

ANOTHER TEXAS TWIST IN INSURERS’ USE
OF EXTRINSIC EVIDENCE TO AVOID A DUTY
TO DEFEND

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INTRODUCTION

A liability insurer's duty to defend its insureds in litigation is a key component of the liability insurance bargain.¹ The merits of the plaintiff's lawsuit against the insured are irrelevant to the insurer's duty to defend.² Furthermore, and importantly, the duty to defend attaches where there is merely the potential for coverage under the policy in question.³ Consequently, an insurer may have a duty to defend an insured even though it ultimately has no duty to indemnify the insured.⁴

There are two approaches to determining an insurer's duty to defend. The first is the four corners rule, also and better described as the eight corners rule.⁵ Under the eight corners rule, the factual allegations in the plaintiff's complaint or petition are compared with the insurance policy, and the insurer owes a defense only if those allegations potentially implicate the insurer's duty to indemnify the insured.⁶ Applying the eight corners rule,

1. See *Campbell v. Super. Ct.*, 52 Cal. Rptr. 2d 385, 392–93 (Ct. App. 1996) (“[O]ne of the primary benefits of an insurance policy is that the insured can expect the insurer to defend against third-party claims.”); *Pine Oak Builders, Inc. v. Great Am. Lloyds Ins. Co.*, 279 S.W.3d 650, 655 (Tex. 2009) (“A defense of third-party claims provided by the insurer is a valuable benefit granted to the insured by the policy, separate from the duty to indemnify.”); *Woo v. Fireman's Fund Ins. Co.*, 164 P.3d 454, 459–60 (Wash. 2007) (“The duty to defend is a valuable service paid for by the insured and one of the principal benefits of the liability insurance policy.”).

2. See *United Fire & Cas. Co. v. Prate Roofing & Installations, LLC*, 7 F.4th 573, 581 (7th Cir. 2021) (“[A] liability insurer may not deny a defense on the ground that the suit against its insured is hopeless.”); *Murray-Kaplan v. NEC Ins., Inc.*, 617 S.W.3d 485, 493 (Mo. Ct. App. 2021) (“An insurer has a duty to defend an insured when the insured is exposed to potential liability to pay based on the facts known at the outset of the case, no matter how unlikely it is that the insured will be found liable and whether or not the insured is ultimately found liable.”).

3. *Chi. Title Ins. Co. v. Jen*, 245 A.3d 150, 162–63 (Md. Ct. Spec. App. 2021); *Sturkin v. Miss. Ass'n of Supervisors, Inc.*, 315 So. 3d 521, 537 (Miss. Ct. App. 2020); *Merrick v. Fischer, Rounds & Assocs., Inc.*, 939 N.W.2d 795, 807 (Neb. 2020).

4. *Greene v. Westfield Ins. Co.*, 963 F.3d 619, 628 (7th Cir. 2020) (applying Indiana law); *Lua v. QBE Ins. Corp.*, 421 F. Supp. 3d 1082, 1089–90 (D. Colo. 2019) (applying Colorado law); *U-Haul Co. of Mo. v. Carter*, 567 S.W.3d 680, 685 (Mo. Ct. App. 2019) (quoting *Arch Ins. Co. v. Sunset Fin. Servs., Inc.*, 475 S.W.3d 730, 733 (Mo. Ct. App. 2015)); *ZRZ Realty Co. v. Beneficial Fire & Cas. Ins. Co.*, 266 P.3d 61, 66 (Or. 2011).

5. This approach is also sometimes called the comparison test, the complaint allegation rule, or the exclusive pleading rule. See *Harleysville Mut. Ins. Co. v. Buzz Off Insect Shield, L.L.C.*, 692 S.E.2d 605, 610 (N.C. Ct. App. 2010) (referring to the comparison test); *RESTATEMENT OF THE L. OF LIAB. INS.* § 13 cmt. a (AM. L. INST. 2019) (noting the four corners, eight corners, and complaint allegation rule terminology); William T. Barker, *When Can Extrinsic Evidence Defeat the Duty to Defend?*, *NEW APPLEMAN CURRENT CRITICAL ISSUES IN INS. L.*, Apr. 2007, at 1, 3 (referring to the exclusive pleading rule).

6. As the explanation of the rule indicates, the “eight corners” describe the four corners of the complaint or petition combined with the four corners of the insurance policy. *Richards v. State Farm Lloyds*, 597 S.W.3d 492, 494–95 (Tex. 2020); *AES Corp. v. Steadfast Ins. Co.*, 725 S.E.2d 532, 535 (Va. 2012).

facts outside the pleadings are not material to the determination of the insurer's duty to defend.⁷

Second, there is the extrinsic evidence approach, under which the allegations in the plaintiff's petition or complaint are merely the starting point in analyzing the duty to defend.⁸ The extrinsic evidence approach requires the insurer to additionally look beyond the pleadings and consider any facts brought to its attention or that it reasonably could discover at the time suit was filed when deciding whether it owes a duty to defend.⁹ Where the insurer is *unaware* of extrinsic evidence that potentially triggers coverage,

7. *Chavez v. Ariz. Auto. Ins. Co.*, 947 F.3d 642, 646 (10th Cir. 2020) (applying Colorado law); *Leithbridge Co. v. Greenwich Ins. Co.*, 464 F. Supp. 3d 734, 739 (E.D. Pa. 2020) (applying Pennsylvania law); *Sammy v. First Am. Title Ins. Co.*, 168 N.Y.S.3d 519, 524 (App. Div. 2022); *Allianz Glob. Risks US Ins. Co. v. Ace Prop. & Cas. Ins. Co.*, 483 P.3d 1124, 1139 (Or. 2021).

8. *See, e.g.,* *McMillin Homes Constr., Inc. v. Nat'l Fire & Marine Ins. Co.*, 247 Cal. Rptr. 3d 825, 830 (Ct. App. 2019) ("To evaluate whether an insurer owes a duty to defend, we start by comparing the allegations of the complaint to the terms of the policy. . . . Extrinsic facts may give rise to a duty to defend where they reveal the possibility of coverage." (citation omitted)); *Peterson v. Ohio Cas. Grp.*, 724 N.W.2d 765, 773 (Neb. 2006) ("An insurer's duty to defend an action against the insured must, in the first instance, be measured by the allegations of the petition against the insured. . . . In determining its duty to defend, an insurer must not only look to the petition or complaint filed against its insured, but must also investigate and ascertain the relevant facts from all available sources." (citation omitted)); *Sw. Steel Coil, Inc. v. Redwood Fire & Cas. Ins. Co.*, 148 P.3d 806, 812 (N.M. Ct. App. 2006) ("If the duty to defend does not arise from the complaint on its face, the duty may arise if the insurer is notified of factual contentions or if the insurer could have discovered facts, through reasonable investigation, implicating a duty to defend."); *USAA Prop. & Cas. Ins. Co. v. Clegg*, 661 S.E.2d 791, 798 (S.C. 2008) ("Although the cases addressing an insurer's duty to defend generally limit this duty to whether the allegations in a Complaint are sufficient to bring the claims within . . . coverage . . . , an insurer's duty to defend is not strictly controlled by the allegations in Complaint. Instead, the duty to defend may also be determined by facts outside of the complaint that are known by the insurer.").

