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Call For Article Contributions

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Synopsis of Illinois Mold & Silica Decisions and Verdicts

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MOLD CLAIMS

Illinois Case Law On Mold Claims

In Washington Court Condominium Association-Four et al. v. Washington-Golf Corp. et al., 150 Ill. App. 3d 681, 501 N.E.2d 1290 (1st Dist. 1986), condominium owners brought suit against a general contractor and two subcontractors alleging negligence and breach of implied warranty of habitability among other theories of recovery. Plaintiffs alleged that Defendant, Weather Shield, negligently supplied windows and exterior sliding glass doors resulting in water damage to the insulation, walls, ceilings, and electrical outlets of their apartments. As a result of the water damage, the plaintiffs alleged that mold began to grow in their homes. One plaintiff alleged that the mold growth caused severe respiratory problems and an allergic reaction in her son. The plaintiff sued under the tort theory of negligence. The defendant brought a motion to dismiss the negligence count on the ground that the economic loss doctrine barred recovery. In Illinois, the economic loss doctrine requires physical harm, not just economic loss to recover under this tort. Since plaintiff's minor son who suffered severe respiratory problems and an allegoric reaction from the mold growth on the carpeting was never brought in as a party to the action, the court held that the plaintiffs were not able to rely on this injury to defeat the economic loss doctrine. The appellate court reversed the trial court's denial of Weather Shield's motion to dismiss plaintiff's negligence action. The appellate court reasoned that the dismissal of plaintiff's complaint focused on the windows and sliding doors not working properly which constitutes only an economic loss. The appellate court reversed the trial court's denial of Whether Shield's motion to dismiss the plaintiff's breach of implied warranty of habitability claim. The appellate court found that the cause of action for breach of warranty of habitability did not extend to the sub-contractor, Weather Shield, because the general contractor was a viable entity.

In Wilson v. Indiana Insurance Co., 150 Ill. App. 3d 669, 502 N.E.2d 69 (4th Dist. 1986), the insured filed a complaint against its insurer, Indiana Insurance Company for its refusal to pay a claim under the homeowner's policy. The plaintiff and her husband entered into a homeowner's insurance contract with defendant, Indiana Insurance Company in March of 1981. In early January of 1983, while plaintiff was away from the home for four days, a pipe burst and water was absorbed into the structure and flooring of the home. Plaintiff did not become aware of the damage until late November of 1983. Plaintiff canceled her insurance with Indiana in March of 1983, three months after the pipe burst, and purchased insurance from Pekin Insurance Co.(a non-party). In November of 1983, plaintiff filed a claim with Pekin. On January 23, 1984, Pekin denied coverage because the damage occurred before the Pekin policy became effective. In late January of 1984, over one year after the pipe burst, plaintiff filed a claim with Indiana Insurance Company. After investigation, Indiana denied coverage. Indiana's insurance contract provided that suits on the policy must be commenced within 12 months from the inception of the loss. Since the plaintiff failed to notify Indiana of the loss in time, the plaintiff lost her contractual right to file suit. In addition, Indiana's insurance policy provided an exception for mold and wet or dry rot, among other exclusions. Indiana moved to dismiss plaintiff's complaint. The trial court granted defendant's motion and dismissed plaintiff's complaint. The plaintiff appealed the dismissal of plaintiff's complaint. The appellate court affirmed the dismissal of her complaint. The appellate court based its decision on the fact that plaintiff failed to timely notify Indiana within the 12 month limitations period as set forth in the insurance policy. Therefore, the appellate court never addressed whether the provision excluding mold and wet or dry rot from coverage precluded plaintiff's recovery.

Illinois Jury Verdicts and Settlements in Mold Claims

Moldy Storage of Household Belongings Triggers Allergy. Hanson v. Atlas Van Lines, 92 L 212, November 17, 1995. Verdict: $5.8 Million. Defendants negligently permitted plaintiffs' household goods to become wet, moldy, mildewed and bug-infested during a two-month storage while plaintiffs (husband and wife) were waiting for their new home to be built. Plaintiff, husband, age 39, suffered an allergic reaction caused by exposure to the moldy, mildewed and bug-infested boxes, resulting in cardiopulmonary arrest. Husband regained consciousness after originally being pronounced dead on arrival. Husband suffered permanent

brain damage and severe short-term memory loss. Husband was a former mergers and acquisitions financial specialist earning $80,000 in 1987. He is now unemployable. Husband needs a constant companion and will require seizure medication for the duration of his life. Husband's past and future medical bills and lost wages totaled $5 million. Wife recovered $80,000 for her loss of consortium claim.

Moldy Dog Food Causes Fungal Infection Leading to Bronchitis. 83 L 60. Settlement: $48,500. Plaintiff sued General Foods as a result of a fungal infection from breathing mold from Gravy Train Dog Food, causing bronchitis. Medical bills totaled $5,000. Title of action is unavailable. No other facts were reported.

SILICA CLAIMS

Illinois Case Law On Silica Claims

In Kessinger et al. v. Grefco Inc., 173 Ill. 2d 447, 672 N.E. 2d 1149 (1996), plaintiffs sued defendant, Grefco, a supplier of silica-containing material, for failure to warn plaintiffs about the dangers of its silicosis-causing product. Undisputed evidence was introduced that the labels on Grefco's products did not warn of silica exposure. Grefco argued that despite the lack of warning labels on its products, the workers should have known of the exposure risks. The plaintiffs' medical expert testified that the plaintiffs suffered from both silicosis and asbestosis. Grefco introduced evidence that plaintiffs suffered from asbestosis only and not silicosis. The medical experts on both sides differed on what they thought the x-rays revealed. Since the damage to the lungs was near the bottom of the lungs, the defense experts argued that the injuries were consistent with asbestosis not silicosis. Grefco also introduced evidence that the type of silica in its product, natural diatomaceous earth, posed an exceedingly slight risk of causing silicosis. The jury returned a not guilty verdict for the defendants because the jury found that the plaintiffs did not suffer from silicosis. The appellate court reversed the trial court and remanded the case for a new trial relying on doctrine of offensive collateral estoppel. The offensive collateral estoppel doctrine is used to prevent the relitigation of issues previously lost against another plaintiff by the same defendant. The Supreme Court of Illinois found that the appellate court misapplied the doctrine of offensive collateral estoppel and affirmed the verdict of not guilty of the trial court. The Illinois Supreme Court held that the application of the offensive collateral estoppel doctrine would be unfair to Grefco because it would preclude Grefco from presenting the defenses discussed above in this case.

