

GUIDE TWO? THE DUTY TO DEFEND AFTER GUIDE ONE

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"Deceptive Trade Practices Act and Insurance Code Update" — 1995
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"Appellate Review of Jury Verdicts Finding a Breach of Duty of Good Faith and Fair Dealing" — 1994

TABLE OF CONTENTS

I.	INTRODUCTION	K3-1
II.	<i>GUIDE ONE</i> SUMMARY	K3-1
A.	What <i>Guide One</i> Answered:	K3-2
B.	What <i>Guide One</i> Left Unanswered:	K3-2
C.	The General Rule	K3-2
D.	The <i>Northfield</i> Rule	K3-2
E.	The <i>Boll</i> Rule	K3-2
F.	The Post <i>Guide One</i> Aftermath	K3-3
G.	No Exception to the Eight Corners Rule, Dicta is Dicta	K3-3
H.	Using the So-Called <i>Boll</i> Standard as an Exception	K3-4
I.	Coverage Facts Cover a Broad Scope of Evidence	K3-4
J.	Extrinsic Evidence Cannot Contradict Pleadings	K3-4
K.	The Contours of the Southern District’s Exception	K3-5
L.	Using the <i>Northfield</i> Test-Impossibility Necessary, No Facts Contradicting Any Facts in the Pleading Allowed	K3-5
M.	Using the “General Test”-Facts Not Required to Clarify Vague Pleadings	K3-6
N.	Refusing to Find Any Exception	K3-6
O.	Declining to Predict When an Exception May Be Applicable-Following the Eight Corners Rule	K3-6
III.	POST <i>GUIDE ONE</i> RESULTS: AN OVERVIEW	K3-7
IV.	POST <i>GUIDE ONE</i> RESULTS: AN ANALYSIS	K3-7
V.	A MODEST PROPOSAL: KEEPING THE RULE SIMPLE	K3-8

I. INTRODUCTION

Few insurance law issues remain as poorly understood and applied as the “Eight Corners Rule.” Designed to prevent insurers from denying a defense on coverage grounds based solely on the absence of potential liability, a well intentioned rule often falls prey to clever pleadings and unintended consequences. Consider the following:

Pamela Plaintiff files suit alleging she was “injured in a collision with a truck being driven by Danny Driver in the course and scope of his employment with Colossal Corporation, insured by Immense Insurance Company, under Policy No. ABC, which was in full force and effect at the time of the accident.” In fact, Plaintiff was not hit by a truck; Driver was in a car; he has never worked for Colossal; and, to make matters worse, the policy was cancelled for non-payment of premium eight weeks before the accident.

Common sense tells us that Driver should be defended by any valid policy that covers him for the allegations in the petition, whether the allegations are true or not. But, a strictly applied Eight Corners Rule would force Immense to defend a non insured under a non-existent policy.

In 2006, the Texas Supreme Court was asked to decide whether an exception to the Eight Corners Rule exists that would allow courts to consider extrinsic evidence in determining an insurer’s duty to defend. *Guide One Elite Ins. Co. v. Fielder Road Baptist Church*, 197 S.W.3d 305 (Tex. 2006). Despite *Guide One* being decided over a year ago, the extent of the Eight Corners Rule and its applicability to the above scenario are as unclear, if not more so, than 40 years ago.

II. GUIDE ONE SUMMARY

Guide One Elite Ins. Co. v. Fielder Road Baptist Church addressed the issue of whether a court could allow extrinsic evidence as an exception to the Eight Corners Rule when such evidence (1) is

“overlapping evidence”: evidence that was pertinent to both issues of coverage and issues of liability in the underlying suit, and (2) the evidence contradicts allegations in the pleadings. *Id.*

The *Guide One* third party plaintiff filed a sexual misconduct claim against Fielder Road Baptist Church and Charles Evans. *Id.* at 307 The pleadings alleged “[a]t 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.”*Id.*

Guide One, the Church’s insurer, filed a declaratory judgment asserting that it had no duty to defend. *Id.* at 308. Guide One sought Evans’ church employment record in discovery. *Id.* The church moved for a protective order arguing that Guide One’s duty to defend the Church should be determined by the pleadings and the policy (Eight Corners Rule) without using extrinsic evidence in making the determination. *Id.* The trial court compelled discovery of Evans’ employment history and it revealed that Evans quit working at the church before the Church’s insurance policy under Guide One went into effect. *Id.* The trial court found that Guide One had no duty to defend the Church based on this evidence. *Id.* The court of appeals reversed the trial court’s summary judgment for Guide One, ruling that the trial court erred in considering extrinsic evidence to determine whether Guide One had a duty to defend and Jane Doe’s allegations sufficed in invoking the duty. *Id.* The Texas Supreme Court granted Guide One’s petition for review. *Id.*

