to be purchased by the insured. As a result, there may a temptation for some courts to make number of occurrences decisions that are outcome determinative. At least one court has recognized this possibility and cautioned against it. *Unigard Ins. Co. v. U.S. Fid. & Guar. Co.*, 728 P.2d 780, 782 (Idaho Ct. App. 1986) ("A determination of the number of occurrences cannot be result-oriented. It must rest on a principled analysis that is not predisposed to favor insureds or insurers.").

50-State Survey: Number of Occurrences

Alabama: The Supreme Court of Alabama adopted the "cause" test and held that, where a roofing crew failed to adequately cover the exposed portion of a roof under repair, causing additional damage, the two events, because they were easily distinguishable in time and space, and because one event did not cause the other, each constituted a separate occurrence. *U.S. Fire Ins. Co. v. Safeco Ins. Co.*, 444 So. 2d 844, 846–47 (Ala. 1983). The policy defined "one occurrence" "[f]or the purpose of determining the limit of the company's liability" as "all bodily injury and property damage arising out of continuous or repeated exposure to substantially the same general conditions shall be considered as arising out of one occurrence." *Id.* at 845–46. The court held that "[a]s long as the injuries stem from one proximate cause there is a single occurrence." *Id.* at 846 (quoting *Appalachian Ins. Co. v. Liberty Mut. Ins. Co.*, 676 F.2d 56, 61 (3rd Cir. 1982)). The court viewed the negligent act of the roofing crew as a separate, intervening cause and not a proximate cause. *Id.* at 847; *see also St. Paul Fire & Marine Ins. Co. v. Christiansen Marine, Inc.*, 893 So. 2d 1124, 1137 (Ala. 2004) (holding that, for purposes of calculating the deductible owed, in the absence of evidence of more than one proximate cause, the breakup of several barges constituted a single occurrence); *Certain Underwriters at Lloyd's, London v. Southern Natural Gas Co.*, 142 So. 3d 436 (Ala. 2013) (discussing *Safeco* and *Christiansen Marine* and finding a single occurrence) ("Based on the arguments before us, we cannot say that there was a separate intervening cause. Sonat had cleanup areas at each site where Pydraul (and the PCBs in that lubricant) had contaminated the groundwater; that contamination was caused by the use of Pydraul through a unitary pipeline, and the manner of operating each compressor station was the same."); *Am. Cas. Co. of Reading v. Allen*, No. 12-2414, 2015 U.S. Dist. LEXIS 130979 (N.D. Ala. Sept. 29, 2015) (involving professional liability policy and discussing *Christiansen Marine*) ("[T]he state-court plaintiffs and their decedents were injured at different time periods, at different hospitals, and, perhaps, by different strains of bacteria.

These claims may be related if the alleged injuries arise from the same cause — a single act, error, or omission or related acts, errors, or omission connected by a common fact, circumstance, situation, transaction, event, advice, or decision."); *Frankenmuth Mut. Ins. Co. v. Gates Builders, Inc.*, No. 20-00596, 2022 U.S. Dist. LEXIS 79825 (S.D. Ala. May 3, 2022) ("[T]o find that there was only one occurrence, the evidence must show that the faulty construction that caused the balcony damage is the same type of faulty construction that caused the damage to the substrate. However, the allegations of the complaint are insufficiently detailed to make this determination."); *Progressive Specialty Ins. Co. v. Robles*, No. 22-566, 2023 U.S. Dist. LEXIS 84606 (N.D. Ala. May 15, 2023) ("[T]here is at least a jury question of whether two independent conditions caused the accidents here. A reasonable juror could find that Noojin's negligence caused the first collision, and six minutes later, Bell's negligence caused the second collision. For this reason, granting summary judgment for Progressive would be improper.").

Alaska: The Supreme Court of Alaska held that injuries sustained by six people, on account of a teenager firing a single shot from a gun, killing one friend and injuring another, were caused by a single occurrence. *United Services Auto. Ass'n v. Neary*, 307 P.3d 907 (Alaska 2013). The shooter's parents' homeowner's policy defined "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results . . . in . . . bodily injury." The court explained: "[I]t was not the Michauds' alleged failure to secure their firearms, nor their alleged failure to supervise their son, that constituted the event that was 'unforeseen and unexpected' from their standpoint as insureds; rather, it was 'the shooting that gave rise to the injuries' that was 'unforeseen and unexpected' and therefore, from their perspective, was the accident. The analysis is the same as it was in *Koikos* [*see* Florida], though the mathematics are different. Here there may have been multiple acts of negligence, but it was a single gunshot that caused the plaintiffs' damages. The single gunshot was the one occurrence for purposes of liability coverage." The court specifically rejected the shooter's parents call to adopt the "effects" test and find that, because there were six discrete injuries (the single bullet struck two individuals which in turn caused emotional distress to both sets of their parents) there were six occurrences. "Courts have correctly observed that the [effects] test renders insurers' liability both unpredictable and limitless, since any one event can cause many injuries to many people." *See also Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Triumvirate, LLC*, No. 23-00146, 2025 U.S. Dist. LEXIS 7331 (D. Alaska Jan. 14, 2025) ("Case law in Alaska [*Neary*] and

other jurisdictions supports finding a single occurrence when a single, unforeseen event results in multiple injuries that can be traced to negligence during, before and after that event.") ("Mr. Horvath alleges he suffered discrete additional injuries associated with the delay in initiating a rescue operation after the helicopter crash. But these injuries arose out of the single unforeseen event—the helicopter crash. The delayed rescue is reasonably encompassed within the Policy's 'continuing damage' definition of an occurrence. Further, the crash was closely linked in time and space to the hours-long delay in rescue such that an average person would consider the crash and subsequent rescue effort as a single event.").

Arizona: The Supreme Court of Arizona held that embezzlement, committed over a five-year period by an employee of the insured, by forging company checks, constituted a single occurrence under an employee fidelity policy. *Employers Mut. Cas. Co. v. DGG & CAR, Inc.*, 183 P.3d 513, 518–19 (Ariz. 2008). The policy defined "occurrence" as "all loss caused by, or involving, one or more 'employees,' whether the result of a single act or series of acts." *Id.* at 515. The court held that, based on this definition, the employee's embezzlement, although including a number of thefts, was a "series of acts," each one following the other. *Id.* "The policy plainly considers the loss resulting from the embezzlement of a single employee an occurrence, with an attendant $50,000 policy limit." *Id.* at 516. The Supreme Court of Arizona also concluded that its decision was consistent with the majority of courts interpreting similar policy language in corresponding factual situations. *Id.*; *see also Superstition Crushing, LLC v. Travelers Cas. and Sur. Co. of Am.*, 360 Fed. Appx. 844, 846 (9th Cir. 2009) ("The fact that one employee was guilty of multiple embezzlements does not mean that there were multiple occurrences, because all of her embezzlements were part of a single 'series of acts.' Here, there was only one occurrence, a series of embezzlements by one employee. Thus, this interpretation is supported by the policy language as a whole, as well as by Arizona case law.") (following *Employers*) (finding guidance in the public policy rationale discussed by *Employers*—that if an "occurrence" happens each time there is an individual theft, it actually hurts insureds who suffer small losses because they would be less than the deductible); *Austin Mut. Ins. Co. v. Aldecoa*, No. 2011–0040, 2011 Ariz. App. Unpub. LEXIS 1265 (Ariz. Ct. App. Oct. 11, 2011) (holding that the meaning of "occurrence" centers on whether there was but one proximate, uninterrupted and continuing cause which resulted in all of the injuries and damage) ("In this case, the actions of each grandparent—leaving the pool gate unlocked and failing to supervise the children properly—constituted two causative acts and, therefore,

two 'occurrences' under the policy. As conceded by Austin, each act was necessary to produce an injury that otherwise would not have occurred. The actions were taken by separate actors on separate days, each presumably acting without actual knowledge of the other's act. We cannot conclude that these separate acts constituted one uninterrupted 'natural and continuous sequence.'") (citations omitted); *Grain Dealers Mut. Ins. Co. v. Sharbono*, No. 12–02607, 2013 U.S. Dist. LEXIS 170939 (D. Ariz. Dec. 4, 2013) ("[T]he definition of 'occurrence' in *Helme* [*Arizona Property and Cas. Ins. Guar. Fund v. Helme*, 735 P.2d 451 (Ariz. 1987)] is significantly different from that in the present case. In *Helme*, 'occurrence' was defined as 'any incident, act or omission, or series of related incidents, acts or omissions resulting in injury.' Because the policy defined an occurrence as something 'resulting in' injury, the *Helme* court analyzed the number of causative acts that resulted in the injury. The Flores policy at issue here, however, does not define 'occurrence' in causal language, rather it defines 'occurrence' as an 'accident' with no reference to the causes of injury in the accident. The plain language of the Flores policy contemplates coverage for each accident, i.e., the collision between the pickup truck and tractor trailer, not the individual acts of negligence of the policy holder that might have led to the accident."); *Am. Strategic Ins. Corp. v. Clark*, No. 1 CA-CV 12-0881, 2013 Ariz. App. Unpub. LEXIS 1398 (Ariz. Ct. App. Dec. 19, 2013) ("Ordinarily, courts addressing causation surrounding an 'occurrence' under an insurance contract will examine whether 'there was but one proximate, uninterrupted, and continuing cause which resulted in all of the injuries and damages.' Thus, 'even though there have been multiple causative acts, there will be a single 'occurrence' if the acts are causally *related to each other* as well as to the final result.'") (quoting *Helme* and emphasis in original); *Cincinnati Indem. Co. v. Southwestern Line Constructors Joint Apprenticeship & Training Program*, 422 P.3d 1086 (Ariz. Ct. App. 2018) (rejecting the argument that, under *Helne*, the number of independent acts that caused a pole to break (five), determines the number of occurrences) ("The policy at issue in *Helme* defined 'occurrence' in relation to incidents, acts, or omissions that result in injury. Cincinnati Indemnity's Policy, in contrast, defines an 'occurrence' as an 'accident,' not the precipitating causes of the accident. This difference in policy language renders *Helme* inapplicable here."); *Landmark Am. Ins. Co. v. Shurwest LLC*, No. 19-04743, 2020 U.S. Dist. LEXIS 167774 (D. Ariz. July 23, 2020) (involving professional liability policy and discussing *Helme*) ("For the eleven lawsuits to be related or part of the same series of omissions, there would have to be some indication that the acts alleged in one lawsuit 'caused' the other. There is no such indication here."); *AIMS Ins. Program Managers*,

Inc. v. Nat'l Fire Ins. Co., No. 20-0032, 2021 Ariz. App. Unpub. LEXIS 123 (Ariz. Ct. App. Feb. 4, 2021) (applying *Helme*) ("While each case National relies upon involved a string of thefts that occurred without interruption or involvement by the insured, here, the thieves sent separate counterfeit email packages to AIMS that induced the company to make three wire transfers in payment of three distinct invoices. Thus, the three fraudulent email packages were not 'one proximate, uninterrupted, and continuing cause' that resulted in 'all of the injuries and damages' that AIMS suffered. Rather, each fraudulent demand for payment of one of the invoices was a distinct 'causative act' that constituted a separate occurrence under the policy.").

