The Insurer's Right to Seek Reimbursement: Will The Buss Stop in Oklahoma

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COMMENTS

THE INSURER’S RIGHT TO SEEK REIMBURSEMENT: WILL THE BUSS STOP IN OKLAHOMA?

I. INTRODUCTION

Although not necessarily a new issue, the commercial insurer’s right to seek reimbursement of defense costs expended on claims ultimately determined not to be covered merits renewed attention given the trend of recent case law. The insurer’s right to seek reimbursement has been greatly enhanced by the California Supreme Court decision in Buss v. Superior Court. In Buss, the court held for the first time that in a mixed action, an action in which covered and non-covered claims are asserted, an insurer has a duty to defend the entire action as a duty imposed by law. However, if the insurer has reserved the right to seek reimbursement, it may be entitled to seek reimbursement from its insured for defense costs allocated to those claims which were never potentially covered. Buss and its progeny have developed guidelines which a commercial liability insurer may follow in order to preserve and successfully claim the right to seek reimbursement of defense costs in a mixed action.

Oklahoma appears to have only one case that discusses the insurer’s right to seek reimbursement of costs. Although the application of the case is likely limited to the specific facts of that case, analogies may be made to the rationale utilized in the Buss opinion. California insurance law is persuasive and consistent with the general state of insurance law in Oklahoma addressing the insurer’s duty to defend and to reserve rights to later challenge coverage. Therefore, California insurance law

2. See id. at 774.
3. See id. at 776-78.
4. See discussion infra at Part III.
lends itself to an analysis concerning the direction Oklahoma may take on the issue of reimbursement. Additionally, other jurisdictions have dealt with the reimbursement issue and have done so with varying depths of treatment. Nevertheless, the various opinions provide guidance and direction concerning the insurer’s right to seek reimbursement of defense costs.

Section II of this comment reviews the general development of the insurer’s right to seek reimbursement of defense costs in the state of California. Next, Section III provides an analysis of California case law concerning the reimbursement issue, culminating with a discussion of the California Supreme Court’s decision in Buss. Finally, Section IV continues the analysis by assessing Oklahoma’s potential response to the right to reimbursement issue in light of Buss, concluding that Oklahoma will likely adopt the rationale established by Buss.

II. THE DEVELOPMENT OF THE RIGHT TO SEEK REIMBURSEMENT

In California, the right of the commercial insurer to seek reimbursement of defense costs from its insured in a single action arose out of the insurer’s duty to defend its insured.\(^6\) The progression of California case law prior to the Buss opinion provides four basic propositions regarding the insurer’s right to seek reimbursement of defense costs. The first proposition established by California case law is that the insurer has the duty to defend whenever the insurer ascertains facts which give rise to potential liability.\(^7\) The second proposition is that the insurer must reserve the right or have an understanding that the insurer will later seek the right to reimbursement if it is determined that the insurer had no duty to defend.\(^8\) The third proposition established that the right to reimbursement was based on contract law and not on the equitable doctrine of restitution.\(^9\) The last proposition established that the insured’s silence or simple objection to the insurer’s reservation of rights is not sufficient to defeat the right to reimbursement.\(^10\) The distinguishing factor in the cases prior to the decision in Buss is that those pre-Buss cases did not involve a mixed action. In a mixed action at least one of the claims is potentially covered and at least one of the claims is potentially not covered.\(^11\) The Buss opinion decided for the first time in California that the insurer could seek reimbursement of defense costs in a mixed action and based that right on the doctrine of restitution.\(^12\)

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6. See discussion infra at Part III.
8. See id.
13. See Buss, 939 P.2d at 776-78.
A. The Route to Buss

In California, the insurer's right to seek reimbursement of defense costs for claims not potentially covered begins with Safeco Title Insurance Co. v. Moskopoulos. Safeco, a title insurer, brought a declaratory judgment action to establish whether Safeco had the duty to defend Moskopoulos, a real estate broker, in a suit arising from a flawed purchase of residential property. Safeco agreed to provide a defense to Moskopoulos under a reservation of rights. Safeco reserved the right to assert the defense that it had no duty to defend and that Safeco had a right to reimbursement of attorney fees paid for Moskopoulos's defense.

The trial court rendered judgment for Safeco and held that Safeco did not have the duty to defend Moskopoulos. Additionally, without discussion, the trial court awarded Safeco its attorney fees, costs, expenses, and interest in defending Moskopoulos.

On review, the appellate court affirmed the trial court's decision that Safeco had no duty to defend Moskopoulos because the claim came within an exclusion under the policy. The appellate court based its opinion on the rationale that because the duty to defend is broader than the obligation to indemnify, "the courts have imposed a duty to defend whenever the insurer ascertains facts which give rise to the possibility or 'potential' of liability to indemnify." The appellate court affirmed the award of attorney fees, costs, expenses, and interest without discussion. At best, Moskopoulos recognized the right of the insurer to seek reimbursement of defense costs for non-covered claims; however, the court gave no reasoning for the award of costs.

A subsequent California case in which the insurer sought reimbursement of costs was Western Employers Insurance Co. v. Arciero & Sons, Inc. In Western Employers, Arciero, the insured, was sued regarding damage to condominiums for which it was the general contractor. Arciero tendered defense of the action to Western, the insurer, which accepted under a reservation of rights, contending that the claims were excluded under the policy. Western settled the claims and then filed a declaratory judgment action against Arciero, "seeking restitution for the sums it paid in defending and settling" the claims.

The trial court determined as a matter of law that the claims were not covered under the policy and granted judgment to Western without discussion as to the
entitlement of reimbursement.25 The appellate court affirmed, holding that because Western was not potentially liable for damages under the policy, Western had no duty to defend Arciero.26

The first California case which directly discussed the issue of reimbursement of defense costs was *St. Paul Mercury Ins. Co. v. Ralee Engineering Co.*27 In *Ralee*, the insurer, St. Paul, brought a declaratory judgment action against Ralee to establish that St. Paul did not have the duty to defend Ralee in an action alleging wrongful termination of employment and intentional infliction of emotional distress.28 St. Paul undertook the duty to defend Ralee under a reservation of rights to deny coverage at a later time.29 The district court found that although St. Paul did not have the duty to defend Ralee, St. Paul was not entitled to reimbursement of costs expended in defending Ralee.30 The court of appeals affirmed the district court's decision.31

St. Paul argued that the opinion in *Western Employers*32 was controlling.33 The appellate court found *Western Employers* unpersuasive because the case did not hold as a matter of law that the insurer is always entitled to reimbursement of costs expended in defense of a claim where the insurer had no duty to defend in the first instance.34 The court found that although St. Paul did not have a duty to defend Ralee, it was not entitled to reimbursement because the reservation of rights did not specifically seek reimbursement nor was there an understanding between the parties that Ralee would seek reimbursement of costs.35 While the *Ralee* court did not hold as a matter of law that when the insurer has no duty to defend, the insurer is entitled to reimbursement of defense costs, it did set the stage for later rulings.36 The court's opinion suggested that in order for costs to be reimbursable to the insurer, there must be an understanding between the insured and the insurer.37 The *Ralee* court further suggested that the understanding between the parties may originate in the reservation of rights if it specifically reserves the right to seek reimbursement.38

The right to seek reimbursement of defense costs further evolved in *Travelers v. Lesher*.39 In *Lesher*, the insured was named as a defendant in an antitrust lawsuit.40 Lesher tendered the defense of the action to his liability insurer, Travelers.41 Travelers accepted the defense under a reservation of rights that it had

25. See id. at 689.
26. See id. at 691.
27. See Ralee, 804 F.2d 520.
28. See id.
29. See id. at 522.
30. See id.
31. See id.
32. See Lesher, 231 Cal. Rptr. at 794; Haralambos, 241 Cal. Rptr. at 428.
33. See Ralee, 804 F.2d at 522.
34. See id.
35. See id.
36. See id. at 522-23.
37. See id. at 522.
38. See id.
39. See Lesher, 231 Cal. Rptr. at 794.
40. See id.
41. See id.
no duty to defend because the policy did not provide coverage. Travelers filed a
declaratory judgment action to establish that Travelers had no duty to defend or
indemnify, and to seek reimbursement of costs incurred in defending Lesher. On
Travelers' motion for summary judgment in the declaratory judgment action, the trial
court granted the motion finding that Travelers had no duty to defend or indemnify
Lesher. Subsequent to the grant of summary judgment, Travelers filed a motion
seeking entitlement to attorney's fees and expenses. The trial court granted Lesher's
motion for non-suit on Travelers' claims for reimbursement of fees and costs.

