Nos. 21-11758, 21-11944

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CONTINENTAL CASUALTY COMPANY and
VALLEY FORGE INSURANCE COMPANY,

Plaintiffs-Appellants/Cross-Appellees

v.

WINDER LABORATORIES, LLC and STEVEN PRESSMAN,

Defendants-Appellees/Cross-Appellants,

and

CONCORDIA PHARMACEUTICALS, S.A.R.L.,

Defendant/Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF GEORGIA CASE NO. 2:19-CV-00016-RWS

BRIEF OF *AMICI CURIAE* COMPLEX INSURANCE CLAIMS LITIGATION ASSOCIATION, AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION, AND NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES IN SUPPORT OF PLAINTIFFS-APPELLANTS/CROSS-APPELLEES AND REVERSAL OF THE DISTRICT COURT ORDER IN APPEAL NO. 21-11758

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CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

Counsel for the Complex Insurance Claims Litigation Association, the American Property Casualty Insurance Association and the National Association of Mutual Insurance Companies submit the following Certificate of Interested Persons and Corporate Disclosure Statement pursuant to Fed. R. App. P. 26.1 and Rules 26.1-1 and 26.1-2 of the Rules of the United States Court of Appeals for the Eleventh Circuit:

1. Adams, Kristin M.

2. Advanz Pharma Corp.

3. American Property Casualty Insurance Association ("APCIA") is a trade association of property/casualty insurance companies. APCIA is not a publicly-held company, and has no public company affiliates.

4. Boyd, Nicholas

5. Brewerton-Palmer, Sarah

6. Buchanan Ingersoll & Rooney PC

7. Caplan Cobb LLP

8. CNA Coverage Litigation Group

9. Cobb, James

10. Colaizzi, Roger Anthony

11. Complex Insurance Claims Litigation Association ("CICLA") is a trade association of property/casualty insurance companies. CICLA is not a publicly-held company, and has no public company affiliates.

12. Concordia Pharmaceuticals, S.A.R.L.

13. Concordia Pharmaceuticals (US), Inc.

14. Continental Casualty Company ("CCC")

15. Crook, Christopher S.

16. Cumby, Joshua Counts

17. Daniel, Laurie Webb

18. Dentons US LLP

19. Ellena, Katherine J.

20. Giller, Richard

21. Guinn, Kathryn

22. Holladay, W. Brian

23. Holland & Knight LLP

24. Jones, Maxwell

25. Lavin, Parker J.

26. Linhart, Julie K.

27. Martenson, Hasbrouck & Simon LLP

28. Mirilovic, Lena

29. Morris, Anthony

30. National Association of Mutual Insurance Companies ("NAMIC") is a trade association of property/casualty insurance companies. NAMIC is not a publicly-held company, and has no public company affiliates.

31. O'Shaughnessy, Michael Vincent

32. Pillsbury Winthrop Shaw Pittman LLP

33. Pressman, Steven

34. Reed Smith, LLP

35. Roberts Tate, LLC

36. Smith, S. Lloyd

37. Valley Forge Insurance Company ("VFI")

38. Venable, LLP

39. Verrocchio, Vincent Edward

40. Waddell, Timothy Brandon

41. Wilcox, James Thomas

42. Winder Laboratories, LLC

43. Xiao, Roy

September 7, 2021

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INTEREST OF AMICI CURIAE

The Complex Insurance Claims Litigation Association ("CICLA") is a leading trade association representing major property and casualty insurance companies in *amicus* activity in the courts. CICLA seeks to assist courts in understanding and resolving the core coverage issues that are of greatest consequence to insurers today. CICLA has participated as *amicus curiae* in numerous insurance cases in state and federal courts across the United States, including important cases before this Court.

The American Property Casualty Insurance Association ("APCIA") is the primary national trade association for home, auto, and business insurers. Its members represent nearly 60 percent of the U.S. property-casualty insurance market. APCIA advocates sound public policies on behalf of its members in state and federal legislative and regulatory forums and files *amicus curiae* briefs in significant cases before federal and state courts. APCIA supports the consistent clear, and reasoned development of law affecting its members and policyholders.