Arkansas: The Supreme Court of Arkansas applied the "cause" test and held that, where a man purchased a pistol and a shotgun at a sporting goods store, shot a policeman, killed and wounded several other persons, and then committed suicide, the insured's sale of the weapons constituted a single occurrence within the meaning of the policy. *Travelers Indem. Co. v. Olive's Sporting Goods, Inc.*, 764 S.W.2d 596, 599 (Ark. 1989). The policy defined "occurrence," in pertinent part as, "an accident including continuance [of] or repeated exposure to conditions." *Id.* (alteration in original). The policy also provided that "the limit stated in the declarations as applicable to 'each occurrence' is the total limit of liability . . . for all damages . . . arising out of bodily injury . . . sustained by one or more persons . . . as a result of any one occurrence." *Id.* The court based its decision on the terms of the policy and its conclusion that, following a review of decisions from other jurisdictions, the "cause" test, rather than the "effect" test, holds the better view. *Id.*; *see also Fireman's Fund Ins. Co. v. Scottsdale Ins. Co.*, 968 F. Supp. 444, 448 (E.D. Ark. 1997) (applying the cause test and predicting that the Supreme Court of Arkansas would hold that, in the absence of evidence of two or more independent events/causes, multiple sales of contaminated food at a restaurant to several customers constitute a single occurrence within the meaning of a commercial general liability policy); *Hortica-Florists' Mut. Ins. Co. v. Pittman Nursery Corp.*, No. 07–1119, 2011 U.S. Dist. LEXIS 93263 (W.D. Ark. Aug. 22, 2011) ("The Policy states: 'All loss or damage: (1) Caused by one or more persons; or (2) Involving a single act or series of related acts; is considered one occurrence'. In attempting to interpret this language, it is not clear to the Court whether an 'occurrence' is defined as all acts committed by a single individual, a number of 'related acts' committed by an individual, or a single act committed by an individual. In the case at bar, PNC alleges that Mr. Aydani committed multiple acts of theft or embezzlement spanning multiple years, using multiple sources of funding. Considering the complex nature

of the counterclaim for recovery for Mr. Aydani's acts of theft and the ambiguity of the contractual language on this subject, summary judgment is inappropriate."); *Cincinnati Ins. Co. v. Dievernich*, No. 19-00115, 2021 U.S. Dist. LEXIS 187772 (E.D. Ark. Sept. 30, 2021) (following *Olive's Sporting Goods* and *Fireman's Fund*) ("Similarly, the factual evidence here does not reveal that two or more wholly independent accidents occurred. Instead, the record indicates that each collision was the direct result of the same condition, namely rush-hour traffic. Allen Defendants argue that each driver had a duty to drive safely under Arkansas law, but Allen Defendants do not offer any record evidence that any driver was driving unreasonably or unsafely or otherwise violating their duties of care.").

California: The Court of Appeal of California adopted the "cause" test and held that damage to downhill property caused by a landslide constituted one "occurrence." *Safeco Ins. Co. of America v. Fireman's Fund Ins. Co.*, 148 Cal. App. 4th 620, 633–34 (Cal. Ct. App. 2007). The policies at issue defined "occurrence," in relevant part, as "[a]n accident, including continuous or repeated exposure to the same or similar harmful conditions, which results, during the policy period, in 'bodily injury' or 'property damage.'" *Id.* at 631 (alteration in original). "When all injuries emanate from a common source . . . , there is only a single occurrence for purposes of policy coverage. It is irrelevant that there are multiple injuries or injuries of different magnitudes, or that the injuries *extend over a period of time.* Conversely, when a cause is interrupted, or when there are several autonomous causes, there are multiple 'occurrences' for purposes of determining policy limits and assessing deductibles." *Id.* at 633–34 (quotation omitted) (emphasis and alteration in original). The court concluded that there was one uninterrupted cause or event, the landslide, that resulted in all of the damage. *Id.* at 634; *see also Evanston Ins. Co. v. Ghillie Suits. com, Inc.*, No. C 08–2099, 2009 U.S. Dist. LEXIS 22256 (N.D. Cal. Mar. 19, 2009) (recognizing *Safeco* as the appropriate law but holding that two Marines injured by fire constituted separate occurrences because the proximate cause of the first Marine's injuries was the ignition of his camouflage suit, while the other Marine's suit ignited after he decided to rescue the first Marine and came into contact with the fire) ("Allowing the insurer to limit the number of occurrences to a particular remote cause would effectively eviscerate the purpose of having a per-occurrence limitation as opposed to an aggregate limit."); *Pennsylvania Gen. Ins. Co. v. Am. Safety Indem. Co.*, 185 Cal.App. 4th 1515 (2010) (citing various California cases holding that "occurrence" refers to the underlying cause of injury, rather than the injury or claim itself, when determining how to apply per occurrence limits or per occurrence

typically for inorganic substances such as those expressly enumerated in the Policy definition; i.e. solid, liquid gaseous or thermal irritants or contaminants, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste."); *Granada Ins. Co. v. Linares*, No. 2020-26437, 2022 Fla. Cir. LEXIS 836 (Fla. Cir. Ct. Mar. 25, 2022) (concluding, with no discussion, other than a citation to *Deni Assoc.*, that the pollution exclusion precluded coverage for injury caused by the application of "hair chemicals" to an individual's scalp at a hair studio); *Fla. Farm Bureau Gen. Ins. Co. v. Worrell*, 359 So. 3d 890 (Fla. Ct. App. 2023) (first-party policy) ("[T]he blood left at the Worrells' residence by Anton's unlawful entrance onto their property is not a 'Pollutant' as defined by the policy's exclusion provision—that is, blood is not 'any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste.' Indeed, blood is materially different from any of the substances listed to illustrate that which constitutes a 'pollutant.' Further, blood does not meet the definition of 'waste,' as blood plainly is not a material to be 'recycled, reconditioned or reclaimed.'").

Georgia: The Supreme Court of Georgia held that the pollution exclusion unambiguously precluded coverage for a carbon monoxide leak in an insured landlord's rental property because it qualified as a "pollutant." *Reed v. Auto-Owners Ins. Co.*, 667 S.E.2d 90, 92 (Ga. 2008). "As all parties recognize, the question thus narrows to whether carbon monoxide gas is a 'pollutant'—i.e., matter, in any state, acting as an 'irritant or contaminant,' including 'fumes.' We need not consult a plethora of dictionaries and statutes to conclude that it is." *Id.* The court concluded that nothing in the text of the pollution exclusion supported a reading that it was "limited to what is commonly or traditionally considered environmental pollution." *Id.* In *Ga. Farm. Bureau Mut. Ins. Co. v. Smith*, 784 S.E.2d 422 (Ga. 2016), the Supreme Court of Georgia held that "[u]nder the broad definition contained in Chupp's policy, we conclude that lead present in paint unambiguously qualifies as a pollutant and that the plain language of the policy's pollution exclusion clause thus excludes Smith's claims against Chupp from coverage." *See also Truitt Oil & Gas Co. v. Ranger Ins. Co.*, 498 S.E.2d 572, 574 (Ga. Ct. App. 1998) (holding pollution exclusion applicable to claim arising out of gasoline leak from storage container, rendering neighbor's real property inaccessible, because of road closure due to cleanup); *Scottsdale Ins. Co. v. Pursley*, 487 Fed. Appx. 508 (11th Cir. 2012) (following *Reed* and holding that carbon monoxide was a pollutant which triggered pollution exclusion); *Racetrac Petroleum, Inc. v. Ace American Ins. Co.*, 841 F. Supp. 2d 1286 (N.D. Ga. 2011) (holding that benzene, which is typically found in unleaded

gasoline in small amounts, was a pollutant under the pollution exclusion, and it did not make a difference whether injuries resulted from exposure to highly concentrated amounts or typical concentration found in gasoline), *affirmed* 2011 U.S. App. LEXIS 22455 (11th Cir. Nov. 3, 2011) (concluding that the claims came within the scope of the pollution exclusion and also agreeing with the district court that the pollution exclusion did not "violate Georgia public policy since the liability insurance policies at issue are primarily intended to provide Racetrac with coverage for the countless other risks associated with operating convenience stores"); *Evanston Ins. Co. v. Sandersville R.R. Co.*, No. 5:15-247, 2016 U.S. Dist. LEXIS 134162 (M.D. Ga. Sept. 29, 2016) (following a detailed analysis of Georgia law addressing the pollution exclusion, court held that the exclusion precluded coverage for injuries caused by welding fumes). *But see Barrett v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 696 S.E.2d 326, 330 (Ga. Ct. App. 2010) (declining to follow *Reed* because the allegations of the complaint indicated that the release of natural gas, standing alone, did not cause the underlying plaintiff's injuries) (distinguishing cases where the presence of the pollutant, following its release, dispersal, or seepage was the "but-for" cause of the plaintiff's injury); *Minkoff v. Action Remediation, Inc.*, No. 559/06, 2010 N.Y. Misc. LEXIS 4857 (N.Y. Sup. Ct. Sept. 30, 2010) (applying Georgia law) (concluding that damages resulting from the use of a bleach and Sporicidin mix in mold remediation were not precluded from coverage under policy's pollution exclusion because, as standard supplies in the cleaning business, "a reasonable insured would expect the chemicals released by the mix of bleach and Sporicidin . . . to be covered by the CPL") (noting that a pollution exclusion including such chemicals "would raise public policy issues"); *Centro Dev. Corp. v. Cent. Mut. Ins. Co.*, 720 Fed. Appx. 1004 (11th Cir. 2018) (storm water qualifies as a pollutant); *Recyc Sys. Southeast, LLC v. Farmland Mut. Ins. Co.*, No. 17-225, 2018 U.S. Dist. LEXIS 82248 (M.D. Ga. May 16, 2018) (pollution exclusion applied to noxious odors from a holding pond containing nutrient-rich water disposed of by poultry plants); *Evanston Ins. Co. v. Xytex Tissue Servs., LLC*, 378 F. Supp. 3d 1267 (S.D. Ga. 2019) ("[W]hen bodily injury results from the migration, release, or escape of lead-based paint or carbon monoxide, the substances unambiguously meet the definition for 'pollutant.' The same cannot be said for nitrogen."); *Associated Indem. Corp. v. Hughes*, No. 18-00201, 2019 U.S. Dist. LEXIS 111883 (N.D. Ga. Apr. 25, 2019) (storm water, even when uncontaminated, is a "pollutant"); *Sullivan v. Everett Cash Mut. Ins. Co.*, No. 18-00207, 2019 U.S. Dist. LEXIS 141628 (N.D. Ga. Apr. 17, 2019) (concluding that airborne particulates and dust "fall well within the definition of

