

# CHIPPING AWAY AT THE EIGHT-CORNERS RULE

*Monroe Guaranty v. BITCO* and Its Implications  
for the Insurer's Duty to Defend

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# SPEAKERS



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# THE EIGHT-CORNERS RULE

In 1965, Texas Supreme Court first adopted what we now know as the eight-corners rule.

“[T]he allegations of the complaint should be considered in light of the policy provisions without reference to the truth or falsity of such allegations ....”



Announced a broad view of the eight-corners rule:

“Where the complaint does not state facts sufficient to clearly bring the case within or without the coverage, the general rule is that the insurer is obligated to defend if there is, potentially, a case under the complaint within the coverage of the policy. Stated differently, in case of doubt as to whether or not the allegations of the complaint against the insured state a cause of action within the coverage of a liability policy sufficient to compel the insurer to defend the action, such doubt will be resolved in the insured’s favor.”

# NORTHFIELD EXCEPTION

*Northfield Ins. Co. v. Loving Home Care, Inc.* (5th Cir. 2004)



Source: Jolie McCullough, The Texas Tribune

Fifth Circuit makes an *Erie* guess that the Texas Supreme Court would **NOT** find an exception to the eight-corners rule.

If Texas Supreme Court were to recognize an exception, it would apply when:

1. It is initially impossible to discern whether coverage is potentially implicated; AND
2. When the extrinsic evidence goes solely to a fundamental issue of coverage.

Texas Supreme Court waits 18 years to actually address *Northfield*.

# TEXAS SUPREME COURT'S REACTION TO *NORTHFIELD*

## *GuideOne Elite Ins. Co. v. Fielder Rd. Baptist Church*

Court declines to recognize an exception for “overlapping” evidence that implicates both **coverage** and **merits** of the claim.

- Expressly acknowledges widespread use of *Northfield* exception.
- Interpreted as a tacit approval of *Northfield*.

Tex. 2006

## *Zurich Am. Ins. v. Nokia, Inc.*

Court declines to recognize *Northfield* exception because it was not “initially impossible to determine whether coverage is potentially implicated.”

- This is the second time Texas Supreme Court acknowledges the widespread use of *Northfield* exception.

Tex. 2008

## *Pine Oak Builders, Inc. v. Great Am. Lloyds Ins. Co.*

Extrinsic evidence that contradicts the allegations of the underlying petition is prohibited regardless of it being introduced to limit or trigger the duty to defend.

- Court contemplates an exception for collusion to footnote but does not find it applicable in this case.

Tex. 2009

# FIFTH CIRCUIT EMBRACES EXCEPTION

## *Ooida Risk Retention Group, Inc. v. Williams* (5th Cir. 2009)

No. 08-10381

In *Northfield Ins. Co.*, this Court held that the Texas Supreme Court would not recognize an exception to the eight corners rule. However, the Court also stated that if the Texas Supreme Court were to recognize an exception, it would be possible to discern whether coverage under the policy is determined by extrinsic evidence goes solely to a fact that overlaps with the merits of or engages the underlying case." *Northfield*, 363 F.3d at 531. The Texas Supreme Court in *Fielder Rd. Baptist Church*, 197 S.W.3d 100 (Tex. 2006), cited this language from the Texas Supreme Court and held that the circumstances of the case here support the application of an exception. The district court rejected *GuideOne* support the application of an exception to the eight corners rule exists here.

**We find that *GuideOne* supports our "Erie guess" that the limited conditions of an exception to the eight corners rule exists here. The facts at hand fit comfortably within the narrow language contained in *Northfield*: readily ascertainable facts, relevant to coverage, that do not "not overlap with the merits of or engage the truth or falsity of any facts alleged in the underlying case."**

**conditions of an exception to the eight corners rule exists here. The facts at hand fit comfortably within the narrow language contained in *Northfield*: readily ascertainable facts, relevant to coverage, that do not "not overlap with the merits of or engage the truth or falsity of any facts alleged in the underlying case."**

