On and Off The Buss-Insurer: Recoupment of Defense Costs Today

Douglas R Richmond

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Summary

- Insurers' right to seek recoupment or reimbursement—pick your terminology—of their defense costs incurred in connection with uncovered claims has been, and remains, a feverishly debated issue.
- Insurers have not achieved the widespread acceptance of reimbursement that they anticipated following the California Supreme Court's decisions in *Buss v. Superior Court* and *Scottsdale v. MV Transportation*.
- Today, pro- and anti-recoupment decisions appear to be more-or-less in balance. That status seems unlikely to dramatically change any time soon.

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Introduction

In 1997, the California Supreme Court decided *Buss v. Superior Court*. [1] In *Buss*, the court concluded that a liability insurer that defended a mixed action—that is, a case in which some of the claims are potentially covered and others are not—could seek reimbursement from the insured for the defense costs associated with the claims that were not even potentially covered. [2] As the court explained its reasoning:

> Under the policy, the insurer does not have a duty to defend the insured as to the claims that are not even potentially covered. With regard to defense costs for these claims, the insurer has not been paid premiums by the

> insured. It did not bargain to bear these costs. To attempt to shift them would not upset the arrangement. . . . The insurer therefore has a right of reimbursement that is implied in law as quasi-contractual, whether or not it has one that is implied in fact in the policy as contractual. [3]

Buss was not the first case to hold that an insurance company was entitled to recoup its defense costs associated with the defense of uncovered claims or causes of action. [4] The case did, however, draw significant attention and interest in the insurance industry and among the lawyers representing insurers and policyholders alike.

In 2005, the California Supreme Court returned to an insurer's right to reimbursement in *Scottsdale Insurance Co. v. MV Transportation*. [5] Unlike *Buss*, which involved a mixed action, no claims in the underlying action in *Scottsdale* were covered. [6] In again recognizing the insurer's right to reimbursement, the *Scottsdale* court explained that "the duty to defend, and the extent of that duty, are rooted in basic contract principles. The insured pays for, and can reasonably expect, a defense against third-party claims that are potentially covered by its policy, but no more." [7] In contrast, the insurer "does not bargain to assume the cost of defense of claims that are not even potentially covered." [8] Shifting the cost of defending uncovered claims to the insured in that instance "does not upset the contractual arrangement" between the insurer and the insured. [9] Thus, an insurer is entitled to restitution from the insured where, acting under a reservation of rights, it prophylactically funded the defense of claims that it had no duty of defend. [10] Were the rule otherwise, "the insured, who did not bargain for a defense of noncovered claims, would receive a windfall and would be unjustly enriched." [11]

In the wake of *Buss* and to a lesser degree *Scottsdale*, insurers understandably believed that they broadly enjoyed a right to reimbursement or recoupment—the terms are used interchangeably in this context—in cases where it was determined that they had no duty to defend uncovered claims or causes of action. [12] In fact, on the one hand, numerous courts have held that insurers are entitled to recoup their defense costs associated with uncovered claims or causes of action. [13] On the other hand, a significant number of courts have rejected insurers' right to recoupment, at least in the absence of a policy provision granting the insurer that right. [14] One court even rejected a right of recoupment where the insurer expressly incorporated that right into its policy. [15]

In the years since *Buss* was decided, there seemingly has been a case law trend away from recoupment in the absence of a policy provision granting the insurer that right or an

insured's agreement to the same effect. [16] Regardless of whether such a trend exists, the pro-policyholder position was bolstered by the American Law Institute's (ALI) publication in 2019 of the Restatement of the Law of Liability Insurance. Section 21 of the Restatement provides: "Unless otherwise stated in the insurance policy or otherwise agreed to by the insured, an insurer may not obtain recoupment of defense costs from the insured, even when it is subsequently determined that the insurer did not have a duty to defend or pay defense costs." [17] While recognizing that it was adopting what was then the slight minority position on recoupment, the ALI offered three basic reasons for taking the approach that it did. [18]

> First, because this rule is merely a default, if it turns out that the recoupment rule would be relatively easy to administer or that the costs justify the expense, insurers can incorporate an express right to recoupment in their policies. Second, situating the right to recoupment in the insurance policy carries significant advantages; it puts the legal basis of the insurer's entitlement beyond dispute, making it easier to evaluate for all parties concerned. Third, a default rule of no recoupment places the burden of contracting around the rule on the party best able to do so. [19]

Insurers' right to recoupment remains a point of serious contention between insurers and policyholders. It is also a source of pronounced disagreement among courts. In just the past three years, two state supreme courts and three federal courts of appeals have heard recoupment cases and split on insurers' ability to claim this remedy. [20] This article discusses these competing cases in Parts II and III. Part IV then briefly analyzes some key issues in the debate over insurers' right to recoup defense costs incurred in connection with uncovered claims or causes of action.

Recent Cases Permitting Insurers to Recoup Defense Costs

Recently, two courts—the Nevada Supreme Court first and the U.S. Court of Appeals for the Sixth Circuit thereafter—have recognized insurers' right to seek reimbursement of their defense costs.

The Nevada Supreme Court Upholds an Insurer's Right to Reimbursement in Nautilus

In 2021, the Nevada Supreme Court decided *Nautilus Insurance Co. v. Access Medical, LLC*. [21] The case came to the Nevada Supreme Court from the U.S. Court of Appeals for the Ninth Circuit, which certified this question to Nevada's highest court:

> Is an insurer entitled to reimbursement of costs already expended in defense of its insureds where a determination has been made that the insurer owed no duty to defend and the insurer expressly reserved its right to seek reimbursement in writing after defense has been tendered but where the insurance policy contains no reservation of rights? [22]

The *Nautilus* court answered the Ninth Circuit's question "yes." [23] The court reasoned that when a party to a contract "performs a disputed obligation under protest and a court later determines that the contract did not require performance, the party may ordinarily recover in restitution." [24] According to the *Nautilus* court, this rule "gives effect to the terms of the parties' bargain," and "[i]t applies to an insurance policy as it would to any other contract." [25]

Background

By way of background, Ted Switzer and some former business partners in the medical device industry got crosswise, and Switzer sued his one-time colleagues and other parties. The defendants (collectively, Access Medical) tendered the defense of the lawsuit to their insurer, Nautilus Insurance Co. (Nautilus). Based on the potential for coverage under its policy's advertising injury provisions, Nautilus agreed to defend the case under a reservation of rights. In particular, Nautilus repeatedly reserved the right to deny coverage, withdraw from the defense, and obtain reimbursement of its defense costs if a court determined that no potential for coverage existed for Switzer's claims. Access Medical did not object, and Nautilus assumed the defense. Simultaneously, Nautilus Filed a declaratory judgment action in a Nevada federal court in which it asserted that it had no duty to defend Access Medical.

The district court ultimately found that Nautilus's duty to defend was never triggered because Switzer's lawsuit did not allege a colorable defamation claim and therefore did not implicate the advertising injury coverage in the Nautilus policy. Nautilus then moved for further relief and sought reimbursement of the expenses it incurred defending Switzer's suit. The district court concluded that Nautilus was not entitled to further relief principally because Nautilus did not (1) include a claim for reimbursement or damages in its complaint, or (2) establish that it was entitled to reimbursement under Nevada law. Nautilus appealed to the Ninth Circuit, which concluded that the district court's

determination that Nautilus was not entitled to recoup its defense costs posed a question of first impression under Nevada law. [26] The Ninth Circuit thus certified the question quoted earlier to the Nevada Supreme Court.

The Nevada Supreme Court's Analysis

At the outset, Nautilus contended that it was entitled to reimbursement of its defense costs under a theory of unjust enrichment or quasi-contract. [27] Access Medical countered that these theories are not available when there is an express, written contract —in this instance the insurance policy—that covers the same subject matter. [28] But, while insurance policies are contracts and are treated like other contracts, an insurance policy simply does not apply when there is no duty to defend because neither the allegations of the complaint nor the facts known to the insurer reflect any possibility of coverage. [29] Here, both the federal district court and the Ninth Circuit had found that Switzer's lawsuit never even arguably or potentially triggered coverage under the Nautilus policy, such that Nautilus never owed Access Medical a duty to defend. That being so, the parties' contract was irrelevant to the dispute at hand "and the existence of that contract [did] not foreclose [Nautilus's] unjust enrichment claim." [30]

After concluding that the insurance policy did not control the situation, the court turned to the merits of Nautilus's unjust enrichment claim. The court observed that unjust enrichment has three elements:

> [T]he plaintiff confers a benefit on the defendant, the defendant appreciates such benefit, and there is acceptance and retention by the defendant of such benefit under such circumstances that it would be inequitable for him to retain the benefit without payment of the value thereof. [31]

When the insurer provides a defense, it is clear that the insurer has conferred a benefit on the insured and that the insured appreciates the benefit. The issue then becomes whether equity compels the insured to pay. [32]

This situation is not unique to insurance law; it surfaces more generally in contract law. Contracting parties may disagree over the application of their contract to an unforeseen situation, ultimately leaving it to a court to decide who is right and who is wrong. [33] In the interim, however, it may be impractical to require the parties to obtain a declaratory judgment before proceeding with performance. [34] That is particularly true in the case of insurance, where an insurer that refuses to defend a claim and subsequently loses the

coverage dispute may face extracontractual liability. [35] The result is a significant disincentive for the insurer to deny a defense when a remote possibility exists that a claim may turn out to be covered. [36]

These situations arise with sufficient frequency that the Restatement (Third) of Restitution and Unjust Enrichment proposes a solution:

