

Use of Extrinsic Evidence in Determining an Insurer's Duty to Defend

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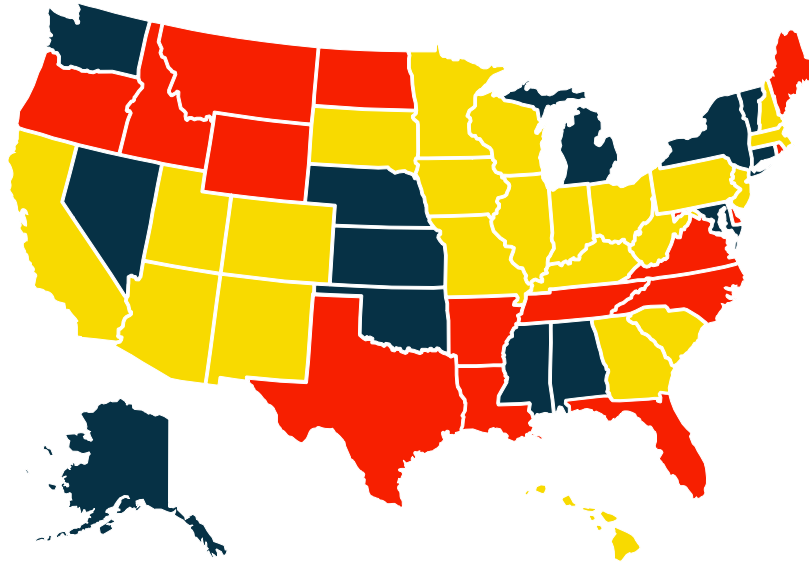
An insurer's duty to defend is typically determined by the allegations of the complaint against the policyholder, regardless of the truthfulness or accuracy of such allegations. However, in some jurisdiction, courts will allow parties to rely upon information found outside of the complaint to determine whether a duty to defend is owed. This information is known as "extrinsic evidence." Policyholders may seek to provide extrinsic evidence to establish a duty to defend, where the facts of the complaint are insufficient to trigger the obligation. Conversely, insurers may seek to introduce extrinsic evidence in order to negate any duty to defend. The jurisdictions vary as to whether extrinsic evidence is permitted. Some courts allow only a policyholder (but not an insurer) to rely upon extrinsic evidence. Other courts allow either party to use such information, while others do not permit the use of extrinsic evidence at all.

This survey is intended to examine the use of extrinsic evidence in determining the duty to defend across the 50 states.

The map on the following page identifies how each state has assessed the use of extrinsic evidence in duty to defend disputes. Dark blue signals that the state is beneficial to the policyholder, in that extrinsic evidence is allowed to establish coverage but not to negate coverage. Yellow alerts the policyholder to have caution; the state may allow both the insured and the insurer to use extrinsic evidence or the state's position may be unclear. Red warns the policyholder that extrinsic evidence is not allowed to establish the duty to defend, or can only be used by an insurer to negate coverage.

50 State Surveys

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-  Extrinsic evidence is allowed to establish coverage but not to negate coverage.
-  Extrinsic evidence may be allowed to both establish and negate coverage.
-  Extrinsic evidence is not allowed to establish the duty to defend, or can only be used by an insurer to negate coverage.

Disclaimer: This survey is current as of **07/2024**. This material is made available for general informational purposes only. The field of insurance law is ever-evolving, and courts may change their views at any time. Readers are advised to independently verify the information contained herein. This material is not intended to, and does not constitute, legal advice, nor is it intended to constitute a solicitation for the formation of an attorney-client relationship. For more information or questions on Extrinsic Evidence, please contact us at coverage@sdvlaw.com.