'pollutant'") ("The phrase 'any solid . . . irritant or contaminant' plainly includes dust and any other particles emitted by a poultry plant, even if those substances are not explicitly listed in the Policy."); *Evanston Ins. Co. v. Sandersville R.R.*, 761 Fed. Appx. 940 (11th Cir. 2019) (pollution exclusion applied to injury from inhaling welding fumes which contained iron particles) ("[W]elding fumes unambiguously qualify as an 'irritant or contaminant,' including . . . fumes."); *Century Cmtys. of Ga. v. Selective Way Ins. Co.*, No. 18-5267, 2019 U.S. Dist. LEXIS 224489 (N.D. Ga. Oct. 25, 2019 (pollution exclusion applied to property damage caused by "water runoff, sediment, silt, and other pollutants") (*aff'd at* 2023 U.S. App. LEXIS 4645 (11th Cir. Feb. 27, 2023) addressing whether the pollution exclusion had been waived); *Lang v. FCCI Ins. Co.*, No. 19-3902, 2021 U.S. Dist. LEXIS 73764 (N.D. Ga. Mar. 30, 2021) (dust from construction work qualified as a pollutant) ("[D]ust is inescapably and unambiguously a 'pollutant,' i.e., an 'irritant or contaminant' under the circumstances here where Plaintiff has alleged that the dust, whether due to its accumulation or otherwise, caused Mr. Love's difficulty breathing and ultimate ICU visit"); *Grange Ins. Co. v. Cycle-Tex, Inc.*, No. 21-1472022, U.S. Dist. LEXIS 255860 (N.D. Ga. Dec. 5, 2022) ("[T]here can be no doubt that the alleged contaminants in the underlying lawsuit — PFAS chemicals — are 'pollutants' within the plain meaning of Cycle-Tex's insurance policy. Not only are 'chemicals' explicitly listed in the policy's definition of 'pollutants,' but Georgia courts have repeatedly emphasized the 'broad' reach of the term 'pollutants' contained within total pollution exclusion clauses."); *Everett Cash Mut. Ins. Co. v. Carpenter*, No. 23-38, 2024 U.S. Dist. LEXIS 237536 (N.D. Ga. Aug. 6, 2024) ("Everett argues that, because insects are 'irritating,' they fall within the definition of pollutant as an 'irritant.' While this argument seems intuitive, the Policy also requires an irritant to be 'solid, liquid, [or] gaseous,' which are counterintuitive ways to describe living creatures such as insects."); *Nationwide Prop. & Cas. Ins. Co. v. Hampton Ct., L.P.*, 754 F. Supp. 3d 1349 (N.D. Ga. 2024) ("Under a plain reading of the Pollution Exclusion at issue here, which broadly defines 'pollutant' as 'any solid, liquid, gaseous or thermal irritant or contaminant,' the Court finds that the 'mold' alleged clearly qualifies as a pollutant."); *Auto-Owners Ins. Co. v. Tabby Place Homeowners Ass'n*, No. 21-346, 2025 U.S. Dist. LEXIS 171624 (S.D. Ga. Sept. 3, 2025) ("The Court finds no meaningful distinction in the fact that the stormwater here is allegedly infiltrating through the ground and thus increasing the amount of groundwater on the adjacent properties, rather than there being a direct stormwater runoff onto the adjacent properties. It is ultimately the stormwater—a 'pollutant' under Georgia law.").

intrusion is a 'happening that is not expected, foreseen, or intended' and thus falls within the definition of 'occurrence.' Certainly, neither the Plaintiff nor the homeowners intended to have water intrude into the 20 homes. Nor can it be said that either the Plaintiff or the homeowners expected or foresaw the water intrusion." *Id. See also Big-D Const. Corp. v. Take it for Granite Too*, 917 F. Supp. 2d 1096 (D. Nev. 2013) (predicting that the Nevada Supreme Court "would hold that faulty workmanship itself does not fall under the common meaning of an accident, and therefore is not an occurrence" but "that an unexpected happening caused by faulty workmanship could be an occurrence") ("Nevada therefore likely would follow the courts which recognize that although faulty workmanship itself is not an accident, the unexpected consequences of that faulty workmanship is an accident."); *Evanston Ins. Co. v. Western Community Ins. Co.*, No. 13–01268, 2014 U.S. Dist. LEXIS 136129 (D. Nev. Sept. 26, 2014) (agreeing with the analysis in *Big-D*); *Gemini Ins. Co. v. N. Am. Capacity Ins. Co.*, No. 14-00121, 2015 U.S. Dist. LEXIS 14836 (D. Nev. Feb. 6, 2015) ("Although faulty workmanship itself cannot constitute an occurrence under Nevada law, an unexpected happening caused by faulty workmanship could be an occurrence. Accordingly, Olsen's alleged faulty workmanship could constitute an occurrence under Nevada law, and thereby create a possibility of coverage under the Policy even if the faulty workmanship occurred when Olsen conducted its repairs.") (citing *Big-D*) (vacated pursuant to a settlement between the parties, 2015 U.S. Dist. LEXIS 80239 (D. Nev. June 18, 2015)); *Ariz Civ. Constructors v. Colony Ins. Co.*, 481 F. Supp. 3d 1141 (D. Nev. 2020) ("While [the Nevada Supreme Court] has yet to clarify whether faulty workmanship itself constitutes an accident, other judges in this district have reasoned that faulty workmanship, on its own and without other, independent damage, is hardly an unexpected occurrence during and after construction. This reasoning accords with decisions from courts nationwide interpreting other states' laws and similar liability insurance policies, including the Ninth Circuit. I agree with those courts' reasoning and adopt their interpretation.").

New Hampshire: The Supreme Court of New Hampshire held that a claim against a landscaper, for faulty workmanship in constructing a leach field and performing landscaping, did not qualify as an "occurrence." *McAllister v. Peerless Ins. Co.*, 474 A.2d 1033, 1036–37 (N.H. 1984) (Souter, J.). "The fortuity implied by reference to accident or exposure is not what is commonly meant by a failure of workmanship." *Id.* at 1036; *see also Webster v. Acadia Ins. Co.*, 934 A.2d 567, 573 (N.H. 2007) (distinguishing *McAllister* and holding that the "occurrence" requirement was satisfied because the claim alleged damage to property other than

the work of the contractor-insured); *see also Concord Gen. Mut. Ins. Co. v. Green & Co. Building & Develop. Corp.*, 8 A.3d 24, 28 (N.H. 2010) (acknowledging that defective work, standing alone, does not constitute an "occurrence," but, rather, an "occurrence" is damage to property other than the work product and damage to the work product other than the defective workmanship) (holding that the entry of carbon monoxide into homes, caused by defective chimneys, was not an "occurrence" because the carbon monoxide caused no physical, tangible alteration of the property, homeowners continued to occupy their homes and no homeowners suffered bodily injury) ("The only effect caused by the faulty chimneys was their loss of use. The loss of use of the insured's work product, standing alone, is not sufficient to constitute an 'occurrence' under the policy."); *Brown v. Concord Group Ins. Co.*, 44 A.3d 586 (N.H. 2012) (citing *Green & Co.* for the proposition that "to constitute an 'occurrence,' the damage at issue must have been to property other than Spencer's work product") ("[T]he factual dispute as to whether the damage was caused by the 2007 repair work or the 2003 original construction of the house is material to whether the damage was caused by an 'occurrence.' If the 2007 work caused damage to the 2003 work, then the damage was caused by an 'occurrence' because the 2007 work is not the same work product as the 2003 work. Conversely, if the damage at issue was actually caused by the 2003 work, then it was not caused by an 'occurrence' because the damage was not to a separate work product."); *Fletch's Sandblasting & Painting, Inc. v. Colony Ins. Co.*, No. 15-490, 2017 U.S. Dist. LEXIS 86488 (D.N.H. June 6, 2017) ("Thick Tech's claim is a noncovered claim for defective workmanship because the costs it seeks to recover were incurred to repair Fletch's defective work rather than to compensate Thick Tech for damage to other property that resulted from the defective work.") (citing *McAllister* and *Concord Gen.*); *Patriot Ins. Co. v. Holmes Carpet Ctr.*, No. 17-73, 2017 U.S. Dist. LEXIS 175643 (D.N.H. Oct. 24, 2017) ("[T]he policy at issue provides coverage only for personal injury or property damage caused by an occurrence, and an insured's defective work does not satisfy this requirement because it lacks the requisite fortuity. This principle applies regardless of whether the claim is for damage to the property that the insured worked on directly or other property that requires repair or replacement in order to correct the defective work. In both instances, the sole cause of the property damage is the insured's defective work, which cannot qualify as an occurrence. In the present case, any property that will be damaged when the defective tile is replaced will be solely the result of the Carpet Center's defective workmanship rather than some intervening fortuitous event or exposure. Therefore, the Carpet

Center is not entitled to a defense because the underlying action does not seek to recover for property damage caused by an occurrence."); *Wallace v. Nautilus Ins. Co.*, No. 18-747, 2019 U.S. Dist. LEXIS 122219 (D.N.H. July 23, 2019) ("Plaintiffs do not dispute that New Hampshire law holds that defective workmanship alone is not an occurrence under the Policy's language. They argue, however, that the occurrence for purposes of the Policy in this case is not the defective workmanship itself, but rather the leaking caused by the defective roofs, which resulted in property damage. The court agrees."); *Hutton Constr., Inc. v. Cont'l Western Ins. Co.*, No. 21-cv-706, 2022 U.S. Dist. LEXIS 117395 (D.N.H. July 5, 2022) ("In sum, based on my analysis of New Hampshire cases, I agree with Continental that damage to nondefective property caused by defective workmanship will not give rise to an occurrence under the policy without an intervening event or exposure that occurs fortuitously and, together with the defective work, harms nondefective property") (acknowledging the New Hampshire Supreme Court has not squarely answered the question of whether an intervening fortuitous event or exposure is required); *Next Ins. U.S. Co. v. Scott Cortemarche Scoco Fam. Home Builders, LLC*, No. 24-cv-00017, 2025 U.S. Dist. LEXIS 57428 (D.N.H. Feb. 14, 2025) (finding no "occurrence" for claimed defects including missing parts, improperly installed components, structural unsoundness and building code violations, all of which were due to faulty workmanship) (adopted in relevant part and rejected on other bases, 2025 U.S. Dist. LEXIS 66509 (D.N.H. Apr. 8, 2025)).