9. *See, e.g.,* *Att'y's Liab. Prot. Soc'y, Inc. v. Ingaldson Fitzgerald, P.C.*, 370 P.3d 1101, 1111–12 (Alaska 2016) ("[T]he duty to defend attaches, if at all, on the basis of the complaint and known or reasonably ascertainable facts at the time of the complaint."); *Thornburg v. Schweitzer*, 240 P.3d 969, 978 (Kan. Ct. App. 2010) (acknowledging that an insurer "must look beyond the effect of the pleadings and consider any facts brought to its attention or any facts which it could reasonably discover in determining whether it has a duty to defend"); *Billings v. Com. Ins. Co.*, 936 N.E.2d 408, 414 (Mass. 2010) ("The duty to defend is determined based on the facts alleged in the complaint, and on facts known or readily knowable by the insurer that may aid in its interpretation of the allegations in the complaint."); *Allen v. Cont'l W. Ins. Co.*, 436 S.W.3d 548, 553 (Mo. 2014) ("[T]he insurer's duty to defend arises only from potential coverage based on facts: (1) alleged in the petition; (2) the insurer knows at the outset of the case; or (3) that are reasonably apparent to the insurer at the outset of the case."); *Merrick v. Fischer, Rounds & Assocs., Inc.*, 939 N.W.2d 795, 807 (Neb. 2020) ("An insurer has a duty to defend if (1) the allegations of the complaint, if true, would obligate the insurer to indemnify, or (2) a reasonable investigation of the facts by the insurer would or does disclose facts that would obligate the insurer to indemnify."); *Zurich Am. Ins. Co. v. Ironshore Specialty Ins. Co.*, 497 P.3d 625, 631 (Nev. 2021) (stating that "an insured may present such extrinsic facts to the insurer, and rely upon them, in order to argue that the insurer owes a duty to defend"); *Nat'l Sur. Corp. v. Immunex Corp.*, 297 P.3d 688, 691 (Wash. 2013) ("Facts that are extrinsic to the pleadings, but readily available to the insurer, may give rise to the duty [to defend].").

however, a court may not consider that evidence in determining the duty to defend.¹⁰ A court deciding whether an insurer had a duty to defend based on extrinsic evidence must evaluate the insurer's knowledge at the time it declined to defend the insured; hindsight has no place in the analysis.¹¹

There are good reasons to favor the extrinsic evidence approach over the eight corners rule when determining an insurer's duty to defend.¹² Indeed, numerous courts employ the extrinsic evidence approach as a result. At the same time, the use of extrinsic evidence to find that an insurer owes a duty to defend raises an obvious opposing question: can an insurer rely on extrinsic evidence to disclaim a duty to defend? After all, if an insurer can demonstrate factually that there is no potential for coverage, it can avoid paying for a defense in a case in which it will never have to indemnify the insured. Be that as it may, the answer to the question posed typically is "no."¹³ When it comes to the duty to defend, the use of extrinsic evidence

10. *Pekin Ins. Co. v. McKeown Classic Homes, Inc.*, 161 N.E.3d 1059, 1068 (Ill. App. Ct. 2020).

11. ALLAN D. WINDT, *INSURANCE CLAIMS AND DISPUTES* § 4:3, at 4-86 to -87 (6th ed. 2013).

12. See ROBERT H. JERRY, II & DOUGLAS R. RICHMOND, *UNDERSTANDING INSURANCE LAW* 698-99 (6th ed. 2018) (comparing the approaches).

13. See, e.g., *Selective Ins. Co. of S.C. v. Target Corp.*, 845 F.3d 263, 269 (7th Cir. 2016) ("When an insurer tries to deny coverage without seeking a declaratory judgment or defending under a reservation of rights, our inquiry [under Illinois law] is necessarily limited to the allegations in the underlying complaint."); *EMD Millipore Corp. v. HDI-Gerling Am. Ins. Co.*, 511 F. Supp. 3d 41, 47 (D. Mass. 2021) (applying Massachusetts law) (quoting *Essex Ins. Co. v. BloomSouth Flooring Corp.*, 562 F.3d 399, 403-04 (1st Cir. 2009)); *Atl. Cas. Ins. Co. v. Innovative Roofing Sys., Inc.*, 411 F. Supp. 3d 1287, 1291 (M.D. Fla. 2019) ("In determining whether an obligation to defend exists [under Florida law], a court may not consider any evidence or testimony outside the four corners of the complaint against the insured."); *ACE Am. Ins. Co. v. Ascend One Corp.*, 570 F. Supp. 2d 789, 795 (D. Md. 2008) (applying Maryland law); *Cap. Env't Servs., Inc. v. N. River Ins. Co.*, 536 F. Supp. 2d 633, 642 (E.D. Va. 2008) (interpreting Virginia law); *Nortek, Inc. v. Liberty Mut. Ins. Co.*, 858 F. Supp. 1231, 1236 (D.R.I. 1994) (applying Rhode Island law); *Devine v. Great Divide Ins. Co.*, 350 P.3d 782, 788 (Alaska 2015) (quoting *Afcan v. Mut. Fire, Marine & Inland Ins. Co.*, 595 P.2d 638, 645 (Alaska 1979)); *Kolbek v. Truck Ins. Exch.*, 431 S.W.3d 900, 907-08 (Ark. 2014) ("Generally, insurers are not allowed to refuse to defend on the grounds that they are in possession of information establishing that the allegations in the complaint giving rise to coverage are untrue."); *Cotter Corp. v. Am. Empire Surplus Lines Ins. Co.*, 90 P.3d 814, 829 (Colo. 2004) ("[W]e base the determination of an insurer's duty to defend on the allegations contained in the underlying complaint when such insurer refuses to defend his insured."); *New London Cnty. Mut. Ins. Co. v. Sielski*, 123 A.3d 925, 936 (Conn. App. Ct. 2015) ("Although there are circumstances where facts beyond those alleged in the underlying complaint and which are known to the insurer can require the insurer to provide a defense, an insurer cannot rely on extrinsic facts to refuse to provide a defense."); *Penn-Am. Ins. Co. v. Disabled Am. Veterans, Inc.*, 481 S.E.2d 850, 852 (Ga. Ct. App. 1997) (rejecting the insurer's argument that the court should excuse its duty to defend based on extrinsic evidence); *Dairy Rd. Partners v. Island Ins. Co., Ltd.*, 992 P.2d 93, 117 (Haw. 2000) (adopting the general rule that an insurer may not use extrinsic evidence to defeat the duty to defend while, at the same time, recognizing a limited exception); *Alombro v. Salman*, 536 So. 2d 764, 767 (La. Ct. App. 1988) ("The insurer's duty to defend is measured by the allegations of the petition even though the insurer may have

tends to be a one-way street. Yet, some courts that generally prohibit an insurer's use of extrinsic evidence to disclaim a duty to defend recognize exceptions.¹⁴ The *Restatement of the Law of Liability Insurance* outlines six exceptions to the rule against insurers' use of extrinsic evidence to deny a

