TENDER IS THE RIGHT

A Survey of Case Law in the United States and Canada Concerning the Recoverability of Pre-Tender Defense Costs

American College of Coverage Counsel
CGL Committee
April 2019

Michael F. Aylward
Morrison Mahoney LLP
Boston, MA

Lyndon F. Bittle
Carrington, Coleman, Sloman & Blumenthal, LLP
Dallas, TX

INTRODUCTION: Tender Is the Right

General liability insurance policies almost invariably require insureds to provide "immediate" written notice of any claim or suit that may be brought against them. Nevertheless, insureds sometimes wait months and even years before tendering the defense of law suits to their insurers.

While a few states continue to give strict effect to such notice provisions and will refuse to require coverage if an insured's notice is untimely, the modern trend has been against forfeiting coverage unless the insured's late notice substantially prejudices the insurer's ability to investigate or defend the suit. Yet, even if the insured does not lose coverage and is entitled to a defense going forward, is it entitled to be reimbursed for defense costs it incurred before putting its insurer on notice?

Courts have adopted several approaches to this question of "pre-tender" legal expenses. Those states that do not permit recovery of "pre-tender" fees do so for disparate reasons. The principal rationale for refusing to allow reimbursement is that an insurer cannot be said to have a duty to pay for the costs of defending a case before it had any opportunity to defend and that the insured's delay, while not perhaps so prejudicial as to preclude coverage altogether, did preclude the insurer from exercising its right to defend. Alternatively, courts in California and a few other states have further found that pre-tender fees are sums that the insured voluntarily pays and are therefore in violation of the "voluntary payment" prohibition in general liability policies. A few states, however, have ruled that insureds should be able to recover "pre-tender" fees absent a showing of prejudice by the insurer.

II. The Insured's Obligation to Tender Its Defense

In most cases, an insured's notice letter to its insurer will explicitly request a defense. In other cases, however, the notice may be described as being merely "precautionary" or may be vague in terms of what is being requested. This vagueness might sometimes reflect the insured's lack of sophistication or might mirror the complexity of some policies, such as those that are written excess of self-insured retentions for which the insured is responsible for defense costs and the like.

In a growing number of states, however, courts have ruled that any form of notice to the insurer is sufficient to constitute a "tender" unless the insured expressly states that no defense is being sought or otherwise acts in a manner inconsistent with an intent to seek a defense. See Cincinnati Cos. v. West Am. Ins. Co., 701 N.E.2d 499, 504 (Ill. 1998)("the better rule is one which allows actual notice of a claim to trigger the insurer's duty to defend, irrespective of the level of the insured's sophistication, except where the insured has knowingly foregone the insurer's assistance); Cobb v. Empire Fire and Marine Ins. Co., 488 So.2d 349, 350 (La. Ct. App. 1986); White Mountain Constr. Co. v. Transamerica Ins. Co., 631 A.2d 907, 910 (N.H. 1993) ("in order for an

insured to tender the defense to the insurer, it need only put the insurer on notice of the claim"); Widener Univ. v. Fred S. James & Co., 537 A.2d 829, 833 (Pa. App. 1988); Towne Realty, Inc. v. Zurich Ins. Co., 548 N.W.2d 64, 67 (Wis. 1996) ("tender of defense occurs once an insurer has been put on notice of a claim against the insured"). Courts applying Pennsylvania law have held the duty to defend can arise even before the underlying claimant files a pleading stating a covered claim. See Post v. St. Paul Travelers Ins. Co., 691 F.3d 500, 518-19 (3d Cir. 2012) (duty to defend malpractice claim triggered by insurer's receipt of pre-suit demand letter from claimant's counsel); Heffernan & Co. v. Hartford Ins. Co. of Am., 2614 A.2d 295, 298 (P. Super. Ct. 1992) (duty to defend triggered when the potential for a covered claim became apparent through plaintiff's response to interrogatories, even though complaint had not been amended to assert such a claim).

Resolving a longstanding question in Illinois law, the Illinois Supreme Court ruled in Cincinnati Cos. v. American Ins. Co., 711 N.E.2d 499 (Ill. 1998), that formal tender of the insured's defense is not necessary so long as the insurer has actual notice of a suit. In rejecting the insurer's contention that it should have no obligation to reimburse another insurer for that portion of the cost of defending a mutual insured that were incurred prior to the date of tender, the court explicitly rejected the analysis that the Seventh Circuit had adopted in earlier cases requiring tender as a precondition to the payment of defense costs. Further, the court rejected distinctions in the "tender" rule that earlier courts have adopted based on the relative sophistication of a policyholder. Accordingly, an insurer's duty to defend is triggered by actual notice of a suit and remains in effect unless or until the insured explicitly indicates to the insurer that its assistance is not wanted.

