Reimbursement 25 Years Post-*Buss v Superior Court*

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Robert D. Allen
The Allen Law Group
Dallas, Texas
bob.allen@theallenlaw.com

Christopher R. Mosley
Foley Hoag LLP
Denver, Colorado
cmosley@foleyhoag.com

Mary Borja
Wiley Rein LLP
Washington, DC
MBorja@wiley.law

Alan Van Etten
Deeley King Pang & Van Etten
Honolulu, Hawaii
ave@dkpvlaw.com

I. GIVE AND TAKE: ACTIONS FOR REIMBURSEMENT

The give-and-take issue addressed in this paper is the situation where the insurer pays defense costs and/or a settlement, but then later wants its money back. When the insurer defends under a reservation of rights, it often expressly reserves the right to seek reimbursement of defense costs if they can later be shown to relate to non-covered claims. Similarly, if a settlement is paid in full but then can be allocated, in whole or in part, to non-covered claims, the insurer might seek reimbursement.

Insurers have sought reimbursement under varying legal theories, including: (a) unjust enrichment; (b) restitution; (c) quasi-contract; (d) *quantum meruit*, and (e) implied-in-fact contract. Policyholders have argued that if there is no right to reimbursement in the policy, to add such a provision after the fact would provide the insurer an additional benefit that was not part of the original bargain. Policyholders have also argued that the potential for insurance coverage drives up the settlement value of a case, which should not be borne by the policyholder if there is no coverage.

Courts across the country have reached opposite conclusions on these issues. An examination of the rulings of state Supreme and appellate courts (excluding federal court predictions of state law on the issue) reveals that the states are nearly evenly split between those states allowing reimbursement and those states disallowing it.

Federal courts have predicted state law (or stated their view of the law in clear comment) that slightly favors disallowing reimbursement.

A. States that Allow Reimbursement

A close review of state Supreme Court or appellate court decisions yields at least six states that allow reimbursement, based either on a clear on-point ruling, or significant statement of the law.

1. California

Under California law, an insurance company has a right to be reimbursed amounts it pays in indemnity, defense, or otherwise, if such amounts are proven to be allocable to claims that are not potentially covered by the policy. *Buss v. Superior Court*, 16 Cal. 4th 35 (1997). An insurer is not required to file a declaratory relief action and obtain a determination of coverage prior to paying amounts on the policyholder's behalf. California courts recognize that would be impractical. *See Blue Ridge Ins. Co. v. Jacobsen*, 25 Cal. 4th 489, 505 (2001); *Scottsdale Ins. Co. v. MV Transportation*, 36 Cal. 4th 643, 661 (2005); *Montrose Chemical Corp. v. Superior Court*, 6 Cal. 4th 287, 305 (1993) (declaratory relief action can be stayed so as to not prejudice policyholder's defense of underlying claim).

The right to reimbursement of amounts paid on an insured's behalf does not have to be expressly provided in the insurance policy. *Buss,* 16 Cal. 4th at 51, fn. 13; *Blue Ridge,* 25 Cal. 4th at 504. To preserve its rights, the insurer may unilaterally reserve its rights, regardless of whether the policyholder explicitly agrees with this reservation or not. *See, e.g., Buss,* 16 Cal. 4th at 42, 61, fn. 27. However, it is not enough to generally reserve rights. *See, e.g., Golden Eagle Ins. Co. v. Foremost Ins. Co.*, 20 Cal. App. 4th 1372, 1392-1393 (1993) (insurer defended without reserving rights and settled using policyholder's money without policyholder's consent). The written communication to the policyholder must apprise the policyholder of the fact that the insurer reserves the right to seek reimbursement of amounts paid on the policyholder's behalf. *See, e.g., Scottsdale,* 36 Cal. 4th at 655; *Blue Ridge,* 25 Cal. 4th at 503, *Buss,* 16 Cal. 4th at 42; *Golden Eagle Ins. Co. v. Cen-Fed, Ltd. ("Cen-Fed"),* 148 Cal. App. 4th 976, 982, fn. 4 (2007) (it was not clear to the court whether Golden Eagle reserved its right to seek reimbursement of defense costs and expenses, an issue for the trial court on remand).

In the indemnity context, an insurer can obtain reimbursement from its policyholder of amounts paid to settle on behalf of its policyholder. *See, e.g., Johannsen v. Calif. State Auto. Assoc.*, 15 Cal. 3d 9, 19 (1975). This is because the duty to indemnify is narrower than the duty to defend and only exists if there is actual coverage for the claim. *See, e.g., Johannsen,* 15 Cal. 3d at 12. This right also arises out of the obligation imposed on insurers to settle claims for a reasonable amount within policy limits if given the opportunity to do so, if the claim is covered by the policy. *Id.*, at 15-16. The right to seek reimbursement of indemnity amounts exists regardless of whether the policyholder objects to the settlement, if the claims are later found to not be covered by the policy. *Blue Ridge,* 25 Cal. 4th 489. This result is appropriate, explained the court, in order to not have the insurer placed in a "Catch 22" — at risk if it refuses to pay the settlement and forced to indemnify non-covered claims if it agrees to pay. *Id.* at 502.

2. Colorado

The Colorado Supreme Court explained in *Hecla Min. Co., v. New Hampshire Ins. Co*., 811 P.2d 1083, 1089 (Colo. 1991) that "[t]he appropriate course of action for an insurer who believes that it is under no obligation to defend, is to provide a defense to the policyholder under a reservation of its rights [and] seek reimbursement should the facts at trial prove that the incident resulting in liability was not covered by the policy, or to file a declaratory judgment action after the underlying case has been adjudicated."

The Colorado Supreme Court provided clearer guidance on an insurer's right to recoupment in *Cotter Corp. v. American Empire Surplus Lines Ins. Co.*, 90 P.3d 814, 828 (Colo. 2004). There, the Supreme Court held an insurer may seek recoupment if (1) it provides a defense to an insured under a reservation of rights; and (2) the underlying claim ultimately is determined not to be covered by the insurers policy. By contrast, an insurer may not seek recoupment where it breaches its duty to defend even if the claim ultimately is determined not to be covered.

Most recently, the 10th Circuit, applying Colorado law, ruled that an insurer can recover defense costs. In *Valley Forge Insurance Company v. Health Care Management Partners, Ltd.*, 616 F.3d 1086 (10th Cir. 2010), the insurers agreed to defend under a general reservation of rights, and the policyholder did not object. During the defense of the underlying case, the insurers filed a declaratory judgment action to deny their duty to defend and recoup defense costs. While noting that the right to recoup defense costs was not a provision of the insurance policy, the 10th Circuit, nevertheless, found that Colorado state law allowed recoupment. As the court noted, "whether the Colorado courts situate the rule in equity, contract, policy, rule of court, or someplace else – whatever doctrinal pigeonhole best fits – one thing is clear: Colorado permits insurers to recoup defense costs in the circumstances before us."

