

OPEN SEASON!

**THE USE OF
EXTRINSIC EVIDENCE
IN THE POST
GUIDEONE ERA**

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I. THE DUTY TO DEFEND

A. Introduction

Liability policies contain two obligations: the duty to defend and the duty to indemnify. In many cases, the focus is on the duty of the insurance company to indemnify – often times during the claim handling stage, prior to the filing of litigation. However, once a lawsuit has been filed, the duty to defend comes into sharp focus, many times because the costs of defense can far exceed the value of the claim. The cost-benefit analysis of determining whether to defend (or settle) a claim is only part of the equation. Determining whether there is an *obligation* to defend under the terms of the policy is always the initial inquiry.

In this regard, the duty to defend is contractual.¹ The scope of the policy itself always determines the carrier's obligations. In Texas, courts follow the "eight corners," or "complaint allegation" rule in determining the duty to defend, meaning, that the terms of the policy are compared with the allegations made in the lawsuit filed. Over the years, a number of cases have discussed the circumstances under which extrinsic evidence (evidence outside of the four corners of the complaint) may be used and for what purpose it may be used. Recently, however, the Supreme Court of Texas shed light on this question in the now widely cited case of *Guideone Elite Ins. Co. v. Fielder Road Baptist Church*.²

In that case, while the Supreme Court did not *recognize* an exception to the

eight-corners rule in Texas, it did acknowledge the various state and federal appellate decisions that had, implicitly been paving the way for the circumstances (or lack thereof) under which the parties may consider extrinsic evidence in determining their respective rights and obligations. Since that decision, a number of other Supreme Court decisions have been issued, mostly involving the duty to defend, that are more remnant of decisions handed down in the late 1980's and early 1990's. In some ways, these decisions may seem like "open season" has been declared on the insurance industry, and the respite the industry has enjoyed in more recent years.

In reality, however, the *Guideone* opinion leaves open as many questions as it appears to have answered. Further, as we will discuss in the body of this article, the *Guideone* opinion cuts both ways; for insurers, the decision is a sword as well as a shield. This means that the options are limited for both carriers and policy holders. Nevertheless, options do exist, and in the right case, *Guideone* can be as much a friend as a foe. So, we may assume, it's open season for everyone!

B. The Complaint Allegation Rule

Historically, in determining the duty to defend, Texas courts follow the "complaint allegation," or "eight-corners" rule. Under the complaint allegation rule, the duty to defend is determined by examining two documents and two documents only: (1) the "four corners" of the insurance policy and (2) the "four corners" of the complaint or pleadings filed against the insured.³

¹*Houston Petroleum v. Highlands Ins.*, 830 S.W.2d 153, 155 (Tex. App.--Houston [1st Dist.] 1990, writ denied); *Whalley v. City of Dallas*, 758 S.W.2d 301, 304 (Tex. App.--Dallas 1988, writ denied).

² 197 S.W.3d 305 (Tex. 2006).

³ *Fidelity & Guar. Ins. Underwriters, Inc. v. McManus*, 633 S.W.2d 787 (Tex. 1982); *Taylor v. Travelers Ins. Co.*, 40 F.3d 79, 81 (5th Cir. 1994)(under Texas law, an insurer's duty to defend is determined by examining the allegations in the petition filed against the insured and the relevant insurance policy).

Under the complaint allegation rule, the carrier must compare these documents in order to determine whether any of the claims asserted against the insured come within the coverage afforded by the policy.”⁴ If the pleadings filed against the insured contain one or more allegations, which if taken as true, set forth a claim that comes within the coverage of the policy, the carrier is obligated to defend.⁵ The carrier may not consider the truth or falsity of the claims made. And, the carrier must defend, if at all, all claims made, regardless of whether the claims are false, fraudulent or groundless. However, in determining the duty to defend, the carrier need not imagine factual scenarios that implicate coverage, or possibilities of coverage that do not exist. If the pleadings fail to state a claim clearly within the boundaries of coverage, no duty to defend exists.

As a general principle, carriers may not use extrinsic evidence in order to determine their contractual obligations. As indicated, however, much consideration has been given to this rule, and certain noteworthy exceptions have been judicially created. In 2007, the Texas Supreme Court *acknowledged* (and clarified) these exception, at least in principle, paving the way for a possible high court declaration of the circumstances under which extrinsic evidence may be used to determine the duty to defend.

⁴*American Alliance Insurance Co. v. Frito Lay*, 788 S.W.2d 152, 153 (Tex. App.--Dallas 1990, writ dismissed); *Texas Medical Liability Trust v. Zurich Ins. Co.*, 945 S.W.2d 839 (Tex. App.--Austin 1997, no writ) (eight-corners rule applies to determine whether a party is an additional insured for the purposes of an insurer’s duty to defend).

⁵*Argonaut Southwest*, 500 S.W.2d 633, 635 (Tex. 1973); *Heyden Newport Chem Ins. Co. v. Southern Gen. Ins. Co.*, 387 S.W.2d 22, 26 (Tex. 1965).

II. USE OF EXTRINSIC EVIDENCE

As indicated above, under the “complaint allegation” rule, a determination of the duty to defend is made solely by looking to the facts alleged on the petition and to the policy.⁶ Where the facts alleged in the complaint are sufficient to establish coverage, or lack thereof, no extrinsic evidence will be admitted.⁷ Generally, Texas holds that in ascertaining the duty to defend, “it is inappropriate to consider “facts ascertained before the suit, developed in the process of the litigation, or by the ultimate outcome of the suit.”⁸ Recently, however, the Texas Supreme acknowledged the circumstances under which an exception *might* be created for the use of extrinsic evidence.⁹ As acknowledged by the *Guideone* Court, extrinsic evidence may only be considered (1) when the petition alleges facts that are insufficient to determine the duty to defend *and* (2) where the extrinsic evidence sought to be used touches on only coverage issues and not the liability of the insured. This means that the pleadings must be silent on the relevant issue *and* the issue must involve a discreet coverage question that does not impact the merits of the underlying case. In order to fully appreciate the Court’s ruling, an analysis of the history and evolution of the use of extrinsic evidence in duty to defend cases is helpful.

⁶*American Physicians Ins. Exch. v. Garcia*, 876 S.W.2d 842 (Tex. 1994); *Heyden Newport Chem. Ins. Co. v. Southern Gen. Ins. Co.*, 387 S.W.2d 22 (Tex. 1965).

⁷*Id.*

⁸*Canutillo Independent School District v. National Union Fire Insurance Co.*, 99 F.3d 695 (5th Cir.1996).

⁹ *Guideone Elite Ins. Co. v. Fielder Road Baptist Church*, 197 S.W.3d 305 (Tex. 2006).