The appellate court found that the trial court properly ruled Travelers had no
duty to defend or indemnify Lesher because of an exclusion under the policy. Travelers argued on appeal of the non-suit regarding reimbursement of fees and costs
that the letter sent to Lesher was a complete reservation of rights and was sufficient
d for decision by the trier of fact. The appellate court, however, found that the letter
did not mention Travelers' intention to seek reimbursement and therefore held, as a
matter of law, the reservation of rights was insufficient to entitle Travelers to
reimbursement.

Travelers argued in the alternative that its claim for reimbursement had support
in the equitable doctrine of quasi-contract or restitution. The appellate court found
the argument unpersuasive. The court based its rationale on principles of restitution
that "a person who, incidental to the performance of his own duty or to the protection
of his own things, has conferred a benefit upon another, is not thereby entitled to
contribution." In other words, the insurer who assumes the defense of the insured
under a reservation of rights does so not only to benefit the insured, but also in "large
part to protect the insurer from a subsequent claim that it breached its insurance
contract with the insured." Therefore, the court found that the doctrine of restitution
did not entitle Travelers to seek reimbursement for attorney's fees and costs expended
defending Lesher.

California law concerning the right to seek reimbursement further unfolded in
Insurance Company of the West v. Haralambos Beverage Company. In
Haralambos, the insured was sued for breach of contract. The insured tendered
defense to Insurance Company of the West ( "ICW") who accepted under a

42. See id.
43. See id.
44. See id. at 795.
45. See Lesher, 231 Cal. Rptr. at 798.
46. See id.
47. See id.
48. See id. at 809.
49. See id.
50. See id.
51. See Lesher, 231 Cal. Rptr. at 809.
52. Id.
53. See id.
54. See id. at 810.
55. See Haralambos, 241 Cal. Rptr. at 428.
56. See id.
reservation of rights to later deny coverage. The case was tried to a jury which found against Haralambos and awarded contract damages to the plaintiff.

ICW filed a declaratory judgment action seeking a declaration that ICW did not have a duty to defend or indemnify under the policy. ICW additionally sought equitable indemnification for defense costs expended on behalf of Haralambos. The court granted summary judgment in favor of ICW and awarded ICW its defense costs. Haralambos appealed.

The appellate court found that Haralambos’s claim under the ICW policy was not potentially covered under the policy, and therefore, ICW had no duty to defend or indemnify. Regarding the reimbursement of costs, ICW argued that courts have affirmed judgments in which insurers sought reimbursement of defense costs when the insurer had no duty to defend. In support of ICW’s contention, the court cited Western Employers and Moskopoulos. However, the appellate court found no case that held as a matter of law that an insurer is entitled to seek reimbursement of defense costs when the insurer had no duty to defend. The appellate court stated there were only two possible theories of recovery: (1) “an agreement or understanding between the parties that the insured would reimburse the insurer” for costs of defense when coverage issues are determined in the insurer’s favor and (2) “equitable restitution.” Regarding the first theory, the court found there was no evidence of an agreement or understanding between the parties that Haralambos would reimburse ICW as a matter of law, and therefore, summary judgment was improperly granted. With respect to the equitable restitution theory, the court stated the general rule that “money voluntarily paid to another with knowledge of the facts cannot be recovered back.” The court additionally adopted the rationale of Lesher and held that whether “ICW conferred a benefit incidental to the protection of its own interests” was a question of fact for the jury.

In Omaha Indemnity Insurance Co. v. Cardon Oil Company, the insurer, Omaha, filed a declaratory judgment action against the defendants for relief regarding insurance coverage under a comprehensive general liability insurance policy. Cardon was sued for securities fraud and Omaha accepted the duty to defend subject

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57. See id.
58. See id. at 429.
59. See id.
60. See id.
61. See Haralambos, 241 Cal. Rptr. at 429.
62. See id.
63. See id. at 430.
64. See id. at 434.
65. See Western Employers, 194 Cal. Rptr. 688.
66. See Moskopoulos, 172 Cal. Rptr. 248.
67. See Haralambos, 241 Cal. Rptr. at 434.
68. Id.
69. See id.
70. Id.
71. See Lesher, 231 Cal. Rptr. at 809.
72. Haralambos, 241 Cal. Rptr. at 435.
73. Omaha, 687 F. Supp. at 503.
to a reservation of rights that it had no coverage and specifically reserving the right to seek reimbursement of all defense costs. The district court found that Omaha did not have the duty to defend Cardon because the alleged claims were not covered under the subject policy.

Omaha filed a subsequent motion in the declaratory judgment action seeking reimbursement of costs and fees expended in defending Cardon. Omaha’s reservation of rights letter stated:

Additionally,[] Omaha Indemnity specifically reserves its right to seek reimbursement of all defense costs, including attorney’s fees . . . . In that regard, it is contemplated that a declaratory relief action will be filed . . . . That action will also seek reimbursement of any defense costs paid to or on behalf of any person or entity claiming entitlement to defense or indemnity under the policy.

The court found Cardon was aware of Omaha’s intention to seek reimbursement of its costs. Cardon argued that because it never responded to the reservation of rights letter, there was no understanding or agreement between the parties. Cardon argued that a unilateral reservation of rights was not sufficient to allow reimbursement of defense costs.

Relying on *Western Employers Ins. Co. v. Arciero & Sons, Inc.*, the district court found California law allowed the insurer to be reimbursed its fees in defending against claims for which there was no duty to defend. The court, however, relying on *St. Paul Mercury Ins. Co. v. Ralee Engineering Co.*, held that an insurer was not entitled to reimbursement unless there was an understanding between the parties that the right to reimbursement would be sought in the event there was no duty to defend. Cardon argued that its silence could not “constitute acquiescence,” citing *Insurance Company of the West v. Haralambos Beverage Co.* The district court found this argument unpersuasive and stated that in both *St. Paul* and *Haralambos*, “the reservation of rights letters sent by the insurers made no reference to reimbursement of litigation expenses* whereas here, the reservation of rights specifically spoke to the reimbursement of defense costs.* The *Omaha* court held that because the insurer expressly and specifically reserved its right to seek reimbursement of defense costs and because there was no evidence that the insured expressly refused

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74. See id.
75. See id.
76. See id.
77. Id. at 504.
78. See *Omaha*, 687 F. Supp. at 504.
79. See id.
80. See id.
81. See *Western Employers*, 194 Cal. Rptr. 688.
82. See *Omaha*, 687 F. Supp. at 504.
83. See *Ralee*, 804 F.2d 520.
84. See *Omaha*, 687 F. Supp. at 504.
85. See *Halambros* 241 Cal. Rptr. at 429.
86. *Omaha*, 687 F. Supp. at 504-05.
87. See id. at 505.
to consent to the insurer’s reservation of rights, the insurer adequately reserved its rights to seek reimbursement of litigation costs. Therefore, the Omaha court’s holding allowed the insured’s silence to constitute acquiescence to the reservation of rights and seemed to further require that the insured take positive steps to refuse to consent to a reservation of rights.