Guide One argued that the court should apply an exception to the traditional Eight Corners Rule because the extrinsic evidence at issue was primarily relevant to the issue of coverage rather than the merits of the plaintiff’s underlying claim and even if the extrinsic evidence they sought pertained to both coverage and liability the court should still recognize an exception to the Eight

Corners Rule for “mixed” or “overlapping” extrinsic evidence. *Id.*

A. What *Guide One* Answered:

(1) The particular circumstances of the *Guide One* case presented no basis to make an exception to the Eight Corners Rule. *Id.* at 311.

(2) “Overlapping evidence”: evidence that goes to coverage as well as liability issues in the underlying claim is not admissible extrinsic evidence in determining whether the insurer has a duty to defend. *Id.*

(3) The court refused to apply a “true facts” exception to the Eight Corners Rule on the grounds that the duty to defend does not turn on the truth or falsity of the plaintiff’s allegations. *Id.*

B. What *Guide One* Left Unanswered:

Guide One seems to raise more questions than it answered; namely: If these particular circumstances gave the court no basis to make an exception to the Eight Corners Rule, then are there circumstances that would?

Guide One acknowledged that intermediate and federal courts have made exceptions to the Eight Corners Rule. *Guide One* cited seven intermediate court cases that found exceptions to the Eight Corners Rule, yet never overturned or even disapproved any of them. *Id.* at 308-311.

The court even discussed possible exceptions in dicta, making three distinct observations regarding intermediate and federal courts that find exceptions to the Eight Corners Rule.

C. The General Rule

The court first observed that courts recognizing an extrinsic evidence exception to the Eight Corners Rule generally permitted such evidence “only when relevant to an independent and discrete

coverage issue, not touching on the merits of the underlying third-party claim.” *Id.* at 308.

D. The *Northfield* Rule

The court next acknowledged that the Fifth Circuit Court of Appeals made a guess as to what rule the Texas Supreme Court might adopt as an exception to the Eight Corners Rule if it were to do so in *Northfield Ins. Co. v. Loving Home Care, Inc.*, 363 F.3d 523 (5th Cir. 2004). The *Northfield* court guessed that if the Texas Supreme Court were to eventually recognize an exception to the Eight Corners Rule, it would likely do so when (a) it is initially impossible to discern whether coverage is potentially implicated and (b) 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.” *Id.* at 309.

E. The *Boll* Rule

The court next discussed one of the original and most influential intermediate court cases that found an exception to the Eight Corners Rule, *International Service Ins. Co. v. Boll*, 392 S.W.2d 158 (Tex. Civ. App. Houston 1965, writ ref’d n.r.e.).

The court distinguished the facts of *Guide One* from *Boll* because the extrinsic evidence in *Boll* (a) went strictly to a coverage issue and (b) did not contradict any allegations in the plaintiff’s pleadings material to the merits of the underlying claim. *Id.* at 310.

Assuming arguendo that the three above statements implicitly endorse an exception to the Eight Corners Rule, then which of these three statements, if any, should form the analytical basis for determining when extrinsic evidence offered is admissible?

Since *Guide One*, each of the above three statements have been adopted by different courts as their “test” or “rule” for determining whether to

allow an exception. This is one factor that can account for lower courts' lack of uniformity since *Guide One*.

If "overlapping" extrinsic evidence is not allowed, what type of evidence, if any, is allowed?

In *Guide One*, the court stressed that the "overlapping" character of the extrinsic evidence offered was the basis for its declining to find an exception. So again, assuming arguendo that only evidence that goes to "pure/strict coverage issues" is allowed, what guidelines determine what constitutes a "pure" coverage fact?

Pre-*Guide One* cases employed a broad spectrum of bases for determining whether a fact was a "pure coverage" fact. The strictest of the tests limited "pure coverage facts" to facts that addressed one of three "fundamental coverage issues":

- (1) whether the person sued is excluded from the policy,
- (2) whether a policy contract exists, or
- (3) whether the property in question is insured under the policy.