New Jersey: The New Jersey Supreme Court, in *Cypress Point Condominium Assoc. v. Andria Towers*, 143 A.3d 273 (N.J. 2016), after stating that it "had never addressed questions of coverage for consequential damages caused by faulty workmanship under the 1986 ISO standard form CGL policy," concluded: "[U]nder our interpretation of the term 'occurrence' in the policies, consequential harm caused by negligent work is an 'accident.' Therefore, because the result of the subcontractors' faulty workmanship here—consequential water damage to the completed and nondefective portions of Cypress Point—was an 'accident,' it is an 'occurrence' under the policies and is therefore covered so long as the other parameters set by the policies are met. *See Weedo, supra*, 81 N.J. at 249, 405 A.2d 788 (noting that CGL policies do 'not cover an accident of faulty workmanship but rather faulty workmanship that causes an accident')." *Id.* at 289. The court looked at cases nationally and observed that they "represent a strong recent trend in the case law [of most federal circuit and state courts] interpet[ing] the term 'occurrence' to encompass unanticipated damage to nondefective property resulting from poor workmanship."

Id. at 285. The court went on to address the impact of the "subcontractor exception" to the "your work" exclusion: "This exception to the 'your work' exclusion was not contained in the 1976 ISO CGL form, but unquestionably applies in this case. Accordingly, the third and final step of our inquiry compels the conclusion that, because the water damage to the completed portions of Cypress Point is alleged to have arisen out of faulty workmanship performed by subcontractors, it is a covered loss. *Id.* at 289. In *Travelers Prop. Cas. Co. of Am. v. USA Container Co.*, 686 Fed. Appx. 105 (3rd Cir. 2017), the court rejected the insurer's argument -- that the CGL Policy does not provide coverage to replace or repair defective work – on the basis of *Cypress Point:* "[I]n *Cypress Point*, the New Jersey Supreme Court rejected this very argument: '[R]elying on *Weedo*, the insurers assert that damage to an insured's work caused by a subcontractor's faulty workmanship is foreseeable to the insured developer because damage to any portion of the completed project is the normal, predictable risk of doing business. . . . We disagree.' The court also cited favorably to *U.S. Fire Insurance Co. v. J.S.U.B., Inc.*, 979 So.2d 871 (Fla. 2007), where the Florida Supreme Court rejected an insurer's argument that faulty workmanship can never be an accident because it results in reasonably foreseeable damages; and confirm[ed] that the 1986 revisions to the standard CGL policy . . . specifically cover[ed] damage caused by faulty workmanship to other parts of work in progress; and damage to, or caused by, a subcontractor's work after the insured's operations are completed." *Id.* at 108-09. *See also 313 Jefferson Trust, LLC v. Mercer Ins. Cos.*, No. 2907-15, 2018 N.J. Super. Unpub. LEXIS 35 (N.J. Super. Ct. App. Div. Jan. 8, 2018) (finding no "occurrence" because "although there may have been unintended or unexpected expenses because of the contractor's poor workmanship, there was no finding by the trial court that there was harm to any completed, nondefective portions of a building") ("We do not read *Cypress Point* so broadly as to define occurrence without some damage to nondefective property."); *Velez v. Angel Consulting, LLC*, No. BER-L-8280-19, 2021 N.J. Super. Unpub. LEXIS 1675 (N.J. Super. Ct. Aug. 10, 2021) (finding insuring agreement was not met because no consequential damages were alleged - all damages sought were based on poor workmanship or work that was never completed); *Antamex Int'l Inc. v. Zurich Am. Ins. Co.*, No. 20-cv-15232, 2023 U.S. Dist. LEXIS 108867 (D.N.J. June 22, 2023) (noting that in order to trigger coverage for a construction defect claim, "there must be consequential damage to non-defective portions of the property, not simply damage to the defective work-product itself").

of the CGL Policy and applicable West Virginia case law") (*affirmed* 614 Fed. Appx. 622 (4th Cir. 2015)); *State ex rel. Nationwide Mut. Ins. Co. v. Wilson*, 778 S.E.2d 677 (W. Va. 2015) ("According to the Nelsons' complaint, Mr. Hlad negligently built their house, and thereby 'adversely impacted the structural integrity of [their] home, [and caused] cracks in the foundation of [their] home and water leaks and structural and other property damages[.]' The Nelsons also assert that as a result of Mr. Hlad's defective work, they had to replace 'various doors, windows, walls, lights;' 'vinyl siding and flashing;' 'kitchen cabinets, tiles, and appliances;' etc. These damages were caused by an 'occurrence.'") (also concluding that "to the extent that the amended complaint alleged that Mr. Hlad's actions were intentional misconduct or purely breach of contract, his actions are not "occurrences").

Wisconsin: The Supreme Court of Wisconsin held that damage to a warehouse constructed by an insured–general contractor, caused by a soil engineering subcontractor's faulty site-preparation advice, qualified as an "occurrence." *Am. Family Mut. Ins. Co. v. Am. Girl, Inc.*, 673 N.W.2d 65, 76 (Wis. 2004). "The damage to the 94DC occurred as a result of the continuous, substantial, and harmful settlement of the soil underneath the building. Lawson's inadequate site-preparation advice was a cause of this exposure to harm. Neither the cause nor the harm was intended, anticipated, or expected." *Id.* The court also addressed the "subcontractor exception" to the "your work" exclusion and rejected the insurer's argument that it creates coverage where none existed: "There is coverage under the insuring agreement's initial coverage grant. Coverage would be excluded by the business risk exclusionary language, except that the subcontractor exception to the business risk exclusion applies, which operates to restore the otherwise excluded coverage." *Id.* at 83–84; *see also Toldt Woods Condominiums Owner's Ass'n, Inc. v. Madeline Square, LLC*, No. 2007AP1763, 2008 Wisc. App. LEXIS 638 (Wis. Ct. App. Aug. 13, 2008) (examining several Wisconsin decisions and concluding that faulty workmanship is not an "occurrence," but, rather, faulty workmanship that causes damage to other property is an "occurrence"); *Mantz Automation, Inc. v. Navigators Ins. Co.*, No. 2009AP1681, 2010 Wisc. App. LEXIS 358 (Wis. Ct. App. May 12, 2010) (holding that faulty workmanship in itself does not constitute an "occurrence" and there was no evidence of subsequent property damage); *Acuity v. Society Ins.*, 810 N.W.2d 812 (Wis. Ct. App. 2012) ("The lessons of *American Girl*, *Glendenning's [Limestone & Ready-Mix Co., Inc. v. Reimer*, 721 N.W.2d 704 (Wis. Ct. App. 2006)], and *Kalchthaler* [*v. Keller Const. Co.*, 591 N.W.2d 169 (Wis. Ct. App. 1999)] are that while faulty workmanship is not an 'occurrence,' faulty workmanship may cause an

'occurrence.' That is, faulty workmanship may cause an unintended event, such as soil settling in *American Girl*, the leaking windows in *Kalchthaler*, or, in this case, the soil erosion, and that event—the 'occurrence'—may result in harm to other property."); *Henshue Const., Inc. v. Terra Engineering & Const. Corp.*, 833 N.W.2d 873 (Wis. Ct. App. 2013) ("Based on its review of engineering drawings, Henshue mistakenly believed that the storm sewer pipe that crossed its excavation was connected only to two small inlets in a driveway. For this reason, Henshue did not install a temporary diversion pipe. The storm sewer pipe, however, was connected to the storm sewer for a large parking lot. The result of Henshue's failure to divert the storm water was that significant amounts of water entered the excavation when heavy rains fell in the area. The flooding was not an event that Henshue anticipated. As Henshue points out: 'Henshue did not divert the storm pipe precisely because it did not expect any water to travel through the pipe and into the excavation.' Henshue did not anticipate that its work would result in flooding that would cause damage, and thus the flooding event was an accident and an occurrence requiring coverage under the policy."); *Yeager v. Polyurethane Foam Insulation, LLC*, 808 N.W.2d 741 (Wis. Ct. App. 2011) ("Yeager contends that, because PFI's conduct led to unexpected or accidental property damage, PFI's conduct must have constituted an occurrence under the CGL policy. However, an unexpected or accidental bad result does not qualify as an 'occurrence' for purposes of insurance coverage; instead, it is the act which causes the bad result that must qualify as an 'occurrence' or 'accident' under the policy.") (faulty workmanship, and not an "occurrence," took place where the insured came into a house to spray insulation and sprayed more than he should, did not protect the areas where he was spraying, allowed his hoses to leak, did not properly fill the voids in the wall, or sprayed the material on too thin); *Dahl v. Peninsula Builders, LLC*, 855 N.W.2d 904 (Wis. Ct. App. 2014) ("[A]pplying the rule of *Glendenning's* here, there is no alleged event that could constitute an occurrence.") (describing *Glendenning's:* "We therefore conclude that faulty workmanship in itself is not an 'occurrence'—that is, 'an accident'—within the meaning of the CGL policy. An 'accident' may be caused by faulty workmanship, but every failure to adequately perform a job, even if that failure may be characterized as negligence, is not an 'accident,' and thus not an 'occurrence' under the policy.") ("The buildings that gave way in *American Girl* and *Acuity* were better supported than Peninsula's argument."); *Smith v. Anderson*, 893 N.W.2d 790 (Wis. 2017) (dissenting opinion from the court dismissing the petition for review as improvidently granted) ("The 'occurrence' that R&B Construction is alleged to have caused in the instant case is the continuous and repeated exposure

to water leaking into the basement and matter flowing into and clogging the drain tiles. Like the faulty workmanship in [*American Girl* and *Acuity v. Society Ins.*, 810 N.W.2d 812 (Wis. Ct. App. 2012)], R&B Construction's allegedly faulty workmanship in the instant case led to our conclusion that R&B Construction's alleged negligence led to leaking basement walls and clogging of the drain tiles. Either of these conditions continually caused unexpected water damage to Smith's house. Water damage, when it is a condition that unexpectedly results from faulty workmanship, is an 'occurrence' under the policy. Therefore, we conclude that the complaints allege facts that Smith's residence experienced property damage caused by an occurrence.").