The National Association of Mutual Insurance Companies ("NAMIC") is the largest property/casualty insurance trade group with a diverse membership of more than 1,400 local, regional, and national member companies, including seven of the top 10 property/casualty insurers in the United States. NAMIC members lead the personal lines sector representing 66 percent of the homeowner's insurance market

and 53 percent of the auto market. Through our advocacy programs we promote public policy solutions that benefit NAMIC member companies and the policyholders they serve and foster greater understanding and recognition of the unique alignment of interests between management and policyholders of mutual companies.

CICLA, APCIA and NAMIC respectfully submit that their participation as *amici* may assist the Court.[1] *Amici* have a national perspective and an understanding of the local concerns, as well as in-depth knowledge of the important insurance contract issues presented in this case. This Court is asked to decide whether an insurer is entitled to reimbursement of costs paid in defense of its insured where the insurer expressly reserved its right in writing to seek reimbursement of defense costs, which the policyholder accepted, and it is later determined that the insurer owed no duty to defend. This issue is of substantial importance and this Court's ruling will impact interests well beyond those of the parties here. *Amici* seek to provide a useful

[1] This brief is submitted pursuant to Fed. R. App. P. 29. All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part. Further, no such counsel or party, or person other than *amici*, their members, or their counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

Affiliates of Plaintiffs-Appellants/Cross-Appellees are members of CICLA and APCIA. However, this brief is filed on behalf of CICLA, APCIA, and NAMIC, and not any individual member company.

and significant perspective on the dilemma facing an insurer that believes in good faith that its policy provides no coverage for the underlying claim.

STATEMENT OF THE ISSUES

Amici will address the key issue of whether an insurer is entitled to reimbursement of costs paid in defense of its insured, where the insurer expressly reserved its right in writing to seek reimbursement of defense costs, which the policyholder accepted, and it is later determined that the insurer owed no duty to defend. As *amici* will demonstrate, the district court's ruling rejecting a right of reimbursement, absent a specific policy provision or express agreement providing for reimbursement, was in error and should be reversed.

STATEMENT OF FACTS AND STATEMENT OF THE CASE

Amici adopt the Statement of Facts set forth in the brief of Valley Forge Insurance Company ("VFI") and Continental Casualty Company ("CCC") (together, the "Insurers"), and briefly summarize the facts here.

Winder Laboratories, LLC, and Steven Pressman (the "policyholders") sought coverage under primary and umbrella policies issued by the Insurers for an underlying lawsuit. Doc. 1; Doc. 1-3. The Insurers issued multiple reservation of rights letters agreeing to defend the policyholders pursuant to a reservation of rights, including expressly reserving the right to seek reimbursement of defense fees and costs incurred on behalf of the policyholders in the underlying lawsuit. Doc. 1-8,

Doc. 74-6, ¶ 4. The policyholders accepted the Insurers' defense of the underlying lawsuit and did not object to the Insurers' reservation of the right to seek reimbursement of defense fees and costs. Doc. 74-6, ¶ 5. Rather, the policyholders' attorneys submitted their bills to VFI, which paid them. Doc. 74-6, ¶¶ 9-10.

The Insurers filed the instant declaratory judgment action in the district court on January 17, 2019, seeking a ruling that they owed no duty to defend or indemnify the policyholders for the underlying lawsuit, and for reimbursement of defense fees and costs they had incurred on behalf of the policyholders. Doc. 1. The district court granted the Insurers' motion for judgment on the pleadings, determining that they had no duty to defend or indemnify the policyholders in the underlying lawsuit based on the policies' exclusion for injuries arising out of the failure to conform to statements of quality made in the policyholders' advertisements. Doc. 54.

Nonetheless, the district court later denied the Insurers' motion for summary judgment on the issue of reimbursement and entered summary judgment in favor of the policyholders. The district court ruled that the Insurers were not entitled to reimbursement of defense fees and costs paid on behalf of the policyholders, despite having no duty to defend or indemnify under the policies. Doc. 93. In so doing, the district court adopted the minority position set out in the ALI's Restatement of the Law of Liability Insurance, § 21, holding that an insurer has no right to recoup

defense fees or costs absent a specific provision in the insurance policy or another express agreement permitting reimbursement. Doc. 93.

