2010 Wisc. App. LEXIS 215 (Wis. Ct. App. Mar. 24, 2010) (concluding that insurer was prejudiced by late notice where it lost ability to participate in legal proceedings such as filing motions or obtaining discovery); *Ansul, Inc. v. Emp'rs Ins. Co. of Wausau*, 826 N.W.2d 110 (Wis. Ct. App. 2012) (finding prejudice as a matter of law resulted from insured's failure to notify because facts showed some potentially relevant evidence had been lost); *Old Republic Ins. Co. v. Liberty Mut. Fire Ins. Co.*, 138 F. Supp. 3d 1013 (E.D. Wis. 2015) (setting forth a detailed explanation of prejudice sustained by the insurer on account of insured's late notice); *Shugarts v. Mohr*, 894 N.W.2d 443 (Wis. Ct. App. 2016) ("The decisions interpreting WIS. STAT. § 631.81(1) hold that when the insured fails to give notice within one year after the time required by the policy, there is a rebuttable presumption of prejudice and the burden of proof shifts to the claimant to prove that the insurer was not prejudiced by the untimely notice."), *review granted* 2017 Wisc. LEXIS 513 (Wis. Sept. 11, 2017).

Wyoming: Prejudice required. In *Century Sur. Co. v. Jim Hipner, LLC*, 377 P.3d 784 (Wyo. 2016) the Wyoming Supreme Court answered in the affirmative the following question certified to it by the Eight Circuit Court of Appeals: ["W]hether, under Wyoming law, an insurer must be prejudiced before being entitled to deny coverage when the insured has failed to give notice 'as soon as practicable.' Many states have expressly adopted a notice-prejudice rule under which an insurer will only be able to disclaim coverage if it demonstrates it was actually prejudiced by late notice. *See* 46A C.J.S. Insurance § 1769. To date, Wyoming has not." *Id.* at 785. In adopting a prejudice requirement, the *Hipner* court undertook a thorough examination of late notice law nationally, including its history, and rested its decision on: the unequal bargaining power between insurer and insured, including that insurance policies are contracts of adhesion, the public interest in compensating accident victims, including innocent third parties and preventing insurers from reaping undeserved windfalls. After adopting the notice-prejudice rule, the court turned to the insurer's argument that its policy specifically excluded coverage unless the insured notified the insurer "as soon as practicable . . . whether [the insurer] [is] prejudiced or not." The *Hipner* Court held that an insurer cannot contract around the prejudice requirement and such policy language was void as against public policy. Thus, the court adopted a two-step approach to an insurer's claim of late notice. "This approach requires a preliminary determination that an insured's notice was untimely, in violation of the notice requirement contained in the insurance policy. The question of the timeliness of the insured's delay in providing notice will

depend upon a number of factors, including, but not limited to, the language of the notice requirement in the policy, the timing of the notice, the insured's knowledge of the underlying facts and ability to provide notice, the sophistication of the parties, the type of insurance at issue, and the reasonableness of any delay. Once it is determined that notice was untimely, a court should then turn to the question of whether the insurer was prejudiced by that delay. If the insurer was prejudiced, then the insurer will be relieved of its obligation to provide coverage." *Id.* at 791.

reimburse reasonable pre-tender defense costs. *Id.*; *see also Dale Corp. v. Cumberland Mut. Fire Ins. Co.*, No. 09-1115, 2010 U.S. Dist. LEXIS 65052 (E.D. Pa. June 30, 2010) (following *Rite Aid Corp.* and holding that the insurer's duty to defend arose prior to insured's tender of notice because the insurer could not show any prejudice arising from the late notice).

Rhode Island: A District Court of Rhode Island held that an insurer was only liable for paying insured's defense costs that were incurred after it was notified of the underlying litigation. *Michaud v. Merrimack Mut. Fire Ins. Co.*, No. 94-0175B, 1994 U.S. Dist. LEXIS 19930 (D.R.I. Nov. 16, 1994). The court reasoned that, because the insured "voluntarily incurred legal expenses for their defense in the ... action without [the insurer's] consent in clear violation of unambiguous policy language[,]" ... the insureds "are now hard pressed to justify reimbursement for *all* defense costs and expenses since the initiation of the ... action." (emphasis in original).

South Carolina: A District Court of South Carolina addressed whether the insurer was obligated to provide coverage for pre-tender defense costs and concluded that "an insurer's duty to defend arises upon the filing of the underlying complaint, and late notice from the insured does not excuse the insurer from complying with its duty to defend except where the insurer can show prejudice." *Episcopal Church in So. Carolina v. Church Ins. Co. of Vt.*, 53 F. Supp. 3d 816 (D.S.C. 2014). The court reasoned that "under South Carolina law, the duty to notify is merely a covenant that, absent a showing of prejudice, does not excuse the insurer from complying with its duty to defend." On the specific issue at hand, the court predicted that "the South Carolina Supreme Court would join [other] . . . courts and hold that, absent a showing by the insurer of substantial prejudice caused by the insured's late notice, an insurer who breached its duty to defend will be liable for reasonable costs of defense incurred both before and after notice."

South Dakota: No instructive authority.