*Northfield*, 363 F.3d at 531. The fact relevant to whether Moses is an "employee" under Section 390.5—whether he was tandem-driving with Williams, and thus "operating a commercial motor vehicle"—does not implicate Williams' negligence in the underlying suit, does not contradict any of the allegations in the pleadings, and controls the question of policy coverage. See, e.g., *W. Heritage Ins. Co. v. River Entm't*, 998 F.2d 311, 314-15 (5th Cir. 1993)(holding that applicability of policy exclusion for service of alcohol to an intoxicated person was necessary to determine initial question of coverage, and thus considering evidence extrinsic to the pleadings and policy). Because the pleadings do not

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- Switched from *wouldn't recognize* to *would*.
- Even so, since *Northfield*, the Fifth Circuit twice allowed extrinsic evidence.
- But Texas Supreme Court stays silent.

# TEXAS SUPREME COURT RECOGNIZES FRAUD EXCEPTION

## *Loya Ins. Co. v. Avalos* (Tex. 2020)

- Created to address cases of collusive fraud.
- If an insurer has “undisputed evidence” of the fraud, it can withdraw its defense without filing a declaratory judgment action.
- Unlikely to have widespread application but could be extended if it involved the insured’s fraud.



<https://www.freepik.com/photos/damaged-car> Damaged car photo created by jcomp - [www.freepik.com](http://www.freepik.com)

★ *False and fraudulent allegations against the insured made by third parties, without the involvement of the insured, can still create a duty to defend.*

# FIFTH CIRCUIT CERTIFIED QUESTION

## *Richards v. State Farm Lloyds* (Tex. 2020)

- ATV accident case.
- Homeowners policy excluded accidents that occurred off the insured premises.
- Pleadings did not specify where the accident occurred, but extrinsic evidence proved it occurred off the insured premises.
- Federal trial court applied an exception to the eight corners rule where the policy does not promise to defend against “groundless, false, or fraudulent” allegations.
- Fifth Circuit certified the issue to the Texas Supreme Court, disavowing any intent to limit the scope to that issue alone.



## FIFTH CIRCUIT CERTIFIED QUESTION

*Richards v. State Farm Lloyds* (Tex. 2020)

“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?”

“We disclaim any intention or desire that the Supreme Court of Texas confine its reply to the precise form or scope of the question certified.”