In Solich v. George & Anne Portes Canter Prevention Center of Chicago, 273 Ill. App. 3d 977, 652 N.E.2d 1211 (1st Dist. 1995), Mr. Solich, an employee of U.S. Steel, filed suit against his employer U.S. Steel for failing to report the results of three annual physicals. Further, Mr. Solich filed suit against the Portes Cancer Prevention Center of Chicago for its failure to inform Mr. Solich of the adverse results of a chest x-ray taken in 1975. Mrs. Solich also sued both Portes and U.S. Steel for her loss of consortium. Mr. Solich, a member of management at U.S. Steel, was entitled to an optional yearly physical. The physicals were normally conducted at the plant's own medical clinic. However, in 1975, the clinic was understaffed and U.S. Steel contracted with Portes to perform the x-ray. Portes informed U.S. Steel, but did not inform Mr. Solich of the result of his x-ray. Mr. Solich also received x-rays in 1976 and 1977 performed by U.S. Steel's medical clinic, not the Portes clinic. The results of the 1976 and 1977 x-rays indicated lung fibrosis, but Mr. Solich was likewise never informed of the results. In 1982, Mr. Solich's physical revealed the presence of silicosis. Portes filed a counterclaim against U.S. Steel for equitable apportionment seeking recovery from U.S. Steel for its percentage of fault. (Portes presumably sued for equitable apportionment rather than under the Illinois Contribution Act because the Illinois Contribution Act was not in effect at the time of the wrongful occurrence.) Portes counterclaim was based on U.S. Steel's failure to report results of x-rays that U.S. Steel's medical clinic took in 1976 and 1977. The jury returned a verdict for both plaintiffs and against both defendants. The jury apportioned liability at 1% to Portes and 99% to U.S. Steel. The appellate court held that the Illinois Workers' Compensation Act barred the Soliches' claims against U.S. Steel. The appellate court further held that the statute of repose barred the Soliches' claim against Portes. The only issue appealed by the plaintiffs to the Illinois Supreme Court was that of the statute of repose against Portes. The Illinois Supreme Court reversed the appellate court holding that the statute of repose did not bar the claim against Portes. The Illinois Supreme Court remanded the case to the appellate court. The appellate did not address the statute of repose issue because the Illinois Supreme Court resolved it. The appellate court held that: 1) the cancer screening center owed a legal duty to plaintiffs; 2) the employer's liability to the cancer screening center for its third-party complaint was limited to the amount of workers' compensation that employer paid to the worker; and 3) a new trial was required because of poorly worded jury instructions.

In Betts et al. v. Manville Personal Injury Settlement et al., 225 Ill. App. 3d 882, 588 N.E.2d 1193 (4th Dist. 1992). Workers and their wives sought damages for personal injuries, wrongful death, and loss of consortium resulting from exposure to asbestos and diatomaceous earth. (Silica is derived from diatomaceous earth.) The cases were tried on theories of negligence and strict liability. This appeal arises from the consolidation of five separate lawsuits filed in McLean County, Illinois. The trial court entered judgment in favor of some of the eighteen plaintiffs. The trial court granted summary judgment in favor of some of the defendants, dismissed some of the plaintiffs, and directed verdict in favor of some of the defendants. The trial court also entered judgment in favor of some of the third-party defendants. This twenty-seven issue appeal was brought seeking review of the trial court's entries of judgment. One issue raised on appeal was whether Wedron, a third-party defendant who was a supplier of diatomaceous earth, was properly dismissed from the suit. Defendant Grefco, a supplier of diatomaceous earth, filed a third-party complaint for contribution against Wedron, a company that allegedly supplied the employer (UNARCO) with silica flour, a form of crystalline silica. Grefco alleged that the silica flour supplied by Wedron contributed to the workers' injuries. Wedron moved to dismiss the third-party complaint on grounds that it supplied the silica flour before the effective date of the Illinois Contribution Act. The trial court agreeing with Wedron's position, dismissed the third-party complaint against Wedron. The appellate court affirmed the trial court's dismissal of Wedron.

Illinois Jury Verdicts and Settlements in Silica Claims

Medical Malpractice – Failure to tell worker of silicosis – Solich v. George & Anne Portes Canter Prevention Center of Chicago and U.S. Steel Corp., 84 L 6738, June 11, 1990. Verdict: $2.45 million. Mr. Solich underwent an employer-sponsored physical exam where X-rays showed fibrosis of the lungs. The Portes Cancer Prevention Center of Chicago never informed Mr. Solich of lung abnormality, but Portes informed U.S. Steel, Mr. Solich's employer of plaintiff's lung condition. Mr. Solich sued Portes and U.S. Steel for their failure to inform him of the results of his x-rays. Mrs. Solich sued both Portes and U.S. Steel for her loss of consortium. The jury awarded Mr. Solich $3.1 million and Mrs. Solich was awarded $350,000. The jury apportioned liability at 99% to U.S. Steel and 1% to Portes. This verdict was reversed on appeal. The new verdict or settlement was not reported. See Section 5 above for a more in depth discussion and history of this case.