determined there was no coverage on the basis of known or ascertainable fact."); *Penney v. Capitol City Transfer, Inc.*, 707 A.2d 387, 389 (Me. 1998) ("Even though evidence beyond the pleadings may later establish the absence of a duty to indemnify, that evidence is not properly considered in determining the duty to defend."); *Aetna Cas. & Sur. Co. v. Cochran*, 651 A.2d 859, 863 (Md. 1995) (noting the court's prior holding that "an insurer may not use extrinsic evidence to contest coverage under an insurance policy if the tort suit complaint establishes a potentiality of coverage"); *Century Sur. Co. v. Andrew*, 432 P.3d 180, 184 n.4 (Nev. 2018) ("[A]s a general rule, facts outside of the complaint cannot justify an insurer's refusal to defend its insured."); *W9/PHC Real Est. LP v. Farm Fam. Cas. Ins. Co.*, 970 A.2d 382, 391 (N.J. Super. Ct. App. Div. 2009) ("[A]n insurer must defend if the complaint states a cause of action covered by the policy even if the insurer knows of extrinsic facts which would put the claim outside of the insurance coverage."); *Found. Reserve Ins. Co. v. Mullenix*, 642 P.2d 604, 606 (N.M. 1982) ("[T]he complaint filed in this case alleges facts within the coverage of the policy, and it is the duty of the insurer to undertake the defense even though its own investigation has revealed that the claim sued upon is not in fact covered."); *One Reason Rd., LLC v. Seneca Ins. Co.*, 83 N.Y.S.3d 235, 238 (App. Div. 2018) (quoting *Fitzpatrick v. Am. Honda Motor Co.*, 575 N.E.2d 90, 91–92 (N.Y. 1991)); *De Smet Farm Mut. Ins. Co. v. Gulbranson Dev. Co.*, 779 N.W.2d 148, 155–56 (S.D. 2010) ("Even when extraneous facts available in depositions and other record evidence outside the pleadings show the claim as pleaded in the underlying action is false, groundless, or even fraudulent, the duty to defend cannot be defeated if on the face of the pleadings it indicates the claim falls within the policy coverage."); *Webb v. USAA Cas. Ins. Co.*, 457 P.3d 1258, 1265 (Wash. Ct. App. 2020) ("An insurer can consider facts outside of the complaint only to find a duty to defend, not to deny a duty to defend.").

14. See, e.g., *BBG Design Build, LLC v. S. Owners Ins. Co.*, 820 F. App'x 962, 965–66 (11th Cir. 2020) (applying Florida law and applying an equitable exception to the eight corners rule which holds that a court may consider undisputed extrinsic facts, which, had they been alleged in the complaint, clearly would have defeated coverage); *Pompa v. Am. Fam. Mut. Ins. Co.*, 520 F.3d 1139, 1147 (10th Cir. 2008) (predicting Colorado law in a case where the insured's criminal conviction was "an indisputable fact that [was] not an element of either the cause of action or a defense in the underlying litigation"); *Dairy Rd. Partners*, 992 P.2d at 117 ("[A]n insurer may only disclaim its duty to defend by showing that none of the facts upon which it relies [to deny a defense] might be resolved differently in the underlying lawsuit."); *Am. Fam. Mut. Ins. Co. v. Savickas*, 739 N.E.2d 445, 453–54 (Ill. 2000) (concluding that the insured's first degree murder conviction collaterally estopped the administrator of the victim's estate from contending that the victim's injury was not expected or intended); *State Mut. Ins. Co. v. Bragg*, 589 A.2d 35, 38 (Me. 1991) ("[M]urder, attempted murder and sexual abuse of a child convictions are narrow exceptions to the general rule that determines a duty to defend solely from the insurance contract and the allegations of the complaint."); *Norman Int'l, Inc. v. Admiral Ins. Co.*, 279 A.3d 425, 433–35 (N.J. 2022) (permitting consideration of facts outside the complaint to deny a defense); *Polarome Int'l, Inc. v. Greenwich Ins. Co.*, 961 A.2d 29, 50 (N.J. Super. Ct. App. Div. 2008) (permitting the insurers to consider extrinsic evidence where the complaints were ambiguous, and the insurers were unable to evaluate their potential duties to indemnify the insured and thus their duties to defend); *Town of Moreau v. Orkin Exterminating Co.*, 586 N.Y.S.2d 466, 468 (App. Div. 1991) (permitting evidence of the insured's criminal convictions for knowingly disposing of hazardous waste in concluding that there was no "occurrence"); *Loya Ins. Co. v. Avalos*, 610 S.W.3d 878, 882 (Tex. 2020) ("Given the contractual foundations of the eight-corners rule, we conclude it does not bar courts from considering such extrinsic evidence regarding collusive fraud by the insured in determining the insurer's duty to defend.").

defense.¹⁵ There is also a contrary minority approach that permits insurers to rely on extrinsic evidence to deny coverage.¹⁶

Insurers' attempted use of extrinsic evidence to deny a duty to defend surfaced as a prominent insurance law issue in 2020 through two Texas Supreme Court decisions:¹⁷ *Richards v. State Farm Lloyds*¹⁸ and *Loya Insurance Co. v. Avalos*.¹⁹ In *Richards*, the Texas Supreme Court reasoned that the eight corners rule applies regardless of whether a liability insurance policy contains a groundless claims clause.²⁰ Thus, State Farm Lloyds could not use extrinsic evidence to escape its duty to defend its insureds on the basis that its homeowners' insurance policy did not contain a groundless claims clause.²¹ In *Loya*, the court held that the eight corners rule does not prohibit courts from considering extrinsic evidence of insureds' "collusive fraud" when determining insurers' duty to defend.²² As the *Loya* court explained, "an insurer owes no duty to defend when there is conclusive evidence that groundless, false, or fraudulent claims against the insured have been manipulated by the insured's own hands in order to secure a defense and coverage where they would not otherwise exist."²³

15. RESTATEMENT OF THE L. OF LIAB. INS. § 13(3) (AM. L. INST. 2019).

16. See, e.g., *Alfa Mut. Ins. Co. v. Jones*, 555 So. 2d 77, 77–79 (Ala. 1989) (examining a stipulation in addition to the plaintiff's complaint in determining that the insurer owed no duty to defend); *Teufel v. Am. Fam. Mut. Ins. Co.*, 419 P.3d 546, 549 (Ariz. 2018) ("The insurer may investigate the matter, however, and refuse to defend based on facts discovered outside the complaint that take the case outside coverage."); *Riddell, Inc. v. Super. Ct.*, 222 Cal. Rptr. 3d 384, 391 (Ct. App. 2017) ("Extrinsic facts can also negate the duty to defend, but only if the facts are undisputed and conclusively eliminate the potential for coverage."); *Gonzalez v. Fire Ins. Exch.*, 184 Cal. Rptr. 3d 394, 409 (Ct. App. 2015) ("Extrinsic facts negating an insurer's duty to defend must have been known to the insurer at the time of tender or at the inception of the lawsuit."); *5200 Keystone Ltd. Realty, LLC v. Neth. Ins. Co.*, 29 N.E.3d 156, 161 (Ind. Ct. App. 2015) ("If an insurer is aware of facts outside the pleadings that clearly disclose an absence of coverage, it can refuse to defend." (footnote omitted)); *Haarstad v. Graff*, 517 N.W.2d 582, 585 (Minn. 1994) ("Because State Farm in this case had sufficient knowledge of Graff's intentional acts independent of the allegations in the complaint, we hold State Farm had no duty to defend in this case."); *Revelation Indus., Inc. v. St. Paul Fire & Marine Ins. Co.*, 206 P.3d 919, 923 (Mont. 2009) (stating that where a complaint alleges facts that come within coverage but the insurer knows of other actual facts that negate coverage, the insurer is relieved of its duty to defend).

17. For detailed examinations of these cases, see Douglas R. Richmond, *Using Extrinsic Evidence to Excuse a Liability Insurer's Duty to Defend*, 74 SMU L. REV. 120, 128–46 (2021).

18. 597 S.W.3d 492 (Tex. 2020).

19. 610 S.W.3d 878 (Tex. 2020).

20. *Richards*, 597 S.W.3d at 500. A so-called groundless claims clause explicitly requires the insurance company to defend the insured even if the plaintiff's allegations are "groundless, false or fraudulent." See *id.* at 496 n.2.

21. See *id.* at 498 ("State Farm did not contract away the eight-corners rule altogether merely by omitting from its policy an express agreement to defend claims that are 'groundless, false or fraudulent.'").

22. *Loya*, 610 S.W.3d at 882.

