

**HOW TO PLEAD THE CASE FOR COVERAGE –
COVERAGE: WHAT IT IS AND WHAT IT SHOULD BE**

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HOW TO PLEAD THE CASE FOR COVERAGE – COVERAGE: WHAT IT IS AND WHAT IT SHOULD BE

By Mark L. Kincaid

I. INTRODUCTION

This paper concerns how to plead the case for coverage, even though the very idea is something of a misnomer. All a plaintiff can do is plead the case in a manner that gives rise to the insurer's duty to *defend* its insured. But that doesn't mean the insurer has to *pay* the claim. The duty to pay depends on the proof at trial, and proof on coverage issues (in a subsequent trial) that were not decided in the underlying suit.

II. WHY PLEAD INTO COVERAGE?

It seems counterintuitive that a plaintiff would intentionally plead in a way that provoked an insurer to fund the opposition. Nevertheless, there are significant reasons why this is precisely what the plaintiff wants to do.

The most obvious reason to *plead* into coverage is to try to *prove* a claim that is covered so the insurer will have to *pay* it. This rationale exists when the defendant does not have the resources to pay.

Pleading a potentially covered claim sets the stage for proving a claim that is actually covered. If you don't have enough facts to plead it, you are unlikely to have enough facts to prove it. While merely pleading a claim is not sufficient, that is a step in the right direction.

Professor Ellen Pryor has written a thorough series of articles on pleading into coverage the duty to defend. In one paper, Prof. Pryor identifies several other reasons why a plaintiff might plead into coverage:

- (1) If an insurer finds itself obligated to defend, the insurer may take into account defense costs, even of a non-covered claim, which may give the claim settlement value.
- (2) If a claim is covered, the insurer has a duty to settle and may be liable for an excess judgment if it breaches that duty. An insurer defending a potentially covered claim may determine that the risk of failing to settle is too high, so the insurer may be willing to pay.
- (3) The insurer could erroneously fail to defend, which in some jurisdictions (but not Texas) will "estop" the insurer from contesting its duty to pay.
- (4) In some jurisdictions, if the insurer wrongfully denies a defense, it may be liable

for extra-contractual damages, which may give the claim value.

- (5) If the insurer defends, but does not properly reserve its right later to contest coverage, the insurer may have waived coverage defenses and be required to pay the claim.

Ellen S. Pryor, *The Stories We Tell: Intentional Harm & The Quest For Insurance Funding*, 75 Tex. L. Rev. 1721, 1734 (1997).

Of course, there are cases where the facts themselves simply state a claim within coverage, and there is no need to consciously plead into, or out of, coverage.

III. WHY NOT?

There may be valid reasons not to plead into coverage, if the facts support a claim that is not necessarily covered.

For example, if the defendant has sufficient resources to pay the resulting judgment, requiring it to defend a claim that is not covered by insurance may create economic incentives to settle. The economic pressure would not exist to the same degree if an insurance company was bearing the cost of the defense.

The principle at issue may make it desirable from the plaintiff's prospective to sue the defendant on theories that cannot be covered by insurance. A victim of abuse may want to sue the abuser for intentional conduct, seeking vindication and to punish the wrongdoer. Artful pleading to recharacterize the claim as negligence to seek insurance may not be desirable, if it would allow the wrongdoer to avoid responsibility.

Another author has noted other circumstances where pleading into coverage may not be desirable. For example, if the plaintiff wants quick injunctive relief, then triggering a defense by an insurer may hamper the process, without providing any benefit. See Beth D. Bradley, *Pleading Traps & Tricks: Pleading In & Out of Coverage*, in State Bar of Texas Insurance Law Section, *Insurance, Litigation and You: The Impact of Insurance In Litigation*, tab 3, p.11 (2004). In addition, unnecessarily pleading multiple years or invoking multiple lines of coverage, may simply complicate negotiations because of issues between and among the various insurers. *Id.*

IV. GENERAL RULES REGARDING THE DUTY TO DEFEND

- The duty to pay and the duty to defend are distinct, separate duties. *King v. Dallas Fire Ins. Co.*, 85 S.W.3d 185, 187 (Tex. 2002); *Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d 819, 821-22 (Tex. 1997).

