Case No. 79130

IN THE SUPREME COURT OF NEVADA

NAUTILUS INSURANCE COMPANY,	)
	)
Appellant,	)
	)
vs.	)
	)
ACCESS MEDICAL, LLC; FLOURNOY MANAGEMENT LLC; AND ROBERT CLARK WOOD, II	)
	)
Respondents.	)

CERTIFIED QUESTION

FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
NOS. 17-16265, 17-16272, 17-16273; D.C. NO. 2:15-CV-00321-JAD-GWF

AMICI CURIAE BRIEF OF COMPLEX INSURANCE CLAIMS LITIGATION ASSOCIATION AND AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION

IN SUPPORT OF APPELLANT NAUTILUS INSURANCE COMPANY

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NRAP 26.1 DISCLOSURE

The undersigned counsel certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed:

1. The Complex Insurance Claims Litigation Association ("CICLA") is a trade association incorporated in Delaware.

2. The American Property Casualty Insurance Association ("APCIA") is a trade association incorporated in the District of Columbia.

3. CICLA and APCIA are represented by Laura A. Foggan of Crowell & Moring LLP and Daniel F. Polsenberg and Joel D. Henriod of Lewis Roca Rothgerber Christie LLP.

These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Dated this 27th day of November, 2019.

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STATEMENT OF INTEREST

The Complex Insurance Claims Litigation Association ("CICLA") and American Property Casualty Insurance Association ("APCIA") are trade associations of major property and casualty insurance companies. Together, CICLA and APCIA represent over a thousand insurers across the United States, which issue policies to customers all over the world.

Amici have a significant interest in the issue certified to this Court from the United States Court of Appeals for the Ninth Circuit. This Court is asked to decide:

> 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?

This issue is of substantial importance, and this Court's ruling will impact interests well beyond those of the parties here. Amici have significant experience with legal issues related to property and casualty insurance, and seek to provide valuable insight to assist this Court in deciding the issue presented. Amici seek to provide a useful and significant perspective on the dilemma facing an insurer that believes in good faith that its policy provides no coverage at all for the underlying claim.

ARGUMENT

The critical question in this case is whether a third-party liability insurer that in good faith believes it owes no coverage for an underlying claim may — under a reservation of the right to recoup amounts paid pending a judicial determination of coverage — provide a defense to its policyholder without losing the right to recoupment if a court later determines that no coverage is in fact owed. There are substantial legal and public policy reasons supporting recoupment. Most significantly, a rule permitting recoupment protects the interests of both insurers and policyholders until adjudication of the coverage issue can be obtained. A rule permitting recoupment ensures that policyholders are provided a defense when coverage is in doubt, while also protecting the insurer if it is later determined that no coverage was actually due. Additionally, the majority of courts have found that recoupment is supported by the equitable doctrines of quantum meruit and unjust enrichment where, as here, the insurer expressly reserves its rights to recoupment and the policyholder accepts the defense. This Court should thus answer the certified question in the affirmative.

I. Consistent with the Majority View, this Court Should Hold that an Insurer that Provides a Defense Under an Express Reservation of the Right to Reimbursement Is Entitled to Recover Amounts It Paid If a Court Later Determines the Insurer Did Not Have a Duty to Defend.

A. Sound public policy weighs in favor of allowing an insurer to recover defense costs it paid subject to a right of reimbursement if it is later determined that no duty to defend ever existed.

Public policy favors recoupment when, as here, the question of coverage is in dispute and the insurer lacks the opportunity to resolve the coverage dispute before undertaking a defense. A rule permitting recoupment in this circumstance encourages insurers that in good faith believe they owe no coverage at all to nevertheless provide a defense to protect the policyholder's rights and timely seek a judicial determination of coverage. Such a rule also protects policyholders while balancing the interests of insurers by permitting recoupment if it is determined that the insurer was correct and no coverage at all was owed.