The district court erred in rejecting the majority rule holding an insurer has a right of reimbursement under the circumstances here, where it provides a defense to the policyholder under a reservation of rights that the policyholder accepts, including an express reservation of the right to recoup defense costs, and later obtains a court ruling of no coverage under the policy.

SUMMARY OF 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 actually was due.

Additionally, the majority of courts have found that recoupment is supported by the equitable doctrines of implied-in-fact contract, quantum meruit, and unjust enrichment where, as here, the insurer expressly reserves its right to recoupment and the policyholder accepts the defense. This Court should therefore reverse the ruling of the district court, which erroneously ruled against a right of recoupment.

ARGUMENT

Consistent with the majority view, sound public policy, and the clear terms of the policies, 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 had no duty to defend or indemnify.

I. 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.[2] 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 the insurer defends and never owed a duty to defend, as the Insurers 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. Also, courts have recognized that "the insurer's savings

[2] *See, e.g.*, *Certain Interested Underwriters at Lloyd's, London v. Halikoytakis*, 556 F. App'x 932, 933 (11th Cir. 2014) (applying Florida law) ("[the insured] ought in fairness make [the insurer] whole" once it was determined the policy afforded no coverage, where the insured accepted a defense subject to the insurer's reservation of rights to recover defense costs) (quoting *Colony Insurance Co. v. G & E Tires & Service, Inc.*, 777 So. 2d 1034, 1039 (Fla. 1st DCA 2000)); *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.").

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."[3]

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 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."

[3] *See, e.g.*, *Scottsdale Ins. Co. v. Sullivan Props., Inc.*, No. 04–00550 HG–BMK, 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).

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 likewise would 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 worthy purpose of encouraging insurers to accept the defense of their policyholders in situations involving disputes

as to coverage.[4] 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.

II. 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 not agreed to accept non-covered risks. The policies here expressly state that the Insurers afford specified coverage only with respect to damages or loss because of "bodily injury," "property damage" or "personal and advertising injury" "to which this insurance applies." Doc. 75-2; Doc. 75-3. The Insurers have 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, the Insurers

[4] *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.").

filed a declaratory judgment action in federal district court to resolve the coverage issue. Doc. 1.

The district court found that the Insurers had no duty to defend or indemnify the insureds against the underlying claims, based on a policy exclusion providing that there is no coverage for personal and advertising injury "[a]rising out of the failure of goods or products to conform with any statement of quality or performance." Doc. 54. The district court concluded that all of the allegations in the underlying lawsuit fell squarely within the scope of this exclusion. Doc. 54. This finding of no coverage meant that the Insurers had no legal obligation to defend or indemnify the insureds. Further, the plain terms of the policies specify that the Insurers' defense and indemnity obligations apply only with respect to matters "to which this insurance applies."

The policies' terms unmistakably state where the Insurers' obligations under the policy end. In other words, the policies *do* provide for a right to recoupment because there is no coverage under the policy language. There is no need for the policies to go further—as the district court erroneously concluded here—to describe the Insurers' rights with respect to recouping any costs advanced for uncovered claims. Where the policy expressly limits the insurer's duty to defend or indemnify 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. As recently

explained by the Nevada Supreme Court in adopting the majority rule, recognizing a right to reimbursement does not modify the parties' agreement. Rather, where it is determined there was never a duty to defend in the first instance, allowing the insurer to recoup defense costs paid "gives effect to the parties' agreement." *Nautilus Ins. Co. v. Access Med., LLC*, 482 P.3d 683, 690 (Nev. 2021).[5]

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 district court's conclusion that a right of reimbursement should not exist ignores the facts that the policies unmistakably provide that the duty to defend or indemnify does not apply to uncovered claims, and that the right to recoup costs advanced by the Insurers is based on longstanding unjust enrichment principles that are part of the fabric of settled law over which the insurance contracts are written.