- An insurer’s duty to defend is determined solely by the allegations in the pleadings and the language of the insurance policy. This is the “eight-corners” or “complaint allegation rule.” *King v. Dallas Fire Ins. Co.*, 85 S.W.3d at 187; *National Union Fire Ins. Co. v. Merchants Fast Motor lines, Inc.*, 939 S.W.2d 139, 141 (Tex. 1997); *Trinity v. Cowan*, 945 S.W.2d at 821.
- The allegations of the complaint should be considered in light of the policy provisions, without reference to the truth or falsity of the allegations, and without reference to what the parties know or believe the true facts to be. *Argonaut Southwest Ins. Co. v. Maupin*, 500 S.W.2d 633, 635 (Tex. 1973); *Colony Ins. Co. v. H.R.K., Inc.*, 728 S.W.2d 848, 850 (Tex. App.–Dallas 1987, no writ); *Gulf Chemical & Metallurgical Corp. v. Associated Metals & Minerals Corp.*, 1 F.3d 365, 369 (5th Cir. 1993).
- A court resolves all doubts regarding the duty to defend in favor of finding the duty. *King v. Dallas Fire Ins. Co.*, 85 S.W.3d at 187; *Merchants Fast Motor lines, Inc.*, 939 S.W.2d at 141; *Heyden Newport Chem. Corp. v. Southern Gen. Ins. Co.*, 387 S.W.2d 22, 26 (Tex. 1965).
- When applying the eight-corners rule, a court will give the allegations in the petition a liberal interpretation. The supreme court explained:

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 a 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.

Heyden Newport v. Southern Gen., 387 S.W.2d at 26 (quoted in *National Union v. Merchants*, 939 S.W.2d at 141).

- A court must focus on the factual allegations rather than the legal theories asserted. *Farmers Texas County Mut. Ins. Co. v. Griffin*, 955 S.W.2d 81, 82 (Tex. 1997);

National Union v. Merchants, 939 S.W.2d at 141.

- If the petition does not allege facts within the scope of coverage, an insurer is not legally required to defend a suit against its insured. *King v. Dallas Fire Ins. Co.*, 85 S.W.3d at 187; *Trinity v. Cowan*, 945 S.W.2d at 821.
- A court will not look outside the pleadings or imagine factual scenarios that might trigger coverage. *National Union v. Merchants*, 939 S.W.2d at 142.

V. DUTY TO DEFEND VS. DUTY TO INDEMNIFY

An insurer’s duty to defend and duty to indemnify are distinct and separate duties. *Farmers v. Griffin*, 955 S.W.2d at 82; *Trinity Universal v. Cowan*, 945 S.W.2d at 821-22. As the *Griffin* court noted, an 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.” 855 S.W.2d at 82.

The duty to defend is determined solely from the pleading and policy, while the duty to indemnify depends on the development of the underlying facts. Courts often say that the duty to defend is broader than the duty to indemnify. While this is often the case, it isn’t necessarily so.

In *Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d 819 (Tex. 1997), the court found there was no duty to defend an individual who worked at a photo shop and made extra copies of racy photos of the plaintiff. The court reasoned that the plaintiff’s complaints of “severe mental pain . . . , loss of privacy, humiliation, embarrassment, fear, frustration, [and] mental anguish” were not “bodily injuries” within the policy language. The court reached this conclusion, because there was no specific pleading of bodily harm or physical manifestations.

The *Cowan* court recognized that a claim for mental anguish could allow the plaintiff to offer proof of physical manifestations, but would not necessarily require such proof. While the court would liberally construe the allegations in the petition in determining the duty to defend and would resolve any doubts in favor of the insured, the court would not read additional facts into the pleadings. 945 S.W.2d at 825.

Thus, in *Cowan*, there was no duty to defend because there was no pleading of physical manifestations. Nevertheless, there could be a duty to pay if the award to the plaintiff was based on proof of physical manifestations. Because the pleadings could be broad enough to allow such proof, *Cowan*

exemplifies a situation where there was no duty to defend but there ultimately could be a duty to pay.

VI. WHEN ONE CLAIM IS COVERED, THE INSURER MUST DEFEND ALL

If the petition potentially states any covered claim, the insurer must defend the entire suit. The courts reason that the insurance contract obligates the insurer to defend its insured, not to provide a partial defense. *See St. Paul Ins. Co. v. Tex. Dept. of Transp.*, 999 S.W.2d 881, 884 (Tex. App.–Austin 1999, pet. denied); *Landmark Chevrolet Corp. v. Universal Underwriters Ins. Co.*, 121 S.W.3d 886, 890 (Tex. App.–Houston [1st Dist.] 2003, no pet.); *Rhodes v. Chicago Ins. Co.*, 719 F.2d 116, 119 (5th Cir. 1983).

