March 09, 2022

FEATURE

Litigating the Duty to Indemnify

Christopher R. Mosley, Stephen Robin, Ellen Van Meir, and Nicholas K. Low

Share:

fluxfoto/E+ via Getty Images Plus

Dispositive or otherwise substantive motions can help bolster the record in the underlying case, making it easier to litigate the duty to indemnify.

The duty to indemnify is a central and fundamental component of insurance coverage. For as key a role it plays in every liability coverage case, the boundaries of the duty to indemnify still remain hard to identify in many instances. Because the duty to indemnify implicates *two* proceedings—the underlying litigation and the coverage litigation—the duty to indemnify has provided policyholders with many headaches over the years as they try to balance the insured's interests in the underlying litigation with their interests in the coverage litigation. Insurers also worry that their rights on coverage issues may be compromised by a position the insured may have to take in the underlying litigation. Further, judges facing coverage issues worry about overturning or relitigating issues that have already been the subject of a final order. In all, the duty to indemnify poses many interesting and challenging issues for practitioners to best represent their clients' interests. This article seeks to identify some of those issues and provide guideposts for how practitioners should approach the many complex problems that may arise in a duty to indemnify context.

One recurring issue with the duty to indemnify is what evidence a court may consider, particularly when the underlying case ended in a final judgment or arbitration ruling. The South Carolina Supreme Court recently provided a helpful structure for courts and practitioners to use when determining what evidence to use to determine the duty to indemnify in *Ex parte Builders Mutual Insurance Co.*[1] This case, largely in line with many other jurisdictions' approaches, presents a clear framework for practitioners to use when framing complex coverage issues involving the duty to indemnify.

Duty to Defend versus Duty to Indemnify

Distinguishing the duties. Under a typical liability policy, an insurance carrier owes two primary duties to its insured: the duty to defend and the duty to indemnify. To determine the duty to defend, many jurisdictions only allow the insurer to review the policy and the lawsuit petition against the insured, and as long as any allegation is even potentially covered by the policy, the insurer has a duty to defend. This is often referred to as the "eight corners" or "four corners" rule because the insurer is limited to reviewing what is within the "four corners" of the policy and the "four corners" of the petition.[2] Thus, an insurer may be obligated to defend its insured if one or more of the allegations in the complaint fall within coverage, even though ultimate judgment is rendered as a result of an act or omission that is not covered.[3] The factual allegations are accepted as true, and all doubts as to coverage are resolved in favor of the insured.[4] To prevent artful pleading designed to avoid policy exclusions, courts generally focus on examining the factual allegations in the complaint, not how the plaintiff in the underlying action frames the request for relief.[5] In other words, the focus of the coverage inquiry is on the substance, not the form, of the allegations.[6]

On the other hand, it is commonly held that the insurer's duty to indemnify is narrower in scope than its duty to defend its insured.[7] The "duty to indemnify" means the insurer's duty to pay the claim, by funding a settlement or paying a judgment against the insured. Unlike the duty to defend, which is typically determined by the policy and petition, the duty to indemnify is based on any and all information developed in the underlying suit or claim.[8] What this generally means is that a carrier may have a duty to defend even though it is ultimately determined that it has no duty to indemnify.[9] Unlike the duty to defend, which must be assessed at the very outset of a case, the duty to indemnify arises only when the insured's underlying liability is established.[10]

What happens when there is no duty to defend. Jurisdictions are split on whether a finding of no duty to defend means that there is no duty to indemnify. The majority of jurisdictions hold that the duty to defend is always broader than the duty to indemnify and that there can be no duty to indemnify where a duty to defend does not exist.[11] Other jurisdictions, with Illinois as one example, hold that because the duties to defend and indemnify are considered at different points in the case, it is possible that "the legal theory of the underlying suit may change" such that a claim that did not trigger the duty to defend may later be changed to trigger the duty to indemnify.[12]

As an example of the majority rule, in *Banner Bank v. First American Title Insurance Co.*,[13] the Tenth Circuit addressed the scope of an insurer's duties to defend and indemnify under Utah law where a bank brought an action against its title insurer alleging a breach of the duty to defend and indemnify the underlying action. As explained by the Tenth Circuit, a patron of Banner Bank secured loans for his businesses by conveying deeds of trust to the bank as collateral. The bank then purchased a title insurance policy from First American to cover those deeds of trust. Unfortunately, this patron was using his businesses to operate a Ponzi scheme, and the U.S. Securities and Exchange Commission later filed an enforcement action against that patron, in which a receiver was appointed to represent his creditors. The receiver filed an action against the bank, challenging the conveyances. Relying on the title policy, the bank requested that First American defend it in the receiver's action. First American refused and explained that the receiver's action fell outside the coverage of the policy. The bank and the receiver eventually entered into a settlement agreement, and the bank then sued First American for breach of the duty to defend and the duty to indemnify.