Product Liability – Lung Disease from Diatomaceous Earth / Asbestos – Dietrich et al. v. Grefco Inc., 86 L 112, November 21, 1994. Verdict: Not Guilty. Workers alleged that they developed silicosis and pulmonary fibrosis from exposure to silica and asbestos between 1951 and 1971. Defendant argued that the plaintiffs did not have silicosis and that defendant's product did not contain silicosis-causing material. Defendant argued that its product contained natural amorphous (having no real or apparent crystalline form) diatomaceous earth, which has a slight risk of causing silicosis. This case was originally tried in 1990 resulting in a $3.6 million dollar verdict for plaintiffs, but was later reversed on appeal resulting in a new trial where defendants were found not guilty. A different law firm represented defendant on appeal.

For a more detailed presentation of recommended investigation and defense strategies for both mold claims and silica claims, as well as pending legislation and standards, please contact this author.
– Kenneth J. Barrish

Reserve The Right to Seek Reimbursement of Defense Costs – You Just Might Be Able to Get Them Back

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In the crazy world of an insurer's potential duty to defend – and threats of estoppel if that duty is not properly fulfilled – insurers often decide to provide a policyholder with a defense under a reservation of rights. There are some cases across the country that are starting to recognize situations in which an insurer may be able to seek reimbursement of spent defense costs from a policyholder after the insurer obtains a finding that the it did not actually have a duty to defend. A relatively recent example of such a case may be found in the U.S. Court of Appeals for the Sixth Circuit decision in United National Ins. Comp. v. SST Fitness Corp., 309 F.3d 914 (6th Cir. Nov. 4, 2002).

In this case, SST Fitness faced a lawsuit brought in 1997 by Precise Exercise Equipment for alleged patent

infringement, unfair competition and unjust enrichment arising out of SST Fitness' marketing and sales of certain abdominal exercise machines. SST Fitness tendered the claim to its CGL carrier, United National, and requested a defense.

United National agreed to provide a defense under a reservation of rights and filed a declaratory judgment action. United National eventually secured a declaratory judgment that its CGL policy, in fact, did not provide coverage. This decision was based on the single argument that the claims did not meet the listed offenses of "advertising injury" as defined in the policy. See United National Ins. Comp. v. SST Fitness Corp., 1997 U.S. Dist. LEXIS 23192, at *4, 14-17 (U.S. Dist. Ct. S.D. Ohio, December 12, 1997) (Magistrate Jg. Hogan), as adopted by, 1998 U.S. Dist. LEXIS 20691 (U.S. Dist. Ct. S.D. Ohio, February 27, 1998) (Dist. Ct. Jg. Weber), upheld on appeal, 182 F.3d 447 (6th Cir. June 28, 1999). In the ten months between the filing of the underlying suit in February 1997 and the Magistrate Judge's initial ruling in December 1997, United National had paid over $100,000 in defense costs in the underlying litigation. SST Fitness, 309 F.3d at 916.

In its reservation of rights letter, United National specifically stated: "United National reserves the right to recoup from SST any defense costs and fees to be paid subject to this reservation letter on the basis that no duty to defend now exists or has existed with regard to the tendered suit." SST Fitness, 309 F.3d at 916. The Sixth Circuit noted that SST Fitness accepted the payment of its defense costs without acknowledging or objecting to this reservation of the right to seek reimbursement. Id.

The Sixth Circuit analyzed United National's right to seek such reimbursement under Ohio law, which did not have any case law on this issue. Thus, the court first looked to decisions from other jurisdictions and noted that several courts have allowed an insurer to recover defense costs where the insurer specifically reserved that right in writing to the insured. Of these cases, the court specifically cited the following: Colony Ins. Comp. v. G & E Tires & Service, Inc., 777 So. 2d 1034 (Fla. Ct. App. 2000) (Florida law); Grinnell Mutual Reinsurance Comp. v. Sheirk, 996 F. Supp. 836 (S.D. Ill. 1998) (Illinois law); Resure, Inc. v. Chemical Distributions, Inc., 927 F. Supp. 190 (M.D. La. 1996) (New Mexico law); Knapp v. Commonwealth Land Title Ins. Comp., 932 F. Supp. 1169 (D. Minn. 1996) (Minnesota law); First Federal Savings & Loan Assoc. of Fargo, ND v. Transamerica Title Ins. Comp., 793 F. Supp. 265 (D. Colo. 1992) (Colorado law). The court came to the conclusion that these cases consistently held that an insurer may seek recovery of defense costs if it is determined that it did not have a duty to defend any of the underlying claims "where the insurer: 1) timely and explicitly reserves its right to recoup the costs; and 2) provides specific and adequate notice of the possibility of reimbursement." SST Fitness, 309 F.3d at 919.

The Sixth Circuit did note that it found at least three cases that had not allowed recoupment. Terra Nova Ins. Comp. v. 900 Bar Inc., 887 F.2d 1213 (3rd Cir. 1989); In re Hansel, 160 B.R. 66 (Bankr. S. D. Tex. 1993); Shoshone First Bank v. Pacific Employers Ins. Comp., 2 P.3d 510 (Wyo. 2000). However, these cases were distinguished as they were all decided on the basis that the insurers' reservation of rights letters did not sufficiently reserve the right to seek reimbursement. SST Fitness, 309 F.3d at 918.

The Sixth Circuit rejected all of SST Fitness' arguments against recoupment. First, SST Fitness argued that United National could not unilaterally create a right of recoupment where such a right was not found within any provision of the insurance policy. The court rejected this argument as moot. United National did not claim that the right of recoupment originated with the policy. Instead, United National argued that its reservation of rights letter constituted a new "implied in fact" contractual agreement that was accepted through receipt of the defense costs without objection to the reserved right to seek reimbursement. SST Fitness, 309 F.3d at 921.

Second, SST Fitness argued that a new contract could not have been formed due to a lack of consideration since the insurer itself benefits from providing a defense under a reservation of rights by avoiding a bad faith or estoppel claim. Again, the court rejected this argument. Instead, the court focused on the public policy argument that this insured and all insureds derive a benefit from allowing reimbursement since it promotes an insurer's willingness to defend even in cases where coverage is questionable. SST Fitness, 309 F.3d at 921.