Similarly, the Minnesota Supreme Court ruled in Home Ins. Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 658 N.W.2d 522 (Minn. 2003), that sound public policy does not support a rule that requires insureds to expressly request a defense in order to trigger the duty to defend. The court ruled that the insured's ignorance with respect to the particular language that it must use to invoke its right to a defense should not negate the insurer's contractual duties. Further, it found that public policy supported requiring an insurer to promptly undertake its insured's defense or begin an action for declaratory relief so as to promptly resolve coverage disputes. It concluded that, "once an insurer receives notice of the suit, it is responsible for defending the insured unless the insured explicitly refuses the insurer an opportunity to defend." The court ruled that, "once notice is given, even without an express request for a defense, it should be the responsibility of the insurer to contact the insured to determine whether the insurer's assistance in the suit is required."

The Texas Supreme Court, on the other hand, has held that an insurer's duty to defend an insured does not arise unless and until that insured explicitly requests a defense, even where the insurer is fully aware of the lawsuit and is defending another insured against the same claims:

> Mere awareness of a claim or suit does not impose a duty on the insurer to defend under the policy; there is no unilateral duty to act unless and until the additional insured first requests a defense—a threshold duty that the insured fulfills under the policy by notifying the insurer that the insured has been served with process and the insurer is expected to answer on its behalf.

Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Crocker, 246 S.W.3d 603, 608 (Tex. 2008).

III. Courts Barring Recovery for Pre-Tender Fees

Whether characterized as a formal request for a defense or mere notice of a claim, most courts have ruled that the defense obligation does not arise until a claim for coverage is tendered to the insurer. As a result, the majority view is that an insured cannot recover for defense costs incurred prior to the date of tender. See, e.g. Coastal Refining & Mktg., Inc. v. USF&G, 281 S.W.3d 279, 294 (Tex. App. 2007); Lafarge Corp. v. Hartford Cas. Ins. Co., 61 F.3d 389 (5th Cir. 1995) (Texas law); Travelers Prop. Cas. Co. v. Hillerich & Bradsby, 589 F.3d 257 (6th Cir. 2010) (Kentucky law); Kmart Corp. v. Footstar, Inc., 777 F.3d 923 (7th Cir. 2015) (New Jersey law); Embroidme.com, Inc. v. Travelers Prop. & Cas. Co. of Am., 845 F.3d 1099 (11th Cir. 2017)(Florida law); Litton Systems, Inc. v. Shaw's Sales & Services, Ltd., 579 P.2d 48, 52 (Ariz. App. 1978); Tradewinds Escrow, Inc. v. Truck Ins. Exch., 118 Cal.Rptr.2d 561 (Cal. App. 2002); Reliance Ins. Co. v. County Line Place, 692 F.Supp. 694, 698 (S.D. Miss. 1988); Sentinel Am. Ins. Co. v. Aetna Cas. & Sur. Co., 876 P.2d 1314 (Haw. 1994); Cellex Biosciences, Inc. v. St. Paul Fire & Marine Ins. Co., 537 N.W.2d 621 (Minn. App. 1995); Am. Motorists Ins. Co. v. Public Service Mut. Ins. Co., 540 N.Y.S.2d 671 (App. Div. 1989); William C. Vick Constr. Co. v. Penn. Nat'l Mut. Cas. Ins. Co., 1999 WL 412328 (E.D.N.C. March 24, 1999); Oregon Ins. Guaranty Ass'n v. Thompson, 760 P.2d 890 (Or. App. 1988).

A. Cases Focusing on Denial of Insurer's Right to Defend

The majority view of the courts that refuse to require reimbursement of "pre-tender" fees is that an insurer can only defend a case of which it is aware. Accordingly, its duty to defend does not arise until it receives the insured's tender of its defense. As the Massachusetts Appeals Court observed in Rass Corp. v. The Travelers Companies, 63 N.E. 3d 40 (Mass. App. Ct. 2016):

> It would be irrational … to conclude that the insurer could breach that duty at a point when it is unaware that the duty exists. Second, when an insurer receives late notice, it is unable to control or minimize costs that have already been incurred…Here, during the three-month delay, Travelers was unable to recommend counsel,

> negotiate a fee rate, or take other steps to protect its interests and minimize losses.
>
> Finally, if the opposite result were reached, an insured could be incentivized to delay providing notice so as to control its own defense for as long as possible, knowing that, absent prejudice, the insurer would have to cover the bill for reasonable defense costs.

