NO. 19-0802

IN THE SUPREME COURT OF TEXAS

STATE FARM LLOYDS,
Appellee,
vs.

JANET RICHARDS, MELVIN RICHARDS, AND AMANDA CULVER MEALS,
Appellants.

ON CERTIFIED QUESTION FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, CASE NO. 18-10721

AMICUS CURIAE BRIEF OF COMPLEX INSURANCE CLAIMS LITIGATION ASSOCIATION, THE AMERICAN PROPERTY AND CASUALTY INSURANCE ASSOCIATION, AND THE NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES IN SUPPORT OF APPELLEE STATE FARM LLOYDS

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INTEREST OF AMICUS CURIAE

The Complex Insurance Claims Litigation Association ("CICLA"), the American Property and Casualty Insurance Association ("APCIA"), and the National Association of Mutual Insurance Companies ("NAMIC") are trade associations of major property and casualty insurance companies, which collectively represent more than a thousand insurance companies in the country. They provide a substantial percentage of liability coverage written in Texas and throughout the nation containing provisions similar or identical to those at issue in this appeal.

CICLA, APCIA, and NAMIC are all vitally interested in the judicial interpretation of these coverage provisions and, because of their members' extensive experience, can provide a unique perspective on the issues presented. CICLA, APCIA and NAMIC have participated in many cases throughout the country, including cases before the Supreme Court of Texas.[1] Due to their members' extensive experience with the insurance principles and policy provisions here, amici respectfully submit that their participation is desirable. Amici will demonstrate that, where extrinsic facts determine if coverage applies, but have no

[1] CICLA, or its predecessor, the Insurance Environmental Litigation Association ("IELA"), has appeared before this Court in important insurance cases, including: *GuideOne Elite Ins. Co. v. Fielder Rd. Baptist Church*, 197 S.W.3d 305 (Tex. 2006); *Lamar Homes, Inc. v. Mid-Continent Cas. Co.* 242 S.W.3d 1 (2007); *Kelley-Coppedge, Inc. v. Highlands Ins. Co.*, 980 S.W.2d 462 (Tex. 1998); *Nat'l Union Fire Ins. Co. v. CBI Indus., Inc.*, 907 S.W.2d 517 (Tex. 1995).

bearing on the merits of the underlying claim, consideration of them does not violate the spirit or settled application of the Texas "eight corners" rule. Further, in the situation here, consideration of the true facts supports the public interest by protecting the efficient working of the insurance system.

The fees and costs for this brief have been paid entirely by amici. *See* Tex. R. App. P. 11(c).

ISSUE PRESENTED

On September 9, 2019, the United States Court of Appeals for the Fifth Circuit certified the following question to this Court:

> Is the policy-language exception to the eight-corners rule articulated in *B. Hall Contracting Inc. v. Evanston Ins. Co.*, 447 F.Supp.2d 634 (N.D.Tex. 2006), a permissible exception under Texas law?

This Court accepted the Certified Question on September 13, 2019 in accordance with Rule 58. The Court should answer the certified question in the affirmative. This is particularly true where, as here, the extrinsic facts relied on to determine if an insurance policy is applicable do not conflict with the underlying allegations and have no bearing on the merits of the underlying case.

STATEMENT OF FACTS

A. The Policy

Appellee State Farm issued a homeowners' policy to Janet and Melvin Richards for the period March 20, 2017 through March 20, 2018. (ROA.545) Under the policy, State Farm agreed to provide a defense "if a claim is made or a

suit is brought against an **insured** for damages because of **bodily injury**… *to which this coverage applies,* caused by an **occurrence**." (ROA.590, "Coverage L) (Italics added.) The policy does not provide for a defense "even if the allegations of the suit are groundless, false or fraudulent." *See* (ROA.590-91) The defense provision further provides that State Farm may "make any investigation" in connection with the defense. (ROA.590)

The policy contains two exclusions relevant here. The "Motor-Vehicle Exclusion" exempts coverage for bodily injury "arising out of the … use … of … a motor vehicle owned or operated by or rented or loaned to any insured." Exclusion 1.e. (ROA.592) Further, "motor vehicle" includes an "all-terrain vehicle… owned by an insured and designed or used for recreational or utility purposes off public roads, ***while off an insured location.***" (ROA. 565) (Emphasis added). And "insured location" means "the residence premises."

The "Insured Exclusion" excludes coverage for bodily injury to any "insured," defined as: "you, and, ***if residents of your household***: (a.) your relatives; and (b.) any other person under the age of 21 who is in the care of a person described above." Exclusion 1.h. (ROA.576, 593) (Emphasis added.)

