

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

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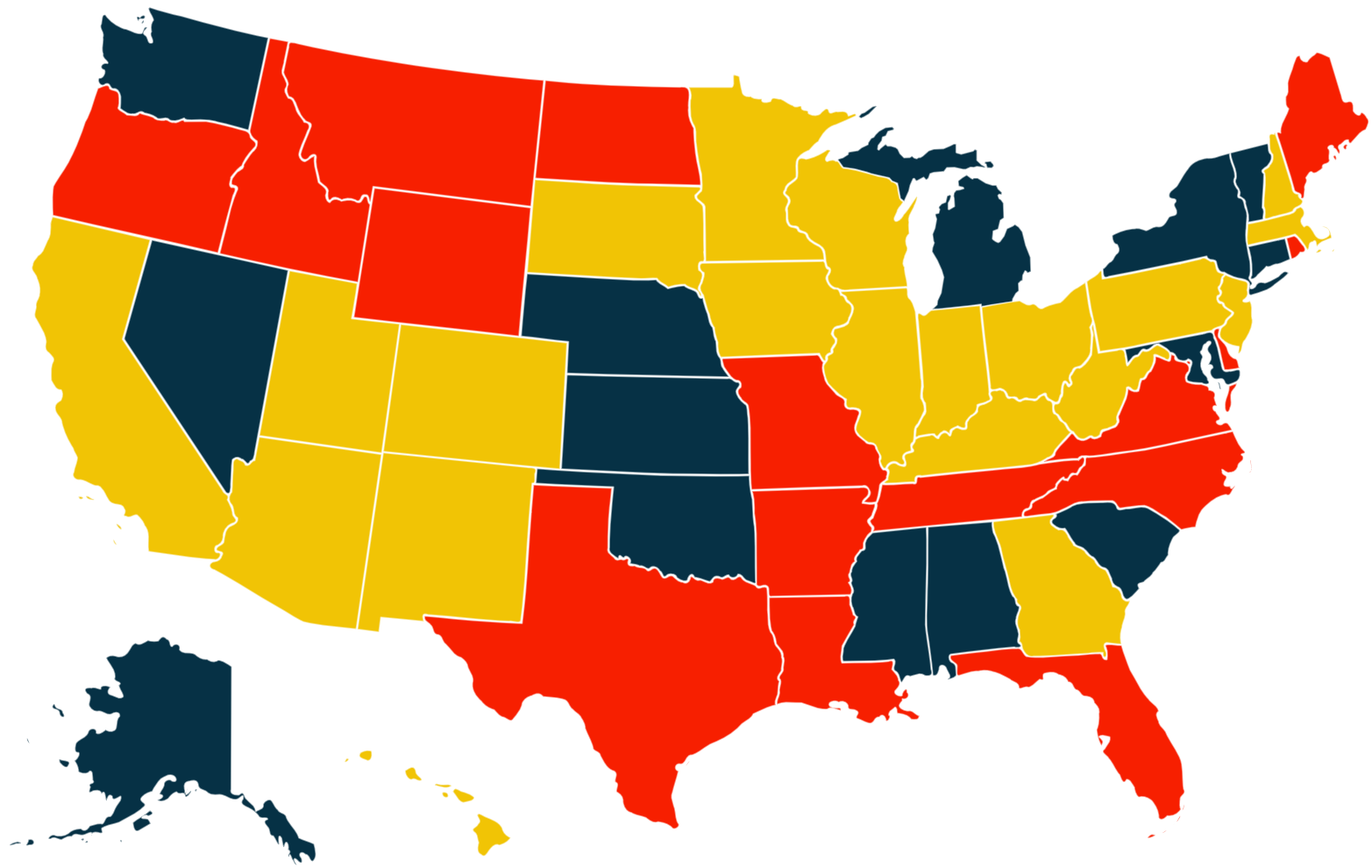
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THURSDAY, AUGUST 29, 2024

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.