The premise underlying this line of cases is that an insurer's duty to defend does not arise until it receives notice of a law suit and is given the opportunity to defend. See Montrose Chemical Corp. v. Canadian Universal Ins. Co., 861 P.2d 1153 (Cal. 1993); Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Crocker, 246 S.W.3d 603, 608 (Tex. 2008). As a result, these courts have ruled that an insurer's obligation to pay defense costs cannot pre-date its duty to defend.

Applying this premise, the Indiana Supreme Court ruled in Dreaded, Inc. v. St. Paul Guardian Ins. Co., 904 N.E.2d 1267 (Ind. 2009), that issues of prejudice are irrelevant to the right of an insured to recover pre-tender costs. As the insurer could not defend a case of which it was unaware, its duty to defend did not arise until it was finally put on notice. The court emphasized the limitations of its holding, pointing out that the case did not involve an effort by an insurer to avoid its defense obligation altogether, nor was it a question of the adequacy of notice or whether the insured had some reasonable basis for having failed to give notice at an earlier date.

Consistent with this view, Texas intermediate appellate courts and the Fifth Circuit have held an insured is not entitled to recover defense costs before the defense is tendered to its insurer, based on the principle that "the duty to defend does not arise until a petition alleging a potentially covered claim is tendered to the insurer." Lafarge Corp. v. Hartford Cas. Ins. Co., 61 F.3d 389 (5th Cir. 1995) (citing Members Ins. Co. v. Branscum, 803 S.W.2d 462 (Tex. App. 1991); see also Coastal Refining & Mktg., Inc. v. USF&G, 281 S.W.3d 279 (Tex. App. 2007) ("Because 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.").

Not all courts, however, have agreed with this premise. In Washington, for instance, the state Supreme Court declared in Nat'l Surety Corp. v. Immunex Corp., 297 P.3d 688, 695 (Wash. 2014), that "the duty to defend arises not at the moment of tender, but upon the filing of a complaint alleging facts that could potentially require coverage."

B. Cases Focusing on Insured's Voluntary Payments

Alternatively, some courts have refused to require insurers to pay pre-tender fees on the grounds that they are costs the insured voluntarily incurred without the insurer's

knowledge or consent and are therefore precluded from coverage under Condition 4(c) (now 4(d)), which states:

> **d.** No insured will, 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.

For example, in a case applying Georgia law, the Connecticut Supreme Court ruled Aetna was not liable to reimburse an insured for $330,000 in defense costs that were incurred in defending a case before the insurer was put on notice. Interface Flooring Systems, Inc. v. Aetna Cas. & Sur. Co., 804 A.2d 201 (Conn. 2002). The court held that the insurer's duty to defend did not arise until the claim was tendered to it and that the insured had, in any event, breached the cooperation clause by voluntarily incurring such costs without the knowledge or consent or the insurer.

Courts applying Texas law have also cited the voluntary-payments clause in support of denying reimbursement of pre-tender defense costs. See, e.g., Lafarge Corp. v. Hartford Cas. Ins. Co., 61 F.3d 389 (5th Cir. 1995); Coastal Refining & Mktg., Inc. v. USF&G, 281 S.W.3d 279 (Tex. App. 2007); Nagel v. Kentucky Central Ins. Co., 894 S.W.2d 19 (Tex. App. 1995) (policy's voluntary-payment clause barred insured's quantum meruit claim for recovery of pre-tender defense costs); see also E&L Chipping Co., Inc. v. Hanover Ins. Co., 962 S.W.2d 272 (Tex. App. 1998) (insureds not entitled to recover costs after successfully defending three lawsuits where they did not notify insurer or tender defense of those suits).

Illinois courts have similarly ruled that the "voluntary payments" prohibition precludes an insured from recovering defense costs incurred before notice was provided to its insurer. Westchester Fire Ins. Co. v. Heileman Brewing Co., 747 N.E.2d 484 (Ill. App. 2001). However, an insurer will be estopped to rely on this provision if it has failed to defend under a reservation of rights or to bring a declaratory judgment action to resolve its claimed coverage obligations. Sullivan House, Inc. v. Federal Ins. Co., 2008 WL 410208, at *4 (N.D. Ill. Feb. 7, 2008) and American Serv. Ins. Co. v. China Ocean Shipping Co., 402 Ill. App. 3d 513, 531, 932 N.E.2d 8, 24 (1st Dist. 2010).