More recently, the Wisconsin Supreme Court held that while faulty workmanship is not an accident and thus, not an "occurrence" under an insurance policy, faulty workmanship can lead to an "occurrence" that causes "property damage". *5 Walworth, LLC v. Engerman Contr., Inc.*, 992 N.W.2d 31 (Wis. 2023). In *5 Walworth*, the plaintiff alleged that a contractor negligently constructed an in-ground pool, which caused the walls of the pool to crack and water to leak into the surrounding soil, requiring the plaintiff to demolish the pool and construct a new one. *Id.* at 35. The court noted "[t]he improper installation of the shotcrete and the incorrect placement of the steel reinforcing bars are not enough on their own to constitute an occurrence; if proven, that is faulty workmanship. But the record can support a conclusion that this faulty work caused the pool to crack and leak, and those cracks became worse as the pool leaked and destabilized the surrounding soil. The cracks, leakage, and soil damage could constitute accidents—unexpected and unforeseen events—caused by improper installation. And these cracks and the damage to the surrounding soil also could constitute physical injuries to the homeowner's tangible property—i.e., property damage as defined by the policy." *Id.* at 43. *See also LCB, LLC v. Spectrum Brands, Inc.*, 2 N.W.3d 411 (Wis. Ct. App. 2023) ("LCB's alleged failure to maintain the premises cannot be characterized as an 'occurrence' in itself, but it allegedly resulted in an unexpected and injurious event that can be: the leased premises flooded and water came into contact with lithium, causing an explosion") (citing *5 Walworth* and others); *Probst Grp., LLC v. Colony Ins. Co.*, No. 23-cv-765, 2024 U.S. Dist. LEXIS 201690 (W.D. Wis. Nov. 5, 2024) ("In other words, property damage is not excluded from coverage simply because the original cause was poor workmanship. Rather, so long as the workmanship caused some intervening event that qualifies as an accident, and that event caused the property damage, the occurrence requirement is satisfied.") (citing *5 Walworth* and others).

North Carolina: The Supreme Court of North Carolina held that it was not against the state's public policy to insure against punitive damages that are awarded for other than intentional conduct, such as for wanton or gross acts. *Mazza v. Med. Mut. Ins. Co. of N.C.*, 319 S.E.2d 217, 221–23 (N.C. 1984). The court emphasized that it was not deciding whether public policy prohibits insurance for intentional acts. *Id.* at 220. Turning to the policy language, the court rejected the insurer's argument that the term "damages" includes only those damages attributable to a particular injury, reasoning that "[t]he plain and ordinary meaning of the language used in the policy, particularly from the viewpoint of a layman, covers 'all damages' and contains no exclusion for punitive damages." *Id.* at 223. In *St. Paul Mercury Ins. Co. v. Duke University*, 849 F.2d 133 (4th Cir. 1988), the appeals court held that punitive damages, for intentional conduct, are insurable. "The *Mazza* court's reservation of the issue [concerning insurability of punitive damages for intentional conduct], however, is precisely that: a declaration of what the court was not deciding. To read a state court's refusal to decide an issue as a de facto decision of that issue would divest the state courts of their authority to determine state law." *Id.* at 136. *See also New S. Ins. Co. v. Kidd*, 443 S.E.2d 85, 88 (N.C. Ct. App. 1994) (examining North Carolina cases addressing coverage for punitive damages and noting that they all reached the same conclusion—the policy must explicitly state that it does not provide such coverage); *Universal Underwriters Ins. Co. v. Lallier*, 334 F. Supp. 3d 723 (E.D.N.C. 2018) (rejecting Universal's assertion that providing insurance coverage for a civil action, related to "heinous criminal acts," would be "tantamount to 'condoning insurance against the results' of Lallie's criminal acts" because "it is not against public policy to enforce an insurance policy that provides coverage for punitive damages arising from wanton or grossly negligent conduct"); *Progressive Se. Ins. Co. v. Rodriguez*, No. 23-00701, 2024 U.S. Dist. LEXIS 193519 (D.S.C. Oct. 24, 2024) ("[U]nder North Carolina law, if an insurance company wishes to exclude punitive damages from coverage, it must do so explicitly in the policy.").

North Dakota: The Supreme Court of North Dakota held that, in general, public policy precludes coverage for punitive damages. *Cont'l Cas. Co. v. Kinsey*, 499 N.W.2d 574, 580–81 (N.D. 1993). Specifically, N.D. Cent. Code § 9–08–02 prohibits contracts that would exempt a person from being held responsible for the consequences of his wrongful intentional conduct and N.D. Cent. Code § 26.1–32–04 precludes insurers from indemnifying insureds for losses caused by the insured's willful acts. *Id.* However, the specific insurance policy before the *Kinsey* Court expressly provided coverage for punitive damages. *Id.* at 577. Therefore, the court

concluded that the insurer was obligated to pay for the punitive damages awarded. *Id.* at 581. But, in order to give effect to the legislature's objectives, the court held that the insurer was entitled to seek indemnity from its insured, who was prohibited by statute from being indemnified for injury caused by his own fraud or deceit. *Id.*; *See also Tibert v. Nodak Mut. Ins. Co.*, 816 N.W.2d 31 (N.D. 2012) (applying standard set in *Kinsey* and holding that insured could not receive indemnification for punitive damages it already paid to third party because, as in *Kinsey*, injured third party had been fully compensated, and wrongdoing insured had been held responsible).

Ohio: Punitive or exemplary damages against an insured are precluded under uninsured and underinsured motorist policies, as well as any other policy of casualty or liability insurance that is covered by sections 3937.01 to 3937.17 of Ohio's Revised Code. Ohio Rev. Code § 3937.182; *see also State Farm Mut. Ins. Co. v. Blevins*, 551 N.E.2d 955, 959 (Ohio 1990) (permitting coverage for punitive damages under an uninsured motorist policy if provided by the specific contractual language); *The Corinthian v. Hartford Fire Ins. Co.*, 758 N.E.2d 218, 221 (Ohio Ct. App. 2001) (addressing the history of section 3937.182 and holding that it does not preclude coverage for statutory punitive damages awarded without any finding of malice, intent, or ill will); *Neal-Pettit v. Lahman*, 928 N.E.2d 421 (Ohio 2010) (holding that attorney's fees awarded as a result of punitive damages were covered because (1) they could qualify as "damages which an insured person is legally obligated to pay" because of "bodily injury"; (2) they were not clearly and unambiguously within a policy exclusion for "punitive or exemplary damages, fines or penalties"; and (3) public policy did not serve as a prohibition); *Motorists Mut. Ins. Co. v. Dandy-Jim, Inc.*, 912 N.E.2d 659, 667 (Ohio Ct. App. 2009) (As a willful or knowing violation of the Telephone Consumer Protection Act is different from an intentionally malicious act that could give rise to punitive damages, the treble damages provision of the TCPA is not punitive in nature, and, therefore, public policy did not prohibit insurance coverage for treble damages under the TCPA); *Foster v. D.B.S. Collection Agency*, No. 01-CV-514, 2008 U.S. Dist. LEXIS 22264 (S.D. Ohio Mar. 20, 2008) (following *Corinthian*) ("[T]o the extent that Plaintiffs are awarded punitive damages pursuant to a statute without any finding of malice, ill will, or other similar culpability, Northland must indemnify Dickerson/D.B.S. against those damages. If punitive damages are awarded after a finding of malice, ill will, or other similar culpability, or are awarded other than pursuant to a statute, Ohio public policy forbids their indemnification."); *Stephens v. Grange Mut. Ins. Co.*, No. 2011-CA-102, 2012 Ohio App. LEXIS 4357 (Ohio Ct. App. Oct. 26, 2012) (holding that punitive damages were

not insurable as a matter of public policy); *World Harvest Church v. Grange Mut. Cas. Co.*, No. 13AP-290, 2013 Ohio App. LEXIS 5994 (Ohio Ct. App. Dec. 24, 2013) (citing *Neal-Pettit* and holding that statute prohibited insurance coverage for punitive damages awarded under a commercial liability policy and public policy prohibited coverage for punitive damages based on insured's malicious conduct), *reversed* 68 N.E. 3d 738 (Ohio 2016) (addressing applicability of an abuse exclusion); *Huntington Nat'l Bank v. AIG Specialty Ins. Co.*, No. 23-3039, 2024 U.S. App. LEXIS 2369 (6th Cir. Feb. 1, 2024) ("Ohio law demonstrates that for insurance coverage to be uninsurable under the law, the damages claimed must be based on an intent to injure, malice, ill will, or other similar culpability.") (citing *The Corinthian*, *Motorists*, *Neal-Pettit* and others).

