

**ALERT**

# No Duty to Defend Where Allegations in Underlying Lawsuit Showed That Insureds Could Reasonably Foresee Claim

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The United States District Court for the Southern District of Texas, applying Texas law, held that an insurer had no duty to defend insureds in an underlying legal malpractice action where, prior to the inception of the policy, the insureds had a reasonable basis to believe that a claim could be made against them. *Darwin Select Insurance Co. v. Laminack, Pirtle & Martines, LLP*, 2012 WL 423380 (S. D. Tex. Feb. 8, 2012). The court, however, concluded that the determination of the insurer's duty to indemnify was not yet justiciable and stayed the coverage action pending the resolution of the underlying litigation.

An insurer issued a lawyers' errors and omissions policy to a firm that inceptioned on June 17, 2010 and precluded coverage for Wrongful Acts that occurred prior to that date if, prior to the inception of the policy, "any Insured had a basis to foresee that the Wrongful Act might reasonably be expected to be the basis of a Claim against any Insured." During the policy period, the insureds provided notice of a malpractice claim in which former clients alleged that the insureds had advised them in 2003 that there were no statute of limitations problems in connection with a potential antitrust lawsuit. The former clients alleged that they delayed filing the antitrust lawsuit based on that advice. In March 2008, a court granted summary judgment in favor of defendants in the antitrust lawsuit after determining that the statute of limitations had expired prior to the filing of the suit.

The insurer agreed to participate in the defense of the malpractice action pursuant to a reservation of rights and filed a declaratory judgment action seeking a declaration that it did not have a duty to

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defend or a duty to indemnify the insureds. The insurer argued that the allegations in the underlying litigation demonstrated that the insureds had knowledge of a wrongful act that might reasonably be expected to be the basis of a claim as of the March 2008 decision that the statute of limitations had expired prior to their filing antitrust litigation.

The court first addressed whether the issue of foreseeability was to be determined on a subjective or objective basis and concluded that "the unambiguous Policy language indicates that the foreseeability issue is to be determined on an objective basis." The court continued that it was "inconceivable" that experienced attorneys, upon notice of the statute of limitations decision in the antitrust litigation, "would not have a basis to foresee that missing the filing deadline might reasonably be expected to be the subject of a malpractice claim against them." The court therefore held that, based on the allegations of the underlying action, the insurer had no duty to defend.

The court stated that the issue of the duty to indemnify was justiciable only after the underlying suit was concluded, unless the same reasons that negated the duty to defend negated "any possibility the insurer will ever have a duty to indemnify." The court noted that the underlying litigation was still pending and declined to address the issue of the duty to indemnify. The court therefore stayed the coverage action until the conclusion of the underlying litigation.