

# CAUSE NO. 06-1018

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IN THE SUPREME COURT OF TEXAS

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**D.R. HORTON-TEXAS, LTD.,**  
*Petitioner*

v.

**MARKEL INTERNATIONAL INSURANCE COMPANY, LTD.,**  
*Respondent*

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ON MOTION FOR REHEARING

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**BRIEF OF AMICI CURIAE  
TEXAS ASSOCIATION OF BUILDERS &  
NATIONAL ASSOCIATION OF HOME BUILDERS  
IN SUPPORT OF PETITIONER D.R. HORTON-TEXAS, LTD.**

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## **INTRODUCTION**

Texas Association of Builders (“TAB”) and National Association of Home Builders (“NAHB”), pursuant to Tex. R. App. P. 11, respectfully submit this brief as amici curiae in support of the Motion for Rehearing filed by Petitioner D.R. Horton–Texas, Ltd. (“D.R. Horton”). TAB represents the State of Texas’ home builders and NAHB represents the nation’s home builders. TAB and NAHB urge this Court to reconsider its denial of the Petition for Review and find that, at the very least, the Fourteenth District Court of Appeals erred by conflating the “duty to defend” with the “duty to indemnify” when it held that because D.R. Horton could not introduce extrinsic evidence to establish the duty to defend, as a matter of law, it also could not establish a duty to indemnify. The court of appeals’ holding on that issue effectively deprives D.R. Horton of the additional insured status for which it contracted with its subcontractor based on the incomplete allegations pled by the third-party claimant. And, even if an “eight corners” approach is taken whereby no extrinsic evidence is admitted at the duty to defend stage, the same standard should not be applied to the duty to indemnify, as it is well-recognized that the duties are separate and distinct.

## **STATEMENT OF INTEREST**

TAB is a non-profit trade association that was established over 50 years ago to help promote the dream of home ownership and to serve the common interests of those involved in the residential construction industry in the State of Texas. TAB’s 11,500+ membership base primarily is made up of home builders, remodelers, developers and other companies and individuals who have an interest and a stake in a healthy and vibrant

homebuilding industry in the State of Texas. TAB is affiliated with NAHB and 31 local associations that are located throughout the State of Texas. TAB's membership represents approximately 550,000 jobs and \$35 billion of the Texas economy.

TAB, as amicus, has an interest in this case in that TAB and its members are extremely concerned about the scope of commercial general liability ("CGL") insurance coverage and the role CGL insurance plays within the construction industry in general, and in the housing industry in particular. This interest stems, in part, from the importance of additional insured status as a contractual risk transfer tool, which is used often by members of TAB in their building contracts.

NAHB is a non-profit trade association that represents more than 200,000 builders and associate members organized into more than 800 affiliated state and local associations in all fifty states, the District of Columbia, and Puerto Rico. These affiliated associations include 32 state and local associations in Texas, representing 11,500+ members who build most of Texas' housing. NAHB is the voice of the American housing industry. NAHB's goals are to promote home ownership; foster a healthy and efficient housing industry; and promote policies that will keep safe, decent and affordable housing a national priority. Like TAB, members of NAHB also use additional insured status as an important contractual risk transfer tool.

NAHB can offer this Court a broad view of the role that CGL insurance plays within the home building industry across the nation. Moreover, both it and TAB can provide this Court insight into the ramifications the court of appeals' decision will have on Texas home builders and Texas homeowners alike if it is upheld.

Neither TAB nor NAHB are parties to this lawsuit and they have no direct financial interest in its outcome. This brief was drafted for TAB and NAHB by the undersigned counsel who was paid a fee for preparing the brief.

**STATEMENT OF THE CASE**

TAB and NAHB adopt the Statement of the Case in the Petitioner's Petition for Review.

**STATEMENT OF JURISDICTION**

TAB and NAHB adopt the Statement of Jurisdiction in the Petitioner's Petition for Review.

**ISSUES PRESENTED**

TAB and NAHB adopt the Issues Presented in the Petitioner's Petition for Review.