Tennessee: A District Court of Tennessee held that an insured was entitled to recover pre-tender fees and expenses because the insurer did not experience any prejudice as a result of the insured's late notice. *Smith & Nephew, Inc. v. Fed. Ins. Co.*, No. 02-2455, 2005 U.S. Dist. LEXIS 49058 (W.D. Tenn. Dec. 12, 2005). The court concluded that "a prejudice analysis should apply to both the existence of a duty to defend after late notice, as well as to whether that duty includes pre-notice costs," because a state like Tennessee concludes that "notice is not a condition precedent to coverage." "While it is logically consistent to find that a duty to defend does not

arise until notice is provided in a state that holds notice to be a condition precedent to the duty to defend, the same is not true for a state, like Tennessee, which holds the duty exists independent of notice. In a state where the duty to notify is merely a covenant that, absent a showing of prejudice, does not excuse the insurer from complying with its duty to defend, the logic of such a holding becomes significantly attenuated, for it creates a time gap between the insurer's right to control the defense and its duty to provide one."

Texas: The Court of Appeals of Texas held, "based on the [voluntary payment] provision, that [the insureds] cannot recover the costs of defending the [underlying lawsuits], since they failed to notify the insurers of the suits pursuant to the policy provisions, and since they voluntarily undertook such costs and payments." *E & L Chipping Co. v. The Hanover Ins. Co.*, 962 S.W.2d 272, 278 (Tex. Ct. App. 1998). The court declined to accept the insureds' argument that the insurer was required to prove that it was prejudiced. *Id.*; *see also 15625 Ft. Bend Ltd. v. Sentry Select Ins. Co.*, No. H-12-0600, 2014 U.S. Dist. LEXIS 34673 (S.D. Tex. Mar. 13, 2014) (citing *E & L Chipping* and holding that insurer did not have to pay any defense costs or attorney's fees incurred by insured before insured provided notice of suit to insurer); *Coastal Ref. & Mktg. v. U.S. Fid. and Guar. Co.*, 218 S.W.3d 279, 294 (Tex. Ct. App. 2007) (citing *E & L Chipping* for the proposition that "[b]ecause an insurer's duty to defend is triggered by notice, the insurer has no duty to reimburse the insured for defense costs incurred before the insured gave the insurer notice of the lawsuit"); *Protectors Ins. & Fin. Servs., LLC v. Lexington Ins. Co.*, No. H-12-3469, 2013 U.S. Dist. LEXIS 130338 (S.D. Tex. Sep. 12, 2013) (citing *Coastal Ref. & Mktg.* and concluding that insurer did not have to reimburse insured for legal expenses incurred before date insurer received tender of suit).

Utah: A District Court of Utah held that, "as a matter of law, [insurers] are not liable for any litigation expenses incurred prior to tender of defense to them." *Crist v. Ins. Co. of N. Am.*, 529 F. Supp. 601, 603 (D.C. Utah 1982). In reaching its determination, the court reasoned that "[t]he insurer's duty to defend corresponds to the insured's duty to relinquish control of the defense, and one cannot arise without the other." *Id.* at 603. "Plaintiffs counter that because the defendants refused to defend, they cannot now be heard to complain that tender was untimely, and argue that the failure to award these expenses constitutes a windfall for the defendants. The responsibility of promptly notifying their respective insurers and tendering to them their defense of the action, however, rested with the insureds. Any windfall would on the contrary result from requiring the defendants to bear the burden of the defense prior to their knowledge of the action." *Id.* at 604.

the complaint do not fall potentially or arguably within the policy coverage, then there is no need to look beyond the allegations in the complaint, and the duty to defend is not triggered."); *Motorists Mut. Ins. Co. v. Natl. Dairy Herd Improvement Assn., Inc.*, 750 N.E.2d 1169 (Ohio Ct. App. 2001) ("Because we have determined that the allegations in the *Agritronics* complaint do not state a claim that potentially or arguably falls within the purview of the insurance policy, we need not look at extraneous matter developed during the course of discovery."); *Cincinnati Specialty Underwriters Ins. Co. v. Larschied*, No. 1-14-01, 2014 Ohio App. LEXIS 4036 (Ohio Ct. App. Sept. 22, 2014) ("Even under the liberal notions of notice pleading it would be inherently unfair to require the insurer to provide a defense where the pleadings failed to notify, even arguably, that the insured is being sued on a claim covered by the policy."); *Mesa Underwriters Specialty Ins. Co. v. Myers*, No. 14-2201, 2016 U.S. Dist. LEXIS 108444 (N.D. Ohio Aug. 16, 2016) ("Sireco's claim for damages to its roof is not 'potentially or arguably' covered. The claim is for damages Sireco has incurred or will incur to fix Myers's negligent work on the roof itself, and thus outside the policy's coverage. Resort to extrinsic materials for purposes of fleshing out Sireco's claims is therefore unnecessary and impermissible under *City of Willoughby Hills* and *National Dairy Herd*.").