23. *Id.*

As important as the *Richards* and *Loya* decisions were, however, both as a matter of Texas law and potentially as persuasive authority in other jurisdictions, neither case addressed a lingering extrinsic evidence test of Texas courts' historical adherence to the eight corners rule: the so-called *Northfield* exception. By way of background, the insurer in *Northfield Insurance Co. v. Loving Home Care, Inc.*²⁴ argued that extrinsic evidence showed that it had no duty to defend the insureds, but the district court held that extrinsic evidence was irrelevant under the eight corners rule and that Northfield thus owed its insureds a defense.²⁵ The Fifth Circuit affirmed the district court's judgment and, in the process, made an "*Erie* guess" that the sitting Texas Supreme Court "would not recognize any exception to the strict eight corners rule."²⁶ The *Northfield* court then went on and, in what is plainly dicta, speculated that "in the unlikely situation that the Texas Supreme Court were to recognize an exception to the strict eight corners rule," any such exception would apply only "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."²⁷ That dicta became the *Northfield* exception to the eight corners rule in Texas state and federal courts.

The Texas Supreme Court acknowledged the *Northfield* exception in *GuideOne Elite Insurance Co. v. Fielder Road Baptist Church*²⁸ but held that it did not apply on the facts of that case.²⁹ The court rejected the *Northfield* exception again a few years later for fact-specific reasons in *Pine Oak Builders, Inc. v. Great American Lloyds Insurance Co.*³⁰ Around the same time as *Pine Oak*, however, the Fifth Circuit recalibrated its position and concluded that, based on *GuideOne*, the Texas Supreme Court *would* permit consideration of extrinsic evidence when evaluating an insurer's duty to defend so long as the case fit within the *Northfield* exception.³¹ Then, in 2021, the Fifth Circuit was presented with *BITCO General Insurance Corp. v. Monroe Guaranty Insurance Co.*³²

24. 363 F.3d 523 (5th Cir. 2004).

25. *Id.* at 532–35.

26. *Id.* at 531.

27. *Id.* (footnote omitted).

28. 197 S.W.3d 305 (Tex. 2006).

29. *Id.* at 310–11.

30. 279 S.W.3d 650, 655 (Tex. 2009) ("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.").

31. See *Ooida Risk Retention Grp., Inc. v. Williams*, 579 F.3d 469, 479 (5th Cir. 2009) ("We find that *GuideOne* supports our '*Erie* guess' that the limited conditions of an exception to the eight corners rule exists here. The facts at hand fit comfortably within the narrow language contained in *Northfield* . . .").

32. 846 F. App'x 248 (5th Cir. 2021).

The question in that case was which of the insured drilling company's successive liability insurers owed it a duty to defend after a farmer sued the drilling company for its allegedly negligent performance in drilling an irrigation well that left the drill bit stuck in the bore hole, among other problems. The perceived key to deciding the case was whether the court could "consider extrinsic evidence—the stipulated date the drill bit became stuck—when deciding whether a duty to defend exist[ed]."³³ Recognizing that this was "an important and determinative question of Texas law as to which there [was] no controlling Texas Supreme Court precedent,"³⁴ the Fifth Circuit certified two questions to the Texas Supreme Court:

1. Is the exception to the eight-corners rule articulated in *Northfield* . . . permissible under Texas law?
2. When applying such an exception, may a court consider extrinsic evidence of the date of an occurrence when (1) it is initially impossible to discern whether a duty to defend potentially exists from the eight-corners of the policy and pleadings alone; (2) the date goes solely to the issue of coverage and does not overlap with the merits of liability; and (3) the date does not engage the truth or falsity of any facts alleged in the third party pleadings?³⁵

In early 2022, the Texas Supreme Court answered the certified questions in *Monroe Guaranty Insurance Co. v. BITCO General Insurance Corp.*³⁶ There is now a *Monroe* exception to the eight corners rule under Texas law with which courts must reckon. The broader question is whether courts in other states that have traditionally adhered to the eight corners rule will adjust their approaches and follow *Monroe*. As will be explained later, they ought not.

I. *MONROE* IN THE TEXAS SUPREME COURT

A. *Background and Facts*

The parties in *Monroe* were liability insurers that provided commercial general liability (CGL) coverage to 5D Drilling & Pump Service, Inc. (5D) in consecutive annual policy periods. BITCO insured 5D from October 2013 to October 2015. Monroe insured 5D from October 2015 to October 2016. In 2016, David Jones sued 5D for breach of contract and negligence, seeking damages caused by 5D's alleged blunders while drilling an irrigation well on his farm.³⁷ In particular, Jones alleged in his petition that 5D drilled the well at an unacceptable angle; stuck the drill bit in the bore

33. *Id.* at 248.

34. *Id.*

35. *Id.* at 252.

36. 640 S.W.3d 195 (Tex. 2022).

37. *Id.* at 197.

hole, thereby rendering the well useless; failed to plug the well, retrieve the drill bit, and drill a new well; and failed to case the well, causing material to slough into it.³⁸ Oddly, though, Jones's petition did not state when 5D's alleged negligence occurred or even when 5D started or halted work on the well.³⁹ Similarly, Jones alleged in his petition that 5D's negligent acts variously damaged his land, but he did not articulate when the damage occurred.⁴⁰

5D tendered its defense to both BITCO and Monroe. BITCO defended 5D under a reservation of rights, but Monroe refused to defend on the basis that any property damage occurred before its policy took effect.⁴¹ Indeed, as Monroe pointed out, its policy "limited the scope of the duty to defend to cover property damage only if it 'occur[red] during the policy period.'"⁴² Furthermore, under Monroe's policy, coverage applied only if, prior to the policy period, no insured knew that the property damage had occurred in whole or in part.⁴³ Continuing, if 5D knew, prior to the policy period, that the property damage had occurred, then, under the Monroe policy, any continuation, change, or resumption of such property damage during the policy period would be deemed to have been known prior to the policy period.⁴⁴

BITCO sued Monroe in federal court, seeking a declaration that Monroe had a duty to defend 5D. BITCO and Monroe stipulated that 5D's drill bit stuck in the bore hole "in or around November 2014," or around ten months before BITCO's policy would expire and Monroe's policy would take effect.⁴⁵ Both insurers moved for summary judgment. Monroe insisted that it had no duty to defend 5D because the stipulation confirmed that property damage occurred during BITCO's policy period and, therefore, Monroe's policy "deemed all property damage to have been known during BITCO's policy period, long before Monroe's policy became effective in October 2015."⁴⁶

The district court concluded that it could not consider the parties' stipulation as to when 5D's drill bit lodged in the well because the stipulation was extrinsic evidence.⁴⁷ Heeding the eight corners rule, the district court determined that Monroe owed a duty to defend 5D because the alleged damage to Jones's property could have occurred anytime between the 2014

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 197–98 (quoting the Monroe policy).

43. *Id.* at 198.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

execution of the drilling contract and Jones's initiation of his lawsuit in 2016 (during either or both insurers' policy periods).⁴⁸ Monroe appealed to the Fifth Circuit, which, as outlined earlier, certified two questions to the Texas Supreme Court.

