Unlocking the Mystery of Use of Extrinsic Evidence in the Duty to Defend

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RULE OF CONTRACT

- 1973 CGL Form
- “company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage, even if the allegations of the suit are groundless, false or fraudulent . .”

RULE OF CONTRACT

- 2013 CGL Form
- “We will have the right and duty to defend the insured against any “suit” seeking those damages,”

RULE OF CONTRACT

- “We may look to extrinsic evidence outside of the allegations and/or fact pleaded by any claimant to determine whether we owe a duty to defend or indemnify against a suit. We may rely on extrinsic information to deny the defense and/or indemnity of a suit.”
- “We have the right and duty to defend only those insureds . . against any suit seeking damages to which this insurance applies.”

EARLY SUPREME COURT AUTHORITY

- Early Texas Supreme Court authority made no mention of and did not consider the use of extrinsic evidence One of the earliest cases, Heyden Newport Chem. Ins. Co. v. Southern Gen'l Ins. Co. (1965), referred only to the eight-corners rule implying that only the pleadings and the policy could be considered. See Argonaut Southwest Ins. Co. v. Maupin (1973) National Union Fire Ins. Co. of Pittsburgh, Pa. v. Merchants Fast Motor Lines (1997) and King v Dallas Fire Ins. Co. (2002).

GUIDEONE

- GuideOne Elite Ins. Co. v. Fielder Road Baptist Church, 197 S.W.3d 305 (Tex. 2006)
- "Although this Court has never expressly recognized an exception to the eight-corners rule, other courts have. Generally, these courts have drawn a very narrow exception, permitting the use of extrinsic evidence only when relevant to an independent and discrete coverage issue, not touching on the merits of the underlying third-party claim."

GUIDEONE

- "Recently, the Fifth Circuit observed that if this Court were to recognize an exception to the eight-corners rule, it would likely do so under similar circumstances, such as: "when it is initially impossible to discern whether coverage is potentially implicated *and* when the extrinsic evidence goes solely to a fundamental issue of coverage which does not overlap with the merits of or engage the truth or falsity of any facts alleged in the underlying case." Northfield Ins. Co. v. Loving Home Care, Inc., 363 F.3d 523, 531 (5th Cir.2004)"

PINE OAKS

- Pine Oak Builders v. Great American Lloyds, 279 S.W.3d 650, 655 (Tex. 2009)
- "Although this Court has never expressly recognized an exception to the eight-corners rule, other courts have. Generally, these courts have drawn a very narrow exception, permitting the use of extrinsic evidence only when relevant to an independent and discrete coverage issue, not touching on the merits of the underlying third-party claim."

PINE OAKS

- “In deciding the duty to defend, the court should not consider extrinsic evidence from either the insurer or the insured that contradicts the allegations of the underlying petition. “
- “Pine Oak views GuideOne Elite as distinguishable because in that case the insurer was attempting to introduce extrinsic evidence to limit its duty to defend, whereas here Pine Oak, the insured, offered extrinsic evidence to trigger the duty to defend. This distinction is not legally significant.”

PINE OAKS

- “Our analysis in GuideOne Elite did not consider whether an exception to the eight-corners rule might exist where the parties to the underlying suit collude to make false allegations that would invoke the insurer’s duty to defend, because the record did not indicate collusion.”

D.R. HORTON

- D. R. Horton—Texas v. Markel Intern. Ins., 300 S.W.3d 740 (Tex. 2009)
- "D.R. Horton argues that the court of appeals erred by not recognizing an exception to the eight-corners doctrine, also known as the complaint allegation rule, to allow parties to introduce extrinsic evidence relating to coverage-only facts in the duty to defend analysis. Markel argues that D.R. Horton waived this issue, and we agree."

D.R.HORTON

- We do not decide D.R. Horton's argument for this Court to recognize an exception to the eight-corners doctrine because it did not raise this argument in the trial court or in the court of appeals until its second motion for rehearing, after our opinion issued in GuideOne Elite Insurance Co. v. Fielder Road Baptist Church, 197 S.W.3d 305 (Tex.2006)

WHO IS AN INSURED?

- Blue Ridge Ins. Co. v. Hanover Ins. Co., 748 F. Supp. 470, 473 (N.D. Tex. 1990)
- “Those decisions assume as a predicate for application of the rule they express that the person claiming a right to a defense is an insured. Blue Ridge’s case authorities do not mean that a person who is not an insured under an insurance policy is to be treated as one for defense purposes just because of false allegations made by the damage suit plaintiff. The status of “insured” is to be determined by the true facts, not false, fraudulent or otherwise incorrect facts that might be alleged by a personal injury claimant, Parker in this case. “