## **STATEMENT OF FACTS**

TAB and NAHB adopt the Statement of Facts in the Petitioner's Petition for Review.

## **SUMMARY OF ARGUMENT**

Home builders require subcontractors to pay substantial premiums for liability insurance to protect them from the risk of loss that results from inadvertent property damage to the houses they build when such property damage is caused by or arises out of the work of their subcontractors. Moreover, a traditional contractual risk transfer tool for the home builder is to require that it be named as an additional insured under its subcontractors' policies. Then, when the home builder is sued for property damage (or bodily injury) arising out of the work of their subcontractors, the home builder turns to its subcontractors' liability insurer to provide a defense and, ultimately, indemnity for the claims asserted against it.

Under Texas law, and assuming an "eight corners" rule applies, the home builder is at the mercy of the claimant's pleading. If the claimant fails to reference the subcontractor, which is quite common in the home building context, a defense under the subcontractors' policy may never be triggered. That result occurs even when, as here, extrinsic evidence exists that would have satisfied the causal nexus and triggered additional insured status. This problem is then further compounded by a finding that no duty to defend necessarily means that no duty to indemnify exists. In other words, the duty to defend is conflated with the duty to indemnify because of an improper extension of the "eight corners" rule to the duty to indemnify.

In the instant case, Markel International Insurance Company, Ltd. (“Markel”) and Sphere Drake Insurance, Ltd. (“Sphere Drake”) refused to defend D.R. Horton, who was an additional insured under policies issued by those companies to D.R. Horton’s subcontractor, Rosendo Ramirez, because the allegations in James and Cicely Holmes’ pleadings did not specify that the property damage was a result of Ramirez’s work. The court of appeals held that, under the “eight corners” rule, neither Markel nor Sphere Drake owed D.R. Horton a defense even though evidence existed that clearly established the causal nexus necessary to trigger additional insured status.

Despite acknowledging the existence of “a significant amount” of extrinsic evidence that established Ramirez’s role on the project, the court of appeals concluded that the lack of any reference to Ramirez in the pleadings negated *both* the duty to defend and the duty to indemnify. That ruling, however, flies in the face of the nature of the duty to indemnify, which is based on the *actual* facts and not the facts as alleged in a pleading.

TAB and NAHB acknowledge that, in the vast majority of cases, the duty to defend can and should be decided by looking only at the four corners of the pleadings in the underlying lawsuit and the four corners of the insurance policy at issue. And, TAB and NAHB acknowledge this Court’s recent holding in *Pine Oak Builders, Inc. v. Great Am. Lloyds Ins. Co.*, 2009 WL 353526 (Tex. Feb. 13, 2009), in which the Court again reaffirmed an “eight corners” approach to the duty to defend. But when application of that rule results in a finding of no duty to defend, it should not automatically be extended to the duty to indemnify *unless* the same reasons that negate the duty to defend *necessarily* negate any possibility that a duty to indemnify can be triggered. Here, the

court of appeals' recognition that extrinsic evidence existed regarding Ramirez's role in causing the property damage at issue necessarily means that a duty to indemnify potentially existed, and thus the court of appeals erred by applying the same "eight corners" test to the duty to indemnify.

By ruling on both at the same time, the court deprived D.R. Horton and home builders like it of contracted-for additional insured status. Allowing this decision to stand, at least with respect to the duty to indemnify, risks disrupting the Texas home building industry and could increase housing prices for Texas home owners.

### **ARGUMENT & AUTHORITIES**

#### **A. No duty to defend does not *necessarily* mean no duty to indemnify.**

By denying the petition for review filed in this case, this Court upheld the court of appeals' finding that no exception exists to the "eight corners" rule under Texas law.<sup>1</sup> *See D.R. Horton-Texas, Ltd. v. Markel Int'l Ins. Co., Ltd.*, 2006 WL 3040756, \*4–\*5 (Tex. App.—Houston [14th Dist.] Oct. 26, 2006, pet. denied). But, even if no such exception exists, this Court still should have granted the petition for review in order to clarify an important issue in Texas jurisprudence regarding the relationship between the duty to defend and the duty to indemnify—namely, that the lack of the former does not *always* negate the latter.