A. Historical Overview

Prior to the issuance of the *Guideone* opinion, one commentator quantified the three known judicial exceptions to the “eight corners” rule, permitting consideration of extrinsic evidence under the following circumstances.¹⁰ (1) where facts that are not reflected in the complaint and which are unrelated to the merits and allegations in the underlying complaint take the case outside of coverage (such as the issue of whether the activity in question involved a business pursuit, whether the automobile involved in an accident was a covered vehicle, and the determination of whether the party sued is an insured); (2) where a false allegation is made in the underlying complaint solely for the purpose of bringing the case within coverage and not for the purpose of actually stating a claim; and (3) where the use extrinsic evidence establishes that the damages sought by the claimant are not covered by the policy.¹¹

One early decision in which extrinsic evidence was considered was *Trinity Universal Ins. Co. v. Bethancourt*.¹² There, the court held that where there is a “conflict between the facts as alleged in the petition and the actual facts as they are also known or ascertainable by the insurer,” extrinsic evidence may be considered in determining the duty to defend. In *Trinity*, the suit alleged the insured committed an intentional act; the insured gave a statement to the insurer that he, in fact, did no such thing. The court allowed consideration of extrinsic facts and permitted the consideration of facts dealing with the truth and validity of the claims against the insured.

¹⁰A. Windt, *INSURANCE CLAIMS & DISPUTES*, § 4.04, pp. 174-181 (3d Ed. 1995).

¹¹*Id.*

¹²331 S.W.2d 943, 945-46 (Tex. Civ. App.--Amarillo 1959, no writ).

Subsequently in *Travelers Ins. Co. v. Newsom*,¹³ the same court that decided *Trinity*, held that decision was in error and refused to follow it, noting that the decision was “against the great weight of authority...in Texas and in other jurisdictions.”¹⁴ The court noted that prior Texas cases refused to allow consideration of such evidence or require that the insurer “ascertain” the true facts before denying a defense.¹⁵ The court emphasized that there was no language in the contract sufficient to support consideration of anything but the allegations.¹⁶ The court held that if extrinsic facts could not be shown as a basis for denial of the duty to defend, then there was no logical reason they could be used to establish a duty to defend.¹⁷

The Texas Supreme Court, however, left no room for the use of extrinsic evidence in *Heyden Newport Chem. Co. v. Southern Gen. Ins. Co.*¹⁸ The *Heyden* court cited *Newsom* with approval, noting the court was correct in its strict interpretation of *Maryland Casualty Co. v. Moritz*;¹⁹ *Heyden*.²⁰ Newport sought coverage as an additional insured under Pickering’s policy because it had been previously sued as though it were legally responsible for Pickering’s acts. Newport admitted that, in

¹³352 S.W.2d 888, 890-94 (Tex. Civ. App.--Amarillo 1961, writ ref’d n.r.e.).

¹⁴*Id.* at 894.

¹⁵*Id.* at 890-91.

¹⁶*Id.* at 893.

¹⁷*Id.* at 894.

¹⁸387 S.W.2d 22, 24-25 (Tex. 1965).

¹⁹138 S.W.2d 1095 (Tex. Civ. App.--Austin 1940, writ ref’d).

²⁰387 S.W.2d at 25.

actuality, Pickering was not an agent. This was the extrinsic evidence in question that the *Heyden* court refused to consider. *Heyden* represents the strictest possible view of the complaint allegation rule, but one that still may be applicable even post-*Guideone*.

B. Pre-*Guideone* Cases Allowing the Use of Extrinsic Evidence

One of the most widely cited pre-*Guideone* cases is the case of *International Services, Inc. v. Boll*,²¹ There, Roy Hamilton Boll, the only son of Bastian Boll was in an automobile collision with Plunk while driving his father's car. Boll filed suit to recover for property damage done to his car. Plunk filed a cross action, and then another suit. Plunk alleged that he was in a collision with a car "owned by Bastian Boll and being driven by his son." However, Plunk failed to name the son. Boll's policy excluded Roy Hamilton Boll from coverage. It was undisputed that Roy was Boll's only son. In considering International's duty to defend, the court recognized the "complaint allegation" rule, but that where the complainant is not sufficiently specific in his or her allegations to determine whether the party sued is, in fact, a named or designated insured, extrinsic evidence may be used to determine the status of the insured.

This rationale in *Boll* was followed in *Cook v. Ohio Cas. Ins. Co.*,²² in which Wigley sued Cook, who sought a defense from his auto insurer, Ohio. Ohio denied the defense; Cook lost the lawsuit; and Cook sued Ohio to recover for the damages and legal fees. The policy excluded damages incurred by Mrs. Cook in driving her mother's car, and these facts were stipulated.

²¹392 S.W.2d 158 (Tex. Civ. App.--Houston 1965, writ ref'd n.r.e.).

²²418 S.W.2d 712, 716 (Tex.Civ.App.--Texarkana 1967, no writ).

However, the pleadings did not reveal this information. Thus, the claim as pled was potentially within coverage. Extrinsic evidence in the form of affidavits was presented, showing that the actions of the insureds were excluded because they were driving the automobile of a resident of the same household.²³ The court held that consideration of the affidavits was proper.²⁴ The court relied upon *Boll* and suggested that the Texas Supreme Court would "draw a distinction between cases in which the merit of the claim is in issue and those where the coverage of the insurance policy is in question."²⁵ In the first instance, held the court "the allegation of the petition controls," and in the second "the known or ascertainable facts are to be allowed to prevail."²⁶ Other courts soon followed the *Cook* court rationale.²⁷

In *State Farm Fire & Cas. Co. v. Wade*,²⁸ the court relied upon the *Cook* and *Boll* decisions. In *Wade*, Williamson and Holland set off from Port O'Connor, Texas, in Williamson's boat, and were found drowned in the Gulf of Mexico, five days later. Holland's Estate sued Williamson's Estate for wrongful death. State Farm tendered a defense under a reservation of

²³*Id.* at 714.

²⁴*Id.* at 715.

²⁵ *Id.*

²⁶ *Id.*

²⁷*See Rowell v. Hodges*, 434 F.2d 926, 929-30 (5th Cir. 1970) (following *Cook* and related cases where issue was whether vehicle in accident was an insured vehicle); *Hartford Fire Ins. Co. v. Rainbow Drilling Co.*, 748 S.W.2d 262, 267 (Tex. App.--Houston [14th Dist.] 1988, no writ) (underlying petition and absence of extrinsic evidence of possession required finding that insurance was not available).

²⁸827 S.W.2d 448 (Tex. App.--Corpus Christi 1992, writ denied).

rights, and filed a declaratory judgment action. The problem noted by the court was that it was impossible to know how the boat named in the policy was used when it left Port O'Connor and such fact was critical to its determination.

The court noted that 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, the evidence adduced at the trial in a declaratory judgment action may be considered along with the allegations in the underlying petition. The court noted the "complaint allegation" rule of *Heyden* but emphasized that in the instant case, without addressing the truth or falsity of the allegations in the underlying petition in the wrongful death action, and construing the alleged facts broadly, it was impossible to determine whether or not the policy was, in fact, triggered because it was impossible to know how the boat was used. The court noted that as under *Cook* and *Boll*, how the boat was used was critical to a determination of coverage under the policy. Again, it is important to an overall understanding of the status of the insured exception to note that the boat was named or designated in the policy.