> If one party to a contract demands from the other a performance that is not in fact due by the terms of their agreement, under circumstances making it reasonable to accede to the demand rather than to insist on an immediate test of the disputed obligation, the party on whom the demand is made may render such performance under protest or with reservation of rights, preserving a claim in restitution to recover the value of the benefit conferred in excess of the recipient's contractual entitlement. [37]

The *Nautilus* court was persuaded by the Restatement approach. [38] The court reasoned that when time is of the essence, it makes sense for the parties to swiftly decide what to do, and to argue later over who must pay. [39] Because an insurer risks extracontractual liability if it loses the coverage case after declining to defend the third-party suit against the insured, "it is generally 'reasonable [for the insurer] to accede to the demand rather than to insist on an immediate test of the disputed obligation.'" [40] The court accordingly concluded that, when a court decides that an insurer never had a duty to defend, and the insurer clearly and expressly reserved its right to recover its defense costs, it is fair to require the insured to reimburse the insurer. [41] The court therefore held "that when a court finally determines that the insurer had no contractual duty to defend, the insurer may ordinarily recover in restitution if it has clearly reserved its right to do so in writing." [42] The court further observed that "[a]s our law has more forcefully encouraged insurers to offer to defend doubtful claims, . . . it is only fair to permit those insurers to recover costs that they never agreed to bear." [43]

The court was not impressed by Access Medical's arguments against recognizing Nautilus's right to restitution. The *Nautilus* court acknowledged that courts in other states had concluded that permitting reimbursement in this context was akin to allowing the insurer to unilaterally amend the policy. [44] Those courts reason that an insurer can seek reimbursement only when the policy expressly permits it. [45] In that vein, Access Medical argued that the policy expressly required Nautilus to "bear 'all expenses [it] incur[s]'" for

any claim it defends, regardless of whether the policy required it to defend that claim in the first place. [46] The court disagreed:

> [W]hen a court holds that there never was a duty to defend, it is holding that the claims were never even potentially covered by the policy. Therefore, when the insurer reserved its right to seek reimbursement, it was not extracting an amendment to a contract that would otherwise govern its defense. *No* contract governed its defense. In these circumstances, there is no reason it cannot reserve a right it has, not pursuant to the contract, but pursuant to the law of restitution. [47]

The court also rejected Access Medical's argument that permitting reimbursement would retroactively erode the duty to defend and would constrict the established view that the duty to defend is broader than the duty to indemnify. [48] The court explained that, while the duty to defend is indeed broadly construed, and doubts about its application are resolved in the insured's favor, the duty is not absolute. [49] "When a court concludes that a claim was never even potentially covered, the court should hold that the duty to defend never arose." [50] Again, a result of that holding is that the insurer may be entitled to recoup its defense costs if it properly reserved its right to do so. [51]

In rejecting Access Medical's argument that permitting Nautilus to recover its defense costs would erode and narrow the duty to defend, the *Nautilus* court contrasted the duty to defend under Nevada law from the views of the duty held by courts that had rejected insurers' right to reimbursement.

> In contrast, the courts which deny reimbursement appear to reason that—at least in general—a court cannot hold that there never was a duty to defend. Rather, if the duty was disputed and the insurer defended under a reservation of rights, the court can only hold that there is no longer a duty to defend. . . . In those states' view, any time an insurer agrees to defend a claim—even under a reservation of rights—the claim is "potentially covered" and thus triggers the duty to defend. . . . In this construction, an insurer's reservation of the right to seek a declaration that the duty to defend never arose in the first place would be ineffective at best, and nonsense at worst.
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> Because an insurer in those states . . . has a duty to defend any time it does defend, it may be true that permitting reimbursement would narrow that duty. But the duty to defend in Nevada has never been that expansive. An

> insurance policy is a contract, and we do not "force upon parties contractual obligations, terms or conditions which they have not voluntarily assumed." . . . "[W]here, as here, there was never a duty to defend, this limited remedy [i.e., extinguishing the insurer's obligation to pay only prospectively from the date of the judgment] provides the insured more, and the insurer less, than the parties' bargain contemplated." Here, the parties bargained for Nautilus to defend against certain kinds of allegations, and the federal courts have determined that Switzer's allegations were not of that kind. We do not erode the duty to defend by acknowledging its existing limits. [52]

In conclusion, the *Nautilus* court fully answered the Ninth Circuit's certified question by explaining that when a court decides that an insurer never had a duty to defend the insured, the insurer expressly reserved its right to seek reimbursement of its defense costs, and the insured accepted the defense from the insurer, the insurer is entitled to reimbursement. [53] Under general principles of unjust enrichment and restitution, because the insurer conferred a benefit on the insured by furnishing a defense, the insured appreciated the benefit, and it was reasonable for the insurer to accede to the insured's demand for a defense, it is equitable to require the insured to reimburse the insurer's defense costs. [54] "This result gives effect to the parties' agreement, as well as the court's judgment, by recognizing that the insurer was never contractually obligated to furnish a defense." [55]

The Sixth Circuit Reaffirms an Insurer's Right to Recoup Its Defense Costs

In 2024, the Sixth Circuit, in *Great American Fidelity Insurance Co. v. Stout Risius Ross, Inc.*, [56] made "an *Erie* guess" in predicting whether the Michigan Supreme Court would require an insured to reimburse its insurer for the cost of defending claims that the insurer had no duty to defend. [57] *Great American* began as a declaratory judgment action filed in a Michigan federal district court in which Great American Fidelity Insurance Co. (Great American) sought a determination that it had no duty to defend or indemnify Stout Risius Ross, Inc. and Stout Risius Ross, LLC (collectively, Stout) in lawsuits related to Stout's financial valuations for Appvion, Inc.'s Employee Stock Ownership Plan (ESOP). In a nutshell, Stout allegedly overvalued Appvion's corporate parent's stock and thereby induced Appvion employees to invest their retirement savings in the ESOP. When Appvion declared bankruptcy in October 2017, the corporate parent's stock price crashed, which, in turn, ruined the ESOP.

Great American agreed to defend Stout under a reservation of rights in a lawsuit filed by the ESOP known as the *Appvion ESOP* action. Great American reserved its rights based on an exclusion in its policy (Exclusion F) for claims "based on or arising out of actual or alleged violation of: (1) The Employee Retirement Income Security Act of 1974; (2) The Securities Act of 1933; (3) The Securities Act of 1934; (4) Any state Blue Sky or Securities law." [58] Great American also reserved the right to seek reimbursement of its defense costs if it turned out that it had no duty to defend or indemnify Stout in the *Appvion ESOP* case. [59]

In its complaint, the ESOP accused Stout of fraud and negligent misrepresentation, in addition to asserting claims based on ERISA and federal securities laws. [60] The district court denied Great American's motion for partial summary judgment based on the ESOP's complaint because the court concluded that Exclusion F did not apply to the common law claims. On September 25, 2020, the ESOP filed a second amended complaint in which it alleged only federal securities law claims and Great American again moved for partial summary judgment. This time the district court granted the motion, holding that because Exclusion F applied to federal securities law claims, Great American no longer had a duty to defend or indemnify Stout. [61]

Great American next moved for partial summary judgment on its reimbursement claim. Great American sought its defense costs incurred both before the ESOP filed its second amended complaint on September 25, 2020 ($563,740.15) and after that date ($60,486.34). [62] Great American pursued reimbursement on two theories: implied-in-fact contract and unjust enrichment. [63] The district court denied the motion with respect to defense costs incurred before September 25, 2020, because it had previously ruled that Great American had a duty to defend Stout until then. [64] But, because the district court had also held that Great American had no duty to defend Stout after the ESOP amended its complaint on September 25, 2020, it concluded that Great American could recover its costs incurred on or after that date on the implied-in-fact contract theory. [65]

Both sides appealed to the Sixth Circuit. Great American challenged the district court's ruling that it could not recover its defense costs incurred before September 25, 2020, while Stout contested the district court's holding that Great American could seek reimbursement of its defense costs incurred on or after that date.

The *Stout* court succinctly rejected Great American's argument that it should be able to recoup its defense costs incurred before September 25, 2020, because, until the ESOP filed its second amended its complaint, Great American had a duty to defend Stout. [66] Thus, this prong of Great American's reimbursement argument was meritless. [67] As for

the insurer's right to recoup its defense costs after September 25, 2020, this was a novel issue under Michigan law, so the court had to predict how the Michigan Supreme Court would rule. [68]

The court explained that Michigan appellate courts recognize implied-in-fact contracts in insurance. [69] The court recalled that it had been presented with a similar question a few years earlier in *Continental Casualty Co. v. Indian Head Industries, Inc.* [70] In *Indian Head*, the Sixth Circuit had to predict how the Michigan Supreme Court would resolve the reimbursement issue in a case where the insurer had defended the insured in numerous asbestos cases spanning years and had reserved its right to seek the reimbursement of defense costs in excess of its pro rata share of those costs. [71] The *Indian Head* court surveyed Michigan case law and determined that Michigan law allows implied-in-fact contracts. [72] The court then explained:

> Since Michigan law allows for implied-in-fact and implied-in-law contracts to exist, the only remaining question is whether such an implied contract existed between Continental and Indian Head. To this point, . . . the majority of jurisdictions have held that an insurer is entitled to reimbursement under an implied-in-fact contract where the insurer: 1) timely and explicitly reserves its rights to reimbursement; and 2) provides sufficient notice of the specific possibility of reimbursement. . . . In order to have the right under an implied-in-law contract, the insurer must: 1) timely assert its rights to reimbursement; 2) provide notice of the intent to seek reimbursement; and 3) allow the insured to have meaningful control of the defense and negotiation process. . . .
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> In this case, either form of implied contract is met as Continental expressly reserved its rights in a letter that plainly stated to Indian Head that Continental would seek reimbursement. Furthermore, the district court only granted Continental reimbursement for claims brought after the reservation of rights, finding the reservation of rights timely with respect to those claims but not those submitted prior to the letter. Considering this, and that Indian Head does not contest that it subsequently accepted the payments while retaining control of the litigation process in the underlying suits, it was proper for the district court to find Continental is entitled to reimbursement as an implied contract existed between the two parties. [73]

In this case, as in *Indian Head*, the insurer (Great American) issued a timely reservation of rights letter that specifically informed the insured (Stout) that it might seek reimbursement of its defense costs and it defended the insured after it no longer had a contractual duty to do so. [74] The *Stout* court concluded that Stout had offered "no reason to depart" from the *Indian Head* analysis. [75]

Retreating, Stout argued there was no consideration to support a contract, because Great American had a pre-existing legal duty to defend it in the underlying litigation. [76] But that premise failed because Great American owed no duty to defend Stout after the ESOP filed its second amended complaint. [77] Stout also contended that no implied contract existed because mutual assent was lacking. [78] The court rejected that argument because Stout accepted Great American's offer of a defense after Great American timely reserved its right to seek reimbursement of its defense costs. [79] Stout's acceptance of the defense sufficiently manifested assent under Michigan law. [80]

The *Stout* court concluded that, while Michigan law did not clearly recognize Great American's right to reimbursement in these circumstances, "the 'relevant data'" suggested that the Michigan Supreme Court would recognize an implied-in-fact contract on these facts. [81] The court therefore affirmed the district court's decision that Stout was required to reimburse Great American for defending it in the *Appvion ESOP* case on or after September 25, 2020, on an implied-in-fact contract theory. [82]

Summary

The *Nautilus* and *Stout* courts recognized an insurer's right to seek reimbursement of defense costs where (1) the insurer owed no duty to defend because there were no claims that were even potentially covered; and (2) the insurer timely and specifically reserved its right to seek reimbursement of its defense costs. [83] Neither court was asked to decide whether an insurer could seek reimbursement of its defense costs linked to uncovered claims in a mixed action. Assuming that the *Stout* court accurately predicted Michigan law, however, it would seem that courts applying Michigan law would *not* permit reimbursement in mixed actions. This conclusion follows from the *Stout* court's refusal to allow Great American to recover its defense costs incurred prior to September 25, 2020, during which time the ESOP's complaint included common law fraud and negligent misrepresentation claims that were not excluded from coverage by Exclusion F. [84] Only after the potentially covered causes of action were removed from the case and Great American continued to defend Stout until the district court in the declaratory judgment

action awarded it summary judgment, was Great American entitled to seek reimbursement of its defense costs.

Recent Cases Rejecting Insurers' Right to Recoup Defense Costs

Nautilus and *Stout* aside, recent case law on insurers' right to recoup their defense costs supposedly suggests a trend against recoupment. [85] In 2023 and 2024, cases from the Eleventh Circuit, First Circuit, and Hawaii Supreme Court furthered this trend.

The Eleventh Circuit Predicts Georgia Law

In *Continental Casualty Co. v. Winder Laboratories, Inc.*, [86] Winder Laboratories, Inc. (Winder), a generic pharmaceutical manufacturer managed by Stephen Pressman, was insured under a primary general liability policy issued by Valley Forge Insurance Co. (VFI) and an umbrella policy issued by Continental Casualty Co. (Continental). The materially identical policies required the insurers to "defend the insured[s] against any 'suit'" seeking damages for "personal and advertising injury." [87] The policies also had a "failure to conform" exclusion that barred coverage for injuries "[a]rising out of the failure of goods, products or services to conform with any statement of quality or performance made in [the insureds'] 'advertisement.'" [88] As is typical, neither policy included a provision that allowed the insurers to recoup defense costs linked to uncovered claims or causes of action. [89]

Concordia Pharmaceuticals, Inc. (Concordia) sued Winder and Pressman in the U.S. District Court for the Northern District of Georgia, pleading various claims under Georgia law and the Lanham Act. Concordia's fourth amended complaint ultimately became the operative pleading.

VFI and Continental jointly sent Winder and Pressman a letter agreeing to defend them under a reservation of rights. In that letter, VFI expressly reserved its right to seek the reimbursement of its defense costs incurred in connection with all claims that its policy did not potentially cover. [90] Pressman signed and returned an "Acknowledgement of Defense under a Reservation of Rights," under which he and Winder elected to retain independent counsel to represent them in Concordia's lawsuit. [91] As the litigation progressed, the insurers sent Winder and Pressman updated reservation of rights letters that specifically asserted a right to reimbursement on Continental's behalf as well. [92]

While the Concordia litigation was underway, VFI and Continental filed a declaratory judgment action in the Northern District of Georgia. The insurers asserted that they had no duty to defend or to indemnify Winder and Pressman in connection with Concordia's lawsuit and that they were entitled to be reimbursed for their related defense costs and fees. The district court hearing the declaratory judgment action held that VFI and Continental had no duty to defend Winder and Pressman because Concordia's fourth amended complaint did not allege personal or advertising injury and it further triggered the failure to conform exclusion. [93] The court then encouraged the parties to reach an agreement on the reimbursement of defense costs. [94] That they could not do, and they soon filed cross-motions for summary judgment on the issue. In ruling on the motions, the district court noted that whether an insurer had a right to reimbursement when that right was asserted in a reservation of rights letter but was not contained in the insurance policy was an open question under Georgia law. [95] The district court found in favor of Winder and Pressman on the basis "that an effective reservation of rights necessarily required a preexisting contract right: '*[A]bsent a provision in the insurance policy*—or some other express agreement—an insurer who issued an otherwise valid, unilateral reservation of rights *cannot recoup its defense fees or costs*.'" [96] Both sides appealed to the Eleventh Circuit. Winder and Pressman contested the district court's coverage determination, while VFI and Continental challenged the district court's rejection of their reimbursement claims.

The Eleventh Circuit first concluded that the failure to conform exclusion applied, such that the district court properly held that VFI and Continental did not have an ongoing duty to defend the Concordia litigation. [97] That determination only resolved half the issues on appeal, however, as the *Winder Laboratories* court explained:

> [W]e have concluded that the insurers *no longer* have a duty to defend the Fourth Amended Complaint, but that does not mean that the insurers *never had* a duty to defend at earlier stages of the case. Rather, because insurers under Georgia law have a broad duty to defend when there is "even arguably" a covered claim, . . . the insurers had an active duty to defend up until the point when the district court ruled otherwise. Simply put, under the facts of this case, the insurers were under a duty to defend until the district court ruled that they were not.

This determination brings us to the second issue on appeal—whether, under Georgia law, asserting a right to reimbursement in a reservation of rights letter entitles an insurer to

reimbursement even if the insurance contract did not contemplate a right to recoupment. [98]

The court separated its analysis into two questions. First, did the insurers' reservation of rights letters create a new contract with the insureds? [99] The court concluded that the letters did not create a new contract. [100] Second, would the Georgia Supreme Court recognize a right to reimbursement absent a corresponding contractual right? [101] This was a novel question of Georgia law. [102] The *Winder Laboratories* court concluded that the Georgia Supreme Court would not recognize such a right and accordingly affirmed the district court. [103]

The insurers contended that the insureds both implicitly and explicitly agreed to the terms of the reservation of rights letters that asserted the insurers' rights to reimbursement. [104] This argument pivoted on the fundamental contract law principle of consideration. [105] The court had to decide whether the reservation of rights letters "created a new contract—either explicitly (because one of the letters was signed by the insureds) or implicitly (because the insureds accepted the defense while aware of the letters' terms)." [106] Critically on this point, a party's promise to perform a preexisting contractual obligation does not furnish consideration for a new agreement. [107]

VFI and Continental argued that there was adequate consideration attributable to the reservation of rights letters because (1) Winder and Pressman received a defense; and (2) they could choose their defense counsel. [108] The court easily rejected the insurers' first argument for consideration because the VFI and Continental policies required them to defend Winder and Pressman against certain third-party lawsuits. The reservation of rights letters also provided for such defense. In other words, the reservation of rights letters were textbook promises to perform a preexisting contractual obligation that did not constitute consideration for a new contract under Georgia law. [109]

The insurers' second argument for consideration fared no better. The policies did not specify who would select defense counsel, but the reservation of rights letters gave the insureds the ability to either (a) select their own counsel; or (b) allow the insurers to appoint defense counsel for them. [110] Basically, VFI and Continental went from having to provide a defense in accordance with their policies to having to provide a defense through counsel of their choice or through counsel chosen by the insureds as allowed under the reservation of rights letters. [111] Either way, though, VFI and Continental were obligated to provide a defense. "In other words, because the insurers did not have the explicit right to choose counsel for the insureds under the [policies], the insurers did not give anything

up to reach the new arrangement wherein the insureds ha[d] the option of selecting their own counsel." [112] Consequently, there was no consideration under Georgia law. [113]

Alternatively, VFI and Continental argued that Winder and Pressman were unjustly enriched because they retained the benefit of an expensive defense that they knew they were not owed. [114] The court was unimpressed. The insurers' unjust enrichment argument likely failed from the start due to the existence of a written contract (the insurance policies), but it failed on the merits regardless. [115] Quite simply, it was not unjust to require VFI and Continental to fulfill their contractual obligations to their insureds and doing so did not confer a windfall on Winder and Pressman. [116]