B. The Accident and Underlying Petition

On June 11, 2017, Jayden was in a fatal ATV accident while under the Richards' supervision. (ROA.1503) Ms. Meals, Jayden's mother, sued the

Richards, alleging that the Richards were liable for negligence, gross negligence and wrongful death in failing to properly supervise, monitor, and instruct Jayden on the safe operation of the ATV. (ROA.604-606) The petition, as amended, does *not* allege either that the ATV accident occurred on the Richards' insured premises, or that Jayden was not a resident of the Richards' household in addition to residing with his mother and maternal grandmother. (ROA.603)

C. Extrinsic Evidence on Coverage Facts

State Farm brought a declaratory judgment action in federal court seeking a declaration that State Farm had no duty to defend or indemnify for the liability alleged in the wrongful death action based on the Motor Vehicle and Insured Exclusions of the policy. State Farm moved for summary judgment, supporting its motion with extrinsic evidence concerning: (1) whether the accident that caused Jayden's bodily injuries took place at a covered location, and (2) Jayden's status as an insured under the Richards' policy. Specifically, the extrinsic evidence shows that:

- On June 11, 2017, Jayden died from bodily injuries he sustained in an accident that occurred on a paved roadway on Iriquois Trail in Parker County, Texas. (ROA.1010-1012) (Richards' Admissions). *See also* ROA.1040-1042 (Texas Peace Officer's Crash Report).
- Jayden was a resident of the Richards' household at the time of the accident. (ROA.962-1039) (Richards' Admissions and Order appointing Ms. Richards as a Joint Managing Conservator of Jayden.)

SUMMARY OF ARGUMENT

It is a fundamental principle of Texas law that, absent ambiguity, insurance policies will be enforced according to their plain meaning. Here, the policy language requires the insurer to defend claims "to which this coverage applies." In determining whether it has a duty to defend, State Farm has the right to investigate and to weigh readily-ascertainable evidence concerning whether the policy's coverage applies. That right is particularly strong when, as here, the extrinsic evidence pertains purely to coverage facts that do not conflict with the allegations of the underlying lawsuit and that have no bearing on the merits of the underlying claim.

The homeowners' policy here provides the Richards a defense against claims for bodily injury to which coverage applies, caused by an occurrence. Based on its investigation, State Farm determined that two separate policy exclusions precluded coverage. First, under the policy's "Motor Vehicle Exclusion," coverage does not apply to bodily injury arising out of the use of an ATV while "off an insured location." Extrinsic evidence incontrovertibly establishes that the accident occurred away from the Richards' insured premises, a fact which, based on the plain language of this exclusion, disposes of coverage. Second, under the Insured Exclusion, coverage does not apply to bodily injury to an "insured," which includes relatives who are residents of the Richards'

household. State Farm presented extrinsic evidence that Jayden was a resident of the Richards' household at the time of the accident, which, according to the plain language of this exclusion, is also dispositive of coverage.[2]

Thus, this case presents the following situation:

- the insurer has a duty to defend only claims "to which coverage applies";
- the underlying petition does not allege certain facts that are not relevant to the merits of the wrongful death action but that potentially resolve coverage, including (1) where the ATV accident occurred, and (2) that Jayden was a resident of the Richards' household in addition to having his primary residence with Ms. Meals; and
- extrinsic evidence offered by the insurer – including admissions made during discovery, a Peace Officer's crash report, and a court order –establishes such facts, which the insurer contends negate coverage.

Under these circumstances, the insurer's use of the evidence proffered is proper under the "policy-language exception to the eight-corners rule," is consistent with established principles of insurance contract construction, and is grounded in well-established Texas law. Particularly when the extrinsic evidence goes to a question of coverage that does not overlap with the issues in the underlying case, Texas law

[2] The assertion in the underlying petition that Jayden's primary residence was with his mother does not contradict the fact that Jayden was also a resident of the Richards' household for purposes of insurance coverage. *E.g., Hartford Cas. Ins. Co. v. Phillips*, 575 S.W.2d 62, 63-64 (Tex. Civ. App.—Texarkana 1978, no writ).

permits insurers and courts to look beyond the eight-corners rule to the true facts to determine if there is coverage and thus any duty to defend.

Many courts and commentators, including many courts applying Texas law, have recognized that consideration of extrinsic evidence on "purely coverage facts" is proper as an exception to the eight-corners rule.[3] There is no jeopardy to the policyholder's interests, and the insurance contract terms are enforced. Here, the insurer sought to rely on the facts that the ATV accident occurred off the Richards' property and that Jayden was a resident of his grandparents' home.