See also Certain Underwriters at Lloyd's v. Health Care Management Partners, Ltd., No. 05-CV-00373-RPM, 2006 WL 2050962 (D. Colo. July 20, 2006) (allowed reimbursement of fees where insurer had properly reserved right to seek reimbursement).

3. Connecticut

The Connecticut Supreme Court held in *Security Ins. Co. of Hartford v. Lumbermens Mut. Cas. Co.*, 826 A.2d 107, 124 (Conn. 2003) that "[w]here the insurer defends the policyholder against an action that includes claims not even potentially covered by the insurance policy, a court will order reimbursement for the cost of defending the non-covered claims in order to prevent the policyholder from receiving a windfall."

4. Florida

The Florida Supreme Court has not ruled on the issue. Several appellate courts, however, have allowed reimbursement. *See Colony Ins. Co. v. G & E Tires & Service, Inc.*, 777 So. 2d 1034, 1038-39 (Fla. Dist. Ct. App. 2000) (insurer entitled to reimbursement of defense costs allocable to non-covered claims where the insurer had "timely and expressly reserved the right to seek reimbursement of the costs"); *Jim Black & Assoc. Inc. v. Transcontinental Ins. Co.*, 932 So. 2d 516 (Fla. Dist. Ct. App. 2006) (insurer was entitled to reimbursement of defense fees and costs where it reserved the right). Regarding settlement costs, a federal court held that an insurer cannot recover them until coverage is resolved. *Steadfast Ins. Co. v. Sheridan Children's Healthcare Servs. Inc.,* 34 F.Supp.2d 1364, 1366-67 (S.D. Fla. 1998).

5. Montana

The Montana Supreme Court held in *Horace Mann Insurance Company v. Hanke* that the insurer could be reimbursed for indemnity costs for uncovered claims, as long as the insurer properly reserves its right to do so. 312 P.3d 429 (Mont. 2013). In *Horace Mann*, the policyholder allegedly converted the personal property of an acquaintance who had stopped paying the policyholder storage fees. The acquaintance sued the policyholder for theft, conversion and negligence, and sought compensatory and punitive damages. Horace

Mann agreed to defend the policyholder under a reservation of rights, and filed a declaratory judgment action against the policyholder seeking a declaration that it had no duty to defend or indemnify the policyholder for the lawsuit. *Horace Mann*, 312 P.3d at 353-54.

While the coverage action was pending, the underlying case settled, with Horace Mann agreeing to pay $20,000 and the policyholder agreeing to pay $34,000. However, when the policyholder was unable to fund his portion of the settlement, Horace Mann agreed to loan the policyholder $34,000, subject to recoupment in the declaratory judgment action. The trial court held that the claims against the policyholder were not covered, and that Horace Mann had properly reserved its rights to recover the $34,000 in indemnity. However, the trial court denied Horace Mann's request for recoupment of defense costs, holding that Horace Mann had not properly reserved its rights on that issue. The Montana Supreme Court affirmed the district court's opinion, concluding that Horace Mann had expressly reserved its right to recoupment on indemnity, following the procedures set forth by the court in *Travelers Casualty & Surety Company v. Ribi Immunochem Research, Inc.*, 108 P.3d 460 (Mont. 2005).

6. Nevada

In *Nautilus Ins. CO. v. Access Medical*, 482 P.3d 683 (Nev. 2021), the Ninth Circuit Court of Appeals certified the following question to Nevada Supreme 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?
>
> Here, the Nevada Supreme Court concluded that the answer is yes, holding:
>
> 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. This rule gives effect to the terms of the parties' bargain. It applies to an insurance policy as it would to any other contract.

Id. at 685-86.

Nautilus v. Access Medical involved coverage for a business dispute submitted under Coverage B. Nautilus initially declined to defend, but eventually decided to defend the suit while reserving its rights to disclaim coverage, withdraw from defense, and obtain a reimbursement of defense fees if a court determined that no potential for coverage existed for the claims to which the insured Access Medical Respondents did not object. Accordingly, Nautilus provided a defense to Access Medical in the business dispute suit and simultaneously, it sought a declaratory judgment in a Nevada federal district court, stating that it had no duty to defend Access Medical. *Id.* at 686.

The Nevada Supreme Court stated its basic premise that: "[a] *party that performs a disputed obligation under protest, and does not in fact have a duty to perform, is entitled to reimbursement." Id.* at 688. Turning to the merits Nautilus's unjust enrichment claim, the Nevada Supreme Court noted that "[u]njust enrichment has three elements: 'the 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.'" *Id.* at 688 *citing* *Cert. Fire Prot. Inc. v. Precision Constr.*, 128 Nev. 371, 381, 283 P.3d 250, 257 (2012) (internal quotation marks omitted).

The Nevada Supreme court noted that "[w]hen the insurer furnishes a defense, it is clear that the insurer has conferred a benefit on the policyholder, and that the policyholder appreciates it. The issue is whether equity requires the policyholder to pay." *Id.* In this regard, the Nevada Supreme Court chose not to cite to the Restatement of the Law of Liability Insurance; but rather cited to the Restatement (Third) of Restitution and Unjust Enrichment, which provides that:

> 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.

Restatement (Third) of Restitution & Unjust Enrichment (hereinafter Restatement (Third)), § 35 (2011).

Citing to an Angela Elbert law review article and with approval to ***Scottsdale Ins. Co. v. MV Transp.***, 115 P.3d 460, 468 (Cal. 2005) and *Buss v. Superior Court*, 939 P.2d 766, 778 (Cal. 1997), the Nevada Supreme Court concluded:

> 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. Under generally applicable principles of unjust enrichment and restitution, the insurer has conferred a benefit on the policyholder; the policyholder appreciated the benefit; and, because it is reasonable for the insurer to accede to the policyholder's demand, it is equitable to require the policyholder to pay. 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.

Id. at 691-92.

7. New Jersey

New Jersey generally permits reimbursement. *See Hebela v. Healthcare Ins. Co.*, 851 A.2d 75, 86 (N.J. App. Div. 2004) (applying equitable principle of "unjust enrichment," court allowed recoupment of defense costs); *SL Indus., Inc. v. America Motorists Ins. Co.*, 607 A.2d 1266, 1280 (N.J. 1992) (insurer can seek reimbursement if it can carry the burden to show defense costs that are allocable to non-covered claims). However, a New York state appellate court, applying New Jersey law, held that the right of recoupment may be waived by the terms of the policy. *National Union Fire Ins. Co. v. Turner Constr. Co.*, 986 N.Y.S.2d 74 (N.Y. App. Div. 2014). In *Turner Construction*, the policy contained an endorsement stating that "the insurance carrier agrees not to take action or recourse against any insured for loss paid or expenses incurred because of any claims made against this policy." The court held that, despite the fact that the construction claims were not covered, National Union had no right to seek recoupment of defense costs that it had incurred on this matter.