Finally, but somewhat anticlimactically given its preceding analysis, the court had to predict whether Georgia law would permit an insurer to recoup its defense costs "when such a right is provided for in a reservation of rights letter but not the parties' operative insurance contract." [117] In attempting to reach a decision, the court focused on Georgia insurance law and, in particular, the foundational principle that the duty to defend is broader than the duty to indemnify. [118]

The *Winder Laboratories* court reasoned that, if it adopted a rule that allowed an insurer to seek reimbursement of its defense costs without an insurance policy provision establishing that right, "the duty to defend would collapse into the duty to indemnify." [119] In other words, if an insurer owed a duty to defend but the insurer could obtain reimbursement of its defense costs upon a court's determination that no ongoing duty to defend existed, the duty to defend would simply become the duty to indemnify. [120] So sweeping a result would not be compatible with Georgia insurance law, which imposes on insurers a broad duty to defend and a more limited duty to indemnify. [121] Accordingly, the court predicted that the Georgia Supreme Court would apply that logic and adopt "a 'no recoupment' rule." [122]

The court reassured itself of its correctness by observing that its holding comported with a perceived national trend against the recoupment of defense costs in similar situations. [123] While an insurance company can provide for reimbursement in its policies, it cannot create a right to reimbursement in a reservation of rights letter concerning a policy that does not contain enabling language. [124]

The Hawai'i Supreme Court Rejects Recoupment

Approximately three months after the Eleventh Circuit issued its opinion in *Winder Laboratories*, the Hawai'i Supreme Court decided *St. Paul Fire & Marine Insurance Co. v. Bodell Construction Co*. [125] In *Bodell*, the U.S. District Court for the District of Hawai'i certified this question to the Hawai'i Supreme Court: "Under Hawai'i law, may an insurer seek equitable reimbursement from an insured for defense fees and costs when the applicable insurance policy contains no express provision for such reimbursement, but the insurer agrees to defend the insured subject to a reservation of rights, including reimbursement of defense fees and costs?" [126] The Hawai'i Supreme Court answered the certified question "no." [127] The court held that "an insurer may not recover defense costs for defended claims unless the insurance policy contains an express reimbursement provision. A reservation of rights letter will not do." [128] The *Bodell* court offered three principal reasons for its conclusion that insurers generally do not have a right to reimbursement of defense costs.

First, insurance policies are contracts, and mutual understanding and consent enliven a contract's terms. [129] A reservation of rights letter reinforces the terms in the contract. [130] An insurer may reserve its contractual rights in a reservation of rights letter but cannot create new ones there. [131] To permit an insurer to secure a right to reimbursement through a reservation of rights without a policy provision granting the right in the first place would be tantamount to allowing the insurer to unilaterally amend the policy. [132] A reservation of rights letter does not alter the policy's coverage or remake the contract, nor does it relieve the insurer of the cost of defending its insured where the insurer had a duty to defend. [133] So, unless the policy provides a right to reimbursement, the insurer enjoys no such right. [134]

Second, recognizing an insurer's right to reimbursement of defense costs would erode the duty to defend. [135] After all, an insurer's duty to defend is assessed at the outset of a case, not at the end. If a complaint or petition alleges claims that are potentially covered, an insurer that declines to defend does so at its peril. [136] But if insurers recover their costs incurred in defending uncovered claims, the duty to defend may instead be determined *after* the insurer assumes the defense. [137] This sequence narrows the broad duty to defend, dilutes the insurer's good-faith duty to defend, and, even worse, may encourage bad faith on the insurer's part. [138]

According to the *Bodell* court, reimbursement undermines the duty to defend by resting the insurer's right and duty to defend on a judicial determination that a complaint or petition alleged covered claims. [139] Permitting an insurer to recoup its defense costs

would effectively equate the insurer's duty to defend with its duty to indemnify. [140] As for insureds, rather than protection against all possible claims, they would only be protected against repaying defense costs for claims that were eventually found to be covered. [141]

At the same time, refusing reimbursement does not deprive insurers of a remedy. [142] If an insurer is uncertain about whether a complaint or petition alleges covered claims, it can pursue a declaratory judgment action. [143]

Third, the *Bodell* court rejected the insurers' unjust enrichment argument, writing that "[d]efense is part of the deal." [144] By their nature, contracts benefit both parties. Although the insurer is contractually obligated to defend the insured, the insurer benefits by earning the premium that it charged for the policy and by retaining the right to control the defense. [145] In sum, by defending the insured, the insurer protects itself at least as much as it protects its insured. [146]

In contrast, if the court were to allow reimbursement, it might well be the insurer that would be unjustly enriched. When an insured is required to reimburse its insurer's defense costs, it is paying for the insurer to protect itself. [147] If an insurer undertakes its insured's defense and a court later determines that there was no duty to defend, the insurer has received free insulation from bad faith or breach of contract claims. [148] This is a win-win situation for the insurer. "Meanwhile, the insured 'receives no greater benefit than if its insurer had refused to defend outright.'" [149]

Finally, the insurers argued that, without a right to reimbursement, insurers might be tempted to deny costly and questionable claims rather than defending those suits. [150] The *Bodell* court gave this argument short shrift. The court noted that insurers, as skilled defenders of litigation, are well positioned to evaluate their defense obligations. [151] Plus, potential liability for bad faith and breach of contract sufficiently motivates them to honor their contractual obligations. [152]

The First Circuit Rejects Recoupment Under Massachusetts Law

Berkley National Insurance Co. v. Atlantic-Newport Realty Co., [153] in which the First Circuit applied Massachusetts law, is the latest reported case rejecting recoupment.

In the underlying litigation, Stephen Papsis sued Granite Telecommunications, LLC (Granite) and Atlantic-Newport Realty LLC (Atlantic) for a foot injury that he suffered as a

result of a sewage backup while working in a cafeteria operated by Granite. Granite was the named insured under a Berkley National Insurance Co. (Berkley) policy; Atlantic was an additional insured under the policy.

Atlantic and Granite tendered Papsis's lawsuit to Berkley. Berkley asserted that it had no duty to indemnify Granite or Atlantic by virtue of the pollution exclusion in its policy. Nonetheless, Berkley agreed to assume the defense of Papsis's suit under "a 'full' reservation of the right to disclaim coverage." [154] Berkley further reserved its right "to bring an action for declaratory relief to be relieved of any *continuing* obligation to provide a defense." [155] In connection with the latter reservation, however, Berkley stated that, pending a coverage determination, it would fully defend Papsis's suit and would pay all reasonable costs and fees incurred in the defense. [156]

Berkley thereafter filed a declaratory judgment action in a Massachusetts federal court. In addition to asserting that Berkley had no duty to defend or indemnify Granite and Atlantic based on its policy's pollution and fungi or bacteria exclusions, Berkley's complaint included a claim for restitution under Massachusetts law for the costs Berkley had incurred in defending Papsis's suit. [157] The district court ultimately awarded Berkley summary judgment based on the fungi or bacteria exclusion. The district court also found for Berkley on its restitution claim and held that Atlantic and Granite were obligated to reimburse Berkley's defense costs. [158] In so holding, the district court reasoned that Atlantic and Granite should have expected Berkley to seek reimbursement of its defense costs based on its "explicit reservation of rights." [159] Atlantic and Granite appealed the decision to the First Circuit.

On appeal, the insureds contended that the district court erred in part because there was no support in the record for the district court's finding that Berkley had explicitly reserved its right to seek reimbursement of its defense costs and thus there was no basis for permitting Berkley to pursue restitution. [160] The First Circuit agreed.

In fact, the *Berkley National* court was unclear as to which "unilateral reservation" of rights by Berkley the district court had in mind in ruling for Berkley. [161] The court's uncertainty arose because Berkley not only made a "full" reservation of its right to disclaim coverage but also reserved the right to seek a declaratory judgment that it had no duty to defend Atlantic and Granite against Papsis's claims. [162] It was therefore possible that the district court had either or both reservations in mind. It made no difference in the end.

The First Circuit stated that Berkley's "full" reservation of its right to deny coverage was not itself a reservation of the right to seek reimbursement. [163] Nor was Berkley's

reservation of the right to seek a declaratory judgment excusing its duty to defend an express reservation of its right to seek reimbursement of its defense costs. [164] Indeed, in the letter in which it reserved its right to pursue a declaratory judgment action, Berkley stated "that '[p]ending the receipt of such a' declaratory judgment," it "would 'provide a full defense to the Papsis case and . . . pay all reasonable costs and fees associated with [that] defense.'" [165]

The *Berkley National* court also rebuffed Berkley's apparent claim that Massachusetts law would permit a liability insurer to seek reimbursement of its defense costs in the absence of an express reservation of rights to that effect. [166] The court could find no support for that argument in out-of-state cases or under Massachusetts case law, the district court had cited no such authority, and Berkley offered none. [167] In fact, all the authority on-point required an express reservation of rights as a predicate for a recoupment claim. [168]

The court concluded that the district court should have granted Atlantic and Granite judgment on the pleadings with respect to Berkley's restitution claim rather than awarding Berkley summary judgment. [169] The First Circuit thus reversed and vacated the district court's judgment on this aspect of the case.

Observations and Analysis

Insurers' right to recoup defense costs incurred in connection with uncovered claims or causes of action is controversial and courts are certain to remain divided on the subject as the recent case law reflects. Some general principles, however, merit discussion.