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[3] *Western Heritage Ins. Co. v. River Entm't*, 998 F.2d 311, 313 (5th Cir.1993) ("[W]hen the petition does not contain sufficient facts to enable the court to determine if coverage exists, it is proper to look to extrinsic evidence in order to adequately address the issue."); *Westport Ins. Corp. v. Atchley, Russell, Waldrop & Hlavinka, L.L.P.*, 267 F.Supp.2d 601, 621-22 (E.D.Tex.2003) (extrinsic evidence admissible in deciding the duty to defend where fundamental policy coverage questions can be resolved by readily determined facts that do not engage the truth or falsity of the allegations in the underlying petition, or overlap with the merits of the underlying suit); *State Farm Fire & Cas. Co. v. Wade*, 827 S.W.2d 448, 452-53 (Tex. App.—Corpus Christi 1992, writ denied) (concluding that extrinsic evidence could be admitted in deciding the duty to defend when the facts alleged are insufficient to determine coverage and "when doing so does not question the truth or falsity of any facts alleged in the underlying petition"); *Gonzales v. Am. States Ins. Co.*, 628 S.W.2d 184, 187 (Tex. App.—Corpus Christi 1982, no writ) (holding that facts extrinsic to the petition relating only to coverage, not liability, may be considered to determine a duty to defend, where such evidence does not contradict any allegation in the petition); *Cook v. Ohio Cas. Ins. Co.*, 418 S.W.2d 712, 715-16 (Tex. Civ. App.—Texarkana 1967, no writ) ("[T]he Supreme Court draws a distinction between cases in which the merit of the claim is the issue and those where the coverage of the insurance policy is in question. In the first instance the allegation of the petition controls, and in the second the known or ascertainable facts are to be allowed to prevail."); *Int'l Serv. Ins. Co. v. Boll*, 392 S.W.2d 158, 161 (Tex. Civ. App.—Houston 1965, writ ref'd n.r.e.) (considering extrinsic evidence of identity of driver of insured vehicle by stipulation to conclude no duty to defend or indemnify arose). *See also* 1 ROWLAND H. LONG, THE LAW OF LIABILITY INSURANCE § 5.02[2][b][ii] at 5-27 (2006) (insurer may rely on extrinsic facts relevant to coverage that do not affect the third party's right of recovery to refuse to defend); 1 ALLAN D. WINDT, INSURANCE CLAIMS AND DISPUTES § 4:4 Insurer's refusal to defend based on existence of extrinsic facts (4th ed. 2001) (insurer may use extrinsic evidence of facts that are immaterial or extraneous to the third-party's claim and relate solely to coverage).

These were not necessary elements of the underlying claim and would not have been resolved at trial of that claim. The facts proffered were easily ascertainable, they were evidence of which the court could have taken judicial notice,[4] and they were actually uncontroverted. Permitting consideration of them upholds the terms of the insurance agreement and advances the public policy interest in a strong insurance system.

Insurance contracts are underwritten and priced based on the risks that the insurer agrees to assume. Ignoring known facts that show coverage does not apply, and that put a claim outside the scope of the insurer's defense obligation, renders the insurer's original risk assessment a nullity.[5] Such an expansion puts insurers at risk for liabilities for which no premium was paid. Moreover, a windfall to one insured comes at the expense of the insurance-buying public. Courts and commentators have noted that, if the insurer is forced to cover risks outside the policy, then the costs of that increased risk must be passed on to all consumers of insurance, potentially affecting the price and availability of insurance coverage for Texas policyholders. *E.g., Garvey v. State Farm Fire & Cas. Co.*, 770 P.2d 704, 711 (Cal. 1989) (violation of basic principles of contract interpretation to expand

[4] The insurer's evidence took the form of admissions made during discovery, a Peace Officer's crash report, and a court order.

[5] Further, a rule that ignores the true facts in determining the duty to defend would invite fraud and allow claimants to manufacture coverage, through notice pleading, by omitting facts that would otherwise negate coverage.

coverage beyond what was contemplated by the written agreement creates uncertainty in the underwriting process requiring increased premiums for all insureds).

ARGUMENT

I. PERMITTING RELIANCE ON COVERAGE FACTS THAT DEMONSTRATE THE POLICY DOES NOT APPLY IS CONSISTENT WITH THE PLAIN POLICY TERMS AND SETTLED RULES OF INSURANCE CONTRACT CONSTRUCTION.