Other cases that have relied on the prohibition against "voluntary payment" to prevent reimbursement for pre-tender costs include Palmer v. Truck Ins. Exchange, 66 Cal. App.4th 916 (1998); Tradewinds Escrow, Inc. v. Truck Ins. Exch., 118 Cal.Rptr.2d 561 (Cal. App. 2002); O'Brien Family Trust v. Glens Falls Ins. Co., 461 S.E.2d 311 (Ga. App. 1995); and Town of Mount Pleasant v. Hartford Acc. & Indem. Co., 625 N.W.2d 317 (Wis. App. 2001).

Some courts have questioned whether the voluntary payment prohibition extends to defense costs. See Shell Oil Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 52 Cal.

Rptr.2d 580 (Cal. App. 1996) (holding that the "voluntary payment" prohibition in the cooperation clause does not apply to defense costs, particularly where these costs were necessitated by the exigencies of the litigation and thus were not "voluntarily paid").

C. Cases Permitting Reimbursement for "Pre-Tender" Fees

Rationalizing the "pre-tender" doctrine on the basis of policy conditions such as the duty to cooperate and the prohibition against "voluntary payments" may also result in courts requiring insurers to reimburse insureds for "pre-tender" fees in states where insurers may rely on conditions to coverage only where the insured's delay has somehow prejudiced the insurer. See TPLC v. United Nat'l Ins. Co., 44 F.3d 1484 (10th Cir. 1995) (Pennsylvania law would require reimbursement for pre-tender fees absent proof of prejudice); Safeguard Scientifics, Inc. v. Liberty Mut. Ins. Co., 961 F.2d 209 (Table), unpublished opinion available at 1992 WL 12915247) (pre-notice fees recoverable where insurer was not prejudiced); Rite-Aid Co. v. Liberty Mut. Ins. Co., 2006 WL 2376238 (M.D. Pa. Aug. 14, 2006) (following Safeguard and TPLC); Westchester Fire Ins. Co. v. Heileman Brewing Co., 747 N.E.2d 484 (Ill. App. 2001).

Taking this approach, the Maryland Court of Appeals ruled in Sherwood Brands, Inc. v. Hartford Acc. & Indem. Co., 698 A.2d 1078 (Md. 1997), that an insurer may be obligated to reimburse its policyholder for pre-notice costs unless it can show prejudice as a result of the delay in tender. The court held that the duty arises at the date of the original suit but that no claim for breach may exist until such time as the insurer is made aware of the claim.

Not all courts have agreed that the "notice-prejudice" rule should apply to claims for pre-tender fees. For instance, a federal judge in Vermont observed in The Roman Catholic Diocese of Burlington, Vermont, Inc. v. St. Paul Travelers Ins. Co., No. 06-112 (D. Vt. Mar. 24, 2008) (unpublished opinion), that there is a "distinct and material" difference between the consequences of prejudicially late notice and the issue of pre-tender fees: "one results in a total forfeiture of coverage based on an insured's technical failure to provide timely notice whereas the other does not result in a complete forfeiture of coverage and instead provides the insured the choice of defending some of the suit on its own at its own cost."

Nevertheless, a number of courts have required insurers to reimburse "pre-tender" fees in the absence of prejudice due to the insured's delay. See Nationwide Mut. Fire Ins. Co. v. Beville, 825 So. 2d 999, 1004 (Fla. Dist. Ct. App. 2002); Episcopal Church in S.C. v. Church Ins. Co. of Vt., 2014 WL 5302955 (D.S.C. Sept. 22, 2014); Nat'l Surety Corp. v. Immunex Corp., 297 P.3d 688, 695 (Wash. 2014).

IV. State by State Analysis

ALABAMA	**No case law.**	
ALASKA	**No case law.**	
ARIZONA	**Not allowed.**	Manny v. Estate of Anderson, 574 P.2d 36 (Ariz. App. 1977) (duty to defend does not arise until insured tenders); Litton Systems, Inc. v. Shaw's Sales & Services, Ltd., 579 P.2d 48, 52 (Ariz. App. 1978).
ARKANSAS	**No case law.**	
CALIFORNIA	**Not allowed.**	Faust v. The Travelers, 55 F.3d 471 (9th Cir. 1995); Northern Ins. Co. v. Allied Mutual Ins. Co., 955 F.2d 1353 (9th Cir. 1992); Montrose Chemical Corp. v. Canadian Universal Ins. Co., 6 Cal. 4th 287, 861 P.2d 1153 (1993) (duty to defend does not arise until insured tenders to insurer); Truck Ins. Exch. v. Unigard Ins. Co., 94 Cal. Rptr. 2d 516 (Cal. App. 2000)(pre-tender costs were incurred in breach of the policy's "voluntary payment" clause). But see OneBeacon America Ins. Co. v. Fireman's Fund Ins. Co., 95 Cal.Rptr.3d 808 (Cal. App. 2009)(pre-tender prohibition does not apply to contribution claim by another insurer).
COLORADO	**No case law.**	
CONN.	**Allowed. [?]**	Interface Flooring Systems, Inc. v. Aetna Cas. & Sur. Co., 804 A.2d 201 (Conn. 2002) (reimbursement not allowed under applicable Georgia law because duty to defend did not arise until the claim was tendered and insured breached cooperation clause by incurring such costs without the knowledge or consent or the insurer).