In Walbrook Insurance Company Ltd. v. Goshgarian & Goshgarian, the positive steps to refuse to consent to a reservation of rights, as implied in Omaha, were expanded. Walbrook, the insurer, accepted the duty to defend under a reservation of rights which specifically reserved the right to recover defense costs. Walbrook filed an action for declaratory relief seeking a declaration of its rights and reimbursement of costs paid to defend the insured, Goshgarian. The insured moved for summary judgment on the issues of the insurer’s duty to defend and the insurer’s entitlement to reimbursement. The court, due to a lack of evidence, found it was precluded from granting summary judgment regarding whether Walbrook had the duty to defend.

Goshgarian argued in its summary judgment brief that even if Walbrook did not have the duty to defend, Walbrook was not entitled to reimbursement of defense costs because Walbrook did not make an adequate reservation of rights. Goshgarian’s rationale was that the reservation of rights was not adequate because Goshgarian expressly refused to consent to the reservation. In fact, Goshgarian, in two separate letters, acknowledged the defense but objected to the reservation of rights. However, despite the objections, Goshgarian accepted payments in excess of $500,000 for costs of defense. The court found that since Goshgarian knew Walbrook intended to seek reimbursement, there was an understanding between the parties. While the insured expressly objected to the reservation of rights, the insured nevertheless accepted the payment of defense costs by the insurer. The court found that by accepting the payment of defense costs that there was an implied agreement to the reservation of rights, and therefore, as a matter of law, Walbrook adequately reserved its right to reimbursement. The court concluded that if it was established that Walbrook had no duty to defend Goshgarian, then Walbrook was entitled to reimbursement of its attorney fees and defense costs paid.

88. See id.
89. See id.
90. See Walbrook, 726 F. Supp. at 778-82.
91. See id. at 778-82.
92. See id. at 778.
93. See id. at 779.
94. See id. at 781.
95. See id.
96. See Walbrook, 726 F. Supp. at 781.
97. See id. at 782.
98. See id.
99. See id. at 784-85.
100. See id. at 785.
101. See id.
102. See Walbrook, 726 F. Supp. at 785.
In *American Motorists Insurance Co. v. Allied-Sysco Food Services, Inc.*, the insured, Allied, was sued for sexually discriminatory hiring practices. AMICO tendered the defense of the action to its insurer, American Motorists Insurance Company ("AMICO"). AMICO accepted the defense subject to a reservation of rights to later deny coverage. AMICO filed a declaratory relief action seeking a determination of no duty to defend and seeking reimbursement.

AMICO argued entitlement to reimbursement of its costs because its reservation of rights created an understanding between the parties. The court, however, disagreed finding that an understanding had not been created because the reimbursement language was not contained in the first reservation of rights letter but was contained in the third letter sent to Allied which was sent after AMICO had already begun to pay defense costs. Moreover, the court found that AMICO’s reservation of rights letter “expressly conditioned reimbursement” upon Allied’s approval and that because approval was not received, there was no agreement to reimburse AMICO. Therefore, AMICO was not entitled to reimbursement of its costs.

In conclusion, before *Buss* was decided, California courts recognized the insurer’s right to seek reimbursement of defense costs for an uncovered claim in an action where either all claims or no claims were potentially covered. The courts began by establishing that insurers have a duty to defend whenever the insurer ascertains facts which give rise to potential liability. The California courts next suggested that in order for costs to be reimbursable to the insurer, there had to be an understanding between the parties which could originate, if specifically stated, in a reservation of rights letter. The natural progression led to opinions deciding how the right could be reserved. More specifically, the United States District Court for the Northern District of California held that the reservation of rights is effective even when an insured is silent because his silence is deemed acquiescence to the reserved rights. Going further, the United States District Court for the Central District of California held that the reservation of the right to seek reimbursement is effective even when the insured objects to the reservation of rights if the insured has accepted the defense. A California appellate court held that the right to seek reimbursement must be reserved expressly in the reservation of rights letter prior to paying for defense costs. Prior to *Buss*, the right to seek reimbursement was based on single

104. See id.
105. See id.
106. See id.
107. See id. at 114.
108. See id.
109. See American, 24 Cal. Rptr. 2d at 114.
110. See id. at 114-15.
111. See discussion supra Part III.A.
112. See Moskopoulos, 172 Cal. Rptr. at 251.
113. See Ralee, 804 F.2d at 522.
114. See Omaha, 687 F. Supp. at 505.
115. See Walbrook, 726 F. Supp. at 785.
116. See American, 24 Cal. Rptr. 2d at 114.
action claims and founded in basic contract law. The California Supreme Court in *Buss* established the right to seek reimbursement in a mixed action and based that right on principles of restitution.

B. The Buss Arrives

In 1997 the Supreme Court of California decided *Buss v. Superior Court*. The *Buss* court found that the insurer was entitled to seek reimbursement from the insured for defense costs expended on claims that were not even potentially covered under its policy in a mixed action. Jerry Buss "owned and operated the Los Angeles Lakers, a professional basketball team, the Los Angeles Lazers, a professional indoor soccer team, the Los Angeles Kings, a professional hockey team... Great Western Forum indoor sports arena... and owned and operated, at least indirectly and in part, certain cable television broadcasting networks." H & H Sports, Inc. brought an action against Buss asserting twenty-seven causes of action against Buss and Buss-related persons and entities. Buss tendered the defense of the action to his insurers, including Transamerica Insurance Company ("Transamerica"). Transamerica was the only insurer which did not refuse to defend and deny coverage.

Buss contracted with Transamerica for two commercial general liability ("CGL") insurance policies which were relevant to the H & H Sports action. Transamerica accepted the defense of the H & H Sports action under both CGL policies because included in the twenty-seven causes of action was a defamation cause of action which Transamerica conceded was potentially within the coverage of the CGL policies. Although Transamerica accepted the defense of the H & H Sports action, it did so under a reservation of rights. Included in Transamerica's reservation of rights was the statement, "[w]ith respect to defense costs incurred or to be incurred in the future, Transamerica reserves full rights to be reimbursed and/or an allocation of attorney's fees and expenses in this action if it is determined that there is no coverage under this policy." The opinion suggests that Buss and Transamerica entered into a separate agreement supported by consideration that provided "[i]f a court... orders that defense costs be shared pro rata by... Buss... and Transamerica... Buss... shall reimburse Transamerica for the appropriate

117. See discussion infra Part II. A.
118. See *Buss*, 939 P.2d at 776-77.
119. See *id.* at 766.
120. See *id.* at 776-77.
121. See *id.* at 769.
122. See *id.*
123. See *id.*
124. See *Buss*, 939 P.2d at 769.
125. See *id.*
126. See *id.*
127. See *id.*
pro rata share of the fees and costs paid to that date."\textsuperscript{129} The purported agreement, however, was merely a letter from counsel for Buss agreeing to hourly rates among other things, and a statement that if an arbitrator found that defense costs were to be shared on a pro rata basis, Buss would reimburse Transamerica for the appropriate pro rata share.\textsuperscript{130} Although Transamerica argued as one of its theories for reimbursement that this was a separate agreement, the court disregarded the agreement without discussion.\textsuperscript{131}

Buss later settled the H & H Sports action, paying H & H Sports several million dollars.\textsuperscript{132} Transamerica ultimately spent approximately $1,000,000 defending Buss; however, defense of the defamation claim accounted for only about $55,000 of the total defense cost.\textsuperscript{133} Buss requested that Transamerica contribute to the settlement but Transamerica refused.\textsuperscript{134}

Buss filed suit against Transamerica asserting causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, and declaratory relief.\textsuperscript{135} Transamerica filed a cross-complaint seeking declaratory relief that Transamerica did not owe coverage to Buss and therefore did not have to contribute to the settlement.\textsuperscript{136} Additionally, Transamerica sought a declaration that Transamerica had a right to seek reimbursement of defense costs.\textsuperscript{137}

Transamerica moved the court for summary judgment on Buss’s complaint.\textsuperscript{138} The superior court granted Transamerica’s summary judgment, finding that there was no reasonable basis for Transamerica to be required to contribute to the settlement.\textsuperscript{139}