Oklahoma: The Supreme Court of Oklahoma adopted the rationale of *Nw. Nat'l Cas. Co. v. McNulty*, 307 F.2d 432 (5th Cir. 1962), discussed in the introduction, and held that public policy prohibited insurance for liability for punitive damages that arose out of one's own misconduct. *Dayton Hudson Corp. v. Am. Mut. Liab. Ins. Co.*, 621 P.2d 1155, 1160 (Okla. 1980) (noting that, putting aside the public policy prohibition, policy language "for all sums which the insured might become legally obligated to pay" – "is sufficiently broad to include liability for punitive damages"). However, the *Dayton Hudson* Court held that the public policy prohibition against coverage for punitive damages did not apply to such damages that are assessed on the basis of vicarious liability. *Id.* In reaching its decision, the Supreme Court of Oklahoma made much of the fact that the employer itself may be guilty of reckless disregard in not discharging an unfit employee. *Id.* at 1161. If so, public policy would prohibit coverage for punitive damages assessed against the employer. *Id.*; *see also Magnus Foods, Inc. v. Cont'l Cas. Co.*, 36 F.3d 1491, 1499 (10th Cir. 1994) (applying Oklahoma law) (finding that the insurer bears the burden of requesting a special verdict or special interrogatories to determine if punitive damages were awarded based on direct or vicarious liability and if it is impossible to determine such basis, the punitive damages are presumed to be covered.); *Finley v. Atlas Computers, Inc.*, No. 10-CV-405, 2011 U.S. Dist. LEXIS 23285 (N.D. Okla. Feb. 10, 2011) (citing *Magnum* for proposition that "public policy forbids insurance coverage for punitive damages, except when punitive damages liability arises solely under principles of vicarious liability"); *James River Ins. Co. v. Blue Ox Dance Hall, LLC*, No. 16-0151, 2017 U.S. Dist. LEXIS 84422 (N.D. Okla. May 31, 2017) ("As a matter of Oklahoma law, an insured may not ordinarily obtain coverage for punitive damages, because this would allow a culpable party to escape punishment for his wrongs and shift the

burden to the premium payers of an insurance company."); *Am. Nat'l Prop. & Cas. Co v. Select Mgmt. Group., LLC*, No. 20-542, 2021 U.S. Dist. LEXIS 54515 (N.D. Okla. Mar. 23, 2021) (noting that, if an employer is held vicariously liable for the acts of its employee, a punitive damages award against the employer is insurable) ("In Oklahoma, insurers are generally not liable for punitive damages imposed against their insureds, the rationale being that allowing tortfeasors to shift the burden to an insurer would undermine the purpose of exemplary damages, which is to punish the wrongdoer and deter others from engaging in similar conduct. However, an exception exists where the insured has been held vicariously liable for the misconduct of its servant."); *Progressive Direct Ins. Co. v. Hudgins*, No. 20-497, 2021 U.S. Dist. LEXIS 215919 (N.D. Okla. Sept. 13, 2021) (declaring that auto insurer had no obligation to indemnify the insured for any award of punitive damages because the policy's punitive damages exclusion complied with Oklahoma law prohibiting insurers from indemnifying insureds for such damages); *Progressive Direct Ins. Co. v. Pope*, 507 P.3d 688 (Okla. 2022) ("Considering the well-known history of statutorily multiplied damages in the context of a combined punitive and deterrent purpose, our discussion of the Legislature's purpose for 47 O.S. § 10-103 in 1987 [requiring a driver to stop at the scene of an accident and liability for failure to do so], and construction of this statute as part of the insurance policy, we conclude the statutory treble damages in 47 O.S.2011, § 10-103 are for the purpose of controlling conduct of drivers and are punitive in nature. We conclude the treble damages in 47 O.S.2011, § 10-103 are punitive for the purpose of the exclusion in the policy."). The Supreme Court of Oklahoma held that public policy precludes coverage for punitive damages under an uninsured motorist policy. *Aetna Cas. & Sur. Co. v. Craig*, 771 P.2d 212. 214–15 (Okla. 1989).

Oregon: The Supreme Court of Oregon held that it is not against public policy for an insurer to provide coverage for punitive damages. *Harrell v. Travelers Indem. Co.*, 567 P.2d 1013, 1021 (Or. 1977). Instead, the *Harrell* Court concluded that the insurability of punitive damages is based on a decision by the insurer whether it wishes to take on such risk, reasoning that "as long as insurance companies are willing, for a price, to contract for insurance to provide protection against liability for punitive damages to persons or corporations deemed by them to be 'good risks' for such coverage, and as long as liability for punitive damages continues to be extended to 'gross negligence,' 'recklessness,' and for other conduct, 'contrary to societal interests,' we are in agreement with those authorities which hold that insurance contracts providing protection against such liability should not be held by

plaintiff's complaint, it asserts that Janos Stahl did not have the consent of Deerfield Colony to drive the 2000 GMC Jimmy off its property on February 9, 2014. There is a conflict of interest because the jury in the wrongful death action will decide the issue of whether Janos had implied permission to drive the 2000 GMC Jimmy on public roads that night. The answer to such question will be helpful in determining whether the automobile accident is covered by the insurance policy. By reserving the noncoverage issue, a conflict of interest will be avoided and the interests of the insured and the insurer in defending against the injured claimant will be identical. Therefore, the Court finds the issue of coverage is not yet fit for adjudication, and that there will be little hardship to the parties in withholding court consideration, as this matter lacks ripeness.").

Tennessee: A Tennessee District Court concluded that the mere existence of a relationship between an insurer and defense counsel was not sufficient to create a conflict of interest. *Tyson v. Equity Title & Escrow Co. of Memphis, LLC*, 282 F. Supp. 2d 829, 832 (W.D. Tenn. 2003). The court seemed persuaded that the Tennessee Rules of Professional Conduct were sufficient to safeguard the insured, stating that "[t]ypically, the relationship between an insurance company and the attorney that it hires to defend an insured is that of principal and independent contractor. An insurance company clearly possesses no right to control the methods or means by which an attorney defends its insured. The employment of an attorney by an insurance company to represent its insured does not impose upon that attorney any duty or loyalty to the insurance company that could impair the attorney-client relationship between the attorney and the insured." *Id.* at 831–32 (citations omitted); *see also In re Petition of Youngblood*, 895 S.W.2d 322, 328–29 (Tenn. 1995) (rejecting a per se rule that an insurer cannot use staff counsel to defend its insureds and instead finding that whether there is a conflict in such arrangement must be determined on a case-by-case basis under the Tennessee Code of Professional Conduct); *Developers Diversified of Tenn., Inc. v. Tokio Marine & Fire Ins. Co.*, No. 04-00015, 2019 U.S. Dist. LEXIS 70184 (M.D. Tenn. Apr. 25, 2019) (looking to *Tyson* for guidance in determining whether a law firm had a conflict of interest to warrant disqualification) ("As an insurance company, '[t]he employment of an attorney . . . to represent its insured does not impose upon that attorney any duty or loyalty to the insurance company that could impair the attorney-client relationship between the attorney and the insured.'") (quoting *Tyson*); *Cornerstone Church of Nashville, Inc. v. GuideOne Ins.*, No. 20-00956, 2021 U.S. Dist. LEXIS 210355 (M.D. Tenn. Nov. 1, 2021) ("Tennessee rules of professional conduct generally 'prohibit[] any relationship

between the attorney and the insurer, or any other person or entity, which impairs the attorney's complete loyalty to the client with regard to the performance for the client of the agreed legal services or with regard to any matter touching the attorney-client relationship between the attorney and the insured.' (quoting *Youngblood*). GuideOne and Cornerstone may have had shared interests when it came to the claims pleaded against Cornerstone in state court, but, on the topic of any insurance claim by Cornerstone to GuideOne, the parties and their interests were adverse.").

Texas: The Supreme Court of Texas held that, when defending an insured under a reservation of rights, if "the facts to be adjudicated in the liability lawsuit are the same facts upon which coverage depends, the conflict of interest will prevent the insurer from conducting the defense." *N. County Mut. Ins. Co. v. Davalos*, 140 S.W.3d 685, 689 (Tex. 2004). If so, the insurer loses the right to conduct the defense, but remains obligated to pay for it. *Id.* at 686. The *Davalos* court also listed other types of conflicts that may justify an insured's refusal of an offered defense: "(1) when the defense tendered 'is not a complete defense under circumstances in which it should have been,' (2) when 'the attorney hired by the carrier acts unethically and, at the insurer's direction, advances the insurer's interests at the expense of the insured's,' (3) when 'the defense would not, under the governing law, satisfy the insurer's duty to defend,' and (4) when, though the defense is otherwise proper, 'the insurer attempts to obtain some type of concession from the insured before it will defend.'" *Davalos*, 140 S.W.3d at 689 (quoting 1 Allan D. Windt, Insurance Claims & Disputes § 4.25 at 393 (4th ed. 2001)); *see also Rx.com, Inc. v. Hartford Fire Ins. Co.*, 426 F. Supp. 2d 546, 561 (S.D. Tex. 2006) ("Hartford's reservation of rights letter did not invoke a coverage exclusion that would be established by proof of the same facts to be decided in the underlying lawsuit."); *In re CES Envtl. Serv. Inc.*, No. H-11-560, 2011 (S.D. Tex. Mar. 31, 2011) (holding that trustee in estate in bankruptcy proceeding, as fiduciary of the estate, should choose defense counsel because insurer had issued several reservation of rights letters and insurer's "only interest [was] showing that the harm [was] not covered under the policies") (citing *Davalos*); *Taylor v. Allstate Ins. Co.*, 356 S.W.3d 92 (Tex. Ct. App. 2011) (citing rule from *Davalos* in addressing whether Texas law recognizes a cause of action by an insured against its insurer for tortious interference with the insured's relationship with his attorney); *Partain v. Mid-Continent Specialty Ins. Services, Inc.*, 838 F. Supp. 2d 547 (S.D. Tex. 2012) (examining five issues presented in a reservation of rights letter to determine if facts upon which coverage clearly depends will be adjudicated in the underlying action); *Downhole Navigator, L.L.C. v. Nautilus Ins. Co.*, 686 F.3d 325

(5th Cir. 2012) (applying Texas law) (concluding that "the facts to be adjudicated" in the underlying litigation were not the same "facts upon which coverage depends") ("[A]lthough the policy excludes coverage for 'testing' or 'consulting' services, the facts about whether Downhole breached a duty to Sedona by failing to act as a reasonably prudent provider of deviation-correction services are not equivalent to the facts that could determine whether Downhole was 'testing' or 'consulting' for Sedona."); *Graper v. Mid-Continent Cas. Co.*, 756 F.3d 388 (5th Cir. 2014) (applying Texas law) ("An adjudication of the accrual date (the fact to be adjudicated in the underlying lawsuit) need not be a judicial ruling necessarily deciding the date of when the infringing conduct occurred (the fact upon which coverage depends). Thus, under the *Davalos* same facts test, there is no disqualifiable conflict of interest between the Insureds and Mid–Continent in litigating the statute of limitations defense.") ("[W]e hold that an application of the *Davalos* 'same facts' standard evidences no conflict here. The underlying trial court's determination that there was a willful violation of KFA's copyright under § 504(c)(2) would not settle the issue of whether that violation was knowing; a violation can amount to reckless conduct and still be willful under the statute. Because the infringement could be willful conduct under § 504(c)(2), entitling KFA to enhanced damages, without a finding of knowing infringement thereby excluding coverage, there is no disqualifying conflict of interest under *Davalos*."); *Allstate Cnty. Mut. Ins. Co. v. Wootton*, 494 S.W.3d 825 (Tex. Ct. App. 2016) (addressing *Davalos* and whether the facts at issue gave rise to the right to independent counsel); *Stadium Motorcars, LLC v. Fed. Ins. Co.*, No. H-18-1920, 2019 U.S. Dist. LEXIS 82251 (S.D. Tex. May 15, 2019) (reviewing issues in a reservation of rights letter and concluding that there was no disqualifying conflict of interest under *Davalos*); *Amerisure Ins. Co. v. Thermacor Process, Inc.*, No. 20-01089, 2021 U.S. Dist. LEXIS 51896 (N.D. Tex. Mar. 19, 2021) (finding that the insured was entitled to independent counsel because the insurer "did not simply send a reservation-of-rights letter upon providing a defense" but "took the additional step" of filing a declaratory judgment action against the insured while the underlying lawsuit was pending, and attempted to communicate with the underlying plaintiff "in an attempt to include [it] in this coverage lawsuit"); *Mid-Continent Cas. Co. v. Harris County Mun. Util. Dist. No. 400*, No. 09-22-00252, 2023 Tex. App. LEXIS 6935 (Ct. App. Tex. Aug. 31, 2023) (addressing *Davalos* and agreeing with insurer that "the facts upon which coverage depends will not be adjudicated in the underlying election contest suit").