Under Texas law, contracts of insurance are governed by the same rules of construction applicable to other contracts. *E.g., Am. Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 157 (Tex. 2003); *CBI Indus.*, 907 S.W.2d at 520 (same). The primary goal of contract interpretation is to determine the parties' intent as expressed in the written agreement. *E.g., Utica Nat'l Ins. Co. of Texas v. Am. Indem. Co.*, 141 S.W.3d 198, 202 (Tex. 2004) (the plain language of an insurance policy must be given effect when the parties' intent may be discerned from it). If no ambiguity in the policy exists, Texas law requires that the insurance policy be enforced in accordance with its plain meaning. *E.g., Don's Bldg. Supply v. OneBeacon Ins. Co.*, 267 S.W.3d 20, 24 (Tex. 2008)*; Utica Nat. Ins. Co. v. Fidelity Cas. Co. of New York*, 812 S.W.2d 656, 661 (Tex. App.—Dallas 1991, writ denied); *Hall v. Mutual Benefit Health & Acc. Ass'n*, 220 S.W.2d 934 (Tex. Civ. App.—Amarillo 1949, writ ref'd).

Under the policy language here, State Farm is obligated to defend claims against an insured for damages because of bodily injury "to which this coverage applies," caused by an occurrence. The duty to defend arises only for suits to which coverage applies. If the actual facts establish that coverage does not apply, State Farm has no duty to defend the underlying claim. In this situation, to apply the policy's plain meaning and give effect to the parties' intent, an insurer must be permitted to rely on readily ascertainable extrinsic evidence of "actual facts" that negate coverage and establish that it has no duty to defend.[6]

In *B. Hall Contracting Inc. v. Evanston Ins. Co*., 447 F.Supp.2d 634 (N.D. Tex. 2006), *vacated on other grounds*, 273 Fed. Appx. 310 (5th Cir. 2008), for instance, the policy similarly required the insurer to defend "any suit seeking [ ] damages" "because of bodily injury to which this insurance applies." *Id*. at 638. The *B. Hall* court held that, when an insurer's duty to defend applies only to covered claims, and not to "groundless, false or fraudulent" allegations, insurers and courts may look to extrinsic evidence to establish whether the petition seeks damages to which the insurance applies. *Id*. at 645. Under the policy terms at

[6] *See Weingarten Realty Management Co. v. Liberty Mut. Fire Ins. Co.*, 343 S.W.3d 859, 867-68 (Tex. App.—Houston [14th Dist.] 2011, pet. denied) (extrinsic evidence permitted of actual facts about additional insured status of party seeking coverage where insurer contracted to insure only specific policyholder and its actual lessors, not to defend every party sued in the capacity as a lessor even though they are strangers to both the lease and the insurance policy). *See also Northfield Ins. Co. v. Loving Home Care, Inc.*, 363 F.3d 523, 531 (5th Cir. 2004).

issue in *B. Hall* and here, consideration of extrinsic evidence that negates coverage is necessary to preserve the limits of the insurer's contractual obligation.

In this case, the policy's Motor Vehicle Exclusion precludes coverage for claims seeking damages resulting from bodily injury arising out of the use of an ATV *while off an insured location***.** State Farm submitted evidence that the Richards admitted the ATV accident occurred "off an insured location," and the Texas Peace Officer's Crash Report corroborates that fact. (ROA.1010-1012, 1040-42).[7] Similarly, the policy precludes coverage for claims for bodily injury to "any insured." "Insured" is defined to include relatives and any other person under the age of 21 in the care of an insured who are "residents of [the] household." (ROA.576, 593)[8] State Farm introduced an Order that appointed Ms. Richards as a Joint Managing Conservator of Jayden, and granted her periods during which Jayden was to reside with the Richards, as well as certain duties and rights for Jayden's care and support. (ROA.962-1039). To enforce the plain insurance contract terms, consistent with settled Texas rules of insurance contract construction, State Farm must be permitted to rely on extrinsic facts showing the absence of coverage for the claim.

[7] The operative petition contains no allegation about the location of the accident. (ROA.77, 602-609.)

[8] The petition alleges that Jayden resided with his mother and maternal grandmother, but does not state that Jayden was not also a resident of the Richards' household for insurance purposes. (See ROA.604)

II. TEXAS LAW PERMITS AN INSURER TO CONSIDER EXTRINSIC FACTS THAT ARE RELEVANT TO WHETHER COVERAGE APPLIES AND DO NOT OVERLAP WITH THE MERITS OF THE UNDERLYING CLAIM.

Texas courts, like many courts across the country, have endorsed an "extrinsic evidence" exception for facts "relevant to an independent and discrete coverage issue, not touching on the merits of the underlying third-party claim." *See GuideOne*, 197 S.W.3d at 308. This exception was first articulated in *Boll*, 392 S.W.2d at 160, where the court held that the insurer owed no duty to defend under an automobile-liability policy based on consideration of extrinsic evidence about the identity of the driver of the vehicle involved in the accident alleged. [9]

In *GuideOne Elite Ins. Co. v. Fielder Road Baptist Church*, 197 S.W.3d 305 (Tex. 2006), the Court declined to extend the exception articulated in *Boll* where the insurer sought to rely on "mixed" facts that were relevant both to coverage and the merits of the underlying action, and had committed to "defend any suit brought against [the insured] seeking damages, even if the allegations of the suit are

