Coverage B Conundrum

Do the Facts Alleged or the Elements of Liability Control Courts' Duty-to-Defend Analysis?

By Gabriel Darwick and Suzanne Whitehead

A Wisconsin Supreme Court decision represents the latest departure from a practical, deeply rooted framework for evaluating an insurer's duty to defend.

It is well settled that an insurer's duty to defend arises whenever the factual allegations in the complaint raise a reasonable possibility of coverage. Yet in *West Bend Mutual Insurance Co. v. Ixthus Medical Supply, Inc.*, 2019 WI 19 (Wis. 2019), the Wisconsin Supreme Court explicitly evaluated the duty to defend based on the elements of liability to the exclusion of the factual allegations. The *West Bend* court's decision represents the latest departure from a practical, deeply rooted framework for evaluating an insurer's duty to defend. This article examines the *West Bend* decision and cases in other jurisdictions reaching similar and different results and provides the authors' views on guiding courts away from adopting *West Bend's* flawed approach.

West Bend Court Shifts Wisconsin Law and Evaluates Duty to Defend Based on Elements of Liability

The *West Bend* coverage dispute arose from a lawsuit between Abbott Laboratories, its affiliates, and West Bend Insurance Company's named insured, Ixthus Medical Supply, Inc. In November 2015, Abbott sued

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Ixthus, among others, for trademark and trade dress infringement, fraud, and other common law and statutory violations. Abbott alleged that Ixthus illegally conspired to import and sell diverted international blood glucose test strips that Abbott manufactured with labeling that had not been cleared by regulators for sale in the United States. This was, according to Abbott, part of a fraudulent scheme in which Ixthus knowingly participated. Abbott alleged 13 causes of action, including federal trademark dilution under section 43(c) of the Lanham Act, 15 U.S.C. §1125(c), and claims under New York General Business Law sections 360-1 and 349. Although some of the causes of action in the complaint required proof of intent, others, such as those previously identified, did not.

Ixthus tendered its defense and indemnity to West Bend, its commercial general liability (CGL) insurer, contending that the Abbott complaint alleges a covered "personal and advertising injury" under Coverage B. West Bend denied the tender and promptly filed suit, seeking a declaration that it had no duty to defend or indemnify Ixthus. Among other things, West Bend asserted that the "knowing violation" exclusion barred coverage because the complaint alleged that Ixthus acted intentionally and with knowledge that it was defrauding Abbott by buying international test strips at a lower price and selling them domestically to increase profit. 2019 WI 19, ¶ 25. The knowing violation exclusion barred coverage for "'[p]ersonal and advertising injury' caused by or at the direction of the insured with knowledge that the act would violate the rights of another and would inflict 'personal advertising injury.'" *Id*. at ¶ 26.

Neither Abbott nor Ixthus sought to steer the court away from the intentional acts alleged in the complaint. Rather, they relied on prior Wisconsin appellate court decisions to argue that "the inquiry is not whether the complaint alleges intentional acts, but whether the complaint alleges any nonintentional cause of action for which the insured could be liable." It followed that since intent was not a required element of certain causes of action, the knowing violation exclusion did not bar coverage.

The court agreed with Abbott and Ixthus, holding the following:

> The knowing violation exclusion will preclude coverage at the duty-to-defend stage only when every claim alleged in the complaint requires the plaintiff to prove the insured acted with knowledge that its actions 'would violate the rights of another and would inflict 'personal and advertising injury.' If the complaint alleges any claims that can be proven without such a showing, the insurer will be required to provide a defense.

Id. at ¶ 29. The court continued, noting, "[e]ven though the complaint generally assert[ed that] Ixthus acted wrongfully and with knowledge that it was defrauding Abbott," the duty to defend was triggered because certain Lanham Act and general business law (GBL) claims could be proved without establishing knowledge or intent to violate Abbott's rights and inflict injury. *Id*. at ¶ 36–37.

