

# Locke Lord QuickStudy: The Texas Supreme Court Approves the ?Broader Use of Extrinsic Evidence to Determine ?an Insurer’s ?Duty to Defend

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The Texas Supreme Court recently issued two opinions expanding the use of extrinsic evidence to determine an insurer’s duty to defend third-party claims. *Monroe Guar. Ins. Co. v. BITCO Gen. Ins. Corp.*, No. 21-0232, 2022 WL 413940 (Tex. Feb. 11, 2022); *Pharr—San Juan—Alamo Indep. Sch. Dist. v. Tex. Political Subdivisions Prop./Cas. Joint Self Ins. Fund*, No. 20-0033, 2022 WL 420491 (Tex. Feb. 11, 2022). The opinions reaffirm the longstanding “eight-corners rule” as the primary means for determining an insurer’s duty to defend. Under that rule, “the insurer’s duty to defend is determined by comparing the allegations in the plaintiff’s petition to the policy provisions, without regard to the truth or falsity of those allegations and without reference to facts otherwise known or ultimately proven.” *Monroe*, 2022 WL 413940, at \*3. In 2020, the Court recognized a narrow exception to the rule that allows a court to “consider extrinsic evidence that the insured and a third party suing the insured colluded to make false representations of fact to secure a defense and create coverage where it would not otherwise exist.” *Id.* (citing *Loya Ins. Co. v. Avalos*, 610 S.W.3d 878, 879 (Tex. 2020)). The recent 2022 opinions recognize a broader exception to the rule that allows the use of extrinsic evidence when “the evidence “(1) goes solely to an issue of coverage and does not overlap with the merits of liability, (2) does not contradict facts alleged in the pleading, and (3) conclusively establishes the coverage fact to be proved.” *Id.* at \*8.

The context for the “*Monroe* exception” dates back to 2004, when the Fifth Circuit made an *Erie* guess that Texas law would allow the use of extrinsic evidence under similar circumstances. *Northfield Ins. Co. v. Loving Home Care, Inc.*, 363 F.3d 523 (5th Cir. 2004). Between 2004 and 2022, the Texas Supreme Court had several opportunities to adopt the “*Northfield* exception,” but it did not expressly do so. Nor did it reject the Fifth Circuit’s interpretation of Texas law. *Monroe*, 2022 WL 413940, at \*5. So lower courts were left hanging; and that led to inconsistent results. *Id.* (citing cases).

Directly confronted with the issue in *Monroe*, the Fifth Circuit posed two certified questions to the Texas Supreme Court: (i) “whether the *Northfield* exception to the ‘eight-corners rule’ is permissible under Texas law”; and (ii) “whether the date of an occurrence is a type of extrinsic evidence that may be considered when [the applicable] requirements are satisfied.” *Id.* at \*1. In answering the first question, the Texas Supreme Court confirmed that Texas law “permits consideration of extrinsic evidence” under circumstances similar to those recognized in *Northfield*—“with minor refinements.” *Id.* at \*6. First, whereas *Northfield* allowed extrinsic evidence to be considered “only if it is initially impossible to discern from the pleadings and policy ‘whether coverage is

potentially implicated,” the Texas Supreme Court held that “[t]he better threshold inquiry, reflected in more recent authorities, is: does the pleading contain the facts necessary to resolve the question of whether the claim is covered?” *Id.* Second, the Texas Supreme Court eliminated *Northfield’s* requirement that the extrinsic evidence go to a ‘fundamental’ coverage issue.” As explained in *Monroe*, courts need not “determine [] which coverage issues are—or are not—fundamental.” *Id.* And third, unlike *Northfield*, the Texas Supreme Court held that “the proffered evidence must conclusively establish the coverage fact at issue.” *Id.* at \*7.

The *Pharr—San Juan—Alamo I.S.D.* case provided an immediate opportunity to apply the new “*Monroe* exception.” The issue in *Pharr* was whether a “golf cart” was a “covered auto,” which was defined in the policy to mean “a land motor vehicle ... *designed for travel on public roads.*” 2022 WL 420491, at \*1. Following *Monroe*, the Court’s “initial inquiry” was “whether the [plaintiff’s] petition states a claim that could trigger the duty to defend under the eight-corners rule.” *Id.* at \*5. Applying definitions of a “golf cart” found in dictionaries and Texas statutes, the Court concluded that a “golf cart” is “designed for use on a golf course, not for travel on public roads.” *Id.* at \*7. Because the insurer had no duty to defend under the eight-corners rule, that should have been the end of the analysis. But the Court proceeded to discuss the *Monroe* factors, holding that it “may not consider extrinsic evidence *unless*: (1) [the plaintiff’s] petition alleged ‘a claim that could trigger the duty to defend,’ (2) a ‘gap’ in [the] 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 [the] petition, and (5) the extrinsic evidence ‘conclusively establishes the coverage fact to be proved.’” *Id.* at \*8 (quoting *Monroe*). The first factor was dispositive (and essentially moves the eight-corners analysis into the *Monroe* analysis). Because the petition alleged that the plaintiff was “thrown from a ‘golf cart,’ [the] petition left no ‘gap’ that would prevent us from determining whether the duty exists. *Id.* Nevertheless, the Court went on to explain why the other *Monroe* factors “do not support the consideration of extrinsic evidence in this case.” *Id.* In the end, the Court concluded that “the *Monroe* exception does not apply, and the eight-corners rule governs the duty to defend in this case.” *Id.*

These recent cases answer a long-open question about the use of extrinsic evidence when deciding an insurer’s duty to defend. The cases also provide a blueprint for analysis that should be useful for advocates and promote more consistency in state and federal cases involving duty-to-defend issues.

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