

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

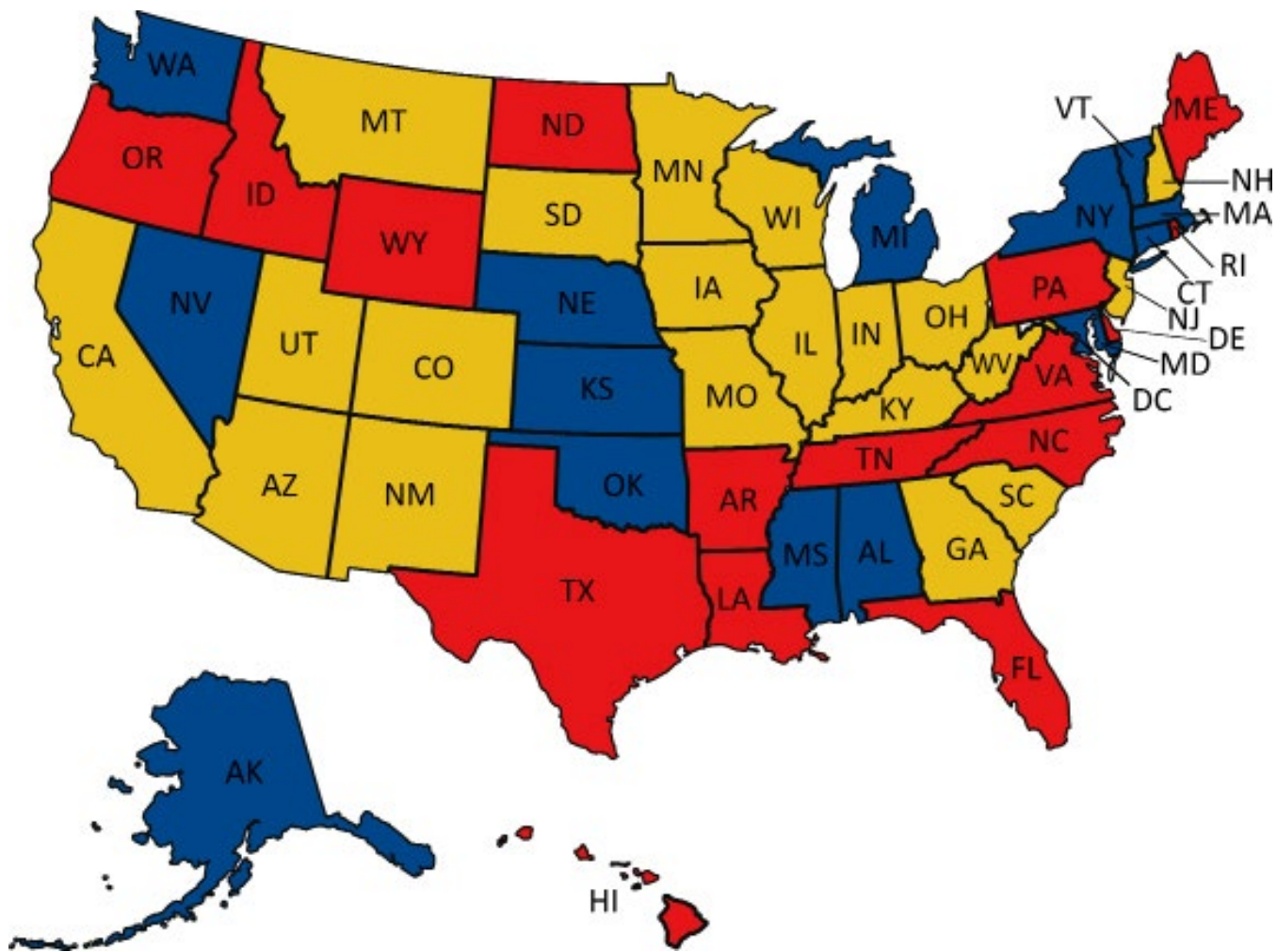


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An insurer's duty to defend is typically determined by the allegations of the complaint against the policyholder, regardless of the truthfulness or accuracy of such allegations. However, in some jurisdiction, courts will allow parties to rely upon 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.
























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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

State	Policyholder Impact	Relevant Authority
 Alabama	Favorable	<i>Gunnin v. State Farm and Cas. Co.</i> , 508 F. Supp. 2d 998 (M.D. Ala. 2007); <i>Pharmacists Mut. Ins. Co. v. Godbee Med. Distributions, Inc.</i> , 733 F. Supp. 2d 1281 (M.D. Ala. 2010).
 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>Northern Ins. Co. 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).
 Arkansas	Unfavorable	<i>Scottsdale Ins. Co. v. Morrow Land 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	Unclear	<i>Montrose Chem. Corp. v. Superior Court</i> , 861 P.2d 1153 (Cal. 1993); <i>Scottsdale Ins. Co. v. MV Transp.</i> , 115 P.3d 460 (Cal. 2005).
 Colorado	Unclear	<i>Compare Thompson v. Md. Cas. Co.</i> , 84 P.3d 496 (Colo. 2004) with <i>Pompa v. Am. Family Mut. Ins. Co.</i> , 520 F.3d 1139 (10th Cir. Colo. 2008).
 Connecticut	Favorable	<i>Hartford Cas. Ins. Co. v. Litchfield Mut. Fire Ins. Co.</i> , 876 A.2d 1139 (Conn. 2005).
 Delaware	Unfavorable	<i>Pac. Ins. Co. v. Liberty Mut. Ins. Co.</i> , 956 A.2d 1246 (Del. 2008); <i>Cont'l Cas. Co. v. Alexis I Du Pont Sch. Dist.</i> , 317 A.2d 101 (Del. 1974).
 DC	Unfavorable	<i>Navigators Ins. Co. v. Baylor & Jackson, PLLC</i> , 888 F. Supp. 2d 55 (D.D.C. 2012).
 Florida	Unfavorable	<i>Hartford Accident & Indem. Co. v. Beaver</i> , 466 F.3d 1289 (11th Cir. Fla. 2006); <i>Colony Ins. Co. v. G & E Tires & Serv. Inc.</i> , 777 So.2d 1034 (Fla. Dist. Ct. App. 2000).