		The court found "the issue of reimbursement for pre-tender expenses" had apparently not been considered by Connecticut courts, although on other notice issues "Connecticut law is more lenient, and thus in conflict with, Georgia law."
DELAWARE	**No case law.**	
FLORIDA	**Not allowed.**	Embroidme.com, Inc. v. Travelers Prop. & Cas. Co. of Am., 845 F.3d 1099 (11th Cir. 2017) (liability insurer had no obligation to reimburse its insured for defense costs incurred during 14 months before notice of copyright-infringement case was provided to insurer). See also Hanover Ins. Co. v. Anova Food, LLC, 173 F.Supp.3d 1008 (D. Haw. 2016) (applying Florida law) (insured was not entitled to recover its attorney's fees for the 8-month period before it tendered the defense of the underlying claim to its insurer). But see Nationwide Mut. Fire Ins. Co. v. Beville, 825 So. 2d 999 (Fla. Dist. Ct. App. 2002) (allowing recovery).
GEORGIA	**Not allowed.**	O'Brien Family Trust v. Glens Falls Ins. Co., 461 S.E.2d 311 (Ga. Ct. App. 1995)(holding that such costs are in breach of the cooperation clause); Elan Pharmaceutical Research Corp. v. Employers Ins. of Wausau, 144 F.3d 1372, 1374 (11th Cir. 1998). See also Interface Flooring Systems, Inc. v. Aetna Cas. & Sur. Co., 804 A.2d 201 (Conn. 2002)(applying Georgia law) (duty to defend did not arise until the claim was tendered; insured breached cooperation clause by voluntarily incurring such costs without the

		knowledge or consent or the insurer).
HAWAII	**Not allowed.**	Great Am. Ins. Co. v. Aetna Cas. & Sur. Co., 876 P.2d 1314 (Haw. 1994)
IDAHO	**No case law.**	
ILLINOIS	**Generally not allowed.**	Illinois courts have ruled that the "voluntary payments" prohibition precludes an insured from recovering defense costs incurred before notice was provided to its insurer. Westchester Fire Ins. Co. v. Heileman Brewing Co., 747 N.E.2d 484 (Ill. App. 2001). However, an insurer will be estopped to rely on this provision if it has failed to defend under a reservation of rights or to bring a declaratory judgment action to resolve its claimed coverage obligations. Sullivan House, Inc. v. Federal Ins. Co., 2008 WL 410208 (N.D. Ill. Feb. 7, 2008); American Serv. Ins. Co. v. China Ocean Shipping Co., 932 N.E.2d 8 (Ill. App. 2010). Earlier cases had been more aggressive in barring reimbursement for "pre-tender" fees. Aetna Cas. & Sur. Co. v. Chicago Ins. Co., 994 F.2d 1254 (7th Cir. 1993); Hartford Acc. and Ind. Co. v. Gulf Ins. Co., 837 F. 2nd 767, 772 (7th Cir. 1988); Institute of London Underwriters v. The Hartford Fire Ins. Co., 234 Ill. App. 3d 70, 599 N.E.2d 1311 (1992).
INDIANA	**Not allowed.**	Dreaded, Inc. v. St. Paul Guardian Ins. Co., 904 N.E.2d 1267 (Ind. 2009) (issues of prejudice are irrelevant to the right of an insured to recover pre-tender costs; since the insurer could not defend a case of which it was unaware, its duty to defend did not