Later, an unpublished case applied the principles of *Wade* and upheld the trial court's consideration of extrinsic evidence in the form of an affidavit in affirming a summary judgment order finding a lack of a duty to defend.²⁹ Constitution, which was a claims-made errors and omissions carrier, sued Michigan, a carrier which provided general liability coverage, relating to a suit by Vickers (underlying plaintiff) against the adjusting firm of Abercrombie, Simmons

²⁹*Constitution State Ins. Co. v. Michigan Mut. Ins. Co.*, No. 04-95-00197-CV, 1996 WL 383117 (Tex. App.--San Antonio, July 10, 1996).

and Clarke, Inc.³⁰ Constitution's claims-made policy period was from October 20, 1988 to October 20, 1989 with a retroactive date of October 20, 1983.³¹ Michigan provided general liability coverage from May 23, 1988 to May 23, 1989.³² Vickers' petition alleged an injury on September 19, 1985, from which stemmed further injury due to denial of necessary medical treatment by the defendants, including Abercrombie, however, no final date of injury was pled.³³

The court cited to *Wade* for the following proposition:

If the petition does not allege facts sufficient to determine coverage, extrinsic evidence can be examined.³⁴

The court considered extrinsic evidence in the form of an affidavit by Mr. Abercrombie which provided a chronology of events regarding his firm's handling of Vickers' case.³⁵ The affidavit stated that his firm's last actions on the Vickers' claim were on or before April 28, 1988. In affirming the trial court's grant of summary judgment in favor of Michigan, the court stated the following:

Constitution's policy was purchased specifically to cover

³⁰*Id.* at *1.

³¹*Id.* at *3.

³²*Id.*

³³*Id.*

³⁴*Id.* at *2 citing *Western Heritage Ins. Co. v. River Entertainment*, 998 F.2d 311, 313 (5th Cir. 1993); *Wade*, 827 S.W.2d at 452-53 (Tex. App.--Corpus Christi 1992, writ denied); *Gonzales v. American States Ins. Co.*, 628 S.W.2d 184, 187 (Tex. App.--Corpus Christi 1992, no writ).

³⁵*Constitution*, 1996 WL 383117 at *3.

losses from mishandling of claims and definitely encompasses the time period of Vickers' claim. Michigan Mutual's policy excluded "work or other operations" covered through other insurance and the affidavit confirmed that the injuries claimed in the Vickers' petition did not fall within Michigan Mutual's policy period. Therefore, we find that Michigan Mutual established that it did not have a duty to defend Abercrombie because the occurrence was not within the policy period and coverage was secondary.³⁶

Clearly, the court considered the trial court's review of extrinsic evidence proper in determining Michigan's duty to defend and whether or not the event occurred within Michigan's policy period.

Also, *Blue Ridge Ins. Co. v. Hanover Ins. Co.*³⁷ illustrates this point. The court relied upon *Gonzales v. American States Ins. Co.*, 628 S.W.2d 184, 186-87 (Tex. App.--Corpus Christi 1982 (no writ) (which relied upon *Cook*), and dealt with an omnibus insured. Parker was injured when a car driven by Scottie Beech, a minor, struck hers. Scottie was driving a car owned by Southern Iconics, Inc. (who was the employer of his father, Jimmy Beech). Parker sued Jimmy, Scottie and Southern Iconics, and alleged in her petition that Scottie had permission to drive the car. Southern Iconics and its employees were insured by Hanover. Jimmy was also insured personally by Blue Ridge. Hanover declined to defend the action, asserting that Scottie's accident was not covered under the

policy. Blue Ridge assumed the defense and then brought suit for reimbursement from Hanover through subrogation. Hanover maintained that it had no duty to defend, and submitted affidavits proving without dispute that although Jimmy had permission to use the car, he was prohibited from allowing anyone else to use the car. As such, Scottie was not an insured, and thus, as coverage was also precluded for Southern Iconics and Jimmy, there was no coverage for the accident. Blue Ridge argued that, regardless of the true facts of the case, the allegation that Scottie had permission to drive the car was sufficient to invoke coverage under the Hanover policy.

The district court held that the status of an 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. The court based its decision upon the reasoning in *Gonzales v. American States Ins. Co.*³⁸ which was also relied upon in *McLaren*.³⁹ In *Gonzales*, the coverage issue revolved around whether a piece of equipment was owned by the insured, as plaintiffs had alleged. The *Gonzales* court held that evidence of ownership of the equipment was directly relevant to the issue of liability and not coverage, and would therefore be inadmissible. The *Blue Ridge* court expanded the exception by applying it to an omnibus insured. Certainly this case would not withstand *Guideone* scrutiny today.

Neither would the case of *McLaren v. Imperial Cas. & Indem. Co.*,⁴⁰ In that

³⁶*Id.* (emphasis added).

³⁷748 F. Supp. 470, 473 (N.D. Tex. 1990).

³⁸628 S.W.2d 184 (Tex. App.--Corpus Christi 1982, no writ).

³⁹*supra*.

⁴⁰767 F. Supp. 1364 (N.D. Tex. 1991), *aff'd* 968 F.2d 17 (5th Cir. 1992), *cert. denied*, 507 U.S. 915, 113 S.Ct. 1269, 122 L.Ed.2d 665 (1993).

case, McLaren was sexually assaulted by a policeman, Taylor, after she was pulled over and given a sobriety test. Taylor was convicted of sexual assault. McLaren then sued Taylor, among other defendants. Taylor sought a defense from Imperial, the Bedford Police Department's insurer. Imperial denied the defense. Taylor took a default judgment, and settled with McLaren, assigning her all of his rights against Imperial. McLaren then sued Imperial.

The court held that the mere allegation that Taylor was in the course and scope of his duties as an officer was insufficient to invoke coverage, because conclusory allegations do not invoke a duty to defend when the true facts demonstrate that McLaren's claims actually arose from a personal venture on Taylor's part. The court determined that the true facts can be used to establish the non-existence of a defense obligation. The court quoted *Gonzales v. American States Ins. Co.*,⁴¹ which provided the following:

Where the insurance company refuses to defend its insured on the ground that the insured is not *liable* to the claimant, the allegations in the claimant's petition control, and facts extrinsic to those alleged in the petition *may not be used* to controvert those allegations. But, where 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.

⁴¹628 S.W.2d 184 (Tex. App.--Corpus Christi 1982, no writ).

(Emphasis in original).⁴² The court continued:

The [complaint allegation] rule simply does not apply when the issue to be decided is whether there is coverage, as distinguished from whether there is liability on the part of the insured... "An insurance company under a provision requiring it to defend an action, even if it is groundless, false, or fraudulent, is under no duty to defend a claim which is outside the coverage of the policy."⁴³

In *Ohio Cas. Ins. Co. v. Cooper Machinery Corp.*,⁴⁴ James was injured while in the course of employment by a defective steam roller which was sold by Cooper and manufactured by Mauldin. Cooper sought a defense from Ohio in the resulting suit. Ohio denied the defense, and Cooper brought a declaratory judgment action seeking a defense under the policy. The court held that the policy contained an exclusion which precluded coverage as alleged in the petition. The court further held that the plaintiff's failure to plead the facts accurately did not provide a duty to defend under the policy where true facts of the case indicate no duty:

Cooper and James are mistaken in thinking that the claimant can, in effect, create coverage by a false allegation.... While an insurance company cannot avoid the policy defense obligation on the ground that extrinsic facts establish that its

⁴²*McLaren*, 767 F. Supp. at 1374 citing *Gonzales*, 628 S.W.2d at 187.

⁴³*Id.* citing *Hagen Supply Corp. v. Iowa Nat'l Mut. Ins. Co.*, 331 F.2d 199 (8th Cir. 1964).

