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The *Monroe* Doctrine: The Duty to Defend under Texas Law and When Insurers Must Pay for Counsel

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1. The Duty to Defend and Why It's Important.

In Texas, an insurance policy typically imposes two separate and distinct obligations on the insurer: the duty to defend and the duty to indemnify.

It has been said that the duty to defend is "broader" than the duty to indemnify, though that may depend on the factual allegations in a pleading. But there's no question that the duty to defend is one of the most important features of an insurance policy. When an insurer has a duty to defend, it must hire and pay for the insured's legal representation—even if the claim ultimately is not covered by the policy.

1.1. The Duty to Indemnify Distinguished.

As the names suggest, the duty to defend requires the insurer to defend against a claim made against its insured, while the duty to indemnify requires the insurer to pay covered claims and judgments against the insured. *D.R. Horton-Texas, Ltd. v. Markel Int'l Ins. Co.*, 300 S.W.3d 740, 743 (Tex. 2009). While related, courts determine whether these two duties apply independently of each other.

"Whether a claim triggers an insurer's duty to defend and whether a claim eventually is covered or excluded for purposes of indemnity are different questions." *Gilbert Texas Const., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 132 (Tex. 2010). The Supreme Court illustrated the distinction as follows: "[A] plaintiff pleading both negligent and intentional conduct may trigger an insurer's duty to defend, but a finding that the insured acted intentionally and not negligently may negate the insurer's duty to indemnify." *Farmers Texas Cnty. Mut. Ins. Co. v. Griffin*, 955 S.W.2d 81, 82 (Tex. 1997) (per curiam).

Thus, the primary distinction between the duty to defend and the duty to indemnify can be thought of as one of timing. The question of whether the insured owes a duty to defend its insured from a given claim naturally arises at the outset of the litigation—i.e., once the claim is made, the insured may demand its insurer defends the suit. The claim itself is the triggering event for the duty to defend. *See Gilbert*, 327 S.W.3d at 132.

By contrast, the duty to indemnify arises toward the end of the litigation. In fact, in many cases "it may be necessary to defer resolution of indemnity issues until after the underlying third-party litigation is resolved because coverage may turn on facts actually proven in the underlying lawsuit." *D.R.*

Horton-Texas, 300 S.W.3d at 745. This is because the question at the indemnification stage is whether the insurer must pay out to its insured for covered claims on which liability is found. The coverage question at this stage is thus "determined by the facts as they are established in the underlying suit." *Gilbert*, 327 S.W.3d at 132–33. Evidence is therefore generally required to establish or refute an insurer's duty to indemnify. *D.R. Horton-Texas*, 300 S.W.3d at 744.

Because the duty to indemnify requires evidence from the underlying suit, it is also traditionally not ripe for resolution until the underlying case is resolved. *See Farmers Texas Cnty. Mut. Ins. Co. v. Griffin*, 955 S.W.2d 81, 84 (Tex. 1997). But oftentimes, "same reasons that negate the duty to defend likewise negate any possibility the insurer will ever have a duty to indemnify." *Id.* (italics omitted). When that is the case, courts may determine the indemnification question early. *Id.*

But although it will often be the case that defeating the duty to defend will mean defeating the duty to indemnify, that is by no means a hard-and-fast rule. For example, a failure to plead physical manifestations of mental anguish might mean the duty to defend does not attach under a policy that covers only physical pain or injury. But that "does not affect a party's right to introduce evidence of physical manifestations of mental anguish against a tortfeasor . . . ." *See Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d 819, 825 n.4 (Tex. 1997). Those later pleadings might in such a case trigger the duty to indemnify, even if a court already has determined that there was no duty to defend.

Nevertheless, the practical impact of the two duties upon both insurer and insured is, naturally, tied to these general timing considerations. The value of the duty to indemnify is largely in the coverage of claims that ultimately establish the insured's liability. *See Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d 819, 821 (Tex. 1997) ("The duty to indemnify is triggered by the actual facts establishing liability in the underlying suit."). It relieves the insured of the cost of paying out judgments, which can, of course, be quite large. But it is largely irrelevant unless and until the underlying facts establish liability that requires payment. So, what is an insured to do about claims that may ultimately fail, but that will likely cost quite a lot to defend against?

1.2. The Value of the Duty to Defend.

Because the duty to defend protects the insured from the financial burden of defending themselves against a lawsuit regardless of whether the claim is actually covered, the duty to defend is one of the most important features of an insurance policy. When an insurer has a duty to defend, they are obligated to hire and pay for the insured's legal representation. This is almost always a

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