Third, SST Fitness argued that United National was simply a "volunteer" not entitled to reimbursement. This argument also was rejected. Instead, the court held that United National could not be considered a "volunteer" since it explicitly reserved the right to seek this recovery in writing to the insured. Moreover, the "volunteer" doctrine is only applicable to equity causes of action, whereas, United National sought recoupment under an "implied in fact" contractual theory.

Finally, the "volunteer" doctrine is meant to prevent a party from forcing goods or services upon a party. United National did not force defense costs on its policyholder, SST Fitness requested the defense costs. SST Fitness, 309 F.3d at 922-23.

A dissenting opinion disagreed with the majority's holding that United National's reservation of rights letter created a separate "implied in fact" contractual right to reimbursement of defense costs. This dissent, instead, would have held that SST Fitness' failure to object should not create a new contract due to the general contractual principal that silence should not be construed as acceptance of an offer. SST Fitness, 309 F.3d at 926.

The dissent further cited to the Couch on Insurance treatise for the argument that an insurer's attempt to reserve the right to reimbursement of defense expenses is an unenforceable "pro tanto supersession of the policy without separate agreement and separate consideration." SST Fitness, 309 F.3d at 926 (citing 14 Couch on Insurance §202:40 at 202-98-99 (3d ed. 1999). Judge Clay cited the Shoshone First Bank and Terra Nova cases for the argument that when an insurer attempts to reserve this right to reimbursement, it places the insured in the position of making a "Hobson's choice" between either accepting the defense that it requested with this new condition, or rejecting/objecting to that defense and incurring all of the defense cost itself. SST Fitness, 309 F.3d at 927. In the end, the dissent appeared swayed by the argument that if the insurer really wanted a right to reimbursement of defense costs in this kind of a situation, then the insurer could have preserved the right to do so directly in the insurance policies. SST Fitness, 309 F.3d at 927.

Despite the dissent's comments to the contrary, the Sixth Circuit's majority decision in SST Fitness and the several similar cases across the country should lead insurer claim representatives and coverage counsel to consider reserving the right to seek reimbursement of defense costs where the insurer is providing a defense under a reservation of rights. It should only take an additional sentence or two to reserve this right to reimbursement. The key items to remember are: 1) the reservation of this right should be presented clearly and explicitly; 2) it should be timely presented to the insured before defense counsel is retained; and 3) if the insured objects, the parties should quickly discuss, negotiate and resolve this issue in order to avoid a possible waiver argument.

It should also be noted that the right to reimbursement might not be applicable to all reservation of rights situations. Consider the example of an insurer that reserves the right to decline coverage based on an "expected and intended damages" exclusion. This is a reservation of the right to deny the duty to indemnify. The duty to defend would still exist at least until there was conclusive evidence or a judgment in the underlying case. In this scenario, reimbursement of incurred defense costs is probably not available even under this SST Fitness case.

The SST Fitness case and three of the cases cited therein for support all involved situations in which the insurers argued that they never had a duty to defend. To put it another way, none of the cases involved a situation where the defense duty initially existed and only later was terminated by a development in the underlying case. SST Fitness, 182 F.3d at 449-50 (intellectual property claims did not meet any of the listed "offenses" within the definition of "advertising injury"); G & E Tires, 777 So. 2d at 1037 (insurer with a policy that excluded acts arising out of employment practices did not have a duty to defend sexual harassment claim of employee); Grinnel Mutual, 996 F. Supp. at 838 (insurer with a policy that excluded acts committed in furtherance of a crime did not have a duty to defend gun shot negligence claim due to insured's criminal conviction and court martial in military court); Resure, 927 F. Supp. at 194 (insurer with a policy that contained an absolute pollution exclusion did not have a duty to defend bodily injury claims arising out of chemical tanker truck explosion and exposure of contaminants).

Finally, a question arises as to whether an insurer that initially does have a duty to defend could recoup a portion of defense costs incurred after a certain date when that duty to defend was terminated by a development in the underlying case. Consider the example of an insurer that defends under a reservation of rights because only one of the several alleged causes of actions is arguably covered. If that one covered cause of action is dismissed in the underlying case before trial, could the insurer later seek recovery of defense costs incurred after that dismissal? Assuming the amount sought is significant enough to warrant going after, nothing in the SST Fitness decision precludes such a partial recovery under this hypothetical.

For all of these reasons, it is prudent for all insurer claim representatives and coverage counsel to consider reserving the right to seek reimbursement of defense costs. You just might be able to get them back – eventually. Note that United National defend the underlying patent claim against SST Fitness in 1997 and it took over five years to get this decision requiring SST Fitness to reimburse those defense expenses.

– Dawn M. Gonzalez

PRE-TENDER DEFENSE COSTS: COVERED OR NOT?

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Insurance coverage issues are as varied as the state courts that try to decide them. One exception to this point is the issue of whether a policyholder may recover pre-tender defense costs. For the purpose of this article, "pre-tender defense costs" refer to the costs incurred by a policyholder before it tenders a claim to its insurance carrier. Typically, pre-tender defense costs will include investigation, expert witnesses, and attorney fees. Insurers will usually deny that they are required to reimburse the policyholder for pre-tender defense costs.

Most liability policies contain a "voluntary payments" provision that precludes coverage for any payment voluntarily made by the policyholder. Insurers typically point to this provision in support of their decision denying reimbursement for pre-tender defense costs. In the typical commercial general liability policy the voluntarily payments condition states:

"No insured shall, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent."

However, state courts vary on the issue of whether a policyholder's pre-tender defense costs are precluded from coverage under this policy provision. For the most part, the judicial decisions addressing this issue fall into one of three categories:

1) States that outright deny reimbursement to the policyholder for pretender defense costs;

2) States that require the insurer to demonstrate they have been "prejudiced" by the acts of the policyholder in delaying his tender before allowing the enforcement of the voluntary payment provision; and

3) States that have not dealt directly with this issue but have ruled on "notice" provisions contained in a policy, which rulings allows us to speculate on possible conclusions for pre-tender defense costs.

