

CAUSE NO. 06-1018

IN THE SUPREME COURT OF TEXAS

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

v.

MARKEL INTERNATIONAL INSURANCE COMPANY, LTD.,
Respondent

ON PETITION FOR REVIEW

**BRIEF OF AMICUS CURIAE ASSOCIATED GENERAL CONTRACTORS OF
AMERICA – TEXAS BUILDING BRANCH
IN SUPPORT OF PETITIONER D.R. HORTON-TEXAS, LTD.**

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INTRODUCTION

Associated General Contractors of America – Texas Building Branch (“AGC-TBB”), pursuant to TEX. R. APP. P. 11, respectfully submits this brief as amicus curiae in support of the Petition for Review and Motion for Rehearing filed by Petitioner D.R. Horton–Texas, Ltd. (“D.R. Horton”). AGC-TBB represents the State of Texas’ general contractors. AGC-TBB urges this Court to 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

The AGC-TBB is a branch of the Associated General Contractors of America (“AGCA”). The AGCA is the oldest and largest nationwide association representing construction contractors. AGCA was formed in 1918 and it represents more than 32,000 firms in nearly 100 chapters throughout the United States. The AGC-TBB is comprised of twelve AGCA building chapters located throughout the State of Texas. The

membership of these twelve chapters consists of approximately 370 general contractors and 3,890 specialty contractors, subcontractors and suppliers, all doing business in Texas. Because of its unique perspective as an influential representative of a broad segment of the construction industry, this organization has submitted amicus curiae briefs in numerous jurisdictions across Texas. Moreover, it has a great interest in the many risks that are inherent in the construction process, and insurance has long played an important role for its members in managing those risks. Whether members of the AGC-TBB can depend on their additional insured status under commercial general liability (“CGL”) insurance policies to provide some reasonable degree of protection against financial harm is a matter of continuing and urgent interest to the members of this organization. Consequently, though it is not a party to this appeal, this brief is filed by the AGC-TBB as amicus curiae through the undersigned independent counsel, who was not paid a fee by the AGC-TBB for its preparation.

STATEMENT OF THE CASE

AGC-TBB adopts the Statement of the Case in the Petitioner’s Petition for Review.

STATEMENT OF JURISDICTION

AGC-TBB adopts the Statement of Jurisdiction in the Petitioner’s Petition for Review.

ISSUES PRESENTED

AGC-TBB adopts the Issues Presented in the Petitioner’s Petition for Review.

STATEMENT OF FACTS

AGC-TBB adopts the Statement of Facts in the Petitioner's Petition for Review.

ARGUMENT & AUTHORITIES

AGC-TBB adopts, in their entirety, the arguments and authorities presented by the Texas Association of Builders and the National Association of Home Builders in their two amici curiae briefs already on file with this Court. Those briefs were filed in support of D.R. Horton-Texas, Ltd.'s Petition for Review and its subsequent Motion for Rehearing.

A need exists to clarify whether Texas recognizes any exception to the "eight corners" rule. Simply put, confusion remains prevalent among Texas courts. *Compare, e.g., Ooida Risk Retention Group, Inc. v. Williams*, 2009 WL 2461850 (5th Cir. Aug. 12, 2009) (finding that an exception to the "eight corners" rule existed through the Fifth Circuit's "Erie guess" in *Northfield Ins. Co. v. Loving Home Care, Inc.*, 363 F.3d 523, 531 (5th Cir. 2004)), with *Mary Kay Holding Corp. v. Federal Ins. Co.*, 309 F. App'x 843 (5th Cir. 2009) (finding that Texas has yet to adopt an exception to the "eight corners" rule). This continued confusion as to Texas' standing on the existence of any exception to the "eight corners" rule needs to be clarified. And, if this Court were to permit a limited and narrow exception to the "eight corners" rule for "coverage-only" facts that do not overlap or in any way contradict the allegations in the underlying lawsuit, AGC-TBB respectfully submits that this is the "poster child" case for recognition of such an exception.

Even if this Court does not agree that any exception exists to the “eight corners” rule *or* that this case does not present the right circumstance to recognize any such exception, AGC-TBB notes that since the filing of the aforementioned Motion for Rehearing and related briefing, other courts have continued to find that absent a duty to defend, no duty to indemnify ever can exist. *See, e.g., Jenkins v. State & County Mut. Fire Ins. Co.*, 2009 WL 1650071, *5 (Tex. App.—Fort Worth June 11, 2009, no pet. h.) (“Absent a threshold duty to defend, there can be no liability to [the additional insured], or to the [claimant] derivatively.” (quoting *Nat’l Union Fire Ins. Co. v. Crocker*, 246 S.W.3d 603, 609 (Tex. 2008))). Such holdings continue to highlight the fact that courts erroneously interpret the relationship between an insurer’s duty to defend its insured under Texas “eight corners” rule and an insurer’s duty to indemnify its insured based on the actual facts. As such, AGC-TBB, in support of D.R. Horton, urges this Court to find that a determination that no duty to defend exists does not *necessarily* mean that no duty to indemnify ever can exist.

PRAYER

Based on the foregoing, AGC-TBB, in support of D.R. Horton, prays 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, AGC-TBB prays that this Court 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 17th day of August 2009, I forwarded a true and correct copy of this Amicus Curiae Brief to those identified below via certified mail, return receipt requested.

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