

THOUGHT LEADERSHIP

News

WESTERN DISTRICT OF TEXAS ADMITS EXTRINSIC EVIDENCE IN DUTY-TO-DEFEND CASE

Newsbrief

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Last Wednesday, the Western District of Texas, Austin Division relied on extrinsic evidence to negate an insurer's duty to defend, adding to the small handful of federal cases that have openly applied the putative exception to the eight-corners rule. In *Star-Tex Resources, LLC v. Granite State Ins. Co.*, No. A-12-CV-326 ML (W.D. Tex. April 24, 2013), the insured and its employee faced a petition which alleged an automobile accident occurred in an auto auction lot, but did not identify the employee's precise role in causing the automobile accident. The insured sought a defense from its CGL carrier, whose policy contained an automobile exclusion barring coverage for injuries "arising out of the ownership, maintenance, use or entrustment to others of any aircraft, 'auto' or watercraft owned or operated by or rented or loaned to any Insured."

Although the petition clearly identified an automobile accident and alleged that the employee caused the accident, it did not state whether the employee was operating the auto at the time of the accident. The insurer argued that the only reasonable inference that could be reached was that the employee was operating the auto. The court disagreed, concluding that any number of reasonable inferences could be reached, such as (a) the employee was directing traffic in the lot and caused the accident, (b) the employee was walking in the lot and caused the accident, or (c) the employee was a passenger in the auto and distracted the driver. Therefore the court considered extrinsic evidence showing what the employee was doing at the time of the accident to determine whether the automobile exclusion applied. Because the undisputed evidence clearly showed the employee was driving the auto, the court found no duty to defend.

This case adds to the small but growing list of federal cases which consider *Northfield Ins. Co. v. Loving Home Care, Inc.*, 363 F.3d 523, 528 (5th Cir. 2004) and *GuideOne Elite Ins. Co. v. Fielder Rd. Baptist Church*, 197 S.W.3d 305, 308 (Tex. 2006) together to create a presently viable exception to the otherwise strict eight-corners rule forbidding consideration of anything other than the policy and the petition to determine the duty to defend. It remains to be seen whether Texas state courts will join this growing trend.