The chart below provides a brief summary of the relevant decisions from each of the fifty states regarding these issues.

SURVEY OF STATES

Alabama – Undecided

On the issue of notice generally: The failure of the insured to tender papers in a timely fashion in compliance with the provisions of the policy will relieve the insurer of their obligation to defend. Watts v. Preferred Risk Mut. Ins. Co., 423 So.2d 171, 173 (Ala. 1982). The purpose of this rule is to allow the insurer to control the litigation. However, actual notice of the lawsuit, from any source, may bar the insurer of this defense. Safeway Ins. Co. of Ala., Inc. v. Thompson, 688 So.2d 271, 273 (Ala. Civ. App. 1982).

Alaska – Undecided (but probably yes)

On the issue of notice generally: Alaska courts will treat an insurance policy as a "contract of adhesion" favoring the insured by not strictly enforcing a policy provision. The Alaska Supreme Court has held that the requirement of prompt notice of a claim or loss is to protect the insurer from prejudice and absent prejudice, regardless of reasons for the delayed notice, there is no justification for excusing the insurer from its obligations. Moreover, the burden of demonstrating prejudice is on the insurer and not the insured. Weaver Bros. v. Chappel, 684 P.2d 123, 125-126 (Alaska 1984).

Arizona – Possibly

Although there is no relevant caselaw on "pre-tender" voluntary payments, Arizona courts have interpreted the voluntary payments provision in some policies and have held: Policy provision requiring insured to cooperate with insurer in defense and settlement of claims and provision indicating any voluntary payment or assumption of liability by the insured will be done at "insured's own risk," will be enforced only if the insurer is "substantially prejudiced." The determination of "substantial prejudice" is a question for the trier of fact. Clark Equip. Co. v. Arizona Property and Cas. Ins. Guar. Fund, 943 P.2d 793, 801-802 (Ariz. Ct. App. 1997); see also Holt v. Utica Mut. Ins. Co., 759 P.2d 623, 628 (Ariz. 1988).

California – No

The Ninth Circuit Federal Court of Appeals, applying California law, held that an insurer had no obligation to reimburse insured for defense costs incurred by insured before it tendered its defense to insurer. The court also notes that there is no California authority that imposes a "prejudice" requirement to enforce a voluntary payment provision in a policy. Faust v. The Travelers, 55 F.3d 471 (9th Cir. 1995). Recovery of pre-tender expenses should not be denied in all cases as a matter of

law. Ultimately recovery depends on whether the costs were voluntarily incurred. Fiorito v. Superior Court, 226 Cal. App. 3d 433, 439, 277 Cal. Rptr. 27, 31 (Cal. Ct. App. 1990).

Colorado – No

Colorado courts have said that "[e]xpress provisions in a policy requiring that the insured give notice of the accident and forward suit papers to the insurer as a condition precedent to coverage are enforceable." Such provisions may only be set aside based upon substantial justification, such as an adequate excuse for noncompliance or actual notice to the insurer by a third party. Hansen v. Barmore, 779 P.2d 1360, 1362 (Colo. Ct. App. 1989); see also Telectronics, Inc. v. United Nat. Ins. Co., 796 F. Supp. 1382, 1388 (1992).

Connecticut – Undecided

On the issue of notice generally: Connecticut courts will typically look into the circumstances of each case to determine if the insurer has been materially prejudiced by the insureds failure to comply with a policy provision. The burden of proving there was no material prejudice to the insurer is placed on the insured. Aetna Cas. and Sur. Co. v. Murphy, 538 A.2d. 219, 224 (Conn. 1988).

Washington, D.C. – Undecided

On the issue of notice generally: In the District of Columbia, if the policy expressly makes compliance with its notice provision a condition precedent to liability on the part of the insurer, the insured's failure to comply with the notice provision will release the insurer of liability on the policy. Travelers Indem. Co. of Illinois v. United Food & Commercial Workers Int'l. Union, 770 A.2d 978, 991 (D.C. Cir. 2001).

Florida – Undecided

Although there is no relevant caselaw on "pre-tender" voluntary payments, some Florida cases seem to lean in the direction that a voluntary payments provision would be enforced. It appears Florida courts will usually uphold policy provisions. In a case not directly on point, a Florida court held: A liability insurer is not required to pay the insured's expenses unless the actions of the insurer have "forced" the insured to engage its own attorneys. Carrousel Concessions, Inc. v. Florida Ins. Guar. Ass'n, 483 So.2d 513, 517 (1986).

Georgia – No

The Georgia courts have held that the insurer is not obligated to pay insured's pre-tender legal expenses unless there is a provision in the policy to the contrary. O'Brien Family Trust et al., v. Glen Falls Ins. Co., 461 S.E.2d 311, 313 (Ga. Ct. App. 1995). Also, the federal court has interpreted Georgia law by holding that an insured did not trigger the insurer's duty to defend until it tendered notice of the lawsuit, and as a result, insurer is not liable for the litigation expenses insured incurred before that date. Elan Pharm. Research Corp. v. Employers Ins. of Wausau, 144 F.3d 1372, 1382 (11th Cir. 1998), relying on O'Brien decision.

Hawaii – No

Insurer had no duty to contribute to defense costs incurred prior to its receiving notice of the underlying action. Great Am. Ins. Co. v. Aetna Cas. & Sur. Co., 876 P.2d 1314, 1314 (Haw. 1994).

Idaho – Undecided

Although very little caselaw on this issue, the Idaho Supreme Court has indicated that an insurer's duty to defend a lawsuit arises at the time when notice is given in the manner required by the policy. Kootenai County v. Western Cas. and Sur. Co., 750 P.2d 87, 90 (Idaho 1988). However, Idaho courts have indicated that an insurer's duty to defend arises upon the filing of a complaint whose allegations, in whole or in part, read broadly, reveal a potential for liability that would be covered by the insured's policy. Kootenai, 750 P.2d at 89. This leaves open the question of whether an insurer would have to pay pre-tender defense costs from the time the lawsuit was filed or from the time of notice to the insurer.

