

Kipper Burke Argues that Insurance Carriers Should be Allowed to Establish True Facts in Duty to Defend Determinations in Texas Courts

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In a byline published in a recent edition of the *Journal of Texas Insurance Law*, Hinshaw partner Christopher “Kipper” Burke argues that insurers should have the opportunity to establish that there is no coverage at the duty to defend stage of a lawsuit in circumstances where the plaintiff and the defendant lack the incentive to litigate the true facts that would eliminate coverage.

Kipper explains that under current Texas law, Texas courts analyze the insurer’s duty to defend under the “eight-corners rule,” which determines the insurer’s duty to defend based solely on the allegations in the complaint and the policy terms, regardless of the actual facts. That approach limits an insurer’s ability to address coverage issues until after a final judgment has been entered.

As an example, Kipper notes that suits involving workplace injuries often involve gamesmanship where the injured workers who would qualify as employees of the defendant under Texas law allege that they were an independent contractor of the defendant. Alleging that the injured worker was an independent contractor is likely sufficient under current law to trigger a duty to defend under standard commercial general liability or commercial auto policies.

In the litigation, the parties fail to address the plaintiff’s status as an employee because to do so would negatively impact their client’s case. If the plaintiff is an employee, the plaintiff will likely lose insurance coverage, and the defendant will waive all common law defenses. These cases are prepared and tried under a fiction that the injured plaintiff was an independent contractor rather than an employee.

Kipper argues that allowing for a “true facts exception” to the duty to defend determination where the dispositive coverage fact will not be fully and fairly litigated in the underlying lawsuit would help promote judicial efficiency,

prevent non-adversarial or collusive outcomes, and better serve the public policy goal of truth-seeking in litigation. His article also proposes that procedural options like intervention, in addition to declaratory judgment actions, would help address these issues early and efficiently.

[Read the full article \(PDF\)](#)

- *Journal of Texas Insurance Law*: “The Search for the Truth: The True Facts Exception to the Duty to Defend from the Carrier’s Perspective” Spring 2025

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