VII. FACTS VS. LEGAL THEORIES

As noted above, one rule is that a court must focus on the factual allegations rather than the legal theories asserted. *Farmers v. Griffin*, 955 S.W.2d at 82. In *Griffin* the facts showed the plaintiff was injured in a drive-by shooting, which the court found was clearly intentional. The petition alleged that the insured driver was negligent in how he operated the vehicle and in allowing the shooting to occur. The court found there was no duty to defend, because the driver's conduct as shown by the facts was clearly intentional and could not constitute negligent behavior as a matter of law. *See also Freedman v. Cigna Ins. Co.*, 976 S.W.2d 776, 778-79 (Tex. App.–Houston [1st Dist.] 1998, no pet.) (citing various cases finding no duty to defend claims for intentional acts, even though they were pleaded as negligence, and holding that intentional omission to disclose facts regarding property was not covered, even though it was alleged as negligence).

VIII. THE EIGHT-CORNERS RULE AND EXTRINSIC EVIDENCE

Numerous courts strictly apply the eight-corners rule and refuse to consider extrinsic evidence. For example, in *Heyden Newport Chem. Corp. v. Southern Gen. Ins. Co.*, 387 S.W.2d 22, 26 (Tex. 1965), the court would not consider evidence that the negligent driver was not actually the agent of the insured.

In *Gulf Chemical & Metallurgical Corp. v. Associated Metals & Minerals Corp.*, 1 F.3d 365, 370 (5th Cir. 1993), Gulf and others were sued by plaintiffs who claimed that chemicals caused them injuries from 1946 to 1990. The plaintiffs alleged that Gulf was liable for its sale of a certain chemical. One insurer argued that its policy expired before the date when Gulf began to ship the chemical and therefore it should have no duty to defend. The court rejected this argument, because it relied on extrinsic evidence. The court found a duty to defend.

Similarly, in *E & L Chipping Co. v. Hanover Ins. Co.*, 962 S.W.2d 272, 276 (Tex. App.–Beaumont 1998,

no pet.), the insurer wanted to show that the insured knew about the loss before the policy was issued and made misrepresentations in the insurance application by failing to list any claims. The court rejected this argument, because it relied on extrinsic evidence.

Strict application of the eight-corners rule works both ways. Just as insurers in the preceding cases could not rely on extrinsic facts to negate a duty to defend, the Texas Supreme Court has held that an insurer has no duty to investigate to determine if there are additional facts that might create coverage. The court stated:

To the contrary, under the “complaint allegation rule” an insurer is entitled to rely solely on the factual allegations contained in the petition in conjunction with the terms of the policy to determine whether it has a duty to defend. “The duty to defend is not affected by facts ascertained before suit, developed in the process of litigation, or by the ultimate outcome of the suit.” . . . Thus, there was no duty to investigate coverage under these facts.

Trinity Universal Ins. Co. v. Cowan, 945 S.W.2d 819, 829 (Tex. 1997); *see also Taylor v. Travelers Ins. Co.*, 40 F.3d 79, 81 n.2 (5th Cir. 1994); *Travelers Ins. Co. v. Newsom*, 352 S.W.2d 888, 893 (Tex. Civ. App.–Amarillo 1961, writ ref'd n.r.e.).

Prof. Pryor has noted that Texas follows the minority position by not requiring an insurer to defend if the insurer is aware or should be aware of extrinsic facts that would suggest there is coverage. Ellen S. Pryor, *Duty To Defend: The Rule of Extrinsic Evidence, and Remedies*, State Bar of Texas Consumer Law Section, 6th Annual Ultimate Insurance Seminar, tab 2, at 2 (1997).

In contrast, a line of cases has allowed extrinsic evidence to be considered in certain circumstances. These cases are discussed in more detail below.

The issue of extrinsic evidence was squarely confronted in *Northfield Ins. Co. v. Loving Home Care, Inc.*, 363 F.3d 523 (5th Cir. 2004). In the underlying case, the plaintiffs sued Loving Home Care after their daughter was fatally injured by a nanny provided by LHC. The nanny was later convicted of felony injury to a child, which was an intentional act. The plaintiffs sued LHC alleging that the nanny negligently caused the injuries. LHC's insurer filed a declaratory judgment suit arguing that it had no duty to defend because extrinsic evidence established that the exclusions for “criminal acts” and “physical/sexual abuse” applied.