B. *The Texas Supreme Court Opinion*

In answering the first certified question—that is, whether under Texas law the *Northfield* exception was a valid exception to the eight corners rule—the Texas Supreme Court noted that in *Loya Insurance Co. v. Avalos*,⁴⁹ it had held that courts could consider extrinsic evidence that the insured had colluded with a plaintiff to obtain a defense.⁵⁰ Now, the court was ready to go further and approve courts' consideration of extrinsic evidence when evaluating insurers' duty to defend in cases in which the *Avalos* exception did not apply.⁵¹ In recognizing another exception to the eight corners rule, however, the *Monroe* court was careful to clarify that it was not thereby discarding or diminishing the eight corners rule.⁵² Rather, under Texas law, the eight corners rule remains the starting point in any duty to defend analysis, and it usually will resolve the question of whether the insurer owes a defense.⁵³ But if the allegations in a plaintiff's complaint or petition 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," Texas law permits a court to consider extrinsic evidence that "(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."⁵⁴

After articulating this new exception to the eight corners rule, the *Monroe* court explained how it was different from the *Northfield* exception.⁵⁵ According to the *Monroe* court, its new exception tracked the *Northfield* exception with minor refinements:

First, *Northfield* states that extrinsic evidence may be considered only if it is initially impossible to discern from the pleadings and policy "whether coverage is potentially implicated." . . . We think this standard invites courts to do what our authorities prohibit: "read facts into the pleadings" or "imagine factual scenarios which might trigger coverage." . . . The better threshold inquiry, . . . is: does the pleading contain the facts necessary to resolve the question of whether the claim is covered? . . .

48. *Id.*

49. 610 S.W.3d 878 (Tex. 2020).

50. *Monroe*, 640 S.W.3d at 199.

51. *Id.* at 201.

52. *Id.*

53. *Id.*

54. *Id.* at 201–02.

55. *Id.* at 202.

The second refinement relates to the types of extrinsic evidence that may be considered. *Northfield* required that the extrinsic evidence go to a “fundamental” coverage issue: (1) whether the person sued has been excluded by name or description from any coverage, (2) whether the property in suit is included in or has been expressly excluded from any coverage, and (3) whether the policy exists.⁵⁶

BITCO argued that, if a court is permitted to consider extrinsic evidence, that evidence should have to relate to a “fundamental” coverage issue listed in *Northfield*.⁵⁷ Monroe countered that there were fundamental coverage issues beyond those identified by the *Northfield* court.⁵⁸ In fact, the *Monroe* court considered the rationale for considering extrinsic evidence to be sound regardless of whether the disputed coverage issue qualified as fundamental.⁵⁹ So, rather than charging courts with deciding which coverage issues are or are not fundamental, the court simply dropped the requirement.⁶⁰

Next, the court noted that its new exception to the eight corners rule refined the *Northfield* exception in yet a third way by requiring the proffered extrinsic evidence to “conclusively establish the coverage fact at issue.”⁶¹ The coverage fact need not be stipulated, but a court may not consider extrinsic evidence if, after doing so, “there would remain a genuine issue of material fact as to the coverage fact to be proved.”⁶² In sum:

[T]he eight-corners rule remains the initial inquiry to be used to determine whether a duty to defend exists. But 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, Texas law permits consideration of extrinsic evidence 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. The consideration of extrinsic evidence under these standards advances our dual goals of effectuating the parties' agreement as written, while protecting the insured's interests in defending against the third party's claims. A contrary rule that ignores conclusively proven facts showing the absence of coverage would create a windfall for the insured, requiring coverage for which the insured neither bargained nor paid. Such a windfall would come at the expense of all

56. *Id.* (citations omitted).

57. *Id.*

58. *Id.*

59. *Id.* at 202–03.

60. *Id.* at 203.

61. *Id.*

62. *Id.*

consumers of insurance, who ultimately shoulder the expense of the insurer's increased defense costs through higher premiums.⁶³

The Fifth Circuit's second certified question asked whether a court permitted to consider extrinsic evidence could do so regarding the date of an occurrence.⁶⁴ Given the court's answer to the first certified question, this one came easily. Briefly, because the court had declined to limit the types of potentially coverage-determinative facts provable by extrinsic evidence, evidence of the date of an occurrence was fair game if it otherwise met the court's multipart test.⁶⁵

In this case, however, the extrinsic evidence did not meet the test.⁶⁶ In cases of continuing damage like that alleged here, the *Monroe* court explained, evidence of the date of property damage overlaps with the merits.⁶⁷ According to the court, "[a] dispute as to *when* property damage occurs also implicates *whether* property damage occurred on that date, forcing the insured to confess damages at a particular date to invoke coverage, when its position may very well be that no damage was sustained at all."⁶⁸

Monroe argued that its stipulation with BITCO that the drill bit got stuck in the well's bore hole in November 2014 eliminated its duty to defend because it established that property damage occurred long before its policy took effect.⁶⁹ The court was not persuaded. As the court saw things, in the underlying case, 5D surely would have tried to prove that sticking the drill bit did not cause any damage.⁷⁰ And to obtain coverage from Monroe, 5D would necessarily argue that some of Jones's alleged damages occurred after November 2014.⁷¹ That argument would, of course, undermine its liability defense, which was best served by arguing that there was never any property damage attributable to its conduct.⁷² Long story short, because using the stipulation as Monroe advocated would overlap with the merits of liability in these ways, it could not be considered in determining whether Monroe owed 5D a defense.⁷³

63. *Id.* (footnote omitted).

64. *Id.*

65. *Id.* at 203–04.

66. *Id.* at 204.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

C. Return to the Fifth Circuit

Upon the case's return to the Fifth Circuit, that court found that Monroe's duty to defend was triggered by the allegations in Jones's petition.⁷⁴ In doing so, the court understandably adhered to the Texas Supreme Court's reasoning.⁷⁵ The Fifth Circuit also rejected Monroe's arguments that two exclusions in its policy absolved it of any duty to defend.⁷⁶ The Fifth Circuit therefore affirmed BITCO's win in the district court.

II. THE *MONROE* EXCEPTION DOES NOT REACH *PHARR*

Although the focus of the insurance law community in Texas and elsewhere has in many instances been on *Monroe*, another extrinsic evidence case reached the Texas Supreme Court around the same time. *Monroe*'s companion case, *Pharr-San Juan-Alamo Independent School District v. Texas Political Subdivisions Property/Casualty Joint Self Insurance Fund*,⁷⁷ came to the court on a petition for review from a lower Texas appellate court. The Texas Supreme Court decided *Pharr* the same day it decided *Monroe*.⁷⁸

A. The Court of Appeals Decision

Pharr was a declaratory judgment action occasioned by Lorena Flores's lawsuit against the Pharr-San Juan-Alamo Independent School District (PSJA) for damages sustained by her daughter Alexis, who, she alleged, was injured after being thrown from a golf cart driven by a PSJA employee.⁷⁹ When PSJA demanded that the Texas Political Subdivisions Property/Casualty Joint Self Insurance Fund (TPS) defend and indemnify it under an auto liability policy, TPS denied coverage. The TPS policy defined an "auto" as "a land motor vehicle, trailer or semitrailer designed for travel on public roads but does not include mobile equipment."⁸⁰ The policy defined "mobile equipment" in part as "vehicles designed for use principally off public roads."⁸¹ TPS asserted that golf carts necessarily were "mobile equipment" because the Texas Transportation Code defined a

74. *BITCO Gen. Ins. Corp. v. Monroe Guar. Ins. Co.*, 31 F.4th 325, 331, 332–33 (5th Cir. 2022).

75. *See id.* at 331 (referring to the Texas Supreme Court's decision).

76. *Id.* at 331–32.

77. 642 S.W.3d 466 (Tex. 2022).

78. *Id.* at 472.

79. *Tex. Pol. Subdivisions Prop./Cas. Joint Self Ins. Fund v. Pharr-San Juan-Alamo Indep. Sch. Dist. (Pharr I)*, 628 S.W.3d 486, 489 (Tex. App. 2019), *aff'd on other grounds sub nom. Pharr-San Juan-Alamo Indep. Sch. Dist. v. Tex. Pol. Subdivisions Prop./Cas. Joint Self Ins. Fund*, 642 S.W.3d 466 (Tex. 2022).