State	Policyholder Impact	Relevant Authority
 Georgia	Unclear	<i>Compare 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	Unfavorable	<i>Burlington Ins. Co. v. Oceanic Design & Constr., Inc.</i> , 383 F.3d 940 (9th Cir. Haw. 2004); <i>Weight v. USSA 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).
 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).
 Indiana	Unclear	<i>Compare Transam. Ins. Co. 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. Emp'rs 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 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	<i>Compare James Graham Brown Found., Inc. v. St. Paul Fire & Marine Ins. Co.</i> , 814 S.W.2d 273 (Ky. 1991), with <i>Lenning v. Commer. Union Ins. Co.</i> , 260 F.3d 574 (6th Cir. Ky. 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).

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 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	Favorable	<i>Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co.</i> , 788 N.E.2d 522 (Mass. 2003); <i>Millipore Corp. v. Travelers Indem. Co.</i> , 115 F.3d 21 (1st Cir. 1907).
 Michigan	Favorable	<i>Am. Bumper & Mfg. Co. v. Hartford Fire Ins. Co.</i> , 550 N.W.2d 440 (Mich. 1996); <i>Matthew T. Szura & Co. v. Gen. Ins. Co. of Am.</i> , 543 Fed. Appx. 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. v. Lipscomb</i> , 75 So. 3d 557 (Miss. 2011).
 Missouri	Unclear	<i>Allen v. Cont'l W. Ins. Co.</i> , 436 S.W.3d 548 (Mo. 2014); <i>Standard Artificial Limb v. Allianz Ins. Co.</i> , 895 S.W.2d 205 (Mo. Ct. App. 1995).
 Montana	Unclear	<i>Revelations Indus., Inc. v. St. Paul Fire & Marine Ins. Co.</i> , 206 P.3d 919 (Mont. 2009); <i>Landa v. Assur. 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).
 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, 570 (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); <i>but see Flomerfelt v. Cardiello</i> , 997 A.2d 991 (N.J. 2010).

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 New Mexico	Unclear	<i>W. Heritage Bank v. Fed. Ins. Co.</i> , 938 F. Supp. 2d 1219 (D.N.M. 2013); <i>but see Sw. Steel Coil, Inc. v. Redwood Fire & Cas. Ins. Co.</i> , 140 N.M. 720 (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. 2d Dep't 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).
 Ohio	Unclear	<i>Ward v. United Foundaries, Inc.</i> , 951 N.E.2d 770 (Ohio 2011); <i>but see Brush Wellman, Inc. v. Certain Underwriters at Lloyd's, London</i> , No.03-CVH-08, 2006 WL 4455491 (Ohio Com. Pl. Aug. 30, 2006).
 Oklahoma	Favorable	<i>Poteau Ford Mercury, Inc. v. Zurich Am. Ins. Co.</i> , No. 06-1030, 2009 WL 9508739 (Okla. Civ. App. May. 8, 2009); <i>First Bank of Turley v. Fid. & Deposit Ins. Co.</i> , 928 P.2d 298 (Okla. 1996).
 Oregon	Unfavorable	<i>Ledford v. Gutoski</i> , 877 P.2d 80 (Or. 1994); <i>Insenhart v. Gen. Cas. Co.</i> , 377 P.2d 26 (Or. 1962).
 Pennsylvania	Unclear	<i>Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co.</i> , 908 A.2d 888 (Pa. 2006); <i>Am. & Foreign Ins. Co. v. Jerry's Sport Center, Inc.</i> , 2 A.3d 526 (Pa. 2010); <i>Unitrin Direct Ins. Co. v. Esposito</i> , 280 F. Supp. 3d 666, 670-71 (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).
 South Carolina	Unclear	<i>Jessco, Inc. v. Builders Mut. Ins. Co.</i> , 472 Fed. Appx. 225 (4th Cir. 2012); <i>Town of Duncan v. State Budget & Control Bd.</i> , 482 S.E.2d 768 (S.C. 1997); <i>but see USAA Prop. & Cas. Ins. Co. v. Clegg</i> , 661 S.E.2d 791 (S.C. 2008).

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 South Dakota	Unclear	<i>State Farm Fire & Cas. Co. v. Harbert</i> , 741 N.W.2d 228 (S.D. 2007).
 Tennessee	Unfavorable	<i>Travelers Indem. Co. of Am. v. Moore & Assocs.</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</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).
 Utah	Unclear	<i>Basic Research, LLC v. Admiral Ins. Co.</i> , 297 P.3d 578 (Ut. 2013); <i>but see Fire Ins. Exch. v. Estate of Therkelsen</i> , 27 P.3d 555 (Ut. 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).
 West Virginia	Unclear	<i>Farmers & Mechs. Mut. Ins. Co. v. Cook</i> , 557 S.E.2d 801 (W. Va. 2001); <i>but see 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. v. Bradley Corp.</i> , 660 N.W.2d 666 (Wis. 2003); <i>but see 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).