Oklahoma: The Supreme Court of Oklahoma held that the determination of the duty to defend is not limited to the allegations in the complaint. *First Bank of Turley v. Fid. & Deposit Ins. Co.*, 928 P.2d 298, 303 (Okla. 1996) ("The defense duty is measured by the nature and kinds of risks covered by the policy as well as by the reasonable expectations of the insured. An insurer has a duty to defend an insured whenever it ascertains the presence of facts that give rise to the potential of liability under the policy. The insurer's defense duty is determined on the basis of information gleaned from the petition (and other pleadings), from the insured and from other sources available to the insurer at the time the defense is demanded (or tendered) rather than by the outcome of the third-party action.") (citations omitted). The *Turley* Court stated: "The duty to defend cannot be limited by the precise language of the pleadings. The Insurer has the duty to look behind the third party's allegations to analyze whether coverage is possible." *Id.* at 303 n.15; *see also Fossil Creek Energy Corp. v. Cook's Oilfield Services*, 242 P.3d 537, 544 n.14 (Ok. Ct. App. 2010) (quoting standard from *Turley*); *Colony Ins. Co. v. Bear Productions, Inc.*, No. 12-122, 2013 U.S. Dist. LEXIS 43716 (E.D. Okla. Mar 26, 2013) ("Colony has a duty to look beyond the precise language of the pleadings in the Underlying Action and look at the facts behind the third parties' allegations to analyze whether coverage is

possible. More precisely stated, if the insurer knows the true facts concerning the subject of his insured's adversary's claim, and said facts make of it a claim, or action, against which the insurer is obliged, under the policy, to defend the insured, then the allegations of the adversary's pleadings are 'incidental', and not controlling as to the insured's (sic) obligation to defend.") (internal citations and quotations omitted); *Schwegman v. Continental Casualty Co.*, No. 16-0730, 2017 U.S. Dist. LEXIS 69129 (N.D. Ok. May 5, 2017) (discussing *Turley* and providing "several reasons to believe the Oklahoma Supreme Court would find that an insurer in this situation would have the duty to defend," including the use of extrinsic evidence).

Oregon: The Supreme Court of Oregon held that the determination of the duty to defend is limited to the allegations in the complaint. *Ledford v. Gutoski*, 877 P.2d 80, 82 (Or. 1994) ("Whether an insurer has a duty to defend an action against its insured depends on two documents: the complaint and the insurance policy. An insurer has a duty to defend an action against its insured if the claim against the insured stated in the complaint could, without amendment, impose liability for conduct covered by the policy.") (citation omitted); *see also Isenhart v. Gen. Cas. Co.*, 377 P.2d 26, 28–29 (Or. 1962) ("If a contrary rule were adopted, requiring the insurer to take note of facts other than those alleged, the insurer frequently would be required to speculate upon whether the facts alleged could be proved. We do not think that this is a reasonable interpretation of the bargain to defend."); *see also Goritsan v. Nautilus Ins. Co.*, No. 10-433, 2010 U.S. Dist. LEXIS 141508 (D. Or. Nov. 16, 2010) (following *Ledford*); *Bresee Homes, Inc. v. Farmers Ins. Exchange*, 293 P.3d 1036 (Or. 2012) ("[N]either the failure to identify correctly the claims nor the failure to state them separately defeats the duty to defend. As long as the complaint contains allegations that, without amendment, state a basis for a claim covered by the policy, the duty to defend arises."); *Leach v. Scottsdale Indemn. Co.*, 323 P.3d 337 (Or. Ct. App. 2014) (finding that a duty to defend was owed after resolving, as it "must," an ambiguity in the complaint in favor of the insured). *But see Fred Shearer & Sons, Inc. v. Gemini Ins. Co.*, 240 P.3d 67 (Or. Ct. App. 2010) (distinguishing *Ledford* and concluding that, when the question is whether the insured is being held liable for conduct that falls within the scope of the policy, it makes sense to look exclusively to the complaint; but the same cannot be said with respect to whether a party seeking coverage is an "insured") (allowing a party to use extrinsic evidence to establish its status as an insured under a vendor's endorsement). More recently, in *West Hills Dev. Co. v. Chartis Claims, Inc.*, 385 P.3d 1053 (Or. 2016), the Supreme Court of Oregon discussed *Ledford* and *Bresee* and rejected the insurer's "assertion

brought) constitutes a single occurrence. This 'restrictive' policy definition sweeps into a single occurrence all injuries and damage resulting from one 'proximate, uninterrupted and continuing cause,' such as here with the malfeasance of Elkhart law enforcement.").

Iowa: An Iowa District Court adopted the "cause" test and held that, defective windows manufactured and sold by the insured, that resulted in water damage, constituted a single "occurrence." *Liberty Mut. Ins. Co. v. Pella Corp.*, 631 F. Supp. 2d 1125, 1135–36 (S.D. Iowa 2009), *aff'd in part and rev'd in part on other grounds*, 650 F.3d 1161 (8th Cir. 2011). The policy defined "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." *Id.* at 1136. After acknowledging a lack of guidance under Iowa law, the court adopted the majority view—the "cause" test—and held that "the damages alleged by each of the plaintiffs in the Underlying Lawsuits arise from the 'the continuous or repeated exposure to the same general harmful conditions'—that is, to the design, manufacture, and allegedly fraudulent sale of a product containing the same latent defect." *Id. See also Pella Corp. v. Liberty Mut. Ins. Co.*, No. 11-00273, 2017 U.S. Dist. LEXIS 53631 (S.D. Iowa Mar. 31, 2017) ("The parties agree that the Court should determine the number of occurrences with reference to the underlying cause(s) of covered property damage but disagree regarding the level of generality at which that concept should be applied.") (court undertook a detailed factual analysis). In *Just v. Farmers Auto. Ins. Ass'n*, 877 N.W.2d 467 (Iowa 2016), the Iowa Supreme Court, following a lengthy and nationwide review, adopted the cause test in the context of an automobile accident: "[W]e think the policy language 'regardless of the number of . . . [v]ehicles involved in the auto accident' provides sufficient clarification for purposes of this case. As we have already noted, in common vernacular a multi-vehicle accident took place. Furthermore, we believe the prevailing cause theory should apply here. That theory is consistent with Iowa's existing approach to insurance policy interpretation. Under that theory, no cause intervened between the truck—SUV collision, in which Crivaro was killed and his SUV was wrecked, and the motorcycle—SUV collision seconds later. Additionally, only a minimal span of time elapsed. Therefore, we find that the single accident limit on bodily injury liability in the Farmers policy unambiguously applies under the facts of this case."

