High Court: Duty to Indemnify Not Dependent on Duty to Defend

by JOHN COUNCIL

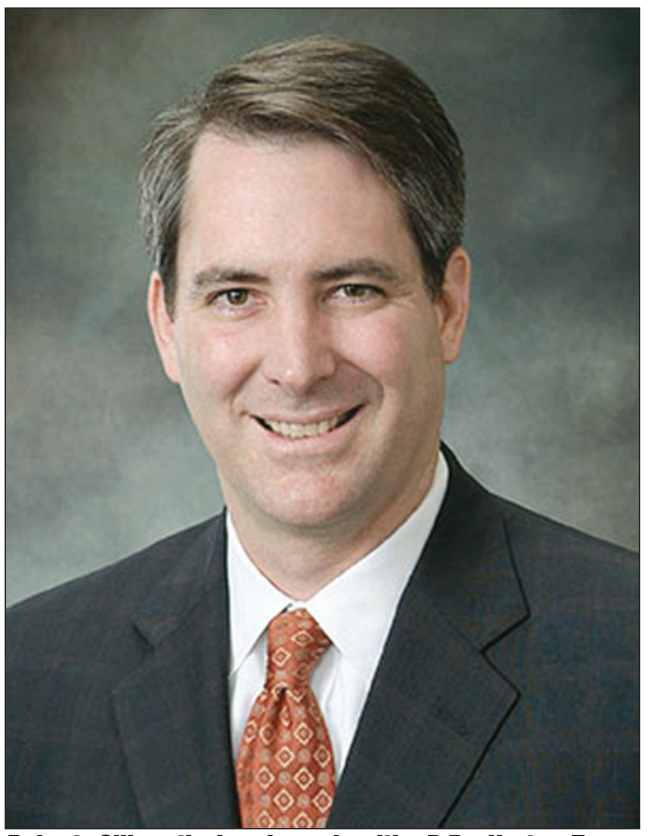
In the world of insurance law, it stands to reason that if there is no duty for an insurance company to defend an insured, there is probably no duty to indemnify the insured. But that's not so, according to a recent Texas Supreme Court decision.

In Dec. 11's *D.R. Horton-Texas v. Markel International Insurance Co.* the high court held "that the duty to indemnify is not dependent on the duty to defend and that an insurer may have a duty to indemnify its insured even if the duty to defend never arises."

The background to the case, according to the opinion, is as follows: James and Cicely Holmes purchased a house built by D.R. Horton-Texas. The couple claimed that, soon after moving in, they discovered mold in their home, so they sued D.R. Horton for remedial costs. They alleged that latent defects in the chimney, roof, vent pipes, windows, and flashing around the roof and chimney allowed water to enter the house, causing mold damage.

In their petition, the Holmeses indentified only D.R. Horton as responsible for the defects and negligent attempts to repair them. D.R. Horton claimed that one of its subcontractors performed masonry work on the home as well as some of the repairs that contributed to the alleged defects. But the Holmeses did not sue the subcontractor or implicate it in their pleadings.

The subcontractor previously had obtained a commercial general liability (CGL) policy from Markel International Insurance Co. that named D.R. Horton as an additional insured entitled to coverage for claims against it arising from the subcontractor's work. After the Holmeses sued D.R. Horton, D.R. Horton sought coverage from Markel. Markel refused to defend D.R. Horton because the underlying plaintiffs' petition did not plead facts indicating that the subcontractor's work was defective and, therefore, did not invoke coverage under the subcontractor's CGL policy for D.R. Horton. D.R. Horton obtained counsel at its own expense to defend itself in the Holmeses' suit and settled with the Holmeses before trial.



Robert Gilbreath is pleased with *D.R. Horton-Texas*, which he says clears up confusion *Griffin* caused in the lower courts.