B. States that Disallow Reimbursement

1. Alabama

Alabama courts have not ruled on the defense cost issue. But the Alabama Supreme Court refused to recognize an insurer's right to reimbursement of an uncovered indemnity payment, absent unusual circumstances. *See Mt. Airy Ins. Co. v. The Doe Law Firm*, 668 So.2d 534 (Ala. 1995) (holding that an insurer's payment of a malpractice claim against its insured was voluntary and, therefore, the insurer was not entitled to reimbursement where it paid a settlement to an underlying plaintiff in a legal malpractice case and filed a declaratory judgment action seeking a determination of coverage and the right to reimbursement).

2. Arkansas

The Arkansas Supreme Court ruled that an insurer cannot seek reimbursement of defense costs based upon a reservation of rights letter. *See Medical Liability Mutual Ins. Co. v. Alan Curtis Enterprises, Inc*., 373 Ark. 525 (2008). This ruling overrides the prior federal court predictive ruling in *Nobel Insurance Co. v. Austin Powder Co.*, 256 F. Supp. 2d 937, 940 (W.D. Ark. 2003) ("an insurer who defends a claim for which coverage did not exist is entitled to reimbursement [of] costs for both the settlement amount and litigation expenses only if the insurer: 1) timely and explicitly reserved its right to recoup the costs; and 2) provided specific and adequate notice of the possibility of reimbursement").

3. Hawaii

In *St. Paul Fire and Marine Ins. Co. v. Bodell*, 538 P.3d 1049 (Haw. 2023), the Supreme Court of Hawaii addressed a certified question from the United States District Court for the District of Hawaii, which asked:

> Under Hawaii 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?

Id. at 1050.

The Court responded in the negative and 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." *Id.* at 1051. The Court provided three bases for reaching its decision.

First, the Court stated that the terms of the policy govern, and noted that both Hawaii caselaw and statutory law call for interpreting insurance policies in the policyholder's favor. Thus, from a contract interpretation perspective, the Court bluntly concluded that "[i]f an insurance contract has no express right to reimbursement, there's no reimbursement." *Id.* at 1052.

Second, the Court stated that permitting reimbursement would erode the duty to defend. Since the duty to defend must be determined at the time a claim is made, the Court held that "[i]f insurers recover for defending uncovered claims, our law flips: the duty defend may be determined *after* the insurer tenders a defense[,]" which would narrow the broad duty to defend and "dilute an insurer's good faith duty to take on a defense" or worse, "bring on bad faith." *Id*. (emphasis in original).

Finally, the Court explicitly rejected the insurer's argument that defending uncovered claims unjustly enriches policyholders. The Court reasoned that insurers benefit from their duty to defend by retaining premiums, directing litigation, and making decisions on the case. Thus, the Court held that an insurer defending its insured protects itself as much as it protects the insured. The Court also noted that reimbursement may actually unjustly enrich the insurer, as it would be insulated from bad faith by defending an insured, but then it could later get the defense fees back, meaning the insured would be in the same position as if it had no insurance at all.

For these reasons, the Court held that "an insurer may not seek reimbursement from an insured for defending claims when an insurance policy contains no express provision for reimbursement." *Id.* at 1053.

4. Illinois

In *General Agents Insurance Co. of America, Inc. v. Midwest Sporting Goods Co.*, 828 N.E.2d 1092 (Ill. 2005), the Supreme Court of Illinois clearly held that an insurer has no right of reimbursement for defense costs allocable to non-covered causes of action, absent an express policy provision stating otherwise. This is the major ruling disallowing reimbursement, and a strong counterpoint to cases allowing reimbursement. Midwest Sporting Goods was sued for creating a "public nuisance" by selling guns to inappropriate purchasers. The insurer agreed to defend in a mixed action, reserving rights to recoupment of defense costs. Midwest did not reply to the ROR letter, but accepted the defense. The insurer then filed a DJ action on coverage. The trial and appellate courts found no duty to defend and ruled that the insurer could seek reimbursement, following *Buss*.

The Illinois Supreme Court reversed. Notably, the Court also rejected a prior federal court prediction of Illinois law on this point. In its analysis, the Court was persuaded by the point that "[i]f an insurance carrier believes that no coverage exists, then it should deny its insured a defense at the beginning instead of defending and later attempting to recoup from its insured the costs of defending the underlying action." *Id*. at 1102 (citation omitted). The Court explained that the insurer should not be allowed to place the policyholder in the "Hobson's Choice" between suing to establish a defense or accepting a defense but under the threat of reimbursement later. "Furthermore, endorsing such conduct is tantamount to allowing the insurer to extract a unilateral amendment to the insurance contract." *Id*. The Court stated it was following the "minority" rule on this issue. Interestingly, its own ruling (which turned the tide in Pennsylvania) has nearly reversed the majority and minority, at least when viewed by state court rulings.

5. Pennsylvania

Pennsylvania generally disallows reimbursement, as the Pennsylvania Supreme Court affirmed in *American and Foreign Ins. Co. v. Jerry's Sports Center Inc.*, 2 A.3d 526, 529 (2010). The Court declined to accept the insurers' various arguments in favor of reimbursement – contractual, quasi-contractual, or equitable. The insured was one of several firearms wholesalers-distributors sued for negligent creation of a public nuisance. While there was some question as to whether the suit alleged bodily injury insured by the policy, the insurer provided a defense under a reservation of rights; after prevailing on declaratory judgment that it had no duty to defend or indemnify, it moved for reimbursement of defense costs.

The Court held that allowing the insurer to recoup defense costs absent a reimbursement provision in the policy would amount to a retroactive erosion of the duty to defend. Under basic rules of contract interpretation, because the policy contained no reimbursement provision, the insurer had no right to reimbursement under the policy and without that right, could not create a contract by virtue of a reservation of rights letter. Nor did the insurer have an equitable right to reimbursement, since the insurer's exercise of its right and duty to defend did not unjustly enrich the insured. Instead, it was the insurer who

benefited by exercising control over the defense of a potentially covered claim and thus insulating itself from bad faith liability.

However, a recent Third Circuit decision held that an insurer may recoup its defense costs if the insurance policy expressly provides for that right. *Camico Mut. Ins. Co. v. Heffler, Radetich & Saitta, LLP*, 2014 WL 5070473 (Oct. 10, 2014). In *Heffler*, the policyholder was insured under an errors & omissions policy with a $100,000 sublimit for claims for misuse, misappropriation, theft or embezzlement. The firm was sued after an employee was arrested for submitting and approving false claims while overseeing a class action settlement. The policy contained a provision stating that if the insurer paid any claims expenses or damages in excess of the applicable limits of liability, Heffler would reimburse the insurer for those amounts within thirty days. In the coverage action, Heffler disputed that the $100,000 sublimit applied. The district court held, and the appeals court affirmed, that the sublimit applied. The appeals court also affirmed the district court's holding that the policy language required Heffler to reimburse the insurer for the defense costs paid in excess of the sublimit, in an exception to the rule set forth in *Jerry's Sports Center*.