Utah: The Eight Circuit Court of Appeals, applying Utah law, left little doubt about what it thought of the risk for conflict when an insurer undertakes to defend its insured under a reservation of rights, stating "we cannot escape the conclusion that it is impossible for one attorney to adequately and fairly represent two parties in litigation in the face of the real conflict of interest which existed here. Even the most optimistic view of human nature requires us to realize that an attorney employed by an insurance company will slant his efforts, perhaps unconsciously, in the interests of his real client the one who is paying his fee and from whom he hopes to receive future business the insurance company." *U.S. Fidelity & Guar. Co. v. Louis A. Roser Co.*, 585 F.2d 932, 938 n.5 (8th Cir. 1978). Nonetheless, the court did not adopt the rule that a reservation of rights creates a *per se* conflict of interest. Rather, the court concluded that a conflict existed based on the specific facts at hand. *Id.* at 939. Among others, one of the three theories of recovery alleged in the underlying action was not covered by the policy. *Id.* at 938. In addition, the insurer filed a declaratory judgment action seeking a determination of no coverage. *Id.* at 940. *See also State Farm Fire & Cas. Co. v. Inevat, LLC*, No. 17-00901, 2018 U.S. Dist. LEXIS 97075 (D. Utah June 8, 2018) (concluding that no right to independent counsel existed in the context of some sort of alleged postponement of the litigation to the insured's detriment) ("Defendants contend a conflict of interest has arisen between themselves and State Farm appointed counsel, requiring State Farm to pay for independent counsel selected by the Defendants. State Farm counters, arguing no conflict exists because under a 'dual-client' paradigm the attorney's allegiance is always to the insured because of an insurer's duty to provide a defense in good faith. The parties agree that Utah courts have not directly addressed the conflict of interest issue, but decline the court's invitation for certification."); *Liberty Mut. Fire Ins. Co. v. Michael Baker Int'l, Inc.*, No. 19-00881, 2022 U.S. Dist. LEXIS 61263 (D. Utah Mar. 31, 2022) (addressing independent counsel issue in the context of the admissibility of policyholder's expert's opinion that insurer's reservation of rights warranted offering the insured independent counsel).

Vermont: The Supreme Court of Vermont held that a unilateral reservation of rights by an insurer is ineffective. *Am. Fidelity Co. v. Kerr*, 416 A.2d 163, 165 (Vt. 1980). "Control of the defense, with knowledge of the facts and without consent of the insured, constitutes an election to stand by the terms of the policy." *Id.*; *see also Beatty v. Employers' Liab. Assurance Corp., Ltd.*, 168 A. 919, 923 (Vt. 1933) (emphasis added) ("The insurer may, if it is in doubt as to its liability, refuse to assume the defense, and await the result, thus leaving the insured free to defend or compromise in his own way through his own counsel; or it may obtain some agreement with

becoming effective and . . . not giving[] notice of the suit to [the insurer] until almost 2 ½ years after it was filed." *Fire Ins. Co. v. G. Heileman Brewing Co.*, 747 N.E.2d 955, 968 (Ill. App. Ct. 2001). "A voluntary payment provision provides that an insurer will not be held liable for expenses voluntarily incurred by an insured before tendering defense of a suit to the insurer. . . . An insurer seeking to avoid responsibility because of a breach of this clause must show prejudice." *Id. See also Westfield Ins. Co. v. Indem. Ins. Co. of N. Am.*, No. 14-3040, 2020 U.S. Dist. LEXIS 6548 (C.D. Ill. Jan. 15, 2020) ("A tender of a defense within a reasonable time effectively requires an insurer to pay all the defense costs, even those incurred before the date of the tender of the defense.") (citing *West American Ins. Co. v. Yorkville Nat. Bank*, 939 N.E.2d 288 (Ill. 2010)).

Indiana: The Supreme Court of Indiana, differentiating the situation where insurers attempt to "completely disclaim . . . policy obligations" due to late notice, held that an insurer—regardless of whether prejudice existed—was not obligated to reimburse its insured for defense costs and expenses incurred before the insured notified the insurer of the suit because an insurer's duty to defend does not arise until notice of the claim has been received. *Dreaded, Inc. v. St. Paul Guardian Ins. Co.*, 904 N.E.2d 1267, 1273 (Ind. 2009). "The function of a notice requirement is to supply basic information to permit an insurer to defend a claim. The insurer's duty to defend simply does not arise until it receives the foundational information designated in the notice requirement. Until an insurer receives such enabling information, it cannot be held accountable for breaching this duty." *Id.*; *see also Great N. Ins. Co. v. Precision Plastics of Indiana, Inc.*, 910 N.E.2d 1288, at *7 (Table) (Ind. Ct. App. 2009) ("[T]he trial court's requirement of prejudice in its order, which was issued prior to the *Dreaded* opinion, is contrary to the subsequent holding in *Dreaded.* Notice of an occurrence or claim triggers the duty to defend on the part of the insured. Here, it is undisputed that the tender of notice did not occur until 1991 even though the discovery of the contamination occurred in 1989. Thus, the Insurance Company's duty to defend Precision did not begin until February 19, 1991."); *Travelers Ins. Companies v. Mapleburst Farms, Inc.*, 953 N.E.2d 1153 (Ind. Ct. App. 2011) (discussing *Dreaded* and holding that insurer was not obligated to pay pre-tender defense costs); *Meridian Mut. Ins. Co. v. Majestic Block & Supply Inc.*, 1 N.E.3d 173 (Ind. Ct. App. 2013) (applying *Dreaded* and stating that under the late notice doctrine, insurer was not liable for pre-tender defense costs); *Roman Catholic Archdiocese of Indiana v. Travelers Ins. Co.*, No. 12-1246, 2013 U.S. Dist. LEXIS 32702 (S.D. Ind. Mar. 7, 2013) (citing *Dreaded* and *Travelers* and holding that notice to insurer after

case had been resolved precluded insurer's responsibility for prior defense fees and costs); *T.R. Bulger v. Indiana Ins. Co.*, No. 46D03-0709-388, 2014 Ind. Super. LEXIS 209 (Ind. Super. Ct. May 1, 2014) (reiterating *Maplehurst* [2011] and stating that "[t]he policies at issue also contain a voluntary payments clause, which provides that the insured will not incur any expense without prior approval except at his own cost. Indiana law provides that an insurer is not liable when an insured breaches a voluntary payment clause by not obtaining the insurer's consent prior to incurring the expense."); *Travelers Cas. & Sur. Co. of Am. v. Maplehurst Farms*, 18 N.E.3d 311 (Ind. Ct. App. 2014) (holding that "the trial court erred when it interpreted *Travelers Ins. Cos. v. Maplehurst Farms, Inc.*, 953 N.E.2d 1153 (Ind. Ct. App. 2011) to require Travelers to pay costs that were incurred as a result of [a] [s]ettlement. As a result, the trial court erred by granting summary judgment to Maplehurst."); *Arcelormittal Ind. Harbor LLC v. Amex Nooter, LLC*, No. 15-195, 2018 U.S. Dist. LEXIS 542 (N.D. Ind. Jan. 3, 2018) (stating rule from *Dreaded* and addressing the timing of various defense costs in determining any payment obligation).

Iowa: No Instructive authority.

Kansas: Kansas District Court predicted that "the Kansas Supreme Court would agree with numerous courts and a leading insurance-law treatise that an insurer is not liable for the pretender costs of defense incurred by the insured irrespective of the existence of prejudice." *Ottawa Bancshares, Inc. v. Great Am. Sec. Ins. Co.*, 764 F. Supp. 3d 1079 (D. Kan. 2025). "Plaintiff asserts that 'Kansas law requires an insurance company to demonstrate it was prejudiced by the failure to receive consent before such costs are denied.' It then cites three cases where that specific issue never arose and does nothing to develop the analogy between those cited cases and this case. And in any event, those marginally relevant citations do not persuade the Court that the Kansas Supreme Court, if presented with the issue, would disavow the general weight of authority presented by Defendant, which holds that a showing of prejudice is not required." *Id.* at 1090. (citing cases from Illinois, New York and Indiana).