Some Jurisdictions Take a Similar Approach

The *West Bend* court's hard-and-fast rule compelling a duty-to-defend analysis that is premised on the elements of a cause of action, rather than the facts, is the most explicit embrace of this concept by a state high court. But the *West Bend* court is not alone in its view that under certain circumstances a knowing violation exclusion will not preclude the duty to defend—regardless of the allegations pleaded—if a cause of action can be proved without intent. *See Bridge Metal Indus., LLC v. Travelers Indem. Co.*, 812 F. Supp. 2d 527 (S.D.N.Y. 2011), *aff'd*, 559 F. App'x 15 (2d Cir. 2014); *Orlando Nightclub Enters. v. James River Ins. Co.*, No. 6:07-cv-1121, 2007 U.S. Dist. Lexis 88320 (M.D. Fla Nov. 30, 2007); *Allied Ins. Co. v. Bach*, No. 05 C 5945, 2007 U.S. Dist. Lexis 13339 (N.D. Ill. Feb. 27, 2007); *Cosser v. One Beacon Ins. Grp.*, 15 A.D.3d 871 (N.Y. App. Div. 2005); *KM Strategic Mgmt., LLC v. Am. Cas. Co. of Reading, PA*, 156 F. Supp. 3d 1154 (C.D. Cal. 2015).

In *Bridge Metal*, for example, another alleged trademark infringer sought a defense under the personal and advertising injury coverage of a CGL policy when it was sued for, among other things, violations of the Lanham Act. As in *West Bend*, the insurer, Travelers Indemnity Company, sought to preclude coverage under the knowing violation exclusion. In the underlying complaint, the plaintiff, National, alleged that Bridge Metal, the insured, used confidential information to manufacture, market, and sell products that apparently were identical to National's; was telling potential clientele that it could manufacture fixtures just like National's for a less expensive price; and Bridge Metal was trying falsely to advertise and deceptively palm off its products so as to confuse and deceive the public about the true origin of the fixtures. National further alleged that Bridge Metal's conduct was intentional, willful, wanton, malicious, oppressive, and reckless. 812 F. Supp. 2d at 530–31. To avoid application of the knowing violation exclusion, Bridge Metal argued that although the complaint alleged intentional conduct, it could have been found liable for several causes of action without any finding of intentional conduct. *Id*. at 544. Just as the *West Bend* court held, the district court held that duty to defend existed "despite the allegations of intentional conduct" because "National's complaints asserted covered causes of action for which Plaintiffs could have been liable to National without any intentional conduct." *Id*. at 545. The Second Circuit affirmed.

Without going quite as far as *West Bend* or *Bridge Metal*, the Eleventh Circuit in *Travelers Property Casualty Co. of America v. Kansas City Landsmen, L.L.C.*, 592 F. App'x 876 (11th Cir. 2015), held that the knowing violation exclusion did not preclude the insurers' duty-to-defend car rental companies. The complaint alleged willful violations of a provision of the Fair and Accurate Credit Transaction Act (FACTA) because the FACTA violation could be proved with "reckless disregard," and the allegations in the underlying complaint did not necessarily limit its allegations against the insureds to violations of FACTA conducted knowingly, as opposed to violations committed with reckless disregard. The court reasoned that it could "find nothing in the [underlying] complaint that would foreclose the [underlying] plaintiffs from being able to proceed and, given the necessary evidence, prevail at trial on the theory that the [insureds] violated [FACTA] with reckless disregard."