50 State Surveys

Use of Extrinsic Evidence in Determining an Insurer's Duty to Defend

STATE	POLICYHOLDER IMPACT	RELEVANT AUTHORITY
 Alabama	Favorable	<i>Gunnin v. State Farm & Cas. Co.</i> , 508 F. Supp. 2d 998 (M.D. Ala. 2007); <i>Pharmacists Mut. Ins. Co. v. Godbee Med. Distribs., Inc.</i> , 733 F. Supp. 2d 1281 (M.D. Ala. 2010); <i>Hartford Cas. Ins. Co. v. Merchants & Farmers Bank</i> , 928 So. 2d 1006 (Ala. 2005).
 Alaska	Favorable	<i>Williams v. GEICO Cas. Co.</i> , 301 P.3d 1220 (Alaska 2013); <i>Afcan v. Mut. Fire, Marine & Inland Ins. Co.</i> , 595 P.2d 638 (Alaska 1979).
 Arizona	Unclear	<i>N. Ins. Co. of New York v. Morgan</i> , 918 P.2d 1051 (Ariz. Ct. App. 1995); <i>U.S. Fid. & Guar. Corp. v. Advance Roofing & Supply Co.</i> , 788 P.2d 1227 (Ariz. Ct. App. 1989); <i>Long v. City of Glendale</i> , 93 P.3d 519 (Ariz. Ct. App. 2004).
 Arkansas	Unfavorable	<i>Scottsdale Ins. Co. v. Morrowland Valley Co., LLC</i> , 411 S.W.3d 184 (Ark. 2012); <i>Tri-State Ins. Co. v. B&L Prods., Inc.</i> , 964 S.W.2d 402 (Ark. Ct. App. 1998).
 California	Unfavorable	<i>Montrose Chem. Corp. v. Super. Ct.</i> , 861 P.2d 1153 (Cal. 1993); <i>Scottsdale Ins. Co. v. MV Transp.</i> , 115 P.3d 460 (Cal. 2005); <i>Storek v. Fid. & Guar. Ins. Underwriters, Inc.</i> , 504 F. Supp. 2d 803 (N.D. Cal. 2007), aff'd, 320 F. App'x 508 (9th Cir. 2009).
 Colorado	Unclear	Compare <i>Thompson v. Md. Cas. Co.</i> , 84 P.3d 496 (Colo. 2004), with <i>Pompa v. Am. Fam. Mut. Ins. Co.</i> , 520 F.3d 1139 (10th Cir. 2008), and <i>Dish Network Corp. v. Arch Specialty Ins. Co.</i> , 989 F. Supp. 2d 1137 (D. Colo. 2013), aff'd sub nom. <i>Dish Network Corp. v. Arrowood Indem. Co.</i> , 772 F.3d 856 (10th Cir. 2014).
 Connecticut	Unclear	<i>Hartford Cas. Ins. Co. v. Litchfield Mut. Fire Ins. Co.</i> , 876 A.2d 1139 (Conn. 2005); <i>Misiti, LLC v. Travelers Prop. Cas. Co. of America</i> , 61 A.3d 485 (Conn., 2013).
 Delaware	Favorable	<i>Pac. Ins. Co. v. Liberty Mut. Ins. Co.</i> , 956 A.2d 1246 (Del. 2008); <i>Cont'l Cas. Co. v. Alexis I. duPont Sch. Dist.</i> , 317 A.2d 101 (Del. 1974).
 Florida	Unfavorable	<i>Hartford Accident & Indem. Co. v. Beaver</i> , 466 F.3d 1289 (11th Cir. 2006); <i>Colony Ins. Co. v. G & E Tires & Serv., Inc.</i> , 777 So.2d 1034 (Fla. Dist. Ct. App. 2000).
 Georgia	Unclear	Compare <i>Anderson v. S. Guar. Ins. Co. of Ga.</i> , 508 S.E.2d 726 (Ga. Ct. App. 1998), with <i>Hoover v. Maxum Indem. Co.</i> , 730 S.E.2d 413 (Ga. 2012).
 Hawaii	Unclear	<i>Dairy Rd. Partners v. Island Ins. Co.</i> , 992 P.2d 93 (Haw. 2000); but see <i>Burlington Ins. Co. v. Oceanic Design & Constr., Inc.</i> , 383 F.3d 940 (9th Cir. 2004); <i>Weight v. USAA Cas. Ins. Co.</i> , 782 F. Supp. 2d 1114 (D. Haw. 2011).
 Idaho	Unfavorable	<i>AMCO Ins. Co. v. Tri-Spur Inv. Co.</i> , 101 P.3d 226 (Idaho 2004); <i>Hoyle v. Utica Mut. Ins. Co.</i> , 48 P.3d 1256 (Idaho 2002).

