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Beyond the Eight Corners: The Supreme Court of Texas Significantly Expands the Role of Extrinsic Evidence for Determining an Insurer's Duty to Defend

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Often as important as an insured's indemnity rights under an insurance policy, liability policies usually also require the insurer to fund the insured's defense when the lawsuit alleges claims that are potentially covered by the policy. Under Texas's "Eight-Corners Rule," a keystone tenet of Texas insurance law, courts determine the insurer's duty to defend by comparing the allegations in the underlying plaintiff's petition to the policy provisions, without regard to the truth or falsity of those allegations and without reference to facts otherwise known or ultimately proven. *See, e.g., GuideOne Elite Ins. Co. v. Fielder Rd. Baptist Church*, 197 S.W.3d 305, 308 (Tex. 2006). Courts generally may not consider extrinsic evidence or facts outside the pleadings. *Id*.

On February 11, 2022, however, the Texas Supreme Court recognized a major exception to the Eight-Corners Rule to allow consideration of extrinsic evidence to determine the duty to defend in certain circumstances.[1] In *Monroe v. BITCO*, Monroe Guaranty Insurance Company denied a defense because the underlying petition did not state the date of the property damage. Cause No. 21-0232, — S.W.3d —, 2022 WL —, at *— (Tex. Feb. 11, 2022). Therefore, Monroe argued, the facts alleged were not sufficient to establish that the damage occurred during the policy period, even though the parties stipulated to the date of the damage, and the stipulated date was within the policy period. *Id*. BITCO General Insurance Corporation, a co-insurer of the insured, argued that the Court should recognize an exception to the Eight-Corners Rule where the petition is silent on a key coverage fact, such as the date of the occurrence. *Id.*

The Court agreed but crafted strict constraints for the exception. *Id.* The Court held that Texas courts may consider extrinsic evidence, "if the underlying petition states a claim that could trigger the duty to defend, and the application of the eight-corners rule, due to a gap in the plaintiff's pleading, is not determinative of whether coverage exists, . . . provided the evidence (1) goes solely to an issue of coverage and does not overlap with the merits of liability, (2) does not contradict facts alleged in the pleading, and (3) conclusively establishes the coverage fact to be proved." *Id*. After adopting the exception, however, the *Monroe* Court found that the stipulated facts in the underlying lawsuit could not be considered for the duty to defend because those stipulated facts did not go solely to the coverage issue and instead overlapped with the merits of liability. *Id*.

While the Court did not allow the proffered extrinsic evidence in *Monroe*, the very same day the Court issued its opinion in *Pharr-San Juan-Alamo Independent School District v. Texas Political Subdivisions Property/Casualty Joint Self Insurance Fund*, applying the exception to allow extrinsic evidence to determine the insurer's duty to defend. Cause No. 20-0033, — S.W.3d —, 2022 WL —, at *— (Tex. Feb. 11, 2022). Specifically, the *Pharr* Court held that extrinsic evidence showing that the golf cart at issue was not street legal, as required to be covered by the auto policy, could be considered to defeat the duty to defend because that evidence was conclusive of the coverage issue and it went solely to coverage without overlapping with the merits of the underlying case. *Id*.

In summary, the *Monroe* exception is a major development that up-ends more than a half-century of Texas insurance jurisprudence. Expect both insurers and insureds to invoke the *Monroe* exception with frequency because, on its face, it may be used to both create or avoid the duty to defend.

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[1] The Texas Supreme Court previously adopted a narrower exception allowing courts to consider extrinsic evidence that the insured and a third-party suing the insured colluded to make false representations of fact to secure a defense and create coverage where it would not otherwise exist. *See Loya Insurance Company v. Avalos*, 610 S.W.3d 878, 879 (Tex. 2020). For many years before *Avalos*, the Court teased the possibility of an exception to the Eight-Corners Rule under certain circumstances but never formally recognized one. *See*, *e.g.*, *Pine Oak Builders, Inc. v. Great Am. Lloyds Ins. Co.*, 279 S.W.3d 650, 653-56 (Tex. 2009); *Zurich Am. Ins. Co. v. Nokia, Inc.*, 268 S.W.3d 487, 498 (Tex. 2008); *GuideOne Elite Ins. Co. v. Fielder Road Baptist Church*, 197 S.W.3d 305, 308-09 (Tex. 2006).