Subsequently, Buss moved the court for summary judgment on Transamerica’s cross-complaint.\textsuperscript{140} The superior court denied Buss’s motion.\textsuperscript{141} In light of the denial of his motion, Buss filed a petition for a writ of mandamus to the California Court of Appeals.\textsuperscript{142} The Court of Appeals denied the peremptory writ and found that Buss’s summary judgment was subject to independent review.\textsuperscript{143} Upon review, the court held that in the absence of policy language or an express agreement supported by consideration, an insurer may not recover costs expended defending a claim for which there was a potential for coverage.\textsuperscript{144} The court further held that an insurer which has defended under a specific reservation of rights to seek reimbursement, may

\textsuperscript{129} Id.
\textsuperscript{130} Telephone interview with John R. Brydon, Attorney, Haines, Lea & Brydon (October 25, 1999) (Mr. Brydon was co-counsel with James E. Gibbons representing Transamerica Insurance Company in Buss v. Superior Court).
\textsuperscript{131} Id.
\textsuperscript{132} See Buss, 939 P.2d at 770.
\textsuperscript{133} See id.
\textsuperscript{134} See id. at 771.
\textsuperscript{135} See id.
\textsuperscript{136} See id.
\textsuperscript{137} See id.
\textsuperscript{138} See Buss, 939 P.2d at 771.
\textsuperscript{139} See id.
\textsuperscript{140} See id.
\textsuperscript{141} See id.
\textsuperscript{142} See id.
\textsuperscript{143} See Buss, 50 Cal. Rptr. 2d at 452.
\textsuperscript{144} See id. at 455.
be entitled to reimbursement if it can show a fair and reasonable allocation of defense
costs made between potentially covered claims and non-covered claims. 145

Following the Court of Appeals decision, Buss petitioned the Supreme Court
of California for review. 146 The supreme court granted review and stayed the
proceedings in the superior court pending a determination. 147

The court granted review to resolve the following four issues related to
commercial general liability policies: (1) may the insurer seek reimbursement from
the insured for defense costs; (2) for what specific costs may the insurer obtain
reimbursement; (3) when the insurer seeks reimbursement, who has the burden of
proof; and (4) what is the burden of proof. 148

The court began its analysis with a discussion of relevant insurance law,
concluding with a determination of the insurer’s duty to defend in a mixed action. 149
In a mixed action, the insurer has the duty to defend the entire mixed action
“prophylactically as an obligation imposed by law in support of the policy.” 150 In
other words, if an insured tenders defense to the insurer in a suit which has a mix of
potentially covered claims and potentially non-covered claims, the insurer must
nevertheless defend the suit in its entirety. 151

Based on the insurer’s duty to defend the entire mixed action and relying on the
law of restitution, the court held that an insurer in a mixed action claim is entitled to
seek reimbursement of defense costs attributable to claims that are not even
potentially covered under its policy. 152 “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.” 153 In response to the second
question, the court held that in a mixed action the costs which may be reimbursed are
the costs that are reasonably allocated solely to those claims that are not even
potentially covered. 154 In response to its third and fourth questions, the court held
that in a mixed action when the insurer seeks reimbursement of defense costs from the
insured, the insurer has the burden of proof by a preponderance of the evidence. 155

III. THE RIGHT TO SEEK REIMBURSEMENT AS ESTABLISHED BY BUSS AND ITS
PROGENY

A liability insurer which has provided a defense to its insured under a
reservation of rights for claims which are potentially covered but are ultimately

145. See id. at 458.
146. See Buss, 939 P.2d at 772.
147. See Buss, 917 P.2d at 1165, aff’d, 939 P.2d 766 (1997).
148. See Buss, 939 P.2d at 768.
149. See id. at 772-75.
150. Id. at 775.
151. See id.
152. See id. at 776-77.
153. Id. at 777.
154. See Buss, 939 P.2d at 778.
155. See id. at 778.
determined non-covered may not recover its defense costs from its insured. If the defense provided is in a mixed action and at least one of the claims had potential for coverage, the insurer has the duty to defend the entire action. In this situation the insurer may recover its defense costs for claims ultimately determined not to be potentially covered provided it specifically reserved the right to seek reimbursement. Additionally, the insurer carries the burden of proof and must be able to reasonably allocate costs to the non-covered claims.

A. The Duty to Defend

The duty to defend is a threshold matter in the analysis of the insurer’s right to seek reimbursement. Because the insurer’s duty to defend is not dependent upon ultimate liability, an insurer’s duty to defend its insured is broader than its duty to indemnify. The insurer’s duty to indemnify runs to claims actually covered as proven by the facts. In contrast to the duty to indemnify, the duty to defend extends to claims that are merely potentially covered as proven by the facts. An insurer’s duty to defend is not limitless. The duty is limited by the “nature and kind of risk covered by the policy.” Regardless of how broadly the duty to defend is construed, the insurer has no duty to defend when there is no potential coverage under any theory. “Potentially covered” has been defined as “each [claim] may possibly embrace some triggering harm of the specified sort within the policy period caused by an included occurrence.”

In an action in which all claims are potentially covered, the insurer has a duty to defend. The duty to defend is grounded in basic contract law; the policy’s language so states and the insurer has been paid premiums by the insured for a defense. In contrast, the insurer has no duty to defend in an action in which no claim is even potentially covered. This also, is based on contract law because the insurer has not contracted to provide defense costs for claims not even potentially covered.

In a mixed action, at least one of the claims is potentially covered and at least one of the claims is potentially not covered. The insurer in a mixed action does not

156. See id. at 775-76.
157. See id. at 776.
158. See id.
159. See id. at 778.
160. See Aerojet, 948 P.2d at 921.
162. See Buss, 939 P.2d at 773.
163. See Aerojet, 948 P.2d at 921.
166. See Aerojet, 948 P.2d at 921.
167. See id.
168. See id.
169. See id.
170. See id.
171. See id.
have the duty to defend the claim in its entirety purely arising under the law of contracts. The insurer has the duty to defend the potentially covered claim but not the claim which is not potentially covered. Nevertheless, the California Supreme Court in Buss held that the insurer has the duty to defend the entire mixed action "prophylactically as an obligation imposed by law in support of the policy." The prophylactic obligation is based upon the rationale that "to defend meaningfully, the insured must defend immediately," and, therefore, "to defend immediately, it must defend entirely.

The duty to defend is not dispositive on the issue of whether the insurer has the right to seek reimbursement of defense costs on claims ultimately found not to be covered under the applicable policy. Although the duty to defend has been established, the right to reimbursement must be created by policy, separate contract, reservation of rights, or restitution. Once the right to reimbursement is created, the right must be adequately reserved.

B. Insurer's Right to Reimbursement

An insurer defending a mixed action will undoubtedly incur costs in connection with its defense of the insured in order to fulfill its duty to defend. An insurer’s right to seek reimbursement in a mixed action only extends to costs clearly attributable to claims not potentially covered. Those costs may be recovered when the insurer has a right to reimbursement when: (1) the policy provides for reimbursement; (2) the insurer and insured enter into a non-waiver agreement or separate contract; (3) the insurer provides the insured with a reservation of rights letter; or (4) the law of restitution implies the right.

1. Policy Provides for Reimbursement

A contractual right of reimbursement of defense costs for non-covered claims may be granted in the policy. If the policy itself provides for reimbursement, the policy "would qualify itself." If such language were in the policy, as a matter of contract law, the insured agreed to the right when he purchased the policy.

