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# ATTORNEYS' FEES INCURRED IN DEFENDING INSURANCE POLICY NON-COVERED CLAIMS: WHO PAYS?

*Joseph F. Cunningham with James N. Markels\**

## I. INTRODUCTION

In 2005, the U.S. property/casualty insurance industry generated \$437,709,106.00 in net premiums written.<sup>1</sup> Of the top ten U.S. carriers, nearly all had created in-house law firms in metropolitan areas to lessen the claims-handling/litigation costs so paramount an element of their business costs.<sup>2</sup> Indeed, it is difficult to name another commercial enterprise that devotes so much money to payment of attorneys' fees.<sup>3</sup> At the same time, commentators on the legal profession have indicated that moneymaking has become the profession's "driving issue . . . , the driving goal"<sup>4</sup> and that the emphasis has become the "priority" of moneymaking.<sup>5</sup>

Given this growing tension between the interests of insurers and their insureds, it is surprising that relatively little scholarly or academic work has addressed the significant issue of whether or not insurers are entitled to recover attorneys' fees and costs expended by them when defending cases that involve factual allegations that fall outside the terms and conditions of their insureds' policies. The lack of critical regard for this topic cannot be rationalized by concluding only insignificant sums of money are involved, because many disputes between insurer and insured over the obligation to pay defense counsel involve millions of dollars.<sup>6</sup>

With this somewhat odd indifference by parties to this far-reaching legal and business issue, it is appropriate to look at the major cases on this

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1. *Net Premiums Written, Top Property/Casualty Writers, United States—2005*, 107 BEST'S REVIEW 55, 55–56 (2006).

2. See, e.g., Rodd Zolkos, *Ward Identifies What Makes Some Insurers a Cut Above*, BUS. INS., Aug. 21, 2000, <http://www.businessinsurance.com/cgi-bin/article.pl?articleId=2243>.

3. See, e.g., STEPHEN J. CARROLL ET AL., ASBESTOS LITIGATION 95 (2005) (reporting that in the expensive field of asbestos litigation, "defense legal fees and expenses consumed more than \$21 billion, about 31 percent of the funds spent by defendants and insurers on asbestos personal injury claims through 2002").

4. Kathryn Alfisi, *Books in the Law: A Conversation with Joseph Goulden*, WASH. LAW., June 2006, at 38, 39.

5. Joseph E. Ulrich, *The Business of Law Practice Is Business*, 18 J. CIV. LITIG. 29, 29–30 (2006).

6. See CARROLL ET AL., *supra* note 3, at 95–96 (reporting that the \$21 billion spent on defense legal fees and expenses in asbestos litigation was partially caused by insurers and insureds disputing coverage issues).

topic from the past few years. Case law is not abundant on this topic. But those jurisdictions—both state and federal—that have addressed the issue have done so in depth; with a polar disparity of opinion by a number of well-regarded courts.

Part II of this article will analyze major cases that do not recognize the insurer's right to recovery. Part III will analyze major cases that do recognize the insurer's right to recovery. Finally, Part IV will compare the two different ways courts treat this issue and conclude that the rule recognizing the insurer's right to recovery is the better rule.

## II. MAJOR CASE LAW NOT RECOGNIZING A RIGHT TO RECOVERY

### A. FOURTH CIRCUIT INTERPRETING MARYLAND LAW

In *Perdue Farms, Inc. v. Travelers Casualty & Surety Co. of America*,<sup>7</sup> the U.S. Court of Appeals for the Fourth Circuit, interpreting Maryland law under *Erie Railroad Co. v. Tompkins*,<sup>8</sup> recently tackled the issue of carrier entitlement to defense fees/costs. The insurer had paid out defense costs for both covered and uncovered claims, but then sought to recover the costs of defending the uncovered claims.<sup>9</sup> The court decided that allowing such partial recovery would “significantly tip the scales in favor of the insurer,”<sup>10</sup> and cause liability insurance to “all but cease to function,”<sup>11</sup> turning it instead into an “up-front defense whose line-item costs would then be the subject of subsequent litigation.”<sup>12</sup>