A Policy Provision Creating a Right to Reimbursement Should Be Enforced

First, even courts that have been hostile to insurers' claimed right to reimbursement of their defense costs generally acknowledge that such a right is enforceable if it is expressly preserved in the policy. [170] As the Restatement of the Law of Liability Insurance observes, "[w]hen an insurer's claim to recoupment is based on an express contractual right to reimbursement . . . it presents no legal difficulty." [171] *West American Insurance Co. v. Del Ray Properties Inc.* [172] is illustrative.

Del Ray Properties Inc. (Del Ray) operated two mobile home parks in Longview, Washington. In August 2016, Longview sued Del Ray for failing to pay its utility bills. Del Ray residents Sharon Doerr and Randall Beck also sued the company, alleging that Del

Ray's willful failure to pay the city jeopardized their water and garbage services. The two lawsuits were subsequently consolidated.

Del Ray was insured under a commercial general liability (CGL) policy issued by West American Insurance Co. (West American) and a businessowners policy from North Pacific Insurance Co. (North Pacific). The insurers agreed to defend Del Ray in the consolidated litigation under reservations of rights. The insurers sent Del Ray three reservation of rights letters, the last one dated July 12, 2022. [173] In their final reservation of rights letter, West American and North Pacific informed Del Ray that under an endorsement to their policies, they had the right to recoup their defense costs if it was later determined that the claims for which they provided a defense were not covered. [174] The policies' identical endorsements stated:

> If we initially defend an insured or pay for an insured's defense but later determine that none of the claims, for which we provided a defense or defense costs, are covered under this insurance, we have the right to reimbursement for the defense costs we have incurred.
>
> The right to reimbursement under this provision will only apply to the costs we have incurred after we notify you in writing that there may not be coverage and that we are reserving our rights to terminate the defense of the payment of defense costs and to seek reimbursement for defense costs. [175]

West American and North Pacific filed a declaratory judgment action in a Washington federal court and won summary judgment: the court held that they had no duty to defend or indemnify Del Ray in connection with the consolidated litigation. [176] After resolving the coverage questions, the court turned to West American's and North Pacific's claims that they were entitled to recover their defense costs incurred after their July 12, 2022, reservation of rights letter. [177]

On the one hand, under controlling Washington law, insurers generally may not seek reimbursement for defense costs incurred while their duty to defend remains uncertain. [178] As the Washington Supreme Court explained in *National Surety Corp. v. Immunex Corp.*: [179]

> Disallowing reimbursement is most consistent with Washington cases regarding the duty to defend, which have squarely placed the risk of the

> defense decision on the insurer's shoulders.
>
> It is the insurer that decides whether to defend . . . before any judicial determination of coverage. Providing a defense benefits the insurer by giving it the ability to monitor the defense and better limit its exposure. When an insurer defends under a reservation of rights, it insulates itself from potential claims of breach and bad faith, which can lead to significant damages, including coverage by estoppel. . . . In turn, the insured receives the benefit of a defense until a court declares none is owed. Conversely, when an insurer declines to defend altogether, it saves money on legal fees but assumes the risk it may have breached its duty to defend or committed bad faith. . . .
>
> We reject [the insurer's] view that an insurer can have the best of both options: protection from claims of bad faith or breach without any responsibility for the costs of defense if a court later determines there is no duty to defend. This "all reward, no risk" proposition renders the defense portion of a reservation of rights defense illusory. The insured receives no greater benefit than if its insurer had refused to defend outright. [180]

On the other hand, another Washington federal court had held a few years earlier that when a court determines that the insurer owed no duty to defend and the insurance policy at issue contains language asserting the right to recover defense costs in that situation, Washington law permits recoupment. [181] In *Immunex*, after all, the Washington Supreme Court was concerned only with the situation where an insurer claims a right to recoupment in a reservation of rights letter. [182] In that instance, an insurer's right to recoupment "was not bargained for." [183] In contrast, when a policy contains a provision expressly granting the insurer a right to reimbursement, the insurer's ability to recoup its defense costs associated with uncovered claims *was* bargained for. Thus, even under Washington law, reimbursement is permissible where the policy provides for it. [184]

The *West American* court accordingly found that West American and North Pacific had explicitly bargained for the right to recover their costs incurred in defending the underlying litigation and that their rights were thus "valid under the relevant policy endorsements." [185] Consequently, West American and North Pacific could seek reimbursement of their defense costs incurred after July 12, 2022. [186]

In conclusion, while insurers that want to preserve their right to recoup their defense costs should expressly provide for recoupment in their policies, that is not necessarily as easy as it sounds. First, if the insurer is admitted to do business in the state where it intends to issue such a policy, there is no guarantee that the state's insurance department will approve the insurer's proposed policy language or endorsement. Depending on the state, it may be only surplus lines insurers that can provide for recoupment in their policies. Second, there are also commercial realities at play. Insurance brokers may resist insurers' inclusion of recoupment language in policies or the addition to policies of endorsements that provide for recoupment. An insurance company that includes recoupment provisions in its policies may risk losing business as a result. For many insurers—perhaps most—preserving the right to recoupment is not nearly as important as underwriting new business. After all, insurers seldom pursue recoupment, whether because the relevant facts are unfavorable, the amount of the defense costs does not justify further litigation expense, or the insured lacks the resources to satisfy any judgment that the insurer might obtain. Third, although most courts recognize an insurer's express contractual right to reimbursement, not all do. [187]

Cases with No Duty to Defend in the First Place

Second, if an insurer does not have an express contractual right to reimbursement, the next strongest case for recognizing such a right is one where the insurer never had a duty to defend in the first place. [188] In that instance, the insurer incurred defense costs without any legal obligation to do so. [189] As the California Supreme Court explained:

> An insurer facing unsettled law concerning its policies' potential coverage of the third party's claims should not be forced either to deny a defense outright, and risk a bad faith suit by the insured, or to provide a defense where it owes none without any recourse against the insured for costs thus expended. The insurer should be free, in an abundance of caution, to afford the insured a defense under a reservation of rights, with the understanding that reimbursement is available if it is later established, as a matter of law, that no duty to defend ever arose. [190]

Also, in a case where the insurer never owed a duty to defend, two of the principal arguments against recoupment do not apply. First, when a court holds that there never was a duty to defend, it is holding that the policy never even potentially covered the third-party action. [191] Thus, it cannot be said that, by seeking reimbursement, the insurer is unilaterally amending the parties' contract, as some courts that have rejected

reimbursement have concluded. [192] In fact, there effectively was no contract that governed the insurer's defense obligation. [193] That being so, the insurer surely can "reserve a right it has, not pursuant to the contract, but pursuant to the law of restitution." [194]

Second, where the insurer never owed a duty to defend, it cannot reasonably be said that allowing reimbursement erodes the duty to defend. [195] However broad the duty to defend may be, it is not limitless. [196] Just as an insurer does not promise to indemnify an insured for any liability regardless of its nature, an insurer does not promise to defend an insured against all claims, whatever they might be. [197] Rather, the insurer and insured contract for a defense of only certain claims. This is apparent from the insuring agreement of a standard CGL policy, for example, which provides:

> We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. [198]

Accordingly, requiring an insured to reimburse an insurer for the insurer's costs incurred in defending uncovered claims does not erode the duty to defend. [199]

Reimbursement in Mixed Actions

Third, mixed actions present insurers with their weakest argument for recoupment. This is first because of the "entire suit" rule," also known as the "in for one, in for all" rule, the "mixed-action rule," and the "complete defense rule." This rule holds that an insurer asked to defend a mixed action generally must defend the insured against *all* claims alleged in the lawsuit, including those that are not covered, so long as the insurer has an arguable duty to indemnify the insured on even one of the claims. [200] But the entire-suit rule is not necessarily dispositive insofar as an insurer's right to recoupment is concerned, as the California Supreme Court outlined in *Buss v. Superior Court*: [201]

> [W]e . . . justify the insurer's duty to defend the entire "mixed" action prophylactically, as an obligation imposed by law in support of the policy. To defend meaningfully, the insurer must defend immediately. . . . To defend

> immediately, it must defend entirely. It cannot parse the claims, dividing those that are at least potentially covered from those that are not. . . . The fact remains: As to the claims that are at least potentially covered, the insurer gives, and the insured gets, just what they bargained for, namely, the mounting and funding of a defense. But as to the claims that are not, the insurer may give, and the insured may get, more than they agreed, depending on whether defense of these claims necessitates any additional costs. [202]

Thus, the *Buss* court held as to claims in a mixed action that are not even potentially covered, the insurer may seek reimbursement of its associated defense costs. [203]

Under *Buss*, the entire-suit rule governs the scope of the duty to defend, but it does not govern the allocation of defense costs. The fact that an insurer must defend a mixed action in its entirety for practical reasons does not prevent the insurer from later seeking reimbursement of defense costs that it never bargained to bear. [204]

The challenge for insurers regarding reimbursement in mixed actions is that assuming they overcome the entire-suit rule based on *Buss*, insureds have other plausible arguments against reimbursement. For one, a standard liability insurance policy states in the insuring agreement that the insurer will defend certain "suits" against the insured. [205] Nothing in the policy language confines the duty to defend to potentially covered "claims" pleaded in such suits. [206] Alternatively, the supplementary payments provision in a standard liability insurance policy provides that the insurer will pay, with respect to anv suit against an insured that the insurer defends, "[a]ll expenses [the insurer] incur[s]." [207] Policyholders contend that this language precludes the allocation of defense costs between covered and uncovered claims. [208]

This is not to say that insurers have no right to recoupment in mixed actions. Indeed, *Buss* proves just the opposite. It is to say, however, that insurers' right to recoupment is weaker in mixed actions than it is in other contexts.

