

Insurer Has Duty to Defend Class Actions Suits Alleging Fee Kickback Scheme under Lawyers Liability Policy

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The United States District Court for the Southern District of Texas, applying Texas law, has held that an insurer has a duty to defend lawyers and a law firm under a lawyers professional liability policy in connection with three lawsuits by former clients alleging that their attorneys participated in a fee kickback scheme. *American Guarantee & Liability Ins. Co. v. Hoeffner*, 2009 WL 130221 (S.D. Tex. Jan. 16, 2009). In doing so, the court stressed that the duty to defend is determined solely by reference to the policy and the allegations in the underlying complaint.

The underlying plaintiffs alleged that the lawyers "participated in a kickback scheme that caused the plaintiffs' silicosis claims to be settled at arbitrary amounts and that resulted in millions of dollars in attorneys' fees for the lawyer and the law firm." The insurer sought a declaration that it owed no duty to defend because (a) the insureds' acts did not constitute "Legal Services"; (b) the plaintiffs sought, in part, forfeiture, disgorgement and other amounts that did not constitute "Damages"; and (c) prior knowledge and intentional acts exclusions applied to bar coverage.

The court rejected the insurer's arguments, stating that, in determining whether an insurer has a duty to defend, Texas applies the "'eight-corners rule' that provides that the duty to defend is determined by the plaintiff's pleadings in the underlying lawsuit." The court also stated that only where the underlying complaint "clearly alleges only facts that would exclude coverage" does the insurer not have a duty to defend, but that where "it is unclear from the complaint . . . whether the factual allegations fall within the policy's coverage, the insurer is obligated to defend if there is, potentially, a case under the complaint within the coverage of the policy."

The court held that "when construed broadly, . . . [the insured's act] committed in connection with the settlement of the silicosis lawsuits . . . is a[n] act ordinarily performed as a lawyer." In addition, the court held that, even though the underlying complaints make claims for "forfeiture, disgorgement, and punitive damages [that] are not covered 'Damages' under the policy, . . . [b]ecause at least part of the claim for relief requested . . . is monetary damages as defined by the Policy, the presence of additional claims for damages not

covered . . . does not eliminate [the insurer's] duty to defend." Further, the court rejected the insurer's arguments based on the prior knowledge and intentional acts exclusions, stating that "[a]lthough it appears clear from other sources that [the insured's] alleged participation in the kickback scheme occurred before" the prior knowledge date and that the insured might have made admissions in cross-claims that his conduct was intentional, "the duty to defend is determined based on the factual allegations in the complaint in the underlying lawsuit, and it is not affected by 'facts ascertained before suit, developed in the course of litigation, or by the ultimate outcome of the suit.'"