Only slightly less strict, and in practice nearly identical in its results, some courts held that facts regarding the "status" of the insured were pure coverage facts but facts regarding the scope of coverage were not.

Other courts took a somewhat more liberal approach in finding that pure coverage facts had to be facts that are not alleged to have occurred during the incident that gave rise to the underlying claim.

The most permissive rule allows any evidence that does not overlap with a liability issue.

If the "true facts" exception does not apply in the context of this case in which overlapping evidence was sought to defeat the insurer's duty, would true facts be admissible in a "pure coverage" evidence

setting for purposes of controverting fraudulent or false pleadings?

In citing the oft quoted line that "the duty to defend does not turn on the truth or falsity of a plaintiff's allegations," does *Guide One* intend to protect a plaintiff's every word contained in the pleadings, or just the facts forming the basis of the allegations, specifically the facts of the pleading that state the elements of a justiciable claim?

F. The Post *Guide One* Aftermath

Since *Guide One*, intermediate and federal courts have looked to *Guide One* for analysis of a possible exception to the Eight Corners Rule. Over 130 cases have cited *Guide One* since it was decided just 17 months ago. The cases' holdings are in as much a state of divergence and disagreement as they were before *Guide One*, if not more so. Two Houston courts provide a good illustration:

G. No Exception to the Eight Corners Rule, Dicta is Dicta

The 14th Court of Appeals has found no exception to the Eight Corners Rule. *D.R. Horton-Texas, Ltd. v. Markel Intern. Ins. Co., Ltd.*, No. 14-085-00486-CV, 2006 WL 3040756 (Tex. App.-Houston [14th Dist.] Oct. 26, 2006, pet. filed) (not designated for publication).

Horton sought insurer Markel to defend a construction suit because a sub-contractor's insurance policy extended coverage to Horton when the sub-contractor was working for him. The plaintiff's petition, however, only mentioned Horton and not the sub-contractor. Horton sought to introduce extrinsic evidence proving the sub-contractor was working for him on the day in question. The court did not allow the evidence in, holding that the extrinsic evidence Horton sought to admit was "overlapping" evidence, risking implicating the sub-contractor as a responsible third party. Under *Guide One* such evidence is inadmissible; thus Markel had no duty to defend. A footnote in the case was more telling in what

the 14th District may do in future cases where “coverage only” facts are sought to be introduced: the court responded to Horton’s argument that *Guide One* recognized an exception for evidence solely related to coverage by stating that neither the 14th District nor the Texas Supreme Court recognized any exception to the Eight Corners Rule and that any “such language is mere dicta”.

H. Using the So-Called *Boll* Standard As an Exception

The United States District Court for the Southern District of Texas, in contrast, has allowed extrinsic evidence in two construction water damage cases to establish whether the home damage occurred during a time the insurance policy covered. *Boss Management Services, Inc. v. Acceptance Ins. Co.*, No. H-06-2397, 2007 WL 2752700 (S.D. Tex., Sept 19, 2007); *Bayou Bend Homes, Inc. v. Scottsdale Ins. Co.*, No. H-05-1544, 2006 WL 2037564 (S.D. Tex., July 18, 2006) (not designated for publication). In *Boss Management*, the third party plaintiff sued Boss for water damage occurring “since completion of the home”. Insurers refused to cover Boss on the grounds that the plaintiff’s petition failed to allege water damage occurred during the policy period. *Id.* at *3. The plaintiff sought to introduce a certificate of occupancy as evidence that the home was completed and occupied during the policy coverage period thus the policy covered damage occurring since completion of the home. *Id.* The Court held that this was a proper use of extrinsic evidence and a permissible exception to the Eight Corners Rule. *Id.* at *7. The court reasoned that the *Guide One* court, by distinguishing its facts from *Boll* without overruling it, implicitly endorsed the *Boll* holding. *Id.* at *11. The court then found that the extrinsic evidence was sufficiently similar to the *Boll* case in that both the certificate of occupancy in this case and the stipulation in *Boll* sought to “provide external undisputed information that readily clarifies vague allegations in the pleadings”. *Id.* at *12. *Boss Management* and *Bayou Bend* employed identical reasoning based on *Guide One*’s *Boll* discussion