⁴⁴817 F. Supp. 45 (N.D. Tex. 1993).

insured is not liable to the claimant, it can avoid the defense obligation if the extrinsic facts show that the alleged facts pertaining to coverage are false and that under the true facts there is no coverage under the policy. In the instant action, the complaint on its face shows that the causes of action asserted in the state court action are outside the coverage of the policy. However, even if there were allegations of facts that would indicate the existence of coverage, the insurance company would be entitled in the declaratory judgment action to establish that the facts are false and that, therefore, there is no obligation under the policy.⁴⁵

Western Heritage Ins. Co. v. River Entertainment, also illustrates pre-*Guideone* use of extrinsic evidence to defeat a duty to defend.⁴⁶ In this case, Robert Hill became intoxicated at River Entertainment's Pepe's establishment, and then drove his car, hitting the Rodriguezes' car and killing their minor daughter. The Rodriguezes filed suit, *inter alia*, against River Entertainment, who sought a defense from its insurer, Western Heritage. Western Heritage denied a duty to defend, and River Entertainment brought a declaratory judgment action. River Entertainment then appealed the district court's finding that there was no duty to defend.

⁴⁵*Id.* at 48 citing *McLaren v. Imperial Cas. & Indem. Co.*, 767 F. Supp. 1364, 1372-1375 (N.D. Tex. 1991), *aff'd*, 968 F.2d 17 (5th Cir. 1992), *cert. denied*, 507 U.S. 915, 113 S.Ct. 1269, 122 L.Ed.2d 665 (1993), and *Blue Ridge Ins. Co. v. Hanover Ins. Co.*, 748 F. Supp. 470, 473 (N.D. Tex. 1990).

⁴⁶998 F.2d 311 (5th Cir. 1993).

The Fifth Circuit noted *Heyden* and that ordinarily the duty to defend is determined by the "complaint allegation" rule, however, when the petition does not allege sufficient facts to enable the court to determine if coverage exists, it is proper to look to extrinsic evidence in order to adequately address the issue. In *Western Heritage*, the Rodriguezes' complaint omitted any reference to liquor or intoxication. Thus, although coverage for the event was certainly excluded by the liquor liability exclusion, no such facts were asserted. Relying upon *Wade*, the court held that because it was impossible to discern from the Rodriguezes' complaint why Hill was so impaired such that Pepe's employees had a duty to restrain him and because that fact was critical to the determination of the duty to defend, extrinsic evidence was admissible to determine the reason for the impairment.

The issue in *Western Heritage* was whether the petition alleged a covered liability and the court held that finding coverage under the petition, where the plaintiffs' omitted all references to alcohol and intoxication, ostensibly to plead the case into coverage, when it was obviously not within coverage, would be manifestly unjust to the insurer. This case may represent a case that would not withstand Supreme Court scrutiny today. Although the petition in *Western Heritage* was silent as to whether Rodriguez was intoxicated, and thus, there were not extrinsic facts *contradicting* the pleadings, the recent decision in *Pine Oaks Builders v. Great American Lloyds Ins. Co.*⁴⁷ appears to suggest that silence as to the applicability of a policy exclusion does not give rise to the right to look outside of the pleadings. Again, the material inquiry will

⁴⁷ 2009 Tex. LEXIS 30, 52 Tex. Sup. J. 348 (Tex. 2009).

now be whether the allegation touches upon the merits of the underlying litigation or not.

In *Essex Ins. Co. v. Redtail Products, Inc.*,⁴⁸ Redtail sold motor oils for use in engines. It was the business practice of Redtail to use the marks of certain engine manufacturers on its product's label to show consumers that its oil can be used with various engines. On September 27, 1996 OMC complained to Redtail that its business practice violated OMC's trademark rights. Redtail contacted its insurance agent to see if its existing insurance policy covered advertising injuries. Redtail was informed that it was not currently covered for this type of injury. Redtail instructed its insurance agent to obtain a policy which would provide coverage. On October 14, 1996, Essex issued a policy which provided coverage for advertising injuries. On June 2, 1997, OMC sued Redtail. Redtail, in turn, demanded that Essex provide it with a defense and indemnity in the OMC lawsuit.⁴⁹

Essex filed a declaratory action seeking a ruling that OMC's claim was excluded from coverage based upon Redtail's knowledge of the pending suit. The court began its analysis under the premise that while Texas follows the "complaint allegation rule," there are circumstances when extrinsic evidence may be consulted. Specifically, when the complaint in the underlying lawsuit does not allege facts, if taken as true, sufficient to determine the existence of a duty to defend. The court found that the "complaint allegation rule" did not apply because OMC's complaint did not allege facts

allowing a determination of coverage under the Essex policy.⁵⁰

The Essex policy excluded coverage for any advertising injury which was committed prior to the beginning of the policy period. Therefore, in order for OMC to have stated a cause of action covered by the Essex policy, OMC must have alleged facts showing the alleged trademark violations occurred after the beginning of the policy period. The court found that OMC did not allege facts sufficient to enable the court to determine whether the alleged trademark violations occurred before or after the policy period.⁵¹ As a result, Essex was allowed to introduce the September 27, 1996 letter which conclusively established that the alleged violation occurred prior to the policy period. Consequently, the court found that Essex did not owe Redtail a duty to defend or indemnify Redtail in the OMC lawsuit.⁵² This is a case that would likely be decided the same way under the new *Guideone* rules.

C. Pre-*Guideone* Cases Rejecting The Use Of Extrinsic Evidence

One early Texas case rejecting the use of extrinsic evidence was *Gonzales v. American States Ins. Co.*⁵³ In *Gonzales*, Perez (a minor) brought suit against multiple defendants, including Gonzales after he sustained injuries when his leg was caught in an ice auger. Gonzales had welded into place the guard or grate which was placed over the auger. Gonzales sought a defense from American States, who declined defense based upon an exclusion in the policy and

⁴⁸ 1998 WL 812394 (N.D. Tex. Nov. 12, 1998).

⁴⁹ *Id.* at *1.

⁵⁰ *Id.* at *2.

⁵¹ *Id.* at *2-3.

⁵² *Id.* at 4.

⁵³ 628 S.W.2d 184, 186-87 (Tex. App.--Corpus Christi 1982, no writ).

which then filed a declaratory judgment action. The defendants were sued for manufacturing installing, supplying, and *owning* the product which injured Perez. The court held that the issue of “ownership” was material in the underlying suit and had to be assumed to be true; thus, the court would not consider extrinsic facts showing that the insured did *not own* the product in determining if there was a duty to defend.⁵⁴ The court explained:

Where the insurance company refuses to defend its insured on the ground that the insured is not liable to the claimant, the allegations in the claimant’s petition control, and facts extrinsic to those alleged in the petition may not be used to controvert those allegations. But, where 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 claimants’ petition *may be used* to determine whether a duty to defend exists.⁵⁵

A similar result was reached by the court in *Gulf Chemical & Metallurgical v. Associated Metals & Minerals Corp.*,⁵⁶ Associated Metals (ASOMA) manufactured certain chemicals through their chemical division. In 1985, ASOMA renamed the chemical division “Gulf” and sold it to Cheminter. From 1986 to 1988, Gulf in this capacity manufactured and sold a chemical compound to Lone Star. Employees of Lone Star initiated a suit against numerous manufacturers, including Gulf, alleging toxic exposure to various chemicals from

1946 to 1990. Gulf sought indemnity from ASOMA and four of its insurers, including ISLIC. ISLIC insured Gulf for a period which terminated before Gulf began shipping the chemicals.