6. Texas

Reimbursement and the scope of an insurer's rights following payment of an uncovered claim has been addressed by the Texas Supreme Court in three opinions; first in *Texas Ass'n of Counties County Government Risk Management Pool v. Matagorda County*, 52 S.W.3d 128 (Tex. 2000) ("*Matagorda County*") and later in two opinions issued *in Excess Underwriters at Lloyd's v. Frank's Casing Crew & Rental Tools, Inc*. 2005 Tex. LEXIS 418 (Tex. May 27, 2005) & 246 S.W.3d 42 (Tex. 2008) ("*Frank's Casing*").

In *Matagorda County*, the Court addressed two main issues: first, because, the County did not expressly consent to reimbursement, was there an "implied consent" or an "implied-in-fact contract" for reimbursement; and second, did the circumstances of the case warrant imposing an equitable right to reimbursement under either a doctrine of "equitable subrogation" or quasi-contract theories of unjust enrichment or quantum meruit? The Court answered these questions in the negative, summing up its holding by stating that "when coverage is disputed and the insurer is presented with a reasonable settlement demand within policy limits, the insurer may fund the settlement and seek reimbursement only if it obtains the insured's clear and unequivocal consent to the settlement and the insurer's right to seek reimbursement."

In *Frank's Casing*, the Texas Supreme Court withdrew its original opinion and reversed course. Because Franks had only consented to the settlement and not to the insurer's right to seek reimbursement, the Court found that insurer had no right to reimbursement. While the Court recognized that the insurer is also in a difficult situation in such cases, it resolved that dilemma by determining that the risk of such coverage uncertainties is best placed on the insurer.

7. Washington

In *National Surety Corporation v. Immunex Corporation*, 297 P.3d 688 (Wash. 2013), the Washington Supreme Court held in a 5-4 decision that an insurer does not have a right of recoupment of defense costs, even if it is subsequently determined that the claims are not covered under its policy. The Court held that National Surety was obligated to pay for the cost of the defense from the date of tender until the date on which the trial court in the coverage action determined that National Surety had no duty to defend the policyholder. *Immunex*, 297 P.3d 887 – 88. In the *Immunex* case, National Surety had agreed to defend Immunex, subject to a reservation of rights, and agreed to reimburse Immunex for its past defense costs, subject to a right of recoupment. However, when the trial court held that the claims were not covered, National Surety had not actually reimbursed Immunex for any defense costs. The dissenting opinion held that Immunex was unjustly enriched by the majority's decision and questioned adopting a blanket rule as opposed to a review of the equities in each case. *Id*. at 898 – 99.

8. Wyoming

Wyoming disallows reimbursement. *See Shoshone First Bank v. Pacific Employers Ins. Co.*, 2 P.3d 510, 513-14 (Wyo. 2000) (unless an agreement to the contrary is found in the policy, the insurer is liable for all costs of defending the action and may not allocate any of those costs to the policyholder). As the court explained, "the insurer is not permitted to unilaterally modify and change policy coverage . . . . 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").

C. Federal Court Rulings Allowing Reimbursement

1. Alaska. *See Unionamerica Ins. Co., Ltd. v. General Star Indem. Co.*, 2005 WL 757386, at *7-8 (D. Alaska Mar. 7, 2005) (predicting the Alaska Supreme Court would allow reimbursement if the insurer expressly reserves its right to seek it).

2. Hawaii. *See Okada v. MGIC Indem. Corp.*, 823 F.2d 276 (9th Cir. 1986) (applying Hawaii law) (court found an insurer can seek reimbursement of defense costs allocable to non-covered claims if the insurer reserved its rights). However, see *Scottsdale Insurance Co. v. Sullivan Properties, Inc*. 2006 WL 505170, at *1 (D. Haw. 2006), (court predicted that, under Hawaii law, an insurer could seek reimbursement of defense costs only if it had no duty to defend the underlying action; the court did not reach the issue of whether the insurer could seek reimbursement for defense of non-covered claims if some claims were covered and triggered a complete duty to defend). *But see St. Paul Fire & Marine Ins. Co. v. Bodell Construction*, 538 P.3d 1049 (Hawaii 2023) (disallowing reimbursement).

3. Kentucky. *See Employers Reinsurance Corporation v. Mutual Ins. Co., Ltd.*, No. 3:05CV556-S, 2006 WL 2734437 (W.D. Ky., September 22, 2006) (court recognized that Sixth Circuit allows reimbursement where the parties have expressly agreed

through a reservation that the insurer has the right to reimbursement if coverage is later found not to exist). *See also Travelers Prop. & Cas. Co. of America v. Hillerich & Bradsby Co., Inc*., 598 F.3d 257, 265-66 (6th Cir. 2010) (insurer who settles a non-covered claim is entitled to reimbursement of settlement costs where the insurer has reserved rights and notified the policyholder of its intent to seek reimbursement of such costs).

4. Michigan. *See Budd v. Travelers Indem. Co.*, 820 F.2d 787 (6th Cir. 1987) (reimbursement is allowed where allocation between covered and non-covered claims can be established by the insurer). *See also Dow Chem. Corp v. Associated Indem. Corp.*, 1991 WL 568033 (E.D. Mich. Dec. 6, 1991); *See also, Great American Fidelity Insurance Co. v. Stout Risius Ross Inc. et al.*, Case Nos. 23- 1167/1195 (6th Cir., April 8, 2024) (unpublished) (no reimbursement allowed for defense costs incurred while underlying complaint alleged potentially covered claims for relief; reimbursement allowed for defense costs incurred after underlying complaint amended to dismissed all potentially covered claims).

5. New York. *See Gotham Ins. Co. v. GLNX, Inc*., 1993 WL 312243 (S.D.N.Y. Aug. 6, 1993) (applying New York law, the court allowed the insurer to pursue reimbursement against the policyholder for defense costs allocable to non-covered claims).

6. Tennessee. There is no reported Tennessee authority on point. However, in *Cincinnati Ins. Co. v. Grand Pointe, LLC*, 2007 WL 2301179 (E.D. Tenn. 2007), a federal district court, predicting Tennessee law, held that an insurer was entitled to recoup defense costs when it defended the insured subject to a reservation of the right of recoupment, and when it was later determined that no duty to defend existed.