Regarding the insurer's duty to indemnify, the bank argued that the settlement agreement "establish[ed] the basis for the suit" such that First American "should be required to indemnify the Bank even if First American did not have a duty to defend initially."[14] The Tenth Circuit ultimately reaffirmed that, under Utah law, the duty to indemnify is narrower than the duty to defend, stating that "[i]f there was no duty to defend, there cannot be a duty to indemnify."[15] The court also added that it was "hesitant to look to the settlement agreement for guidance because the parties certainly have an incentive to negotiate a settlement agreement that will create liability for the insurer, regardless of the true nature of the action."[16] Accordingly, the Tenth Circuit reaffirmed that an insurer would not have a duty to indemnify its insured if there was no initial duty to defend, even in light of the terms of a settlement agreement.

Triggering the Duty to Indemnify

An insurer's duty to indemnify its insured will only be triggered after the insured's underlying liability is established, which most typically occurs after the merits of the lawsuit have been assessed by a court or arbitrator or after a settlement agreement has been reached. An insurer's duty to indemnify generally cannot be ascertained until the completion of litigation.[17] Moreover, under the duty to indemnify imposed by an insurance policy, an insurer must indemnify an insured only against losses that are covered under the terms of the policy.[18]

The most straightforward manner to trigger the duty to indemnify is by the findings made in the underlying action, by either the judge or the jury.[19] The duty to indemnify may also be based upon findings made in arbitration proceedings. For example, a recent federal district court considered whether an arbitration award provided a basis upon which an insurer could establish a duty to indemnify its insured.[20] This court refused to accept the argument that the duty to indemnify was not justiciable because the "arbitration award must still be confirmed in a court of law" before the underlying arbitration can be deemed concluded, and the court instead found that the insurer's duty to indemnify claim was ripe "given that no legal precedent indicates that duty-to-indemnify claims are not ripe until an underlying arbitration award is confirmed."[21]

Alternatively, when the insured enters a settlement, the duty to indemnify is determined on the facts that form the basis for the settlement.[22] Unlike a trial, a settlement agreement may not be documented by a transcript of proceedings or pleadings, which can present a unique challenge in determining coverage for liability incurred in a settlement, including whether or not such a settlement was reasonable.[23] As such, it is important for any settlement agreement to provide the basis supporting the amount paid under the settlement and allocation by claim.[24]

Proving the Duty to Indemnify a Judgment or Arbitration

Proving the duty to indemnify where there is a final judgment or arbitration award in the underlying litigation can be a challenging and complex determination. Courts presiding over coverage litigation are wary to overturn or relitigate findings of fact made in underlying cases, but the factual records are often not sufficiently developed to address many of the coverage issues that may arise in the coverage litigation.

Collateral estoppel. The primary concern courts have when addressing duty to indemnify issues is that of collateral estoppel. Put generally, "[c]ollateral estoppel, like the related doctrine of res judicata, has the dual purpose of protecting litigants from the burden of relitigating an identical

issue with the same party or his privy and of promoting judicial economy by preventing needless litigation."[25] In the context of the duty to indemnify, courts wish to avoid relitigating identical issues that were decided as part of the underlying litigation.

The *Second Restatement of Judgments* states that when an indemnitor has an independent duty to defend its indemnitee, as insurers have in liability policies, and it is given "reasonable notice of the action and an opportunity to assume its defense," a judgment against the indemnitee will have the following effects: "(a) [t]he indemnitor is estopped from disputing the existence and extent of the indemnitee's liability to the injured person; and (b) [t]he indemnitor is precluded from relitigating those issues determined in the action against the indemnitee as to which there was no conflict of interest between the indemnitor and the indemnitee."[26] A "conflict of interest" exists "when the injured person's claim against the indemnitee is such that it could be sustained on different grounds, one of which is within the indemnitor's obligation to indemnify and another of which is not."[27]

One manner in which this collateral estoppel rule is invoked is when an insurer attempts to contest a default judgment entered against its insured, when the insurer was given the opportunity to defend its insured. In *Andrew v. Century Surety Co.*, a Nevada federal court held that an insurer was estopped from later challenging the liability or coverage of its insured, after its insured entered into a default judgment.[28] In *Andrew*, the underlying case involved a car accident allegedly caused by an employee of the insured. The insurer denied coverage for the insured in this case because it concluded that the driver-employee was not acting within the scope of his employment at the time of the accident.[29] The insured entered into a settlement agreement and allowed a default judgment to be entered against it.[30] In the subsequent coverage litigation, the insurer was estopped from contesting the "material findings of fact essential to the judgment against the insured. This includes precluding the insurer from re-litigating a coverage defense that contradicts the facts necessary to the underlying judgment."[31] Accordingly, the insurer was precluded from contesting the finding that the driver-employee was acting within the scope of his employment at the time of the accident, because such a finding was necessary to the default judgment of the insured. The court held that there was no "conflict of interest," as contemplated in the *Restatement*, because both the insurer and the insured would have had an equal interest in proving that the driver-employee was acting outside the scope of his employment at the time of the accident.[32]