In determining the duty to defend, the lower court found that, in light of the policy period, ISLIC had no duty to contribute to Gulf’s defense. However, the Fifth Circuit disagreed, citing *American Alliance Ins. Co. v. Frito-Lay, Inc.*,⁵⁷ as controverting authority. The court found that the Texas rule of law was set forth by *American Alliance*, and stated:

In Texas, the duty to defend and duty to indemnify are distinct and separate causes of action. Texas courts follow the “Eight Corners” or “Complaint Allegation” rule when determining the duty to defend. This rule *requires* the trier of fact to examine *only* the allegations in the [underlying] complaint and the insurance policy in determining whether a duty to defend exists. *The duty to defend is not affected by facts ascertained before suit, developed in the process of litigation, or by the ultimate outcome of the suit.*⁵⁸

The Fifth Circuit noted that the plaintiff-employees alleged that they were exposed to chemicals from 1946 to 1990, but had not delineated the dates of exposure to each company’s chemicals. Thus, the court found that the later-discovered fact that Gulf did not ship any chemicals to Lone Star until January 20, 1986, was irrelevant under *American Alliance*, or the “eight

⁵⁴*Id.* at 187.

⁵⁵*Id.* (Emphasis added).

⁵⁶1 F.3d 365 (5th Cir. 1993).

⁵⁷788 S.W.2d 152 (Tex. App.--Dallas, 1990, writ dismissed).

⁵⁸*Id.* at 153-4 (emphasis in original).

corners” rule. Further, according to the court, the exception to the eight corners rule as set forth in *State Farm Fire & Cas. Co. v. Wade*⁵⁹ and *Gonzales v. American States Ins. Co. of Texas*⁶⁰ was inapplicable to the case at hand. The court held that the cases only teach that a court may look outside a complaint to determine *coverage*. But, in the case at hand, the district court had looked outside the complaint to determine liability, which is prohibited even by the cases citing the exception.

The Fifth Circuit in *Gulf Chemical* found that the *Wade* exception to the eight corners rule was only applicable to determine coverage and the Fifth Circuit reversed because the district court had used the exception to determine liability. Rather, the duty to defend was at issue, and thus, the question of whether the plaintiffs had alleged facts which were covered by the policy. According to the court, the actual dates of Gulf’s distribution of chemicals was irrelevant to coverage as the insurer must defend all suits, regardless of whether the allegations stated were false or groundless.

Similarly, in *LaFarge Corp. v. Hartford Cas. Ins. Co.*,⁶¹ the Fifth Circuit disallowed the consideration of extrinsic evidence concerning the date of the alleged “occurrence” allegedly triggering coverage under the policy. LaFarge’s subsidiary, Anchor Wate, was a joint venturer in LAC. LAC was subcontracted by general contractor American West, to construct a pipeline from California to Texas for All American. The pipeline was substandard, and All American sued, among others, LAC

and Anchor Wate. Nineteen months later, All American added LaFarge as a defendant. LaFarge sought a defense from its insurer, Hartford. Hartford denied coverage, but later agreed to reimburse defense costs incurred from the date of notice of LaFarge’s addition to the suit. Both LaFarge and Hartford filed declaratory judgment actions. The district court ultimately found Hartford had a duty to defend, prorated due to the fact that other insurance also covered the duration of the incident.

Hartford argued that under the *Western Heritage*, *McLaren*, *Wade*, *Boll* and *Gonzales*, cases, extrinsic evidence was admissible since the complaint was ambiguous as to when the damage actually took place. The Fifth Circuit disagreed, however, and distinguished the cases as “inapposite [as] they involve situations in which the complaint either omitted or indisputably misrepresented material facts that would have clearly excluded coverage.”⁶²

Further, the court refused to accept Hartford’s characterization of the complaint as ambiguous. The complaint alleged only the date that the damage was *discovered*, February, 1988, but not the dates that the damage occurred. Hartford’s policy period covered April 1, 1987 to April 1, 1988. The court held that it was not simply the replacement of the pipe, but rather the ongoing corrosion of the pipe, necessitating the replacement of the pipe, which invoked coverage. Thus, the court reasoned, the allegation that the damage was discovered in February, 1988 was sufficient grounds to infer that some part of the damage had occurred during the policy period. The court concluded that “clearly, this is not a case in

⁵⁹827 S.W.2d 448 (Tex. App.--Corpus Christi 1992, writ denied).

⁶⁰628 S.W.2d 184 (Tex. App.--Corpus Christi 1982, no writ).

⁶¹61 F.3d 389 (5th Cir. 1995).

⁶²*LaFarge*, at n.8.

which it is impossible to discern whether coverage is potentially implicated.”⁶³

The Fifth Circuit characterized the instances in which extrinsic evidence is admissible as situations in which relevant information was omitted or indisputably mischaracterized. It is interesting to note that in *LaFarge*, the court itself recognized the need for its inference that damage must have occurred during the policy period, as the discovery was made during the policy period. Nevertheless, the Fifth Circuit disallowed extrinsic evidence, instead basing its opinion upon the date of the occurrence inferred from the petition.

In *Hill and Wilkinson, Inc. v. American Motorist Ins. Co.*,⁶⁴ Hill and Wilkinson (“H&W”) sought coverage as an “additional insured” of a liability policy issued to Potter by AMICO. Potter was a subcontractor employed by H&W at a construction site in Grand Prairie, Texas. Burns, an employee of Potter’s, was killed at the Grand Prairie construction site while acting in the course and scope of his employment. Burns’ heirs brought a wrongful death action alleging 19 counts of negligence against Potter and 26 counts of negligence against H&W.⁶⁵

H&W alleged that AMICO owed it a duty to defend in the underlying lawsuit. At the outset, the court noted that if H&W is found to be an additional insured, AMICO owes it a duty to defend it in the underlying lawsuit; if H&W is not an additional insured, then AMICO has no duty to defend H&W. The court stated,

[T]he determinative issue for additional insured coverage, however, is whether the allegations in the underlying lawsuit involve claims of negligence against the named insured, to-wit Potter.⁶⁶

The court found that it was “unassailable” that the underlying action involved claims of negligence against Potter.

AMICO contended that it did not owe H&W a duty to defend it, because the additional insured endorsement cannot provide broader coverage than the protection contemplated by the H&W/Potter contract. AMICO alleged that the indemnity language in the H&W/Potter contract was invalid “for purposes of providing protection for H&W’s own direct acts of negligence.” As a result, AMICO argued that the additional insured endorsement did not provide it with a duty to defend H&W.⁶⁷

The court found that AMICO “seriously” misapprehended how the duty to defend is determined and when extrinsic evidence may be consulted in making that determination. The court stated that reference to evidence outside the pleadings is justified in few instances and noted two examples, (1) when the petition does not enable the court to determine if coverage exists, (2) when the insured contends that the events giving rise to the suit are outside coverage. However, even in those instances, whether it is proper to consult extrinsic evidence is within a court’s sole discretion.⁶⁸

In *AMICO*, the court found that resorting to extrinsic evidence was not

⁶³*Id.* at 394.