D. Federal Court Rulings Disallowing Reimbursement

1. Georgia. In *Continental Cas. Co. v. Winder Laboratories, LLC*, 73 F.4th 934 (11th Cir. 2023), the 11th Circuit held an insurer cannot seek reimbursement of defense costs based on a reservation of rights letter absent a contractual provision authorizing reimbursement.

2. Idaho. Federal district courts, predicting Idaho law, disallow reimbursement, most recently in *Blue Cross of Idaho Health Service, Inc. v. Atlantic Mutual Ins. Co*., 734 F.Supp.2d 1107 (D. Idaho 2010). *See* also *St. Paul Fire & Marine Ins. Co. v. Aspen Realty*, No. CV 05-355-S-MHW, 2006 U.S. Dist. LEXIS 94061 (D. Idaho Dec. 27, 2006) (held that no insurer right of reimbursement existed absent a reservation of such a right in the policy).

3 Iowa. One federal district, predicting Iowa law, has held that insurers have no right to reimbursement of defense costs when was determined that an entire lawsuit is not covered. *See, e.g., Pekin Ins. Co. v. Tysa, Inc.*, No. 3:05-cv-00030-JEG, 2006 U.S. Dist. LEXIS 93525 (S.D. Iowa Dec. 27, 2006) (predicting that the Iowa Supreme Court would not allow reimbursement of defense costs, even when an insurer reserved its rights to

reimbursement). The court did not address whether an insurer can recoup that portion of defense costs attributable to uncovered claims where some claims are covered.

4. Kansas. Kansas law was applied recently by a Virginia federal court in *Houston Cas. Co. v. Sprint Nextel Corp*., Case No. 09-CV-1387, 2010 WL 4852649 (E.D. Va. 2010). The dispute arose out of an underlying securities action where a settlement was reached in the amount of $57.5 million. Sprint was insured under a number of D&O policies providing $100 million in coverage, including an excess policy issued by Houston Casualty providing $15 million in coverage. Houston Casualty agreed to contribute to the settlement, but reserved the right to deny coverage and seek reimbursement. Houston Casualty filed a reimbursement action after another insurer secured a decision declaring that it was not required to provide coverage for the underlying securities claim. The court held that Houston Casualty could not obtain reimbursement because there was no basis under the policy for an insurer to make a settlement advance and later seek its return.

5. Maryland. *See Perdue Farms, Inc. v. Travelers Cas. & Sur. Co. of Am.*, 448 F.3d 252, 258 (4th Cir. 2006) (disallowing reimbursement even though the insurer had agreed to defend subject to a reservation of its right to seek reimbursement for defense costs allocable to non-covered claims, the court found that, under Maryland law, a right of reimbursement for defense costs for non-covered claims would "serve only as a backdoor narrowing of the duty to defend, and would appreciably erode Maryland's long-held view that the duty to defend is broader than the duty to indemnify").

6. Massachusetts. *See Berkley Nat'l Ins. Co. v. Atlantic-Newport Realty LLC*, 93 F.4th 543 (1st Cir. 2023). In *Berkley v. Atlantic*, the First Circuit, applying Massachusetts law, reversed a District Court ruling allowing Berkley to seek reimbursement of both defense costs and a settlement payment from a party who qualified as an additional insured under one of its policies. The underlying case involved a weird foot injury caused by a sewer backup at a cafeteria, so Berkley possessed coverage defenses based on the pollution and fungi exclusions.

On the one hand, the reservation of rights letter stated that the defense was being provided under a "full" reservation of the right to disclaim coverage and it "reserve[ed] its rights to bring an action for declaratory relief to be relieved of any continuing obligation to provide a defense" and that "pending the receipt of such a determination, [Berkley would] provide a full defense … and pay all reasonable costs and fees associated with its defense." *Id.* at 1. On the other hand, the declaratory judgment action filed by Berkley sought a determination of no duty to defend and a count for restitution. *Id.* at 2.

Next, funded by Berkley with the involvement and the threatening encouragement of the additional insured, the foot injury case settled. Berkley then amended the declaratory judgment action to include a count for restitution of its settlement payment.

At issue in the declaratory judgment action was the impact of one of the early state supreme court cases on reimbursement, *Medical Malpractice Joint Underwriting Ass'n of*

Mass. v. Goldberg, 680 N.E.2d 1121 (Mass. 1997), which disallowed reimbursement of a settlement payment under facts indicating overreaching or at least unclean hands on the part of the insurer seeking reimbursement and in so doing announced a three-prong test for allowing reimbursement; to wit:

> Where an insurer defends under a reservation of rights to later disclaim coverage … it may later seek reimbursement for an amount paid to settle the underlying tort action only if the insured has agreed that the insurer may commit the [insurer's] own funds to a reasonable settlement with the right later to seek reimbursement from the insured, or if the insurer secures specific authority to reach a particular settlement which the insured agrees to pay. **The insurer may also notify the insured of a reasonable settlement offer and give the insured an opportunity to accept the offer or assume its own defense.**

Id. at 1129 (emphasis added).

On the one hand, Atlantic-Newport argued that reimbursement is only available if the insurer strictly and literally complies with the *Goldberg* test. On the other hand, Berkley asserted that strict compliance with the *Goldberg* test was not necessary because *Goldberg* was distinguishable due to its laudable conduct and the antagonistic conduct of Atlantic-Newport. Alternatively, Berkley contended that even if *Goldberg* applied, there was, for all practical purposes, constructive compliance with the third prong due to Atlantic-Newport's aggressive actions.

For example, there was no question that Atlantic-Newport knew of and vehemently wanted the weird foot injury case to settle (whereas in *Goldberg*, the insurer settled the case without informing the insured about it). Also, Atlantic-Newport, a sophisticated company, was in essence controlling its own defense, albeit funded by Berkley (whereas in *Goldberg*, the insurer controlled the defense all along).

At the end of the day, Atlantic-Newport's strict compliance argument carried the day. By listening to the oral argument, you get the impression that the author of the opinion, Chief Judge Barron, was hostile to the argument that *Goldberg* was not controlling and/or its test did not have to be complied with to its letter. Accordingly, since there was no correspondence in the record wherein Berkley notified Atlantic-Newport of the settlement offer and specifically gave Atlantic-Newport the opportunity to either accept the offer or assume its own defense, the court held that Berkley did not comply with the *Goldberg* test; so it did not possess the right to seek reimbursement of the settlement payment or the costs in defending Atlantic-Newport in the weird foot injury case. *Berkley v. Atlantic-Newport Realty*, __ F.4th ___; 2024 WL 723978 at **10, 13.