in finding that the insured owed a duty to defend to the insurer. *Id.*

I. Coverage Facts Cover a Broad Scope of Evidence

Another United States District Court has also ruled on what extrinsic evidence is admissible as “pure coverage” evidence, holding that evidence determining the scope of an insurance policy as well as the status of the insured is admissible. *Roberts, Taylor & Sensabaugh, Inc. v. Lexington Ins. Co.*, No. H-06-2197, 2007 WL 2592748 (S.D. Tex., Sept. 5, 2007). The third party plaintiff sued Roberts for injuries sustained at his company’s work site. *Id.* at *2. The third party plaintiff’s petition only implicated Roberts’ company in the incident. *Id.* Roberts argued that since his company was sub-contracting for Eagle Pro during the incident he is covered by their policy. *Id.* Roberts offered his subcontract with Eagle Pro as extrinsic evidence that invoked the duty to defend. *Id.* The insurer conceded that there was an exception to the Eight Corners Rule but argued that the exception was limited to facts regarding “status” of the insured and did not extend to scope of the insurer’s coverage. *Id.* at *4. The court rejected this argument, holding that any fact pertaining solely to coverage (whether scope or status) is admissible as evidence so long as it does not overlap with the merits of the underlying suit. *Id.* at *5. The court thus found that the subcontract had proven that the insurer had a duty to defend Roberts. *Id.* at *9.

J. Extrinsic Evidence Cannot Contradict Pleadings

The Southern District limited the scope of the Eight Corners Rule exception in *Valley Forge Ins. Co. v. Shah*, No. H-05-3056, 2007 WL 737490 (S.D. Tex., March 7, 2007). The third party plaintiff in *Shah* originally filed a petition that did not clearly implicate coverage for the defendant-insured Shah. The suit arose from an accident in which Shah was a driver and Dunaway was a passenger. The insurer (Valley Forge) first

tendered its policy limits to the third party plaintiff Dunaway who refused the offer and demanded more. The insurer next filed an action denying coverage for the third party plaintiff's claim against Shah. Valley Forge filed a motion for summary judgment, then Shah filed a motion for continuance of the summary judgment pending discovery. The next day the plaintiff Dunaway amended her petition to plead language more closely tracking Shah's policy language. Valley Forge offered evidence that seriously challenged the truth of the amended statements. The Court refused to admit such evidence, stating "[e]ven when the allegations appear to be untrue, the court ordinarily cannot consider extrinsic evidence to defeat an insurer's duty to defend." *Shah*, 2007 WL 737490 at *10. The court cited *Guide One* in holding that "outside documents which called into question the truth of matters alleged in an underlying pleading cannot be used in determining a duty to defend." *Id.*

In so ruling the district court paraphrased the *Guide One* holding:

"The Texas Supreme Court found that the evidence of the employment dates [in *Guide One*] directly contradicted the plaintiff's allegations and that the coverage issue overlapped with the merits; either of which would be sufficient reason to disallow consideration of extrinsic evidence."

Id. Citing *Guide One*, 197 S.W.3d at 308-310.

K. The Contours of the Southern District's Exception

Post *Guide One* it appears the Southern District has employed a test paraphrasing the *Boll* holding in determining whether to make an exception to the Eight Corners Rule. The extrinsic evidence must be (1) external, (2) undisputed, and (3) readily clarify a vague allegation in the pleading. This external undisputed evidence has a relatively broad scope, admissible so long as it does not "overlap" with any issues related to the liability of the underlying claim. The court drew the line in

refusing to admit evidence that refuted or challenged matters the underlying pleading alleged.

*It is worth noting that in paraphrasing *Guide One*'s discussion of *Boll* the Southern District court misstated the *Guide One* discussion. *Guide One* was distinguished from *Boll* on the grounds that (1) the *Boll* evidence went strictly to a coverage issue and (2) the evidence did not contradict any allegations in the pleadings material to the merits of the claim. Although the facts in *Boll* could lend itself to such an interpretation, there was no mention in the *Guide One* discussion of the requirement that the evidence "readily clarify a vague allegation". The general requirement that extrinsic evidence is "undisputed" is a much broader proposition than *Guide One* suggesting the evidence only need not contradict allegations material to the merits of the claim. In the *Shah* case, the disputed evidence was potentially material to the merits of the claim.