⁶⁴ 1999 WL 151668 (N.D. Tex. March 15, 1999).

⁶⁵ *Id.* at *1.

⁶⁶ *Id.* at *4.

⁶⁷ *Id.*

⁶⁸ *Id.* at *5.

justified because AMICO's claim was not based upon a scope of coverage issue. The court found that AMICO allowed Potter to extend coverage with any person or organization pursuant to a contract with the only limitation being that coverage arises out of Potter's work. The petition in the underlying lawsuit sufficiently alleged that Burns' death arose out of Potter's work, and pled numerous claims of negligence against H&W. Therefore, the court held that AMICO's contention was without merit.⁶⁹

In *Tri-Coastal Contractors, Inc. v. Hartford Underwriters Ins. Co.*,⁷⁰ Hartford provided Tri-Coastal with two types of coverage. Part One of the policy provided workers' compensation insurance and Part Two provided liability insurance.⁷¹ Tri-Coastal was sued by Antwine for an on-the-job injury. Antwine's petition alleged he was injured in the course and scope of his employment. Antwine alleged that his injuries were the result of Tri-Coastal's negligent training, assigning and supervision of its employees. Notably, Antwine made no reference of worker's compensation benefits in his petition. Hartford defended Tri-Coastal under a reservation of rights. After the suit was settled, Hartford filed suit for declaratory relief claiming it did not owe Tri-Coastal further coverage under its policy. Hartford then moved for summary judgment claiming it had no duty to defend Tri-Coastal under Part Two of the policy because Hartford had paid Antwine workers' compensation benefits under Part One. In support of its claim, Hartford attached evidence to its summary judgment establishing that it had paid Antwine workers' compensation benefits. The trial

court granted Hartford summary judgment and Tri-Coastal appealed.⁷²

Tri-Coastal argued that the trial court erred in considering any information outside the petition and the policy in determining Hartford's duty to defend. Hartford argued, pursuant to *State Farm Fire & Cas. Co. v. Wade*, that extrinsic evidence may be introduced to show that no duty to defend exists when the underlying petition fails to address the applicability of a policy exclusion. Specifically,

[W]hen 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, the evidence adduced at the trial in a declaratory judgment action may be considered along with the allegations in the underlying petition.⁷³

The Houston Court of Appeals held that the holding in *Wade* had not been followed by any other Texas appellate courts, and regardless, was inapplicable in this case. The court of appeals held that

[T]he issue of whether Antwine collected workers' compensation benefits goes to the merits of his lawsuit because he may not sue Tri-Coastal for negligence if he collected workers' compensation benefits for the same injury...Antwine's acceptance of workers' compensation benefits barred him from collecting from Tri-Coastal for

⁶⁹ *Id.*

⁷⁰ 981 S.W.2d 861 (Tex. App.--Houston [1st Dist.] 1999,).

⁷¹ *Id.* at 862.

⁷² *Id.*

⁷³ *Id.* at 863 (citing *State Farm Fire & Cas. Co. v. Wade*, 827 S.W.2d 448, 452 (Tex. App.--Corpus Christi 1992, writ denied).

negligence or gross negligence and is an absolute defense for Tri-Coastal against Antwine's suit.⁷⁴

Consequently, in looking at the face of Antwine's pleadings and the Hartford policy, the court of appeals reversed the trial court's award of summary judgment to Hartford.

D. *Guideone*

As noted by a number of courts since the *Guideone* decision was issued, the *Guideone* Court did not *recognize* an exception to the eight-corners rule. Rather, the Court, in dicta, acknowledged the plethora of cases that had recognized such an exception, noting that it *would* allow the use of extrinsic evidence only in limited circumstances. A recitation of the facts of that case are necessary in order to fully appreciate the impact of the decision.

In *Guideone*, Jane Doe filed a sexual misconduct lawsuit against Fielder Road Baptist Church (the "Church") and Charles Patrick Evans. Doe alleged that "at all times material herein from 1992 to 1994, Evans was employed as an associate youth minister and was under Fielder Road's direct supervision and control when he sexually exploited and abused Plaintiff."

Guideone issued a commercial general liability policy to the Church effective March 31, 1993 that provided limited coverage for legal liability for bodily injury arising out of sexual misconduct which occurs during the policy period. The sexual misconduct liability coverage also gave Guideone the right and duty to defend. Guideone defended the Church in the *Doe* lawsuit under reservation of rights and then filed a declaratory judgment action on the

issue of its duty to defend. Guideone presented evidence to its motion for summary judgment that Evans ceased working for the Church on December 15, 1992, before the Guideone policy took effect. Guideone argued that it had not duty to defend because Doe's allegations against the Church involved Evans' conduct while a youth minister and extrinsic evidence established that Evans' conduct as the youth minister of the Church terminated prior to the effective date of the Guideone policy. Thus, there was no sexual misconduct during the policy period for which the Church was liable as required to trigger the sexual misconduct liability coverage.

The trial court granted Guideone's motion for summary judgment. The court of appeals, however, reversed and concluded that the trial court erred in considering extrinsic evidence to determine Guideone's duty to defend. The Supreme Court affirmed the court of appeals decision and in doing so, provided some guidance to the applicability of the use of extrinsic evidence to determine the duty to defend.

First, the Court acknowledged the narrow exception to the eight-corners rule drawn by other courts. As discussed above, these courts have permitted the use of extrinsic evidence only when that evidence is relevant to an independent and discrete coverage issue, not touching on the merits of the underlying claim against the insured. The Court, however, noted that the extrinsic evidence that Guideone relied upon is relevant to both coverage and the merits of the claim against the Church. The Court followed the existing precedence and rejected the use of "overlapping" or "mixed" extrinsic evidence as an exception to the eight-corners rule. The Court reasoned that the use of overlapping evidence poses a significant risk of undermining the insured's ability to defend itself in the underlying

⁷⁴ *Id.* at 864.

litigation, noting that the Church might have a coverage-related incentive to prove Evans was employed during Guideone's policy term in order to secure coverage. However, such evidence would undermine the Church's defense to those claims.

Also, the Court held that use of extrinsic evidence would "conflate the insurer's defense and indemnity duties without regard for the policy's express terms" that obligated Guideone to defend even if the allegations of the suit are groundless, false or fraudulent. The Court noted that the duty to defend is broader than the duty to indemnify because the plaintiff's allegations alone may invoke the duty to defend, whereas the duty to indemnify is controlled by the actual facts established in the underlying suit. Because Doe alleged that Evans sexually assaulted her during the policy period and while acting as youth minister of the church, the Court held the allegations were sufficient to trigger Guideone's duty to defend.

In sum, the Texas Supreme Court limited the use of extrinsic evidence where two situations are present: (1) when the petition alleges facts that are insufficient to determine the duty to defend and (2) where the extrinsic evidence sought to be used touches on only coverage issues and not the liability of the insured. In *Guideone*, the underlying plaintiffs alleged the dates of employment of the youth minister. For this reason, the facts plead were sufficient to determine the duty to defend. Furthermore, the Court expressly rejected the use of extrinsic evidence where the evidence is relevant to not only the coverage issue, but also the issues of the insured's liability in the underlying lawsuit.