In their efforts to shift the duty-to-defend analysis from the facts to the cause of action elements, policyholders have not

focused solely on the Coverage B knowing violation exclusion in a CGL policy. Similar efforts occasionally succeed when a policyholder seeks to defeat an expected or intended exclusion under Coverage A in a CGL policy. *See Hartford Cas. Ins. Co. v. Conrad & Scherer, LLP*, No. 15-61360, 2015 U.S. Dist. Lexis 190673, at *12 (S.D. Fla. Dec. 16, 2015) (holding that the expected or intended exclusion did not preclude coverage because causes of action could be proven "without a showing that their acts and the resultant harm were knowing or intentional"); *Telecomms. Network Designs, Inc. v. Brethren Mut. Ins. Co.*, 83 Pa. D. & C. 4th 265 (Penn. Ct. Com. Pl. 2007) (complaint alleging violations of the TCPA caused "property damage" could be proven through unintentional conduct, triggering insurer's duty to defend).

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Many Courts Resist Theoretical Circumstances and Stick to the Facts

Fortunately, many courts remain true to the requirement that the duty-to-defend analysis depends on the factual allegations in the complaint rather than the theoretical circumstances in which a cause of action may be established. This is so in various factual contexts, including when insurers have sought to apply a knowing violation exclusion for a claim for "personal or advertising injury." *See Grange Ins. Ass'n v. Roberts*, 179 Wash. App. 739 (Wash. App. Ct. 2013); *Atl. Mut. Ins. Co. v. Terk Techs. Corp.*, 309 A.D.2d 22 (N.Y. App. Div. 2003); *A.J. Sheepskin & Leather Co. v. Colonia Ins. Co.*, 273 A.D.2d 107 (N.Y. App. Div. 2000); *SM Bricknell Ltd. P'ship v. St. Paul Fire & Marine Ins. Co.*, 786 So. 2d 1204 (Fla. Dist. Ct. App. 2001). Many courts also have focused on the factual allegations when insurers have sought to apply an expected or intended exclusion for a claim alleging "bodily injury" or "property damage." *Roberts*, 179 Wash. App. at 739; *Md. Cas. Co. v. Express Prods.*, No. 09-857, 2011 U.S. Dist. Lexis 108048 (E.D. Pa. Sept. 22, 2011); *Capano Mgmt. Co. v. Transcon. Ins. Co.*, 78 F. Supp. 2d 320 (D. Del. 1999); *Russ v. Great Am. Ins. Cos.*, 121 N.C. App. 185 (N.C. 1995).

In a recent decision, a Florida federal court applied a knowing violation exclusion to the alleged facts and determined that the primary insurer did not have a duty to defend. *Amica Mut. Ins. Co. v. RSUI Indem. Co.*, No. 9:19-CV-80010, 2019 Dist. Lexis 33468 (S.D. Fla. Mar. 4, 2019). The underlying action in the *Amica* coverage action involved a tense dispute between Frank Speciale, a condominium owner, and Brian Upton, president of the condo association's board of directors. In the complaint, Speciale alleged that he "'has been and remains'" the 'target' of Upton's 'animosity.'" *Id.* at *3. The complaint characterized "the common denominator" in the claims against Upton as "maliciously motivated bad faith acts and omissions." *Id.* Further, Speciale alleged that Upton "harbor[ed] deep seated malice and ill-will" against him, which resulted in him publishing false and defamatory statements about Speciale. *Id.* Specifically, Speciale alleged that Upton "maliciously, willfully, knowingly and intentionally published written and oral false statements" that Speciale "was fired from his position as inspector for the City of Boca Raton because he was taking bribes." *Id.* Speciale alleged that Upton accused him of "'not know[ing] anything about construction;' accused Speciale of permitting prostitutes to visit his unit and allowing tenants to smoke pot; accused Speciale of 'faking' a disability; and accused Speciale of not paying his assessments, and engaging in illegal and fraudulent conduct." *Id.* Speciale contended that Upton's malicious and intentionally false statements damaged his "good reputation," and Upton had a "bad faith motive to harm [him]." *Id.*

Amica, Upton's umbrella insurer, filed a declaratory judgment action against United Specialty Insurance Company, the commercial general liability insurer for the condominium association, alleging that United has a duty to defend Upton. Amica asserted that as president and a member of the condominium board of directors, Upton was an insured under the United CGL policy and claimed that United had a duty to defend Upton with regard to Speciale's defamation claim under Coverage B. Amica argued that the knowing violation exclusion was ambiguous because the United policy provided "coverage for slander and then take[s] it away even if there was no intent." *Id.* at *4. Amica further asserted that to the extent that the underlying complaint alleged that Upton's defamatory statements were made intentionally, there was "no allegation that the defamatory statements were made with a specific intent to harm." *Id.* United countered by focusing on the facts alleged against Upton, which all involved malicious intent.