80. *Id.* at 490 (quoting the insurance policy).

81. *Id.* (quoting the insurance policy).

“golf cart” as “a motor vehicle designed by the manufacturer primarily for use on a golf course.”⁸² According to TPS, the statutory definition established that a golf cart can never be designed for travel on public roads and therefore could never be an “auto” within the meaning of its policy.⁸³ That being so, TPS argued, the allegations in Flores’s petition nullified its duties to defend and indemnify PSJA.⁸⁴

The parties filed cross-motions for summary judgment. In that exchange, PSJA conceded that golf carts were originally designed for golf course use but argued that the term has a broader meaning today because manufacturers now design and promote some golf carts primarily for use on public roads.⁸⁵ In support of its position, PSJA submitted copies of advertisements from a golf cart manufacturer’s website that depicted people using several models of golf carts to run routine errands on public roads.⁸⁶ PSJA contended that because Flores’s petition failed to describe the golf cart involved in the accident, a reasonable interpretation of the petition included a golf cart designed for use on public roads like those in the ads, thus triggering TPS’s duty to defend.⁸⁷

Not to be outmaneuvered, TPS submitted a variety of evidence that the golf cart involved in the accident was, in fact, intended to principally be used off public roads.⁸⁸ That evidence was not enough, however, and the trial court awarded summary judgment to PSJA on both TPS’s duty to defend and duty to indemnify. TPS then appealed.

The court of appeals noted that PSJA submitted extrinsic evidence to support its summary judgment motion on the duty to defend and TPS responded with its own extrinsic evidence, neither effort respecting the eight corners rule.⁸⁹ While acknowledging that the Texas Supreme Court had yet to expressly recognize an exception to the eight-corners rule (this case preceded *Loya*), the court of appeals explained that several Texas appellate courts had blessed the introduction of extrinsic evidence that was “relevant to coverage but did not touch upon the merits of the underlying suit.”⁹⁰ Here, the court of appeals said, the parties’ extrinsic evidence—(1) whether all golf carts are designed for use principally off public roads and (2) if not, whether the golf cart in the underlying case was so designed—was properly before it “because it was immaterial to the merits of the underlying lawsuit, which sought to establish PSJA’s liability

82. *Id.* (quoting TEX. TRANSP. CODE ANN. § 502.001(18)).

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 491.

88. *Id.* at 491–92.

89. *Id.* at 494.

90. *Id.*

through its employee's negligent operation of the golf cart."⁹¹ (The Texas Supreme Court would later characterize the court of appeals' approach as applying the *Northfield* exception.⁹²)

Flores's petition alleged only that her daughter "was severely injured after being thrown from a golf cart."⁹³ The court concluded that "a liberal interpretation of this threadbare accusation" potentially encompassed a golf cart designed for use on public roads like those depicted in PSJA's extrinsic evidence.⁹⁴ Consequently, TPS was not entitled to summary judgment on its purely legal argument that all golf carts are designed for use principally on, well, golf courses.⁹⁵ At the same time, TPS's extrinsic evidence created a genuine issue of material fact as to whether the golf cart in this case was a typical golf cart intended to be driven on cart paths at a golf course as compared to a model designed for use on public roads, such that PSJA was not entitled to summary judgment on the duty to defend question.⁹⁶

Wrapping up, the court concluded that both parties failed to carry their burdens in their respective summary judgment motions.⁹⁷ It therefore reversed the trial court's judgment and remanded the case to the trial court for further proceedings.⁹⁸ Instead of returning to the trial court, PSJA appealed the decision to the Texas Supreme Court.

B. The Texas Supreme Court Decision

The Texas Supreme Court first determined that Flores's petition did not contain allegations that implicated TPS's duty to defend.⁹⁹ Flores pleaded that her daughter's injuries resulted from the negligent use of a "golf cart," which was not a term that appeared in the TPS auto policy. Accordingly, the court looked to dictionaries and Texas statutes to determine the term's common meaning.¹⁰⁰ Both the dictionaries the court consulted and the Texas Transportation Code uniformly indicated that a golf cart was a motor vehicle designed for use on golf courses.¹⁰¹ The court's research additionally revealed that courts in other jurisdictions had consistently interpreted the term "golf cart" to describe a vehicle designed for use on golf courses,

91. *Id.*

92. *Pharr-San Juan-Alamo Indep. Sch. Dist. v. Tex. Pol. Subdivisions Prop./Cas. Joint Self Ins. Fund*, 642 S.W.3d 466, 472 (Tex. 2022).

93. *Pharr I*, 628 S.W.3d at 495.

94. *Id.* (citing *Nat'l Union Fire Ins. Co. v. Merchs. Fast Motor Lines, Inc.*, 939 S.W.2d 139, 141 (Tex. 1997)).

95. *Id.*

96. *Id.* at 496.

97. *Id.*

98. *Id.* at 496–97.

99. *Pharr-San Juan-Alamo Indep. Sch. Dist. v. Tex. Pol. Subdivisions Prop./Cas. Joint Self Ins. Fund*, 642 S.W.3d 466, 473 (Tex. 2022).

100. *Id.* at 474.

101. *Id.* at 474–75.

rather than to a vehicle designed for travel on public thoroughfares.¹⁰² The court agreed with the sources that it consulted: “the common, ordinary meaning of the term ‘golf cart’ necessarily refers to a cart designed for use on a golf course, not for travel on public roads.”¹⁰³ The court’s adoption of that definition necessarily led it to conclude that TPS had no duty to defend PSJA because Flores’s allegation that her daughter “was ‘thrown from a golf cart’ did not include an allegation that she was thrown from a ‘vehicle designed for travel on public roads.’”¹⁰⁴

The court next considered the possible application of the *Monroe* exception to the facts of this case. The court explained that under *Monroe*, it could not consider extrinsic evidence in evaluating TPS’s duty to defend unless:

- (1) Flores’s petition alleged “a claim that could trigger the duty to defend,”
- (2) a “gap” in her petition leaves us unable to determine whether coverage exists by applying the eight-corners rule, (3) the facts the extrinsic evidence would relate to solely concern the coverage issue and do not overlap with the liability merits, (4) those facts would not contradict facts alleged in Flores’s petition, and (5) the extrinsic evidence “conclusively establishes the coverage fact to be proved.”¹⁰⁵

The “fact” in question here was whether the golf cart involved in the accident was designed for use on public roads, which the court of appeals had correctly concluded related solely to coverage and did not overlap with the merits of Flores’s claims.¹⁰⁶ That is, PSJA was liable if its employee negligently operated the golf cart regardless of whether the golf cart was designed for use on public roads.¹⁰⁷ The other *Monroe* factors, however, did not support the consideration of extrinsic evidence:

By alleging that Alexis was thrown from a “golf cart,” Flores’s petition left no “gap” that would prevent us from determining whether the duty [to defend] exists. Mere disagreements about the common, ordinary meaning of an undefined term do not create the type of “gap” *Monroe* requires. And in the absence of such a gap, any extrinsic evidence that Alexis was actually thrown from something other than a “golf cart” would contradict the facts alleged in Flores’s petition. . . . If Flores had alleged only that Alexis was thrown from a “vehicle,” without any indication of the type of vehicle or whether it was designed for travel on public roads, a gap would exist that prevents us from determining the duty to defend based solely on the petition’s allegations and

102. *Id.* at 476.

103. *Id.* at 476–77.

104. *Id.* at 477.

105. *Id.* (quoting *Monroe Guar. Ins. Co. v. BITCO Gen. Ins. Corp.*, 640 S.W.3d 195, 202 (Tex. 2022)).