		arise until it was finally put on notice); Eastman v. United States, 257 F.Supp. 315 (S.D. Ind. 1966) (duty to defend does not arise until the insurer is notified of the litigation and the insured tenders the defense). But see Governmental Interins. Exch. v. City of Angola, 8 F.Supp.2d 1120 (N.D. Ind. 1998) (insured's demand to be reimbursed for clean-up costs incurred before giving notice to the insurer was not barred by the "voluntary payment" language in its CGL policy as the insured's clean-up measures were not "voluntary" and the insurer presented no evidence the clean-up could have been conducted differently had the insurer been involved).
IOWA	**No case law.**	
KANSAS	**No case law.**	
KENTUCKY	**Not allowed.**	Travelers Prop. Cas. Co. v. Hillerich & Bradsby, 589 F.3d 257 (6th Cir. 2010).
LOUISIANA	**Mixed case law.**	Gully & Associates, Inc. v. Wausau Ins. Co., 536 So.2d 816 (La. Ct. App. 1988) (insurer relieved of any obligation to reimburse insured for pre-notice defense costs). Accord, Cobb v. Empire Fire & Marine Ins. Co., 488 So.2d 340 (La. Ct. App. 1986); Payton v. St. John, 188 So.2d 347 (La. Ct. App. 1966). However, the Court of Appeals has also held that pre-tender defense costs may be recoverable if the insurer cannot show prejudice. Rovira v. LaGoDa, Inc., 551 So.2d 790 (La. Ct. App. 1989).
MAINE	**No case law.**	
MARYLAND	**Allowed.**	Sherwood Brands, Inc. v. Hartford Acc. & Ind. Co., 698 A.2d 1078 (Md. 1997)

		(duty to defend arises at the moment a claim is made against the insured; insurer obligated to reimburse its policyholder for pre-notice costs unless it can show prejudice as a result of the delay in tender).
MASS.	**Not allowed.**	Rass Corp. v. The Travelers Cos., 63 N.E.3d 40 (Mass. App. Ct. 2016) (insurer could not breach duty "when it is unaware that the duty exists"; insureds should not be incentivized to lengthen the period of time they can exclusively control their own defense by delaying notice to their insurer).
MICHIGAN	**Not allowed.**	Am. Mut. Liab. Ins. Co. v. Michigan Mut. Liab. Ins. Co., 235 N.W.2d 759 (Mich. App. 1975) ("Absent a request, an insurer has no duty to defend an insured."); AMI Entm't Network, Inc. v. Zurich Am. Ins. Co., 2012 WL 5199668 (E.D. Mich. Oct. 22, 2012) (no duty to reimburse pre-tender fees); Fireman's Fund Ins.Cos. v. Ex-Cell-O Corp., 790 F. Supp. 1318 (E.D. Mich. 1992); Coil Anodizers, Inc. v. Wolverine Ins. Co., 327 N.W.2d 316 (Mich. App. 1989).
MINNESOTA	**Not allowed.**	C.J. Duffy Paper Co. v. Liberty Mut. Ins. Co., 76 F.3d 177 (8th Cir. 1996); SCSC Corp. v. Allied Mut. Ins. Co., 536 N.W.2d 305, 316 (Minn. 1995); Pedro Companies v. Sentry Ins., 518 N.W.2d 49 (Minn. App. 1994). But see Home Ins. Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 658 N.W.2d 522 (Minn. 2003)(formal tender not required so long as insurer has notice of law suit against its insured).
MISSISSIPPI	**Not allowed.**	Reliance Ins. Co. v. County Line Place, 692 F.Supp. 694 (S.D. Miss. 1988).

		See also Mimmitt v. Allstate County Mut. Ins. Co., 928 So.2d 203 (Miss. Ct. App. 2006); Courtney v. Stapp, 100 So.2d 606 (Miss. 1958) (without notice, the insurer cannot be expected to provide a defense).
MISSOURI	**Not allowed.**	Rocha v. Metropolitan Prop. & Cas. Ins., 14 S.W.3d 242 (Mo. App. 2000) (insurer's duty to defend does not arise until it receives notice of litigation); Crown Center Redevel. Corp. v. Occidental Fire & Cas. Co. of N.C., 716 S.W.2d 348 (Mo. App. 1986) (liability insurer has no obligation to reimburse its policyholder for costs incurred before defense of the action was tendered to it).
MONTANA	**Not allowed. [?]**	Cas. Indem. Exch. Ins. Co. v. Liberty Nat'l Fire Ins. Co., 902 F.Supp. 1235 (D. Mont. 1995) ("[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."). [Recovery of pre-tender defense is not addressed; case turned on notice after settlement.]
NEBRASKA	**No case law.**	
NEVADA	**No case law.**	
NEW HAMPSHIRE	**Not allowed.**	White Mountain Constr. Co. v. Transamerica Ins. Co., 631 A.2d 907 (N.H. 1993) (insured's failure to tender a defense will relieve an insurer of any obligation to reimburse defense costs if there is no notice or if the insured otherwise acts in a manner inconsistent with an intent to seek a defense).