D.R. Horton sued Markel for reimbursement of defense costs and the settlement payment. Markel moved for summary judgment, arguing that it had no duty to defend D.R. Horton in the underlying litigation because the Holmeses' petition did not contain allegations triggering coverage. D.R. Horton responded to the motion by arguing that, although the eight-corners doctrine may limit Markel's duty to defend and indemnify D.R. Horton, the Holmeses' pleadings should be liberally construed in favor of a defense and coverage. The eight-corners doctrine compels judges to determine an insurer's duty to defend by looking only at the four corners of a petition and the four corners of an insurance policy, ignoring all other extrinsic evidence.

The trial court granted Markel's summary judgment motion. D.R. Horton appealed, and Houston's 14th Court of Appeals affirmed the trial court's ruling, finding that Markel did not owe D.R. Horton a duty to defend or indemnify it against the claims brought by the Holmeses. It further explained that the eight-corners doctrine precluded D.R. Horton's claim that Markel owed it a duty to defend because there were no allegations on the face of the Holmeses' petition that implicated the subcontractor's work. The 14th Court reasoned that because Markel had no duty to defend, it also had no duty to indemnify. D.R. Horton appealed the decision to the Supreme Court.

The unanimous opinion noted that, in its briefing to the Supreme Court, Markel argued that under the 1997 high court opinion in *Farmers Texas County Mutual Insurance v. Griffin* one duty cannot exist without the other.

However Justice Dale Wainwright, who wrote for the court in *D.R. Horton*, found that *Griffin* cannot be construed that broadly. He conceded in a footnote that *Griffin* mistakenly has been cited by several intermediate appellate courts as standing for the proposition that if a petition does not trigger a duty to defend, it cannot trigger a duty to indemnify.

"The insurer's duty to indemnify depends on the facts proven and whether the damages caused by the actions or omissions proven are covered by the terms of the policy," Wainwright wrote in the decision, in which Justice Eva Guzman did not participate. "Evidence is usually necessary in the coverage litigation to establish or refute an insurer's duty to indemnify. This is especially true when the underlying liability dispute is resolved before a trial on the merits and there was no opportunity to develop the evidence, as in this case."

"We hold that even if Markel has no duty to defend D.R. Horton, it may still have a duty to indemnify D.R. Horton as an additional insured under [the subcontractor's] CGL insurance policy. That determination hinges on the facts established and the terms and conditions of the CGL policy," Wainwright wrote. The high court remanded the duty-to-indemnify issue to the trial court for proceedings consistent with the opinion.

Robert Gilbreath, a partner in the Dallas office of Hawkins Parnell & Thackston who represents D.R. Horton, is pleased with the decision, which he says clears up confusion *Griffin* caused in the lower courts.

"I think it makes it clear now to those courts that were being a little sloppy in their analysis that, just because there may not be a duty to defend, there may be a duty to indemnify. It's based on the true facts, not on the pleadings," Gilbreath says. "It was sort of a handful of courts that would make this immediate leap without thinking it through. And the Supreme Court felt that they needed to clarify it."

Les Pickett, a director in the Houston office of Galloway, Johnson, Tompkins, Burr & Smith who represents Markel, says he has not decided whether to ask for rehearing of the high court's opinion.

"This decision has an impact on our case, and we'll deal with it accordingly," Pickett says. "In the broader scope of things, I don't think the court decision does much more than restate already existing law."

David M. Pruessner, who represents insurance companies in coverage disputes and is not involved in *D.R. Horton-Texas*, says the ruling is important.

"It stands to reason what the court did. And maybe — since I represent insurance companies and they lost this case — maybe I'm supposed to say this is a bad decision. But it's a good decision, and it makes sense," says Pruessner of Dallas' Law Offices of David M. Pruessner.

"The duties to defend and indemnify are simply separate duties," Pruessner says. "The actual events, the truth that is proven at trial, may be completely different than what was alleged in pleadings. So, this is a good test because it returns to reality the actual facts." TXL

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The Texas Supreme Court's opinion in *D.R. Horton-Texas v. Markel International Insurance Co.* is online at www.texaslawyer.com. Look for the link within the online version of this article.

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