First, recoupment is fundamentally fair. A recoupment claim is premised on the determination in a coverage action that there was in fact no coverage to begin with.[1] In a case where there was no coverage at all, the policyholder was never entitled to any assistance from its insurer regarding the claims asserted against it. If

[1] *See also Travelers Prop. & Cas. In. Co. v. Hillerich & Bradsby Co.*, 598 F.3d 257, 269 (6th Cir. 2010) (predicting Kentucky law) ("It would seem an unjust outcome for the insurer if this Court were to sanction [the] position that … [the] insured would be both getting the settlement at the time it preferred and having that settlement funded by the insurer when no coverage was afforded under the policy.").

the insurer defends or pays to settle, as Nautilus did here, the policyholder will have received a substantial benefit it was never due under the insurance contract.

A rule *prohibiting* recoupment could eliminate the benefit to policyholders of the insurer defending in the first instance, subject to the right to recoup amounts it pays. For example, if an insurer that believes it owes no coverage is precluded from recoupment, the consequences of denying coverage outright may be viewed as a lesser risk than having to forgo any amounts advanced for defense or indemnity under a reservation of rights. Moreover, courts have recognized that "the insurer's savings from reimbursement of defense costs where the insurer never had a duty to defend under the insurance policy will translate into lower premiums for all policyholders."[2]

These public policy considerations were recognized by the court in *Phillips & Assocs., PC v. Navigators Ins. Co.*, 764 F. Supp. 2d 1174 (D. Ariz. 2011). There, an insured tendered certain professional malpractice claims against it to the insurer. The insurer disputed coverage, but agreed to defend under a reservation of rights ("ROR") and agreed with the policyholder's request to settle within limits. Its ROR expressly reserved the right to recoupment in the event the claims were found to be not covered by the policy. The policyholder filed a coverage action, and the insurer

[2] *See, e.g.*, *Scottsdale Ins. Co. v. Sullivan Props., Inc.*, 2007 WL 2247795, at *7 (D. Haw. Aug. 2, 2007) (granting summary judgment to insurer on its claim for reimbursement of defense costs paid under a reservation of rights).

settled the underlying claims five days later. In the coverage action, the court granted the insurer's motion for summary judgment, holding that the insurer was entitled to reimbursement if it prevailed on the merits of the coverage dispute. The court described the dilemma faced by the insurer as follows:

> If an insurer waived its coverage position simply by settling a claim for the insured, the insurer would be forced either to refuse to settle and face a bad faith claim, or to settle the lawsuit and lose its coverage defenses. The "resulting Catch-22" would force insurers to indemnify non-covered claims, violating "basic notions of fairness."

764 F. Supp. 2d at 1176 (internal citations omitted), *quoting Blue Ridge Ins. Co. v. Jacobsen*, 25 Cal. 4th 489, 502 (2001).

Allowing reimbursement of defense costs paid under a reservation of rights would also promote judicial economy. Absent an obligation to reimburse insurers for defense costs paid under a reservation of rights, policyholders who are receiving such a defense during the pendency of a declaratory judgment action have no incentive to seek a swift determination of coverage. Instead, they would be motivated to seek to stay the coverage action, or to draw out the coverage litigation as long as possible while the underlying litigation proceeds. If successful in taking those steps, a policyholder could, in effect, unfairly create *de facto* defense coverage.

In addition, a no-recoupment rule could reduce the opportunity for reasonable settlements in the underlying litigations. The better approach is to

encourage insurer participation in settlements even when coverage is uncertain by allowing for recoupment if a payment is made under a reservation of rights before a judicial determination of coverage can be obtained.

In sum, recognizing a right to recoup defense costs paid under a reservation of rights for claims that are not covered will serve the worthwhile purpose of encouraging insurers to accept the defense of their policyholders in situations involving disputes as to coverage.[3] A rule prohibiting recoupment would have the opposite, undesirable effect: discouraging the provision of a defense to policyholders where coverage is disputed. Public policy supports the rule adopted by the majority of courts, allowing insurers to defend in the first instance while preserving their coverage defenses. This benefits policyholders by providing the initial resource of the insurer for the defense, which may in turn more expeditiously move the case toward resolution.

B. There is no need for the insurance policies to include a provision spelling out the insurers' right to recoupment of defense costs.