L. Using the Northfield Test-Impossibility Necessary, No Facts Contradicting Any Facts in the Pleading Allowed

The Southern District in *Shah* expressly followed the 5th Circuit Court of Appeals' refusal to allow extrinsic evidence that contradicted facts the pleadings alleged even if the extrinsic evidence addressed a "pure coverage" issue. *Liberty Mut. Ins. Co. v. Graham*, 473 F.3d 596 (5th Cir. 2006). The third party plaintiff's petition alleged sufficient facts to support the inference that the defendant, Graham, was driving the company car with the company's permission and was thus covered by the company policy. *Id.* The insurer sought to introduce extrinsic evidence that Graham was intoxicated to show that he was not driving the car for company purposes with the company's permission. *Id.* The lower court, deciding the case before *Guide One* was decided, found that the extrinsic evidence related only to a coverage issue and was a proper exception to the Eight Corners Rule, thus finding that the insurer had no duty to defend. *Id.* The Court of Appeals

began its analysis by noting that the Supreme Court issued the *Guide One* opinion after the lower court had rendered its judgment in this case. *Id.* Thus the Court of Appeals, unlike the lower court, would look to the *Guide One* holding as controlling precedent. *Id.* The Court of Appeals noted *Guide One*'s "approval" of their guess in *Northfield* as to an exception the Supreme Court would make. *Id.* In applying the *Northfield* test the evidence the insurer sought to introduce failed the first prong. *Id.* The pleading stated facts sufficient to potentially implicate policy coverage thus it was not initially impossible to discern whether coverage is potentially implicated as the first prong requires. The 5th Circuit Court of Appeals noted that *Guide One* distinguished its case from *Boll* and followed in distinguishing its case from *Boll* but did so on different grounds. The court reasoned that in *Boll*, the pleading failed to allow a proper determination as to coverage, whereas in this case the pleading had sufficient facts to potentially implicate coverage; thus, the "*Boll* exception" did not apply, thus, the insurer had a duty to defend Graham. *Graham*, 473 F.3d at 602-603.

M. Using the "General Test"-Facts Not Required to Clarify Vague Pleadings

The Northern District of Texas in a case decided after *Guide One* but before *Graham* indicated that it thought extrinsic evidence that went solely to a coverage issue should be admissible as an exception even if it contradicted facts in the pleadings. *B. Hall Contracting Inc. v. Evanston Ins. Co.*, 447 F.Supp.2d 634 (N.D. Tex., 2006). The third party plaintiff sued defendant Hall for personal injuries arising from a roof fire. *Id.* The insurer, Evanston, sought to introduce Company President Brett Hall's testimony that the roof in question was a membrane roof and thus a "membrane roof exclusion" in Hall's policy applied and there was no duty to defend. *Id.* The court stated that *Guide One* described a permissible exception to the Eight Corners Rule when it stated that generally intermediate courts evidence have admitted extrinsic evidence "when

relevant to an independent and discrete coverage issue not touching on the merits of the underlying claim." *Evanston*, 447 F.Supp.2d at 646, citing *Guide One*, 197 S.W.3d at 308. The court acknowledged that the plaintiff's pleadings were sufficient in potentially implicating the insurer's duty to defend. *Id.* at 646-647. The court still allowed the evidence since it had no potential effect on the merits of the underlying claim. *Id.* at 646-647. The court cited *Guide One* and distinguished its facts because the extrinsic evidence in *Guide One* disputed a fact that was an element of the claim made in the underlying suit making it an issue of merit. Since none of the evidence the insurer relies on in denying the duty to defend contradict elements of the claims the lawsuits assert then the evidence fits under the "General" exception *Guide One* articulated: it is evidence that is "relevant to an independent and discrete coverage issue not touching the merits of the underlying claim." *Guide One*, 197 S.W.3d at 308.

N. Refusing to Find Any Exception

The Eastern District did not allow an insured to admit a deposition as evidence that the insurer had no duty to defend in *State Farm Lloyds v. Jones*, No. 4:05-CV-389, 2007 WL 654350 (E.D. Tex., Feb. 27, 2007).

The court cited *Guide One* in holding that there has been no exception to the Eight Corners Rule, and if there were, it would be under the very narrow *Northfield* exception. (Initial impossibility to discern whether coverage is potentially implicated and fact relating solely to coverage). Since insurance coverage was already potentially implicated, the court saw no need to make any exception to the Eight Corners Rule.