III. Recoupment is supported by the equitable doctrines of implied-in-fact contract, 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

[5] *See also Century Surety Co. v. Andrew*, 134 Nev. 819, 822, 432 P.3d 180, 184 (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).

doctrines of implied-in-fact contract, quantum meruit, and unjust enrichment. Under Georgia law, "the duty to defend exists if the claim potentially comes within the policy."[6] "However, where the complaint "unambiguously exclude[s] coverage under the policy," there is no duty to defend.[7] The insured has no right to a defense for uncovered claims.

Here, there was a good faith dispute as to whether the underlying lawsuit alleged any "personal and advertising injury" that was not excluded from coverage under the policies. Thus, when the policyholders tendered the underlying claim, the Insurers were forced to either deny coverage outright at the risk of breaching the policies if their 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. The Insurers thus acted to protect the policyholders' best interests while they awaited judicial guidance on their obligations. Importantly, after the Insurers issued their reservation of rights letters, the policyholders did *not* object and did not elect to conduct their defense at their own expense. Doc. 74-6, ¶¶ 5, 9-10. Rather, aware of the Insurers' position on reimbursement, and the risk that they had presented their Insurers with an uncovered

[6] *Penn-Am. Ins. Co. v. Disabled Am. Veterans, Inc.*, 268 Ga. 564, 565, 490 S.E.2d 374, 376 (1997) (citation omitted).

[7] *Disabled Am. Veterans, Inc.*, 268 Ga. at 565 (citation omitted).

claim, the policyholders repeatedly accepted VFI's payments for the fees and expenses of their defense. *Id.*

This sequence of events falls squarely within the parameters of settled principles of quantum meruit and unjust enrichment law. In Georgia, the elements of a quantum meruit claim are: "the provider performed services valuable to the recipient that were requested by or knowingly accepted by the recipient, that the recipient's receipt of the services without compensating the provider would be unjust, and that the provider expected compensation at the time the services were performed."[8] Unjust enrichment relatedly "exists where a plaintiff asserts that the defendant induced or encouraged the plaintiff to provide something of value to the defendant; that the plaintiff provided a benefit to the defendant with the expectation that the defendant would be responsible for the cost thereof; and that the defendant knew of the benefit being bestowed upon it by the plaintiff and either affirmatively chose to accept the benefit or failed to reject it."[9]

Recovery in quantum meruit or unjust enrichment through reimbursement for the policyholders' received benefit of having their defense costs paid is supported

[8] *Sitterli v. Csachi*, 344 Ga. App. 671, 671, 811 S.E.2d 454, 455 (2018) (emphasis and citation omitted); *see also* OCGA § 9–2–7 ("Ordinarily, when one renders service or transfers property which is valuable to another, which the latter accepts, a promise is implied to pay the reasonable value thereof.").

[9] *Sitterli*, 344 Ga. App. at 673 (emphasis and citation omitted).

by the facts. VFI seeks reimbursement for payments made when coverage never existed under the policies, *i.e.*, when the policies' terms provide there was *no* duty to pay for the defense. The policyholders demanded that their Insurers defend them and then, with full knowledge that the Insurers 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 policyholders' acceptance of payments from VFI, despite full knowledge that the Insurers repeatedly reserved their 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 Georgia law.

A federal court applying Georgia law in precisely this situation recognized these principles of quantum meruit and unjust enrichment recovery.[10] The district court in that case did not impose a requirement that the "understanding" be included in the policy itself. Rather, the court acknowledged the rule under Georgia law that, where a policyholder does not object "to a timely and proper reservation of rights and allow[s] an insurer to provide its defense," the policyholder "is deemed to have

[10] *Illinois Union Ins. Co. v. NRI Const. Inc.*, 846 F. Supp. 2d 1366, 1377 (N.D. Ga. 2012) ("A right of reimbursement is justified under either an unjust enrichment or implied in fact contract theory."). *NRI* predicted Georgia law, as no Georgia appellate court has ruled on this issue. S*ee Georgia Interlocal Risk Mgmt. Agency v. City of Sandy Springs*, 337 Ga. App. 340, 346, 788 S.E.2d 74, 79 (2016). *See also*

consented to the letter's terms."[11] Courts in other states similarly have applied principles of quantum meruit and unjust enrichment where an existing contract between the parties fails to address the specific issue in dispute.[12] For example, a