Kentucky: The Sixth Circuit Court of Appeals, applying Kentucky law, noted that "Kentucky's general pronouncement on late notice is very persuasive authority that Kentucky would continue to place the burden on the insurer to show prejudice due to late notice rather than assuming prejudice as many other jurisdictions have for pre-tender defense costs." *Travelers Prop. Cas. Co. v. Hillerich & Bradsby Co.*, 598 F.3d 257, 274 (6th Cir. 2010). This potential stance, as the Sixth Circuit acknowledged, would contradict most other jurisdictions that "do not allow recovery

for pre-tender costs because those are deemed waived by the insured, especially when an insurance contract prohibits voluntary payments without the consent of the insurer, and so no showing of prejudice is required on the part of the insurer." *Id.* at 273. The court declined to resolve the issue before it, however, because the insured had tendered the claim to the insurer "before its duty to defend arose." *Id.*

Louisiana: The Court of Appeal of Louisiana held that an insured was not entitled to recover defense costs incurred "prior to the notification date" because an "insurer's duty to provide a defense does not arise until the insurer receives notice of the litigation." *Gully & Assoc., Inc. v. Wausau Ins. Co.*, 536 So. 2d 816, 817–18 (La. Ct. App. 1988). The court recognized that an insurer can only escape its duty to defend as a result of an insured's late notice if the insurer can show prejudice, but concluded that the prejudice requirement is not applicable to the issue of pre-tender defense costs because the insurer is not attempting to deny coverage completely. *Id.* at 818. Furthermore, in making its decision, the court emphasized that the insured's policy required it to "immediately forward to the company every demand, notice, summons or other process received by him or his representative." *Id.*; *see also Transcon. Pipe Line Corp v. Nat'l Union Fire Ins. Co.*, 378 F. Supp. 2d 729, 738–39 (M.D. La. 2005) (citing *Gully* for the proposition that "an insurer's duty to provide a defense does not arise until the insurer receives notice of the litigation, regardless of whether the insurance company is prejudiced by the late notice") (quotations omitted from original); *Anco Insulations, Inc. v. AIG Premier Ins. Co.*, No. 7-657, 2013 U.S. Dist. LEXIS 27550 (M.D. La. Feb. 28, 2013) (holding that insurer was not required to reimburse insured for legal fees and costs incurred before insured tendered suits to insurer) (*affirmed* 787 F.3d 276 (5th Cir. 2015)); *Liberty Mut. Ins. Co. v. Jotun Paints, Inc.*, No. 07-3114, 2009 U.S. Dist. LEXIS 2164 (E.D. La. Jan. 13, 2009) (indicating that prejudice is required for an insurer to disclaim coverage for pre-tender defense costs) ("Liberty does not direct the Court to any policy language or authority stating that the insurer is only obligated to pay those defense costs incurred *after* a duty to defend arises. Liberty's motion does not present the question of whether it owes defense costs from a particular date onward. When a duty to defend commences and what that duty entails are obviously distinct questions.") (emphasis in original); *Adventure Harbor Estates, LLC v. LeBlanc*, No. 12-1848, 2014 U.S. Dist. LEXIS 112889 (E.D. La. Aug. 13, 2014) ("In this case the LeBlancs waited nearly a year to notify Allstate of the suit that was filed against them individually. Thus, there is no argument to be made in this case that exigencies forced the LeBlancs to incur expenses to defend the suit before Allstate could step in to provide a defense. In

the interim between being sued and finally notifying Allstate about the lawsuit, the LeBlancs retained the attorney of their choice, which was their prerogative to do, but under the clear terms of the policy they had to exercise that prerogative at their own cost. Allstate is entitled to judgment as a matter of law as to the pre-notice attorney's fees and expenses.") (suggesting that, based on *Peavey Co. v. M/V ANPA*, 971 F.2d 1168 (5th Cir. 1992), lack of coverage for pre-tender defense costs must be supported by policy language); *Nucor Steel La., LLC v. HDI Global Ins. Co.*, No. 21-1904, 2022 U.S. Dist. LEXIS 97326 (E.D. La. June 1, 2022) (finding insurer was not required to show actual prejudice due to the insured's delay in tendering its defense where insurer did not deny coverage, but instead only declined the request for reimbursement of pre-tender defense costs) (rejecting argument that an insurer who learns of a potential duty to defend from a source other than the insured is responsible for defense costs starting from the time it received said notice).

Maine: No instructive authority.

Maryland: The Court of Appeals of Maryland held that an insurer was obligated to reimburse the insured "for the pre-notice fees and expenses incurred by [the insured], which the jury found to be reasonable." *Sherwood Brands, Inc. v. Hartford Accident and Indem. Co.*, 698 A.2d 1078, 1087 (Md. 1997). However, the Maryland high court's decision addressed the issue under various scenarios. "If the insurer declines to defend solely because, in its view, the claim is not even potentially within the policy coverage and the court ultimately agrees with that view, there is no obligation to reimburse the insured for any litigation expenses, whether incurred before or after the notice was given. The timing of the notice has no bearing on the issue. If, on the other hand, as occurred here, the court concludes that the claim *was* potentially within the policy coverage and that, as a result, the insurer *did* breach its duty to defend, the insurer is liable for all damages incurred by the insured as a result of that breach." *Id.* at 1086 (emphasis in original). The court also concluded that an insurer that prospectively assumes a defense, but refuses to reimburse pre-notice defense costs, must prove that it was prejudiced in order to do so. *Id.* In so deciding, the court was persuaded that § 482 of the Maryland Code controlled. *Id.* Section 482 is now MD Code, Insurance § 19-110, which provides: "An insurer may disclaim coverage on a liability insurance policy on the ground that the insured or a person claiming the benefits of the policy through the insured has breached the policy by failing to cooperate with the insurer or by not giving the insurer required notice only if the insurer establishes by a preponderance of the evidence that the lack of cooperation or notice has resulted in actual prejudice to the insurer." *See also*

Maryland: The Court of Appeals for the Fourth Circuit, applying Maryland law, held that an insurer did not have a right to partial reimbursement of defense costs if it were later determined that there was no duty to defend certain claims. *Perdue Farms Inc. v. Travelers Cas. & Sur. Co.*, 448 F.3d 252, 254 (4th Cir. 2006). The court concluded that a partial right to reimbursement would be tantamount to a "backdoor narrowing" of the duty to defend and appreciably erode Maryland's long-held view that the duty to defend is broader than the duty to indemnify. *Id.* at 258. "In the absence of any contrary indication from the Maryland courts, we are unwilling to grant insurers a substantial rebate on their duty to defend." *Id.* at 259. The court also recognized that, even if Maryland looked favorably on a right of partial reimbursement, in this case the defense costs for covered and noncovered claims may have significantly overlapped. *Id. See also Selective Way Ins. Co. v. Nationwide Prop. & Cas. Ins. Co.*, 219 A.3d 20 (Md. App. Ct. 2019) ("[A] rule limiting the insured to a 'partial right of reimbursement' for defense costs would 'serve only as a back-door narrowing of the duty to defend,' which would 'erode Maryland's long-held view that the duty to defend is broader than the duty to indemnify' and 'undermine the bargain that Maryland courts describe insurers reaching with their insureds.'") (quoting from *Perdue Farms*); *Explorer Ins. Co. v. Nagel Farm Serv.*, No. 24-1346, 2025 U.S. Dist. LEXIS 123252 (D. Md. June 30, 2025) (finding that *Perdue* governed and recoupment of defense costs was not permitted because insurer "has not identified any Maryland law authorizing insurers, although under a duty to defend (based on the potentiality of coverage), to recoup defense costs from an insured if it is later determined that coverage is unavailable" and "[t]his Court also has not identified any Maryland cases contradicting *Perdue*").

Massachusetts: The Supreme Judicial Court of Massachusetts held that "[w]here an insurer defends under a reservation of rights to later disclaim coverage . . . it may later seek reimbursement for an amount paid to settle the underlying tort action only if the insured has agreed that the insurer may commit the insured's own funds to a reasonable settlement with the right later to seek reimbursement from the insured, or if the insurer secures specific authority to reach a particular settlement which the insured agrees to pay. The insurer may also notify the insured of a reasonable settlement offer and give the insured an opportunity to accept the offer or assume its own defense." *Med. Malpractice Joint Underwriting Ass'n of Mass. v. Goldberg*, 680 N.E.2d 1121, 1129 (Mass. 1997); *see also Dash v. Chi. Ins. Co.*, No. 00–11911, 2004 U.S. Dist. LEXIS 17309 (D. Mass. Aug. 23, 2004) (discussing *Buss* but declining to reach the issue because the insurer had breached

its duty to defend); *Welch Foods Inc. v. Nat. Union Fire Ins. Co.*, No. 09-12087, 2011 U.S. Dist. LEXIS 17134 (D. Mass. Feb. 9, 2011) (noting that Massachusetts has not decided "whether an insurer is entitled to reimbursement of defense costs paid prior to a court's determination that the insurer had no duty to defend the insured," but ultimately declaring that the Supreme Court of Pennsylvania's decision in "*Jerry's Sport* achieves an appropriate allocation of responsibilities and, therefore, that the insurer bears the responsibility for making this determination, and the concomitant risk if its decision to advance fees is wrong") (affirmed without discussion of reimbursement of defense costs, 659 F.3d 191 (1st Cir. 2011)); *Lexington Ins. Co. v. CareCore Nat'l, LLC*, No. 2012-01782, 2014 Mass. Super. LEXIS 200 (Mass. Super. Ct. July 17, 2014) ("Although some jurisdictions outside of Massachusetts have concluded that an insurer may recoup those costs, they have so held only where the insurer in (sic) made it clear to the insured, either in the policy itself or in its reservation of rights, that it retains the right to seek reimbursement of those costs if a court later determines there was no duty to defend.") ("Moreover, this Court has considerable doubt that the SJC would recognize as enforceable even an express reservation of rights regarding defense costs, given its holding in *Cotter* [*Metro. Life Ins. Co. v. Cotter*, 984 N.E.2d 835 (Mass. 2013)] with respect to indemnification."); *Holyoke Mut. Ins. Co. v. Vibram USA, Inc.*, No. 2015-2321, 2017 Mass. Super. LEXIS 12 (Mass. Super. Ct. Mar. 20, 2017) (applying the Supreme Court of Pennsylvania's decision in *Jerry's Sport* and holding that an insurer was not entitled to recoupment of defense costs incurred prior to a declaratory judgment that a lawsuit was not covered under the policy, because the right to recoupment was not included in the insurer's policies) (Massachusetts SJC agreed to a July 11, 2017 joint request for direct appellate review); *Lionbridge Techs., LLC v. Valley Forge Ins. Co.*, 552 F. Supp. 3d 148 (D. Mass. 2021) (acknowledging that it is "unclear under Massachusetts law whether an insurer can recoup defense costs paid while defending subject to a reservation of rights"), *rev'd on other grounds*, 53 F.4th 711 (1st Cir. 2022); *Berkley Nat'l Ins. Co. v. Atl.-Newport Realty LLC*, 93 F.4th 543 (1st Cir. 2024) (finding no entitlement to recoupment of defense costs where insurer's reservation of rights "plainly is not itself a reservation of the right to seek reimbursement of defense costs") (noting that the court saw no basis to allow for recoupment "on the ground that Massachusetts law would permit a liability insurer's claim for restitution of defense costs to go forward even absent the insurer having made an express reservation of the right to seek reimbursement of those costs").