Kansas: The Supreme Court of Kansas adopted the "cause" test and held that, where the cause of a patient's injuries were a physician's failure to diagnose a malignant lesion, followed by continuing failure to diagnose, there was one proximate,

uninterrupted, and continuing cause that resulted in all of the injuries and damages. *Wilson v. Ramirez*, 2 P.3d 778, 785 (Kan. 2000); *see also American Family Mutual Insurance Co. v. Wilkins*, 179 P.3d 1104, 1114 (Kan. 2008) (adopting the "cause" test and holding that number of occurrences, in the context of an automobile accident, was based on the time-space continuum between the collisions and the drivers' level of control over the vehicle) ("Collisions with multiple vehicles constitute one occurrence when the collisions are nearly simultaneous or separated by a very short period of time and the insured does not maintain or regain control over his or her vehicle between collisions. When collisions between multiple vehicles are separated by a period of time or the insured maintains or regains control of the vehicle before a subsequent collision, there are multiple occurrences."); *Health Midwest Ins. Co., Ltd. v. Cont'l Cas. Co.*, No. 96–661, 2008 Kan. App. Unpub. LEXIS 250 (Kan. Ct. App. Mar. 28, 2008) (holding that the lower court correctly distinguished *Wilson* on the basis that intervening medical mistakes created a situation where there were two separate causes instead of one) (also considering certain relevant Kansas statutory language in reaching its decision).

Kentucky: The Court of Appeals of Kentucky held that injuries sustained by three patrons of a nightclub, in an altercation with employees of the club, constituted one "occurrence." *Cont'l Ins. Cos. v. Hancock*, 507 S.W.2d 146, 152 (Ky. Ct. App. 1973). The court held, without explanation, that all of the injuries arose out of "continuous exposure to substantially the same general conditions." *Id.*; *see also Meridian Citizens Mut. Ins. Co. v. Horton*, No. 5:08-CV-302, 2010 U.S. Dist. LEXIS 28797 (E.D. Ky. Mar. 25, 2010) (citing non-Kentucky cases in discussion of number of deductibles) (concluding that court lacked insufficient factual evidence to determine whether the insured's former employees concocted one scheme to steal the insured's cattle, or whether they formed multiple independent schemes to steal) (property policy); *Piles Chevrolet Pontiac Buick, Inc. v. Auto Owners Ins. Co.*, No. 2011–002317, 2013 Ky. App. Unpub. LEXIS 397 (Ky. Ct. App. May 17, 2013) (following the majority of courts and holding that an embezzlement scheme carried out by a single employee was one occurrence because it constitutes a series of acts, each one following the other) (occurrence defined as "all loss caused by, or involving one or more 'employees', whether the result of a single act or series of acts"); *Davis v. Kentucky Farm Bureau Mutual Ins. Co.*, 495 S.W.3d 159 (Ky. Ct. App. 2016) (adopting the cause test) ("[M]erely because there were multiple negligent acts that combined to cause a single injury or multiple causes of action may be asserted does not mean there were multiple occurrences

as that term is unambiguously defined in the Kentucky Farm Bureau policy ["an accident, including continuous or repeated exposure to substantially the same general harmful conditions"]. There are frequently multiple acts of negligence that cause a single injury. For instance, a negligent driver in a car accident may have been inattentive because he was intoxicated and distracted by his texting and speeding. As a result of the driver's negligence, a collision occurs injuring another person. Under those circumstances, although there were multiple acts of negligence, it cannot be reasonably argued there was more than one accident caused by the driver's negligence."); *Evanston Ins. Co. v. Hous. Auth. of Somerset*, 867 F.3d 653 (6th Cir. 2017) ("The individuals cannot solve this problem by claiming that different branches of the same tree caused the different injuries, creating three accidents, not one. That slices things too finely. You can't 'cut a plank so many times that it ha[s] just one side.' The individuals separately argue that the deaths arose from multiple causes—cardiac arrest in one case, blunt force in another—and thus that each qualifies as an occurrence under the cause approach. But that is a variation on a defeated theme, defeated indeed by the Kentucky Supreme Court in *Hancock*.").