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[11] *NRI Const. Inc.*, 846 F. Supp. 2d at 1376–77 (citing *Jacore Sys., Inc. v. Cent. Mut. Ins. Co.*, 194 Ga. App. 512, 514, 390 S.E.2d 876, 878 (1990)); *see also State Farm Fire & Cas. Co. v. Walnut Ave. Partners, LLC*, 296 Ga. App. 648, 654, 675 S.E.2d 534, 540 (2009) (Georgia law "recognizes that an insurer can reserve its rights unilaterally or with the implied consent of the insured."); *Nationwide Prop. & Cas. Ins. Co. v. Renaissance Bliss, LLC*, 396 F. Supp. 3d 1287, 1298 (N.D. Ga. 2019), *aff'd*, 823 F. App'x 815 (11th Cir. 2020) (ruling the insurer was entitled to reimbursement of settlement payment after a court determination that the lawsuit was not covered under the policy, where the insured had agreed to a reservation of rights under which the insurer could seek reimbursement).

Notably, case law distinguishing *NRI* has involved situations where the insurers did not specifically reserve their rights to recoup defense costs. *See, e.g.*, *Evanston Ins. Co. v. Sandersville Railroad Co*., No. 5:15-CV-247 (MTT), 2017 WL 3166730, at *8 (M.D. Ga. July 25, 2017); *Essex Ins. Co. v. Sega Ventures, LLC*, No. 5:15-CV-247 (MTT), 2015 WL 1505979, at *7 (N.D. Ga. Mar. 31, 2015). Here, in contrast, the Insurers expressly and timely reserved their right to reimbursement.

[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*, No. 1:14–CV–213, 2015 WL 3795028, at *10 (D. Vt. June 18, 2015) (denying motion for judgment on the pleadings on doctor's claim for unjust enrichment against former employer seeking reimbursement of out-of-pocket expenses for licensing fees, health insurance, medical malpractice insurance, and

number of courts, including this Court applying Florida law, have concluded that an insured's acceptance of defense or 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 policyholders could have had no reasonable expectation that the Insurers would defend claims that were not covered. Denying recoupment would unfairly provide the policyholders with a defense for which they neither bargained for nor paid premiums, and would also be unjustly detrimental to the Insurers, 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

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recertification course expenses that were not specifically addressed in her employment contract).

[13] *Probuilders Spec. Ins. Co. v. Double M Construction*, 116 F. Supp. 3d 1173, 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 [the insurer's] defense and passing litigation costs to it for two years"); *see also Halikoytakis*, 556 F. App'x at 933 (applying Florida law) (insurer was entitled to reimbursement of defense costs where the policyholder accepted the defense subject to a reservation of rights, including right to recoup defense costs, and allowed the insurer to defend for over 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").

a right to reimbursement when it is later determined that no coverage exists.[14] This Court should join the majority of courts that have affirmed an insurer's right to recoupment of uncovered defense costs.

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[14] *See, e.g.*, *Nautilus Ins. Co.*, 482 P.3d at 690; *Probuilders*, 116 F. Supp. 3d at 1182; *Dupree v. Scottsdale Ins. Co.*, 96 A.D.3d 546, 947 N.Y.S.2d 428 (2012) (citing *Fed. Ins. Co. v. Kozlowski*, 18 A.D.3d 33 (App. Div. 2005)) (acknowledging insurer's right to recoupment when a later determination of no coverage is made); *Sec. Ins. Co. of Hartford v. Lumbermens Mut. Cas. Co.*, 826 A.2d 107, 125 (Conn. 2003) ("Where the insurer defends the insured against an action that includes claims not even potentially covered by the insurance policy, a court will order reimbursement for the cost of defending the uncovered claims in order to prevent the insured from receiving a windfall."); *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"); *G & E Tires & Serv., Inc.*, 777 So. 2d at 1039 (holding that 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.*, No. 04–00550 HG–BMK, 2007 WL 2247795, at *5 (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) (ruling it would be inequitable for insureds to retain the benefits of