50 State Surveys

Use of Extrinsic Evidence in Determining an Insurer's Duty to Defend

STATE	POLICYHOLDER IMPACT	RELEVANT AUTHORITY
 Illinois	Unclear	<i>Pekin Ins. Co. v. Wilson</i> , 930 N.E.2d 1011 (Ill. 2010); <i>Am. Econ. Ins. Co. v. Holabird & Root</i> , 886 N.E.2d 1166 (Ill. App. Ct. 2008); <i>Title Indus. Assurance Co., R.R.G. v. First Am. Title Ins. Co.</i> , 853 F.3d 876 (7th Cir. 2017).
 Indiana	Unclear	Compare <i>Transam Ins. Servs. v. Kopko</i> , 570 N.E.2d 1283 (Ind. 1991), with <i>Auto-Owners Ins. Co. v. Harvey</i> , 842 N.E.2d 1279 (Ind. 2006); see also <i>Ind. Farmers Mut. Ins. Co. v. N. Vernon Drop Forge, Inc.</i> , 917 N.E.2d 1258 (Ind. Ct. App. 2009).
 Iowa	Unclear	<i>Talen v. Emps. Mut. Cas. Co.</i> , 703 N.W.2d 395 (Iowa 2005); <i>Scottsdale Ins. Co. v. Attys. Process & Investigation Servs.</i> , 778 N.W.2d 218 (Iowa Ct. App. 2009).
 Kansas	Favorable	<i>Miller v. Westport Ins. Corp.</i> , 200 P.3d 419 (Kan. 2009); <i>Hartford Fire Ins. Co. v. Vita Craft Corp.</i> , 911 F. Supp. 2d 1164 (D. Kan. 2012).
 Kentucky	Unclear	Compare <i>James Graham Brown Found., Inc. v. St. Paul Fire & Marine Ins. Co.</i> , 814 S.W.2d 273 (Ky. 1991), and <i>DiBeneditto v. Med. Protective Co.</i> , 3 F. App'x 483 (6th Cir. 2001), with <i>Lenning v. Com. Union Ins. Co.</i> , 260 F.3d 574 (6th Cir. 2001).
 Louisiana	Unfavorable	<i>Elliott v. Cont'l Cas. Co.</i> , 949 So.2d 1247 (La. 2007); <i>Grimaldi Mech. L.L.C. v. Gray Ins. Co.</i> , 933 So. 2d 887 (La. Ct. App. 2006).
 Maine	Unfavorable	<i>York Ins. Group v. Lambert</i> , 740 A.2d 984 (Me. 1999); <i>Harlor v. Amica Mut. Ins. Co.</i> , 150 A.3d 793 (Me. 2016).
 Maryland	Favorable	<i>Aetna Cas. & Sur. Co. v. Cochran</i> , 651 A.2d 859 (Md. 1995); <i>Brohawn v. Transam. Ins. Co.</i> , 347 A.2d 842 (Md. 1975).
 Massachusetts	Unclear	Compare <i>Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co.</i> , 788 N.E.2d 522 (Mass. 2003), and <i>Millipore Corp. v. Travelers Indem. Co.</i> , 115 F.3d 21 (1st Cir. 1997), with <i>Farm Fam. Mut. Ins. Co. v. Whelpley</i> , 767 N.E.2d 1101 (Mass. App. Ct. 2002), and <i>Metro. Prop. and Cas. Ins. Co. v. Morrison</i> , 951 N.E.2d 662 (Mass. 2011).
 Michigan	Favorable	<i>Am. Bumper & Mfg. Co. v. Hartford Fire Ins. Co.</i> , 550 N.W.2d 475 (Mich. 1996); <i>Matthew T. Szura & Co. v. Gen. Ins. Co. of Am.</i> , 543 F. App'x 538 (6th Cir. 2013).
 Minnesota	Unclear	<i>Pedro Cos. v. Sentry Ins.</i> , 518 N.W.2d 49 (Minn. Ct. App. 1994).
 Mississippi	Favorable	<i>MGM Resorts Miss., Inc. v. ThyssenKrupp Elevator Corp.</i> , 58 F. Supp. 3d 697 (N.D. Miss. 2014); <i>Auto. Ins. Co. of Hartford v. Lipscomb</i> , 75 So. 3d 557 (Miss. 2011); <i>Farmland Mut. Ins. Co. v. Scruggs</i> , 886 So. 2d 714 (Miss. 2004).
 Missouri	Unclear	<i>Allen v. Cont'l W. Ins. Co.</i> , 436 S.W.3d 548 (Mo. 2014); <i>Standard Artificial Limb, Inc. v. Allianz Ins. Co.</i> , 895 S.W.2d 205 (Mo. Ct. App. 1995).