See also Dash v. Chicago Insurance Co., 2004 WL 1932760 (D. Mass. Aug. 3, 2004) (court declined to adopt the rule set forth in *Buss* where the insurer had defaulted on its duty to defend entirely and sought to avoid reimbursing its policyholder for defense costs allocable to non-covered defense costs). The district court further opined that it was appropriate for a federal court to carve out an exception to established precedent:

"Massachusetts courts have unambiguously adopted the broad rule that an insurer has a duty to defend an entire suit in which any claim is even potentially covered. There is no reason to assume that in establishing such a rule the courts failed to anticipate the possibility of 'mixed' cases or have otherwise not fully contemplated the consequences of this rule." *Id.* at *10. A state court has also ruled that there is no right to reimbursement where the insurer enters into a settlement agreement without notification to the policyholder. *Medical Malpractice Joint Underwriting Ass'n of Massachusetts v. Goldberg*, 680 N.E.2d 1121 (Mass. 1997).

6. Missouri. *Liberty Mut. Ins. Co. v. FAG Bearings Corp*., 153 F.3d 919 (8th Cir. 1998) (applying Missouri law) (finding that the insurer had no right to reimbursement for defense costs allocable to non-covered claims because the insurer had the duty to defend those claims until the time that it was determined the claims were excluded from coverage and the insurer's remedy at that time was that it was allowed to withdraw from the defense).

7. Nevada. *See Capitol Indem. Corp. v. Blazer*, 51 F. Supp. 2d 1080, 1090 (D. Nev. 1999) (an insurer may be reimbursed for costs incurred in defending against "claims not potentially covered under the insurance policy *only* if there was a clear understanding between the parties that [the insurer] reserved the right to reimbursement for the costs of the investigation and/or defense"). The apparent requirement of agreement by the policyholder effectively disallows reimbursement.

8. New Mexico. *See Resure, Inc. v. Chemical Distrib. Inc.*, 927 F. Supp. 190, 193 (M.D. La. 1996) (applying New Mexico law) (the court suggested that a right of reimbursement might not be available to the insurer if the policyholder objects to the insurer's reservation of rights).

9. Ohio. A split panel of the Sixth Circuit predicted that the Ohio Supreme Court would permit an insurer to recoup defense costs following a judicial determination that there was no duty to defend, if the insurer had defended under a reservation of rights that expressly included the right of reimbursement and the policyholder accepted the defense *without objection* to the reservation. *United Nat'l Ins. V. SST Fitness*, 309 F.3d 914 (6th Cir. 2002). In effect, this disallows reimbursement as a policyholder can readily reject the reservation.

10. Virginia. *See Medical Protective Co. v. McMillan*, 2002 WL 31990490 (W.D. Va. Dec. 16, 2002) (while the court held that an insurer may seek reimbursement when some claims in the underlying action are potentially covered and others are not, the court held that, even accepting *Buss*, there was no right to reimbursement with respect to potentially covered claims and no right to reimbursement if such right is not specifically articulated in the reservation of rights letter).

E. Unresolved

Many states have not addressed the issue directly, whether at the state or federal court level (apart from off-point dicta and vague hints that can be debated either way).

A Delaware lower court came close to the issue in *Nationwide Mut. Ins. Co. v. Flagg*, 789 A.2d 586, 596-97 (Del. Super. Ct. 2001), but expressly noted it lacked a factual and legal record to decide the issue of whether an insurer may seek reimbursement from the policyholder for defense fees and costs relating to claims later proven to fall outside coverage.

In Georgia, prior to *Continental Cas. Co. v. Winder Laboratories, LLC*, 73 F.4th 934 (11th Cir. 2023), the federal courts have reached contradictory holdings. *In Illinois Union Insurance Company v. NRI Construction, Inc.*, 846 F. Supp. 2d 1366, 1377 (N.D. Ga. 2012), the district court held, after reviewing cases on both sides of the issue, that Illinois Union had a right to recoupment of its defense expenses from the policyholder because Illinois Union's reservation of rights letter had (1) timely and explicitly reserved its right of recoupment; and (2) provided specific and adequate notice of the possibility of reimbursement. However, the court's decision did not refer to an earlier case, *Transportation Insurance Co. v. Freedom Electronics*, Inc. 264 F. Supp. 2d 1214, 1221 (N.D. Ga. 2003), in which the court reached the opposite conclusion, stating that "in the absence of a provision requiring reimbursement or case law instructing the Court otherwise, the Court is unwilling to require the [policyholder] Defendants to repay the costs already expended by Plaintiff."

In Minnesota, federal courts have gone opposite ways. *Compare Knapp v. Commonwealth Land Title Ins. Co., Inc.*, 932 F. Supp. 1169, 1171-72 (D. Minn. 1996) (where there is ultimately a determination of non-coverage, an insurer which has provided a defense pursuant to a reservation of rights may recoup defense costs if the right to recoup defense costs is sufficiently reserved), with *Employers Mutual Casualty Co. v. Industrial Rubber Prods., Inc.*, 2006 WL 453207 (D. Minn. Feb. 23, 2006) (absent an express provision in the insurance policy, an insurer was not entitled to reimbursement for defense costs allocable to non-covered claims) and *Westchester Fire Ins. Co. v. Wallerich*, 527 F. Supp. 2d 896 (D. Minn. 2007) (same).

In Wisconsin, an appeals court held that the insurer had a right to recoupment where the automobile policy had lapsed due to non-payment of premium, but the insurer was still obligated to pay a claim asserted against the policyholder for an accident that occurred after the policy had expired but before the insurer's notice to the state of the cancellation was effective. *Acuity v. Albert*, 819 N.W.2d 340 (Wis. Ct. App. 2012).

II. RESTATEMENT OF THE LAW OF LIABILITY INSURANCE

In Section 21, the Restatement of the Law of Liability Insurance addresses recoupment of defense costs.

> § 21. Insurer Recoupment of the Costs of Defense
>
> Unless otherwise stated in the insurance policy or otherwise agreed to by the insured, an insurer may not seek 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.

Even prior to its approval, the Discussion Draft of Section 21 was cited with approval in *Selective Ins. Co. of Am. v. Smiley Body Shop, Inc*., 260 F. Supp. 3d 1023, 1033 (S.D. Ind. 2017). While noting the absence of Indiana law on this issue, the court relied on several out of state decisions as well as Section 21's declaration that "[u]less otherwise stated in the insurance policy or otherwise agreed to by the insured, and insurer may not seek 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."

Citing Section 21, a federal district court in Georgia predicted in *Am. Fam. Ins. Co. v. Almassud*, 522 F. Supp. 3d 1263(N.D. Ga. 2021) that Georgia would not recognize a right of recoupment. *See also Continental Cas. Co. v. Winder Labs., LLC*, No. 2:19-CV-00016-RWS (N.D. Ga. Apr. 20, 2021).