III. LIFE IN THE POST-GUIDEONE ERA

Since the decision was issued in *Guideone*, a number of other courts have considered the circumstances under which extrinsic evidence may be used, expressly citing to the principles outlined in the infamous decision. As will be seen, *Guideone* can be used by carriers as well as policy holders, and the rules do not bend liberally in favor of one or the other.

A. Post-Guidenone Cases Allowing The Use Of Extrinsic Evidence

In *Willbros RPI, Inc. v. Continental Cas. Co.*,⁷⁵ the court held that a master service agreement between Willbros and Harding could be used to determine both Willbros status as an additional insured *and* the scope of work performed under the master service agreement because the additional insured endorsement provided coverage "by written contract" thus contractually enabling the use of the document. Citing to *Guideone*, the court held:

Here, resort to the MSA fits neatly within this exception. It is initially impossible to discern whether coverage is implicated by reference to the CNA policy and the underlying petition. Use of the MSA, furthermore, goes to the most fundamental issue of coverage – that is, whether Willbros qualifies as an insured. Additionally, there is no danger of overlapping with or questioning the truth or falsity of the facts alleged by Exxon.

Even without this exception, resort to the MSA is justified because the CNA policy permits, and indeed requires,

⁷⁵ 2008 U.S. Dist. LEXIS 99851 (S.D. Houston 2008).

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 Harding agreed to add a person or organization as an insured. In a sense, the MSA is a part of the CNA policy, and for the Court to consider it is well within reason and the contemplation of CNA as the policy drafter.⁷⁶

Likewise, in *Roberts, Taylor & Sensabaugh, Inc. v. Lexington Insurance Co.*,⁷⁷ the Southern District of Texas allowed the introduction of an underlying construction contract to determine both the issue of whether Roberts was additionally insured under a liability policy issued by Lexington to Eagle-Pro. In that case, Roberts contracted with Eagle-Pro for the installation of ground pipe under a City of Beaumont contract. Eagle-Pro, in turn, subcontracted the work to Champion. Under the Eagle-Pro agreement, Eagle-Pro agreed to name Roberts as an additional insured. The policy issued by Lexington contained a blanket additional insured endorsement, insuring those parties “where required by written contract,” for liability “arising out of” Eagle-Pro’s work.

Jenkins, an employee of Champion, was injured while in the scope and course of his employment with Champion, working on the City contract. Jenkins sued Roberts. The petition did not mention Eagle-Pro, or the Champion/Eagle-Pro contract. Neither did the petition include allegations as to whether the work Jenkins was performing arose out of Eagle-Pro’s work for Roberts.

⁷⁶ *Id.* at *13.

⁷⁷ 2007 U.S. Dist. LEXIS 65524 (S.D. Tex. 2007).

Lexington argued that it had no duty to defend Roberts and that while extrinsic evidence of the contract between Roberts and Eagle-Pro was permissible to establish that Roberts was an insured, the evidence could not be used to determine whether the loss “arose out of” Eagle-Pro’s work because such evidence touched upon the merits of the underlying claim. The court disagreed, holding:

Texas courts that have recognized an exception to the eight corners rule have not limited the exception to the aspect of coverage dealing with the ‘status’ of a party as an insured or an additional insured under a policy, as Lexington argues. Courts recognizing the exception have distinguished ‘between cases in which the merit of the claim is the issue and those where the coverage of the insurance policy is in question. In the first instance the allegation of the petition controls, and in the second the known or ascertainable facts are allowed to prevail.’

Extrinsic evidence of the Roberts-Eagle-Pro subcontract and the Eagle-Pro Champion sub-contract is not inadmissible because Roberts offers it to prove more than the fact that under its subcontract with Eagle-Pro, it is an additional insured under the Eagle-Pro policy. Courts admit extrinsic not only to show whether a party has the status of an ‘insured’ but also to show whether that party’s liability in an underlying suit ‘arises out of’ events covered by the policy, as long as that extrinsic evidence is limited to coverage and does not overlap with evidence that could

affect liability or the merits of the underlying lawsuit.⁷⁸

Contrast this decision, with the *D.R. Horton* case, discussed below!

Then, in *Hermitage Ins. Co. v. Time Square Dallas, Ltd.*⁷⁹ the Northern District of Texas allowed the use of eyewitness testimony to establish the applicability of an assault and battery exclusion in the face of a pleading that had “excised” all reference to the manner in which the plaintiff’s injuries were sustained.

B. Post-*Guideone* Cases Rejecting The Use Of Extrinsic Evidence

In *D.R. Horton Texas, Ltd. v. Markel International*,⁸⁰ the Houston court of appeals was faced with determining whether extrinsic evidence could be used by a homebuilder to demonstrate that it was an additional insured under two policies of insurance issued to a subcontractor. (Horton was specifically named under one of the policies, but only for liability arising out of the subcontractor’s work for Horton.) There, the pleadings did not mention the subcontractor or contain any allegations indicating that the loss arose out of work performed by the subcontractor for the homebuilder. The court held:

Horton correctly argues we may draw inferences from the petition that may lead to a finding of coverage. An inference is a fact or proposition drawn from an admitted or otherwise proven fact. It is a logical consequence flowing from a fact. In other words, the

eight corners rule does not require us to ignore those inferences that logically flow from the facts alleged...

We recognize that some state and federal courts interpret Texas law to permit a court to consider extrinsic evidence in determining whether a petition states a covered claim. To date, however, the Texas Supreme Court has not recognized such an exception.

Although Horton produced a significant amount of summary judgment evidence that is relevant both to coverage and liability and that links Ramirez to the injuries claimed by the Holmeses, an insured cannot supply such factual allegations when the pleadings and reason do not.⁸¹

Citing to *Guideone* and the appellate decision of *Pine Oak Builders, Inc. v. Great American Lloyds Ins. Co.*,⁸² the court went on further to state:

Horton argues that extrinsic evidence of Ramirez’s work relates solely to coverage, and under the exception to the eight corners rule should be recognized to allow courts to consider evidence relating solely to a fundamental coverage issue...To the extent that either opinion indicates that the authoring court would recognize an exception to the eight corners rule to consider

⁷⁸ *Id.* at *15.

⁷⁹ 2007 U.S. Dist LEXIS 95758 (N.D. Tex. 2007).

⁸⁰ 2006 Tex.App. LEXIS 9346 (Tex.App.-Houston [14th Dist.] 2006, pet. denied).

⁸¹ *Id.* at **15, 16.