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<sup>1</sup> On the same day that it denied the petition for review in this case, this Court also issued an opinion in *Pine Oak Builders, Inc. v. Great Am. Lloyds Ins. Co.*, 2009 WL 353526 (Tex. Feb. 13, 2009), in which it refused an insured's attempt to introduce extrinsic evidence that it used subcontractors to perform the work allegedly complained of by the third-party claimants because such evidence would contradict the allegation that Pine Oak had performed the work itself. *Id.* at \*3. It is not the intent of this brief to attack the Court's holding in *Pine Oak* with respect to the admission of extrinsic evidence at the duty to defend stage. Rather, although TAB and NAHB filed a brief in support of D.R. Horton's petition for review, this brief acknowledges the Court's holding in *Pine Oak* and is limited to the separate and distinct duty to indemnify issue.

In Texas (and elsewhere), it is generally accepted that the duty to defend is broader than the duty to indemnify. *See Burlington Ins. Co. v. Tex. Krishnas, Inc.*, 143 S.W.3d 226, 229 (Tex. App.—Eastland 2004, no pet.); *E&L Chipping Co. v. Hanover Ins. Co.*, 962 S.W.2d 272, 274 (Tex. App.—Beaumont 1998, no pet.); *Northfield Ins. Co. v. Loving Home Care, Inc.*, 363 F.3d 523, 528 (5th Cir. 2004). *See also Am. Family Mut. Ins. Co. v. Roth*, 886 N.E.2d 1149, 1153 (Ill. Ct. App. 2008) (“[T]he duty to defend is broader than the duty to [indemnify].”); *Universal Underwriters Ins. Co. v. Youngblood*, 549 So.2d 76, 78 (Ala. 1989) (“An insurer’s duty to defend can be more extensive than its duty to pay.”); JEFFREY W. STEMPEL, *STEMPEL ON INSURANCE CONTRACTS* § 25.07[A] (3d ed. 2005 & Supp. 2008) (“The duty to defend is broader than [the] duty to indemnify . . . .”); BARRY R. OSTRAGER & THOMAS R. NEWMAN, *HANDBOOK ON INSURANCE COVERAGE DISPUTES* § 5.02 (14th ed. 2008) (“It has been uniformly held that the policy covenant to defend is ‘separate from’ and ‘broader than’ the covenant to indemnify.”). Accordingly, an insurer may have a duty to defend even when the adjudicated facts ultimately result in a finding that the insurer has no duty to indemnify. *See Utica Nat’l Ins. Co. v. Am. Indem. Co.*, 141 S.W.3d 198, 203 (Tex. 2004); *Farmers Tex. County Mut. Ins. Co. v. Griffin*, 955 S.W.2d 81, 82 (Tex. 1997). In other words, it is well-settled that the duty to defend and the duty to indemnify are distinct and separate duties. *See Griffin*, 955 S.W.2d at 82; *Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d 819, 821–22 (Tex. 1997).

In contrast to the duty to defend, the duty to indemnify is not based on the third-party claimant’s allegations, but rather upon the actual facts that comprise the third

party's claim. *See Zurich Am. Ins. Co. v. Nokia, Inc.*, 268 S.W.3d 487, 490 (Tex. 2008); *Canutillo Indep. Sch. Dist. v. Nat'l Union Fire Ins. Co.*, 99 F.3d 695, 701 (5th Cir. 1996). As this Court stated in *Griffin*, “[A]n insurer may have a duty to defend but, eventually, no duty to indemnify. For example, a plaintiff pleading both negligent and intentional conduct may trigger an insurer's duty to defend, but a finding that the insured acted intentionally and not negligently may negate the insurer's duty to indemnify.” *Griffin*, 955 S.W.2d at 82. For this reason, the duty to indemnify is not ripe for determination prior to the resolution of the underlying lawsuit unless a court first determines, based on the “eight corners” rule, that there is no duty to defend and the *same reasons* that negate the duty to defend also negate any *potential* for indemnity. *See id.*