In *Quihuis v. State Farm Mutual Automobile Insurance Co.*, the Arizona Supreme Court took a narrower view of an insured's default judgment.[33] The court first held that an insurer was precluded from disputing the "existence or extent" of its insured's liability after its insured entered into a default judgment.[34] In a departure from the broad preclusion in *Andrew*, the court allowed the insurer to contest certain issues that were necessary to the default judgment.[35] The court's reasoning was that although the *Restatement* precludes insurers from "relitigating" issues determined in the underlying litigation, those individual issues are not actually "litigated" in a default judgment ("'[r]elitigation' implies that there was some prior litigation on the issue").[36] This narrower view of collateral estoppel allows the insurer to contest any individual coverage issue in the coverage litigation, even if it was necessary for the default judgment below.

Insurers may also benefit from the application of collateral estoppel to the duty to indemnify. For example, in *Spring Vegetable Co. v. Hartford Casualty Insurance Co.*, an insured was estopped from relitigating a specific finding of fact in the underlying court that it was negligent in its handling of a supplier's potatoes.[37] Because the insured was found negligent on those grounds in the underlying litigation, it could not contest the applicability of the "injury to product" exclusion, which barred coverage for property damage that occurred to the insured's product.[38] The court in the coverage litigation only considered the findings of fact rendered by the underlying litigation to determine that the insured was precluded from introducing any further evidence or challenging the underlying court.[39]

Ultimately, not many duty to indemnify cases are subject to collateral estoppel because there is often at least one coverage issue that was not squarely decided by the underlying litigation. One common example is when the insured is found liable for a negligence-based action, but the insurer challenges the duty to indemnify under the "intentional acts" exclusion. In *Spears v. State Farm Fire & Casualty Insurance*, the Arkansas Supreme Court did not estop the insurer from challenging the underlying verdict of negligence on the grounds that the intentional acts exclusion excluded coverage.[40] Even though the insured was only found liable for negligence, and no intentional tort, the court held that the insurer was not precluded from arguing that its insured intentionally injured the claimant. This is because there was a conflict of interest between the insured and the insurer with regard to the insured's liability for an intentional tort: the insured's interest was in showing that it was not liable for any of the claimant's injuries, while the insurer's interest was in showing that its insured intentionally injured the claimant. Such a conflict of interest ensures that the insurer is not estopped from contesting the negligence judgment and may therefore introduce additional evidence to rebut that verdict.[41]

Evidence that may be used to establish a duty to indemnify. For cases that are not subject to collateral estoppel or where coverage issues are otherwise not addressed in the underlying litigation, the court in the coverage litigation must look to something other than the judgment in the underlying case. But what evidence should the fact finder consider? Should the fact finder attempt to hew as close to the facts presented in the underlying litigation as possible, or should it blow open the doors to fully relitigate every issue in the underlying case?

Recently, the South Carolina Supreme Court has most clearly explained what evidence a court should consider when addressing the duty to indemnify.[42] The question the court had before it was how to allocate the underlying liability between claims that were covered and those that were not covered.[43] The court stated:

> In the declaratory judgment action, the record of the merits trial shall be the primary source of evidence concerning matters litigated in that trial, such as the extent of the damages. Additional evidence that is relevant to the coverage dispute determination may be presented in the declaratory judgment action, including expert testimony, but the additional evidence should be narrowly tailored to matters that were not actually litigated in the first trial. The trier of fact shall then make a determination allocating on a percentage basis what portion of the underlying verdict constitutes covered damages and what portion constitutes non-covered damages.[44]

This approach seeks to limit the introduction of new evidence to only issues that were not addressed in the underlying litigation and is matched in many other cases.[45] When a court can come to a conclusion on the duty to indemnify *without* looking outside the record from the underlying litigation, it will do so.[46]

This structure appears to be the majority rule for courts that must go beyond the judgment or findings of fact announced in the underlying case. Courts, in general, will look to, in order:

1. The findings of fact or jury verdict, including any special interrogatories that were made a part of the judgment.
2. The records of the underlying trial.
3. Expert testimony interpreting the records of the underlying trial.

