

06-1018

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IN THE SUPREME COURT OF TEXAS  
AUSTIN, TEXAS

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DR. HORTON-TEXAS, LTD.

*Petitioner,*

v.

MARKEL INTERNATIONAL INSURANCE COMPANY, LTD.

*Respondent.*

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RESPONDENT'S RESPONSE TO PETITIONER'S  
MOTION FOR REHEARING

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## ISSUES IN SUPPORT OF DENIAL OF REHEARING

1. Whether Petitioner's extrinsic evidence even could be considered under a narrow exception to the "eight corners" rule—should this Court recognize one—when the evidence directly contradicted the allegations contained in the petition from the underlying tort claim.
2. Whether this is the appropriate case for implementing an exception to Texas's well-established eight-corners jurisprudence when Petitioner failed to develop a single coverage fact in the underlying litigation and where the trial considered—albeit improperly—and rejected D.R. Horton's extrinsic evidence manufactured in the coverage suit.

## RESPONSE TO MOTION FOR REHEARING

### **A. From a Legal, Factual and Policy Perspective, This is a Poor Case in which to Introduce a Sea-Change to Texas Insurance Law.**

Bad facts make for bad law—and this is a case of bad facts. If this Court embraces the “coverage-facts” only exception advocated in this case, it would serve as a poor precedent for the courts of this state as virtually all manner of extrinsic evidence then could be considered in a coverage analysis. This especially is the case where, as here, D.R. Horton manufactured extrinsic evidence after-the-fact (i.e. after it settled the *Holmes*’ underlying lawsuit and subsequently initiated this litigation against Markel) to obtain coverage where it otherwise did not exist. In short, if D.R. Horton is granted the relief requested, this case will be the touchstone for the “coverage-facts only” exception swallowing the “eight corners” rule. For these reasons, this Court should decline D.R. Horton’s invitation to knock the legs out of the “eight corners” rule based on the facts presented in this case.

If this Court wishes to set a precedent for the lower courts to consider “coverage-facts only” beyond the petition and covering policy when determining a duty to defend, then it should select a case where the extrinsic evidence in dispute actually relates to coverage only and does not contradict and/or question the truth or falsity of the underlying Plaintiffs’ (here, the *Holmes*’) petition. This is not that case and this Court should reject Petitioner’s arguments. This Court ultimately may adopt a “coverage-facts only” exception to the “eight-corners” rule. However, as Respondent has demonstrated at

all levels of this litigation, the underlying facts render this case an inappropriate vehicle to do so.

**B. Both D.R. Horton and the Amici Curiae Ignore the Obvious Facts that Undercut a Successful Implementation of an Eight-Corners Exception in this Case.**

This case is rife with legal maneuverings and bad facts that would serve as poor foundation upon which to implement successfully an exception to the state's well-established eight-corners' jurisprudence.

**1. Even assuming D.R. Horton and its Amici prevail in their request for an eight-corners-exception, D.R. Horton *still* loses.**

Throughout the appellate process and in its Motion for Rehearing, D.R. Horton has labored to contort its extrinsic evidence to make it appear related "solely to coverage." However, this Court's analysis need not follow D.R. Horton's tortured path. Even assuming that this Court would recognize a narrow exception to the "eight corners" rule for coverage-only facts, the Record clearly shows that it was not "initially impossible to discern whether coverage is potentially implicated." *GuideOne Elite Ins. Co. v. Fielder Road Baptist Church*, 197 S.W.3d 305, 309 (Tex. 2006). The Holmes' underlying petition did not allege that any of the complained-of defects were caused by the work of subcontractors; did not mention Rosendo Ramirez; or even suggest that the Holmeses were suing D.R. Horton for work done by someone else. (C.R. Vol. III at 419-24). Every allegation in the petition was directed solely at D.R. Horton. When comparing the specific facts alleged in the Holmes' petition to the additional insured endorsement in the Markel Policy, it cannot be contended with any seriousness that it was

“initially impossible to discern whether coverage [under Ramirez’s endorsement was] potentially implicated.” Absent a pleading alleging that D.R. Horton was being sued for liability arising out of Ramirez’s work, there was no question that coverage was not implicated. *See GuideOne*, 197 S.W.3d at 309.

Therefore, this case does not present an opportunity to expand upon the *GuideOne* opinion as urged by D.R. Horton, but rather to stand on *GuideOne*’s sound rejection of extrinsic evidence being used in coverage cases that touch on both coverage and liability.

**2. No facts were developed in the underlying lawsuit that would trigger coverage.**

In its amici brief, the Texas Association of Builders and the National Association of Home Builders set forth the rule they and D.R. Horton wish this Court to adopt:

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.

(*See* Brief of Amici Curiae at p. 12) (emphasis added).