# FIFTH CIRCUIT CERTIFIED QUESTION

## *Richards v. State Farm Lloyds* (Tex. 2020)

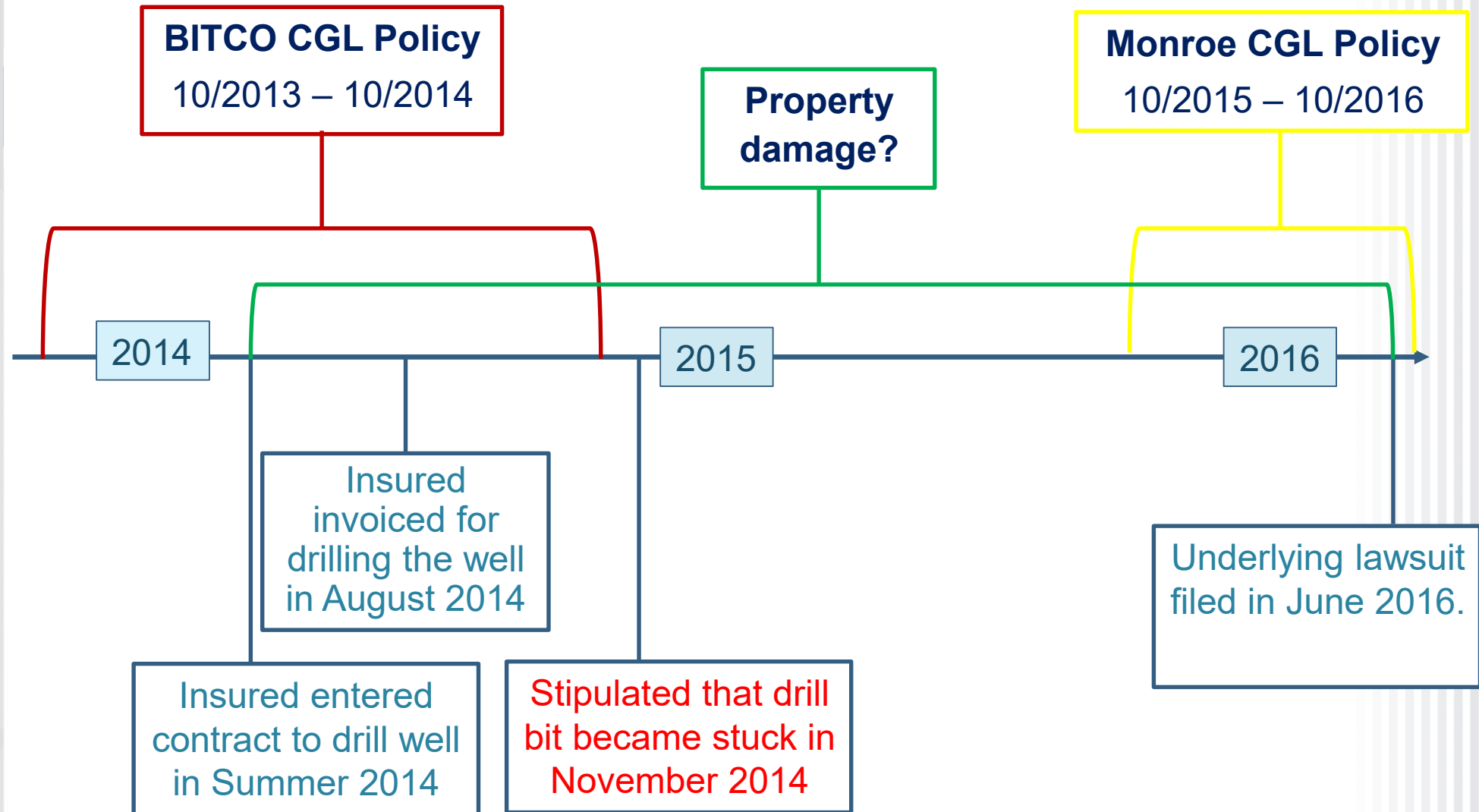
- Texas Supreme Court recognizes that exceptions can be created by agreement (terms of the policy)
- Merely omitting language promising to defend against even “groundless, false, or fraudulent” allegations was not enough
- The court recognized the “widespread” application of the *Northfield* exception to the eight-corners rule but declined to address it because the certified question did not specifically ask it to.
- The court will answer “only the questions certified and nothing more.”

# BITCO V. MONROE GUARANTY

*BITCO Gen. Ins. Corp. v. Monroe Guar. Ins. Co.* (5th Cir. 2021)

- Timing of occurrence question.
- Freshly briefed when *Richards* issued.
- The Fifth Circuit took a lesson and, on its own motion, certified the validity of the *Northfield* exception point blank:
  1. Is the exception to the eight-corners rule articulated in *Northfield Ins. Co. v. Loving Home Care, Inc.*, 363 F.3d 523 (5th Cir. 2004), permissible under Texas law?
  2. When applying such an exception, may a court consider extrinsic evidence of the date of an occurrence when (1) it is initially impossible to discern whether a duty to defend potentially exists from the eight-corners of the policy and the pleadings alone; (2) the date goes solely to the issue of coverage and does not overlap with the merits of liability; and (3) the date does not engage the truth or falsity of any facts alleged in the third-party pleadings?

# BITCO: Underlying Lawsuit



# BITCO: District Court Holding

*BITCO Gen. Ins. Corp. v. Monroe Guar. Ins. Co.* (W.D. Tex. 2019)

Defendants have damaged Plaintiff's property by lodging a drill bit and part of a bottom hole assembly in the aquifer under Plaintiffs' property, damaging the aquifer and damaging the free flow of water in the aquifer.