4 Additional evidence narrowly tailored to cover issues that were not addressed in the underlying trial.

If the findings of fact do not address or resolve the coverage issue, the court will then look at the record of the underlying trial. If the record does not address the coverage issue, the court will then progress to the next step. This stepwise progression of different types of evidence to consider comports with courts' instruction to hew as closely as possible to what the underlying fact finder would have found regarding the coverage issues presented in the subsequent trial.

Proving the Duty to Indemnify a Settlement

Proving the duty to indemnify when the underlying case has settled is somewhat more straightforward than when the underlying case has a trial verdict because the court has no concerns about collateral estoppel or attempting to divine what the underlying court would have decided regarding coverage issues.

When the insured seeks indemnification for a settlement, the insured must prove that "the insured's activity and the resulting loss or damage *actually* fall within the [liability] policy's coverage."[47] The existence of coverage turns on facts, not allegations, so the insured must show the court in the coverage litigation that the loss was actually covered by the terms of the policy.[48]

It is not uncommon for courts to determine that the duty to indemnify is not triggered if it is clear from the complaint that there is no possible factual scenario for a claim to be covered by the policy. For example, in *Ledford v. Gutoski*, the Oregon Supreme Court affirmed a summary judgment denying the duty to indemnify a settlement where the insured settled a claim of malicious prosecution.[49] The court only looked to the claim that was settled and the underlying complaint to determine that a claim for malicious prosecution necessarily requires intent on the part of the insured, which triggered the "intentional injury" exclusion in the policy.[50] On the other hand, courts do not allow the opposite to occur; courts will require more than just the complaint to find that a duty to indemnify exists. The Fifth Circuit stated, "[t]he duty to indemnify requires facts, and factual allegations in a petition do not necessarily all become facts merely because of a settlement of the suit."[51]

In a typical case where the underlying litigation settles, the court will hear new evidence seeking to establish the facts necessary to prove coverage. Courts may, however, limit the amount of new

evidence introduced to attempt to avoid a "full trial of the original suit."[52] Evidence considered from the original suit "include[s] the underlying complaint and settlement agreement, the intent of the parties entering the settlement, and the relative merits of the underlying claims."[53] If the underlying court entered a substantial order before settlement, such as summary judgment or a preliminary injunction, such an order would also be persuasive.[54] Other courts look to "the types of the underlying claims that have been settled" to determine whether they fall into coverage.[55] Many courts, however, will likely have to hear entirely new evidence to determine coverage issues that were not relevant to the underlying case.[56] Ultimately, the amount and type of new evidence heard by the court depends on the type of coverage issues presented to the court and whether those issues were addressed in the record that was developed before settlement in the underlying litigation.

Some courts, however, when faced with a complicated underlying settlement, may decline to hear new evidence and simply find that the "duty to indemnify follows [the] duty to defend."[57] A recent Third Circuit case reaffirmed Pennsylvania law's approach to complex settlements: if the underlying case settled and "determining actual coverage here would require a court" to essentially try the underlying claims for the first time, the court will simply find that the duty to indemnify is coextensive with the duty to defend.[58] This approach may be particularly applicable in cases where there was "little to no fact-finding from the Underlying Action on which [the court] could base a nuanced coverage determination because the parties settled that case before it went to trial."[59]

Therefore, although courts have a much more liberal view when considering evidence for the duty to indemnify when the underlying claim has settled, practitioners may reduce the scope of subsequent litigation by getting as much evidence in the record in the underlying case as possible. If there is any substantial motion practice before a settlement is entered, practitioners could impact the subsequent dispute over the duty to indemnify by crafting their motions with an eye toward potential coverage issues.

Burden of Proof and Allocation

An equally important question as *how* to prove the duty to indemnify is *who* must prove the duty to indemnify. In general, the insured has the burden to prove that its liabilities fall under a grant of coverage in the policies.[60] Once coverage is established, then the insurer has the burden to prove

that an exclusion applies to defeat coverage.[61] If an exception to that exclusion is available, then the insured would again have the burden to prove that the exception applies.[62]

This burden on the insured to establish that the amounts for which it is liable are covered by the policy also generally applies when the insured is held liable for multiple claims, some of which are covered and some which are not covered by the policy. "If the evidence in a post-award coverage action establishes that the [underlying] action included both covered and uncovered claims, then the total award must be allocated, by the court in the coverage action if necessary."[63] The burden to allocate the settlement or judgment amount between covered and uncovered claims typically falls to the insured.[64]

Some courts alter the traditional burdens of proof when the insurer had control of the defense in the underlying case. In *MedMarc Casualty Insurance Co. v. Forest Healthcare, Inc.*, the insured tendered its defense to its insurer once the duty to defend was triggered.[65] The underlying jury verdict did not apportion damages between covered and uncovered claims. The Arkansas Supreme Court reasoned that because the insurer controlled the defense at trial, the insurer "assumed the burden of apportioning the judgment once it took over the defense."[66] This approach is followed by a few other states.[67]