Insurance policy provisions delineating coverage support an insurer's right to recoupment when there is no coverage under the policy. Insurance policies afford coverage only for certain defined risks, and make clear that an insurer has

[3] *See Buss v. Superior Court*, 939 P.2d 766, 778 (Cal. 1997) ("Without a right of reimbursement, an insurer might be tempted to refuse to defend an action in any part … lest the insurer give, and the insured get, more than they agreed.").

not agreed to accept non-covered risks. The policies here expressly state that "Nautilus is required to defend [the policyholders] against 'any suit seeking damages' because of a 'personal and advertising injury,' 'arising out of … [o]ral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products, or services." Joint Appendix, Vol. II, Page 91. Nautilus has no duty to defend or indemnify the policyholder in any suit not meeting those criteria. Faced with a good faith dispute as to whether the underlying claims fell within this definition, Nautilus filed a declaratory judgment action in federal district court to resolve the coverage issue. Joint Appendix Vol. IV, p. 612-21.

The district court found that Nautilus *never* had a duty to defend the policyholder against the underlying claims, because the claims did not seek damages arising from "personal and advertising injury." This was supported by the applicable policy terms, which state unequivocally that a "personal and advertising injury" must arise out of "material that slanders or libels ... or disparages" a person or organization. Joint Appendix Vo. II, p. 91. This finding of no coverage meant that the insurer had no legal obligation to provide a defense. Further, the plain terms of the policies specify that the insurer's defense and indemnity obligations apply only with respect to matters "to which the insurance applies."

The policy terms unmistakably state where the insurer's obligations under the policy end. In other words, the policy *does* provide for a right to recoupment because there is no coverage under the policy language. There is no need for the policy to go further to describe the insurer's rights with respect to recouping any costs advanced for uncovered claims. Where the policy expressly limits the insurer's duty to defend to matters "to which the insurance applies," the right to reimbursement of costs advanced for an uncovered claim is fully supported by the policy terms.[4]

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. The suggestion that a right of reimbursement should not exist ignores the facts that the policy unmistakably provides that the duty to defend does not apply to uncovered claims, and that the right to recoup costs advanced by the insurer is based on longstanding unjust enrichment principles that are part of the fabric of settled law over which the insurance contract is written.

[4] *See also Century Surety Co. v. Andrew*, 134 Nev. Adv. Op. 100, 432 P.3d 180, 184-86 (2018) ("The insured pays a premium for the expectation that the insurer will abide by its duty to defend *when such a duty arises*. . . . The obligation of the insurer to defend its insured is purely contractual…") (emphasis added).

C. Recoupment is supported by the equitable doctrines of quantum meruit and unjust enrichment, and is the approach followed by the majority of courts across the country.

The better-reasoned approach, taken by the majority of courts, is that a right to recoupment exists under the longstanding and widely-accepted equitable doctrines of implied-in-fact contract, quantum meruit, and unjust enrichment. Under Nevada law, "[a]n insurer … bears a duty to defend its insured whenever it ascertains facts which give rise to a potential for coverage under the policy."[5] "However, 'the duty to defend is not absolute,'" and "[a] potential for coverage only exists when there is arguable or possible coverage."[6] The insured has no right to a defense for uncovered claims.

Here, there was a good faith dispute as to whether the complaint "contain[ed] a false statement that would support a claim for defamation, libel, or slander under California law." Joint Appendix, Vol. I, p. 72-78. Thus, when the policyholders tendered the underlying claim, Nautilus was forced to either deny coverage outright at the risk of breaching the policy if its coverage position was determined to be wrong, or assume the defense under a reservation of rights, including the right to recover amounts paid if a court found no coverage to exist. Nautilus thus acted to protect the policyholders' best interests while it awaited

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[5] *United Nat'l Ins. Co. v. Frontier Ins. Co.*, 120 Nev. 678, 686-87, 99 P.3d 1153, 1158 (2004).
[6] 120 Nev. at 787, 99 P.3d at 1160.

judicial guidance on its obligations. Importantly, after Nautilus issued its reservation of rights letters, the policyholder did *not* elect to conduct its defense at its own expense. Joint Appendix Volume II, p. 91. Rather, aware of Nautilus' position on reimbursement, and the risk that it had presented its insurer with an uncovered claim, the policyholder repeatedly accepted Nautilus' payments for the fees and expenses of its defense. *Id.*

