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Fifth Circuit Certifies Eight-Corners Duty to Defend Issue to Texas Supreme Court

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In the recent case of Bitco Gen. Ins. Corp. v. Monroe Guar. Ins. Co., No. 19-51012, 2021 WL 955155 (5th Cir. Mar. 12, 2021), certified question accepted (Mar. 19, 2021), the Fifth Circuit Court of Appeals certified to the Texas Supreme Court the question of whether a court can consider extrinsic evidence when determining an insurer's duty to defend. The underlying lawsuit stems from a construction contract in which J&B Farms of Texas hired 5D, a construction company, to drill a commercial irrigation well through the Edwards Aquifer. Two years after beginning the project, J&B Farms sued 5D and its President for breach of contract and negligence. J&B Farms alleged that while drilling, 5D "stuck the drilling bit in the bore hole, rendering the well practically useless for its intended/contracted for purpose." 5D then "failed and refused to plug the well, retrieve the drill bit, and drill a new well." J&B Farms asserted that 5D drilled the well "with unacceptable deviation" and then "abandon[ed] the well."

5D notified its insurers, BITCO and Monroe, of the lawsuit and demanded a defense from both. BITCO agreed to provide a defense to 5D, but Monroe refused arguing that the alleged property damage fell outside the relevant policy period, and therefore, it had no duty to defend 5D. BITCO then filed a declaratory judgment action seeking a finding that Monroe owed 5D a duty to defend.

The Fifth Circuit decided that determination of this coverage issue required consideration of the Texas "eight corners" rule, which precludes insurers from disclaiming a defense obligation based on facts not alleged in the underlying pleadings. Some Texas federal courts have applied the *Northfield* exception to the eight corners rule when: (1) it is initially impossible to discern whether coverage is potentially implicated, and (2) 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. Monroe attempted to introduce extrinsic evidence showing that property damage occurred at a stipulated date outside the relevant policy period. Monroe argued that the *Northfield* exception to the eight corners rule applied such that the court should consider this evidence extrinsic to the pleading in determining coverage for the underlying lawsuit.

Central to this case is "[w]hether Texas law permits courts to consider the undisputed date of an incident as relevant to determine whether a duty to defend exists is an application of the *Northfield* exception." Although Texas courts have favorably cited this exception, the Texas Supreme Court has not officially adopted it. Thus, the Fifth Circuit determined that this case implicates two issues of Texas law that called for certification: first, whether the *Northfield* exception is permissible under Texas law, and if so, whether it permits a court to consider extrinsic evidence of the date of an occurrence under the circumstances of this case. The Court emphasized that resolution of these questions is important because ascertaining the date of an occurrence is a frequently encountered "gap" in third-party pleadings and can be dispositive in determining an insurer's duty to defend.

Another exception to the eight corners rule has been applied by the Texas Supreme Court in the narrow circumstance where "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." *Loya Ins. Co. v. Avalos* , 610 S.W.3d 878, 882 (Tex. 2020). Allowing an exception, in this case, would only be the second published exception to the eight corners rule made by the Texas Supreme Court.

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