In considering these factual allegations against the duty to defend, the court noted that it was "significant" that Speciale stated that the "common denominator" upon which all of his claims were based was Upton's "maliciously motivated bad faith acts and omissions." *Id.* at *17. The court considered Florida law generally, which dictates that "when a cause of action alleged is one for intentional acts, the insurer has no duty to defend if the subject policy does not provide coverage for intentional misconduct." Id. at *17–18 (citing Nat'l Union Fire Ins. Co. v. Lenox Liquors, 358 So. 2d 533, 536 (Fla. 1978)). The court rejected Amica's position because the "argument ignores the Complaint's allegations that Upton had a 'bad faith motive to harm Speciale' and that 'Upton was and remains relentless in his endeavors to harm [Speciale's] reputation by publishing the false statements and continues to cause [Speciale] damage by republishing and repeating the false statements.'" *Id.* at *18. Therefore, the court concluded that the underlying complaint alleged that

Upton defamed Speciale with a specific intent to harm him, and therefore United properly denied coverage under the knowing violation exclusion.

Similarly, in *Colony Insurance Co. v. Mid-Atlantic Youth Services Corp.*, 485 F. App'x 536, 539 (3d Cir. 2012), the Third Circuit applied the well-settled rule that "it is the facts alleged in the underlying complaint, not the cause of action pled, that will determine if there is coverage," to hold that an expected and intended exclusion and a knowing violation exclusion in a CGL policy barred coverage under Coverages A and B, respectively, notwithstanding allegations of negligence in the complaint. The underlying action there involved a judicial kickback scheme. The insured, Robert Powell (Powell), owned Mid-Atlantic Youth Services Corporation (MAYS), which managed several juvenile detention facilities in Pennsylvania. Juvenile victims filed suit against Powell and MAYS, alleging that Powell paid $2.6 million to two judges in exchange for committing adjudicated juveniles to MAYS' detention facilities. *Id.* In contending that there was coverage for the negligence allegations under Coverage A, Powell and MAYS sought to have the court focus on the bare legal allegations, not the facts, to determine coverage. The Third Circuit declined to permit them to "recast the allegations in the underlying complaint as alleging negligence" when the factual allegations so clearly alleged a knowing and willful conspiracy. *Id*. at 539.

It is important to recognize that the split over the proper duty-to-defend analysis is not jurisdiction specific. For example, take the New York Appellate Division, First Department's decision in *Terk Techs*, 309 A.D.2d 22, 32. There, the court applied a knowing violation exclusion to bar coverage under the "personal and advertising injury" coverage section:

> [N]otwithstanding the fact that a violation of the Lanham Act can be unintentional, and that the complaint in the federal action asserts that Terk acted with "reckless disregard," we can discern no justification from the factual allegations set forth in the complaint to impose a duty to defend Terk upon Atlantic. Indeed, it is impossible to envision how Terk could have unknowingly, and unintentionally, approached a local manufacturer to produce a cheaper, low-quality knock-off of the CD 25; marketed the counterfeit product in packaging indicating it was a genuine Larsen creation manufactured in Denmark, both blatantly false; and then fraudulently misled Larsen when he inquired as to poor sales, indicating that demand was low, whereas the counterfeit product was enjoying vigorous sales. Since all of the factual allegations of the complaint are premised on intentional, "knowing" conduct, they fall squarely within the "knowledge of falsity" exclusion in the Policy.