This sequence of events falls squarely within the parameters of settled principles of unjust enrichment law. "In Nevada, insurance policies are treated like other contracts, and thus, legal principles applicable to contracts generally are applicable to insurance policies."[7] Under Nevada law, "[t]o recover in quantum meruit, a party must establish legal liability on either an implied-in-fact contract or unjust enrichment basis."[8] An "implied-in-fact" contract exists where the parties supply an absent term to an agreement that is "manifested by conduct," or "arises from the tacit agreement from the parties. . . Where such a contract exists … quantum meruit ensures the laborer receives the reasonable value … for his services."[9] Unjust enrichment relatedly "exists when the plaintiff confers a benefit on the defendant, the defendant appreciates such benefit, and there is 'acceptance

[7] *Andrew*, 432 P.3d at 183.
[8] *Certified Fire Prot. Inc. v. Precision Constr.*, 128 Nev. 371, 374, 283 P.3d 250, 253 (2012).
[9] *Id.* at 379-80.

and retention by the defendant of such benefit under circumstances such that it would be inequitable for him to retain the benefit without payment of the value thereof.'"[10]

Recovery in quantum meruit in the form of reimbursement for the policyholders' received benefit of having their defense costs paid is supported by the facts here. Nautilus is seeking reimbursement for payments made when coverage never existed under the policy, i.e., when the policy terms provide there was *no* duty to pay for the defense. The policyholder demanded that its insurer defend it and then, with full knowledge that the insurer disputed coverage and reserved the right to seek reimbursement of defense costs, proceeded to accept payment of the defense. Such conduct creates a contract implied by law and constitutes unjust enrichment. The policyholder's acceptance of payment from Nautilus, despite full knowledge that its insurer repeatedly reserved its right to reimbursement if coverage did not in fact exist, constituted an understanding manifested by conduct that justifies recovery of the value of the benefit conferred under Nevada law.

Federal courts applying Nevada law in precisely this situation recognize these principles of quantum meruit recovery.[11] None of these cases impose a

[10] *Id.* at 381 (citations omitted).

requirement that the "understanding" be included in the policy itself. Indeed, courts in other states similarly have applied principles of quantum meruit to avoid unjust enrichment where an existing contract between the parties fails to address the specific issue in dispute.[12] For example, a number of courts have concluded that an

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[11] *See Probuilders Spec. Ins. Co. v. Double M Construction*, 116 F. Supp. 3d 1173, 1182 (D. Nev. 2015) (applying Nevada law) (An "insurer has a right to reimbursement if the parties agreed that the insured would reimburse the insurer for monies expended in providing a defense" and "the policyholder's acceptance of monies constitutes an implied agreement to the reservation of the insurer's right to seek reimbursement for claims outside of the policy's coverage"); *Capitol Indem. Corp. v. Blazer*, 51 F. Supp. 2d 1080, 1082 (D. Nev. 1999) (applying Nevada law) (holding that "the right of reimbursement does not arise unless there is an understanding between the parties that the insured would be required to reimburse the insurer for monies expending in providing a defense"); *Forum Ins. Co. v. Cty. Of Nye, Nev.*, 26 F.3d 130 (Table), 1994 WL 241384, at *3 (9th Cir. 1994) (applying Nevada law) (finding "sufficient evidence of an 'understanding' that [the insurer] would be reimbursed for the costs of defense," where the insurer "unilaterally, but explicitly, reserved its right to seek reimbursement in a letter" and the policyholder accepted payment for the defense).