A federal district court in Wisconsin observed in *Hayes v. Wisconsin & South Railroad*, 514 F.Supp.3d 1055 (E.D. Wis. 2021) that not only were courts conflicted on the issue of whether an insurer should be allowed to recoup defense costs if it was later found not to have a duty to defend but the ALI itself had taken contradictory positions, seemingly affirming a right to restitution as involving unjust enrichment in Section 35 of the Restatement of the Law of Restitution and Unjust Enrichment, while abjuring any such right in Section 27 of the RLLI.

While the *Hayes* court adopted to follow the RLLI's approach, A narrowly divided Nevada Supreme Court took an opposite view in *Nautilus Ins. Co.. Access Medical, LLC*, 482 P.3d 683 (Nev. 2021) declaring that a general liability insurer is entitled to recoup defense costs that it paid under protest in a case that it had no duty to defend. On a certified question from the Ninth Circuit, the majority declared that "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 policy accepted the defense from the insurer, then the insurer is entitled to that reimbursement. Under generally applicable principals of unjust enrichment and restitution, the insurer has conferred a benefit on the policyholder; the policyholder appreciated the benefit; because it is reasonable for the insurer to accept the policyholder's demand, it is equitable to require the policyholder to pay." The majority concluded that this holding was consistent with Restatement of

Restitution and found that, whereas the ALI's new insurance restatement had reached a different conclusion, it had done so for reasons that the court disagreed with. Three justices dissented, arguing that a court should not rely on equitable principles to imply contractual terms where an express agreement existed between the parties that lacked such terms, nor was it appropriate to permit Nautilus to create a remedy through a unilateral reservation of rights that are not set forth in the agreed terms of the policy itself.

A Delaware trial court, applying Tennessee law, ruled in *Catlin Specialty Ins. Co. v. CBL & Assocs. Props.*, 2018 WL 3805868 (Del. Super. Ct. Aug. 9, 2018) that an insurer was entitled to recover defense costs it advanced under a reservation of rights for a non-covered claim. The Superior Court declined to follow Section 19, declaring that "the Restatements are mere persuasive authority until adopted by a court; they never, by mere issuance, override controlling case law. And this Restatement itself acknowledges that '[s]ome courts follow the contrary rule.'"

NOTE ON UNJUST ENRICHMENT

There is a conflict regarding insurer recoupment between The Restatement of Liability Insurance § 21 and The Restatement (Third) of Restitution & Unjust Enrichment § 35. The Restatement of Restitution states the following with respect to the performance of a disputed obligation:

> [T]he risk of enhanced liability in coverage disputes may compel a performance by the insurer that is outside the scope of the insurance contract. If the insurer, by denying coverage, risks a potential liability greater than the amount initially in controversy--and if the insurer is obliged to take action before the coverage issue can be adjudicated--the effect of the applicable legal rules may be to subject the insurer to an extracontractual liability. ***Such a result distorts the parties' allocation of risks and creates the sort of unjust enrichment with which the present section is concerned*** . . . . If the insurer--having given adequate notice that it is proceeding under reservation of rights--eventually prevails in the underlying coverage dispute, it may recover that part of its outlay that exceeds its policy obligation by a claim in restitution within the rule of this section"

Restatement (Third) of Restitution & Unjust Enrichment § 35, cmt. c (emphasis added).

The reporters for the Restatement of Liability Insurance disagreed with this analysis, noting that "there are substantial reasons to conclude that recognition of such a claim [of restitution] by a liability insurer is inappropriate because of special considerations of insurance law." Restatement of Liability Insurance § 21, cmt. b. The comment goes on to list the following reasons:

- The issue of the right to recoup the costs of defending a noncovered legal action is a known uncertainty that the insurer can address in the liability insurance contract;
- a default no-recoupment rule better informs insurance regulators of the coverage that the insurer intends to provide under the policy form, facilitating informed administrative review of insurers' intent to seek recoupment, and, once the form permitting recoupment is approved, better informs insurance purchasers of the more limited defense coverage provided by the policy.
- There are important benefits accruing to an insurer that chooses to defend under a reservation of rights, such as maintaining control over the cost, quality, and direction of the defense, obtaining access to privileged defense-related materials, and participating in settlement discussions.

See id.

Another important reason against adopting the recoupment rule from the Restatement of Restitution, which reason has to do with unique characteristics of an insurance contract, is "the parties' allocation of risks" that are unique to the insurance context. Restatement (Third) of Restitution & Unjust Enrichment § 35, cmt. c. There is a good argument that the insurer has already allocated those risks and incorporated them into the premium charged for the policy.

As set forth in the Amicus Brief on behalf of the insured in *Bodell*:

> Of course, an insurer may argue that its insured is technically "enriched" by receiving an insurance benefit for which it did not pay premiums. But this argument fails because it ignores the fact that insurance is a business. An insurance company sets premiums according to its estimate of expenses, which include not only judgments and settlement payments, but also defense costs. Hawaii has not had the recoupment rule urged by the insurer here for at least 40 years. In determining the premiums to charge insureds such as Bodell, then, the insurer examined decades of data containing, *inter alia*, defense costs for these kinds of policies issued to similar businesses in the region, with more weight given to data coming from policies and businesses in Hawai'i. Thus, the insureds in Hawai'i, including Bodell, have indeed been paying for the litigation defense at issue here. It would be the insurer, not the insured, who would be unjustly enriched if it obtains the relief it seeks in this action.

Amicus Curiae Brief of United Policyholders in Support of Defendants-Appellees at 11, *St. Paul Fire and Marine Ins. Co. v. Bodell*, 538 P.3d 1049 (Haw. 2023).

III. PRACTICAL ASPECTS OF SEEKING RECOUPMENT

To the extent that an insurer has or may have the right to recoupment as a matter of law, can and how does the insurer, as a practical matter, preserve and enforce those rights?

As a preliminary consideration, the insurer may want to evaluate whether enforcing the right to recoupment will yield any recoupment. The insurer may wish to review financial statements, which may have been provided during underwriting, or which might be publicly available for public companies. The insurer may conduct an asset search, which might identify real property, vehicles, and boats. The asset search may also uncover whether prior liens exist on the assets. None of this is perfect information about collectability of a potential judgment for recoupment, but it can provide a place to start.

If the insurer concludes that there are or may be sufficient assets available to recoup defense costs, the next question is whether the insurer has adequately preserved a right to recoupment. That determination is straightforward where the right is set forth in the policy. In other instances, the insurer may be required to preserve the right to recoup by reserving that right in a reservation of rights letter when it undertakes the defense of the insured. Where the law is unsettled or at least does not preclude recoupment and the policy is silent, the insurer may unilaterally reserve the right to recoup amounts paid in defending and settling an underlying action if it later prevails in a coverage dispute with the insured. The insured may contest that reservation or even assert that the carrier acted in bad faith by setting forth that reservation. *See, e.g., Phillips & Assocs., P.C. v. Navigators Ins. Co*., 764 F.Supp.2d 1174, 1178 (D. Ariz. 2011) (finding in favor of insurer's right to recoup both defense costs and amounts paid to settle claim on behalf of insured).