This chamber-of-horrors argument is a bit extreme, given the broad obligation of an insurer in Maryland, and elsewhere, to fully defend both the covered and non-covered claims once a duty to indemnify potentially exists.<sup>13</sup> This principle of great benefit to the insured, coupled with the basic premise that an insurance policy is a contract whose particular language alone governs the duties and benefits conferred on both parties,<sup>14</sup> plus the court's silence on the insurer's right to ultimate restitution for non-covered claim defense, suggest an insured's potential windfall.

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7. *Perdue Farms, Inc. v. Travelers Cas. & Sur. Co. of Am.*, 448 F.3d 252 (4th Cir. 2006).

8. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

9. *Perdue Farms*, 448 F.3d at 254.

10. *Id.* at 259.

11. *Id.*

12. *Id.*

13. *Montgomery County Bd. of Ed. v. Horace Mann Ins. Co.*, 840 A.2d 220, 226 (Md. App. 2003); *Utica Mut. Ins. Co. v. Miller*, 746 A.2d 935, 940 (Md. App. 2000).

14. See TOM BAKER, *INSURANCE LAW AND POLICY: CASES, MATERIALS, AND PROBLEMS* 25 (2003) (noting that “the relationship between insurers and policyholders remains largely the province of contract law”).

The *Perdue Farms* panel gave little deference to any of these concepts. The opinion's author, Judge James Harvie Wilkinson III, is known as a particularly conservative judge on a very business-friendly, conservative court.<sup>15</sup> Therefore, the adoption of an industry-hostile, rigidly exclusionary rule in this case, buttressed by relatively banal generalities, appears odd. This is especially true, given an absence of controlling Maryland law on point and the case facts.

The insured, *Perdue*, held a policy issued by Travelers to cover claims based upon violations of the Federal Employee Retirement Income Security Act (ERISA).<sup>16</sup> The plaintiff in the underlying class action alleged ERISA as well as wage- and hour-law violations.<sup>17</sup> Wage and hour claims were not covered under the Travelers policy. Nevertheless, the bulk of the allegations of wrongdoing related to such issues, and the bulk of the \$10 million settlement of the case and \$4.4 million in defense costs were attributable to those non-covered items.<sup>18</sup> The court reversed the district court's decision to have Travelers pay all settlement costs involving all claims made, reasoning correctly that the policy clearly did not respond to non-covered events. But it followed what has been termed the minority rule<sup>19</sup> by rejecting application of this analysis to the attorneys' fees and costs expended to defend such extra-policy claims.<sup>20</sup> To bolster its reasoning that settlement-indemnification costs should not be borne entirely by Travelers, the court stated that to do otherwise, "would turn the insurance policy on its head [and] . . . impose liability upon Travelers for claims that its insurance policy never covered."<sup>21</sup>

It is puzzling that the court thought it was appropriate to split the settlement costs, with the insurer paying the costs for the covered claims and the insured paying the costs for the uncovered claims, but found this same reasoning did not apply to splitting the attorneys' fees/costs. This seems especially odd, given the need for lower-court involvement in any necessary apportioning of covered and non-covered dollar amounts comprising the settlement.<sup>22</sup> Furthermore, Travelers had earlier put *Perdue*

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15. Neil A. Lewis, *In List of Potential Justices, Many Kinds of Conservative*, N.Y. TIMES, July 2, 2005, at A13 (characterizing Judge Wilkinson and his 4th Circuit colleague Judge J. Michael Luttig as "indisputably conservatives"); Anna Palmer, *Conservatives Fear 4th Circuit Is Slipping Away*, LAW.COM, July 10, 2007, <http://www.law.com/jsp/article.jsp?id=1183712793303> (stating that the 4th Circuit "has long been a bastion of conservative rulings").