Louisiana: The Supreme Court of Louisiana held that damage to 119 properties, caused by the construction of an underground drainage canal, constituted multiple occurrences. *Lombard v. Sewerage & Water Bd. of New Orleans*, 284 So. 2d 905, 915–16 (La. 1973). The policy defined "occurrence" as "an accident or a continuous or repeated exposure to conditions which results during the policy period in injury to person or real or tangible property which is accidentally caused. All damages arising out of such exposure to substantially the same general conditions shall be considered as arising out of one occurrence." *Id.* at 915. The court reasoned that the word "occurrence" "must be construed from the point of view of the many persons whose property was damaged." *Id.* "As to each of these plaintiffs, the cumulated activities causing damage should be considered as one occurrence, though the circumstances causing damage consist of a continuous or repeated exposure to conditions resulting in damage arising out of such exposure." *Id.* at 915–16; *see also Liberty Mut. Ins. Co. v. Jotun Paints, Inc.*, 555 F. Supp. 2d 686, 695–96 (E.D. La. 2008) (surveying Louisiana case law addressing number of occurrences) ("The property damage in the DuroSeal petitions allegedly arose because of several negligent and fraudulent acts on the part of [the insured] and others. Each of these acts does not constitute a separate occurrence, but rather the acts combined constitute one occurrence for each party injured, *i.e.*, a separate occurrence for each

the BFPDE." *Id.* at 894–95. *See also Swenson v. Auto Owners Ins. Co.*, 831 N.W.2d 402 (S.D. 2013) ("[W]e acknowledge that the issues regarding the existence of 'property damage' caused by an 'occurrence' are threshold issues. However, even if the record contained sufficient allegations of 'property damage' caused by an 'occurrence,' DJ Construction was not entitled to defense or indemnity from Owners if the Policy exclusions applied. Consequently, because we conclude that the circuit court correctly determined the Policy exclusions were applicable, we need not address the parties' disputes regarding whether Swenson and Stewart's claimed damages to their home constitute 'property damage,' and if so, whether the 'property damage' was caused by an 'occurrence.'"); *Owners Ins. Co. v. Tibke Construction*, No. 27932, 2017 S.D. LEXIS 106 (S.D. Aug. 23, 2017) ("[I]f inadvertent faulty workmanship causes unexpected injuries to people or property, it may constitute an accident and thus an occurrence. Currently, the majority of state supreme courts who have decided the issue of whether inadvertent faulty workmanship is an accidental 'occurrence' potentially covered under the CGL policy have decided that it can be an 'occurrence.'") ("Owners' argument that the alleged faulty work was intentional and thus not an accident is unavailing. The failure to test the soil was not an intentional or deliberate action but an unplanned omission, which caused an unexpected result.").

Tennessee: The Supreme Court of Tennessee held that various types of damage to a hotel construction project, caused by the insured's subcontractor's negligent installation of windows, qualified as an "occurrence." *Travelers Indem. Co. of Am. v. Moore & Assocs., Inc.*, 216 S.W.3d 302, 309 (Tenn. 2007). The court concluded that, because it must be assumed that the windows would be installed properly, the insured could not have foreseen the water penetration, and, therefore, the damage qualified as an accident and an "occurrence." *Id.* The court also addressed the "subcontractor exception" to the "your work" exclusion: "It is alleged that the installation of the windows was performed by subcontractors hired by [the insured]. Therefore, damages resulting from the subcontractors' faulty installation of the windows are not excluded from coverage, even if those damages affected [the insured's] work." *Id.* at 310; *see also Cincinnati Ins. Co. v. Grand Pointe, LLC*, Nos. 105-CV-161, 105-CV-157, 2007 U.S. Dist. LEXIS 39784 (E.D. Tenn. May 30, 2007) (addressing *Moore & Associates* and holding that damage solely to a condominium building that the insureds were contracted to design and build did not qualify as "property damage") (declining to address the "subcontractor exception" to the "your work" exclusion because "it is futile to consider the exclusions

to the policy since there is no initial coverage under the insuring agreement"); *Forrest Const., Inc. v. Cincinnati Ins. Co.*, 728 F. Supp. 2d 955, 964 (M.D. Tenn. 2010) ("[I]n light of *Moore*, the counter complaint alleged 'property damage.' The alleged cracking in the foundation is analogous to the water penetration in *Moore*—it is physical damage to the property that occurred *after* the relevant component had been incorrectly installed. Whatever the precise construction defect was here, that defect resulted in further, tangible damage to the house. This was not a case where the 'sole damages' were for 'replacement of a defective component or correction of faulty installation.'") (emphasis in original) (quoting *Moore* at 309–10). *See also Forrest Const., Inc. v. Cincinnati Ins. Co.*, 703 F.3d 359 (6th Cir. 2013) ("*Travelers* did not effect a sea change in the law, but clarified that 'property damage' occurs when one component (here, the faulty foundation) of a finished product (the house) damages another component. This is not a case where the 'sole damages' alleged were the 'replacement of a defective component or correction of faulty installation.'"); *Columbia Nat'l Ins. Co. v. JR Livingston Construction, LLC*, No. 14-01781, 2016 U.S. Dist. LEXIS 41499 (M.D. Tenn. Mar. 28, 2016) (noting that, while some allegations alleged faulty workmanship or materials in the construction repair of a home, homeowners also alleged "physical injury to tangible property beyond merely a recitation of alleged faulty workmanship or materials") ("Applying *Travelers Indemnity*, the Court concludes that the above allegations present claims for property damage because of an occurrence under the Policy. In addition, the Lynches' request for damages is not limited to replacement costs of a defective component or correction of faulty installation.").

