

# Duty to Defend, Trademark Infringement, Prior Notice Exclusion Coverage Update

August 3, 2020  
e-POST

## Duty to Defend – Fifth Circuit (Texas)

***State Farm Lloyds v. Richards et al.***

--- F.3d ---, 2020 WL 4048034 (5th Circ. July 20, 2020)

The U.S. Court of Appeals for the Fifth Circuit recently ruled that an insurer, State Farm Lloyds (State Farm), could not invoke a “very narrow” exception to the four corners rule in a case where the duty to defend the insureds in an underlying action was contested. The underlying case arose when an ATV accident killed the 10-year-old grandson of the insureds, Melvin and Janet Richards (Richards).

In the coverage case, the U.S. District Court for the Northern District of Texas ruled there was no duty to defend based, in part, on extrinsic evidence that the “motor vehicle exclusion” and the “insured exclusion” applied to the case. The appellate court examined the four corners doctrine, as well as a “very narrow” exception that permitted a court to examine extrinsic evidence only when the evidence went “solely to a fundamental issue of coverage which does not overlap with the merits of or engage the truth or falsity of any facts alleged in the underlying case.”

The appellate court ultimately found that exception was not satisfied in the case as “the extrinsic evidence State Farm seeks to admit problematically” overlapped with the merits of the underlying case, or engaged the truth or falsity of the facts alleged in the underlying case. The appellate court explained, for instance, that State Farm’s submission of the official crash report, indicating that the accident happened off Richards’ property, was too contradictory with the underlying allegation that the 10-year-old was operating the ATV on Richards’ property when he was killed. Accordingly, the appellate court determined that the extrinsic evidence was improperly relied on and overturned the district court’s ruling that State Farm had no duty to defend.

---

## Trademark Infringement – Ninth Circuit (California)

***Scottsdale Ins. Co. v. PTB Sales, Inc.***

--- Fed. Appx. ---, 2020 WL 4014162 (9th Cir. July 16, 2020)

The U.S. Court of Appeals for the Ninth Circuit affirmed summary judgment in favor of Scottsdale Indemnity Company (Scottsdale), ruling that Scottsdale was entitled to reimbursement of defense and settlement costs because Scottsdale had no duty to defend or indemnify its insured against a trademark suit. Scottsdale brought an action against its insured, PTB Sales, Inc. (PTB), seeking a declaration of no coverage under a CGL policy, as well as reimbursement for defense and settlement costs it paid under a reservation of rights. Though PTB brought a counterclaim of breach of contract and bad faith, Scottsdale filed a motion for summary judgment, which the trial court granted. PTB appealed.

The appellate court agreed with the lower court's finding that PTB did not meet its burden of establishing personal and advertising coverage, because the underlying allegations simply did not implicate "the use of another's advertising idea" or trade dress infringement. The appellate court reasoned that coverage was also precluded because of the applicability of three exclusions—"the Policy's prior publication, known injury, and intellectual property exclusions." The prior publication and known injury exclusions applied because PTB's alleged trademark infringement and notice of injury to the underlying plaintiff occurred before the policy period began. The intellectual property exclusion also applied because it explicitly negated coverage for trademark infringement claims.

Additionally, the appellate held that the district court properly dismissed PTB's counterclaims as Scottsdale did not breach a duty to fund independent counsel for PTB since the issue of coverage was "solely a legal issue, and the provisions of the [underlying] Complaint and the Policy are fixed and not susceptible to manipulation by appointed counsel." Likewise, the appellate court rejected PTB's allegation of bad faith interference of settlement, finding that PTB voluntarily settled the underlying action. The appellate court also held that Scottsdale properly reserved its rights to seek recoupment of defense and settlement costs, and was, therefore, entitled to reimbursement of those costs.

---

## **Prior Notice Exclusion – Indiana**

### ***Nat'l Collegiate Athletic Ass'n v. Ace Am. Ins.***

--- N.E.3d ---, 2020 WL 3983041 (Ind. Ct. App. July 15, 2020)

The U.S. Court of Appeals of Indiana held that excess insurers had no coverage obligations to the National Collegiate Athletic Association (NCAA) on the basis of a prior notice provision that precluded coverage for a claim rooted in the "the same or Related Wrongful Act alleged or contained" in any claim previously reported to another insurer.

In 2014, a group of former collegiate athletes filed a class action lawsuit against the NCAA, alleging that the NCAA violated antitrust laws by prohibiting athletes from accepting monetary and other benefits from schools (the Jenkins Action). The NCAA sought coverage from multiple excess insurers. The excess insurers denied coverage on the basis of a provision in the primary policy that precluded

coverage for any claims rooted in "the same or Related Wrongful Act" at issue in any prior claim reported by the NCAA to another insurer. The NCAA commenced a declaratory judgment action against the insurers, challenging the denials, but the trial court held in favor of the insurers on the basis of the prior notice exclusion.

The prior claim cited by the insurers, as the basis for the prior notice exclusion, was a class action filed against the NCAA in 2006, alleging that the NCAA violated antitrust laws by placing a cap on the amount of financial aid that could be provided to athletes (the White Action). The cap was set below the full cost of college attendance and the amount offered did not cover supplies, health insurance and other expenses. Though the White Action was settled in 2008, the 2014 complaint in the Jenkins Action explicitly referred to the White Action and settlement, alleging that it "did not end the NCAA's anticompetitive behavior restricting player-compensation."

The appellate court ultimately upheld the denial of coverage, finding that the Jenkins Action was subject to the prior notice provision as the claims in the Jenkins Action arose out of "the same or Related Wrongful Acts" as those alleged in the White Action. The appellate court explained that "[w]hile we agree with NCAA's allegation that [the White Action] centered on the cost-of-attendance gap, whereas Jenkins attacks both rules restricting what schools can offer student-athletes in the form of scholarships as well as rules restricting what others can offer students in the form of endorsements and direct payments, it is clear that both lawsuits essentially focus on the scheme instituted" by the NCAA's bylaws.

---

**Plunkett Cooney's insurance coverage update, The e-Post, is published bi-monthly via email. To receive your copy when it is issued, simply email - [subscribe@plunkettcooney.com](mailto:subscribe@plunkettcooney.com). Please indicate in the email that you would like to be added to the e-POST marketing list.**

---