It is also not necessarily the case that the insured must allocate between covered and uncovered claims in the duty to indemnify context. First, when there is "a single loss and a single claim for damages" that is subject to multiple theories of liability, some of which are covered and some of which are uncovered, courts will typically not require the insured to allocate damages between the different claims.[68]

One other reason courts may not require allocation is if the insured can demonstrate that "a *primary focus* of settlement was a claim covered by the insurance policy."[69] This can be used in cases where there are separate facts and injuries for the covered and uncovered claims, but they are still bundled together into an unallocated settlement.

The "primary focus" of a settlement can also be used to defeat a claim for indemnity. In *Santa's Best Craft LLC v. St. Paul Fire & Marine Ins. Co.*, upon remand from the Seventh Circuit to determine whether the primary focus of the settlement was a covered claim, an Illinois federal court determined that the uncovered claim (trademark infringement) had a much higher likelihood of success than the covered claim (trade dress).[70] Although the underlying case

ultimately settled, the coverage court used the record developed as part of the preliminary injunction sought in the underlying case to determine that there was no evidence to support the sole covered (trade dress) claim.[71] Given the lack of evidence presented supporting the covered claim, the court determined that the primary focus of the settlement was the uncovered claim and denied the duty to indemnify for the entire settlement.[72] Therefore, as *Santa's Best Craft* makes clear, the decision to avoid allocation can go both ways: it can lead to the insurer being on the hook for the entire settlement, but it can also allow the insurer to avoid indemnification for the entire settlement.

Conclusion

The duty to indemnify can be difficult to prove depending on how the underlying case was resolved and the status of the record in the underlying case. Practitioners should recognize that fully developing the record and judgment in the underlying case can have a significant influence on an ultimate determination on the duty to indemnify. By developing the record and judgment, it gives the coverage court information that will be used to determine coverage issues. However, many coverage issues that are not implicated in the underlying claims will necessarily have to be litigated for the first time in the coverage litigation.

Notes

1. 847 S.E.2d 87, 95–96 (S.C. 2020).

2. Other jurisdictions, however, allow the insurer to consider evidence that is extrinsic to or not asserted in the petition in evaluating whether there is a duty to defend; these states demand that insurers conduct a reasonable investigation of the surrounding facts when considering their defense obligation. *See, e.g.*, Standlee v. St. Paul Fire & Marine Ins. Co., 693 P.2d 1101, 1103 (Idaho Ct. App. 1984); Aetna Ins. Co. v. Lythgoe, 618 P.2d 1057 (Wyo. 1980).

3. *See, e.g.*, Jostens, Inc. v. CNA Ins., Cont'l Cas. Co., 336 N.W.2d 544 (Minn. 1983); Brown v. State Auto. & Cas. Underwriters, 293 N.W.2d 822 (Minn. 1980).

4. *See* QBE Ins. Corp. v. Walters, 148 A.3d 785, 788 (Pa. 2016) (citing Donegal Mut. Ins. Co. v. Baumhammers, 938 A.2d 286, 291 (Pa. 2007)).

5. *See id.*

6. *See* Vito v. RSUI Indem. Co., 435 F. Supp. 3d 660, 667 (E.D. Pa. 2020).

7. *See, e.g.*, Gulf Chem. & Metallurgical Corp. v. Associated Metals & Minerals Corp., 1 F.3d 365, 369 (5th Cir. 1993); Hartford Accident & Indem. Co. v. Gulf Ins. Co., 776 F.2d 1380, 1382 (7th Cir. 1985); Mo. Terrazzo Co. v. Iowa Nat'l Mut. Ins. Co., 740 F.2d 647, 652 (8th Cir. 1984).

8. *See* Hatmaker v. Liberty Mut. Fire Ins. Co., 308 F. Supp. 2d 1308, 1313 (M.D. Fla. 2004) (holding that "[t]he duty to indemnify is separate and distinct from the duty to defend" and is "measured by the facts as they unfold at trial or are inherent in a settlement agreement").

9. *See* Pardee Constr. Co. v. Ins. Co. of the W., 77 Cal. App. 4th 1340, 1350 (2000) (explaining that "it is firmly established [that] the duty to defend is broader than the obligation to indemnify" and that the "former arises whenever an insurer ascertains facts that give rise to the possibility or the potential of liability to indemnify").