Texas: The Supreme Court of Texas held that a claim against a general contractor, for damage to a home's sheetrock and veneer, caused by the contractor's negligence in designing and constructing the home's foundation, qualified as an "occurrence." *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 9 (Tex. 2007). The court concluded that there is no logical basis within the definition of "occurrence" for distinguishing between damage to the insured's work and damage to a third party's property. *Id.* "Both types of property damage are caused by the same thing—negligent or defective work." *Id.* (quoting *Erie Ins. Exch. v. Colony Dev. Corp.*, 736 N.E.2d 950, 952 n.1 (Ohio Ct. App. 2000)); *see also Century Sur. Co. v. Hardscape Constr. Specialties Inc.*, 578 F.3d 262, 266 (5th Cir. 2009) (discussing *Lamar Homes*) (allegations of unintended construction defects may constitute an "accident" or "occurrence" under commercial general liability policies); *Pine Oak Builders, Inc. v. Great Am. Lloyds Ins. Co.*, 279 S.W.3d 650, 652 (Tex. 2009) ("Great

N.W.2d 112, 120 (Neb. 2001). "We conclude that as a matter of law, [the insurer's] pollution exclusion, though quite broad, is unambiguous. The language of the policy does not specifically limit excluded claims to traditional environmental damage; nor does the pollution exclusion purport to limit materials that qualify as pollutants to those that cause traditional environmental damage." *Id.*; *see also Harleysville Ins. Group v. Omaha Gas Appliance Co.*, 772 N.W.2d 88, 95–96 (Neb. 2009) (involving claims for carbon monoxide poisoning, due to faulty repair of a gas boiler, which the parties agreed were precluded from coverage by the pollution exclusion) (rejecting argument that an umbrella policy's pollution exclusion only precluded coverage for strict liability pollution claims, but not pollution-related injuries caused by negligence); *Ferrell v. State Farm Ins. Co.*, No. A-01–637, 2003 Neb. App. LEXIS 123 (Neb. Ct. App. May 13, 2003) (following *Becker Warehouse* and holding that coverage for injuries caused by exposure to mercury in an apartment was precluded by the pollution exclusion); *State Farm Fire & Cas. Co. v. Dantzler*, 852 N.W.2d 918 (Neb. 2014) (parties did not dispute that lead-based paint was a pollutant under the pollution exclusion and "[r]egardless of how the lead-based paint is separated from the painted surface or what form it takes once it is separated, an individual's exposure to and absorption of that lead-based paint results from the 'discharge, dispersal, spill, release or escape' of a pollutant"); *Church Mut. Ins. Co. v. Clay Center Christian Church*, 746 F.3d 375 (8th Cir. 2014) (holding that pollution exclusion precluded coverage for injuries resulting from exposure to carbon monoxide).

Nevada: The Supreme Court of Nevada held that the pollution exclusion did not bar coverage for injuries from carbon monoxide exposure when four people died while sleeping in a motel room directly above a pool heater. *Century Sur. Co. v. Casino West, Inc.*, No. 60622, 2014 Nev. LEXIS 50 (Nev. May 29, 2014) (reviewing the pollution exclusion landscape nationally and interpreting its application to traditional and non-traditional pollutants) (concluding that pollution exclusion was ambiguous and susceptible to multiple interpretations, and noting, "[t]o demonstrate that the absolute pollution exclusion applies to nontraditional indoor pollutants, an insurer must plainly state that the exclusion is not limited to traditional environmental pollution").

New Hampshire: The Supreme Court of New Hampshire held that the pollution exclusion did not preclude coverage for claims for injury to a child for lead poisoning on account of exposure to paint carried on his father's clothing from his workplace. *Weaver v. Royal Ins. Co.*, 674 A.2d 975, 978 (N.H. 1996). "Because there are two reasonable interpretations of the policy language, we conclude that

the pollution exclusion is ambiguous." *Id.* at 978; *see also Titan Holdings Syndicate v. City of Keene*, 898 F.2d 265, 268 (1st Cir. 1990) (applying New Hampshire law) ("Excessive noise and light may be 'irritants,' but they are not *solid, liquid, gaseous or thermal* irritants. Nor are they generally thought of as similar to smoke, vapor, soot, fumes, acids, alkalis, chemicals or waste, the illustrative terms used in the policy definition."); *EnergyNorth Nat. Gas, Inc. v. Am. Home Assurance Co.*, No. Civ. 99–502-JD, 2003 U.S. Dist. LEXIS 12665 (D.N.H. July 16, 2003) (concluding that *Weaver* was not controlling because the pollution at issue (manufactured gas plant waste) was clearly environmental); *Mellin v. N. Sec. Ins. Co.*, 115 A.3d 799 (N.H. 2015) ("Although an insured may have reasonably understood that the pollution exclusion clause precluded coverage for damages resulting from odors emanating from large-scale farms, waste-processing facilities, or other industrial settings, these circumstances are distinguishable from those before us, which involve an odor created in a private residence by common domestic animals. . . . In addition, although Northern emphasizes that the plaintiffs referred to the cat urine odor as 'a chemical smell similar to ammonia,' we do not believe that the reference to 'ammonia' in this context triggers the pollution exclusion clause.").