Illinois – No

The Illinois Appellate Court has stated: Under voluntary payment provision, insurer will not be held liable for expenses voluntarily incurred by insured before tendering defense of suit to insurer; purpose of this clause is to prevent collusion between insurer and injured party. Westchester Fire Ins. Co. v. G. Heilemen Brewing Co., 321 Ill. App. 3d 622, 637, 747 N.E.2d 955, 968 (1st Dist. 2001).

Indiana – Undecided

On the issue of notice generally: Indiana courts have held that there is a presumption the insurer has been prejudiced when an insured provides untimely notice of a claim. Thus, the burden of proving there was no prejudice to the insurer falls on the insured. An Indiana court dealing with untimely notice to the insurer held that: An insurance company cannot

be forced to pay fees and expenses incurred wholly without its knowledge or consent pursuant to an insurance contract when the insured has made no effort to fulfill his duties under that contract. When trial has been held and a cause of action has been concluded without notice to the insuring company, the company will not subsequently be required to disburse proceeds under that policy for expenses or fees incurred without its knowledge. Milwaukee Guardian Ins., Inc. v. Reichhart, 479 N.E.2d 1340, 1342-43 (Ind. Ct. App. 1985).

Kansas – Possibly

For an insurer to avoid its obligations under the policy, it must show prejudice on account of the untimely notice by insured. The same rule applies to the cooperation provisions of the policy, which prohibit the insured from voluntarily incurring expenses. U.S. Fidelity and Guar. Co. v. Saddle Ridge, L.L.C., 1999 WL 1072905, *7 (FN 7, 8) (D. Kan. 1999). In Cessna Aircraft Co. v. Hartford Acc. & Indem. Co., 900 F. Supp. 1489, 1516 (D. Kan. 1995) the Federal District Court predicted Kansas law and held that an insurer must show substantial prejudice to enforce insured's breach of voluntary payment provision of policy.

Louisiana – No

Insurer's duty to provide a defense does not arise until the insurer receives notice of the litigation…and is not responsible for the legal fees and costs incurred prior to the notification date. Gully & Assoc., Inc. v. Wausau Ins. Companies, 536 So.2d 816, 818 (La. Ct. App. 1988); See also Cobb v. Empire Fire and Marine Ins. Co., 488 So.2d 349 (La. Ct. App. 1986); Payton v. St. John, 188 So.2d 647 (La. Ct. App. 1966). In Gully, the court decided that the insurer was not liable for pre-notification defense costs and attorney fees. Gully, 536 So.2d at 818.

Maine – Undecided

On the issue of notice generally: The courts have held that for an insurer to avoid either its duty to defend or its liability thereunder based on an insured's delay in giving notice, a liability insurer must show (a) that the notice provision was in fact breached, and (b) that the insurer was prejudiced by the insured's delay. Ouellette v. Maine Bonding & Cas. Co., 495 A.2d 1232. 1235 (Me. 1985).

Maryland – Possibly

Liability insurers are not categorically excused from paying for defense costs that insured incurs before giving notice of claim to insurer. Where insured incurs defense expenses before giving notice of claim to liability insurer, but insurer once notified undertakes the defense, insurer's obligation to pay for the pre-notice expenses depends on whether insurer has been prejudiced, which in turn depends on whether it was reasonable under circumstances for insured to have incurred the expenses, whether expenses were reasonable, and whether expenses materially exceeded that which insurer would likely have incurred in any event had notice been given earlier. Sherwood Brands, Inc. v. Hartford Acc. and Indem. Co., 347 Md. 32, 48-49 (1997).

Massachusetts – No

No duty to defend or to participate in a defense can arise before the insurer has notice of the suit against the insured, or at least of the underlying claim and the likelihood of suit…and no duty to provide defense costs could have arisen until at least that time. Hoppy's Oil Serv., Inc., 783 F. Supp. 1505, 1509 (1992). As a general rule, insurer has no duty to defend until it receives notice of claim and the insurers are not liable for pre-notice defense costs. American Mut. Liability Ins. Co. v. Beatrice Companies, Inc., 924 F. Supp. 861, 872 (N.D. Ill. 1996) (applying Massachusetts law).

Michigan – Probably No

Although the state courts in Michigan have not ruled directly on "pre-tender" voluntary payments, in one case the federal district court held: Defense costs incurred in connection with contaminant in sites before insurer was tendered defense were waived and were not damages proximately caused by insurer's improper refusal to defend; policyholders voluntarily chose to respond by themselves to Environmental Protection Agency and New Hampshire environmental regulatory actions, and any defense costs incurred by policyholders prior to tender of offense were voluntarily made. Fireman's Fund Ins. Companies v. Ex-Cell-O Corp., 790 F. Supp. 1318, 1330, 1333 (E.D. Mich. 1992).

Minnesota – Probably No

The Minnesota Supreme Court has made it clear that "the formal tender of a defense request is a condition precedent to the recovery of attorneys' fees that a party incurs defending claims that a third party is contractually obligated to pay." SCSC Corp. v. Allied Mut. Ins. Co., 536 N.W.2d 305, 316 (Minn. 1995); see also Pedro Companies v. Sentry Ins., 518 N.W.2d 49, 51 (Minn.App.1994). The insurer is not required to reimburse the insured for expenses incurred before insured tendered its defense. SCSC Corp., 536 N.W.2d at 317; Pedro Companies, 518 N.W.2d at 51-52 (holding insurer was not responsible for

costs incurred defending a claim that was dismissed before insured tendered its defense). C.J. Duffey Paper Co. v. Liberty Mut. Ins. Co., 76 F.3d 177 (8th Cir. 1996). BUT: Generally, an insurer is not responsible for defense costs incurred prior to the tender of a defense request, but circumstances may justify a departure from the general rule. Insured argued that the district court erred in denying pre-tender defense costs because insurer's denial of its insurance relationship with insured misled insured and delayed its claims. Insured had the initial burden to establish coverage and, in order to recover pre-tender defense costs, the ultimate burden to demonstrate bad-faith denial. Because insured didn't show bad-faith denial, refusal to award pre-tender defense costs was appropriate. Gopher Oil Co. v. American Hardware Mut. Ins. Co., 588 N.W.2d 756, 771 (Minn. Ct. App. 1999). Also, the Minnesota Supreme Court has held: General rule is that an insured does not invoke its insurer's duty to defend until it properly tenders a defense request. Logically, then, an insurer cannot be held responsible for defense costs incurred prior to the tender of the defense request giving rise to the insurer's duty to defend, although there may be circumstances justifying a departure from the general rule. Domtar, Inc. v. Niagara Fire Ins. Co., 563 N.W.2d 724, 739 (Minn. 1997).