10. *See, e.g.*, Maneikis v. St. Paul Ins. Co. of Ill., 655 F.2d 818 (7th Cir. 1981); Westfield Ins. Co. v. Kroiss, 694 N.W.2d 102, 106–07 (Minn. Ct. App. 2005) (ruling that an insured was entitled to a defense even though the complaints against it did not specifically allege that damage occurred during the policy period); *see also* City of New York v. Certain Underwriters at Lloyd's of London, Eng., 790 N.Y.S.2d 82, 84 (App. Div. 2005); Cincinnati Ins. Co. v. Pro Enters., Inc., 394 F. Supp. 2d 1127 (D.S.D. 2005) (determining that an insurer owed a duty to defend against a defamation count, as it did not establish that all of the claims asserted against its insured "clearly" fell outside of coverage).

11. *See, e.g.*, Trinity Universal Ins. Co. v. Broussard, 932 F. Supp. 1307, 1310–11 (N.D. Okla. 1996) (an insurer brought a coverage action seeking a declaratory judgment that it owed no coverage to its insured in the underlying litigation and obtained a summary judgment ruling that there was no duty to indemnify its insured because it had no obligation to defend where the damages sought by the underlying plaintiffs were all excluded by the application of the commercial general liability policy's "your work" exclusion); Nationwide Gen. Ins. Co. v. Pelkey, No. 6:19-CV-2327-WWB-DCI, 2021 WL 2895643, at *3 (M.D. Fla. July 9, 2021) (explaining that, under Florida law, because the duty to indemnify is narrower than the duty to defend, it cannot exist if there is no duty to defend); Sanders v. Phoenix Ins. Co., 843 F.3d 37 (1st Cir. 2016) (holding that, under Massachusetts law, an insurer's lack of duty to defend precluded its duty to indemnify its insured attorney under a homeowners policy with respect to claims by a client's estate arising out of the client's alcohol-

related death when she was involved in an intimate relationship with the attorney while he was representing her in divorce proceedings).

12. Grinnell Mut. Reinsurance Co. v. Reinke, 43 F.3d 1152, 1154 (7th Cir. 1995) (Illinois law) ("[B]ecause of the possibility that the legal theory of the underlying suit may change, a conclusion that the insurer need not defend does not imply that it need not indemnify. It need not indemnify on allegations found insufficient to activate a duty to defend, but the theory of recovery is not fixed until the case ends." (citation omitted)); *see also In re* Tex. Ass'n of Pub. Schs. Prop. & Liab. Fund, 598 B.R. 570, 583 (W.D. Tex. 2019) (explaining that, under Texas law, an insurer's duty to indemnify can be determined with the pleadings alone if "the same reasons that negate the duty to defend likewise negate any possibility the insurer will ever have a duty to indemnify" (quoting Farmers Tex. Cnty. Mut. Ins. Co. v. Griffin, 955 S.W.2d 81, 84 (Tex. 1997))).

13. 916 F.3d 1323 (10th Cir. 2019).

14. *Id.* at 1328.

15. *Id.*

16. *Id.*

17. *See, e.g.*, Tibert v. Nodak Mut. Ins. Co., 816 N.W.2d 31 (N.D. 2012) (noting that the duty to indemnify is generally determined by the actual result in the underlying action); Clark v. Sputniks, LLC, 368 S.W.3d 431 (Tenn. 2012) (finding that an insurer's duty to indemnify is based upon the facts found by the trier of fact).

18. *See, e.g.*, Est. of Bradley *ex rel.* Sample v. Royal Surplus Lines Ins. Co., 647 F.3d 524 (5th Cir. 2011) (applying Mississippi law); ACE Am. Ins. Co. v. Freeport Welding & Fabricating, Inc., 699 F.3d 832 (5th Cir. 2012) (applying Texas law in finding that an insurer's duty to indemnify generally cannot be determined until the underlying suit has been resolved); Olson v. Farrar, 809 N.W.2d 1 (Wis. 2012).

19. *See* LCS Corrections Servs., Inc. v. Lexington Ins. Co., 800 F.3d 664 (5th Cir. 2015) (finding that, under either Texas or Louisiana law, courts generally will evaluate the insurer's duty to indemnify after the parties have developed the actual facts that establish liability in the underlying lawsuit);

Bank of R.I. v. Progressive Cas. Ins. Co., 19 F. Supp. 3d 378 (D.R.I. 2014) (holding that, under Rhode Island law, the insured's duty to indemnify for a covered loss suffered because of litigation is established from both the facts established at trial and the final determination by the jury); Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Coinstar, Inc., 39 F. Supp. 3d 1149 (W.D. Wash. 2014) (applying Washington law to find that the duty to indemnify hinges on the insured's actual liability to the claimant and actual coverage under the policy).