[9] The policy in *Boll* excluded coverage of "any claim arising from accidents which occur while any automobile is being operated by Roy Hamilton Boll [the insured's son]." The underlying lawsuit sought damages arising from an accident involving a vehicle operated by the "insured's son" but did not name Roy Hamilton Boll expressly. The extrinsic evidence considered was a stipulation by the parties that the son referred to in the petition was Roy. *Id.*

groundless, false or fraudulent …" *GuideOne*, 197 S.W.3d at 310.[10] But the Court did signal that the exception's applicability turned on whether the extrinsic evidence went "strictly to the coverage issue" and "did not contradict any allegation in the third-party claimant's pleadings material to the merits of that underlying claim." *Id.* In *Boll*, the insurer did not use extrinsic evidence to establish that the driver of the vehicle was not liable for the accident. Rather, the insurer argued that even if the driver were liable, there were no potential underlying facts under which his liability could be covered by the policy based on the applicable policy exclusion.

The rationale for the extrinsic evidence exception in *Boll* was further articulated by the Fourteenth Court of Appeals in *Weingarten Realty Management Co. v. Liberty Mut. Fire Ins. Co.*, 343 S.W.3d 859, 869 (Tex. App.—Houston [14th Dist.] 2011, pet. denied). In *Weingarten Realty*, the court explained that the eight-corners rule prevents an insurer from refusing to defend an insured based on the lack of merit in the underlying case. However, applying the eight-corners rule to pure coverage questions does not advance this policy. *Id*. Thus, even when an insurer has committed to defend "groundless, false and fraudulent claims," Texas law supports the conclusion that an insurer should not be required to defend when

[10] In *GuideOne*, the Court said: "The policy thus defined the duty to defend more broadly than the duty to indemnify. This is often the case in this type of liability policy and is, in fact, the circumstances assumed to exist under the eight-corners rule. *Id.*

extrinsic evidence can readily establish that the policy does not provide coverage even if all the allegations in the plaintiff's petition are true. [11]

Here, the extrinsic evidence — about the location of the accident and whether Jayden was a resident of the Richards' household — does not affect the merits of the underlying negligence suit. In fact, a Texas court agreed that the insured's residence was an extrinsic fact relating only to coverage and permitted evidence on precisely this issue in another case. *See Cook v. Ohio Cas. Ins. Co.*, 418 S.W.2d 712 (Tex. Civ. App.—Texarkana 1967, no writ) (extrinsic evidence that daughter was resident of the insured's household at the time of the accident considered in determining that insured owed no duty to defend because evidence only addressed coverage and not the merits of the underlying claim). Similarly, State Farm's arguments on the Motor Vehicles and Insured Exclusions do not depend on the truth of the allegations in the underlying petition. State Farm argues that, even accepting the allegations in the petition as true, coverage does not apply because extrinsic evidence invokes two policy exclusions which preclude coverage.

[11] *Wade*, 827 S.W.2d at 452-53 ("It makes no sense to us … to say that extrinsic evidence should not be admitted to show that instrumentality (boat) was being used for a purpose explicitly excluded from coverage particularly, when doing so does not question the truth or falsity of any facts alleged in the underlying petition filed against the insured.").

The merits of Ms. Meal's negligence action against the Richards, on the one hand, and whether there is insurance coverage for those lawsuits, on the other, are separate and distinct issues. This is not a case in which the extrinsic evidence offered by the insurer conflicts with the allegations in the underlying petition, or relates to a disputed issue in the underlying claim. *Cf. Pine Oak Builders, Inc. v. Great Am. Lloyds Ins. Co.*, 279 S.W.3d 650, 654 (Tex. 2009); *Zurich American Ins. Co. v. Nokia, Inc.*, 268 S.W.3d 487, 497 (Tex. 2008). Moreover, generally there is no reason for a claimant to include non-liability facts that bear solely on coverage in pleading his or her claim. There are many circumstances where coverage facts would never be before the court, unless they were extrinsic facts supplied by the insurer in a separate coverage action. For this reason, courts routinely consider such extrinsic coverage facts, often without even explicitly discussing the fact that consideration of them is not prohibited by an eight-corners (or what some jurisdictions call a four-corners) rule.

For instance, in *Patriarch Partners, LLC. v. AXIS Insurance Company*, No. 16-CV-2277, 2017 WL 4233078 (S.D.N.Y., Sept. 22, 2017), *aff'd by* 758 Fed. Appx. 14 (2d Cir. 2018), a court validated an insurer's denial of a defense based on non-liability coverage facts outside the complaint. Specifically, that court was asked to approve of an insurer's reliance on the "prior pending litigation" exclusion and facts outside the complaint in refusing to defend. Citing, *inter alia*,

the existence of an SEC subpoena, a Formal Order of Investigation, and additional facts submitted by affidavit concerning the SEC's underlying investigation of the policyholder prior to the policy period, the court held that the insurer correctly refused to defend on the grounds that the SEC's investigation was a "prior or pending" "claim," and was therefore excluded from coverage.