[12] *See, e.g.*, *Porter v. Hu*, 169 P.3d 994, 1006 (Haw. Ct. App. 2007) (affirming jury award on unjust enrichment claim to terminated agent where principal wrongfully retained agent's book of business and agency contract did not expressly address payment of compensation under the circumstance, finding that "[w]hile it is stated that an action for unjust enrichment cannot lie in the face of an express contract, a contract does not preclude restitution if it does not address the specific benefit at issue"); *Associated Wrecking & Salvage Co. v. Wiekhorst Bros. Excavating & Equip. Co.*, 424 N.W.2d 343, 349-50 (Neb. 1988) (restitution under quantum meruit was appropriate for equipment lessor who performed work beyond the scope of a contract, where the lessor warned the other party that the work would cost extra, that he would charge for his time, and the other party "continued to accept the plaintiff's services, knowing that they were not rendered gratuitously"); *Catamount Radiology, P.C. v. Bailey*, 2015 WL 3795028, at *10 (D. Vt. June 18, 2015) (denying motion for unjust enrichment asserted by doctor against former employer for reimbursement of out of pocket expenses for licensing fees, health

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insured's acceptance of indemnity payments subject to a reservation of rights "'constitutes an implied agreement to the reservation' of the insurer's right to seek reimbursement for claims outside of the policy's coverage."[13]

Restitution of such payments for a defense that was never contractually owed is appropriate here, as the policyholder could have had no reasonable expectation that Nautilus would defend claims that were not covered. Denying recoupment would unfairly provide the policyholder with a defense for which it neither bargained for nor paid premiums, and would also be unjustly detrimental to the insurer, which did not contractually undertake a duty to defend non-covered claims.

A majority of state and federal courts have followed the approach that an insurer is entitled to recoup from its policyholder amounts paid under reservation of a right to reimbursement when it is later determined that no coverage exists.[14]

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insurance, medical malpractice insurance, and mammography recertification course expenses that were not specifically addressed in her employment contract).

[13] *See, e.g.*, *Probuilders*, 116 F. Supp. 3d at 1182 (D. Nev. 2015) (applying Nevada law) (insurer was entitled to reimbursement of defense costs, where the policyholder "implicitly agreed to the reservation of rights by accepting Probuilders' defense and passing litigation costs to it for two years"); *Am. Economy Ins. Co. v. Hartford Fire Ins. Co.*, 695 Fed. Appx. 194, 196 (9th Cir. 2017) (applying Montana law) (insurer was entitled to reimbursement of defense costs "because [the policyholder] 'implicitly accepted' their defense under a reservation of rights").

[14] *See, e.g.*, *Probuilders Spec. Ins. Co. v. Double M Construction*, 116 F. Supp. 3d 1173, 1182 (D. Nev. 2015); *Dupree v. Scottsdale Ins. Co.*, 96 A.D.3d 546, 546

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(N.Y. App. Div. 2012) (citing *Fed. Ins. Co. v. Kozlowski*, 18 A.D.3d 33 (App. Div. 2005)) (acknowledging insurer's right to recoupment in the event that a later determination of no coverage is made); *United Nat'l Ins. Co. v. SST Fitness Corp.*, 309 F.3d 914, 921 (6th Cir. 2002) (applying Ohio law) ("Because [the policyholder] entered into an implied in fact contract by accepting the defense costs subject to a reservation of right to recoupment if a court determined that [the insurer] had no duty to defend [the policyholder] and a court found [the insurer] had no duty to defend, [the insurer] is entitled to reimbursement of its defense costs and prejudgment interest"); *Colony Ins. Co. v. G & E Tires & Serv., Inc.*, 777 So.2d 1034, 1039 (Fla. Dist. Ct. App. 2000) (holding that an insurer's unilateral reservation of rights preserved its right to seek reimbursement of defense costs incurred to defend non-covered claims); *Resure, Inc. v. Chem. Distribs., Inc.*, 927 F. Supp. 190, 194 (M.D. La. 1996) (applying New Mexico law), *aff'd* 114 F.3d 1184 (5th Cir. 1997) (holding insurer was entitled to reimbursement where the "reservation [of rights] specifically referred to the possibility that [the insurer] might seek reimbursement for any and all costs of defense" and where "[t]here [was] nothing in the record to suggest [the policyholder] objected to the reservation"); *Knapp v. Commonwealth Land Title Ins. Co.*, 932 F. Supp. 1169, 1172 (D. Minn. 1996) (applying Minnesota law) (where an insurer properly meets its duty to defend "and subsequently successfully challenges policy coverage, it should be entitled to the full benefit of such a challenge and be reimbursed for the benefits it bestowed, in good faith, to its insured"); *Scottsdale Ins. v Sullivan Props., Inc.*, 2007 WL 2247795, at *4 (D. Haw. Aug. 2, 2007) (applying Hawaii law) ("It is consistent with Hawaii Supreme court law that reimbursement of defense costs be allowed where the insurer expressly reserved the right to recoup such sots in its reservation of rights and the insured accepted the defense"); *Cincinnati Ins. Co. v. Grand Pointe, LLC*, 501 F. Supp. 2d 1145, 1169 (E.D. Tenn. 2007) (applying Tennessee law) ("It would be inequitable for Defendants to retain the benefits of the defense without repayment of the defense costs. Defendant[s] received the benefit of a defense they were not paying for, Defendants knew they were receiving a defense they were not funding, and defendants were aware from [the insurer's] reservation-of-rights letter that [the insurer] claimed a right to reimbursement if it was determined that [the insurer] owed no duty to defend.").