New Jersey: The Supreme Court of New Jersey held that the pollution exclusion should be read to apply "to injury or property damage arising from activity commonly thought of as traditional environmental pollution," or more specifically pollution resulting from "environmental catastrophe related to intentional industrial pollution." *Nav-Its, Inc. v. Selective Ins. Co. of Am.*, 869 A.2d 929, 937 (N.J. 2005) (addressing the exclusion in the context of exposure to toxic fumes in a floor coating/sealant operation). "[W]e are confident that the history of the pollution-exclusion clause in its various forms demonstrates that its purpose was to have a broad exclusion for traditional environmentally related damages." *Id.* at 936–37; *see also Baughman v. U.S. Liab. Ins. Co.*, 662 F. Supp. 2d 386, 399 (D.N.J. 2009) (holding that exposure to mercury at daycare center occupying a former thermometer manufacturing facility was not traditional environmental pollution because it was indoors, and therefore not excluded by the pollution exclusion) (relying on other jurisdictions' "conclusion that traditional environmental pollution does not include exposure to toxic materials released indoors" and determining that pollution exclusion "thus does not include mercury contamination in Kiddie Kollege [daycare facility]"); *Merchants Ins. Co. of N.H., Inc. v. Hessler*, No. COV/03–5857, 2005 U.S. Dist. LEXIS 18173 (D.N.J. Aug. 18, 2005) (holding that the pollution exclusion did not apply to bodily injury and property damage resulting from exposure to

lead paint); *Spartan Oil Co. v. New Jersey Property Liability Ins. Guar. Ass'n*, No. A-5156-10T2, N.J. Super. Unpub. LEXIS 1290 (N.J. Super. Ct. App. Div. June 8, 2012) (application of pollution exclusion to heating oil spill hinged on meaning of "delivered" or "finally delivered" as used in exclusion); *Woodcliff Lake Bd. of Educ. v. Zurich Am. Ins. Co.*, No. A-5772-11T3, 2013 N.J. Super. Unpub. LEXIS 2041 (N.J. Super. Ct. App. Div. Aug. 14, 2013) (holding that coverage for damages resulting from asbestos abatement was precluded under property policy's pollution exclusion and vandalism exception did not apply); *Herz v. 141 Bloomfield Ave. Corp.*, No. A-2954-13T2, 2015 N.J. Super. Unpub. LEXIS 1274 (N.J. Super. Ct. App. Div. June 1, 2015) ("'Pollutants' is defined in the policy as including 'waste,' which would encompass the type of discharge expected from a faulty septic system. Because the Verona Inn was shut down as the result of a threatened discharge of 'pollutants,' under the CGL policy exclusion, there is no coverage."); *Castoro & Co. v. Hartford Accident & Indem. Co.*, No. 14-1305, 2016 U.S. Dist. LEXIS 134686 (D.N.J. Sept. 29, 2016) (despite observing that, under *Nav-Its*, the pollution exclusion is limited to traditional environmental pollution, the court held that, according to *Nav-Its*, even when a pollution exclusion's language does not require intent, "New Jersey public policy requires intent to avoid unregulated and sweeping elimination of pollution-caused damage coverage") (applying an intent requirement from *Morton International* (*see* New Jersey, chapter 14, involving the qualified pollution exclusion)); *Benjamin v. State Farm Ins. Co.*, No. 15-4123, 2017 U.S. Dist. LEXIS 131078 (D.N.J. Aug. 17, 2017) (discussing and following *Castoro*) ("Given the applicability of the pollution exclusion only in a context involving 'traditional environmental pollution' under *Nav-Its* and the failure of Clarendon to allege (let alone demonstrate the existence of evidence from which a reasonable fact-finder could find) that Plaintiffs intended to pollute the Property, the Court declines to grant summary judgment at this time on the grounds that the Pollution Exclusion applies.").

New Mexico: No instructive authority.

New York: The Court of Appeals of New York held that the pollution exclusion did not preclude coverage for a bodily injury claim arising out of paint or solvent fumes discharged during painting and stripping work performed by the insured. *Belt Painting Corp. v. TIG Ins. Co.*, 795 N.E.2d 15, 21 (N.Y. 2003). "Were we to adopt [the insurer's] interpretation, under the language of this exclusion any 'chemical,' or indeed, any 'material to be recycled,' that could 'irritate' person or property would be a 'pollutant.' We are reluctant to adopt an interpretation that would infinitely enlarge the scope of the term 'pollutants,' and seemingly contradict both a 'common speech' understanding of the relevant terms and the reasonable expectations