Id. But see Cosser v. One Beacon Ins. Grp., 15 A.D.3d 871 (N.Y. App. Div. 2005) (declining to apply a knowing violation exclusion to complaint alleging Lanham Act and GBL causes of action that can be proved without intent). *Compare Hartford Cas. Ins. Co. v. Conrad & Scherer, LLP*, No. 15-61360, 2015 U.S. Dist. Lexis 190673 (S.D. Fla. Dec. 16, 2015), *with CareMedic Sys., Inc. v. Hartford Cas. Ins. Co.*, No. 8:06-CV-1185, 2008 U.S. Dist. Lexis 30370 (M.D. Fla. Apr. 1, 2008).

California, too, has issued mixed decisions. In a recent California decision, the district court held that an umbrella policy's exclusion providing that there is no coverage for personal injury "when the insured acts with specific intent to cause any harm" applied to preclude coverage for false imprisonment claims by focusing on the facts alleged. *See Kogler v. State Farm Gen. Ins. Co.*, 291 F. Supp. 3d 1054 (N.D. Cal. 2018). In the underlying complaint, the plaintiff alleged, among other things, that the underlying defendant insured falsely imprisoned her by dragging her by the hair without her consent. The court applied the facts as alleged and held, "Viewed objectively, [the insured's] conduct supports a finding as a matter of law that he acted with the specific intent to harm Kogler when he lifted her off the ground by her hair." *Id.* at 1058. Thus, the court concluded that the exclusion applied and State Farm owed no duty to defend.

Yet in *Gonzalez v. Fire Insurance Exchange*, 234 Cal. App. 4th 1220, 1239 (Cal. Ct. App. 2015), the court determined that the insurer did not meet its burden on the expected or intended exclusion because the insured "denied any wrongdoing at the time of tender and because [the insurer] has not submitted any evidence to the contrary." The court discussed that based on the complaint, the defendant could have been found liable for damages incurred by Gonzalez due to his negligence in creating the conditions that led to her false imprisonment in the room. Additionally, the complaint "raised the possibility that the other individuals named in the complaint were the ones who perpetrated the sexual assault against Gonzalez." *Id.* at 1240. Further, the court stated that a "tort such as false imprisonment may result from intentional conduct and is therefore non-accidental, but a subjective intent or expectation that harm would occur on the part of the insured is not required for liability." Additionally, the court noted that Gonzalez's cause of action for slander per se also did not require proof that an individual intended to cause harm:

> Furthermore, distinguishing a tort as intentional and determining whether any damages are intended or expected by the insured requires a fundamentally different analysis. One may commit an intentional act without subjectively intending or expecting damages. Here, [insurer] has failed to meet its burden to conclusively show that [defendant] would have expected or intended any damages to flow from his alleged conduct based solely on the allegations of the complaint.

Id. at 1240.

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Reconciling *West Bend*

Those courts that have departed from the *Terk Techs* line of reasoning, and in particular the *West Bend* court, do not seem to reconcile their positions with the oft-stated rule that the duty to defend should not be determined based on the theory of liability, even though that rule controls in Wiscon-

sin and in other jurisdictions that have set aside the facts. *See James Cape & Sons Co. v. Streu Constr. Co.*, 2009 WI App. 154, ¶ 16 (Wis. App. Ct. 2009) ("Our focus is on the facts alleged, the incidents giving rise to the claims, not [the claimant's] theory of liability"); *Mount Vernon Fire Ins. Co. v. Creative Hous.*, 88 N.Y.2d 347, 352 (N.Y. 1996) ("… while the theory pleaded may be the insured's negligent failure to maintain safe premises, the operative act giving rise to any recovery is the assault."); *Amerisure Mut. Ins. Co. v. Microplastics, Inc.*, 622 F.3d 806, 815 (7th Cir. 2010) ("The factual allegations of the complaint, rather than the legal theory under which the action is brought, determine whether there is a duty to defend.").