This Court should join the majority of courts that have affirmed an insurer's right to recoupment of uncovered defense costs.[15]

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[15] Amici note that the ALI's Restatement of the Law of Liability Insurance ("RLLI"), § 21, adopts a minority view in tension with the courts and the Restatement of the Law (Third) of Restitution and Unjust Enrichment, limiting insurers' right to recoupment. The RLLI has been heavily criticized for deviating from insurance common law and abandoning the ALI's mission of creating a reliable resource on the law. *See, e.g.*, A. Hugh Scott, *ALI's Proposed Insurance Law Restatement: A Trojan Horse?*, Law360 (May 10, 2017), available at https://www.law360.com/articles/889483; *see also* Victor E. Schwartz & Christopher E. Appel, *The American Law Institute at the Cross Road: With Power Comes Responsibility*, Nat'l Found. For Judicial Excellence, Vol. 2, Issue 1 (May 22, 2017), available at https://sites-shb.vuture.net/40/161/landing-pages/pp-alert-5.25.17---article.asp?sid=blankform; Kim V. Marrkand, *With Insurance Liability Restatement, American Law Institute Deviates from Its Mission and the Common Law*, Washington Legal Foundation Legal Backgrounder, Vol. 32, No. 13 (May 19, 2017), available at http://www.wlf.org/upload/legalstudies/legalbackgrounder/051917LB_Marrkand.pdf ; Scott Seaman, *ALI Draft Restatement Misstates Key Insurance Law Issues*, Law360 (Sep. 18, 2017), available at https://www.law360.com/articles/964887/ali-draft-restatement-misstates-key-insurance-law-issues.

As the late Justice Antonin Scalia cautioned in *Kansas v. Nebraska*, 135 S. Ct. 1042, 1064 (2015):

> [M]odern Restatements … are of questionable value, and must be used with caution. The object of the original Restatements was "to present an orderly statement of the general common law." … Over time, the Restatements' authors have abandoned the mission of describing the law, and have chosen instead to set forth their aspirations for what the law ought to be.

Many state legislatures have responded to the aspirational aspects of the RLLI by reinforcing that state law, not the proposals in the RLLI, should govern insurance disputes. Tennessee Code § 56-7-102; Ohio Revised Code § 3901.81 (2018); Michigan Code §500.3032 (2018); North Dakota Code § 26.1-02-34 (2019); Arkansas Code § 23-60-112 (2019); Texas House Bill No. 2757 (2019); Kentucky
(Continued...)

In *Helca Mining*, for example, the Colorado Supreme Court held that "the appropriate course of action for an insurer who believes that it is under no obligation to defend, is to provide a defense to the insured under a reservation of rights to seek reimbursement should the facts at trial prove that the incident resulting in liability was not covered by the policy."[16] Similarly, in *Ribi ImmunoChem*, the Montana Supreme Court held that an insurer is entitled to reimbursement of costs paid in defense of claims ultimately found to be outside the scope of coverage so long as the insurer expressly reserved the right to do so.[17] *See also Am. Economy Ins. Co. v. Hartford Fire Ins. Co.*, 695 Fed. Appx. 194, 196 (9th Cir. 2017) (applying Montana law) (affirming summary judgment for insurer on its claim for recoupment of defense costs); *U.S. Specialty Ins. Co. v. Sussex Airport, Inc.*, 2016 WL 2624912, at *5 (D.N.J. May 9, 2016) (applying New Jersey law, granting summary judgment to insurer on its claim for reimbursement of defense costs); *Probuilders Spec. Ins. Co.*, 116 F. Supp. 3d at 1183 (applying Nevada law, granting summary judgment to insurer on its claim for recoupment of defense costs); *United Spec. Ins. Co. v. CDC Housing, Inc.*, 233 F. Supp. 3d 408, 414 (S.D.N.Y. 2017) (applying New York law) (citation omitted).