**AGES**  
of Contract and Defendants' Negligence,  
costs necessary to drill another well and  
ants have damaged Plaintiff's property by  
e assembly in the aquifer under Plaintiffs'  
ing the free flow of water in the aquifer.  
xceeding (\$1,000,000.00), ONE-MILLION

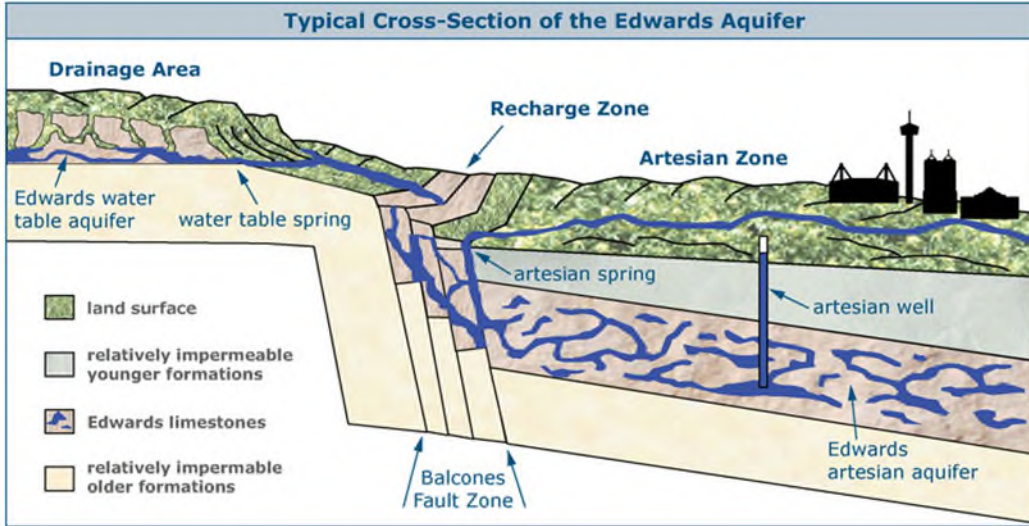
**XII. JURY DEMAND**

Plaintiff hereby requests that all causes of action alleged herein be tried before a jury. Plaintiff has tendered the appropriate fee.

**XIII. PRAYER**

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays, moves and respectfully requests this Honorable Court for the following relief:

That upon final hearing and trial hereof, this Honorable Court grant to the Plaintiff such relief as to which he may show himself justly entitled, either at law or in equity, either general or special, including declaratory judgment against the Defendant(s) for actual damages, attorney's fees, costs of suit, and prejudgment and post judgment interest, if allowed by law.



Source: Gregg Eckhardt, The Edwards Aquifer Website

## *BITCO: Fifth Circuit Opinion*

*BITCO Gen. Ins. Corp. v. Monroe Guar. Ins. Co.* (5th Cir. 2021)