106. *Id.*

107. *Id.*

the policy's provisions, and extrinsic evidence proving that the vehicle was or was not designed for use on public roads would not contradict the general allegation that the accident involved a "vehicle." But by pleading that the vehicle was a "golf cart," the petition provided all the information necessary to determine the duty to defend. As a result, the *Monroe* exception does not apply, and the eight-corners rule governs the duty to defend in this case.¹⁰⁸

At bottom, TPS had no duty to defend PSJA because Flores's petition did not allege a claim that could fall within the policy's coverage for liabilities resulting from the use of an auto.¹⁰⁹ The court of appeals correctly reversed the summary judgment for PSJA on TPS's duty to defend even though it did so for different reasons than those offered by the supreme court.¹¹⁰

The *Pharr* court next analyzed TPS's duty to indemnify PSJA, which required it to determine whether the golf cart from which Alexis Flores was thrown was, in fact, designed for travel on public roads.¹¹¹ The court reasoned that the extrinsic evidence TPS submitted conclusively established that the golf cart was not designed for use on public roads.¹¹² So, again, the court of appeals correctly reversed summary judgment for PSJA, albeit for different reasons on which the supreme court based its decision.¹¹³

Under the *Pharr* court's reasoning, TPS was entitled to summary judgment on its duty to defend and its duty to indemnify PSJA.¹¹⁴ Because TPS had not petitioned the court for review (PSJA did), as a matter of Texas appellate procedure, the supreme court could not simply reverse the court of appeals and enter judgment for TPS. The supreme court therefore remanded the case to the trial court for further proceedings in accordance with the court of appeals' judgment,¹¹⁵ which it affirmed.¹¹⁶

C. Summary

Many observers likely believed that *Pharr* was a textbook case for application of the *Monroe* exception based on the parties' opposing views of whether the golf cart involved in the underlying accident was an auto or mobile equipment under the TPS policy and the extrinsic evidence that each party mustered to support its position. Instead, by announcing that parties' simple disagreements about the common, ordinary meaning of undefined terms in complaints or petitions do not create the type of

108. *Id.* at 477–78 (citation omitted).

109. *Id.* at 478–79.

110. *Id.* at 479.

111. *Id.*

112. *See id.* at 480 (describing the extrinsic evidence).

113. *Id.*

114. *Id.*

115. *Pharr I*, 628 S.W.3d at 496–97.

116. *Pharr*, 642 S.W.3d at 480.

pleading “gap” required to admit extrinsic evidence,¹¹⁷ the Texas Supreme Court clearly signaled how narrowly courts should construe the *Monroe* exception.

III. ANALYSIS

The *Monroe* exception provides an avenue for insurers to offer extrinsic evidence to avoid owing a duty to defend. Again, an insurer must be able to pass a five-part test if it wants to offer extrinsic evidence for this purpose.¹¹⁸ The elements of that test are the following: (1) the underlying complaint or petition must state a claim that could trigger the duty to defend; (2) the application of the eight corners rule, due to a gap in the complaint or petition, is not determinative of whether coverage exists; (3) the extrinsic evidence must go solely to an issue of coverage and not overlap with the merits of liability; (4) the extrinsic evidence does not contradict facts alleged in the plaintiff’s complaint or petition; and (5) the extrinsic evidence must conclusively establish the coverage fact to be proved.

When considering application of the *Monroe* exception going forward, the first element will likely not be controversial. The second element—the existence of a gap in the underlying complaint or petition that prevents disposition under the eight corners rule—is also unlikely to create many disputes. This is due in significant part to the Texas Supreme Court’s declaration that “[m]ere disagreements about the common, ordinary meaning of an undefined term do not create the type of ‘gap’ *Monroe* requires.”¹¹⁹ The fourth element—the extrinsic evidence cannot contradict facts alleged in the plaintiff’s pleading—should rarely come into play as well. That leaves the third and fifth elements as the most probable battlegrounds.

The third element—the requirement that extrinsic evidence must go solely to an issue of coverage and not overlap with the merits of liability—will be difficult for an insurer to satisfy in many cases because of the expected frequency with which coverage and liability issues will overlap.¹²⁰

117. *Id.* at 477.

118. The *Monroe* court enumerated only three elements, but it did so after stating that for the three-part test to apply, (1) the allegations in a plaintiff’s complaint or petition must potentially trigger the insurer’s duty to defend; and (2) the application of the eight corners rule must not be determinative of whether coverage exists due to a gap in the plaintiff’s pleading. *Monroe Guar. Ins. Co. v. BITCO Gen. Ins. Corp.*, 640 S.W.3d 195, 201–02, 204 (Tex. 2022). Thus, the *Monroe* court established a five-part test, even though it chose to number only three of the elements in its opinion. In *Pharr*, the court clarified that it had adopted a five-part test in *Monroe*. *Pharr*, 642 S.W.3d at 477.

119. *Pharr*, 642 S.W.3d at 477.

120. See, e.g., *Knife River Corp.-S. v. Zurich Am. Ins. Co.*, No. 3:21-CV-1344-B, 2022 WL 686625, at *8 (N.D. Tex. Mar. 8, 2022) (concluding that the court could not consider the provisions of a subcontract in a coverage dispute arising out of an auto accident in a construction zone because the subcontract’s provisions would overlap with the liability issues in the

Recall that in *Monroe*, for example, the parties' stipulation as to the date that the drill bit became stuck in the bore hole for the well—which was intended simply to establish the date of the “occurrence” for coverage purposes—was held to overlap with the merits of liability in the underlying case.¹²¹ In cases involving additional insureds, where responsibility for providing a defense is commonly at issue and generally cannot be determined by applying the eight corners rule, the contractual provisions that might be expected to aid in the resolution of that question will often not make their way into evidence because the contracts in which they are contained will blend coverage issues with the merits of liability.¹²²

Finally, it is easy to foresee repeated disputes over the fifth element, that is, whether the extrinsic evidence in question conclusively establishes the coverage facts to be proved. For instance, beyond the type or nature of the proffered extrinsic evidence, what level of certainty is required for “conclusive” proof? According to the *Monroe* court, for extrinsic evidence to conclusively establish the coverage fact to be proved there must be no genuine issue of material fact remaining after its admission¹²³—effectively the same standard required for summary judgment—but that still leaves ample room for dispute in many cases.

Assuming it generally wanted to preserve the eight corners rule, the *Monroe* court could have provided much clearer guidance for policyholders and insurers when it comes to the use of extrinsic evidence to extinguish an insurer's duty to defend. In addition to recognizing collusive fraud as an exception to the eight corners rule, which the court previously did in *Loya Insurance Co. v. Avalos*,¹²⁴ the court could have adopted the approach outlined in section 13(3) of the *Restatement of the Law of Liability Insurance*.¹²⁵ Under the *Restatement* approach, an insurer may rely on extrinsic evidence to extinguish its duty to defend where “facts not at issue in the legal action for which coverage is sought and as to which there is no genuine dispute” establish that (a) the defendant in the third-party action is not an insured under the insurance policy that allegedly furnishes a duty to defend; (b) the vehicle or other property involved in the underlying accident is not covered property under the liability insurance policy in question and the defendant is not otherwise owed a defense; (c) the claim was reported late under a claims-made-and-reported policy; (d) the policy in question is a

underlying case).

121. *Monroe*, 640 S.W.3d at 204.

122. See, e.g., *Knife River*, 2022 WL 686625, at *8 (“Under Texas law the Court may not consider the AWP Subcontract in evaluating whether Zurich owes a duty to defend because the provisions overlap with liability determinations.”).