Reserving the Insurer's Right to Recoup Defense Costs

Finally, an insurer that may want to recoup its defense costs must reserve its right to do so. It is important that the insurer's reservation of rights letter specifically and clearly state that the insurer is reserving the right to seek reimbursement of its defense costs. If the policy includes a reimbursement provision as in *West American Insurance Co. v. Del Ray Properties Inc.*, [209] the insurer should quote the policy language in its reservation of

rights letter. In this context even more so than in cases of questionable coverage, courts will surely disfavor vague or "boilerplate" reservation of rights letters.

Conclusion

Insurers' right to seek recoupment or reimbursement—pick your terminology—of their defense costs incurred in connection with uncovered claims remains a feverishly debated issue. Insurers have not achieved the widespread acceptance of reimbursement that they anticipated following the California Supreme Court's decisions in *Buss* and *Scottsdale*. Today, pro- and anti-recoupment decisions appear to be more or less in balance. [210] That status seems unlikely to change any time soon.

Endnotes

1. 939 P.2d 766 (Cal. 1997).
2. *Id.* at 776.
3. *Id.* (citations and footnote omitted).
4. Jeffrey W. Stempel, *A Deeper Dive into Nautilus: Differentiating Insurer Efforts to Recover Defense Costs and Assessing Recoupment in the Wake of the ALI Restatement*, 57 Tort Trial & Ins. Prac. L.J. 57, 61 (2022).
5. 115 P.3d 460 (Cal. 2005).
6. *See id.* at 465 (discussing the Court of Appeal's decision in the case).
7. *Id.* at 469.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *See* Stempel, *supra* note 4, at 61 (footnotes omitted) ("The California Supreme Court's 1997 decision in *Buss v. Superior Court* . . . was trumpeted by insurers as a definitive holding ushering in an era of recoupment.").

13. *See, e.g.*, Great Am. Fid. Ins. Co. v. Stout Risius Ross, Inc., Nos. 23-1167/1195, 2024 WL 1511983, at *4–5 (6th Cir. Apr. 8, 2024) (applying Michigan law); Cont'l Cas. Co. v. Indian Head Indus., Inc., 666 F. App'x 456, 467–69 (6th Cir. 2016) (applying Michigan law); Travelers Prop. Cas. Co. of Am. v. Hillerich & Bradsby Co., 598 F.3d 257, 268 (6th Cir. 2010) (predicting Kentucky law); Valley Forge Ins. Co. v. Health Care Mgmt. Partners, Ltd., 616 F.3d 1086 (10th Cir. 2010) (predicting Colorado law); United Nat'l Ins. Co. v. SST Fitness Corp., 309 F.3d 914, 921 (6th Cir. 2002) (applying Ohio law); Cincinnati Ins. Co. v. Grand Pointe, LLC, 501 F. Supp. 2d 1145, 1169 (E.D. Tenn. 2007) (predicting Tennessee law); Resure, Inc. v. Chem. Distribs., Inc., 927 F. Supp. 190, 194 (M.D. La. 1996) (applying New Mexico law); Knapp v. Commonwealth Land Title Ins. Co., 932 F. Supp. 1169, 1172 (D. Minn. 1996) (applying Minnesota law); Gotham Ins. Co. v. GLNX, Inc., No. 92 Civ. 6415 (TPG), 1993 WL 312243, at *4 (S.D.N.Y. Aug. 6, 1993) (holding that the insurer was entitled to recoup its defense costs having reserved that right); Hecla Mining Co. v. N.H. Ins. Co., 811 P.2d 1083, 1089 (Colo. 1991); Sec. Ins. Co. of Hartford v. Lumbermens Mut. Cas. Co., 826 A.2d 107, 125 (Conn. 2003); Nationwide Mut. Ins. Co. v. Flagg, 789 A.2d 586, 597 (Del. 1991); Jim Black & Assoc., Inc. v. Transcon. Ins. Co., 932 So. 2d 516, 518 (Fla. Dist. Ct. App. 2006); Colony Ins. Co. v. G & E Tires & Serv., Inc., 777 So. 2d 1034, 1039 (Fla. Dist. Ct. App. 2000); Allianz Ins. Co. v. Guidant Corp., 884 N.E.2d 405, 419 (Ind. Ct. App. 2008); Nat'l Indem. Co. v. State, 499 P.3d 516, 534 (Mont. 2021); Nautilus Ins. Co. v. Access Med., LLC, 482 P.3d 683, 692 (Nev. 2021); Hebela v. Healthcare Ins. Co., 85 A.2d 75, 86 (N.J. Super. Ct. App. Div. 2004); Dupree v. Scottsdale Ins. Co., 947 N.Y.S.2d 428, 429 (App. Div. 2012); Chiquita Brands Int'l, Inc. v. Nat'l Union Fire Ins. Co., 57 N.E.3d 97, 101 (Ohio Ct. App. 2015).

14. *See, e.g.*, Berkley Nat'l Ins. Co. v. Atlantic-Newport Realty LLC, 93 F.4th 543, 557–60 (1st Cir. 2024) (applying Massachusetts law); Cont'l Cas. Co. v. Winder Lab'ys, LLC, 73 F.4th 934, 944–49 (11th Cir. 2023) (predicting Georgia law); Emps. Mut Cas. Co. v. Bartile Roofs, Inc., 618 F.3d 1153, 1175–76 (10th Cir. 2010) (citing and quoting Shoshone First Bank v. Pac. Emps. Ins. Co., 2 P.3d 510, 515–16 (Wyo. 2000)); Am. Modern Home Ins. Co. v. Reeds at Bayview Mobile Home Park, LLC, 176 F. App'x 363, 367 (4th Cir. 2006) (applying Maryland law); Perdue Farms, Inc. v. Travelers Cas. & Sur. Co. of Am., 448 F.3d 252, 258–59 (4th Cir. 2006) (predicting Maryland law); Liberty Mut. Ins. Co. v. FAG Bearings Corp., 153 F.3d 919, 924 (8th Cir. 1998) (applying Missouri law); Am. Fam. Ins. Co. v. Almassud, 522 F. Supp. 3d 1263, 1269 (N.D. Ga. 2021) (predicting Georgia law); Hayes v. Wis. & S. R.R., LLC, 514 F. Supp. 3d 1055, 1062 (E.D. Wis. 2021) (applying Wisconsin law); Blue Cross of Idaho Health Serv., Inc. v. Atl. Mut. Ins. Co., 734 F. Supp. 2d 1107, 1113–17 (D. Idaho 2010) (predicting Idaho law); Pekin Ins. Co. v. Tysa, Inc., No. 3:05-cv-00030-JEG, 2006 WL 3827232, at *19 (S.D. Iowa Dec. 27, 2006) (predicting Iowa law); Med. Liab. Mut. Ins. Co. v. Alan Curtis Enters., Inc., 285 S.W.3d 233, 237 (Ark. 2008); St. Paul Fire & Marine Ins. Co. v. Bodell Constr. Co, 538 P.3d 1049, 1053 (Haw. 2023); Gen. Agents Ins. Co. of Am., Inc. v. Midwest Sporting Goods Co., 828 N.E.2d 1092, 1103 (Ill. 2005); Am. W. Home Ins. Co. v. Gjonaj Realty & Mgmt. Co., 138 N.Y.S.3d 626, 630–36 (App. Div. 2020); Am. & Foreign Ins. Co. v. Jerry's Sport Ctr., Inc., 2 A.3d 526, 544 (Pa. 2010); U.S. Fid. & Guar. Co. v. U.S. Sports Specialty Ass'n, 270 P.3d 464, 468 (Utah 2012); Nat'l Sur. Co. v. Immunex Corp., 297 P.3d 688, 695 (Wash. 2013); *Shoshone First Bank*, 2 P.3d at 515–16.

15. Att'ys Liab. Prot. Soc'y, Inc. v. Ingaldson Fitzgerald, P.C., 370 P.3d 1101, 1111 (Alaska 2016) ("When an insurer has a duty to defend, Alaska law prohibits enforcement of a policy provision

entitling that insurer to reimbursement of fees and costs incurred during the defense of claims under a reservation of rights."), *abrogated on other grounds by* Buntin v. Schlumberger Tech. Corp., 487 P.3d 595 (Alaska 2021).

16. *See* William G. Passanante & Jessica Goldberg, *Why Insurance Companies Should Lose the Battle over Recoupment of Defense Costs*, For the Def., Nov. & Dec. 2023, at 18, 22.

17. Restatement of the L. of Liab. Ins. § 21 (Am. L. Inst. 2019).

18. For a general discussion of section 21 and its enactment, see Stempel, *supra* note 4, at 58–62. For criticism of the Restatement position, see Laura A. Foggan, *Insurer Recoupment of Defense Costs: Why the Restatement Adopts the Wrong Approach*, 68 Rutgers U.L. Rev. 193 (2015).

