

THOMPSON
COE

CHANGING THE RULES OF THE GAME

**Redefining The Duty To Defend And
The Duty To Indemnify**



JAMIE R. CARSEY

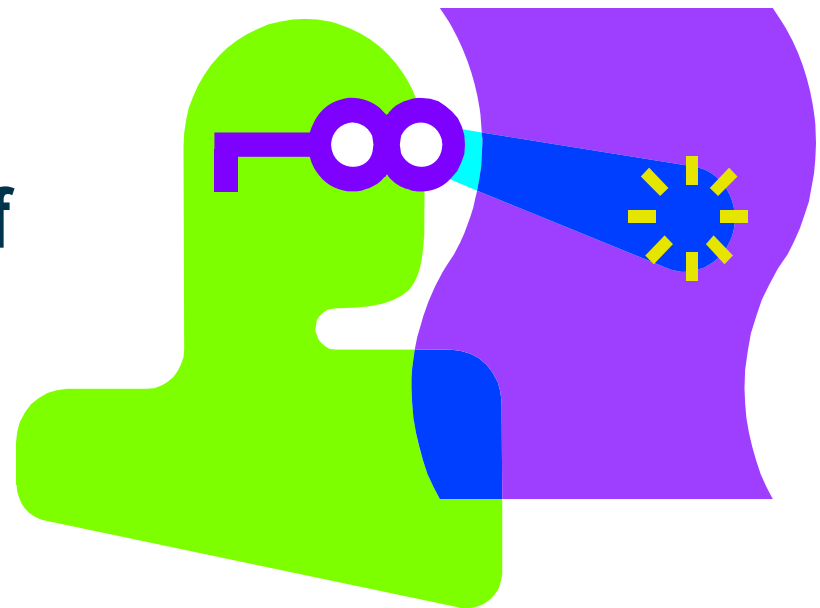
The Duty To Defend

- **In Texas, the duty to defend is determined by the eight-corners rule.**



The Eight-Corners Rule

- **Compare the allegations alleged in the pleadings to the terms and conditions of the policy.**
- **Look at the factual allegations, not the legal causes of action.**



The Eight-Corners Rule

- **When the alleged cause of action is neither clearly outside nor clearly within coverage, the insurer is obligated to defend if there is, potentially, a cause under the complaint within the coverage of the policy.**

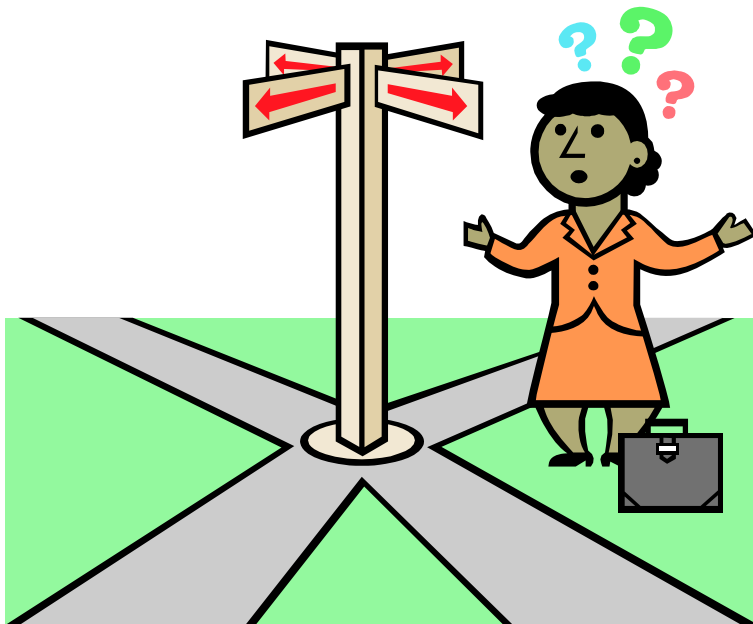
Texas Courts Allowing Extrinsic Evidence

- *State Farm & Casualty v. Wade*, 827 S.W.2d 448 (Tex.App.-Corpus Christi 1992).
- *Gonzales v. American States Insurance Company*, 638 S.W.2d 184 (Tex.App. -Corpus Christi 1982).
- *Westport Insurance Group v. Atchley, Russell, Waldrop & Hlavinka*, 267 F.Supp.2d 601 (E.D. Tex. 2003).
- *Mid-Continent Casualty Company v. Oney*, No. Civ. A. 5:03-cv-129 (N.D.Tex. May 27, 2004).