50 State Surveys

Use of Extrinsic Evidence in Determining an Insurer's Duty to Defend

STATE	POLICYHOLDER IMPACT	RELEVANT AUTHORITY
 Montana	Unfavorable	<i>Revelation Indus., Inc. v. St. Paul Fire & Marine Ins. Co.</i> , 206 P.3d 919 (Mont. 2009); <i>Landa v. Assurance Co. of Am.</i> , 307 P.3d 284 (Mont. 2013).
 Nebraska	Favorable	<i>Peterson v. Ohio Cas. Group</i> , 724 N.W.2d 765 (Neb. 2006); <i>Mortg. Exp., Inc. v. Tudor Ins. Co.</i> , 771 N.W.2d 137 (Neb. 2009).
 Nevada	Favorable	<i>Zurich Am. Ins. Co. v. Ironshore Specialty Ins. Co.</i> , 497 P.3d 625 (Nev. 2021).
 New Hampshire	Unclear	<i>Webster v. Acadia Ins. Co.</i> , 934 A.2d 567 (N.H. 2007); <i>Ross v. Home Ins. Co.</i> , 773 A.2d 654 (N.H. 2001).
 New Jersey	Unclear	<i>Abouzaid v. Mansard Gardens Assocs., LLC</i> , 23 A.3d 338 (N.J. 2011); but see <i>Flomerfelt v. Cardiello</i> , 997 A.2d 991 (N.J. 2010).
 New Mexico	Unclear	<i>W. Heritage Bank v. Fed. Ins. Co.</i> , 938 F. Supp. 2d 1219 (D.N.M. 2013), aff'd, 557 F. App'x 807 (10th Cir. 2014); but see <i>Sw. Steel Coil, Inc. v. Redwood Fire & Cas. Ins. Co.</i> , 148 P.3d 806 (N.M. Ct. App. 2006).
 New York	Favorable	<i>QBE Ins. Corp. v. Adjo Contr. Corp.</i> , 121 A.D.3d 1064 (N.Y. App. Div. 2014); <i>Fitzpatrick v. Am. Honda Motor Co., Inc.</i> , 575 N.E.2d 90 (N.Y. 1991).
 North Carolina	Unfavorable	<i>Harleysville Mut. Ins. Co. v. Buzz Off Insect Shield, L.L.C.</i> , 692 S.E.2d 605 (N.C. 2010); <i>Erie Ins. Exch. v. Builders Mut. Ins. Co.</i> , 742 S.E.2d 803 (N.C. Ct. App. 2013).
 North Dakota	Unfavorable	<i>Tibert v. Nodak Mut. Ins. Co.</i> , 816 N.W.2d 31 (N.D. 2012); <i>Forsman v. Blues, Brews & B.-B-Ques, Inc.</i> , 903 N.W.2d 524 (N.D. 2017).
 Ohio	Unclear	<i>Ward v. United Foundries, Inc.</i> , 951 N.E.2d 770 (Ohio 2011); <i>Acuity v. Masters Pharm., Inc.</i> , 205 N.E.3d 460 (Ohio 2022); but see <i>City of Willoughby Hills v. Cincinnati Ins. Co.</i> , 459 N.E.2d 555 (Ohio 1984).
 Oklahoma	Favorable	<i>Poteau Ford Mercury, Inc. v. Zurich Am. Ins. Co.</i> , No. 104, 162, 2009 WL 9508739 (Okla. Civ. App. May. 8, 2009); <i>First Bank of Turley v. Fid. & Deposit Ins. Co. of Md.</i> , 928 P.2d 298 (Okla. 1996).
 Oregon	Unfavorable	<i>Ledford v. Gutoski</i> , 877 P.2d 80 (Or. 1994); <i>Isenhardt v. Gen. Cas. Co. of Am.</i> , 377 P.2d 26 (Or. 1962).
 Pennsylvania	Unclear	<i>Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Com. Union Ins. Co.</i> , 908 A.2d 888 (Pa. 2006); <i>Am. & Foreign Ins. Co. v. Jerry's Sport Ctr., Inc.</i> , 2 A.3d 526 (Pa. 2010); <i>Unitrin Direct Ins. Co. v. Esposito</i> , 280 F. Supp. 3d 666 (E.D. Pa. 2017).
 Rhode Island	Unfavorable	<i>Quality Concrete Corp. v. Travelers Prop. Cas. Co. of Am.</i> , 43 A.3d 16 (R.I. 2012); <i>Med. Malpractice Joint Underwriting Ass'n of R.I. v. Charlesgate Nursing Ctr., L.P.</i> , 115 A.3d 998 (R.I. 2015).

