

Allegations in Original Complaint Irrelevant to Determining Duty to Defend under Amended Complaint

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The United States Court of Appeals for the Fifth Circuit, applying Texas law, has held that a court cannot consider the allegations in the original complaint when determining whether an insurer has a duty to defend under an amended complaint. *Northfield Ins. Co. v. Loving Home Care, Inc.*, 2004 WL 547938 (5th Cir. Mar. 22, 2004). The court also held that the duty to indemnify is nonjusticiable until completion of the underlying litigation.

The insurer issued an insurance policy that provided professional liability coverage to a company that provided nannies for in-home childcare. A child died while in the care of one of the company's employees, and the employee was subsequently found guilty of the charge of felony injury to a child. Thereafter, the child's parents filed suit against the insured company, among others. In the initial complaint in the underlying suit, the plaintiffs included allegations relating to the employee's criminal conviction and the intentional nature of her conduct. However, the plaintiffs later amended their complaint, removing all such allegations.

The insurer filed a declaratory action, asserting that it was not obligated to defend or indemnify the company in the underlying action because the policy excluded coverage for "criminal acts" and "physical/sexual abuse." Although the amended complaint did not include allegations implicating those exclusions, the insurer argued that the initial complaint made such allegations and that the plaintiff was attempting to "perpetuate fraud on the court by artfully pleading facts to bring the excluded claims within coverage."

The court of appeals ruled against the insurer based on an "*Erie* guess" that the Texas Supreme Court would not recognize any exception to the eight corners rule in Texas. That rule provides that "if the four corners of the petition allege facts stating a cause of action which potentially falls within the four corners of the policy's scope of coverage, resolving all doubts in favor of the insured, the insurer has a duty to defend." The court concluded that "no matter what facts the previous versions of their petition alleged, the burden shifted to [the insurer] to show that the plain language of the policy exclusions when compared against the facts alleged in the underlying petition precluded coverage."

The Fifth Circuit held that, under Texas law, once a duty to defend is determined, the duty to indemnify becomes nonjusticiable until the underlying suit is concluded. The court also noted that, even if this were not the case, district courts have discretion to decline to grant relief as to the duty to indemnify under the Declaratory Judgment Act.

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