Texas Courts Allowing Extrinsic Evidence

- *Western Heritage v. River Entertainment*, 998 F.2d 311, 313 (5th Cir. 1993).
- *Harken Exploration Company v. Sphere Drake Insurance Company*, 261 F.3d 466 (5th Cir. 2001).
- *Northfield v. Loving Home Care*, 363 F.3d 523 (5th Cir. 2004).
- *Primrose Operating Company v. National American Insurance*, 382 F.3d 546 (5th Cir. 2004).

Potential Exceptions to the Eight Corners Rule



- **Extrinsic evidence is readily ascertainable**
- **Evidence goes solely to coverage issues**
- **Evidence does not overlap with merits of the underlying case.**

GuideOne Elite v. Fielder Road Baptist

- The Texas Supreme Court maintained its strict application of the eight-corners rule.
- The Court noted lower courts' applications of exceptions to the eight-corners rule but did not apply one.



Pine Oak Builders v. Great American

- **Construction Defect Case**
 - **EIFS failures allegedly caused water damage to homes**
 - **Insurers denied the duty to defend**
- **Trial Court found in favor of insurers' motions for summary judgment**
- **Court of Appeals held Great American had a duty to defend four of the five lawsuits**

Pine Oak Builders

- **Texas Supreme Court Analysis**
 - ***Glass* petition contained no allegations of defective work performed by a subcontractor.**
 - ***Glass* petition asserted causes of actions for breach of contract and warranty, violation of the Residential Construction Liability Act, and negligence based on Pine Oak's alleged failure to perform its work in a good and workmanlike manner and a failure to make requested repairs.**

Pine Oak Builders

- **Texas Supreme Court Analysis**
 - **At issue was the “subcontractor exception” to the Damage to Your Work Exclusion – coverage depends on whether the alleged defective work was performed by Pine Hill or a subcontractor.**
 - **Pine Oak argued that this extrinsic evidence should be considered in a duty to defend analysis, even though it directly contradicted the facts alleged in the *Glass* Lawsuit.**
- **Court held to the strict application of the eight-corners rule.**

What If There Aren't Any Corners?

The Duty to Defend Under A Lost Policy



Lost Policies

- **Insured has the burden to prove the terms of a lost policy**
- **Terms and conditions of a lost policy may be established through secondary evidence**
- **The insured's inability to locate a policy does not necessarily excuse the notice requirement**

Duty to Indemnify

- **The duty to defend and the duty to indemnify are two separate and distinct responsibilities.**
- **The duty to indemnify takes into consideration all the evidence developed in the suit and through trial.**

Duty to Indemnify

- **Remember this ?**
 - **The duty to defend is broader than the duty to indemnify.**
 - **There is no duty to indemnify if there is no duty to defend .**

D.R. Horton-Texas v. Markel Int'l Ins. Co.

- **Construction Defect (Mold) Case**
 - **D.R. Horton sought a seeking defense and indemnity as an additional insured under a subcontractor's CGL policy.**
 - **Claimant's petition identified D.R. Horton as the only responsible party.**
 - **D.R. Horton claimed one of its subcontractors, Ramirez, contributed to the alleged defect.**
- **Ramirez was insured by Markel and D.R. Horton was an additional insured on the Markel Policy.**

D.R. Horton

- **Markel did not defend D.R. Horton because the petition did not allege Ramirez's work was defective.**
- **D.R. Horton hired its own counsel, settled with the underlying plaintiff, and sued Markel.**
- **Trial court granted Markel's MSJ.**
- **Fourteenth Court of Appeals affirmed.**

D.R. Horton

Texas Supreme Court Analysis

- The duty to defend and the duty to indemnify are distinct and separate duties.
- The duty to indemnify is determined by the facts in the underlying case.
- The Court limited *Griffin* to the facts in that case and explained that the holding in *Griffin* was based upon the impossibility that the policyholder could introduce any conceivable facts proving that injuries arising out of an alleged drive-by shooting would fall within coverage of the auto policy at issue.

D.R. Horton Texas Supreme Court Analysis

- **The Court held, “Even if Markel has no duty to defend ... it may still have a duty to indemnify... That determination hinges on the facts established and the terms and conditions of the CGL Policy issued to Ramirez.”**
- **The Court relied upon the following key factors:**
 - **Ramirez was a subcontractor who worked on the complainant’s home;**
 - **Ramirez performed masonry work that contributed to the defect;**
 - **Ramirez’s CGL Policy named D.R. Horton as an additional insured.**

QUESTIONS?
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