20. Nat'l Builders Ins. Co. v. Architects, Devs. & Contractors, Inc., No. 5:20-CV-162-H, 2021 WL 3030178, at *4–6 (N.D. Tex. Feb. 10, 2021).

21. *Id.*

22. *See, e.g.*, Bresee Homes, Inc. v. Farmers Ins. Exch., 293 P.3d 1036, 1044 (Or. 2012).

23. *See, e.g.*, Neth. Ins. Co. v. Main St. Ingredients, LLC, 745 F.3d 909 (8th Cir. 2014) (under Minnesota law, a settlement in an underlying action must include claims for risks the insurer agreed to assume in order for the insurer's duty to indemnify to arise, which means that an insurer's duty to indemnify arises only if the insured ultimately proves up facts showing coverage); *In re* Farmers Tex. Cnty. Mut. Ins. Co., 621 S.W.3d 261, 273–74 (Tex. 2021) (noting that an insurer also will not be obligated to indemnify its insured for a settlement that is collusive or unreasonable in amount under Texas law).

24. *See* King v. Cont'l W. Ins. Co., 123 S.W.3d 259, 266 (Mo. Ct. App. 2003) (the settlement agreement between the underlying plaintiff and the insured, requiring the insured to pay damages for building a home in violation of the underlying plaintiff's copyright, which was committed as part of the insured's advertising, established the insurer's duty to indemnify under advertising injury coverage of the insurance policy); Sprint Lumber, Inc. v. Union Ins. Co., No. WD 82930, 2021 WL 1256653, at *13–14 (Mo. Ct. App. Apr. 6, 2021) (holding that the settlement agreement between the insured and the underlying plaintiff established the insurer's duty to indemnify when the agreement included multiple bases for the settlement where "each of the bases was independent and distinct and . . . each, on its own, supported the total amount paid under the settlement").

25. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979) (footnote omitted).

26. Restatement (Second) of Judgments § 58(1) (Am. L. Inst. 1982).

27. *Id.* § 58(2).

28. 134 F. Supp. 3d 1249, 1263 (D. Nev. 2015).

29. *Id.* at 1253.

30. *Id.*

31. *Id.* at 1262.

32. *Id.* at 1264–65.

33. 334 P.3d 719 (Ariz. 2014).

34. *Id.* at 724.

35. *Id.* at 725–26.

36. *Id.* at 725.

37. 801 F. Supp. 385, 393 (D. Or. 1992).

38. *Id.*

39. *Id.* at 388–89.

40. 725 S.W.2d 835, 838 (Ark. 1987).

41. *Id.* at 836–37 (noting that the jury at the coverage trial heard from multiple witnesses establishing that the insured intentionally injured the victim).

42. *Ex parte* Builders Mut. Ins. Co., 847 S.E.2d 87, 95–96 (S.C. 2020).

43. *Id.* at 95.

44. *Id.* at 95–96 (footnotes omitted).

45. *See, e.g.*, Swicegood *ex rel.* Swicegood v. Med. Protective Co., No. 3:95-CV-0335-D, 2003 WL 22234928, at *11–15 (N.D. Tex. Sept. 19, 2003) ("[N]ew evidence can be introduced at a coverage trial when the proof is necessary to resolve a controlling coverage question that was not conclusively decided in the indemnity suit."); Mid-Continent Cas. Co. v. C-D Jones & Co., No. 3:09-CV-565-MCR-CJK, 2013 WL 12081104, at *5 (N.D. Fla. Aug. 6, 2013) ("This finding will be based on the trial court record below and if that is insufficient, the [insured] may present additional expert evidence, to which the Plaintiffs may present rebuttal evidence."). For other courts supporting this view, see *Cyprus Amax Minerals Co. v. Lexington Ins. Co.*, 74 P.3d 294, 301 (Colo. 2003) (looking to the complaint as the "starting point for the analysis" but then looking to the facts as developed in the underlying litigation); *Pa. Nat'l Mut. Cas. Ins. Co. v. St. Catherine of Siena Par.*, 790 F.3d 1173, 1180 (11th Cir. 2015); and *Bank of R.I. v. Progressive Cas. Ins. Co.*, 19 F. Supp. 3d 378, 384 (D.R.I. 2014).

46. *See* Great Am. Lloyds Ins. Co. v. Mittlestadt, 109 S.W.3d 784, 787 n.1 (Tex. App. 2003) (considering only "the record from the underlying suit, which includes the pleadings, the trial transcript, the insurance policy, and the judgment, all of which were before the trial court in the indemnity suit").

47. Outboard Marine Corp. v. Liberty Mut. Ins. Co., 607 N.E.2d 1204, 1221 (Ill. 1992).

48. W. All. Ins. Co. v. N. Ins. Co. of N.Y., 176 F.3d 825, 831 (5th Cir. 1999).

49. 877 P.2d 80, 82 (Or. 1994).