Missouri – Undecided

On the issue of notice generally: Insured's claim against insurer for defense was waived by insured's failure to notify insurer of the claim and suit. Hawkeye-Security Ins. Co. v. Iowa Nat. Mut. Ins. Co., 567 S.W.2d 719 (Mo. 1978).

Montana – Undecided (Probably No)

On the issue of notice generally: An insurer's duty to defend is ordinarily "triggered" when the insured, or someone on the insured's behalf, tenders the defense of an action potentially within the policy coverage. Consequently, where the insured has failed to tender the defense of an action to its insurer, the latter is excused from its duty to perform under its policy or to contribute to a settlement procured by a coinsurer. Casualty Indem. Exch. Ins. Co. v. Liberty Nat. Fire Ins. Co., 902 F. Supp. 1235, 1238-1239 (1995).

New Hampshire – Undecided

On the issue of notice generally: There will be special circumstances where the actions of the insured will negate the insurer's duty to defend. An example is when an insured fails to follow the contractual notice requirements. White Mountain Cable Const. Co. v. Transamerica Ins. Co., 137 N.H. 478, 483-84 (1993); Cf. Jostens, Inc. v. CNA Ins./Continental Cas., 403 N.W.2d 625, 629 (Minn. 1987) (notice is affirmative defense to duty to defend and indemnify).

New Jersey – No

It appears the New Jersey Supreme Court will not enforce a "voluntary payment" provision in a policy if the insured acts reasonable and promptly, however, it does seem if the insurer is prejudiced or the insureds actions are unreasonable, the provision will be enforced. Specifically, the Supreme Court stated: If insured acts properly and promptly in conveying additional information to insurer that may trigger coverage and duty to defend, insured will be reimbursed for previously expended defense costs; however, if additional information outside underlying complaint is not properly and promptly forwarded, insurer cannot be held liable for defense costs that it had no opportunity to control…[As such,] [i]nsured's failure to convey promptly information that led it to believe that general liability and comprehensive catastrophe insurers were required to defend former employee's action estopped insured from seeking reimbursement for its full defense costs; rather, insurers could be held liable only for those defense costs that arose after it was informed of facts triggering duty to defend. SL Indus., Inc. v. American Motorists Ins. Co., 128 N.J. 188, 199-200 (1992).

New Mexico – Undecided

On the issue of notice generally: A proper balance between the interests of the insurer and the insured requires a factual inquiry into whether, in the circumstances of a particular case, an insurer has been prejudiced by its insured's delay in giving notice of an event triggering insurance coverage. 756 Roberts Oil v. Transamerica Ins. Co., 113 N.M. 745, 753 (1992). The court also held that the insurer must demonstrate substantial prejudice as a result of a material breach of the insurance policy by the insured before it will be relieved of its obligations under a policy. Id. at 756.

New York – No

Insured is entitled to recover attorneys' fees incurred after the date that it notified insurer of the underlying action. See Michaud v. Merrimack Mut. Fire Ins. Co., 1994 WL 774683 at *7 (D.R.I. 1994) (insurer liable for attorney's fees from date that it first had knowledge of

underlying action). Smart Style Indus., Inc. v. Pennsylvania Gen. Ins. Co., 930 F. Supp. 159, 164 (S.D.N.Y. 1996).

North Carolina – No

Insurer does not need to pay for those legal fees incurred by the insured prior to giving notice to insurer. A contrary result would require the insurer to pay for those defense costs which it had no opportunity to control. When the insured's delay in providing relevant information prevents the insurer from assuming control of the defense, the insurance company is liable only for that portion of the defense costs arising after it was informed of the facts triggering the duty to defend. Wm. C. Vick Constr. Co. v. Pennsylvania Nat. Mut. Cas. Ins. Co., 52 F. Supp. 2d 569, 596 (E.D.N.C. 1999).

North Dakota – Undecided

On the issue of notice generally: A duty to defend arises only if the condition precedent to the policy, such as proper notice, is met. Lack of notice is an affirmative defense of the insurer to both the duty to defend and the duty to indemnify. Because [insured] clearly violated the notice provisions of the policy, [insurer] neither has a duty to provide coverage for insured against [underlying] claims nor has a duty to defend insured in that action. Employers Reinsurance Corp. v. Landmark, 547 N.W.2d 527, 533 (N.D. 1996).

Ohio – Undecided

Although there is no caselaw specifically on point, the Ohio Appellate Court did find in favor of the insurer when the insured made a voluntary payment to the EPA without first notifying the insurer of the claim. Specifically, the court found: In Ohio there is no burden [on the insurer] to show that a voluntary payment or settlement made by the insured in violation of a term in the insurance contract prejudiced the insurer before a ruling can be made that a material breach of the contract occurred which relieves the insurer of the obligation to make payment. Champion Spark Plug Co. v. Fidelity & Cas. Co. of New York, 687 N.E.2d 785 (Ohio App. Ct.1996).

Oklahoma – Undecided

On the issue of notice generally: An insurer ordinarily has no duty to defend an insured absent a request to provide a defense, which act serves to trigger the insurer's performance under the contract. It is the insured's sole duty to give its insurer timely and adequate notice of a third-party claim to aid the insurer in the discovery of facts bearing on coverage. First Bank of Turley v. Fidelity and Deposit Ins. Co. of Maryland, 928 P.2d 298, 304 (Okla. 1996).

