

# Duty to Defend, Employment Discrimination and Resident Exclusion Coverage Update

February 15, 2022

## Duty to Defend – Texas

***Pharr-San Juan-Alamo Indep. Sch. Dist. v. Texas Pol. Subdivisions Prop./Cas. Joint Self Ins. Fund.***

--- S.W.3d ---, No. 20-0033, 2022 WL 420491 (Tex. Feb. 11, 2022)

***Monroe Guar. Ins. Co. v. BITCO Gen. Ins. Corp.***

--- S.W.3d ---, No. 21-0232, 2022 WL 413940 (Tex. Feb. 11, 2022)

The Supreme Court of Texas, answering certified questions, held that, in certain circumstances, courts can look beyond the plain language of the policy and the underlying complaint to determine whether there is a duty to defend.

The Supreme Court heard arguments in two separate cases in response to certified questions from the U.S. Court of Appeals for the Fifth Circuit. The certified questions related to whether Texas law permits consideration of extrinsic evidence to determine whether a duty to defend exists when the plaintiff's pleading is silent about a potentially dispositive coverage fact. The Supreme Court examined whether the state could deviate from the so-called "eight-corners rule," which allows courts to look only at the insurance policy and the underlying complaint to determine whether a duty to defend exists.

The Supreme Court adopted a narrowed version of the Northfield exception to the eight corners rule laid out in *Northfield Ins. Co. v. Loving Home Care Inc.*, 363 F.3d 523 (5th Cir. 2004). The Northfield exception allows extrinsic evidence to be used if the existence of a duty to defend cannot be determined due to information gaps in the policy and the complaint. The Supreme Court narrowed the Northfield exception for Texas state courts, holding that the exception only applies if certain criteria are met.

The Supreme Court explained that the eight-corners rule "remains the initial inquiry to be used to determine whether a duty to defend exists." After that, "if the underlying petition states a claim that could trigger the duty to defend, and the application of the eight-corners rule, due to a gap in the plaintiff's pleading, is not determinative of whether coverage exists, Texas law permits consideration of extrinsic evidence provided the evidence (1) goes solely to an issue of coverage and does not overlap with the

merits of liability, (2) does not contradict facts alleged in the pleading, and (3) conclusively establishes the coverage fact to be provided.”

By: Michael Hanchett

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## **Employment Discrimination Exclusion – Eighth Circuit (Missouri Law)**

### ***AMCO Ins. Co. v. Columbia Maintenance Co.***

No. 21-1822, 2022 WL 288144 (8th Cir. Feb. 1, 2022)

The U.S. Court of Appeals for the Eighth Circuit affirmed the district court’s decision granting summary judgment to the plaintiffs, Amco Insurance Company (AMCO) and Depositors Insurance Company (Depositors). Specially, the appellate court held that the employment discrimination exclusion in the insurers’ policies excluded coverage for the underlying employment discrimination claims.

In the underlying lawsuit, employees of defendant, Columbia Maintenance Company (Columbia), sued the company, claiming they were fired because of their race. Columbia sought coverage under its AMCO and Depositors policies. The insurers denied coverage based on the employment discrimination exclusion. Columbia filed a declaratory judgment action, and the U.S. District Court for the Eastern District of Missouri granted summary judgment in favor of the insurers.

The policy expressly covered personal and advertising injury, which included “discrimination” committed “in the course of ... business.” The exclusion, in turn, precluded “[e]mployment related practices, policies, acts or omissions, such as ... discrimination.” While Columbia believed that the policy was ambiguous and should be construed in favor of coverage, the appellate court disagreed, holding that “the two provisions are not ‘inconsistent,’ much less ‘irreconcilable.’” Rather, the policies were no different than many policies that contain a broad grant of coverage followed by exclusions that narrow the range of covered risks. The appellate court explained that the policies granted broad coverage for discrimination claims and then excluded a subset of those claims, “which is exactly how exclusions work.” Therefore, it affirmed the grant of summary judgment in favor of the insurers.

By: Joshua LaBar

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## **Resident Exclusion – Illinois**

### ***Farmers Ins. Exch. v. Cheekati***

--- N.E.3d ---, 2022 WL 351789, 2022 IL App (4th) 210023

The Illinois Fourth District Appellate Court upheld a resident premises exclusion in a homeowner's insurance policy. Cynthia Donnelly sued her landlords after she injured herself at her rental property. The insured landlords informed their insurer, Farmers Insurance Exchange (Farmers), of the injury and resulting lawsuit, but Farmers denied coverage, claiming that the resident exclusion in the Farmers policy barred coverage. Farmers moved for a declaratory judgment, stating that it correctly denied coverage.

Litigation ensued and Farmers argued in its motion for judgment on the pleadings that the exclusion in its policy applied because, at the time of the injury, Ms. Donnelly was a tenant in the insured landlords' home, and the resident exclusion precludes coverage for "bodily injury to any resident of the residence premises." The insured landlords argued that Ms. Donnelly was not a resident for purposes of the resident exclusion. The trial court granted Farmers' motion, finding that the allegations in the complaint were, in fact, excluded under the resident exclusion in the Farmers policy. Ms. Donnelly and the insured landlords appealed.

The appellate court recognized that the issue in the case was whether Ms. Donnelly qualified as a resident of the landlords' rental property under the resident exclusion in the Farmers policy. While the Farmers policy did not define "resident," the appellate court considered its "plain, ordinary, and popular meaning," holding that Ms. Donnelly was a resident of the landlords' rental property because she signed a lease giving her the right to live in the insured landlords' home, she identified herself as lawfully on the premises, and she intended to live in the home for a considerable amount of time. The appellate court rejected the argument that the policy was ambiguous and concluded that the resident exclusion in the Farmers policy applied to preclude coverage.

By: Danielle Chidiac