House Resolution No. 222 (2018); Indiana House Concurrent Resolution No. 62 (2019); Louisiana Senate Resolution No. 149 (2019).

[16] *Helca Mining Co. v. N.H. Ins. Co.*, 811 P.2d 1083, 1089 (Colo. 1991) (en banc).

[17] *Travelers Cas. & Sur. Co. v. Ribi ImmunoChem Research, Inc.*, 108 P.3d 469, 480 (Mont. 2005).

In *Buss v. Superior Court,* the California Supreme Court conclusively held that an insurer that has defended under a reservation of rights is entitled to recoup defense costs it paid for claims that are not even potentially covered.[18] In a later case, the California Supreme Court summarized *Buss* as follows:

> As *Buss* explained, 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. Conversely, the insurer does not bargain to assume the cost of defense of claims that are not even potentially covered. To shift these costs to the insured does not upset the contractual arrangement between the parties. Thus, where the insurer, acting under a reservation of rights, has prophylactically financed the defense of claims as to which it owed no duty of defense, it is entitled to restitution. Otherwise, the insured, who did not bargain for a defense of noncovered claims, would receive a windfall and would be unjustly enriched.[19]

Courts have consistently determined that insurers are entitled to reimbursement of defense costs upon a determination of non-coverage so long as the reservation was communicated to the insured, which — knowing of and without expressly refusing to consent to the insurer's reservation — then accepted

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[18] *Buss v. Superior Court*, 939 P.2d at 776 ("Under the policy, the insurer does not have a duty to defend the insured as to claims that are not even potentially covered. With regard to defense costs for these claims, the insurer has not been paid premiums by insured. It did not bargain to bear these costs…. 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").

[19] *Scottsdale Ins. Co. v. MV Transportation*, 115 P.3d 460, 469 (2005) (citing *Buss*, 939 P.2d at 774-78).

the defense.[20] This Court should hold likewise and uphold the insurer's claim to recoup uncovered defense costs advanced under its explicit reservation of the right to reimbursement.

CONCLUSION

For the forgoing reasons, *Amici* respectfully urge this Court to hold that an insurer is entitled to reimbursement of costs already expended in defense of its insured where a determination has been made that the insurer owed no duty to defend and expressly reserved its right to seek reimbursement in writing.

DATED this 27 day of November, 2019.

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[20] *Se* e *also An. Economy Ins. Co. v. Hartford Fire Ins. Co.*, 695 Fed. Appx. 194, 196 (9th Cir. 2017) (applying Montana law) (affirming summary judgment for insurer on its claim for recoupment of defense costs); *U.S. Specialty Ins. Co. v. Sussex Airport, Inc.*, 2016 WL 2624912, at *5 (D.N.J. May 9, 2016) (applying New Jersey law, granting summary judgment to insurer on its claim for reimbursement of defense costs); *Probuilders Spec. Ins. Co.*, 116 F. Supp. 3d at 1183 (applying Nevada law, granting summary judgment to insurer on its claim for recoupment of defense costs); *United Spec. Ins. Co. v. CDC Housing, Inc.*, 233 F. Supp. 3d 408, 414 (S.D.N.Y. 2017) (applying New York law) (citation omitted)

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word with a 14-point, double-spaced Times New Roman font.

2. I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 4,875 words.

3. I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 27 day of November, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on November 27, 2019, I submitted the foregoing "Amicus Curiae Brief of Complex Insurance Claims Association and American Property Casualty Insurance Association" for filing *via* the court's eFlex electronic filing system. Electronic notification will be sent to the following:

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