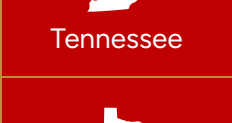






## Use of Extrinsic Evidence in Determining an Insurer's Duty to Defend

- 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   |
|---|---------------------|--|
| <br>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. Distribs., Inc.</i> , 733 F. Supp. 2d 1281 (M.D. Ala. 2010); <i>Hartford Cas. Ins. Co. v. Merchants &amp; Farmers Bank</i> , 928 So. 2d 1006 (Ala. 2005).   |
| <br>Alaska                 | Favorable           | <i>Williams v. GEICO Cas. Co.</i> , 301 P.3d 1220 (Alaska 2013); <i>Afcan v. Mut. Fire, Marine &amp; Inland Ins. Co.</i> , 595 P.2d 638 (Alaska 1979).   |
| <br>Arizona                | Unclear             | <i>Northern Ins. Co. v. Morgan</i> , 918 P.2d 1051 (Ariz. Ct. App. 1995); <i>U.S. Fid. &amp; Guar. Corp. v. Advance Roofing &amp; Supply Co.</i> , 788 P.2d 1227 (Ariz. Ct. App. 1989); <i>Long v. City of Glendale</i> , 93 P.3d 519, 528 (Ariz. Ct. App. 2004).  |
| <br>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&amp;L Prods., Inc.</i> , 964 S.W.2d 402 (Ark. Ct. App. 1998).   |
| <br>California             | Unfavorable         | <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); <i>Storek v. Fid. &amp; Guar. Ins. Underwriters, Inc.</i> , 504 F. Supp. 2d 803 (N.D. Cal. 2007), <i>aff'd</i> , 320 F. App'x 508 (9th Cir. 2009).   |
| <br>Colorado              | Unclear             | Compare <i>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); <i>Dish Network Corp. v. Arch Specialty Ins. Co.</i> , 989 F. Supp. 2d 1137 (D. Colo. 2013), <i>aff'd sub nom. Dish Network Corp. v. Arrowood Indem. Co.</i> , 772 F.3d 856 (10th Cir. 2014). |
| <br>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 Property Cas. Co. of America</i> , 61 A.3d 485 (Conn., 2013).   |
| <br>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 Du Pont Sch. Dist.</i> , 317 A.2d 101 (Del. 1974).   |
| <br>District of Columbia | Unfavorable         | <i>Navigators Ins. Co. v. Baylor &amp; Jackson, PLLC</i> , 888 F. Supp.2d 55 (D.D.C. 2012); <i>Stevens v. United General Title Ins. Co.</i> , 801 A.2d 61 (D.C., 2002).  |
| <br>Florida              | Unfavorable         | <i>Hartford Accident &amp; Indem. Co. v. Beaver</i> , 466 F.3d 1289 (11th Cir. Fla. 2006); <i>Colony Ins. Co. v. G &amp; E Tires &amp; Serv. Inc.</i> , 777 So.2d 1034 (Fla. Dist. Ct. App. 2000).   |
| <br>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).  |
| <br>Hawaii               | Unclear             | <i>Dairy Rd. Partners v. Island Ins. Co.</i> , 992 P.2d 93, 116 (Haw. 2000); but see <i>Burlington Ins. Co. v. Oceanic Design &amp; 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).  |
| <br>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).  |
| <br>Illinois             | Unclear             | <i>Pekin Ins. Co. v. Wilson</i> , 930 N.E.2d 1011 (Ill. 2010); <i>Am Econ. Ins. Co. v. Holabird &amp; 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).   |
| <br>Indiana              | Unclear             | Compare <i>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).   |
| <br>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 &amp; Investigation Servs.</i> , 778 N.W.2d 218 (Iowa App. 2009).  |
| <br>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).  |
| <br>Kentucky             | Unclear             | Compare <i>James Graham Brown Found., Inc. v. St. Paul Fire &amp; Marine Ins. Co.</i> , 814 S.W.2d 273 (Ky. 1991); <i>Dibenedetto v. Med. Protective Co.</i> , 3 F. App'x 483 (6th Cir. 2001); with <i>Lenning v. Commer. Union Ins. Co.</i> , 260 F.3d 574 (6th Cir. Ky. 2001).   |

| STATE  | POLICYHOLDER IMPACT | RELEVANT AUTHORITY   |
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|  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. &amp; 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); <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. 2002); <i>Metro. Prop. and Cas. Ins. Co. v. Morrison</i> , 951 N.E.2d 662 (Mass. 2011). |
|  Michigan         | Favorable           | <i>Am. Bumper &amp; Mfg. Co. v. Hartford Fire Ins. Co.</i> , 550 N.W.2d 440 (Mich. 1996); <i>Matthew T. Szura &amp; 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); <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 v. Allianz Ins. Co.</i> , 895 S.W.2d 205 (Mo. Ct. App. 1995).  |
|  Montana        | Unfavorable         | <i>Revelations Indus., Inc. v. St. Paul Fire &amp; 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); <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, 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); 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); but see <i>Sw. Steel Coil, Inc. v. Redwood Fire &amp; 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); <i>Forsman v. Blues, Brews and 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).   |



| STATE   | POLICYHOLDER IMPACT | RELEVANT AUTHORITY  |
|---|---------------------|---|
|  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. &amp; 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. &amp; 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>USAA Prop. &amp; Cas. Ins. Co. v. Clegg</i> , 661 S.E.2d 791 (S.C. 2008) but see <i>Town of Duncan v. State Budget &amp; Control Bd.</i> , 482 S.E.2d 768 (S.C. 1997).                                 |
|  South Dakota    | Unclear             | <i>State Farm Fire &amp; Cas. Co. v. Harbert</i> , 741 N.W.2d 228 (S.D. 2007); but see <i>Lowery Constr. &amp; 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 &amp; 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); but see <i>Loya Insurance Company v. Avalos</i> , 610 S.W.3d 878 (Tex., 2020).  |
|  Utah          | Unclear             | <i>Basic Research, LLC v. Admiral Ins. Co.</i> , 297 P.3d 578 (Ut. 2013); but see <i>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 &amp; Mechs. Mut. Ins. Co. 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. 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).   |

**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](mailto:coverage@sdvlaw.com).