

# BINDING AUTHORITY

Insurance Coverage Decisions: Issued Today - Impact Tomorrow



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**Top 10 Coverage Cases of 2011** – I am excited to report that Joshua Mooney and I will be discussing our *Mealey's Insurance* article -- [“Two Thousand And Unleaven: A Flat Year For Insurance Coverage”](#) on **Friday January 20 at 10:00 AM EST** on **“Friday Morning Live,”** the weekly insurance talk show hosted by Bill Perkins and Dave Newell of the Florida Association of Insurance Agents. The show can be accessed through the internet by [signing up here](#). It is **free free free** and signing-up couldn't be quicker or easier – you simply need to give your name and e-mail address (even I was able to figure it out). Like *Binding Authority*, the discussion of the “Top 10” article will be serious -- but we'll have some fun along the way. I hope you can tune-in.

January 18, 2012

## **Texas Appeals Court: Insurer Has Duty to Defend Austin**

### **Power**

### ***Dr. Evil For Insurers: A Duty To Defend Standard That Is A Mystery***

I love the Gecko. Unfortunately, our relationship has been on the rocks of late. In all the years of *Binding Authority*, there has never been a case involving GEICO. And, well, let's just put it this way -- it has become a real sore spot for him. I keep explaining it -- While GEICO is a major force in the auto and homeowners markets, those types of policies generally do not lead to coverage disputes that result in opinions that are the stuff of *Binding Authority*. That's all it is. It's nothing personal. Look, I've never had an Aflac case either in *Binding Authority* and the duck isn't sending me hate mail. But the Gecko is just not happy about it and will not let it go. He has been threatening to cancel his subscription.

GEICO debuts on *Binding Authority* today. And, to make up for the long wait, the case involves the standard for determining an insurer's duty to defend. I've said it time and time and time again -- the standard for determining an insurer's duty to defend is, by far, the most important coverage issue of them all. That is -- whether an insurer's duty is determined based solely on the four corners of the complaint or if extrinsic evidence may be considered.

[This is now the third *Binding Authority* in a row to address duty to defend standards. I do not believe that the same issue has ever appeared three consecutive times. I'll ask the *Binding Authority* intern to look into that.]

Most states allow for the consideration of extrinsic evidence, in one form or another, to determine an insurer's duty to defend. While the application of extrinsic evidence rules, in practice, are not always easy, at least the insurer knows going in that the duty to defend determination may not automatically be based on just two documents – the complaint and the policy. *Just how far* beyond the complaint and the policy the duty to defend determination will go is the critical issue in these states.

But even in those states where the duty to defend determination is supposed to be limited to solely the complaint and the policy – so-called “four corners” or “eight corners” states -- courts can sometimes read a complaint in such a manner that their duty to defend decision resembles one that is based on extrinsic evidence – or even no evidence at all.

The January 5 Court of Appeals of Texas decision in *GEICO General Ins. Co. v. Austin Power, Inc.* demonstrates this point well. At issue was GEICO's duty to defend Austin Power in an asbestos bodily injury action brought by Weldon Bradley. The trial court, in the underlying asbestos action, granted summary judgment in favor of Austin Power. Austin Power incurred \$54,706.67 in attorney's fees and costs in defending the *Bradley* case and sought coverage from GEICO. *Austin Power* at 2.

The coverage issue before the Court of Appeals of Texas was very straightforward. Austin Power held a commercial general liability insurance policy issued by GEICO's predecessor, covering the period from December 31, 1969 to December 31, 1970. The policy provided coverage for bodily injury during the policy period. *Id.* at 2.

However, the petition in the underlying *Bradley* suit contained no specific date of injury alleged. GEICO argued that, because nothing was alleged suggesting that Mr. Bradley was injured during the December 31, 1969 to December 31, 1970 policy period, the Petition was not a potentially covered claim under the policy and, thus, did not trigger GEICO's duty to defend.

GEICO's argument was based on the fact that Texas follows the “eight corners” rule for purposes of determining an insurer's duty to defend. When comparing the complaint to the policy – and without resort to anything more, as the rule dictates -- there was no allegation that Mr. Bradley suffered bodily injury, or was even exposed to asbestos, between December 31, 1969 and December 31, 1970.

The *Austin Power* Court disagreed:

As in *Gehan Homes [v. Employers Mutual Casualty Co., 146 S.W.3d 833 (Tex. App.—Dallas 2004, pet. denied)]* the claimants in this case also alleged that the injury occurred before the petition was filed. Although they did not use the word “past,” they used the past tense in alleging that Weldon Bradley “*has suffered* injuries” from asbestos exposure (emphasis added by court). They also alleged numerous exposures and that a conspiracy had existed for many decades. Finally, we know that it can take years of exposure to produce asbestos-related diseases.... In effect, the Bradleys alleged that Weldon was injured sometime before the petition was filed. Nothing in the pleadings negates the possibility that the injury occurred between December 31, 1969 and December 31, 1970. Construing the pleadings liberally and resolving any doubts in the

insured's favor, we agree with the trial court that this is an allegation of a potential occurrence within the policy's coverage period.

*Id.* at 6.

As for adherence to the "eight corners" rule, the *Austin Powers* Court saw no violation of it by its decision:

Austin Power's coverage claim does not depend upon extrinsic evidence or on facts that are not encompassed within the factual allegations in the underlying suit. Here, the allegations themselves, when construed liberally in favor of the insured, are sufficient to state a claim that is potentially within coverage. The plaintiffs in the underlying suit alleged facts that supported an inference of coverage and that were "sufficient to permit proof on a trial" of the truth of the inference. The allegations in the *Bradley* petition, when construed liberally in favor of Austin Power, support the inference that Weldon's injury potentially occurred during the policy period, and therefore the claim is potentially covered. This is sufficient to trigger GEICO's duty to defend the suit.

*Id.* at 7-8.

The *Austin Power* court noted the (very) obvious: "[T]he Bradleys alleged that Weldon was injured sometime before the petition was filed [2007]." Yes, most complaints are written in the past tense. And, when a complaint alleges an injury, those injuries are – are you sitting down, get ready -- usually alleged to have happened before the complaint was filed. Thus, simply by pleading in the past tense, the complaint was interpreted, for duty to defend purposes, as alleging that Mr. Bradley suffered an injury, on account of Austin Power, 37 years earlier.

As the *Austin Power* decision demonstrates, even in a "four corners" or "eight corners" state, a court can have flexibility in how it reads what lies within those corners.

A copy of the January 5, 2012 Court of Appeals of Texas decision in *GEICO General Ins. Co. v. Austin Power, Inc.* can be accessed here:

<http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=922d9d72-314f-4d4c-8987-3dcc1a7a920f&coa=coa14&DT=Opinion&MediaID=00db2ce8-4975-4c2d-b261-fb8acedff2fe>

Please let me know if you have any questions.

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