16. Employee Retirement Income Security Act, 29 U.S.C. §§ 1001–1461 (2007); *Perdue Farms*, 448 F.3d at 254.

17. *Perdue Farms*, 448 F.3d at 255.

18. *Id.* at 254.

19. See *Westchester Fire Ins. Co. v. Wallerich*, No. 07-2145, 2007 WL 2821656, at \*9 (D. Minn. Sept. 25, 2007) (referring to the rule embraced here as "the minority rule").

20. *Perdue Farms*, 448 F.3d at 258.

21. *Id.* at 262.

22. *Id.* at 264.

on notice: upon receipt of the underlying lawsuit from its insured, Travelers warned Perdue that it was reserving its rights under the policy as to both fees/costs and indemnification obligations. Travelers further stated that it intended to seek recovery of defense costs expended on non-covered claims defense.<sup>23</sup>

### B. ILLINOIS LAW

In 2005, the Supreme Court of Illinois embraced the same minority view as Maryland. In *General Agents Insurance Co. of America v. Midwest Sporting Goods Co.*, it reversed the Circuit and lower appellate courts, which had held an insurer was entitled to reimbursement of attorneys' fees for defending a no-coverage case.<sup>24</sup> The underlying case was brought by the City of Chicago and Cook County against the insured for selling guns to inappropriate purchasers and alleged intentional wrongdoing and other non-covered acts. The City sought injunctive relief and punitive damages.<sup>25</sup> Nonetheless, a defense was provided under a reservation of rights that included the right to seek repayment of defense costs for non-covered claims.

But the Illinois Supreme Court, while recognizing the majority of jurisdictions permit such recovery,<sup>26</sup> cited current Wyoming and Texas Supreme Court decisions that did not.<sup>27</sup> Both of those courts held that the absence of policy language permitting the insurer to recoup defense costs was fatal to the carrier's subsequent effort to recover them, despite its articulated reservation of rights to do so if appropriate.<sup>28</sup> The Illinois court adopted this reasoning on the premise that to do otherwise would allow the insurer to "unilaterally modify its contract."<sup>29</sup> It went on to cite with approval *Terra Nova Insurance Co. v. 900 Bar, Inc.*<sup>30</sup> and *Liberty Mutual Insurance Co. v. FAG Bearings Corp.*<sup>31</sup> While the latter case, in rejecting the insurer's claim for reimbursement, provided no thoughtful analysis,<sup>32</sup> the Third Circuit's opinion provides interesting reasoning:

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23. *Id.* at 255.

24. *Gen. Agents Ins. Co. of Am. v. Midwest Sporting Goods Co.*, 828 N.E.2d 1092 (Ill. 2005).

25. *Id.* at 1093–1094.

26. *Id.* at 1098.

27. *Id.* at 1101 (citing *Shoshone First Bank v. Pac. Employers Ins. Co.*, 2 P.3d 510 (Wyo. 2000) and *Tex. Ass'n of Counties County Govt. Risk Mgt. Pool v. Matagorda County*, 52 S.W.3d 128 (Tex. 2000)).

28. *Shoshone*, 2 P.3d at 517; *Tex. Ass'n of Counties*, 52 S.W.3d at 136.

29. *Gen. Agents*, 828 N.E.2d at 1102.

30. *Id.* (citing *Terra Nova Ins. Co. v. 900 Bar, Inc.*, 887 F.2d 1213 (3d Cir. 1989)).

31. *Gen. Agents*, 828 N.E.2d at 1103–04 (citing *Liberty Mut. Ins. Co. v. FAG Bearings Corp.*, 153 F.3d 919 (8th Cir. 1998)).

32. *Liberty Mut.*, 153 F.3d at 924.