NEW JERSEY	**Not allowed.**	SL Indus., Inc. v. Am. Motorists Ins. Co., 607 A.2d 1266 (N.J. 1992); Kmart Corp. v. Footstar, Inc., 777 F.3d 923 (7th Cir. 2015) (New Jersey law).
NEW MEXICO	**Not allowed.**	Garcia v. Underwriters at Lloyd's, 2008 WL 943502 (N.M. Mar. 13, 2008) (duty to defend is triggered by actual notice of a lawsuit whether or not the manner of notice expressly contains a request for a defense).
NEW YORK	**Not allowed.**	Am. Motorists Ins. Co. v. Public Serv. Mut. Ins. Co., 540 N.Y.S.2d 671 (App. Div. 1989) (insurer's duty to pay defense costs does not arise until it receives tender); Sucrest Corp. v. Fisher Governor Co., 371 N.Y.S.2d 927 (Sup. Ct. 1975) (no duty to reimburse pre-tender defense costs); Smart Style Indus., Inc. v. Penn. Gen. Ins. Co., 930 F.Supp. 159 (S.D.N.Y. 1996) (insurer's obligation to pay defense costs does not arise until a claim is tendered to it).
NORTH CAROLINA	**Not allowed.**	William C. Vick Constr. Co. v. Penn. Nat'l Mut. Cas. Ins. Co., 52 F.Supp.2d 569 (E.D.N.C. 1999) (no right to recover pre-tender defense costs), aff'd mem., 213 F.3d 634 (4th Cir. 2000) (unpublished) (full text available at 2000 WL 504197).
NORTH DAKOTA	**No case law.**	
OHIO	**No case law.**	
OKLAHOMA	**Unclear case law**	First Bank of Turley v. Fidelity & Dep. Co. of Maryland, 928 P.2d 298 (Okla. 1996) ("An insurer ordinarily has no duty to defend absent a request to provide a defense, which act serves to trigger the insurer's performance under

		the contract.").
OREGON	**Not allowed.**	Oregon Ins. Guaranty Ass'n v. Thompson, 760 P.2d 890 (Or. App. 1988) (as insurer's duty to defend does not arise until a claim for coverage is tendered to it, insurer has no duty to reimburse pre-tender defense costs); Century Indem. Co. v. The Marine Group, 131 F .Supp. 3d 1018 (D. Or. 2015).
PENNSYLVANIA	**Allowed.**	TPLC v. United Nat'l Ins. Co., 44 F.3d 1484 (10th Cir. 1995) (Pennsylvania law would require reimbursement for pre-tender fees absent proof of prejudice); Safeguard Scientifics, Inc. v. Liberty Mut. Ins. Co., 961 F.2d 209 (Table), Op. available at 1992 WL 12915247) (pre-notice fees recoverable where insurer was not prejudiced); Rite-Aid Co. v. Liberty Mut. Ins. Co., 2006 WL 2376238 (E.D. Pa. Aug. 14, 2006) (following Safeguard and TPLC).
RHODE ISLAND	**Not allowed.**	Michaud v. Merrimack Mut. Fire Ins. Co., 1994 WL 774683 (D.R.I. Nov. 16, 1994) (insurer's obligation to pay defense costs does not arise until a claim is tendered to it).
SOUTH CAROLINA	**Allowed.**	Episcopal Church in S.C. v. Church Ins. Co. of Vt., 2014 WL 5302955 (D.S.C. Sept. 22, 2014).
SOUTH DAKOTA	**No case law**	
TENNESSEE	**Mixed case law.**	Compare Federated Mut. Ins. Co. v. Penn. Nat'l Mut. Ins. Co., 480 F. Supp. 599 (E.D. Tenn. 1979) (recovery not permitted) with Smith & Nephew, Inc. v. Federal Ins. Co., 2005 WL 3434819 (D. Tenn. 2005) (recovery allowed).

TEXAS	**Not allowed.**	Coastal Refining & Mktg., Inc. v. USF&G, 218 S.W.3d 279 (Tex. App. 2007); Lafarge Corp. v. Hartford Cas. Ins. Co., 61 F.3d 389 (5th Cir. 1995) (Texas law); Nagel v. Kentucky Central Ins. Co., 894 S.W.2d 19 (Tex. App. 1995).
UTAH	**Not allowed.**	Crist v. INA, 529 F. Supp. 601 (D. Utah 1982).
VERMONT	**Not allowed.**	The Roman Catholic Diocese of Burlington, Vermont, Inc. v. St. Paul Travelers Ins. Co., No. 06-112 (D. Vt. Mar. 24, 2008) (unpublished opinion; not found on Westlaw).
VIRGINIA	**No case law.**	
WASHINGTON	**Allowed.**	National Surety Corp. v. Immunex Corp., 297 P.3d 688 (Wash. 2014); Time Oil Co. v. CIGNA Prop. & Cas. Co., 743 F. Supp. 1400, 1420 (W.D. Wash. 1990).
WEST VIRGINIA	**No case law.**	
WISCONSIN	**Not allowed.**	Towne Realty v. Zurich Ins. Co., 548 N.W.2d 64 (Wis. 1996) (duty to defend does not arise until insurer receives request to defend); Town of Mount Pleasant v. Hartford Acc. & Indem. Co., 625 N.W.2d 317 (Wis. App. Ct. 2001) (pre-tender costs were in breach of the voluntary payment prohibition in a GL policy).
WYOMING	**No case law.**	

