractor entered into a contract to construct tennis courts. The owner sued the contractor for failing to construct the tennis courts according to the contract. The Insurance policy excluded coverage for damages “by reason of the assumption of liability in a contract or agreement.” *Id.* at 518.

The Court made the reasonable determination that the duty to defend did not exist because the contractor assumed the obligation to construct the tennis courts correctly in its contract with the owner. *Id.* 518 – 520.

The Court next addressed whether there was a duty to indemnify the contractor.

The Court found that the duty to indemnify can only be determined by the facts actually established in the underlying lawsuit. *Ewing*, 684 F. 3d, at p. 521. The Court held that “the duty to indemnify is ordinarily not justiciable until after the underlying lawsuit is resolved because coverage may turn on facts that are proven, even if those facts were not pled.” *Id.* at 521 – 22.

This determination does leave us with some concerns. If there is no determination of facts in the underling lawsuit can there still be a determination of the duty to indemnify? Would the facts have to be determined at a separate trial on the duty to indemnify? Does this ruling limit the possibility that contractors and owners would settle disputes so that the insured contractor can maintain its claim for indemnity?

Insureds must continue to fight efforts to merge these separate obligations so that even if the there is no duty to defend, in the end, the duty to indemnify may still exist. Insurance companies must frame their arguments carefully and leave no fact that could later trigger a duty to indemnify.