TAB and NAHB recognize that, in most cases, the negation of the duty to defend also will negate the duty to indemnify. *See Griffin*, 955 S.W.2d at 84. As explained by this Court in *Griffin*, however, that is not—and should not be—an absolute rule:

We now hold that the duty to indemnify is justiciable before the insured's liability is determined in the liability lawsuit when the insurer has no duty to defend *and the same reasons that negate the duty to defend likewise negate any possibility the insurer will ever have a duty to indemnify*. Based on the facts and the rule we announce today, Farmers has no duty to indemnify Royal. No facts can be developed in the underlying tort suit that can transform a drive-by shooting into an “auto accident.” Farmers has no duty to defend, and, for the same reasons, has no duty to indemnify Royal.

*Id.* As this Court properly recognized in *Griffin*, no facts could have been developed that would have transformed a drive-by shooting into an “auto accident.” In contrast, facts clearly exist here that establish or—at the very least potentially establish—the necessary causal nexus to trigger additional insured status. *See D.R. Horton*, 2006 WL 3040756, at

\*5 (noting the significant amount of evidence linking Rosando Ramirez to the claims at issue, which would have triggered additional insured coverage for D.R. Horton under Ramirez’s policies). The court of appeals, while recognizing the existence of those facts, noted that to allow such evidence to be admitted at the duty to defend stage ““would by necessity conflate the insurer’s defense and indemnity duties without regard for the policy’s express terms.”” *Id.* (quoting *GuideOne Elite Ins. Co. v. Fielder Road Baptist Church*, 197 S.W.3d 305, 310 (Tex. 2006)). Likewise, however, by ignoring that evidence and ruling that the duty to indemnify *cannot* exist simply because the duty to defend does not exist, also “by necessity conflate[s] the insurer’s defense and indemnity duties without regard for the policy’s express terms.” *GuideOne*, 197 S.W.3d at 310. Simply put, the court of appeals incorrectly applied the same “eight corners” rule to both the duty to defend and the duty to indemnify and, in doing so, failed to recognize that the two duties are judged by different standards (i.e., factual allegations that create a potential for coverage versus actual facts that establish coverage).

Even though the “no duty to defend, no duty to indemnify” rule is not absolute, it is oftentimes overstated and applied as an absolute rule. *See, e.g., Am. States Ins. Co. v. Bailey*, 133 F.3d 363 (5th Cir. 1998) (“Logic and common sense dictate that if there is no duty to defend then there must be no duty to indemnify.”); *see also Carolina Cas. Ins. Co. v. Sowell*, 2009 WL 382621, \*16 (N.D. Tex. Feb. 17, 2009) (“In the instant case, the court has determined that there are no claims asserted in the Underlying Lawsuits that fall outside an exclusion. It therefore follows that Carolina can have no duty to indemnify.”); *Century Sur. Co. v. Hardscape Constr. Specialties*, 2006 WL 1948063, \*4 (N.D. Tex.

July 13, 2006) (“Of course, when there is no duty to defend, there is also no duty to indemnify.”). The negation of the duty to defend, however, **does not** automatically negate the duty to indemnify. Even if an insurer obtains a judgment as to defense and indemnity based on a particular petition or complaint, for example, it always is possible that the petition or complaint can be amended to trigger a duty to defend. *See Nautilus Ins. Co. v. Nevco Waterproofing, Inc.*, 2005 WL 1847094 (S.D. Tex. Aug. 3, 2005). In *Nautilus*, for example, the court noted as follows:

This Court’s ruling [on the duty to indemnify] is issued without prejudice and is based on the petition in the underlying suit at the time the court ruled. The Court does not intend to preclude Nevco from seeking indemnity from Evanston if Nevco is found liable on a theory that was not pleaded in Concierge’s operative petition when construed broadly.

