

Fifth Circuit Rules That Duty To Defend Was Never Triggered Despite Insurer's Knowledge Of Underlying Suit (Insurance Law Alert)

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Affirming a Texas district court decision, the Fifth Circuit ruled that an insurer did not breach its duty to defend because the insured had never requested a defense or sought coverage. *Moreno v. Sentinel Ins. Co., Ltd.*, 35 F.4th 965 (5th Cir. June 2, 2022).

N.F. Painting was sued in connection with a worker's injury. N.F. Painting did not notify Sentinel of the suit or seek a defense and instead independently retained counsel. However, a co-defendant in the suit, also insured by Sentinel, did tender its defense to the insurer. More than two years later and after a judgment was entered against N.F. Painting, the underlying claimant, as third-party beneficiary to the policy, sued Sentinel, seeking to recover the judgment. The district court ruled that N.F. Painting was not entitled to coverage since it had failed to notify Sentinel of the suit or request a defense. The Fifth Circuit affirmed.

The Fifth Circuit ruled that Sentinel did not breach its duty to defend because its defense obligations were never triggered in the first place based on N.F. Painting's failure to tender defense. The court deemed it irrelevant that Sentinel received notice of the suit from another insured defendant, noting that "Texas law requires a request from the insured for whom a defense would be provided, not someone else, to trigger the duty to defend."

The court also deemed it irrelevant that N.F. Painting's attorney sent certain court documents to Sentinel in response to Sentinel's request for that material. The court observed that while the transmission of court papers may trigger the duty to defend "in the ordinary case," this was not an ordinary case based on the absence of any correspondence relating to Sentinel's defense. Likewise, the court held that a letter from Sentinel to N.F. Painting's counsel indicating that it would not provide a defense or indemnity did not support an inference that N.F. Painting had requested a defense in light of N.F. Painting's clear decision to hire its own counsel rather than seek coverage from Sentinel.

Finally, the court rejected the contention that N.F. Painting's non-compliance did not relieve Sentinel of its indemnity obligations absent a showing of prejudice. The court explained that where notice is "wholly lacking," prejudice is not required and that in any event, the issuance of a \$1.6 million judgment against N.F. Painting without prior notice to Sentinel constituted prejudice as a matter of law.

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