

Litigating the Duty to Indemnify

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Introductory Remarks

- Lack of clarity amongst courts on how to establish and allocate the duty to indemnify
- Goals:

1

Provide a general framework for how to prove the existence of the duty to indemnify

2

Provide practice pointers for different situations (e.g., final judgments vs. settlement agreements vs. arbitration awards)

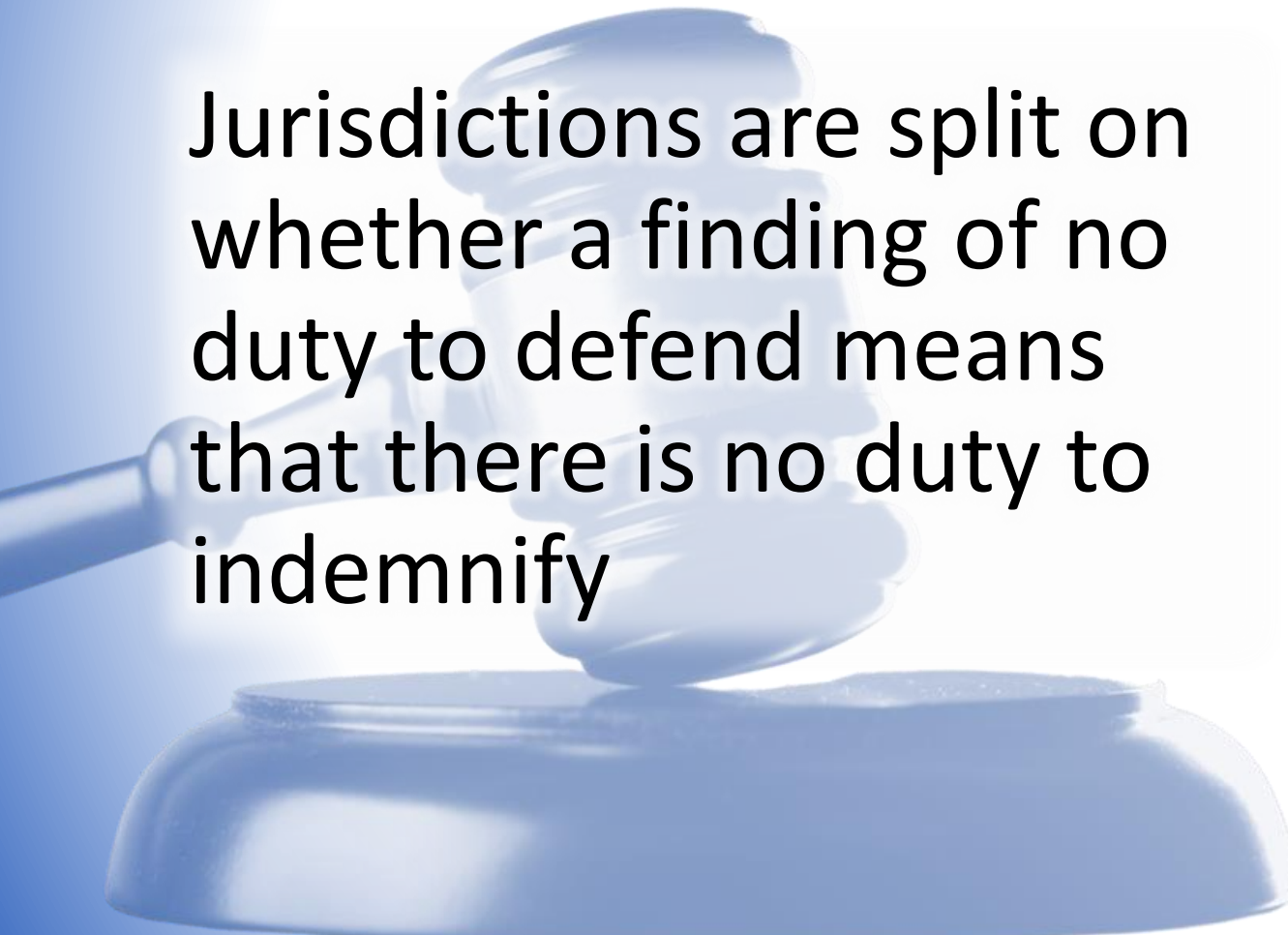
Defining the Duty to Indemnify

Basic Definition

The insurer's duty to pay the claim, by funding a settlement or paying a judgment against the insured

- Typically based on any and all information developed in the underlying suit or claim
- Generally narrower in scope than an insurer's duty to defend
 - Carrier may have a duty to defend even though it is ultimately determined that it has no duty to indemnify.

What If There Is No Duty To Defend?



Jurisdictions are split on whether a finding of no duty to defend means that there is no duty to indemnify

Many states have case law finding that there is no duty to indemnify when no duty to defend, such as **Oklahoma, Florida, Utah, and Massachusetts**

Some states have case law finding that there still may be a duty to indemnify even if no duty to defend, such as **Illinois**

Other states, like **Texas**, have case law taking a more fact-specific view where the duty to indemnify can be determined with the pleadings alone if the same reasons that negate the duty to defend negate any possibility the insurer will ever have a duty to indemnify

Triggering the Duty to Indemnify

- Triggered after the insured's underlying liability is established
- Duty to indemnify an insured only applies to losses that are covered under the terms of the policy
- How underlying liability might be established:
 - Final Judgment with Findings of Facts
 - Arbitration Award
 - Default Judgment
 - Settlement Agreement



Burden to Establish Duty to Indemnify

General Rule

Insured's burden to establish coverage



Exceptions

When Insurer had control of defense

When claims need not be allocated



Final Judgment or Arbitration Award

Does collateral estoppel apply?

What evidence is considered?

- Findings of fact/jury verdict
- Record of underlying trial
- Expert testimony interpreting record
- Additional evidence

Default Judgment

Does collateral estoppel apply?

What evidence is considered?

- Preference for evidence in the record of underlying case
- Additional evidence often considered

Settlement Agreement

- Insured must use actual facts, not pleadings
- Courts still prefer evidence in the record of underlying case



Conclusions and Unresolved Issues

- Focus on record in underlying case
- Unclear how courts will treat new evidence in coverage litigation

CONCLUSION

Questions?