WHO IS AN INSURED

- Calderon v. Mid-Century Ins. Co. of Tex., 1998 WL 898471 (Tex.App.-Austin 1998)
- “We hold that the eight corners rule applies in deciding Mid-Century's duty to defend and that extrinsic evidence cannot be considered. We must take the allegations in the Ibarra petition as true. The Ibarras alleged that Erica had permission to drive Brian's car, a fact Mid-Century and State Farm dispute. Nevertheless, taken as true, the allegation negates the exclusionary provision cited by Mid-Century. As the supreme court has held, the duty to defend is not affected by the facts ascertained before, during, or after the conclusion of the underlying lawsuit. Trinity, 945 S.W.2d at 829. The duty to defend does not depend on what the facts are; it depends only on what the facts are alleged to be. “

ADDITIONAL INSURED

- Roberts, Taylor & Sensabaugh, Inc. v. Lexington Ins. Co., 2007 WL 2592748 (S.D.Tex.2007)
- "("[W]here the basis for the refusal to defend is that the events giving rise to the suit are outside the coverage of the insurance policy, facts extrinsic to the claimant's petition may be used to determine whether a duty to defend exists.").
- Extrinsic evidence of the Roberts-Eagle-Pro and Eagle-Pro-Roberts contracts is admissible to show whether Roberts's alleged liability to Jenkins "arises out of Jenkins's work for or on behalf of Eagle-Pro, under Eagle-Pro's contract with Roberts."

ADDITIONAL INSURED

- Willbros RPI, Inc. v. Continental Cas. Co., No. H-07-2479, (S.D.Tex. 2008)
- “[R]esort to the [subcontract] is justified because the CNA Policy permits, and indeed requires, one to go beyond its four corners to determine whether a person or organization is an additional insured. Use of the “blanket” endorsement effectively incorporates any written agreement under which [the named insured] agreed to add a person or organization as an insured. In a sense the [subcontract] is part of the CNA Policy, and for the Court to consider it is well within reason and the contemplation of CNA as the policy's drafter.”

ADDITIONAL INSURED

- Swinerton Builders v. Zurich American Ins. Co., 2010 WL 4919073 (S.D. Tex.2010)
- " Technically, this contract is outside of the eight-corners rule. However, as the Southern District of Texas has noted, "[s]everal Texas appellate courts have recognized a limited exception to the [eight-corners] rule, to allow parties to introduce extrinsic evidence when the petition in the underlying lawsuit does not allege facts sufficient for a determination of whether those facts, even if true, are covered by the policy."

DATE OF LOSS

- Evanston Ins. Co. v. Kinsale, 7:17-cv-327(S.D. Tex. July 12, 2018)
- Texas courts have recognized “a very narrow exception” to the eight-corners rule that permits the “use of extrinsic evidence only when relevant to an independent and discrete coverage issue, not touching on the merits of the underlying third-party claim.” This exception applies “when it is initially impossible to discern whether coverage is potentially implicated and when the extrinsic evidence goes solely to a fundamental issue of coverage which does not overlap with the merits of or engage the truth or falsity of any facts alleged in the underlying case.”

DATE OF LOSS

- “Here, applying the eight-corners analysis, the ‘four corners’ of the Policies indicate that allegations of damage to tangible property that take place after inception would give rise to a duty to defend, but damage that occurred before inception would not. However, the ‘four corners’ of the VCC Crossclaim do not clearly provide dates when the alleged property damage occurred.”

DATE OF LOSS

- “If the Court were to accept Plaintiff’s argument, then artfully pled complaints that lack specific dates would be sufficient to bind insurance companies to defend claims that are clearly outside of the bounds of their policy. Such a rule would undermine the Court’s driving aim which is to give effect to the intention in the underlying insurance policy.”

DATE OF LOSS

- “[T]he Court also agrees with Defendant that this is a situation in which the extrinsic evidence exception applies. The alleged date of construction goes solely to a fundamental issue of coverage and does not implicate the merits or depend on the truth of the facts alleged. Plaintiff argues that the extrinsic evidence exception would not apply because the Court may not consider a complaint as evidence of the truth of an assertion since the facts asserted in pleadings do not constitute evidence. However, the Court is not referring to the PSJA Counterclaim as evidence of the truth of the dates of construction, but rather as evidence of what allegations were made in the PSJA Counterclaim regarding the dates of construction. Thus, the pleading itself is the evidence, and would fall within the extrinsic evidence exception.”

EXCLUSIONS

- International Service Ins. Co. v. Boll, 392 S.W.2d 158 (Tex. Civ. App.--Houston [1st Dist.] 1965, writ ref'd n.r.e.)
- Cook v. Ohio Cas. Ins. Co., 418 S.W.2d 712 (Tex. Civ. App.--Texarkana 1967, no writ)
- State Farm Fire & Cas. Co. v. Wade, 827 S.W.2d 448 (Tex. App.--Corpus Christi 1992, writ denied)

EXCLUSIONS

- Star-Tex Resources v. Granite State Ins. Co., 553 Fed.Appx. 366 (5th Cir. 2014) “we have suggested that extrinsic evidence is more likely to be considered when an “explicit policy coverage exclusion clause” is at issue.”