The core of commercial general liability policies is usually a standardized form often prepared by the Insurance Services Office ("ISO"). The “ISO” policy is a

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172. See Aerojet, 948 P.2d at 921.
173. See id.
174. See Buss, 939 P.2d at 775.
175. See id.
176. See id.
177. See id. at 776.
178. See id.
179. See id. at 776.
benchmark policy and is subject to modifications as the insurer deems necessary.181 The insurer is generally the drafter of the policy, but policy terms are unlikely to vary between different insurers.182 The “ISO” standard commercial general liability policy does provide a clause regarding the insurer’s right to seek reimbursement of defense costs for claims ultimately determined not to be covered.183

Because the insurer is the drafter of its own policy, it should be encouraged to include a clause regarding the right to seek reimbursement in the policy provisions. Incorporating such a clause, however, still might not adequately reserve the right. The relevant state’s law regarding construction of insurance contracts should be consulted to determine how the language should be drafted to best protect the right and withstand judicial construction. The majority of jurisdictions have adopted the reasonable expectations doctrine.184 The reasonable expectations doctrine may apply to the construction of ambiguous insurance contracts or contracts containing exclusions which are “obscure or technical or are hidden in complex policy language.”185 Therefore, a clause reserving the right to seek reimbursement of defense costs for claims ultimately found not to be covered should be written in plain language and not buried in the policy. Even if a clause for reimbursement is included in the policy language, the insurer may wish to bolster its right by entering into a non-waiver agreement or including the right in a reservation of rights letter.

2. Non-Waiver Agreement/Separate Contract

A non-waiver agreement or separate contract is an express agreement between the insurer and insured that the insurer may conduct a defense of the insured without committing itself to indemnity.186 The insurer offers the express agreement and normally it must be accepted by the insured in writing.187 An insurer may enter into a separate agreement, supported by consideration, with the insured seeking a right to reimbursement or some type of exchange in return for the promise.188 A non-waiver agreement is a bilateral contract.189 Therefore, a contract of this nature would supersede the policy pro tanto.190

An insurance company is not required to enter into a bi-lateral non-waiver agreement in order to preserve its rights to deny coverage after it has accepted the

181. See STempFl, supra note 180; Telephone interview with Don Beckel, Assistant Regional Manager, in Dallas, Texas, Insurance Services Offices, Inc. (Oct. 29, 1999).
182. See STempFl, supra note 180.
183. Interview with Don Beckel, supra note 181.
185. Id. at 868.
187. See id. But see Shelby Steel Fabricators, Inc. v. United States Fidelity & Guar. Ins. Co., 569 So. 2d 309, 310-12 (Ala. 1990) (insurer not estopped from later denying coverage even when insured failed to sign the non-waiver agreement provided by the insurer).
188. See Buss, 939 P.2d at 776.
189. See Haralambos, 241 Cal Rptr. at 432.
190. See Buss, 939 P.2d at 776.
insured's defense. The insurer can protect its rights by a reservation of rights letter.

3. Reservation of Rights Letter

In contrast to a non-waiver agreement which is a bi-lateral agreement, a reservation of rights letter is a unilateral instrument. The purpose of the reservation of rights letter is to enable the insured to make informed decisions regarding whether he needs to take some type of action to protect his interests. Therefore, the insurer should include in its reservation of rights letter any reason why the insured may not be entitled to coverage under the policy.

With regard to an insurer preserving any right it may have back against the insured, such as the right to seek reimbursement of defense costs, the insurer must include language in the reservation of rights letter to give notice to the insured of how it will or how it may proceed under such a right. The insured must be provided with such notice to determine whether to accept the insurer’s defense or to defend itself. Although, the right to seek reimbursement of defense costs is implied in law, it nevertheless must be reserved. However, whether the insured agrees or disagrees with the reservation of rights is irrelevant because the insurer has the right of reimbursement implied in law as quasi-contractual, whether or not it has that right implied in fact as contractual.

4. Restitution

The insurer has the right to seek reimbursement for defense costs as to claims that are not even potentially covered. The right is implied in law. It is important to note that an insurer seeking the right to recover defense costs under a restitution theory may do so only in the defense of a mixed cause action.

The rationale for allowing reimbursement of defense costs for claims which are not even potentially covered is predicated on basic restitution law. The insurer

191. See ALLAND, WINDT, INSURANCE CLAIMS AND DISPUTES § 2.18 (2nd ed. 1982).
192. A reservation of rights letter will generally protect the insurer’s right to deny coverage after it has undertaken the defense of the insured; however, with regard to the issue of seeking reimbursement of defense costs, a simple reservation of rights letter may not be enough. See discussion infra Part III. B.
193. See OSTRAGER supra note 186, at 547.
194. See WINDT, supra note 191, at § 2.13.
195. See id.
196. See Buss, 939 P.2d at 784 n.27.
197. See id.
198. See id.
199. See Buss, 939 P.2d at 775-77 n.12 (discussing the court’s disapproval of AMICO, Haralambos and Lesher because those courts required the insured to agree to the reservation of rights).
200. See id. at 776.
201. See id. at 776-78 n.14 (disapproving of the decisions in Haralambos and Lesher because they held that the insurer does not have a right of reimbursement against the insured which is implied in law as quasi-contractual).
202. See id. at 775-76.
203. See id. at 776.
must prophylactically defend mixed action claims and thereby incurs costs for defending such claims. Regarding the defense costs of the non-covered claims, the insurer has not been paid premiums by the insured. The insurer did not bargain to shoulder these costs. Under the law of restitution a person "who has been unjustly enriched at the expense of another is required to make restitution to the other." The court premised its decision on the insured’s unjust enrichment through the insurer’s "bearing of unbargained-for defense costs."

C. Exercising the Insurer’s Right to Seek Reimbursement

Once the insurer establishes the right to reimbursement by means of the foregoing methods, the insurer must exercise the right in order to receive the benefit. Exercising the right to reimbursement requires (1) a judicial determination of negative coverage; (2) an adequate reservation of rights; (3) an allocation of costs; and (4) proof necessary to obtain reimbursement by a preponderance of the evidence.

1. Judicial Determination of Negative Coverage

Insurers are not entitled to reimbursement of their defense costs attributable to non-covered claims before there has been a judicial determination of negative coverage. The rationale is that until a determination of no coverage has been made, the claims are potentially covered and the insurer has the duty to defend. Once it has been determined that the claim is not potentially covered, the insurer’s duty to defend is extinguished. The duty to defend can only be extinguished prospectively, not retroactively. An insurer must defend until it can prove that there are no claims which are covered under the policy.

A negative determination of no duty to defend does not necessarily entitle an insurer to reimbursement of costs expended on defense of claims on behalf of the insured. The insurer must adequately reserve its right to reimbursement.

204. See Aerojet, 948 P.2d at 921; See Buss, 939 P.2d at 775; See discussion supra Part III. A.
205. See Aerojet, 948 P.2d at 921.
206. See id.
207. See id. at 920.
208. See Buss, 939 P.2d at 777.
209. See id. at 776-78.
210. See id. at 773.
211. See id.
212. See id. at 778.
213. See id.
214. See Buss, 939 P.2d at 773.
215. See id.
216. See id.
217. See id.
218. See id.
2. Adequate Reservation of Rights

An insurer who desires to recover his costs of defending non-covered claims must clearly reserve the right to do so to avoid waiving its right or to avoid the loss of the right through estoppel.\(^{219}\) The insurer must expressly reserve the right to reimbursement of defense costs either by agreement or by a clear reservation of its right to later sue for reimbursement.\(^{220}\) Although a reservation of rights letter does not evidence or imply the insured's consent to the insurer’s reservation of rights, a unilateral reservation of rights may be effective.\(^{221}\) If the insured knew of the insurer’s intent to seek reimbursement if the insurer were found to have no duty to defend, the reservation of rights in this instance would be effective.\(^{222}\) "Because the right is the insurer’s alone, it may be reserved by it unilaterally."\(^{223}\) However, in addition to adequately reserving its right to seek reimbursement, the insurer must be able to prove the defense costs.