This is exactly what happened in the instant matter as D.R. Horton developed no facts in the *underlying lawsuit (the Holmes’ lawsuit)* to trigger coverage. Therefore, Markel properly was awarded summary judgment. D.R. Horton improperly asks this Court to accept facts that it created, not in the Holmes’ *underlying* tort suit, but in a separate breach of contract suit that was filed against an insurer after the underlying tort litigation was resolved without a trial. The “underlying tort suit” and “liability litigation” to be resolved in advance of determining Markel’s duty to indemnify was the *Holmes’*

*lawsuit against D.R. Horton*, not D.R. Horton's breach of contract suit against Markel (where D.R. Horton attempted to introduce "evidence" to show what it failed to prove in the Holmes' litigation, i.e. that D.R. Horton did not perform the work as the Holmes' claimed it did in their lawsuit). The Holmes' case was concluded by D.R. Horton's settlement before the matter was tried to a verdict. At no point in that litigation, either via the Holmes' pleadings or in the discovery developed, was it ever alleged or shown that Rosendo Ramirez performed work on the Holmes' residence. (C.R. Vol. III 419-24). Even D.R. Horton's lead superintendent, Travis Brown, testified in his deposition in the Holmes' lawsuit that he had "no idea" what work, if any, Ramirez performed in the Holmes' house. (C.R. Vol. II at 263).

If D.R. Horton prevails, then the scope of an insurer's analysis of its duty to defend becomes limitless, subject to multiple, perhaps conflicting, facts generated from several legal proceedings. D.R. Horton presents this Court with a model to reshape the analysis of the duties to defend and indemnify that is both unworkable and untenable, and it must be rejected.

**3. The trial court considered D.R. Horton's evidence at the summary judgment phase and Markel still prevailed as a matter of law.**

Even assuming this Court is inclined to permit extrinsic evidence to determine the coverage issues, D.R. Horton *still* loses this case as the trial considered and, presumably, rejected its efforts to manufacture evidence of Ramirez's purported work after the Holmes' litigation was concluded. The trial court overruled Markel's objections to D.R. Horton's summary judgment evidence. Therefore, the trial court must have considered

that evidence in making its summary determination.

D.R. Horton presented a body of extrinsic “evidence” purportedly establishing that Ramirez performed the work on which the Holmes based their lawsuit (C.R. Vol. II at 311–339, 350). D.R. Horton argued that by presenting its cost detail for the Holmes’ residence, handwritten notes of Clark Bottoms, and counsel’s own affidavit, it established that the Holmes actually were suing D.R. Horton for work that Ramirez performed as D.R. Horton’s subcontractor. Assuming that such extrinsic evidence could be considered in an “eight-corners” analysis of Markel’s alleged duty to defend, D.R. Horton failed (or refused) to provide any documentary evidence that supported its conclusion that Ramirez performed any work on the Holmes’ residence at any time.

Even if the trial court considered—albeit improperly—D.R. Horton’s extrinsic evidence, Ramirez was not implicated and additional-insured status under the Policy was not triggered. In the Court of Appeals and before this Court, D.R. Horton fails to acknowledge that the trial court did, in fact, consider its extrinsic evidence, but nonetheless found that it did not raise a scintilla of evidence to preclude summary judgment in Markel’s favor. That is, the trial court overruled all of Markel’s objections to D.R. Horton’s extrinsic evidence and, thus, one must conclude that the court indeed reviewed all of that evidence, but still found in favor of Markel.

While the facts proved in the *underlying* lawsuit can confer a duty to indemnify, it is telling that the so-called “evidence” D.R. Horton proffered at the summary judgment phase was not discovery or testimony from the *underlying Holmes’ lawsuit*. To the contrary, it was information D.R. Horton manufactured in the coverage lawsuit it filed

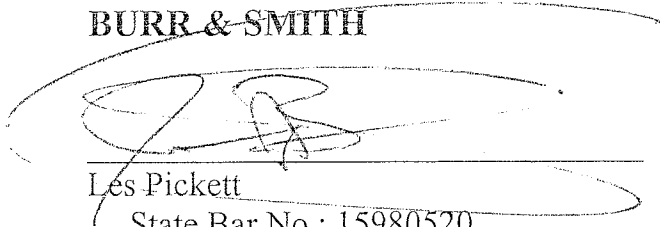
against Markel following its resolution of the Holmes' case as trial started. Thus, D.R. Horton's claim that its right to indemnity was improperly denied by the underlying courts confusing the duty to defend and duty to pay simply is not supported by the arguments in its motion. D.R. Horton had no evidence from the Holmes' case for the court to review on the indemnity issue. The courts have reviewed everything D.R. Horton submitted, but still found in Markel's favor. There is no reversible error in the appeals court decision.

**PRAYER**

For the foregoing reasons, Markel International Insurance Company Limited respectfully prays that this Court deny D.R. Horton's Motion for Rehearing; deny D.R. Horton's petition for review; and affirm the Court of Appeals' judgment affirming in part the trial court's summary judgment for Respondent, Markel. Markel further prays for such other and further relief to which it may show itself justly entitled at law or in equity.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify service of a true and correct copy of Respondent's Response to Motion for Rehearing was made on the following counsel of record on this 30th day of March, 2009 as follows:

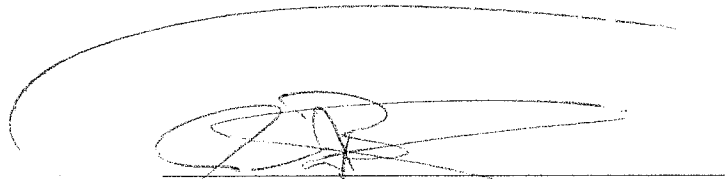
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