V. SURVEY OF CANADIAN PROVINCES

BRITISH COLUMBIA	**Not allowed.**	Lloyd's Underwriters v. Blue Mountain Log Sales Ltd., 2016 BCCA 352 (Insurer's right and duty to defend could not arise until insured gave notice of claim.)
ALBERTA	**No case law.**	
SASKATCHEWAN	**No case law.**	
MANITOBA	**No case law.**	
ONTARIO	**Mixed case law.**	Brockton (Municipality) v. Frank Cowan Co., [2002] O.J. No. 20 (Insurer is under no obligation to reimburse insured for expenses incurred without its authorization or consent.); ING Insurance Co. of Canada v. Federated Insurance Co. of Canada, [2005] O.J. No. 1718 (C.A.) (Excess insurer's duty to defend arises upon being given notice of claim; before the duty arises, there is no obligation to contribute to defence costs.); Markham (City) v. Intact Insurance Co., 2017 ONSC 3150 (Insurer must pay all reasonable costs associated with defence of claims, including those incurred prior to notice); International Comfort Products Corp. (Canada) v. Royal Insurance Co. of Canada, 2000 O.J. 893 (S.C.J.) (Insurer who received formal tender of claim after no-cost settlement held to pay insured's defence costs; relief from forfeiture granted given that insurer admitted no prejudice suffered and court found failure to notify was inadvertent.).
QUEBEC	**Allowed unless delay prejudices insurer.**	Quebec is a civil law jurisdiction. Pursuant to article 2503 of the *Civil Code of Quebec*, the liability insurer

		has an obligation by law to defend its insured. "**2503.** *The insurer is bound to take up the interest of any person entitled to the benefit of the insurance and assume his defence in any action brought against him.* *Legal costs and expenses resulting from actions against the insured, including those of the defence, and interest on the proceeds of the insurance are borne by the insurer over and above the proceeds of the insurance."* The duty to defend can be limited by the insured's failure to notify insurer pursuant to article 2470 of the *Civil Code of Quebec,* which governs the notice of claims. "**2470.** *The insured shall notify the insurer of any loss which may fall under the coverage, as soon as he becomes aware of it. Any interested person may give such notice.* *An insurer who has not been so notified, and thereby suffers injury, may set up against the insured any clause of the policy providing for forfeiture of the right to indemnity in such a case*." Union canadienne compagnie d'assurances v. Ultramar Canada inc. and Succession de feu Denis Beaulieu, 1998 CanLII 12946 (QCCA) (Insurer must show prejudice arising from late notice to invoke forfeiture; given absence of prejudice, insured entitled to claim defence costs against insurer in separate action (at which time issue of pre- and post-tender costs could be addressed.)); See also Aldo Group Inc. c. Chubb

		Insurance Company of Canada, 2013 QCCS 2006, for a more recent decision on the matter (Insurer called in to defend when Insured has already made admissions – clear prejudice to Insurer. Breach disentitles Insured from policy coverage) ; Utica Mutual Insurance Company v. Aspler, Goldberg, Joseph Ltd., 2008 QCCS 3811 (CanLII) (Late notice caused no prejudice to insurer; insurer ordered to reimburse all defence costs.) Compagnie canadienne d'assurances générales Lombard c. Roc-Teck Coatings Inc., 2007 QCCA 986 (CanLII) (Exception : insurer has no duty to cover any legal costs incurred by insured in order to force him to take up its defence through a *Wellington Application* (comparable to a Forced Intervention))
NEW BRUNSWICK	**No case law.**	
NOVA SCOTIA	**No case law.**	
PRINCE EDWARD ISLAND	**No case law.**	
NEWFOUNDLAND & LABRADOR	**No case law.**	
YUKON	**No case law.**	
NORTHWEST TERRITORIES	**No case law.**	
NUNAVUT	**No case law.**	