3. Allocation of Costs

If the insurer is entitled to seek reimbursement of its defense costs expended in defending a claim with no potential for coverage, it must show that the costs can be allocated solely to the claims that were not potentially covered.\(^{224}\) The rationale behind allowing allocation of costs is that the insurer has not been paid premiums with regard to claims that are not potentially covered.\(^{225}\) The insurer must also prove that the costs were not reasonably related to any potentially covered claims.\(^{226}\) If the claims are easily distinguishable, the allocation may be accomplished with little effort.\(^{227}\) However, if the claims are inextricably intertwined, greater care should be taken in separating the costs.\(^{228}\)

4. Burden of Proof

In a mixed action when the insurer is seeking reimbursement of its defense costs, the insurer carries the burden of proof.\(^{229}\) The burden of proof necessary to obtain

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219. See id. at 784 n.27.
221. See Walbrook, 726 F. Supp. at 784; But see Robert A. Zeavin, et al., How to Handle Coverage Disputes, INTRODUCTION TO BUSINESS INSURANCE: LAW AND LITIGATION 635, 676-77 (Practising Law Institute ed. 1985) (pointing out that authorities are split on whether an insured must expressly consent to a unilateral reservation of rights).
222. See Walbrook, 726 F. Supp. at 784.
223. See Buss, 939 P.2d at 784 n.27.
224. See id. at 778.
225. See id.
226. See id. at 778 n. 15.
227. Telephone interview with John R. Brydon, Attorney, Haines, Lea & Brydon (October 25, 1999) (Mr. Brydon was co-counsel with James E. Gibbons representing Transamerica Insurance Company in Buss v. Superior Court. Mr. Brydon indicated that little attempt was made to segregate costs in the Buss action because the main claims, breach of contract and defamation, were easily distinguishable).
228. Id.
229. See Buss, 939 P.2d at 778.
reimbursement for defense costs is by a preponderance of the evidence.\textsuperscript{230} The right to seek reimbursement has its limitations. The right to seek reimbursement founded upon the doctrine of restitution is limited to the defense of mixed actions.\textsuperscript{231} As a matter of common sense, an insurer considering seeking the right to reimbursement would want to base that decision on the amount of defense costs expended and the ability of the insured to reimburse those defense costs. It would not make sense to spend time recouping a small amount of money which would exceed the cost to seek the reimbursement. Additionally, it does not make sense to spend time and money to seek reimbursement from an insured which cannot possibly pay.

IV. \textbf{WILL OKLAHOMA HOP ON THE BUSS?}

Oklahoma has limited case law on the issue of the right to seek reimbursement. Therefore, to speculate what Oklahoma courts will do when deciding the issue requires an analysis of other jurisdictions. California law should be considered as it provides the most in-depth treatment on the issue. Additionally, Oklahoma insurance law closely comports with California insurance law. Lastly, it is worthwhile to glimpse at what other jurisdictions are holding on the issue.

A. \textit{Oklahoma Still Waiting for the Buss}

Oklahoma has only one case that discusses the insurer's right to seek reimbursement: \textit{Tri-State Ins. Co. v. Hobbs}.\textsuperscript{232} However, the usefulness of that opinion on the insurer's right to seek reimbursement of defense costs is questionable and speculative. The holding only applies to a very specific circumstance.\textsuperscript{233} The insured, Hobbs, was a common carrier of freight.\textsuperscript{234} Tri-State was the insurer who provided compulsory liability insurance required by the State as a condition precedent to receiving a common carrier's permit.\textsuperscript{235} The underlying action was a claim by a third party for property damage resulting from Hobbs' freight operations.\textsuperscript{236} Under the special endorsement clause, the policy between Hobbs and Tri-State required the insured to reimburse the insurer for any payments made by the insurer, which under the terms of the policy, it would not have been required to make except for the regulations of the Corporation Commission.\textsuperscript{237} In other words, if the insured presented a claim for which the insurer was not liable except under the Corporation Commission's regulations, the insurer was entitled to reimbursement of payments.\textsuperscript{238}

\begin{align*}
\text{230. See id.} \\
\text{231. See id.} \\
\text{232. See \textit{Tri-State}, 347 P.2d 226.} \\
\text{233. See id. at 229.} \\
\text{234. See \textit{id. at 228.}} \\
\text{235. See \textit{id. at 229.}} \\
\text{236. See \textit{id. at 228.}} \\
\text{237. See \textit{id.}} \\
\text{238. See \textit{Tri-State}, 347 P.2d at 228.}
\end{align*}
The court held that where the Corporation Commission’s regulations enlarged the policy to cover third persons, the agreement by the insured under the policy to reimburse payments to the insurer was valid. The court’s rationale was that but for the Corporation Commission’s regulations, the insurer would not have had to cover the claim. Further, the policy behind common carrier liability is to protect the public and third persons — not to regulate the insurer/insured relationship.

The holding addressed a very specific set of acts, and the opinion’s usefulness on the insurer’s right to seek reimbursement of defense costs was further questioned by the fact that the policy referred to reimbursement of payments. The opinion is unclear whether “payments” includes reimbursement of defense costs or if it contemplates reimbursement of indemnity payments. However, perhaps the rationale underpinning the holding could be analogized to the insurer of an insured tendering the defense of multiple claims — but for the insurer’s duty to defend the entire action, the insurer would not have to cover the claim(s) not potentially covered. This was the same equitable logic and rationale that eventually lead the California Supreme Court to hold as it did in Buss.

B. Will Oklahoma Catch the Buss?

With scant case law on point, the only way to speculate what Oklahoma will do when confronted with the issue of whether the insurer in a mixed action may claim the right to seek reimbursement of defense costs expended on claims ultimately found not to be covered, is to assess the same road California courts took to reach the decision in Buss. In other words, the logical way to gauge the status of Oklahoma insurance law on reimbursement is to use California law as a basis. The Oklahoma Supreme Court has noted that California insurance case law nearly comports with the rules the Oklahoma courts have established for the interpretation of insurance contracts. In furtherance of this proposition, Oklahoma has adopted California law on at least two other insurance issues: (1) the reasonable expectations doctrine; and (2) the insurer’s absolute duty of good faith and fair dealing. Therefore, while certainly not conclusive, Oklahoma may conceivably look to California law on the issue of reimbursement.

As discussed above, the threshold issue in a reimbursement analysis is whether the insurer had the duty to defend. Similar to California law, in Oklahoma the

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239. See id. at 229.
240. See id.
241. See id.
242. See id. at 228.
246. See discussion infra Part III. A.
The insurer’s duty to defend claims against its insured is an *ex contractu* obligation. However, the duty to defend is broader than the duty to indemnify. However, the duty is not limitless and, therefore, is measured by the nature and kinds of risks covered and the reasonable expectations of the insured. An insurer has the duty to defend when the facts “give rise to the potential of liability under the policy.” These Oklahoma principles regarding the insurer’s duty to defend are the same principles applied under California insurance law. Where the two states differ is regarding the duty to defend claims in a mixed action — this is where the *Buss* opinion separates Oklahoma and California in the analysis.

The crux of the *Buss* opinion was devoted to determining the insurer’s right to seek reimbursement of defense costs and hinged upon whether an insurer has a duty to defend all claims in a mixed action. The *Buss* court held that the insurer has the duty to defend the entire mixed action “prophylactically, as an obligation imposed by law in support of the policy.” Although Oklahoma has yet to address the insurer’s duty to defend in a mixed action, it would not be the first time Oklahoma has considered an implied in law duty regarding insurance contracts — the duty of good faith and fair dealing is implied in law.

The duty of good faith and fair dealing, as adopted by the Oklahoma Supreme Court, is an implied in law duty. The duty to defend all claims in a mixed action, as decided by the California Supreme Court, is an implied in law duty. Achieving and maintaining equity is the key rationale supporting these two implied duties. The rationale for implying a duty of good faith and fair dealing is the unequal bargaining and economic power between the insurer and the insured. The rationale for an implied in law duty to defend all claims in a mixed action is that “[t]o defend meaningfully, the insurer must defend immediately . . . and to defend immediately, it must defend entirely.” Without this policy, insurers would have to make the time consuming determination of which claims to defend. That type approach would slow down the process and be unfair to the insured. Additionally, under modern notice pleading, almost all claims as plead appear to have potential for coverage on their face.