*Id.* at \*3 n.6.<sup>2</sup> Thus, while the Southern District of Texas ruled on the duty to indemnify after finding that no duty to defend existed, the court properly limited its finding to the live pleading before it—it did not rule out the possibility that the actual facts on which the duty to indemnify ultimately should be determined would be different than what existed at the time of the duty to defend ruling. Similarly, in *Markel International Insurance Co. v. Campise Homes, Inc.*, 2006 WL 1662604 (S.D. Tex. June 6, 2006), the court concluded that:

The resolution of the duty to defend issue is not automatically dispositive of the issue of indemnity. An insurer’s duty to indemnify is distinct and separate from its duty to defend . . . . However, “[I]anguage in some cases can be read to indicate that if the live pleading at the time a determination of the duty to indemnify is sought did not trigger the duty to defend, no duty to indemnify can be found.” For example, if the same basis that

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<sup>2</sup> This decision was ultimately vacated and remanded by the Fifth Circuit based on mootness when the underlying action against the insured was dismissed after settlement was made with a major contractor.

negates the duty to defend likewise negates any possible duty to indemnify, then a court may properly consider the issue of indemnity.

In the instant case, the Court cannot find that the same basis that negated the duty to defend negates any possible duty to indemnify. Due to the sloppy pleading in the underlying lawsuit, it remains a fundamental mystery when the alleged property damage occurred. The Wolfes' did not allege property damage within the policy period, therefore, there is no duty to defend. However, this does not conclusively resolve the issue of indemnification. Presumably, the conclusion of the underlying lawsuit will clarify when the alleged damage occurred—outside or within the policy period. If the alleged damage occurred within the policy period, then there may be a duty to indemnify. It is impossible at this juncture to make a determination as to indemnification.

*Id.* at \*3 (internal citations omitted). And, in *Admiral Insurance Co. v. Little Big Inch Pipeline Co.*, 523 F. Supp. 2d 524 (W.D. Tex. 2007), the court correctly noted that:

The Court has held that based on the alleged facts in the Underlying Petition, Plaintiff Admiral has no duty to defend the Underlying Defendants in the Underlying Suit because all of the alleged damages are barred by relevant exclusions. Nevertheless, neither party has presented evidence that *any* facts have been conclusively established in the Underlying Suit. It remains possible, then, that facts may later be alleged in subsequent amended pleadings and proven at trial which establish damages that do not fall within any exclusion. These facts may thus potentially trigger Plaintiff Admiral's duty to indemnify. Ruling on the duty to indemnify might therefore be premature and "might very well conflict with findings yet to be made in the state court." Moreover, the Court cannot state with certainty that all possibility is negated that Plaintiff Admiral will "*ever have a duty to indemnify.*"

*Id.* at 545–46 (citing *Westport Ins. Corp. v. Atchley, Russell, Waldrop & Hlavinka, L.L.P.*, 267 F.Supp.2d 601, 634 (E.D. Tex. 2003); *Northfield Ins. Co.*, 363 F.3d at 528).

In *Admiral*, the court acknowledged that the live pleading before it was the second amended pleading and it had no idea how many more times the plaintiffs might amend their pleadings. *Id.* at 546 n.19. "Moreover, this Court would be supercilious to expect the

state court in the Underlying Suit to close the door on subsequent amended pleadings simply because this Court has ruled there is no duty to indemnify based on the allegations in this amended pleading.” *Id.* Further, because any ruling on the duty to indemnify would be contingent on the Underlying Defendants being found liable in the Underlying Lawsuit, the court recognized that its ruling on the duty to indemnify could be rendered moot if they were found not liable. *Id.* at 546. “It is therefore in the consideration of practicality and wise judicial administration not to rule on Plaintiff Admiral’s duty to indemnify before the Underlying Suit is fully adjudicated, since the state court proceeding presents an opportunity for ventilation of a key issue for Plaintiff Admiral’s duty to indemnify.” *Id.* Because it could not rule on indemnity, the court dismissed the remainder of the action without prejudice, as “there remain no issues that are *currently ripe* for adjudication.” *Id.* (emphasis added). *See also Gore Design Completions, Ltd. v. Hartford Fire Ins. Co.*, 538 F.3d 365, 368 n.6 (5th Cir. 2008) (noting that its finding of a duty to defend makes an analysis of the duty to indemnify unnecessary, but recognizing that the district court’s finding that no duty to indemnify existed was premature because it was based on the fact that that court found no duty to defend under the Statement of Claim before it and did not account for the possibility that evidence at trial could implicate coverage).