50. *Id.* This line of cases follows the reasoning that because the duty to defend is broader than the duty to indemnify, any case that fails to trigger the duty to defend necessarily fails to trigger the duty to indemnify. *See id.* at 85; discussion *supra* on what happens when there is no duty to defend.

51. *W. All. Ins. Co.*, 176 F.3d at 831.

52. Perdue Farms, Inc. v. Travelers Cas. & Sur. Co. of Am., 448 F.3d 252, 264 (4th Cir. 2006).

53. *Id.* (citations omitted).

54. *See* Santa's Best Craft, LLC v. St. Paul Fire & Marine Ins. Co., No. 04 C 1342, 2011 WL 1456747, at *3 (N.D. Ill. Apr. 14, 2011), *aff'd*, 483 F. App'x 285 (7th Cir. 2012) (analyzing the preliminary injunction entered in underlying case).

55. Harleysville Mut. Ins. Co. v. Hartford Cas. Ins. Co., 90 F. Supp. 3d 526, 539–40 (E.D.N.C. 2015).

56. *See* Navigators Specialty Ins. Co. v. Moorefield Constr., Inc., 212 Cal. Rptr. 3d 231, 243 (Ct. App. 2016) (hearing new evidence regarding whether the loss was caused by an "accident"); Outboard Marine Corp. v. Liberty Mut. Ins. Co., 607 N.E.2d 1204, 1222 (Ill. 1992) (hearing new evidence to determine when the pollution occurred within the policy period).

57. *See* Liberty Mut. Ins. Co. v. Penn Nat'l Mut. Cas. Ins. Co., No. 20-3468, 2021 WL 5401543, at *4 (3d Cir. Nov. 18, 2021).

58. *Id.*

59. Sapa Extrusions, Inc. v. Liberty Mut. Ins. Co., 939 F.3d 243, 250 n.3 (3d Cir. 2019) (citing Pac. Indem. Co. v. Linn, 766 F.2d 754, 766 (3d Cir. 1985)).

60. *See* Ledford v. Gutoski, 877 P.2d 80, 84 (Or. 1994).

61. *E.g.*, Travelers Cas. & Sur. Co. v. Superior Court, 75 Cal. Rptr. 2d 54, 62 (Ct. App. 1998).

62. *Id.* at 63.

63. RSUI Indem. Co. v. New Horizon Kids Quest, Inc., 933 F.3d 960, 963 (8th Cir. 2019).

64. Perdue Farms, Inc. v. Travelers Cas. & Sur. Co. of Am., 448 F.3d 252, 264 (4th Cir. 2006).

65. 199 S.W.3d 58 (Ark. 2004).

66. *Id.* at 62.

67. *See* Camden-Clark Mem'l Hosp. Ass'n v. St. Paul Fire & Marine Ins. Co., 682 S.E.2d 566, 576 (W. Va. 2009) ("[T]he insured's ordinary burden to allocate a verdict between covered and non-covered claims does not shift to an insurer unless the insurer has an affirmative duty to defend the insured under the policy terms."); Magnum Foods, Inc. v. Cont'l Cas. Co., 36 F.3d 1491, 1498–99 (10th Cir. 1994); World Harvest Church v. Grange Mut. Cas. Co., 2013-Ohio-5707, ¶ 23 (Ct. App.), *rev'd on other grounds*, 68 N.E.3d 738 (Ohio 2016).

68. *In re* Feature Realty Litig., 634 F. Supp. 2d 1163, 1173 (E.D. Wash. 2007) (citing cases from New York, Pennsylvania, New Jersey, and multiple other federal circuits). In *Feature Realty*, there was "but a single injury to be compensated based upon acts clearly covered by the policy," so the court could not and would not require the insured to allocate between the overlapping theories of liability. *Id.* at 1174.

69. Maxum Indem. Co. v. Eclipse Mfg. Co., 848 F. Supp. 2d 871, 884 (N.D. Ill. 2012) (emphasis added) (citing Santa's Best Craft, LLC v. St. Paul Fire & Marine Ins. Co., 611 F.3d 339, 350–51 (7th Cir. 2010)).

70. No. 04 C 1342, 2011 WL 1456747, at *3 (N.D. Ill. Apr. 14, 2011), *aff'd*, 483 F. App'x 285 (7th Cir. 2012).

71. *Id.*

72. *Id.*

This article was adapted from a paper presented at the American College of Coverage Counsel 9th Annual Meeting on September 23, 2021.

ENTITY:

TORT TRIAL AND INSURANCE PRACTICE SECTION

TOPIC:

TORTS

Authors