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## **THE BASSETT BULLETIN™**

### **COMMERCIAL LIABILITY INSURERS MUST CAREFULLY CONSIDER THEIR DUTY TO INDEMNIFY**

It seems plausible that an insurer that is excused from defending an insured would also be excused from indemnifying that insured. This is not the case. Because an insurer's duty to defend and duty to indemnify are separate obligations, an insurer must continuously analyze whether it must indemnify an insured that it does not have to defend.

### **DUTIES TO INDEMNIFY AND DEFEND ARE SEPARATE OBLIGATIONS**

The duty to defend and duty to indemnify are independent obligations of an insurer that arise at different points in time. The duty to defend arises before litigation is completed. *D.R. Horton-Tex., Ltd. v. Market Int'l Ins. Co.*, 300 S.W.3d 740, 744 n.2 (Tex. 2009). A court will consider the pleadings of the underlying liability lawsuit and the policy language when determining an insurer's duty to defend the insured. *Farmers Tex. County Mut. Ins. Co. v. Griffin*, 955 S.W.2d 81, 82 (Tex. 1997).

The duty to indemnify, however, could potentially arise after the duty to defend may have already been excused. An insurer's duty to indemnify is determined based on the facts actually established in the underlying suit. *Zurich Am. Ins. Co. v. Nokia, Inc.*, 268 S.W.3d 487, 490 (Tex. 2008). The duty to indemnify, therefore, could potentially arise after the duty to defend may have already been excused.

The Texas Supreme Court recently held that a commercial liability insurer may still have a duty to indemnify an insured even if it was previously held that there is no duty to defend that insured. *Burlington N. & Santa Fe Ry. Co. v. Nat'l Union Fire Ins. Co.*, No. 10-0064 (Tex. Feb. 27, 2011).

In *Burlington*, the lower court held that an insurer did not have a duty to defend and indemnify based on its analysis of the pleadings and the language of the insurance policy. The lower court reasoned that because the duty to indemnify arguments “were based solely on its duty to defend arguments,” the insurer did not have a duty to indemnify. *Id.* at 2; *see also Farmers Tex. County Mut. Ins. Co. v. Griffin*, 955 S.W.2d 81, 82 (Tex. 1997) (holding that “under the facts pled by the plaintiffs it would have been impossible for the insured defendant to show by extrinsic evidence that the loss fell under the terms of the policy.”)

The *Burlington* Court clarified *Griffin* and reversed the lower court. *Burlington* held that the court of appeals erred when it did not consider “*all* of the evidence extrinsic” to the pleadings and the insurance policy in determining whether the insurer owed a duty to indemnify. *Burlington*, at 4 (emphasis added).

## HOW WILL THE COURT’S DECISION AFFECT INSURERS?

The takeaway from the *Burlington* decision is that even if a duty to defend does not arise from the pleadings, a duty to indemnify could still arise from the extrinsic evidence of the allegations in the pleadings. Furthermore, a Court will consider *all* of the facts gathered during discovery to determine whether an insurer must indemnify an insured. These “facts” may not be uncovered for several months.

Therefore, during the entire lifespan of the underlying liability lawsuit, insurers must continuously re-analyze their indemnification duties towards their insureds.



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