O. Declining to Predict When an Exception May Be Applicable-Following the Eight Corners Rule

In *Sentry Ins. v. DFW Alliance Corp.*, No. 3:04-CV-1043-D, 2007 WL 669418 (N.D. Tex., March

6, 2007) the insured argued the court should allow extrinsic evidence because facts that came to light during the trial made for strong proof that the plaintiff's pleading contained either erroneous or fraudulent facts which the insurer relied on to initially deny him the duty to defend. The court refused to make an exception and allow the extrinsic evidence. The court made an observation regarding possible exceptions to the duty to defend:

"This court has no reliable basis to predict that the Texas Supreme Court would make an exception to the "Eight Corners Rule" in cases, like this one, where the outcome of the trial is different from the factual allegations of the underlying complaint.

Although in some instances the rule, as here, redounds to the benefit of the insurer, it would appear that in operation it more frequently benefits the insured, who is entitled to a defense regardless of the truth of the allegations in the underlying complaint."

Sentry, 2007 WL 669418 at *2.

This observation belies the actual results since *Guide One*. Of the eight above cases discussing *Guide One*, four found no exception: two benefitted the insured and two benefitted the insurers. Four cases found an exception: three benefitted the insured and only one benefitted the insurer.

III. POST *GUIDE ONE* RESULTS: AN OVERVIEW

Five different courts have addressed the issue of finding an exception to the Eight Corners Rule post *Guide One*, thoroughly discussing the possibility of crafting a possible exception to the Eight Corners Rule in light of the *Guide One* holding. One court used the first "General Rule" from the *Guide One* dicta as the test in finding an exception to the Eight Corners Rule. Two courts employed the second "*Northfield* Rule" from the *Guide One* dicta and found no exception. One court employed the third part of the *Guide One*

dicta, "the *Boll* Rule" in finding there was an exception. Two courts declined to find any exception or use any test. All of the courts that have found an exception since *Guide One* have been federal courts.

These results are disparate but not necessarily surprising in light of the *Guide One* holding. The *Guide One* dicta was likely meant to discuss the intermediate and federal courts' history of finding exceptions to the Eight Corners Rule but may have unwittingly announced three distinct standards for finding an exception. This left the courts to decide amongst themselves and naturally, reasonable minds have differed. It is not surprising that neither court using the *Northfield* two prong test in determining whether to make an exception found one. The first prong of the *Northfield* test; that it "must be initially impossible to discern whether coverage is potentially implicated" can be as tough to overcome as the judge may decide to construe it. If taken literally, it is difficult to imagine many scenarios in which a case is before the court of appeals and it is impossible to discern whether coverage is potentially implicated. If a case is before the court of appeals on the matter, then it seems coverage is already *potentially* implicated.

IV. POST *GUIDE ONE* RESULTS: AN ANALYSIS

Courts have, understandably, treaded cautiously in making any judgments beyond *Guide One*'s limited holding. Only the Southern District Federal Court, by virtue of volume having decided four cases that potentially implicated an exception to the Eight Corners Rule, has made any meaningful attempts at answering all three lingering questions *Guide One* left open: (1) an applicable test for an exception (2) the scope of evidence admissible as "coverage facts" and (3) whether denying the "true facts" exception means no extrinsic evidence can contradict any fact in the pleading or only extrinsic evidence contradicting facts material to the merits of the claim are implicated in the court's denial. *Graham* may have cleared up an issue of potential disagreement among the Fifth Circuit Courts. The

Evanston (Northern District) case held that even if a third party plaintiff's petition was sufficient to potentially implicate coverage an insurer or insured could still introduce extrinsic evidence that addressed the coverage issue so long as it was not also relevant to the merits of the underlying claim. The Southern District required that admissible extrinsic evidence "readily clarify a vague allegation in the pleading". *Bayou Bend*, 2006 WL 2037564 at *6. In theory, these two may have been reconcilable in an instance where the pleading still potentially implicates coverage despite vague allegations.

Graham appeared to shut the door on that possibility by holding that once a pleading contains sufficient facts to potentially implicate coverage, extrinsic evidence is inadmissible. Both *Graham* and the Southern District holdings *Boss Management* and *Bayou Bend* cite to *Guide One*'s discussion of the *Boll* case, but in doing so, both overlook a crucial distinction between their analysis of the case and *Guide One*'s analysis. Both courts have imposed a rule that extrinsic evidence not contradict any allegations in the pleadings, but *Guide One* emphasized that they did not allow the extrinsic evidence in their case because it contradicted allegations in the pleading that were *material to the merits of the claim*. The end of this sentence is what can protect an insurer from defending fraudulently pled claims or allow an insured to seek defense in an erroneously pled claim. It is important to protect parties from introducing evidence that could undermine the potential duties in the underlying claim but the end of this sentence provides this protection. To not allow an insurer or an insured to introduce evidence that solely relates to coverage regarding the duty to defend because the pleading is sufficient to implicate coverage, or because it contradicts or disputes a coverage related fact the petition alleges that is untrue, is overprotection and overkill. It does not aid any of the policy reasons for the Eight Corners Rule and unnecessarily complicates such determinations.