50 State Surveys

Use of Extrinsic Evidence in Determining an Insurer's Duty to Defend



STATE	POLICYHOLDER IMPACT	RELEVANT AUTHORITY
 South Carolina	Unclear	<i>Jessco, Inc. v. Builders Mut. Ins. Co.</i> , 472 F. App'x 225 (4th Cir. 2012); <i>USAA Prop. & Cas. Ins. Co. v. Clegg</i> , 661 S.E.2d 791 (S.C. 2008); but see <i>Town of Duncan v. State Budget & Control Bd., Div. of Ins. Servs.</i> , 482 S.E.2d 768 (S.C. 1997).
 South Dakota	Unclear	<i>State Farm Fire & Cas. Co. v. Harbert</i> , 741 N.W.2d 228 (S.D. 2007); but see <i>Lowery Constr. & Concrete, LLC v. Owners Ins. Co.</i> , 901 N.W.2d 481 (S.D. 2017).
 Tennessee	Unfavorable	<i>Travelers Indem. Co. of Am. v. Moore & Assocs. Inc.</i> , 216 S.W.3d 302 (Tenn. 2007); <i>Forrest Const., Inc. v. Cincinnati Ins. Co.</i> , 703 F.3d 359 (6th Cir. 2013); <i>Clark v. Sputniks, LLC</i> , 368 S.W.3d 431 (Tenn. 2012).
 Texas	Unfavorable	<i>Pine Oak Builders, Inc. v. Great Am. Lloyds Ins. Co.</i> , 279 S.W.3d 650 (Tex. 2009); but see <i>Loya Ins. Co. v. Avalos</i> , 610 S.W.3d 878 (Tex. 2020).
 Utah	Unclear	<i>Basic Rsch., LLC v. Admiral Ins. Co.</i> , 297 P.3d 578 (Utah 2013); but see <i>Fire Ins. Exch. v. Est. of Therkelsen</i> , 27 P.3d 555 (Utah 2001).
 Vermont	Favorable	<i>R.L. Vallee, Inc. v. Am. Int'l Specialty Lines Ins. Co.</i> , 431 F. Supp. 2d 428 (D. Vt. 2006); <i>Davis v. Liberty Mut. Ins. Co.</i> , 19 F. Supp. 2d 193 (D. Vt. 1998).
 Virginia	Unfavorable	<i>The AES Corp. v. Steadfast Ins. Co.</i> , 725 S.E.2d 532 (Va. 2012); <i>Marks v. Scottsdale Ins. Co.</i> , 791 F.3d 448 (4th Cir. 2015).
 Washington	Favorable	<i>Campbell v. Ticor Title Ins. Co.</i> , 209 P.3d 859 (Wash. 2009); <i>Truck Ins. Exch. v. VanPort Homes, Inc.</i> , 58 P.3d 276 (Wash. 2002).
 Washington, D.C.	Unfavorable	<i>Navigators Ins. Co. v. Baylor & Jackson, PLLC</i> , 888 F. Supp.2d 55 (D.D.C. 2012); <i>Stevens v. United Gen. Title Ins. Co.</i> , 801 A.2d 61 (D.C. 2002).
 West Virginia	Unclear	<i>Farmers & Mechs. Mut. Ins. Co. of W. Va. v. Cook</i> , 557 S.E.2d 801 (W. Va. 2001); but see <i>State Auto. Mut. Ins. Co. v. Alpha Eng'g Servs., Inc.</i> , 542 S.E.2d 876 (W. Va. 2000).
 Wisconsin	Unclear	<i>Fireman's Fund Ins. Co. of Wis. v. Bradley Corp.</i> , 660 N.W.2d 666 (Wis. 2003); but see <i>Olson v. Farrar</i> , 809 N.W.2d 1 (Wis. 2012).
 Wyoming	Unfavorable	<i>First Wyo. Bank, N.A. v. Cont'l Ins. Co.</i> , 860 P.2d 1094 (Wyo. 1993); <i>Reisig v. Union Ins. Co.</i> , 870 P.2d 1066 (Wyo. 1994).