Courts have declined to "imagine allegations that [the plaintiff] could have made merely because [the plaintiff's] actual allegations went beyond the bare minimum of notice pleading."

In jurisdictions that consider the theory of recovery in evaluating the duty to defend, the *West Bend* decision may not seem to depart significantly from the duty-to-defend analysis. *See, e.g.*, *Jones Boat Yard, Inc. v. St. Paul Fire & Marine Ins. Co.*, 2017 U.S. Dist. Lexis 144988, at *24 (S.D. Fla. Sept. 6, 2017) (applying Florida law) ("an insurer's duty to defend ultimately turns 'on the facts *and* legal theories alleged in the pleadings and claims against the insured.'") (citation omitted) (emphasis in original). However, while it is one thing to consider the legal theory in conjunction with the facts to evaluate the duty to defend, it is quite another to consider the legal theory to the exclusion of the facts. Engaging in the latter analysis requires a court to consider "hypothetical scenarios that could result in indemnity coverage." *Sletten & Brettin Orthodontics, LLC v. Cont'l Cas. Co.*, 782 F.3d 931, 939 (8th Cir. 2015). Thus, courts have declined to "imagine allegations that [the plaintiff] could have made merely because [the plaintiff's] actual allegations went beyond the bare minimum of notice pleading." *Id.* (citing *Bethel v. Darwin Select Ins. Co.*, 735 F.3d 1035, 1040 (8th Cir. 2013)); *Wackenhut Servs. v. Nat'l Union Fire Ins. Co.*, 15 F. Supp. 2d 1314, 1321 (S.D. Fla. 1998) ("inferences that can be made from the allegations of the complaint 'are not sufficient' to trigger the duty to defend."); *Hurley Constr. Co. v. State Farm Fire & Cas. Co.*, 10 Cal. App. 4th 533, 538 (Cal. Ct. App. 1992) ("The insured may not speculate about unpled third party claims to manufacture coverage.").

Permitting the consideration of hypothetical scenarios that were not pleaded in the complaint to trigger the duty to defend on the premise that a claimant alleging only intentional conduct may seek at trial to prove that claim without evidence of intent is not consistent with the reality of litigation. As a preliminary matter, a complaint "must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively." *Starr v. Baca*, 652 F.3d 1202, 1206 (9th Cir. 2011). Thus, when a plaintiff seeks to prove a trademark infringement, the plaintiff must sufficiently identify the infringing conduct. *TWiT, LLC v. Twitter, Inc.*, No. 18-cv-00341, 2018 U.S. Dist. Lexis 90319 (N.D. Cal. May 30, 2018). Similarly, a plaintiff who pleads intentional infliction of emotional distress, must allege facts to support that claim. *Moncada v. W. Coast Quarty Corp.*, 221 Cal. App. 4th 768 (Cal. App. Ct. 2013). Formulaically reciting the elements of a cause of action is insufficient to state a claim. *Harris v. Mills*, 572 F.3d 66 (2d Cir. 2009). Accordingly, whenever a complaint alleges detailed factual conduct to meet the notice pleading requirements, a strong argument can be made that a court should not disregard those allegations to evaluate whether it is possible that the claimant may prove certain claims based on different facts.