Likewise, if a plaintiff brings a lawsuit against the insured alleging only intentional conduct but is granted a trial amendment alleging non-intentional conduct and obtains a judgment on the alternative ground, the duty to indemnify should be triggered even though the insurer never defended. *See, e.g., Cowan*, 945 S.W.2d at 825 n.4 (“This

holding does not affect a party's right to introduce evidence of physical manifestations of mental anguish against a tortfeasor under the 'fair notice' rule . . . . Our holding extends only to the duty to defend under the complaint allegation rule.”); *see also* Ellen S. Pryor, *Mapping the Changing Boundaries of the Duty to Defend in Texas*, 31 TEX. TECH. L. REV. 869, 887–90 (2000) (noting the differences between an insurer's two duties).

Several courts from other jurisdictions and leading commentators agree that a finding of no duty to defend does not *necessarily* mean that no duty to indemnify exists. *See, e.g., Cincinnati Ins. Co. v. Taylor-Morley, Inc.*, 556 F. Supp. 2d 908, 919–20 (S.D. Ill. 2008) (“[T]he Seventh Circuit clarified that the duty to defend is *not always* broader than the duty to indemnify. Indeed, there can be circumstances in which a duty to indemnify would be triggered even if the duty to defend was not. ‘The fact that the duty to defend is generally broader than the duty to indemnify does not mean, as the district court believed, that where there is no duty to defend there can be no duty to indemnify.’”) (quoting *Keystone Consolidated Indus., Inc. v. Employers Ins. Co. of Wausau*, 456 F.3d 758, 761–62 (7th Cir. 2006)); *Skinner v. Allstate Ins. Co.*, 127 P.3d 359, 363 (Mont. 2005) (“However, in a declaratory judgment action, if there remain unresolved related issues in the underlying action that may ultimately affect whether an insurer has a duty to indemnify, issuing a ruling on indemnity obligations is premature.”); *Grinnell Mut. Ins. Co. v. Reinke*, 43 F.3d 1152, 1154 (7th Cir. 1995) (applying Illinois law and finding that although no duty to defend exists, a duty to indemnify might later exist because “the theory of recovery is not fixed until the case ends”); *Ladner & Co., Inc. v. S. Guar. Ins. Co.*, 347 So.2d 100, 103–04 (Ala. 1977) (citing *Lee v. Aetna Cas. & Sur. Co.*, 178 F.2d

750, 752, 753 (2d Cir. 1949), and holding that although no duty to defend exists a ruling on the duty to indemnify is premature because of “the plasticity of modern pleading”);<sup>3</sup> *City of Burns v. Northwestern Mut. Ins. Co.*, 434 P.2d 465, 468 (Or. 1967) (“It seems clear from the terms of the policy that the duty to pay the obligation of the insured for damages and the duty to defend the insured are independent of each other. At the time the case went to trial the complaint did not allege a covered injury and this is the prerequisite to a defense by the insurer. If, however, at the time of adjudication it had been converted into a claim for a covered injury, there appears to be no bar in the policy to the obligation of defendant to pay any resulting judgment. The allegations of the complaint at the time of the commencement of the trial are only relevant to a defense of the claim.”), *overruled in part on other grounds by*, *Ferguson v. Birmingham Fire Ins. Co.*, 460 P.2d 342 (Or. 1969); 1 ALLAN D. WINDT, *INSURANCE CLAIMS & DISPUTES: REPRESENTATION OF INSURANCE COMPANIES & INSUREDS* § 6:10 (5th ed. 2007 & Supp. 2008) (“[T]he fact that an insurer did not have a duty to defend does not mean that it might not *ultimately* have a duty to defend [and] does not mean that it might not *ultimately* have a duty to indemnify.” (emphasis added)).