In *Illinois State Bar Assoc. Mut. Ins. Co. v. Rex Carr Law Firm, LLC*, NOS. 4-16-0365, 2017 WL 2805126 (Ill. App. June 27, 2017), another court addressed this issue explicitly and explained:

> Plaintiff argues that when one looks beyond that complaint and discovers specifically what the $2,159,738.04 is for, there actually is no coverage, because there are no "damages" within the meaning of the policy. Is this reliance on external evidence permissible? Ordinarily, in a declaratory judgment action on an insurer's duty to defend the insured, courts observe the eight-corners rule, staying within the four corners of the underlying complaint and the four corners of the insurance policy. *Pekin Insurance Co. v. St. Paul Lutheran Church*, 2016 IL App (4th) 150966, ¶ 63. But there is an exception to the eight-corners rule: in deciding whether the insurer is contractually obligated to defend the insured, courts may consider extrinsic evidence (factual matters outside the underlying complaint and the insurance policy) provided that consideration of the extrinsic evidence would not hinder the underlying plaintiff from pursuing any theory of liability. *Id.* 64.

As that court put it:

> In other words, "the eight-corners rule bars extrinsic evidence only if, as a result of the proposed declaratory judgment, the plaintiff in the underlying lawsuit could be hampered by collateral estoppel." *Id.* We do not see how the Siddles could be hampered, in their underlying malpractice lawsuit, by a determination of the nature of their damages. Therefore, the eight-corners rule allows plaintiff, the insurer, to present extrinsic evidence of what, specifically, the judgment against the Siddles in the amount of the $2,159,738.04 was for. *See id.*

Other courts agree. For example, in *Talen v. Employers Mut. Cas. Co.*, 703 N.W.2d 395, 405-406 (Iowa 2005), the court stated:

> We have recognized that it is permissible for a liability insurer, in determining whether to accept a tendered defense, to consider facts beyond the allegations in the petition…an insurer has no duty to defend 'if after construing both the policy in question, the pleading of the injured party and any other admissible and relevant facts in the record, it appears the claim is not covered by the indemnity insurance contract. [*citing Cent. Bearings Co. v. Wolverine Ins. Co.*, 179 N.W. 2d 443, 445 (Iowa 1970)]. We find this principle to be especially relevant when the basis for withholding coverage is a policy exclusion the application of which is not readily ascertainable from the allegations of the petition and will not necessarily be determined in the tort litigation.

And in *Pekin Insurance Co. v. Wilson*, 237 Ill. 2d 446, 461 (2010), the court said:

> '[I]f an insurer opts to file a declaratory proceeding, we believe that it may properly challenge the existence of such a duty by offering evidence to prove that the insured's actions fell within the limitations of one of the policy's exclusions. [Citations.] The only time such evidence should not be permitted is when it tends to determine an issue crucial to the determination of the underlying lawsuit [citations] ***.)

(*quoting Fidelity & Casualty Co. of New York v. Envirodyne Engineers, Inc.*, 122 Ill. App. 3d 301, 304-05 (1983)).

Similarly, *Biochemics, Inc. v. Axis Reinsurance Co.*, 963 F. Supp. 2d 64, 70 (D.Mass. 2013), expressed the principle that "…an insurer may use extrinsic evidence to deny a duty to defend based on facts irrelevant to the merits of the underlying litigation, such as whether the claim was first made during the policy period, whether the insured party reported the claim to the insurer as required by the policy, or whether the underlying wrongful acts were related to prior wrongful acts." (*Citing Edwards v. Lexington Ins. Co.* 507 F.3d 35, 40-41 (1st Cir. 2007)(emphasis in original).

Across the country, there are numerous situations where courts routinely allow consideration of extrinsic, non-liability facts bearing solely on coverage. This includes circumstances where courts have:

- Permitted comparison of the underlying complaint to a complaint filed in a prior action, in order to assess the applicability of a "prior-litigation" exclusion. *E.g.*, *Acosta, Inc. v. Nat'l Union Fire Ins. Co.*, 39 So.3d 565, 574-75 (Fla. 1st DCA 2010) ("[c]onsideration of the prior complaint was entirely proper . . . because its existence and authenticity was undisputed."). *See also RSUI Indem. Co. v. Worldwide Wagering Inc.*, No. 17-CV-01690, 2017 WL 3023748 (N.D. Ill. July 17, 2017) (applying Delaware law) (relying on allegations of prior action and noting that courts in other jurisdictions have similarly found that litigation exclusion provisions apply where the underlying litigation arises out of, at least in part, facts and allegations that were included in the prior litigation described in the exclusion provision).