19. Restatement of the L. of Liab. Ins. § 21 cmt. a (Am. L. Inst. 2019).

20. *Compare* Great Am. Fid. Ins. Co. v. Stout Risius Ross, Inc., Nos. 23-1167/1195, 2024 WL 151193, at *4–5 (6th Cir. Apr. 8, 2024) (predicting Michigan law and allowing recoupment), *and* Nautilus Ins. Co. v. Access Med., LLC, 482 P.3d 683, 692 (Nev. 2021) ("When a court determines that an insurer never owed a duty to defend, the insurer expressly reserved its right to seek reimbursement in writing after defense was tendered, and the policyholder accepted the defense from the insurer, then the insurer is entitled to that reimbursement."), *with* Berkley Nat'l Ins. Co. v. Atl.-Newport Realty LLC, 93 F.4th 543, 557–60 (1st Cir. 2024) (rejecting a right to recoupment under Massachusetts law), *and* Cont'l Cas. Co. v. Winder Lab'ys, LLC, 73 F.4th 934, 944–49 (11th Cir. 2023) (rejecting recoupment in predicting Georgia law), *and* St. Paul Fire & Marine Ins. Co. v. Bodell Constr. Co, 538 P.3d 1049, 1053 (Haw. 2023) ("An insurer may not seek reimbursement from an insured for defending claims when an insurance policy contains no express provision for reimbursement.").

21. 482 P.3d 683 (Nev. 2021).

22. *Id.* at 685–86.

23. *Id.* at 686.

24. *Id.*

25. *Id.*

26. Nautilus Ins. Co. v. Access Med., LLC, 780 F. App'x 457, 459 (9th Cir. 2019).

27. *Nautilus*, 482 P.3d at 687.

28. *Id.* (quoting Leasepartners Corp. v. Robert L. Brooks Tr., 942 P.2d 182, 187 (Nev. 1997)).

29. *Id.* at 687–88.

30. *Id.* at 688.

31. *Id.* (internal quotation marks omitted) (quoting Certified Fire Prot. Inc. v. Precision Constr., 283 P.3d 250, 257 (Nev. 2012)).

32. *Id.*

33. *Id.*

34. *Id.* (citing Mark P. Gergen, *Restitution as a Bridge over Troubled Contractual Waters*, 71 Fordham L. Rev. 709, 718–19 (2002)).

35. *Id.* at 689 (citing Century Sur. Co. v. Andrew, 432 P.3d 180, 182 (Nev. 2018)).

36. *Id.*

37. Restatement (Third) of Restitution and Unjust Enrichment § 35 (Am. L. Inst. 2011).

38. *Nautilus*, 482 P.3d at 689.

39. *Id.*

40. *Id.* (quoting Restatement (Third) of Restitution and Unjust Enrichment § 35 (Am. L. Inst. 2011)).

41. *Id.*

42. *Id.*

43. *Id.* at 690 (citation omitted).

44. *Id.* (quoting Gen. Agents Ins. Co. of Am., Inc. v. Midwest Sporting Goods Co., 828 N.E.2d 1092, 1102 (Ill. 2005); then citing Am. & Foreign Ins. Co. v. Jerry's Sport Ctr., Inc., 2 A.3d 526, 544 (Pa. 2010)).

45. *Id.*

46. *Id.* (quoting the Nautilus policy).

47. *Id.* (citing Restatement (Third) of Restitution and Unjust Enrichment § 35 cmt. a (Am. L. Inst. 2011)).

48. *Id.* (quoting *Jerry's Sport Ctr.*, 2 A.3d at 543–44).

49. *Id.* at 691 (quoting United Nat'l Ins. Co. v. Frontier Ins. Co., 99 P.3d 1153, 1158 (Nev. 2004)).

50. *Id.*

51. *Id.*

52. *Id.* (citations omitted) (footnote omitted).

53. *Id.*

54. *Id.* at 691–92.

55. *Id.* at 692.

56. Nos. 23-1167/1195, 2024 WL 1511983 (6th Cir. Apr. 8, 2024).

57. *Id.* at *4.

58. *Id.* at *1 (internal quotation marks omitted).

59. *Id.*

60. *Id.*

61. *Id.* at *2.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at *4.

67. *Id.*

68. *Id.*

69. *Id.* (citing NCMIC Ins. Co. v. Dailey, No. 267801, 2006 WL 2035597, at *5 n.5, *6 (Mich. Ct. App. July 20, 2006)).

70. 666 F. App'x 456, 468 (6th Cir. 2016).

71. *Id.* at 459.

72. *Id.* at 468.

73. *Id.* (citations omitted).

74. *See Stout*, 2024 WL 1511983, at *4.

75. *Id.*

76. *Id.* at *5.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* (first citing Cont'l Cas. Co. v. Indian Head Indus., Inc., 666 F. App'x 456, 468 (6th Cir. 2016); then citing DeCaire v. Bishop's Est., 47 N.W.2d 601, 604 (Mich. 1951)).

81. *Id.* (quoting Combs v. Int'l Ins. Co., 354 F.3d 568, 577 (6th Cir. 2004)).

82. *Id.*

83. *See* Nautilus Ins. Co. v. Access Med., LLC, 482 P.3d 683, 685–86 (Nev. 2021): *Stout*, 2024 WL 1511983, at *4. In *Stout*, of course, Great American owed no duty to defend only after the ESOP filed its second amended complaint and, in doing so, dropped its potentially covered common law fraud and negligent misrepresentation claims. *Stout*, 2024 WL 1511983, at *2. Interestingly, in Michigan, an insurer may not need to specifically reserve its right to seek reimbursement of its defense costs so long as it otherwise clearly informs the insured that it intends to seek reimbursement. *See* NCMIC Ins. Co. v. Dailey, No. 267801, 2006 WL 2035597, at *5 (Mich. Ct. App. July 20, 2006).

84. *See Stout*, 2024 WL 1511983, at *4.

85. *See* Cont'l Cas. Co. v. Winder Lab'ys, LLC, 73 F.4th 934, 948–49 (11th Cir. 2023); Westchester Fire Ins. Co. v. Wallerich, 563 F.3d 707, 715 (8th Cir. 2009); Gen. Star Indem. Co. v. Driven Sports, Inc., 80 F. Supp. 3d 442, 461 n.14 (E.D.N.Y. 2015).

86. 73 F.4th 934 (11th Cir. 2023).

87. *Id.* at 938 (internal quotation marks omitted).

88. *Id.* (internal quotation marks omitted).

89. *Id.*

90. *Id.* at 939 (footnote omitted) (internal quotation marks omitted).

91. *Id.*

92. *Id.* n.5.

93. *Id.* at 939.

94. *Id.*

95. *Id.* at 940.

96. *Id.*

97. *Id.* at 944.

98. *Id.* at 944–45 (citation omitted) (footnote omitted).

99. *Id.* at 945.

100. *Id.*

101. *Id.*

102. *Id.* (citing Ga. Interlocal Risk Mgmt. Agency v. City of Sandy Springs, 788 S.E.2d 74, 79 (Ga. Ct. App. 2016) ("The issue of whether insurers are entitled to recoup defense costs where there is no contractual provision creating such a right is an issue of first impression in Georgia courts, but we need not reach that issue here.")).

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 946 (quoting Glisson v. Glob. Sec. Servs., LLC, 653 S.E.2d 85, 87 (Ga. Ct. App. 2007)).

108. *Id.*

109. *Id.* (quoting *Glisson*, 653 S.E.2d at 87).

110. *Id.* at 946–47.

111. *Id.* at 947.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* (citing Bogard v. Inter-State Assur. Co., 589 S.E.2d 317, 319 (Ga. Ct. App. 2003) ("[T]he existence of the contract between the parties precludes [appellant's] unjust enrichment claim.")).

116. *Id.*

117. *Id.*

118. *See id.* at 948–49.

119. *Id.* at 949.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 950.

124. *Id.*

125. 538 P.3d 1049 (Haw. 2023).

126. *Id.* at 1050.

127. *Id.* at 1051.

128. *Id.*

129. *Id.* (citing Moss v. Am. Int'l Adjustment Co., 947 P.2d 371, 375 (Haw. 1997)).

130. *Id.* at 1052.

131. *Id.*

132. *Id.* (quoting Am. & Foreign Ins. Co. v. Jerry's Sport Ctr., Inc., 2 A.3d 526, 544 (Pa. 2010)).

133. *Id.* (quoting First Ins. Co. of Haw., Inc. v. State *ex rel.* Minami, 665 P.2d 648, 651 (Haw. 1983)).

134. *Id.*

135. *Id.*

136. *Id.* (quoting *Jerry's Sport Ctr.*, 2 A.3d at 542).

137. *Id.*

138. *Id.*

139. *Id.* (quoting *Jerry's Sport Ctr.*, 2 A.3d at 544).

140. *Id.* at 1053 (quoting Gen. Star Indem. Co. v. Driven Sports, Inc., 80 F. Supp. 3d 442, 463 (E.D.N.Y. 2015)).

141. *Id.*

142. *Id.*

143. *Id.* (citing *Jerry's Sport Ctr.*, 2 A.3d at 542).

144. *Id.*

145. *Id.*

146. *Id.* (citing Gen. Agents Ins. Co. of Am., Inc. v. Midwest Sporting Goods Co., 828 N.E.2d 1092, 1103 (Ill. 2005)).

147. *Id.* (citing *Gen. Agents*, 828 N.E.2d at 1103).

148. *Id.* (citing Nat'l Sur. Corp. v. Immunex Corp., 297 P.3d 688, 694 (Wash. 2013)).

149. *Id.* (quoting *Immunex*, 297 P.3d at 694).

150. *Id.*

151. *Id.*

152. *Id.* (citing Best Place, Inc. v. Penn Am. Ins. Co., 920 P.2d 334, 345–46 (Haw. 1996)).

153. 93 F.4th 543 (1st Cir. 2024).

154. *Id.* at 547.

155. *Id.* (internal quotation marks omitted).

156. *Id.*

157. *Id.*

158. *Id.* at 548.