Hawaii: "Coverage under any policy of insurance issued in this state shall not be construed to provide coverage for punitive or exemplary damages unless specifically included." HAW. REV. STAT. § 431:10–240. *See Allstate Ins. Co. v. Takeda*, 243 F. Supp. 2d 1100, 1104 (D. Haw. 2003) (applying HAW. REV. STAT. § 431:10–240 and concluding that, because the policy did not specifically include coverage for punitive damages, the insurer was not responsible for them); *State Farm Fire and Cas. Co. v. Wimberly*, 877 F. Supp. 2d 993 (D. Haw. 2012) (restated statute and *Takeda*); *United States Fire Ins. Co. v. Fea*, No. 16-00173, 2016 U.S. Dist. LEXIS 177554 (D. Haw. Dec. 1, 2016) (referring to *Takeda* and HAW. REV. STAT. § 431:10-240 and holding that "[u]nder Hawaii law, '[c]overage under any policy of insurance issued in [Hawaii] shall not be construed to provide coverage for punitive or exemplary damages unless specifically included.' The Policy does not specifically include coverage for punitive damages."); *State Farm Fire & Cas. Co. v. Shaun Ching*, No. 16-418, 2017 U.S. Dist. LEXIS 39503 (D. Haw. Feb. 24, 2017) (citing statute and holding that insurer was not responsible for punitive damages because its policy did not specifically include such coverage).

Idaho: The Supreme Court of Idaho held that punitive damages were covered under an automobile liability policy. *Abbie Uriguen Oldsmobile Buick, Inc. v. U.S. Fire Ins. Co.*, 511 P.2d 783, 789 (Idaho 1973). The court held that punitive damages were not specifically excluded by the terms of the policy. *Id.* The insurer promised "to pay on behalf of the insured *all* sums which the insured shall be legally obligated to pay as *damages* caused by the use of any automobile." *Id.* (emphasis added). On the subject of public policy, the *Uriguen Oldsmobile* Court concluded that it was not a prohibition against coverage for punitive damages. *Id.* The court adopted the oft-cited position of the Supreme Court of Tennessee in *Lazenby v. Universal Underwriters Insurance Co.*, 383 S.W.2d 1 (Tenn. 1964), which concluded that it is speculative that socially irresponsible drivers would be deterred from their wrongful conduct if coverage for punitive damages were not allowed. *Id.*

Illinois: The Appellate Court of Illinois adopted the rationale of *Northwestern National Casualty 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. *Beaver v. Country Mut. Ins. Co.*, 420 N.E.2d 1058, 1060 (Ill. App. Ct. 1981). However, the *Beaver* Court did not disturb the rule set forth in *Scott v. Instant Parking, Inc.*, 245 N.E.2d 124 (Ill. App. 1969), that an employer may insure for punitive damages that are assessed on the basis of vicarious liability on account of the wrongful conduct of his employee.

Beaver, 400 N.E.2d at 1061. *But see Nutmeg Ins. Co. v. E. Lake Mgmt. & Dev. Corp.*, No. 05 C 1328, 2006 U.S. Dist. LEXIS 85665 (N.D. Ill. Nov. 21, 2006), *aff'd on other grounds* 260 Fed. App'x 914 (7th Cir. 2008) (distinguishing *Beaver* and holding that a landlord's liability for two times damages for violating a municipal ordinance, concerning the handling of security deposits, were not uninsurable as a matter of public policy because such damages are recoverable whether a landlord's failure to comply with the ordinance was inadvertent or intentional).

Indiana: An Indiana District Court held that "it would contravene public policy to allow [a] corporation to shift to an insurer the deterrent award imposed on account of the corporation's own wrongful acts; [but] it would not be inconsistent with public policy to allow the corporation to shift to an insurer the punitive damage award when that award is placed upon the corporation solely as a matter of vicarious liability." *Norfolk & W. Ry. Co. v. Hartford Accident & Indem. Co.*, 420 F. Supp. 92, 97 (N.D. Ind. 1976); *see also Executive Builders, Inc. v. Motorists Ins. Cos.*, No. IP00–0018-C-T/G, 2001 U.S. Dist. LEXIS 6775 (S.D. Ind. Mar. 30, 2001) (citing *Norfolk* in discussing public policy concerning the insurability of punitive damages). In *Commercial Union Insurance Co. v. Ramada Hotel Operating Co.*, 852 F.2d 298, 306 (7th Cir. 1988), the Seventh Circuit Court of Appeals, applying Indiana law, remanded the case to the District Court for the insurer to attempt to meet its burden that punitive damages were awarded based on the insured's direct liability and not vicarious; *Auto-Owners Ins. Co. v. Lake Erie Land Co.*, No. 212-184, 2014 U.S. Dist. LEXIS 62339 (N.D. Ind. May 6, 2014) (citing *Norfolk* and requiring parties to file supplemental briefs (1) "predicting how the Indiana Supreme Court would determine whether Indiana's public policy prohibits the insurability of an award of punitive damages assessed directly against a corporation on a theory of gross negligence and (2) the parties' position as to whether the question should be certified to the Indiana Supreme Court"). [Docket entries reflect that the case was dismissed before the court's ruling.]; *See also Westfield Ins. Co. v. Orthopedic & Sports Med. Ctr. of N. Ind., Inc.*, No. 14-1548, 2017 U.S. Dist. LEXIS 46119 (N.D. Ind. March 28, 2017) (referring to *Executive Builders* and noting that the parties were in agreement that the policies did not provide coverage for the punitive damages claims, in part because courts have held that such coverage is void as against public policy).

Iowa: The Supreme Court of Iowa held that public policy did not preclude coverage for punitive damages. *Skyline Harvestore Sys., Inc. v. Centennial Ins. Co.*, 331 N.W.2d 106 (Iowa 1983). The court concluded that "[i]f the parties wish to