The Fifth Circuit noted that the duty to defend is determined solely by the allegations in the pleadings and the language of the insurance policy. The court

noted several prior cases that recognized narrow exceptions to the strict eight-corners rule. The court recapped these cases as follows:

See, e.g., W. Heritage Ins. Co. v. River Entm't, 998 F.2d 311, 313 (5th Cir. 1993) (“However, when the petition does not contain sufficient facts to enable the court to determine if coverage exists, it is proper to look to extrinsic evidence in order to adequately address the evidence in order to adequately address the issue.”); *McLaren v. Imperial Cas. & Indem. Co.*, 767 F.Supp. 1364, 1374 (N.D. Tex. 1991), *aff’d*, 968 F.2d 17 (5th Cir. 1992) (“[T]here appears to be a more general rule that the true facts always can be used to establish non-existence of a defense obligation, no matter what the plaintiff might allege in her damage suit complaint.”); *State Farm Fire & Cas. Co. v. Wade*, 827 S.W.2d 448, 452-53 (Tex. App.—Corpus Christi 1992, writ denied) (concluding that extrinsic evidence could be admitted in deciding the duty to defend when the facts alleged are insufficient to determine coverage and “when doing so does not question the truth or falsity of any facts alleged in the underlying petition”); *Gonzales v. Am. States Ins. Co.*, 628 S.W.2d 184, 187 (Tex. App.—Corpus Christi 1982, no writ) (holding that facts extrinsic to the petition relating only to coverage, not liability, may be considered to determine a duty to defend, where such evidence does not contradict any allegation in the petition); *Cook v. Ohio Cas. Ins. Co.*, 418 S.W.2d 712, 715-16 (Tex. Civ. App.—Texarkana 1967, no writ.) (“[T]he [Texas] Supreme Court draws a distinction between cases in which the merit of the claim is the issue and those where the coverage of the insurance policy is in question. In the first instance the allegation of the petition controls, and in the second the known or ascertainable facts are to be allowed to prevail.”); *Int’l Serv. Ins. Co. v. Boll*, 392 S.W.2d 158, 161 (Tex. Civ. App.—Houston [1st Dist.] 1965, writ *ref’d n.r.e.*) (considering extrinsic evidence of identity of driver of insured boat by stipulation to conclude no duty to defend or indemnify arose.)

363 F.3d at 529 n.1.

Despite these cases, the Fifth Circuit noted that the Texas Supreme Court has never recognized any exception to the strict eight-corners rule that would

allow courts to examine extrinsic evidence when determining an insurer’s duty to defend. 363 F.3d at 529.

The Fifth Circuit concluded that the Texas Supreme Court would not recognize any exception to the strict eight-corners rule. *Id.* at 531. The court continued:

However, in the unlikely situation that the Texas Supreme Court were to recognize an exception to the strict eight-corners rule, we conclude any exception would apply in very limited circumstances: when it is initially impossible to determine 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 of or engage the truth or falsity of any facts alleged in the underlying case.

363 F.3d at 531. The court described “fundamental coverage issues as including:

- (1) whether the person sued has been specifically excluded by name or description from any coverage,
- (2) whether the property in suit is included in or has been expressly excluded from any coverage, and
- (3) whether the policy exists.

363 F.3d at 530.

Even if the court were to recognize an exception, the court held it would not apply in this case. The court distinguished other cases where the petition did not allege enough facts to determine whether the claim was potentially covered. In this case, the petition did clearly allege that the injuries occurred from negligence, which stated a claim potentially within coverage. The court found the insurer was trying to read in extrinsic evidence to establish an exclusion, which no other case had allowed. 363 F.3d at 533.

The court also explained why it believed that even if an exception were recognized, it would not apply in this case for these reasons:

- First, it was clearly possible to discern whether coverage was potentially implicated.
- Second, no Texas or Fifth Circuit case had ever applied an exception to allow extrinsic evidence where the insurer argued the underlying suit did not allege facts sufficient to determine whether an exclusion applied, as distinct from determining whether coverage was potentially implicated.

- Third, the possible application of the specific exclusions did not constitute a fundamental issue of coverage and was a step removed from any inquiry about express inclusion or exclusion of specific property or persons, or if the policy existed.
- Finally, even if the exclusions were considered fundamental coverage issues that could be answered by looking to extrinsic evidence, that evidence – the nanny’s criminal conviction and the autopsy report on the child – would be barred by the prohibition that such evidence could not put the truth of the facts alleged in the plaintiffs’ petition into question. The evidence clearly overlapped the merits of the underlying negligence suit.

