

Liberty Mut. Ins. Co. v. Graham

No Extrinsic Evidence Exception to Eight Corners Rule

Liberty Mutual Ins. Co. v. Graham, 473 F.3d 596 (5th Cir. 2006) involved a lawsuit against Paul Graham, an employee of Eagle Contracting who was involved in an accident while driving a company vehicle on November 11, 2003. At the time of the accident, Graham was returning home from a local restaurant where he had celebrated his 40th birthday with a friend and consumed alcoholic beverages. Graham fell asleep while driving and rear-ended a motorcycle carrying Mikel Johnson and Christy Wright. Johnson and Wright filed suit against Graham alleging that Graham negligently operated the vehicle and that Eagle negligently entrusted the vehicle to Graham and was vicariously liable for Graham's negligence.

Liberty issued a policy to Eagle that covered the vehicle Graham was driving. Graham asserted that the policy provided him coverage as a permissive user under the omnibus clause that defines an insured as "[a]nyone else while using with your [Eagle's] permission a covered auto you own, hire or borrow" Liberty sought a declaration that the policy did not provide coverage for Graham because his use of the vehicle was not related to company business and because Graham was intoxicated. Liberty asserted that both grounds violated Eagle's written vehicle policy that Graham had signed. In its motion for summary judgment, Liberty argued that the underlying petition did not allege permissive use by Graham and, even if it did, the district court should consider the extrinsic evidence of Graham's violation of the vehicle policy because that evidence related solely to coverage. The district court agreed that the underlying petition did not permit a conclusive coverage determination, found that the extrinsic evidence related solely to coverage, and granted Liberty's motion on both the duty to defend and indemnify Graham.

The Fifth Circuit reversed and rendered on the duty to defend and reversed and remanded on the duty to indemnify. On the duty to defend, the court first restated the familiar "eight-corners" rule, which dictates that "only two documents are ordinarily relevant to the determination of the duty to defend: the policy and the pleadings of the underlying claimant." The facts of the underlying pleading must be liberally construed in favor of coverage and facts outside the pleading, even if easily ascertained, are not usually material. As the court had noted in an earlier opinion, the only exception to the eight-corners rule arises when "it is initially impossible to discern whether coverage is potentially implicated and when the extrinsic evidence goes solely to a fundamental issue of coverage which does not overlap with the merits or or engage the truth or falsity of any facts alleged in the underlying case." *Northfield Ins. Co. v. Loving Home Care, Inc.*, 363 F.3d 523, 528 (5th Cir. 2004). The court noted that the Texas Supreme Court had recently cited the *Northfield* exception with approval in *GuideOne Ins. Co. v. Fielder Road Baptist Church*, 197 S.W.3d 305 (Tex. 2006), before holding that the extrinsic evidence in that case did not fit within the narrow exception.

After establishing the framework for analyzing the duty to defend, the court turned to the facts alleged in the underlying petition against Graham. That petition contained several facts demonstrating "Graham's longstanding permission from Eagle to use his company vehicle for personal use," including: a "long history of permissive use of the vehicle notwithstanding" any

policies to the contrary; that Eagle “knew and condoned” Graham’s use of the vehicle in violation of purported policies; Eagle’s failure to regulate personal use of vehicles; and Eagle’s possession of receipts indicating personal use. The petition also described Graham’s personal pursuit the night of the accident and immediately asserted that Eagle permitted employees including Graham to use vehicles in personal pursuits. Liberally construing these facts and the “reasonable inferences that flow” from them in favor of coverage, the court held that the underlying petition sufficiently alleged that Graham was driving the vehicle with Eagle’s permission at the time of the accident.

Liberty argued that even if the underlying petition facially invoked the duty to defend, extrinsic evidence regarding permission should be considered under the narrow exception acknowledged in dicta in *GuideOne* because such evidence relates solely to Graham’s status as an insured. The court rejected Liberty’s argument for two reasons: (1) the petition was specific enough to determine coverage without resorting to extrinsic evidence, which distinguished the case from *International Service Ins. Co. v. Boll*, 392 S.W.2d 158 (Tex. Civ. App.—Houston 1965, writ ref’d n.r.e.), in which a stipulation and endorsement were considered to resolve an ambiguous allegation in the petition; and (2) coverage did not turn on applicability of an explicit policy exclusion that required reference to “unrelated but readily ascertainable facts” absent from the petition.

Because Liberty had a duty to defend, the court also reversed the district court’s determination that Liberty had no duty to indemnify. Citing conflicting deposition testimony by Graham and Eagle representatives regarding the personal use of company vehicles, the effect of the vehicle policy, and Eagle’s sanctions for personal use of company vehicles, the court held that a fact issue was created regarding whether Graham had implied permission to use the vehicle the night of the accident. The court therefore remanded the issue of indemnity. In no way did the court state or suggest that only this deposition testimony could be considered on the duty to indemnify. The court was considering only the propriety of summary judgment; as the court noted earlier in its opinion, “the facts actually established in the underlying suit control the duty to indemnify” (citing *GuideOne*, 197 S.W.3d at 310).