After the *Buss* court implied the duty to defend an entire mixed action, the consequences of forcing the insurer to defend all claims resulted in a fundamental unfairness to the insurer if one or more of those claims was later determined to have no potential for coverage. Stated more simply, the insured may receive a defense for
which it never bargained. 258 The insured did not pay premiums to the insurer with regard to defense costs for claims which ultimately were not covered, and the insurer did not bargain to bear these costs. 259 To remedy the unjust enrichment of the insured, the Buss court, using the doctrine of restitution, held an insurer may seek reimbursement for defense costs of claims determined not to be even potentially covered. 260 Under the law of restitution “such a right runs against the person who benefits from ‘unjust enrichment’ and in favor of the person who suffers loss thereby.” 261

Restitution is a recognized and firmly rooted ground for recovery in Oklahoma which cuts across many areas of the law including contracts, torts, and estate law. 262 In Oklahoma unjust enrichment “arises not only where an expenditure by one person adds to the property of another, but also where the expenditure saves the other from expense or loss.” 263 Before a party may recover for unjust enrichment, “there must be enrichment to another coupled with a resulting injustice.” 264 Oklahoma law on restitution runs parallel with the rationale underpinning the holding in Buss.

In Oklahoma, the principles of law on the duty to defend and unjust enrichment are very similar to California law principles on the duty to defend and unjust enrichment. The primary difference between Oklahoma and California law regarding these issues is that Oklahoma has not litigated the extent of an insurer’s duty to defend in a mixed action. With little Oklahoma case law on the issue of reimbursement and because Oklahoma has adopted California law on other insurance law issues, Oklahoma likely will adopt the Buss opinion or the Buss rationale.

C. Other Reasons Oklahoma May Ride the Buss

If the similarities between Oklahoma and California insurance law are not persuasive enough to Oklahoma courts, the law of other jurisdictions may be persuasive. Because Oklahoma is in the Tenth Circuit, it would not be unusual for an Oklahoma court to look to other Tenth Circuit jurisdictions for guidance on these issues when the case of first impression arises.

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258. See id.
259. See id. at 776.
260. See id.
261. Id. at 777.
262. See N.C. Corff Partnership v. OXY USA, Inc., 929 P.2d 288, 295 (Okla. Ct. App. 1996). See also Warren v. Century Bank Corporation, 741 P.2d 846, 852 (Okla. 1987) (holding that a constructive trust may be used in order to force restitution from one who was unjustly enriched); Welling v. Am. Roofing and Sheet Metal Co., 617 P.2d 206 (Okla. 1980) (allowing statutory damages for a cause of action of unjust enrichment); Okla. Stat. tit. 78, § 88 (1999) (allowing damages and statutory attorney fees for unjust enrichment for misappropriation under Oklahoma’s Uniform Trade Secrets Act); French Energy, Inc. v. Alexander, 818 P.2d 1234, 1239 (Okla. 1991) (permitting estate executor and estate attorney to retain proceeds from judicial sale of oil and gas lease would result in unjust enrichment, and therefore, the basis of recovery allowable is under the doctrine of unjust enrichment).
1. The Tenth Circuit

Colorado has litigated the insurer's right to seek reimbursement of defense costs from the insured. Much like the development of California law on the right to seek reimbursement, Colorado began with determining the extent of the duty to defend. In Hecla Mining Co. v. New Hampshire Ins. Co., the Colorado Supreme Court held that if an underlying complaint asserts more than one claim, the insurer has the duty to defend against all the claims if any one of the asserted claims is potentially covered by the policy. The opinion is unclear whether the insurer sought reimbursement of defense costs; however, the court, while discussing the duty to defend, implied that an insurer may seek reimbursement:

[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 insured under a reservation of its rights to 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.

Although it can be implied that there is a right to seek reimbursement, the opinion is unclear whether the right refers to a right to seek reimbursement of defense costs from the insured or a right to seek reimbursement of defense costs from an excess liability insurer. In fact, two different Colorado courts use the language in Hecla as instructive on either interpretation.

The Colorado Court of Appeals in Employers' Fire Insurance Co. v. Western Guaranty Fund Services interpreted Hecla in the context of a general liability insurer seeking reimbursement of defense costs from an excess liability insurer. However, the court confused the issue by stating that "[w]hether such language would be sufficient, under Hecla, to put an insured on notice of a possible future claim for reimbursement of defense costs, we need not decide." The issue regarding defense costs was between two insurers and not the insurer and insured. The court's statement is vague and confusing at best; however, in another division of the Colorado Court of Appeals, that court cited both Hecla and Employers' Fire for the proposition that the insurer may seek reimbursement of defense costs from the insured.

In Horace Mann Ins. Co. v. Peters the insurer undertook defense of the insured's lawsuit while pursuing a declaratory judgment action regarding whether it had a duty to defend the insured. One of the issues before the court was whether

266. See id.
267. See id. at 1090.
268. Id.
270. See id at 1113.
272. See id. at 83.
the duty to defend was moot because the underlying litigation had been settled.\textsuperscript{273} The court reasoned that while settlement of the underlying action meant the insurer would not have to continue defending the insurer’s interest, the insured had a contingent liability for the costs of defense, and therefore, the issue of the duty to defend was not moot.\textsuperscript{274} In finding that the insured had a contingent liability for the costs of defense, the court relied on \textit{Hecla} and \textit{Employer’s Fire}.\textsuperscript{275} The proposition in those cases was that if the insurer defended under a reservation of rights, and it was later determined that the insurer had no duty to defend, the insurer could seek reimbursement of defense costs from the insured.\textsuperscript{276} Although the issue before the court was not the right to seek reimbursement, the court acknowledged the right by holding that due to the existence of the right to seek reimbursement, a settlement of the underlying action does not make the issue of the duty to defend moot.\textsuperscript{277} Therefore, the court acknowledged the existence of the insurer’s right to seek reimbursement but failed to discuss the rationale for allowing that right.

In the most recent decision from Colorado, \textit{Flannery v. Allstate Insurance Co.}, the court employed the \textit{Buss} rationale regarding the right of the insurer to seek reimbursement from the insured for defense costs.\textsuperscript{278} In \textit{Flannery}, Flannery Properties, Inc. filed a lawsuit against Ron Byrne alleging eleven claims regarding a dispute over legal boundaries of property.\textsuperscript{279} Byrne counterclaimed against Flannery alleging (1) slander of title; (2) abuse of process; (3) trespass; and (4) business disparagement.\textsuperscript{280} Flannery tendered the defense of the counterclaims to Allstate Insurance Company.\textsuperscript{281} Allstate refused to defend any of the claims against Flannery.\textsuperscript{282} Flannery filed a declaratory judgment action, seeking declaratory relief that Allstate had the duty to defend and seeking monetary relief for breach of contract and breach of an implied covenant of good faith and fair dealing.\textsuperscript{283} The district court held that Allstate’s only duty was to defend the trespass action.\textsuperscript{284} The underlying case between Flannery and Byrne proceeded to trial, and Flannery prevailed as to some claims but lost on Byrne’s trespass counterclaim.\textsuperscript{285}

Even though the district court found that Allstate had a duty to defend the trespass counterclaim, Allstate still refused to defend Flannery.\textsuperscript{286} The federal district court action was still viable because the issue of breach of the covenant of

\begin{thebibliography}{99}
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\bibitem{273} See id. at 85.
\bibitem{274} See id.
\bibitem{275} See id.
\bibitem{276} See id. at 84.
\bibitem{277} See \textit{Horace Mann}, 948 P.2d at 85.
\bibitem{279} See id at 1224.
\bibitem{280} See id
\bibitem{281} See id
\bibitem{282} See id
\bibitem{283} See id at 1225.
\bibitem{284} See \textit{Flannery}, 49 F Supp. 2d at 1225.
\bibitem{285} See id
\bibitem{286} See id
\end{thebibliography}
INSURER’S RIGHT TO SEEK REIMBURSEMENT

good faith and fair dealing remained unadjudicated. In that action, both parties sought summary judgment. Allstate’s motion for summary judgment sought a determination that Allstate was not liable for any fees and costs incurred by Mr. Flannery in defending against the non-trespass counterclaims. The court noted the lack of authority on the issue and looked outside the jurisdiction. Specifically, the court looked to and adopted the Buss rationale which created a quasi-contractual right of reimbursement of defense costs for claims not even potentially covered only if the insurer defended under a reservation of rights or the policy so provided. However, because Allstate refused to defend and did not provide a defense, the court held that Allstate was responsible to pay for the defense costs attributed to all claims— not just the trespass claim.