Consider the situation where the allegations in a lawsuit include untrue facts that bring the claims within a policy exclusion. The insurer may, in fact, owe a duty of indemnity to its insured once the true facts are established at trial and the exclusion is found to be inapplicable. This is possible even though the insurer does not have a duty to

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<sup>3</sup> As noted previously, courts in these same jurisdictions likewise have found that the duty to defend is broader than the duty to indemnify. *See supra* at 4. Nevertheless, as indicated here, the absence of the former does not necessarily preclude the existence of the latter.

defend its insured based solely on the inaccurate facts alleged by the claimant. The oft-quoted statement that the duty to defend is broader than the duty to indemnify reaffirms the liberal nature of the “eight corners” rule, but it does not necessarily result in the negation of the duty to indemnify in all situations where a defense duty is not triggered. Accordingly, the rule is better stated as follows: When no duty to defend exists, and no facts can be developed at the trial of the underlying lawsuit to impose coverage, an insurer’s duty to indemnify may be determined by summary judgment.

**B. The court of appeals’ recognition of significant summary judgment evidence demonstrates that a potential existed for a duty to indemnify.**

The instant case provides the perfect example of a mistaken application of the “if no duty to defend, then no duty to indemnify” rule. The Fourteenth District Court of Appeals concluded that no duty to defend existed because the underlying petition failed to mention the use of subcontractors so as to trigger additional insured status. After reaching this conclusion, the court stated as follows:

Even though we do not look at the specific legal theories alleged to determine the duty to indemnify, if the underlying petition does not raise factual allegations sufficient to invoke the duty to defend, then even proof of all of those allegations could not invoke the insurer’s duty to indemnify. For this reason, the same arguments that disposed of Markel’s duty to defend also dispose of its duty to indemnify. Because the *Holmes* suit did not allege facts covered by the policy, even proof of those facts would not trigger coverage. We therefore affirm the trial court’s summary judgment in favor of Markel on the issue of Markel’s duty to indemnify.

*D.R. Horton-Texas, Ltd. v. Markel Int’l Ins. Co., Ltd.*, 2006 WL 3040756, \*6 (Tex. App.—Houston [14th Dist.] Oct. 26, 2006) (internal citations omitted). The court of appeals clearly was wrong in this regard, as it took its “eight corners” approach too far. In

particular, as noted in the opinion, D.R Horton had produced a “significant amount of summary judgment evidence” demonstrating the requisite causal link between the named insured’s work and D.R. Horton’s liability. *Id.* at \*5. Thus, even if such evidence was not admissible at the duty to defend stage because it would contradict the allegations in the underlying pleadings (i.e., as this Court held in *Pine Oak*), no valid reason exists to ignore the same extrinsic evidence at the duty to indemnify stage. In fact, since the duty to indemnify is based on *actual* facts, the introduction of such evidence to determine the duty to indemnify is proper. And, in this particular case, the underlying suit already had been resolved by settlement, so no reason existed for the court to ignore the actual facts of the case when determining the duty to indemnify. *Cf. Valley Forge Ins. Co. v. Shah*, 2009 WL 291080, \*9 (S.D. Tex. Jan. 30, 2009) (noting that the insurer settled the underlying lawsuit prior to its final adjudication and thus “the court is no longer confined to the allegations and can consider the actual facts, such as who owned the automobile and with whom Pini lived” in determining the insurer’s duty to indemnify its insured).<sup>4</sup>

By ignoring that evidence because of the “eight corners” rule, the court of appeals necessarily conflated the duty to defend with the duty to indemnify—the very fear expressed by this Court in rejecting the use of extrinsic evidence at the duty to defend stage in *GuideOne*. In other words, recognizing that the duties are separate and distinct

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<sup>4</sup> TAB and NAHB acknowledge that the Southern District of Texas also stated—albeit incorrectly—that “[t]he duty to indemnify arises only if the duty to defend first exists.” *Valley Forge*, 2009 WL 291080 at \*9 (citing *Am. States Ins. Co. v. Bailey*, 133 F.3d 363, 368 (5th Cir. 1998)). Nevertheless, it is important to note that initially a defense duty did not arise and that the court recognized a duty to defend based only on an amendment of the plaintiff’s pleadings. *Id.* It is in such scenarios that application of the “no duty to defend, no duty to indemnify” rule as an absolute proves to be erroneous. Similarly, although it did not ring true in *Valley Forge*, a duty to indemnify under the *actual* facts of the case may also later arise.

also requires recognition that taking a standard (e.g., the “eight corners” rule) that is applicable only to one duty (i.e., the duty to defend) and applying it to the other duty (i.e., the duty to indemnify), necessarily defeats that separation and distinction.