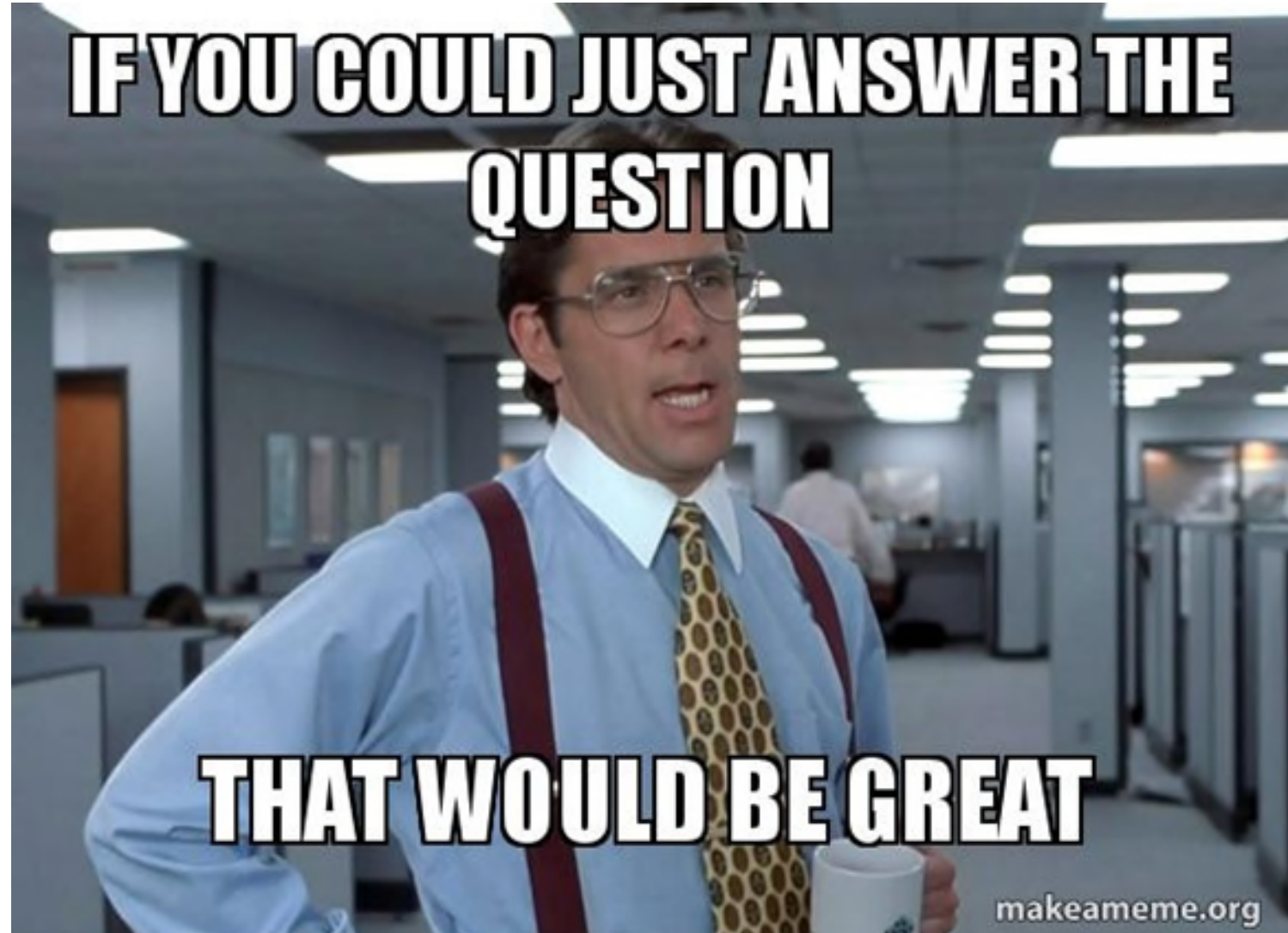
Fifth Circuit notes that pleadings do not provide dates for any alleged negligent acts or property damage.

*“Key to deciding this case is whether this court, applying Texas law, can consider extrinsic evidence—the stipulated date the drill became stuck—when deciding whether a duty to defend exists.”*

Fifth Circuit describes the facts more favorably to *Monroe’s* position

*“Importantly, BITCO and Monroe stipulated that the drill bit was stuck in the bore hole ‘during drilling’ ‘in or around November 2014.’”*

*Fifth Circuit Tries Again*



# The Texas Supreme Court Answers

*Monroe Guar. Ins. Co. v. BITCO Gen. Ins. Corp.* (Tex. 2022)

Extrinsic evidence **is admissible** “if the underlying petition states a claim that could trigger the duty to defend,” but “due to a gap in the plaintiff’s pleadings,” the duty cannot be determined under the eight-corners rule, provided the extrinsic evidence:

- Goes solely to the issue of coverage and does not overlap with the merits of liability,
- Does not contradict facts alleged in the pleading, and
- Conclusively establishes the coverage fact to be proved.

Extrinsic evidence of the date of an occurrence may be considered when the above requirements are met.

Eight-corners rule remains the initial inquiry to determine the duty to defend and will resolve coverage determinations in “most” cases.



# BITCO: Texas Supreme Court's Holding

Despite holding that extrinsic evidence *can* be admissible, holds that “the stipulation offered ... [m]ay not be considered because it overlaps with the merits of liability.”

“In cases of continuing damage like the kind alleged here, evidence of the date of property damage overlaps with the merits.”