In short, while the Colorado Supreme Court has not squarely addressed the issue of reimbursement, other Colorado courts appear to be heading toward adopting Buss. In Hecla Mining Co. v. New Hampshire Ins. Co., the court implied that an insurer may seek reimbursement of defense costs from its insured as long as the insurer provides a defense to the insured under a reservation of rights seeking reimbursement of defense costs. The courts in Employers’ Fire Insurance Co. v. Western Guaranty Fund Services and Horace Mann Insurance Co. v. Peters acknowledged that the insurer has a possible claim for reimbursement of defense costs when the insured has notice of the insurer’s claimed right to seek reimbursement of defense costs. The most recent Colorado opinion on the issue of reimbursement did not fully litigate the issue; however; the court embraced the rationale of Buss and its progeny. There is nothing to suggest that the Colorado Supreme Court will stray from the Buss path.

2. Other Jurisdictions

The issue of the right of the insurer to seek reimbursement of defense costs from its insured is not limited to the Ninth and Tenth Circuits. The different courts considering the reimbursement issue have done so in varying depths of treatment. Nevertheless, the opinions provide guidance and direction on the right to seek reimbursement of defense costs.

a. Texas

The first case in Texas on the issue of reimbursement, Hartford Accident &
Indemnity Company v. LTV Corp., only implicitly discusses reimbursement of defense costs.\textsuperscript{295} Although the court did not specifically address the issue, it alluded, in \textit{dicta}, that a claim for reimbursement may arise under an insurance policy.\textsuperscript{296} Unfortunately, the decision contains no further discussion that would clearly define what conditions or circumstances should be satisfied in order to obtain reimbursement of defense costs.

In \textit{In re Hansel}, a Texas bankruptcy court was presented with the issue of whether an insurer is entitled to seek reimbursement of defense costs.\textsuperscript{297} The court addressed whether the insurer was entitled to an equitable right of reimbursement.\textsuperscript{298} The court found that there was no equitable right of restitution of litigation costs — relying on holdings in \textit{Reliance Ins. Co. v. Alan}, \textit{Ins. Co. of the West v. Haralambos Beverage Co.}, and \textit{Travelers Ins. Co. v. Lesher}.\textsuperscript{299} However, it should be noted that all three of those opinions relied upon by the \textit{Hansel} court were subsequently overruled by \textit{Buss v. Superior Court}.\textsuperscript{300}

The court further discussed whether a right to reimbursement could be found in the reservation of rights letter as argued by the insurer.\textsuperscript{301} The court held that a reservation of rights does not exist when there has been, at a minimum, no unilateral communication of the right sought.\textsuperscript{302} The reservation of rights letter provided to the insured did not include language that the insurer expected the insured to reimburse it for the costs of defense should it be found to have no duty to defend.\textsuperscript{303} Additionally, the policy did not provide for reimbursement, and the parties did not have a non-waiver agreement.\textsuperscript{304} Because the insured did not have notice of the insurer’s intent to seek reimbursement, the court found that the insurer was not entitled to recover litigation costs.\textsuperscript{305}

A recent Texas Court of Appeals opinion, \textit{Matagorda County v. Tex. Ass’n of Counties County Gov’t Risk Management Pool}, noted the lack of Texas law on the insurer’s right to reimbursement.\textsuperscript{306} The court looked to other jurisdictions that have examined the issue — including the California opinion in \textit{Buss}.\textsuperscript{307} The court determined when Texas law on quasi-contracts and restitution is applied to the insurer’s right to seek reimbursement, Texas should follow the same rationale as used in federal and sister states’ courts — \textit{Buss}.\textsuperscript{308} Although a restitution theory was

\textsuperscript{295}. See Hartford Accident & Indem. Co. v. LTV Corp., 774 F.2d 677, 680 (5th Cir. 1985).
\textsuperscript{296}. See id.
\textsuperscript{298}. See id. at 70.
\textsuperscript{299}. See id.
\textsuperscript{300}. See \textit{Buss}, 939 P.2d at 787.
\textsuperscript{301}. See \textit{In re Hansel}, 160 B.R. at 70.
\textsuperscript{302}. See id.
\textsuperscript{303}. See id.
\textsuperscript{304}. See id.
\textsuperscript{305}. See id.
\textsuperscript{307}. See id.
\textsuperscript{308}. See id. at 784-85.
applied, the court found the insurer had no right to seek reimbursement absent specific notice.⁴⁰⁹ The insurer provided coverage under a reservation of rights letter but failed to include any language in the reservation of rights that would give the insured notice of the insurer's intention to seek reimbursement of defense costs.⁴¹⁰

In the most recent decision from Texas, the United States District Court for the Northern District of Texas, Dallas Division, considered the right to seek reimbursement of defense costs upon a motion by the insurer.⁴¹¹ The court relied on the opinions in *In re Hansel* and *Matagorda County* and found that in order to preserve the right to seek reimbursement of defense costs, the reservation of rights letter must specifically notify the insured that the insurer has the intent to seek reimbursement.⁴¹²

In Texas, the right to seek reimbursement of defense costs has been addressed by a Texas bankruptcy court, appellate court and federal district court. Although, the Supreme Court of Texas has yet to render an opinion on the issue, the trend of the lower courts indicates the insurer has the right to seek reimbursement provided the insured has notice of the insurer's intent to seek reimbursement.

b. Louisiana

In *Resure, Inc. v. Chemical Distrib., Inc.*,⁴¹³ a declaratory judgment action, the court determined that the allegations against the insured clearly came within the policy exclusions, and therefore, the insurer did not have a duty to defend.⁴¹⁴ The court held that where the insurer timely reserved its rights under the policy and the reservation specifically addressed reimbursement of defense costs, the insurer was entitled to reimbursement of its defense costs because the insured failed to object to the reservation of rights.⁴¹⁵

c. Massachusetts

In *Millipore Corp. v. Travelers Indem. Co.*, the court held that if at the time the claims were advanced, the insurer could reasonably have concluded that no aspect of the claims fell within the scope of coverage, the possibility of coverage was enough to trigger the duty to defend.⁴¹⁶ The claims in the case were determined reasonable, and thus, the insurer had the duty to defend.⁴¹⁷ A later determination of no duty to

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³⁰⁹. See id. at 785.
³¹⁰. See id.
³¹². See id. at *1-2.
³¹⁴. See id. at 194.
³¹⁵. See id.
³¹⁷. See id.
defend does not negate the duty to defend. 318 The court held the insurer was not entitled to reimbursement of defense costs prior to summary judgment on the coverage issue. 319

V. CONCLUSION

Oklahoma is likely to look to and adopt the Buss opinion and its rationale. California insurance law is and has been persuasive on the issue and is also consistent with general principles of insurance law in Oklahoma. Although the issue of a commercial insurer’s right to seek reimbursement of defense costs from its insured in a mixed action does not appear to have been heavily litigated across the United States, Buss has greatly enhanced the issue. A number of jurisdictions have either expressly adopted Buss or have impliedly adopted the restitution rationale set forth in Buss. 320 Any analysis of the insurer’s right to seek reimbursement of defense costs in a mixed action for a claim or claims which never had potential for coverage will require a critical look at Buss. Therefore, when the Buss does come through Oklahoma, Oklahoma will probably be consistent with past precedent and follow California law -- i.e. Oklahoma should ride the Buss.

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