

ALERT

Declaratory Judgment Action Not Ripe When No Underlying Suit Had Been Filed Against Insured

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The United States District Court for the Northern District of Texas dismissed a lawsuit against an insurer seeking a declaration of the insurer's duty to defend and to indemnify because it was not ripe. *American Construction Benefits Group, LLC v. Zurich American Ins. Co.*, 2014 WL 144974 (N.D. Tex. Jan. 15, 2014).

An insurer issued a D&O policy to a company that was responsible for obtaining reinsurance for its member company. During the company's policy-renewal negotiations with the reinsurer, its president agreed to a certain coverage exclusion. The excluded event later occurred, and the reinsurer declined coverage for that event. The insured company paid its member company's expenses for that excluded event and alleged that its officer's actions in connection with the reinsurance renewal were "wrongful acts" under the D&O policy.

The company tendered the expenses that it paid in connection with the excluded event to the D&O insurer. The company also advised the insurer that it expected the company's members to file a derivative action against the company as a result of the incident. The insured then sought a declaratory judgment that the insurer was obligated to defend and to indemnify the company in the forthcoming derivative action, despite the fact that the carrier had not yet responded to the tender.

The insurer challenged the court's jurisdiction, contending that the declaratory judgment action was not ripe because, under Texas law, the duties to defend and to indemnify depended on the existence of

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an action against the insured by a third party. The court agreed that it could not decide the issue of the insurer's duty to defend before the derivative action was filed. The court noted that Texas followed the "eight-corners" rule to determine an insurer's duty to defend and, therefore, absent an underlying lawsuit, it could not undertake the necessary analysis. The court also concluded that the claim for the duty to indemnify was not ripe because a suit for indemnity required some liability to be established, either through a judgment or settlement.

The court then stated that the company's claim was not ripe for the separate reason that the company had not alleged that it would suffer any hardship if the court withheld consideration of the dispute. To the contrary, absent an underlying lawsuit against it, the company "face[d] no immediate risk that it will be forced to contribute to a settlement agreement or face a bad-faith suit." The court therefore decided that the company had not met its burden to show the existence an actual case or controversy.

Finally, the court dismissed a claim for extracontractual damages under Texas Insurance Code Section 541.060 (a)(4)(A) based on the insurer's failure to affirm or deny coverage for the tendered expenses paid by the company. In doing so, the court emphasized that the Texas statute provided that the insurer must decide whether it had a duty to defend "within a reasonable time *after the filing of a suit*" and must decide whether it had a duty to indemnify "within a reasonable time *after a judgment or settlement*" (emphasis added in opinion). The company had not alleged that it had been sued or that it was party to a settlement. Thus, the company failed to state a claim that the insurer failed to affirm or deny coverage within a reasonable time. The court also noted that the statute required the company to show that it had sustained actual damages but the company had failed "to plausibly allege" actual damages. Its only claimed damages—that it would be injured by the still-unfiled derivative action—were hypothetical and did not constitute "actual damages."

The opinion is available [here](#).