“A dispute as to *when* property damage occurs also implicates *whether* property damage occurred on that date, forcing the insured to confess damages at a particular date to invoke coverage, when its position may very well be that no damage was sustained.” (emphasis in original)



# COMPARING EXCEPTIONS

	<i>Northfield</i> 5th Cir. 2004	<i>BITCO</i> Tex. 2022
Requires a threshold “gap”	✓	✓
Cannot contradict pleadings	✓	✓
Cannot overlap with the “merits of liability”	✓	✓

# “POTENTIALLY IMPLICATED” ???

*Monroe Guar. Ins. Co. v. BITCO Gen. Ins. Corp.* (Tex. 2022)

## What is the practical difference?

Whether “the pleading contains the facts necessary to resolve” the coverage question.

**NOT**

Whether it is “initially impossible to discern from the pleadings and policy whether coverage is potentially implicated.”

Disposed of fundamental coverage prong of *Northfield*.

- Rationale for considering extrinsic evidence is sound regardless of whether it is a fundamental coverage issue.

# EVIDENCE MUST BE CONCLUSIVE

*Monroe Guar. Ins. Co. v. BITCO Gen. Ins. Corp.* (Tex. 2022)

Extrinsic evidence, to be admissible, must “conclusively establish the coverage fact to be proved.”

- Familiar summary judgment standard
- Requires the absence of a fact issue on the “coverage fact,” which presumes both parties can introduce evidence to prove or negate the existence of a fact issue.

# KEY TAKEAWAYS



- Eight-corners rule will remain the primary test.
- Extrinsic evidence is admissible to fill a “gap”
- Key fight probably will be whether the coverage issue overlaps with the merits

# WHAT DOES “GAP” MEAN?



*Pharr-San Juan-Alamo ISD v. Tex. Political Subdivisions Prop.* (Tex. 2022)

- Delivered same day as *Bitco*
- Petition alleged bodily injury caused by “being thrown from a golf cart”
- Appellate court admitted extrinsic evidence of the meaning of golf cart because it “potentially” could refer to a covered auto
- Texas Supreme Court held no duty to defend or indemnify because “golf cart” is not a “covered auto”
- No “gap” in the petition as to coverage
- Reaffirms Court’s commitment to plain language construction



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# APPLYING *BITCO*

**In looking forward, look to the past.**

How would pre-*BITCO* extrinsic evidence cases change, if at all, under *BITCO*?

## APPLYING *BITCO*

*Certain Underwriters at Lloyd's, London v. Superior Nationwide Logistics, Ltd.*  
(S.D. Tex. Feb. 7, 2021)

Court determined it *could not* consider extrinsic evidence under *Northfield* exception because:

- it was *not* initially impossible to discern whether coverage was potentially implicated because looking solely at the eight corners, there were no facts alleged that would give rise to the application of the exclusion for employees of independent contractors



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*Certain Underwriters at Lloyd's, London v. Superior Nationwide Logistics, Ltd.*, No. 4:20-CV-00376, 2021 WL 707671, at \*1 (S.D. Tex. Feb. 7, 2021).



# APPLYING *BITCO*

*Canal Ins. Co. v. Greenland Trucking, LLC* (N.D. Tex. Feb. 9, 2021)

Court considered extrinsic evidence under *Northfield* exception because:



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- it was impossible to determine from the eight corners whether coverage was potentially implicated because the underlying complaint did not state one way or the other whether the injured passenger was an employee (which would go to a fundamental issue of coverage); and
- whether the injured passenger was an employee had no bearing on the merits of the claims in the underlying lawsuit or the truth or falsity of any facts alleged

# BITCO TO THE RESCUE

	<i>Superior Nationwide Logistics</i>	<i>Greenland Trucking LLC</i>
<b>Threshold “gap”</b>	✓	✓
<b>Conclusive</b>	✓	✓
<b>Does not overlap with merits</b>	✓	✓
<b>Does not contradict pleadings</b>	✓	✓

# APPLYING *BITCO*

## *Int'l Serv. Ins. Co. v. Boll* (Tex. Civ. App.—Houston 1965)



- Early eight-corners exception case.
- Auto policy with an exclusion for a particular named individual (the insured's son).
- Pleadings alleged that the insured's "son" was driving, but did not identify him by name, making it impossible to determine solely from the pleadings whether the exclusion applied.
- The court permitted the use of extrinsic evidence to establish that the insured's son was the excluded individual.
- Likely permissible under *BITCO*: the pleadings left a "gap;" the issue went solely to coverage and the evidence did not contradict the pleadings.