In *Phillips*, the insurer and the law firm disputed whether the insurer was entitled to seek reimbursement for settlement amounts and defense costs it had paid should it prevail in the coverage dispute. Ruling on cross-motions for partial judgment on the pleadings, the court concluded that both Arizona and California recognize that the right to recoup is proper, absent bad faith and if the insurer gives notice of its reservation of rights to the insured. The court found that the insurer "provided the Insureds with express notice of its reservation [of the right to seek recoupment] both at the time it accepted the Insureds' defense and at settlement." *Id*. at 1176. Further, the court noted that such a reservation protected the insurer against the unjust enrichment of the insured and furthered public policy interests by providing for the settlement of cases – and therefore compensation to the injured party – where coverage may be uncertain.

The court rejected the law firm's arguments that the insurer lost the right to contest coverage when it settled the underlying action. The court cited *Blue Ridge Insurance Co. v. Jacobsen*, 22 P.3d 313, 321 (Cal. 2001), with approval and agreed that it would violate "basic notions of fairness" to force insurers to indemnify non-covered claims by allowing the settlement of a claim to waive insurers' coverage positions.

Courts have held that a reservation of rights, such as "[insurer] will provide a defense to [insured] for the claim by [claimant], subject to a complete reservation of rights, including the right to withdraw from the defense and/or to seek the reimbursement of defense costs paid by [insurer]" adequately protects the insurer's right to recoupment. *See, e.g., Columbia Cas. Co. v. Abdou*, No. 15cv80-LAB (KSC), 2016 WL 4417711, at *2-4 (S.D. Cal. Aug. 18, 2016) (approving the use of that reservation of rights as sufficient to preserve the right to recoupment).

The insurer may file a declaratory judgment action, both to obtain a judicial determination that the policy did not afford coverage for the claim and that the insurer is entitled to recoupment. The request for such judicial declarations may also be set forth in a counterclaim if the insured initiates the coverage action. The request for a judicial declaration that the insurer is entitled to reimbursement of the defense costs is simply additional relief following the determination that the policy does not afford coverage for the claim. The insurer should specify that it seeks both a declaration of the right to reimbursement and a money judgment against the insured to avoid any dispute about whether the insurer has adequately preserved its demand for reimbursement in its affirmative claim against the insured.

Assuming the court grants a judgment in favor of the insurer on the issue of coverage and that the insurer reserved its rights to seek repayment of defense costs paid for noncovered claims, even without a specific money judgment demand, such "further necessary or proper relief" is authorized by 28 U.S.C. § 2202 "based on a declaratory judgment." *Rincon Band of Mission Indians v. Harris*, 618 F.2d 569, 575 (9th Cir. 1980) ("If further relief becomes necessary at a later point . . . both the inherent power of the court to give effect to its own judgment, and the Declaratory Judgment Act, 28 U.S.C.[§] 2202 (1948), would empower the district court to grant supplemental relief ….") (citation omitted); *see also Powell v. McCormack*, 395 U.S. 486, 499 (1969) ("[a] declaratory judgment can then be used as a predicate to further relief"). The Court's judgment declaring, as a matter of law, that the insurance policy at issue does not afford coverage for the *Mercola* lawsuit, is the proper predicate under 28 U.S.C. § 2202 for further relief in the form of an order of repayment of defense costs and money judgment.

For example, California courts routinely grant insurers' requests for reimbursement of defense costs on motions to alter or amend the judgment under Fed. R. Civ. P. 59(d) and as further relief under 28 U.S.C. § 2202 where the courts determine that the claim is not covered. *See, e.g., Colony Ins. Co. v. Fladseth*, No. C 12-1157 CW, 2013 U.S. Dist. LEXIS 87738, at *5-6 (N.D. Cal. Jun 21, 2013) ("Amendment of the judgment is necessary here pursuant to Federal Rule of Civil Procedure 59(e) to correct the Court's failure to address Plaintiff's request for reimbursement, and to prevent manifest injustice to Plaintiff caused by requiring it to pay Defendants' defense costs even though it has no contractual obligation to do so."); *Hewlett Packard Co. v. Ace Prop. & Cas. Co.*, No. C 99-20207, 2010 U.S. Dist. LEXIS 145065, at *9 (N.D. Cal. Dec. 15, 2010) ("Reimbursement of defense costs pursuant to a motion for reimbursement qualifies as 'proper relief' following a court order that a carrier had no duty to defend.") (*citing Omaha Indem. Ins. Co. v. Cardon Oil Co.*, 687 F.

Supp. 502, 503 (N.D. Cal. 1998); *Progressive Cas. Ins. Co. v. Peerless Ins. Co*., No. 06-1113, 2007 WL 1655790, at *2 (E.D. Cal. June 7, 2007)).

To substantiate the quantum of judgment in favor of the insurer, the insurer may file the declaration of a knowledgeable individual that substantiates the amounts paid in defense costs for the noncovered claim and/or copies of cancelled checks showing the insurer's payment of defense costs. Each form of evidence has been found sufficient to prove the amounts paid subject to recoupment. *Columbia Cas. Co. v. Abdou*, 2016 WL 4417711, at *2 ("Columbia submitted declarations by its claim consultant [ ]; cancelled checks made to Abdou's defense counsel [ ], and invoices from Abdou's defense counsel [ ]. The first two forms of evidence are each independently sufficient to establish that Columbia is entitled to reimbursement of $273,923.56 from Abdou."). In *Abdou*, the court rejected the insured's argument that the summary judgment motion did not adequately support the claimed reimbursement amount because it did not specify the total amount sought where the insurer was continuing to defend while the summary judgment motion was being briefed and pending. The court accepted supplemental submission that demonstrated the amount of the defense costs to be reimbursed, including amounts that were still being processed and paid as of the supplemental submission. The court also noted that if the insured wished to challenge the evidence supporting the amount of defense costs paid, the insured could have simply asked his defense counsel about the amounts, which he failed to do.

If the insurer is successful in obtaining a judgment against the insured for the amount of non-covered defense costs or indemnity that the insurer had paid, then the insurer is like any other judgment-holder. The insurer can record and enforce the judgment. The insurer may be able to place a lien on the insured's assets. A judgment lien on real property is created by recording an abstract of a money judgment with the county recorder. Cal. Civ. Proc. § 697.310(a) (West). The insurer will need to be cognizant about the rules requiring renewals of judgments or liens. In California, for example, money judgments automatically expire after ten years. The insurer must file a request for renewal of the judgment with the court before the ten-year period expires. When the judgment is renewed, the interest that has accrued will be added to the unpaid principal. Liens created at the time of the original judgment also must be renewed.

* * *