V. A MODEST PROPOSAL: KEEPING THE RULE SIMPLE

The *Guide One* court's first instinct was the most sound. When viewing all of the cases that have allowed exceptions over the last 40 years it identified their common thread in the "General Rule":

Courts have allowed extrinsic evidence as an exception to the Eight Corners Rule when the evidence is "relevant to an independent and discrete coverage issue, not touching on the merits of the underlying third-party claim". *Guide One*, 197 S.W.3d at 308.

I would propose that evidence relating to the existence of a policy or someone's status as an insured, should be admissible even if it overlaps a liability fact.

The "General Rule" eliminates all of the conflict as to whether the pleading must be vague, insufficient, impossible to discern whether coverage is implicated, whether it contradicts, refutes, concurs, or coincides with facts in the petition or any other factor courts have convoluted this determination with. It simply asks the question whether this fact could undermine the integrity of the underlying claim, allows it if it does not, denies it if it does. This simple question is what underlies all the policy arguments relating to this issue: conflating the duty to defend and the duty to indemnify, compromising the duty to defend, creating a conflict of interest.

Allowing evidence that contradicts a coverage fact in the pleadings is by no means entering new territory. The 5th Circuit identified as the common bond between all cases that have found an exception to the Eight Corners Rule when allowing insurers to introduce extrinsic evidence was that they all "either omitted or misrepresented material facts that would have excluded coverage." See *Lafarge Corp. v. Hartford Cas. Ins. Co.*, 61 F.3d 389, 394 (5th Cir., 1995). The distinction between omitted and misrepresented facts is often one more of semantics than substance.

The case of *Western Heritage Ins. Co. v. River Entertainment*, illustrates this point. 998 F.2d 311 (5th Cir., 1993). In *Western Heritage* the third party plaintiff, Rodriguez, sued the insured River Entertainment for a fight that occurred on its property, a bar. *Id.* The plaintiff's original petition alleged the fight occurred while the instigators were intoxicated. *Id.* River Entertainment's policy excluded coverage for any claims stemming from the sale of alcoholic beverages to intoxicated persons. *Id.* The plaintiff later amended his petition, conveniently omitting all references to intoxication or alcohol. *Id.* The court termed this an omission, holding that without the references to alcohol and intoxication the pleading was too vague to explain what impaired the aggressor to the point where employees at the bar should have restrained him and thus required extrinsic evidence to clarify. *Id.* The court could have as easily (or even more easily) called this a misrepresentation, and asking the court to make such a distinction serves no real purpose. It seems contrary to notions of justice to allow deceptive silence to be exposed, while protecting outright false allegations. The line drawn between allowing coverage facts that supplement a pleaded fact and allowing coverage facts that refute a pleaded fact is arbitrary and without any real purpose, use, or policy behind it.

In *Guide One*, the court responded to an amicus argument that not allowing extrinsic facts that refute facts in pleadings could "encourage fraud and collusion" by stating "we see no evidence of widespread fraud or collusion". However, the Court will continue not to see evidence of fraud or collusion if this evidence is inadmissible. Despite this apparent self fulfilling prophecy, the *Graham* case presented facts raising high suspicion of fraud while *Shah* and the earlier *Western Heritage* case were blatant fraud. Unlike *Western Heritage*, *Shah* was compelled to follow the *Graham* 5th Circuit holding and allow the defendant a defense they were never entitled to.

A simple survey of the cases shows that allowing extrinsic evidence in determining the duty to defend is a two way street. It can work to the insured's benefit as easily as the insurer.

Allowing extrinsic evidence that relates only to coverage issues puts the insurer at no real advantage over the insured. It simply allows a court to make a more informed determination of the parties' rights early on in the process instead of arbitrarily subjecting these rights to the whims of the plaintiff's petition and how it was crafted.

If courts are careful to keep evidence that could undermine the underlying claim out of the determination of the duty to defend, the fear of "conflation of the duty to defend and the duty to indemnify" is unfounded and from the insured's standpoint it may go further in informing and clarifying the insurer's duties to him.