# APPLYING *BITCO*

## ***Cook v. Ohio Cas. Ins. Co.* (Tex. Civ. App.—Texarkana 1967)**

- Auto policy with exclusion where the insured was driving a vehicle belonging to a related member of the insured's household.
- The pleadings did not address the matter of whose vehicle was involved.
- The court permitted use of extrinsic evidence to establish that the insured was driving an excluded vehicle.
- Likely permissible under *BITCO*: the pleadings left a “gap;” the issue went solely to coverage and the evidence did not contradict the pleadings.
- Notably, not a “fundamental” coverage issue.



# APPLYING *BITCO*

## *State Farm Fire & Cas. Co. v. Wade.* (Tex. Civ. App.—Corpus Christi 1992)



- Boatowner’s policy that excluded coverage where the boat was being used in a “business pursuit.”
  - Pleadings did not address the nature of the insured’s use at the time of the accident.
  - Court permitted use of extrinsic evidence to establish that the insured was using the vessel for an excluded purpose.
- 
- Likely permissible under *BITCO*: the pleadings left a “gap;” the issue went solely to coverage and the evidence did not contradict the pleadings.
  - Can imagine scenarios where it might overlap with the merits.

# APPLYING *BITCO*

## ***Am. Family Mut. Ins. Co. v. Savickas* (Ill. 2000)**

- Insured sued for wrongful death after shooting and killing someone.
- Homeowner's insurer claimed "expected or intended" harm exclusion applied, offered evidence of the insured's murder conviction.
- The intermediate court of appeals held the evidence was inadmissible, but the state supreme court reversed, holding it was admissible to collaterally estop the insured from denying the exclusion applied.
- Likely not admissible under *BITCO*: evidence of a criminal conviction overlaps with the merits of the insured's liability.
- *Northfield* was very similar: The Fifth Circuit held that evidence of a criminal conviction could not be considered to establish that a "criminal acts" exclusion applied.

## ANOTHER POTENTIAL EXCEPTION?



***Weingarten Realty Mgmt. Co. v. Liberty Mut. Fire Ins. Co. (Tex. Civ. App.—Houston [14th Dist.] 1992)***

- Cited by *BITCO* in a footnote as a case recognizing an exception.
- CGL policy that covered the insured’s “lessors” as additional insureds.
- The pleadings erroneously alleged that the defendant was a lessor.
- The court permitted use of extrinsic evidence to establish that the defendant was not a lessor of the insured and, therefore, was not an insured under the policy.
- Not permissible under *BITCO* because the extrinsic evidence contradicted the pleadings and potentially overlapped with the merits.

## ANOTHER POTENTIAL EXCEPTION?



### ***Weingarten Realty Mgmt. Co. v. Liberty Mut. Fire Ins. Co.* (Tex. Civ. App.—Houston [14th Dist.] 1992)**

- Question whether the Texas Supreme Court would recognize this as a separate exception for “pure coverage” disputes.
- The case is similar to *GuideOne Elite Ins. Co. v. Fielder Rd. Baptist Ch.*, 197 S.W.3d 305 (Tex. 2006), where the supreme court disallowed extrinsic evidence to show the insured did not employ the alleged wrongdoer at the time of the incident, contrary to the allegations.
- Key difference: In *GuideOne*, the party seeking a defense was the named insured, whereas in *Weingarten*, the party seeking a defense was a “stranger” to the policy who claimed to be an additional insured.
- The eight-corners rule protects “the insured.”



## LOOKING TO THE FUTURE



<https://www.click2houston.com/features/2022/01/27/s-how-us-youre-a-texan-without-telling-us-youre-a-texan/#/rounds/1/gallery>

- More declaratory judgment actions litigating scope of exception to eight-corners rule
  - What facts do not overlap with the merits?
- Push back on “potentially” implicate coverage as basis for duty to defend
- Most conservative approach is to defend under a Reservation of Rights and seek declaratory relief

# Questions ?

Texas CLE Course Number

174157818



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