CLAIMS MADE POLICIES

- Constitution State Ins. Co. v. Michigan Mut. Ins. Co., No. 04-95-00197-CV, 1996 WL 383117 (Tex. App.—San Antonio, July 10, 1996)

RULE #1

- Rule #1-Extrinsic evidence will not be allowed to contradict specific allegations in the pleading. In both GuideOne as well as Pine Oak, there were specific pleadings that went to the coverage issue that was involved. In GuideOne it was the dates of employment of Evans. In Pine Oak, it was allegations that the home had been built by Pine Oak and not by subcontractors. In GuideOne the court noted that "the extrinsic evidence here concerning Evans' employment directly contradicts the plaintiff's allegations that the Church employed Evans during the relevant coverage period." In Pine Oak, the supreme court noted that "the extrinsic fact Pine Oak seeks to introduce in this coverage action contradicts the facts alleged in the Glass suit." Therefore, it is clear that extrinsic evidence will not be allowed to contradict specific pleadings to the contrary.

RULE #2

- Rule #2-Extrinsic evidence will be allowed only when relevant to independent and discrete coverage issue, not touching on the merits of the underlying third-party claim. In the GuideOne decision, the supreme court also referenced the rule announced in Northfield Ins. Co. v Loving Home Care, Inc. That decision referenced the rule set out above plus added another requirement: "when it initially impossible to discern whether coverage is potentially implicated." However, when the Texas Supreme Court was reiterating its GuideOne decision holding in the Pine Oak decision, it omitted this element. This distinction is important. The Supreme Court seems to say that extrinsic evidence may be allowed if it does not touch on the merits of the underlying case, even if the parties are able to discern whether coverage is implicated.

RULE #3

- Rule #3-Extrinsic evidence will be admitted to both create coverage as well as to defeat coverage. Pine Oak argued that a different rule should apply when a party was trying to use extrinsic evidence to create coverage than when extrinsic evidence was being used to defeat coverage. The court held that "[t]his distinction is not legally significant."

RULE #4

- Rule #4-Extrinsic evidence may be used if collusion can be shown. This exception was referenced in both GuideOne ("the record before us does not suggest collusion. . . ") and Pine Oak ("Our analysis in GuideOne Elite did not consider whether an exception to the eight-corners rule might exist where the parties to the underlying suit collude to make false allegations that would invoke the insurer's duty to defend, because the record did not indicate collusion.") It should be pointed out that collusion does not equate to false allegations in the petition. The plaintiff may try to plead the case in the coverage and allege facts that are known to be false. The insurer in this case still has a duty to defend even if the allegations are false or fraudulent. Collusion in the context of GuideOne and Pine Oak means an agreement between the plaintiff and the insured in the underlying case. The involvement of the insured is essential to trigger the collusion exception.

RULE #5

- Rule #5-The traditional burden of proof issues will apply. The insured initially has the burden of showing that the case falls within the coverage. The insurer will have the burden of showing the application of an exclusion or breach of a condition. What does this mean? In a case where there is no date alleged as to the bodily injury or property damage, the insured would have the burden of bringing forth evidence showing the date of the bodily injury. Similarly, if the injured plaintiff is an employee of the insured but there are no allegations in the petition, the insurer should have the burden of bringing forth extrinsic evidence showing the application of the employee exclusion. If the party with the burden of proof fails to bring forth the evidence where the pleading is silent, summary judgment will be appropriate against that party for failing to carry their burden.

RULE #6

- Rule #6-If the pleadings are silent, there will be no duty to defend until the insured brings forward evidence establishing that bodily injury occurred within the policy period. The insured cannot wait until the end of the case and then present the evidence to the insurer and argue that there was a duty to defend from the initial tender even though the extrinsic evidence had not been tendered. If the pleadings are silent, no duty to defend will commence until the extrinsic evidence has been proffered.
- Likewise, if there are no allegations regarding whether the injured plaintiff was an employee of the insured, the insurer would have an obligation to defend until it presented evidence regarding the plaintiff's employment status.

Rule #7

- Rule #7-What if the insurer and insured produce extrinsic evidence that is contradictory? It is not the policy where the rules of construction would apply. No Texas court has addressed this particular situation. However, consistent with the rules governing the duty to defend, if there is credible extrinsic evidence that would arguably create a duty to defend, the insurer must defend.

RULE #8

- Rule #8-Under Texas law, an insurer has no duty to attempt to search out extrinsic evidence that would potentially create a duty to defend. However, the issue arises as to what is the duty of the insurer if it discovers credible extrinsic evidence that would trigger a duty to defend, even if the burden of producing such evidence is not on the insurer. Under the duty to defend Texas law has imposed no such duty on the part of the insurer. However, consistent with the duty to defend if there is potentially a cause of action stated, the insurer would have a duty to defend if the evidence was credible.