159. Berkley Nat'l Ins. Co. v. Granite Telecomms. LLC, 617 F. Supp. 3d 77, 83 (D. Mass. 2022), *rev'd*, 93 F.4th 543 (1st Cir. 2024).

160. *Berkley Nat'l*, 93 F.4th at 557.

161. *Id.* at 558.

162. *Id.*

163. *Id.* at 559.

164. *Id.*

165. *Id.* (quoting the reservation of rights letter).

166. *Id.*

167. *Id.* at 559–60.

168. *See id.*

169. *See id.* at 560–61.

170. *See, e.g.*, Cont'l Cas. Co. v. Winder Lab'ys, LLC, 73 F.4th 934, 950 (11th Cir. 2023) (stating that insurers "can certainly contract for a right to reimbursement"); St. Paul Fire & Marine Ins. Co. v. Bodell Constr. Co., 538 P.3d 1049, 1051 (Haw. 2023) ("We hold that an insurer may not recover defense costs for defended claims *unless the insurance policy contains an express reimbursement provision*." (emphasis added)); Gen. Agents Ins. Co. of Am., Inc. v. Midwest Sporting Goods Co., 828 N.E.2d 1092, 1103 (Ill. 2005) ("Certainly, if an insurer wishes to retain its right to seek reimbursement of defense costs in the event it later is determined that the underlying claim is not covered by the policy, the insurer is free to include such a term in its insurance contract."); U.S. Fid. & Guar. Co. v. U.S. Sports Specialty Ass'n, 270 P.3d 464, 470 (Utah 2012) (footnote omitted) ("[T]he right to reimbursement must be specifically bargained for and set forth in writing under [a Utah statute] before it may be enforced.").

171. Restatement of the L. of Liab. Ins. § 21 cmt. a (Am. L. Inst. 2019).

172. 671 F. Supp. 3d 1194 (W.D. Wash. 2023).

173. *Id.* at 1198.

174. *Id.* at 1204.

175. *Id.*

176. *See id.* at 1201–03.

177. *See id.* at 1203.

178. *Id.* at 1204.

179. 297 P.3d 688 (Wash. 2013).

180. *Id.* at 693–94 (citations omitted).

181. *West Am.*, 671 F. Supp. 3d at 1204 (citing Mass. Bay Ins. Co. v. Walflor Indus., Inc., 383 F. Supp. 3d 1148, 1166–69 (W.D. Wash. 2019)).

182. *See Immunex*, 297 P.3d at 694.

183. *Id.*

184. *See West Am.*, 671 F. Supp. 3d at 1204 (discussing *Mass. Bay*, 383 F. Supp. 3d at 1167).

185. *Id.*

186. *Id.*

187. *See, e.g.*, Att'ys Liab. Prot. Soc'y, Inc. v. Ingaldson Fitzgerald, P.C., 370 P.3d 1101, 1111 (Alaska 2016) ("When an insurer has a duty to defend, Alaska law prohibits enforcement of a policy provision entitling that insurer to reimbursement of fees and costs incurred during the defense of claims under a reservation of rights."), *abrogated on other grounds by Buntin v. Schlumberger Tech. Corp.*, 487 P.3d 595 (Alaska 2021).

188. *See, e.g.*, Scottsdale Ins. Co. v. MV Transp., 115 P.3d 460, 471 (Cal. 2005); Nautilus Ins. Co. v. Access Med., LLC, 482 P.3d 683, 686, 691 (Nev. 2021).

189. RESTATEMENT OF THE L. OF LIAB. INS. § 21 reps. note (AM. L. INST. 2019).

190. *Scottsdale*, 115 P.3d at 470 (footnote omitted).

191. *Nautilus*, 482 P.3d at 690.

192. *See, e.g.*, Gen. Agents Ins. Co. of Am., Inc. v. Midwest Sporting Goods Co., 828 N.E.2d 1092, 1102 (Ill. 2005) ("[W]e cannot condone an arrangement where an insurer can unilaterally modify its contract, through a reservation of rights, to allow for reimbursement of defense costs in the event a court later finds that the insurer owes no duty to defend."); Shoshone First Bank v. Pac. Emps. Ins. Co., 2 P.3d 510, 516 (Wyo. 2000) ("In light of the failure of the policy language to provide for allocation, we will not permit the contract to be amended or altered by a reservation of rights letter.").

193. *Nautilus*, 482 P.3d at 690.

194. *Id.*

195. *See, e.g.*, St. Paul Fire & Marine Ins. Co. v. Bodell Constr. Co., 538 P.3d 1049, 1051 (Haw. 2023) (stating that "reimbursement erodes the duty to defend"); Am. & Foreign Ins. Co. v. Jerry's Sport Ctr., Inc., 2 A.3d 526, 544 (Pa. 2010) ("[P]ermitting reimbursement for costs the insurer spent exercising its right and duty to defend . . . prior to a court's determination of coverage would . . . amount to a retroactive erosion of the broad duty to defend. . . .").

196. *See* Waller v. Truck Ins. Exch., 900 P.2d 619, 628 (Cal. 1995) ("[T]he duty to defend, although broad, is not unlimited; it is measured by the nature and kinds of risks covered by the policy.").

197. Robert H. Jerry, II & Douglas R. Richmond, Understanding Insurance Law 692 (6th ed. 2018).

198. Ins. Servs. Off., Inc., Commercial General Liability Coverage Form (CG 00 01 04 13), at 1 (2012) [hereinafter ISO CGL Policy].

199. *Nautilus*, 482 P.3d at 691.

200. Mesa Labs., Inc. v. Fed. Ins. Co., 994 F.3d 865, 868 (7th Cir. 2021) (applying Illinois law); Teufel v. Am. Fam. Mut. Ins. Co., 419 P.3d 546, 549 (Ariz. 2018); Carter v. Pulte Home Corp., 266 Cal. Rptr. 3d 447, 455 (Ct. App. 2020); Mount Vernon Fire Ins. Co. v. Visionaid, Inc., 76 N.E.3d 204, 210 (Mass. 2017); Reins. Ass'n of Minn. v. Timmer, 641 N.W.2d 302, 307 (Minn. Ct. App. 2002); Murray-Kaplan v. NEC Ins., Inc., 617 S.W.3d 485, 493 (Mo. Ct. App. 2021); Sammy v. First Am. Title Ins. Co., 168 N.Y.S.3d 519, 524 (App. Div. 2022); Tibert v. Nodak Mut. Ins. Co., 816 N.W.2d 31, 42 (N.D. 2012); Sharonville v. Am. Emps. Ins. Co., 846 N.E.2d 833, 837 (Ohio 2006); Rogowski v. Safeco Ins. Co. of Or., 473 P.3d 111, 114 (Or. Ct. App. 2020); Kramer v. Nationwide Prop. & Cas. Ins. Co., 271 A.3d 431, 435 (Pa. Super. Ct. 2021); Zurich Am. Ins. Co. v. Nokia, Inc., 268 S.W.3d 487, 491 (Tex. 2008); Anderson v. Kayser Ford, Inc., 925 N.W.2d 547, 554 (Wis. Ct. App. 2019).

201. 939 P.2d 766 (Cal. 1997).

202. *Id.* at 775 (footnote omitted) (citations omitted).

203. *Id.* at 776.

204. *See id.* ("Under the policy, the insurer does not have a duty to defend the insured as to the claims that are not even potentially covered. With regard to defense costs for these claims, the insurer has not been paid premiums by the insured. It did not bargain to bear these costs. To attempt to shift them would not upset the arrangement.").

205. *See, e.g.*, ISO CGL Policy, *supra* note 198, at 1.

206. Stempel, *supra* note 4, at 67. This argument is far from ironclad. "It is unrealistic to expect liability insurance policies to explicitly discuss every possible situation that could occur, and all issues relating to the rights and obligations of the parties where the policy coverage is inapplicable." Amici Curiae Brief of Complex Ins. Claims Litig. Ass'n & Am. Prop. Cas. Ins. Ass'n at 8, Nautilus Ins. Co. v. Access Med., LLC, 482 P.3d 683 (Nev. 2021) (No. 79130), 2019 WL 6841106, at *8. Moreover, given that a standard liability insurance policy states that the insurer has no duty to defend any "suit" seeking damages for bodily injury or property damage to which the policy does not apply, it surely follows that the insurer can seek recoupment in connection with the lesser included category of "claims."

207. ISO CGL Policy, *supra* note 198, at 8.

208. *See* Stempel, *supra* note 4, at 90–92. Of course, given the entire-suit rule, an insurer must pay all expenses in a suit that it agrees to defend absent an allocation provision in its policy like those found in directors' and officers' liability insurance policies. If the insurer did not do so, it could not effectively defend the lawsuit pending a coverage determination. Plus, refusing to fully fund the insured's defense before coverage was finally determined would expose the insurer to breach of contract and bad faith claims. So, while the argument against recoupment in mixed actions based on the supplementary payments provision is colorable, there is another side to the story. Furthermore, in a case where the insurer never owed a defense, the supplementary payments argument is especially weak. *See* Nautilus Ins. Co. v. Access Med., LLC, 482 P.3d 683, 690 (Nev. 2021).

209. 671 F. Supp. 3d 1194, 1204 (W.D. Wash. 2023).

210. Cont'l Cas. Co. v. Winder Lab'ys, LLC, 73 F.4th 934, 948 (11th Cir. 2023).

Author

Douglas R Richmond

Doug Richmond is a Senior Vice President with the Lockton Companies LLC, where he consults with Lockton's law firm clients on professional responsibility and liability issues. Before...