Oregon – No

Although there is very little caselaw in Oregon, in Gerling the Oregon court held that an insurance policy covers only post-tender fees and payments relating to claims made by an insured. Gerling America Ins. Co. v. Wagner Const. Co., 1999 WL 962468, at *2 (D.Or. 1999).

Pennsylvania – Possibly

In the absence of a showing of prejudice, the insurer's duty to defend includes the duty to reimburse for reasonable costs of defense incurred prior to notice, as well as for subsequent defense costs. TPLC, Inc. v. United Nat. Ins. Co., 44 F.3d 1484, 1493 (10th Cir. 1995) (applying PA law).

Rhode Island – No

Insurer had a duty to defend its insureds from date it had knowledge of action and should reimburse the insureds for all reasonable defense costs and expenses from that date until the conclusion of the action. Michaud v. Merrimack Mut. Fire Ins. Co., 1994 WL 774683, at *7 (D.R.I. 1994).

South Carolina – Undecided

On the issue of consent generally: In accordance of plain language of policy providing that no legal costs or expenses would be covered without the consent of the insurer, there was no duty to defend. Botany Bay Marina, Inc. v. Great American Ins. Co., 760 F. Supp. 88, 91 (D.S.C. 1991).

South Dakota – Undecided

Excess insurer was entitled to reimbursement from primary insurer or all legal fees that it incurred in performing its secondary duty to defend the insureds, from the time that primary insurer received notice of lawsuit against the insureds to the time that it actively began defending insureds; recovery was warranted on unjust enrichment theory. Church Mut. Ins. Co. v. Smith, 509 N.W.2d 274, 277 (S.D. 1993).

Tennessee – No

By making the payment to a third-party and then seeking reimbursement for such payment, insured attempted to bypass the plain, unambiguous language in the insurance contracts [prohibiting such payments] and thereby divest insurer of its rights to oversee the handling of any claim. Furthermore,

under the commercial general liability policy, insurer is under no obligation to reimburse an insured for payments made by that insured for any obligation assumed or expense incurred without the consent of insurer other than for first aid. By violating the clear language of the policies by assuming an obligation, voluntarily making payment and incurring an expense without insurer's consent, insured did all of the foregoing to their own peril. State Auto. Ins. Co. v. Lashlee-Rich, Inc., 1997 WL 781896, at *4-*5 (Tenn. App. Ct. 1997).

Texas – No

Under Texas law, breach of 'voluntary payment' provision precludes liability for pre-tender defense costs. Lafarge Corp. v. Hartford Cas. Ins. Co., 61 F.3d 389, 394 & 400 n.19 (5th Cir. 1995), overruled on other grounds, Texas Property and Cas. Ins. Guar. Assoc. v. Southwest Aggregates, 982 S.W.2d 600 (Tex. App. Ct. 1998). Insurer is not liable for any defense costs incurred prior to the date insured tendered the amended petition because the "voluntary payment" provision of the policy precludes liability for such pre-tender defense costs. Under Texas law, the duty to defend does not arise until a petition alleging a potentially covered claim is tendered to the insurer. Members Insurance Co. v. Branscum, 803 S.W.2d 462, 466-67 (Tex. App. Ct. 1999).

Utah – No

As a matter of law, expenses [incurred before tender] cannot be recovered. Crist v. Insurance Co. of North Am., 529 F. Supp. 601, 604 (D. Utah 1982).

Virginia – No

Because the policy language was unambiguous in that no legal costs or expenses shall be incurred without the consent of the insurer, the duty to defend is conditioned on the insurer's consent, and without consent, insurer is not liable for defense costs. Chesapeake & Ohio Railway Co v, Certain Underwriters at Lloyds, London, 834 F. Supp. 456, 461 (1993), affirmed in part, reversed on other grounds, CSX Transp., Inc. v. Commercial Union Ins. Co., 82 F.3d 478, (D.C. Cir. 1996).

Washington – Possibly

The Washington Appellate Court has held: Even assuming insurer could prove breach of the voluntary payment provision, it must also prove actual prejudice [in order to avoid paying pre-tender costs]. Because insurer has never asserted it was prejudiced, the court erred in failing to award pre-tender defense expenses. Griffin v. Allstate Ins. Co., 108 Wash. App. 133, 142 (2001).

Wisconsin – No

The court found that the insurer was not responsible for pre-tender expenses incurred by insured in defending suit; insurer's duty to defend did not attach until tender, and thus any expenses that insured incurred prior to that time could not flow from insured's breach of duty to defend, unless such expenses were specifically allowed by contract. Towne Realty, Inc. v. Zurich Ins. Co., 555 N.W.2d 64 (Wis. 1996).

As illustrated above, in those states where the pre-tender costs issue has been addressed directly, the majority of states have held that the insurer is not required to reimburse its insured for such costs. Two justifications are apparent. First, because notice triggers the insurer's duty to defend, any costs incurred before notice could not be attributed to the costs of defending the suit, and thus, not a part of the insurer's general obligations. Second, costs incurred before notice are done voluntarily and without the insurer's consent, in violation of the voluntary payment provision. On the other hand, a small number of states require the insurer to pay for such costs, if the insurer was not prejudiced by their insured's conduct.

Courts from a number of states have not dealt with the issue directly, but nonetheless have dealt generally with the issue of notice. With violations of notice provisions, some courts have ruled that a breach automatically releases the insurer from its obligations under the liability policy. This would seem to lead to the conclusion that an insured cannot recover pre-tender defense costs. On the other hand, some states have ruled that an insurer will not be released from its obligations under the policy unless it can show that it was prejudiced by the insured's breach of the notice provisions. However, it is unclear whether these courts would also require the insurer to demonstrate prejudice in order to avoid paying pre-tender defense costs.

– Marlene A. Kurilla