363 F.3d at 535. The court concluded that the district court properly applied the strict eight-corners rule in deciding whether the insurer had a duty to defend, and in concluding that the insurer did have a duty to defend.

For another recent cases holding that extrinsic evidence may not be considered, see *Landmark Chevrolet Corp. v. Universal Underwriters Ins. Co.*, 121 S.W.3d 886, 890 (Tex. App.–Houston [1st Dist.] 2003, no pet.). For a case recognizing that extrinsic evidence is permitted in the limited circumstances defined as fundamental coverage issues, see *Fielder Road Baptist Church v. Guideone Elite Ins. Co.*, 139 S.W.3d 384, 388 (Tex. App.–Fort Worth, 2004, no pet.). The court in *Fielder Road* concluded that the extrinsic evidence was not allowed in that case, because a fundamental policy issue was not implicated.

IX. PLEADING INTO COVERAGE IN CONSTRUCTION CASES

A recurring area of litigation over the duty to defend is found in cases involving bad construction. The insurers typically argue there is no duty to defend because the damages are not accidental, because they are not property damage, or because they fit within one or more exclusions. Nevertheless, a number of courts have found a duty to defend for various reasons.

In *Gehan Homes, Ltd. v. Employers Mutual Cas. Co.*, 146 S.W.3d 833 (Tex. App.–Dallas 2004, no pet.), the court found the insurer had a duty to defend a homebuilder who was sued by homeowners alleging the house had foundation problems based on the builder’s poor work and its reliance on poor work by others. Citing several other cases, the court found the allegations of defective workmanship stated an “occurrence” within the coverage of the policy. The *Gehan* court refused to look beyond the negligence allegation, giving rise to a duty to defend, in

compliance with the eight-corners rule. *See also In re ML & Assoc.*, 302 B.R. 857 (N.D. Tex. 2003); *CU Lloyd’s of Texas v. Main Street Homes, Inc.*, 79 S.W.3d 687 (Tex. App.–Austin 2002, no pet.); *E & R Rubalcava Construction, Inc. v. Burlington Ins. Co.*, 148 F.Supp.2d 746 (N.D. Tex. 2001); *Federated Mutual Ins. Co. v. Grapevine Excavation, Inc.*, 197 F.3d 720 (5th Cir. 1999); *Gibson & Assoc., Inc. v. Home Ins. Co.*, 966 F. Supp. 468 (N.D. Tex. 1997); *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 335 F.Supp.2d 754 (W.D. Tex. 2004); *Hartrick v. Great American Lloyds Inc. Co.*, 62 S.W.3d 270 (Tex. App.–Houston [1st Dist.] 2001, no pet.).

X. SUGGESTIONS

Based on these cases, the following suggestions may allow a party to “plead into coverage.”

A. Plead Other Theories

Parties seeking to plead into coverage have an incentive to allege alternate theories, even though some theories may be excluded. For example, in *St. Paul Ins. Co. v. Texas Dept. of Transp.*, the plaintiffs alleged the insurer was negligent in its supervision of highway construction, which the court found was not within the “professional service” exclusion, even though allegations of gross negligence and intentional torts would be excluded by the intentional injury exclusion. 999 S.W.2d at 887.

In *Westchester Fire Ins. Co. v. Gulf Coast Rod, Reel & Gun Club*, 64 S.W.3d 609 (Tex. App.–Houston [1st Dist.] 2001, no pet.), the insureds were covered for claims that they intentionally dredged a waterway, where the resulting damage was not expected or intended.

In *Northfield Ins. Co. v. Loving Home Care, Inc.*, 363 F.3d 523, 532-33 (5th Cir. 2004), the court found a duty to defend based on pleadings that the defendant acted negligently, even though extrinsic evidence showed the injuries to the child were intentional. The court reached its conclusion even though the plaintiffs had amended the petition to remove all allegations relating to the intentional nature of the behavior and instead pled only negligence.

Repleading to recharacterize conduct as negligent instead of intentional will not work in cases where the conduct is inherently intentional. For example, sexual molestation of a minor is inherently intentional, no matter how it is pleaded. So there is no duty to defend. *See, e.g., Maayeh v. Trinity Lloyds Ins. Co.*, 850 S.W.2d 193, 195-96 (Tex. App.–Dallas 1992, no pet.). Even if the intentional act exclusion does not apply, other courts hold that sexual assault is not an “occurrence” within the scope of coverage because it is not accidental. *See State Farm Fire & Cas. Co. v. Brooks*, 483 F. Supp.2d 695, 702 (E.D. Tex. 1998). Similarly, pleading that the defendant was drunk will

not make an intentional assault unintentional. *Id.* at 698-99; *see also* *Wessinger v. Fire Ins. Exch.*, 949 S.W.2d 834, 840 (Tex. App.–Dallas 1997, no pet.).