⁸² 2006 Tex.App. LEXIS 5950, No. 14-05-00487-CV, 2006 WL 1892669 (Tex.App.-Houston [14th Dist.], July 6, 2006)

evidence related solely to coverage, such language is mere dicta.⁸³

In *Liberty Mutual Ins. Co. v. Graham*,⁸⁴ Liberty insured Eagle under a commercial auto policy. Graham, an Eagle employee was involved in an auto accident after attending his 40th birthday party. The Fifth Circuit was faced with determining whether the pleadings sufficiently alleged that Graham was a permissive user of the vehicle, thus insured by Liberty Mutual, to allow Liberty to introduce extrinsic evidence that Graham in fact did *not* have permission to use the car. There, the Court held that the use of extrinsic evidence was not permissible because the pleadings sufficiently alleged that Graham's employer had in place a policy of allowing employees to drive vehicles for personal use and that Eagle had failed to enact or enforce any restrictions on Graham's use of the car. In reaching this conclusion, the court distinguished *Boll* and other "intermediate court decisions allowing extrinsic evidence to establish a lack of coverage" on the basis that those cases involved the applicability of a *policy exclusion*.⁸⁵

Contrast that decision with the recent holding in *Pine Oak Builders, Inc. v. Great American Lloyds Insurance Co.*,⁸⁶ wherein the Supreme Court refused to allow a policy holder to introduce extrinsic evidence that the subcontractor exception to exclusion 1 applied to claims made against it in a construction defect lawsuit. There, Great American insured Pine Oak under sequential occurrence based liability policies, from

1993 to 2001. Mid Continent insured Pine Oaks from 2001 until 2003. Between February 2002 and March of 2003, five homeowners sued Pine Oak, alleging that their homes suffered water damage because of defective construction. Four of the suits alleged improper installation of exterior finish insulation ("EIFS"). The other suit, alleged water damage due to improper design and construction of the columns of a balcony.

Both Great American and Mid Continent denied, prompting Pine Oaks to sue. The basis of Mid Continent's declination was an EIFS exclusion, which was not appealed to the Supreme Court. Rather, the matter before the Supreme Court concerned the use of extrinsic evidence to determine the applicability of exclusion "I" to the allegations made. The exclusion concerned whether the damaged work was performed by a subcontractor or not. As noted by the Court, in four of the underlying suits, the petitions expressly alleged that the work was performed by subcontractors. In the remaining suit, no such allegation was made. Pine Oak argued that extrinsic evidence was admissible to show that the work was in fact performed by a subcontractor. The Court disagreed, holding:

The petition in the Glass suit alleges that Pine Oak agreed to construct the plaintiffs' house, that Pine Oak alone constructed columns that provided inadequate support, failed to properly seal seams, negligently attempted to correct a problem with the balcony, failed to perform the work in a good and workmanlike manner, and failed to make the repairs described above. These claims of faulty workmanship by Pine Oak are excluded from coverage under

⁸³ *Id.* at *17.

⁸⁴ 473 F.3d 596 (5th Cir. 2006).

⁸⁵ *Id.* at 19.

⁸⁶ 2009 Tex. LEXIS 30, 52 Tex.Sup. J. 348 (Tex. 2009).

the ‘your work’ exclusion. Faulty workmanship by a subcontractor that might fall under the subcontractor exception to the ‘your work’ exclusion is not mentioned in the petition. If the petition only alleges facts excluded by the policy, the insurer is not required to defend.⁸⁷

Moreover, the Court rejected Pine Oak’s argument that a carrier may not use extrinsic evidence to limit its duty to defend, but must use it to trigger such a duty, holding that the distinction was “not legally sufficient.”⁸⁸

In *Hochheim Prairie Cas. Ins. Co. v. Appleby*,⁸⁹ Hochheim insured Seffel under a farm and ranch policy. Seffel was diagnosed with dementia and placed in a nursing home. Appleby was appointed as Seffel’s guardian. Over the course of three days, Seffel knocked down another resident, Sundby, who later died of her injuries. Sundby’s relatives sued. The pleadings alleged that Seffel suffered from dementia, that he was unable to care for himself, that Appleby was Seffel’s guardian and that Seffel knocked Sundby down over the course of three days, causing her injuries and ultimate death.

Hochheim declined on the basis that Sundby’s injuries were not the product of an occurrence and otherwise were expected or intended from the standpoint of the insured. Appleby brought suit, seeking to introduce extrinsic evidence that Seffel could not have intended the injuries because he was

incapable of forming intent due to his diminished capacity. The trial court agreed and Hochheim appealed.

The court agreed that the use of extrinsic evidence was improper, but held that the petition did not meet the first criteria of *Guideone* – that it be initially impossible to determine whether coverage exists. Rather, the court held that the allegations sufficiently created the possibility that the injuries sustained by Sundby were accidental. Thus, held that court, the use of extrinsic evidence was improper, but also unnecessary.

Similarly, in *State Farm Lloyds v. Jones*,⁹⁰ the court refused to allow the introduction of extrinsic evidence of the applicability of the intentional acts exclusion to a shooting death. There, State Farm insured Jones under a homeowner’s liability policy. The estate of McCullough sued, alleging that Jones “negligently” caused McCullough’s death at her home. State Farm sought to introduce extrinsic evidence of the facts leading up to the shooting, including “that Jones retrieved a loaded weapon from her home and that she did not put down, unload, or return the weapon to her home before a verbal confrontation turned into a physical confrontation.”⁹¹ Jones objected to the evidence and the district court agreed.

The court held that under *Guideone*, the only circumstances allowing the use of extrinsic evidence are 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

⁸⁷ 2009 Tex. LEXIS at *10.

⁸⁸ 2009 Tex. LEXIS at *11.

⁸⁹ 255 S.W.3d 146 (Tex.App.-San Antonio 2008, pet. denied).

⁹⁰ 2007 U.S. Dist. LEXIS 13282 (E.D. Tex. 2007).

⁹¹ *Id.* at *4.

truth or falsity of any facts alleged in the underlying case.”⁹² The court held that the use of extrinsic evidence was improper because to delve deeper into the meaning of the plaintiff’s allegations that the gun was discharged negligently would “engage the truth or falsity” of the allegations made.⁹³

In *Fair Operating, Inc. v. Mid-Continent Cas. Co.*,⁹⁴ Mid Continent insured Fair Operating under a policy that provided pollution coverage for “sudden and accidental” pollution incidents. Fair Operating was sued by an adjacent landowner for property contamination. Mid Continent filed a motion for summary judgment, seeking to introduce evidence that the pollution incident was not “sudden.” The district court considered the evidence and awarded judgment in Mid Continent’s favor. Fair Operating moved for reconsideration, which the district court also granted, and Mid Continent appealed.

On appeal, the Fifth Circuit, citing the *Guideone* criteria, held that it was not initially impossible to determine whether coverage existed. Although the petition was “intentionally vague” about how the emissions occurred, a liberal interpretation of the pleadings created the *possibility* that they occurred suddenly. Thus, the court held that the case did not fit within the *Guideone* criteria.

IV. CONCLUSION

Navigating the duty to defend in the post-*Guideone* world may be extremely difficult. While some general principles may be gleaned from *Guideone*, the cases handed down in the year and a half since the

issuance of the *Guidone* case are impossible to reconcile, and impossible to reconcile with pre-*Guideone* cases. One thing is clear, however: courts are becoming more reticent to use extrinsic evidence under any circumstances. On the one hand, this makes it difficult for the insurance industry to manage expenses and protect indemnity limits. On the other, at least two courts have refused to allow policy holders to introduce extrinsic evidence to show the existence of coverage. Thus, to the extent that “open season” has been declared, it has been declared against everyone. So, each party is free to take their best shot at introducing and/or preventing the use of extrinsic evidence in cases involving the duty to defend.

⁹² *Id.* at *10, 14.

⁹³ *Id.*

⁹⁴ 193 Fed.Appx. 302, 2006 U.S. App. LEXIS 19382 (5th Cir. 2006).