123. *Monroe*, 640 S.W.3d at 203.

124. 610 S.W.3d 878, 882 (Tex. 2020).

125. RESTATEMENT OF THE L. OF LIAB. INS. § 13(3) (AM. L. INST. 2019).

claims-made policy and the underlying action is subject to a prior-and-pending-litigation exclusion or a related-claims exclusion in that policy; and (e) the policy at issue was properly cancelled.¹²⁶

The *Restatement* approach clearly identifies specific situations in which an insurer may use extrinsic evidence to escape a duty to defend. To be sure, the *Restatement* approach allows the use of extrinsic evidence in potentially fewer cases than *Monroe* does. Yet, that can hardly be viewed as a negative from policyholders' standpoint considering the importance and breadth of the duty to defend. Nor is that narrower scope much of a drawback from insurers' perspective, given that the clarity of the *Restatement* approach would likely chill some otherwise expensive and unsuccessful litigation that the *Monroe* exception arguably may invite. Although the *Restatement* approach would not have yielded a different result in *Monroe* because none of the exceptions it proposes applied, nothing prevented the court from adopting it and, besides, the exception the *Monroe* court settled on did not apply on the facts presented either. As for why the Texas Supreme Court apparently did not consider the *Restatement* approach, one possibility is that section 13(3) of the *Restatement* applies only to an insurer's denial of a duty to defend,¹²⁷ while the *Monroe* exception applies equally where an insured is attempting to establish that it is owed a defense.¹²⁸ The Texas Supreme Court has historically declined to consider different extrinsic evidence tests depending on whether an insured is seeking a defense or an insurer is attempting to refuse a defense.¹²⁹

It is also conceivable that the court was reluctant to take the *Restatement* approach in light of the Texas legislature's 2019 enactment of Texas Civil

126. *Id.* § 13(3)(a)–(e). The *Restatement* also permits the use of extrinsic evidence to excuse an insurer's duty to defend where "[t]here is no duty to defend under a similar, narrowly defined exception to the complaint-allegation rule recognized by the courts in the applicable jurisdiction." *Id.* § 13(3)(f). The collusive fraud exception that the *Loya* court recognized falls into this category.

127. The *Restatement* permits the use of extrinsic evidence to trigger the duty to defend by stating that in determining its duty to defend, an insurer must consider any allegation in the plaintiff's complaint or petition, as well as "[a]ny additional allegation known to the insurer, not contained in the complaint or comparable document . . . that a reasonable insurer would regard as an actual or potential basis for all or part of the action." *Id.* § 13(2)(b). The *Restatement* more narrowly limits an insurer's use of extrinsic evidence to excuse its duty to defend outside of the declaratory judgment context to reduce "the uncertainty borne by insureds regarding when they can expect to receive a defense from their insurer." *Id.* § 13 cmt. d.

128. See *Pharr-San Juan-Alamo Indep. Sch. Dist. v. Tex. Pol. Subdivisions Prop./Cas. Joint Self Ins. Fund*, 642 S.W.3d 466, 477 (Tex. 2022).

129. See *Pine Oak Builders, Inc. v. Great Am. Lloyds Ins. Co.*, 279 S.W.3d 650, 655 (Tex. 2009) ("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.").

Practice & Remedies Code section 5.001(b),¹³⁰ which provides that “[i]n any action governed by the laws of this state concerning rights and obligations under the law, the American Law Institute’s Restatements of the Law are not controlling.”¹³¹ The Texas statute was one result of a multi-state lobbying effort by insurance companies to undermine the persuasive value of the *Restatement* because they did not consider some of its provisions to be suitably pro-insurer.¹³² If that effort played any role in the outcome in *Monroe*, then the insurance industry’s relentless attacks on the *Restatement* had the perverse effect of producing a more confusing and less satisfying test for using extrinsic evidence to escape the duty to defend than reliance on the *Restatement* would have yielded.

Finally, the *Monroe* court, in a footnote, reminded policyholders and insurance carriers that if they were dissatisfied with the court’s new common law rule, they could “provide, by contract, for additional or different rules governing the scope of the duty to defend.”¹³³ The obvious problem with that invitation is its practical impossibility. Even if such language broadly acceptable to insurers could be crafted, it would then have to become the industry standard. Otherwise, insurers whose policies did not include such language would soon gain a competitive market advantage as brokers placed business with those insurers in efforts to best secure their clients’ defenses should they ever be sued.

130. See Richard L. Revesz, *The Restatement of Liability Insurance in the Courts*, ALI REP. (Am. L. Inst., Phila., PA), Fall 2021, at 1, 3 (noting the 2019 enactment of the statute).

131. TEX. CIV. PRAC. & REM. CODE § 5.001(b) (2021). Of course, statements like those found in the Texas statute “simply express a truism. No Restatement is controlling law.” Revesz, *supra* note 130, at 3.

132. See Jeffrey W. Stempel, *Hard Battles over Soft Law: The Troubling Implications of Insurance Industry Attacks on the American Law Institute Restatement of the Law of Liability Insurance*, 69 CLEV. ST. L. REV. 605, 607 (2021) (“[Recent years] have witnessed a full court press of lobbying by the insurance industry designed to shape the RLLI in ways favorable to insurers. Notwithstanding considerable success in affecting the content of the RLLI, many insurers . . . continue to contend that the document unduly favors policyholders. Many insurers advocated terminating the entire RLLI project. When these efforts failed, they took the battle to state legislatures, where they have succeeded in obtaining passage of a good deal of anti-RLLI resolutions and even statutes.”); Revesz, *supra* note 130, at 3 (reporting that the Texas legislature enacted section 5.001(b) “at the instigation of a powerful insurance industry lobbyist”).

133. *Monroe Guar. Ins. Co. v. BITCO Gen. Ins. Corp.*, 640 S.W.3d 195, 203 n.12 (Tex. 2022). The court first suggested this alternative two years earlier in *Richards v. State Farm Lloyds*, 597 S.W.3d 492 (Tex. 2020). Recall that in *Richards*, the court held that the approach taken by some Texas federal courts under which the eight corners rule was held not to apply unless the policy contained a groundless-claims clause was held not to be a permissible exception to the eight corners rule as a matter of Texas law. *Id.* at 500. In reasoning its way to that end, the court discussed rules of insurance policy construction and interpretation and, in doing so, stated: “As with any contract, the parties may displace default rules of construction by agreement. . . . Thus, if an insurance policy contained language inconsistent with the eight-corners rule, the policy language would control.” *Id.* at 497 (citations omitted).

CONCLUSION

Under the eight corners rule that many courts follow when deciding whether an insurer owes a duty to defend, insurers have historically been restrained in their ability to use extrinsic evidence to excuse their duty to defend where the plaintiff's complaint or petition alleges facts that suggest the potential for coverage. In recent years, the Texas Supreme Court has been front and center in the extrinsic evidence debate. In its much-anticipated decision in *Monroe Guaranty Insurance Co. v. BITCO General Insurance Corp.*,¹³⁴ the court articulated a new exception to the eight corners rule that permits the use of extrinsic evidence to extinguish an insurer's duty to defend. Unfortunately, the *Monroe* exception is flawed in key respects. Accordingly, rather than following *Monroe*, courts that are considering the circumstances in which insurers should be permitted to use extrinsic evidence to escape their duty to defend should either adopt the approach outlined in section 13(3) of the *Restatement of the Law of Liability Insurance* or craft their own approaches that differ from the *Monroe* exception.¹³⁵

134. 640 S.W.3d 195 (Tex. 2022).

135. See Richmond, *supra* note 17, at 147–60 (outlining alternative scenarios).