The *West Bend* court, and others applying its framework, seems to fail to consider that the allegations pleaded in a complaint constrict the facts and theories of liability that can be introduced at trial. *Stevens v. Helming*, 163 Conn. App. 241, 248 (Conn. App. Ct. 2016) ("Simple fairness requires that a defendant not be forced to defend against facts that are not clearly pleaded in a complaint"). Thus, a claimant who seeks to prove a cause of action based on reckless or negligent conduct for the first time during a trial—when only intentional conduct is alleged in the complaint—will generally be precluded from doing so. *White v. Mazda Motor of Am., Inc.*, 313 Conn. 610, 625 (Conn. 2014) ("the plaintiff was not required to plead a separate malfunction theory count in his complaint, but this does not relieve him of his burden of pleading facts to raise this theory in his complaint as part of his product liability claims"); *Daniels v. Bd. of Educ.*, 805 F.2d 203, 210 (6th Cir. 1986) (holding that a district court did not abuse its discretion by failing to consider a new theory raised for the first time after a trial). Thus, if Abbott's case against Ixthus were to proceed to trial, Abbott would be required to present its case based on Ixthus' purported fraudulent scheme as alleged in the complaint, not based on some alternative theory, such as, perhaps, that Ixthus negligently infringed on Abbott's patent.

Lastly, the *West Bend* court is not necessarily correct in its view that West Bend will owe a duty to indemnify if Ixthus is held liable based on a theory that does not require intent. Most jurisdictions, including Wisconsin, hold that an insurer may litigate coverage issues about which material facts were not litigated and which were not necessary to the underlying judgment. *Nationwide Mut. Ins. Co. v. Pasiak*, 327 Conn. 225 (Conn. 2017) (collecting cases); *Valley Bancorporation v. Auto Owners Ins. Co.*, 212 Wis.2d 609, 619 (Wis. App. Ct. 1997) (insurer bears the burden of proving that the conduct not covered by the insurance policy gave rise to the damages determined by the jury). Thus, even if Ixthus was held liable under a cause of action that could be proved without intent, West Bend would still have the right to challenge its duty to indemnify based on whether the facts supported the application of the knowing violation exclusion. For this reason as well, the *West Bend* court's rule is difficult to reconcile with Wisconsin jurisprudence.

Practical Tips for Guiding Courts Away from the Liability Elements Framework

In the authors' view, the *West Bend* decision upends the appropriate framework for evaluating the duty to defend without justification. From a practical point of view, the *West Bend* court's decision that a cause of action built on a specific set of factual allegations in a complaint may at trial be proved based on another set of facts is wrong. But there is no turning back in Wisconsin, at least when it comes to applying a knowing violation exclusion. Policyholder counsel likely will rely on *West Bend* to argue for its application in other jurisdictions in similar contexts, whether it is to a knowing violation or an expected or intended exclusion, or in some other context. Similar to the insureds in *West Bend*, policyholder counsel will focus whether a complaint alleges any nonintentional causes of action for which the insured could be liable. Further, they will contend that since intent was not a required element of certain causes of action, the knowing violation exclusion, or expected or intended exclusion, does not bar coverage.

To combat this approach, coverage counsel should be prepared to articulate the contradictions between the *West Bend* analysis and the rule, adopted in most jurisdictions, that requires the duty to defend to turn on the facts alleged, not the theories of liability. In our view, the liability-elements approach taken in *West Bend* is far too expansive for the duty-to-defend analysis. As noted by the insurer in *West Bend*, requiring the duty to defend to turn on the elements of the cause of action would transform the duty-to-defend analysis into a "weighty intellectual exercise on the law, and what a cause of action minimally requires, removed from the actual facts." This is not a reasonable or practical framework for insurers to use to determine their coverage obligations to insureds.

We encourage the defense bar to continue to push back on turning the duty-to-defend analysis into a "weighty intellectual exercise on the law." Instead, we urge the defense bar to urge courts to go back to the basics by sticking to the facts. Regardless of whether a complaint asserts a violation of the Lanham Act that could be unintentional, or alleges that the insured acted with reckless disregard, counsel should keep the court focused on the factual allegations, both individually and as a whole, and argue that it is not possible or practical to discern from the facts that the insured acted unknowingly or unintentionally. By focusing on the factual allegations and the basis on which the claimant seeks to hold the insured liable, rather than on hypothetical theories not pleaded in the complaint for which the insured *could* be held liable, counsel can make their best argument to keep courts on a path that stays away from *West Bend*.