A trial court can take one of two *other* routes after ruling on the duty to defend. First, a trial court can refrain from ruling altogether on the issue of the duty to indemnify. See *Markel Int’l Ins. Co., Ltd. v. Campise Homes, Inc.*, 2006 WL 1662604, \*3 (S.D. Tex. June 6, 2006) (“It is impossible at this juncture [i.e., the duty to defend stage] to make a determination as to indemnification.”); *Admiral Ins. Co. v. Little Big Inch Pipeline Co., Inc.*, 523 F. Supp. 2d 524, 545–56 (W.D. Tex. 2007) (declining to rule on the duty to indemnify even though the court concluded that no duty to defend existed). Second, a trial court can limit its ruling to the pleading on file at the time. See also *Nevco Waterproofing*, 2005 WL 1847094, at \*3 n.6 (“This Court’s ruling [on the duty to indemnify] is issued without prejudice and is based on the petition in the underlying suit at the time the court ruled. The Court does not intend to preclude Nevco from seeking indemnity from Evanston if Nevco is found liable on a theory that was not pleaded in Concierge’s operative petition when construed broadly.”). That is, the trial court can hold: “For this reason, the same arguments that disposed of [the insurer’s] duty to defend also dispose of its duty to indemnify [*at this time*].”<sup>5</sup> *D.R. Horton*, 2006 WL 3040756, \*6.

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<sup>5</sup> While these would be viable options in cases where the underlying lawsuit remains pending, as is most often the situation, the instant case had been resolved at the time the trial court made its rulings. Accordingly, even if no duty to defend existed based on the “eight corners” rule, the trial court *should* have considered the extrinsic evidence for purposes of the duty to indemnify. Instead, both the trial court and the court of appeals applied the same “eight corners” rule to both the duty to defend and the duty to indemnify.

Simply put, if this Court does not grant the petition for review in this case and at least reverse the court of appeals' decision on this issue, it will promote the very conflation of the duty to defend and the duty to indemnify that the Court sought to avoid in *GuideOne* and in subsequent opinions. See *GuideOne Elite Ins. Co. v. Fielder Road Baptist Church*, 197 S.W.3d 305, 310 (Tex. 2006) (“[W]ere we to recognize the exception urged here, we would by necessity conflate the insurer’s defense and indemnity duties without regard for the policy’s express terms. *Although these duties are created by contract, they are rarely coextensive.*” (emphasis added)). More specifically, by adhering to the “no duty to defend, no duty to indemnify” rule, this Court would allow an insurer to avoid its duty to indemnify an additional insured—even when the additional insured has evidence to show that a potential for indemnity exists. In doing so, the ability of a general contractor to utilize the insurance for which it negotiated is left to the pleading practice of a third-party claimant’s counsel, who may—for whatever reason—fail to correctly plead the true facts that would entitle the general contractor to insurance.

### **PRAYER**

Based on the foregoing, TAB and NAHB, in support of D.R. Horton, pray that this Court take this opportunity to clarify that a finding of no duty to defend does not necessarily preclude a duty to indemnify. Accordingly, TAB and NAHB pray that this Court grant the Motion for Rehearing and grant the Petition for Review filed by D.R. Horton and hold that, even if the extrinsic evidence at issue here is not admissible under the “eight corners” rule, the evidence *can* be considered in determining whether a duty to indemnify exists.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

This is to certify that on the 12th day of March 2009, I forwarded a true and correct copy of this Amici Curiae Brief to those identified below via certified mail, return receipt requested.

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