B. Plead Broadly & Generally

The general rule is that if the pleadings are too vague or general, the court may find they lack sufficient facts to state a claim potentially within coverage, and the court will not read facts into the pleadings. *See, e.g., Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d at 825; *see generally*, Karen L. Keltz, *The ABCD and E's of the Duty to Defend & Extrinsic Evidence*, in State Bar of Texas, 1st Annual Advanced Insurance Law Course, tab 3.2 at 5 (2004)(discussing the degree of “doubt” that will give rise to, or negate, the duty to defend).

Clarity in pleadings may not be helpful when trying to plead into coverage. As noted above, courts generally hold that uncertainties are resolved in favor of finding a duty to defend. In *Burlington Ins. Co. v. Texas Krishnas, Inc.*, 143 S.W.3d 226 (Tex. App.–Eastland 2004, no pet.), the court found a duty to defend where several different theories were alleged against several different parties all arising out of abuse. The court characterized as “vague” “broadly worded,” and containing a “mishmash of legal theories and factual allegations. The court found the pleadings might well be the result of very careful, as opposed to very careless, pleading practice. 143 S.W.3d at 232.

C. Plead Other Insureds or Actors

Another strategy for pleading into coverage is to consider whether the facts support liability for more than one person on more than one theory. For example, when an insured employer was sued for negligent hiring of an employee who committed an intentional tort, the court found there was a duty to defend the former, but not the latter. *King v. Dallas Fire Ins. Co.*, 85 S.W.3d 185 (Tex. 2002).

One of the most-cited cases establishing the principles for determining the duty to defend is *Heyden Newport Chem. Corp. v. Southern Gen. Ins. Co.*, 387 S.W.2d 22 (Tex. 1965). In that case, the plaintiffs alleged Pickering was an agent for the insured, Newport Industries, at the time of the collision. However, Newport Industries advised the insurer that Pickering was not its agent at the time. The court concluded that the allegations were sufficient to invoke the duty to defend, and the extrinsic fact that Pickering was not an agent could not be considered.

Heyden shows how the plaintiff could “plead into coverage” with respect to the duty to defend, but if he could not prove Pickering was the agent, there would be no duty for the insurer to pay any resulting judgment.

Another example of pleading claims against different people to invoke coverage is found in

Burlington Ins. Co. v. Texas Krishnas, Inc., 143 S.W.3d 226 (Tex. App.–Eastland 2004, no pet.). Certain individuals were accused of intentional abuse, but the insured was entitled to a defense based on allegations that it had negligently hired, trained, and supervised those individuals. *See also State Farm General Ins. Co. v. White*, 955 S.W.2d 474, 477 (Tex. App.–Austin 1997, no pet.) (insurer had duty to defend bystanders sued for negligently failing to report intentional abuse by another).

D. Plead Again

The duty to defend is determined based on the most recent pleading. *See Fielder Road Baptist Church v. Guide One Elite Ins. Co.*, 139 S.W.3d 384, 390 (Tex. App.–Fort Worth 2004, no pet.); *Royal Ins. Co. v. Hartford Underwriters Ins. Co.*, 391 F.3d 639, 644 (5th Cir. 2004). If an initial pleading does not trigger coverage, the party trying to plead into coverage should consider an appropriate amendment that will invoke the duty.

E. Plead Different Dates

Several cases find a duty to defend where the petition alleges conduct occurring during the period of the insurer’s coverage, even though extrinsic evidence shows the conduct did not occur during the policy period. In *Fielder Road Baptist Church v. Guideone Elite Ins. Co.*, 139 S.W.3d 384 (Tex. App.–Fort Worth 2004, no pet.), the plaintiffs alleged the church’s youth pastor was employed from 1992 to 1994 and committed sexual abuse during that time. The insurer’s policy was effective from 1993 to 1994. The court would not consider extrinsic evidence that the youth pastor left employment with the church in 1992, before the insurance policy took effect, because that was extrinsic evidence that would contradict the facts alleged in the petition. *Id.* at 389; *see also Gulf Chemical & Metallurgical Corp. v. Associated Metals & Minerals Corp.*, 1 F.3d 365, 370-71 (5th Cir. 1993).