- Generally permitted consideration of court filings or orders in determining the duty to defend. *E.g.*, *Town of Moreau v. Orkin Exterminating Co*., 568 N.Y.S.2d 466 (App. Div. 1991) (permitting insurer, in declining to defend based on policy exclusions for expected or intentional pollution, to consider collateral estoppel effect of criminal convictions against insured for knowingly dumping hazardous waste).

- Ruled that an insurer may consider the date on which an insured provides written notice of a claim, in order to determine whether the insured timely notified the insurer of a claim, because the "date of written notice to the insurance company is not a fact that would normally be alleged in the [underlying] complaint." *Composite Structures, Inc. v. Cont'l Ins. Co*., 560 Fed. App'x 861, 865-66 (11th Cir. 2014).

- Allowed extrinsic evidence of the identity of the party who notified the insurer of the claim. *E.g.*, *Richardson v. Cincinnati Ins. Co. (In re Blixseth)*, 593 Fed. Appx. 641 (9th Cir. 2015) (applying Montana law, the 9th Circuit held that insurer had no duty to defend under a policy that required that the insured submit claims and extrinsic evidence established that the claim was submitted by the underlying claimant instead).

- Permitted extrinsic evidence as to which there was no genuine dispute to demonstrate applicability of the prior knowledge exclusion in determining the duty to defend. *E.g.*, *Farbstein v. Westport Ins. Corp*., No. 16-cv-62361, 2017 WL 342537 (S.D. Fla. Aug. 9, 2017); *Westport Ins. Corp. v. Albert*, 208 Fed. Appx. 222 (4th Cir. 2006).

- Allowed undisputed facts concerning whether the accident occurred within the scope of employment. *Blake v. Nationwide Ins. Co*., 904 A.2d 1071 (Vt. 2006) (examining undisputed, extrinsic facts, such as that the plaintiff was receiving workers' compensation benefits for his injuries and referred to the accident as a "work-related automobile accident" to find an exclusion which barred coverage for employment-related injuries was triggered).

- Permitted facts, unrelated to the underlying suit, showing that the location where the claim arose was not a designated premises or insured location. *Farm Family Mut. Ins. Co. v. Whelpley*, 767 N.E.2d

1101, 1104 (Mass. App. Ct. 2002) (there was no coverage where the insurer had learned in its investigation of the claim that the accident occurred off of the insured's premises).

- Considered facts outside the complaint showing the claim arose from wrongful acts allegedly committed by company officials before that company was acquired by the named sponsor, and thus before the company became a sponsor organization. *Bilyeu v. National Union Fire Ins. Co. of Pittsburgh, PA*, 184 So.3d 69 (La. Ct. App. 2015).

These examples are offered to illustrate a key point: as Texas courts have done, the law generally recognizes an exception permitting an insurer to rely upon facts that are not an element of either the cause of action or a defense in the underlying litigation. This Court should recognize this principle as well. Many courts have acknowledged the strong public policy reasons support that outcome. As the Tenth Circuit noted, "it would not defeat the legitimate expectations of the insured to a defense, because an insured can have no reasonable expectation of a defense when an indisputable fact, known to all parties, removes the act in question from coverage. *Pompa v. American Family Mut. Ins. Co.*, 520 F.3d 1139, 1148 (10th Cir. 2008).[12]

[12] *See also Nationwide Mutual Fire Ins. Co. v. Keen*, 658 So.2d 1101, 1103 (Fla. 4th DCA 1995) (“consideration of uncontroverted evidence [that is extrinsic to the compliant in determining the duty to defend], in the absence of allegations establishing coverage, is "founded on logic and fairness").

III. CONSIDERATION OF EXTRINSIC EVIDENCE IN DETERMINING THE INSURER'S DUTY TO DEFEND IN THIS CASE IS SUPPORTED BY STRONG PUBLIC POLICY CONSIDERATIONS.

The homeowners' policy at issue precludes coverage for bodily injury arising from motor vehicle accidents that occur off an insured's premises, as well as bodily injury to relatives who are members of the insureds' household. The Richards paid no premium for that coverage, and State Farm did not insure against it. Under the policy language at issue, State Farm also owes no duty to defend claims to which coverage does not apply. Ignoring the contractual limitations under this policy language would impermissibly rewrite the parties' contract. That approach would not only violate the policy's plain language, but would also adversely affect the public interest.