For example, in *Nautilus*, the Nevada Supreme Court held that "when a court determines that the insurer never had a duty to defend and the insurer clearly and expressly reserved its right to seek reimbursement, it is equitable to require the policyholder to pay" and "gives effect to the parties' agreement" that the insurer is liable only for covered claims.[15] Similarly, in *Helca Mining*, 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] *See also Travelers Cas. & Sur. Co. v. Ribi ImmunoChem Research, Inc.*, 108 P.3d 469, 480 (Mont. 2005) (holding 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); *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.*

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the defense without repaying defense costs because they "received the benefit of a defense they were not paying for, [] knew they were receiving a defense they were not funding, and [] were aware from [the insurer's] reservation-of-rights letter that [the insurer] claimed a right to reimbursement" upon a determination of no duty to defend").

[15] *Nautilus Ins. Co.*, 482 P.3d at 689-90.

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

Specialty Ins. Co. v. Sussex Airport, Inc., No. 14-5494 (SRC)(CLW), 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, granting insurer's motion for judgment on the pleadings and ruling it was entitled to recoupment of defense costs).

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.[17] 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

[17] *Buss v. Superior Ct.*, 939 P.2d 766, 775-76 (Cal. 1997) ("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").

> 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.[18]

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 district court here and some other federal courts predicting Georgia law have followed the RLLI on this issue.[19] 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.[20]

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

[19] *See Am. Fam. Ins. Co. v. Almassud*, No. 1:16-CV-4023-RWS, 2021 WL 1116328, at *4 (N.D. Ga. Feb. 17, 2021); *Illinois Union Ins. Co. v. William C. Meredith Co.*, No. 1:07-CV-1840-WBH, 2009 WL 10669607, at *3 (N.D. Ga. June 5, 2009).

[20] *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 (Sept. 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*, 574 U.S. 445, 475, 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.[21]

In keeping with state law, 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 the defense.[22] This Court should hold likewise and uphold the

[21] 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); Tex. Civ. Prac. & Rem. Code Ann. § 5.001 (2019); Kentucky House Resolution No. 222 (2018); Indiana House Concurrent Resolution No. 62 (2019); Louisiana Senate Resolution No. 149 (2019); Idaho S.B. 1176 (2019); Arizona H.B. 2644 (2020); North Carolina House Bill 366 (2021) (codified at N.C. Gen. Stat. § 58-1-2 (2021)).

[22] *See also Am. Economy Ins. Co.*, 695 Fed. Appx. at 196 (applying Montana law) (affirming summary judgment for insurer on its claim for recoupment of defense costs); *Sussex Airport, Inc.*, 2016 WL 2624912, at *5 (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,

Insurers' claim to recoup uncovered defense costs advanced under their explicit reservation of the right to reimbursement.

CONCLUSION

For the foregoing reasons, *Amici* respectfully urge this Court to reverse the ruling of the district court and hold that an insurer is entitled to reimbursement of costs paid in defense of its insured where the insurer expressly reserved its right in writing to seek reimbursement of defense costs, and it is later determined that the insurer owed no duty to defend.

Respectfully submitted,

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granting summary judgment to insurer on its claim for recoupment of defense costs); *CDC Housing, Inc.*, 233 F. Supp. 3d at 414 (applying New York law, granting insurer's motion for judgment on the pleadings and ruling it was entitled to recoupment of defense costs).

CERTIFICATION OF COMPLIANCE

This brief complies with the type-volume limitations set forth in Fed. R. App. P. 29(a)(5) and 32(a)(7)(B), because this brief contains 6,300 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The "Word Count" function of Microsoft Word 2013 was used for this purpose.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point Times New Roman.

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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing brief with the Clerk for the United States Court of Appeals for the Eleventh Circuit by the CM/ECF system, and that service will be accomplished by the CM/ECF system.

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