Insurance contracts are underwritten and priced based on the risks that the insurer agrees to assume.[13] The premium charged reflects the risk that the insurer assumed. Texas courts recognize that an insurer "is entitled to accurately reflect in the policy the risks being insured and to charge premiums based upon those risks." *Holyfield v. Members Mut. Ins. Co*., 566 S.W.2d 28, 29 (Tex. Civ. App.—Dallas), *writ ref'd n.r.e.*, 572 S.W.2d 672 (Tex. 1978). *See also T.C. Bateson Const. Co. v.*

[13] *See e.g., In re Texas Ass'n of School Boards, Inc*., 169 S.W.3d 653, 658 (Tex. 2005) (generally describing insurance as the insured's payment of a premium in exchange for the insurer's assumption of the risk specified in the policy)(*citing* Couch on Insurance 3d § 69.2 (1996)); *Farmers Ins. Exchange v. Greene*, 376 S.W.3d 278 (Tex. App.—Dallas 2012), *aff'd*, 446 S.W.3d 761 (Tex. 2014)("The foundation of insurance is risk distribution and premiums are a function of calculated risk.").

Lumbermens Mut. Cas. Co., 784 S.W.2d 692, 699 (Tex. App.—Houston [14th Dist.] 1989, writ denied) (recognizing that the qualifying phrase "to which this insurance applies" in the insuring agreement "underscores the basic notion that the premium paid by the insured does not buy coverage for all [ ] damage but only for that type of damage provided for in the policy.")

Forbidding consideration of known facts concerning coverage, particularly where they have no relationship to the underlying claim, would have the effect of negating the policy terms and would undermine the efficient working of the insurance mechanism. The public objective of insurance as a risk-spreader is accomplished through a risks-for-premium exchange based on the nature of the insured risks and their likely incidence and cost in the future. Through this process, the insurer calculates the cost consequences of given risks for the pool as a whole. The insurer then sets a premium that, in the aggregate, provides adequate funds to meet the liabilities it agrees to assume. But that original risk assessment becomes a nullity if the language of the policy is ignored or redefined to expand coverage beyond what was bargained for and anticipated by the insurer in the insurance contract. Courts and commentators have noted that expanding coverage beyond

the written contract will require underwriters to pass on the cost of the insurer's expanded, unplanned risk to all consumers of insurance.[14]

Besides serving the public interest by properly tying together the scope of policy coverage and the basis of premium calculation, recognizing an exception to the eight-corners rule for coverage evidence that does not concern the underlying claim limits the danger that third-party claimants will "artfully craft" pleadings in an attempt to trigger insurance coverage. *See Weingarten*, 343 S.W.3d at 869 ("If a contract does not exist, a duty to defend should not be allowed to spring into existence based on artful or inartful pleading.") This consideration is especially relevant and strong when, as here, the claimant has apparently re-pled its petition in an attempt to render the allegations "insufficient" to negate an insurer's defense obligations. An insurer's duty to defend should not turn on the "artful" pleading of a claimant who purposefully removes from her complaint facts that negate coverage in an effort to plead the suit into coverage. Additionally, a clear rule that

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[14] *E.g.*, *Weedo v. Stone-E-Brick, Inc.*, 405 A.2d 788, 790 (N.J. 1979) (same); *North River Ins. Co. v. Cy Thompson Transp. Agency, Inc.*, 840 F.2d 139 (1st Cir. 1988) (insurance contracts are underwritten and priced based on the risks that the insurer agrees to assume). *See also* David S. Miller, *Insurance as Contract: The Argument for Abandoning the Ambiguity Doctrine*, 88 Colum. L. Rev. 1849, 1863 (1988) (the stretching of policy language to find coverage necessarily destroys the delicate risk-allocating mechanism of insurance by replacing the parties' more efficient allocation of risk with a court's status-based decision).

permits consideration of readily ascertainable facts would counteract the distorting effects that modern "notice pleading" can have on insurance coverage determinations.

In sum, enforcing the contractual limitation of the policy by permitting consideration of extrinsic evidence in determining the insurer's defense obligation will support the public interest by protecting the efficient working of the insurance system. It also eliminates any doubt on whether artful pleadings of fact can create insurer obligations that neither party to the insurance policy intended or contracted for in the policy terms.

CONCLUSION

Amici urge the Court to answer the certified question in the affirmative. This Court should rule that an exception to the eight corners rule permits consideration of extrinsic facts relating solely to coverage which do not conflict with the allegations of the underlying petition or overlap with the merits of the claimant's case.

Dated this 4th day of November, 2019.

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CERTIFICATE OF COMPLIANCE

I hereby certify this document contains 6,285 words, within the limit mandated by Texas Rule of Appellate Procedure 9.4(i)(2)(B).

Dated this 4th day of November, 2019.

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