A rule permitting such recovery would be inconsistent with the legal principles that induce an insurer's offer to defend under [a] reservation of rights. Faced with uncertainty as to its duty to indemnify, an insurer offers a defense under reservation of rights to avoid the risks that an inept or lackadaisical defense of the underlying action may expose it to if it turns out there is a duty to indemnify.<sup>33</sup>

The Illinois Supreme Court found this reasoning persuasive.<sup>34</sup> Practitioners know that it is speculative at best and removed from reality otherwise. In many cases the insurer who reserves its rights still undertakes to defend with counsel of its own choosing.<sup>35</sup> The insurance defense bar has been accused of many things over the decades, but "inept or lackadaisical"<sup>36</sup> is not a known label. Surely, chosen defense counsel would not be used more than once if it exhibited such traits. For that matter, any counsel who fail to vigorously represent their clients put their clients at risk and expose themselves to malpractice claims.<sup>37</sup> Nevertheless, the Fourth Circuit in *Perdue Farms* also quoted this dubious reasoning.<sup>38</sup>

The Illinois court also reasoned that implying an agreement to permit the insurer to recover attorneys' fees for non-covered claims defense "places the insured in the position of making a Hobson's choice between accepting the insurer's additional conditions on its defense or losing its right to a defense from the insurer."<sup>39</sup>

This straw man of a Hobson's choice is not in accord with practice. Insurers generally do not pull coverage if an insured or its attorney disputes the content of a reservation-of-rights letter.<sup>40</sup> To do so puts the carrier at risk of paying all personal-counsel fees/costs for defending the underlying

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33. *Terra Nova*, 887 F.2d at 1219.

34. *Gen. Agents*, 828 N.E.2d at 1103.

35. *See, e.g.*, *Fed. Ins. Co. v. Am. Cas. Co. of Reading, PA*, 748 F.Supp. 1223, 1228 (W.D. Mich. 1990) (holding that although the insurer reserved its rights under the policy, the insured "was not entitled to insist on counsel of its choice at [the insurer's] expense"); *L & S Roofing Supply Co., Inc. v. St. Paul Fire & Marine Ins. Co.*, 521 So.2d 1298, 1304 (Ala. 1988) ("The mere fact that the insurer chooses to defend its insured under a reservation of rights does not *ipso facto* constitute such a conflict of interest that the insured is entitled at the outset to engage defense counsel of its choice at the expense of the insurer.").

36. *Terra Nova*, 887 F.2d at 1219.

37. *See, e.g.*, *Am. Guar. & Liability Ins. Co. v. Timothy S. Keiter, P.A.*, 360 F.3d 13, 15 (1st Cir. 2004); *Old Republic Ins. Co. v. Chuhak & Tecson, P.C.*, 84 F.3d 998, 1000 (7th Cir. 1996); *Fein ex rel. Estate of Fein v. Chicago Ins. Co.*, No. 01 Civ. 11386, 2003 WL 21688239, at \*3 (S.D.N.Y. July 18, 2003).

38. *Perdue Farms, Inc. v. Travelers Cas. & Sur. Co. of Am.*, 448 F.3d 252, 259 (4th Cir. 2006).

39. *Gen. Agents*, 828 N.E.2d at 1102.

40. Instead of pulling coverage, an insurer that disputes coverage with its insured would more likely file suit for a declaratory judgment for its responsibilities under the policy. *See, e.g.*, *Transp. Cas. Ins. Co. v. Soil Tech Distrib., Inc.*, No. 4D06-1483, 2007 WL 2254551 (Fla. Dist. Ct. App. Aug. 8, 2007), where the insurer defended under a reservation of rights and then filed suit for declaratory judgment to determine whether it owed either a duty to defend or a duty to indemnify to the insured.

suit and the insured's prosecuting the subsequent coverage action, as well as a potential bad-faith claim.<sup>41</sup> Such a course comports with no reasonable risk/reward analysis. Its erroneous premise hardly provides a reasoned basis for precluding the insurer from attempting to recover attorneys fees unrelated to covered claims.

### III. MAJOR CASE LAW RECOGNIZING A RIGHT TO RECOVERY

#### A. CALIFORNIA LAW

Less than a year before the *Perdue Farms* decision, the Supreme Court of California reached the opposite decision of the *Perdue Farms* court in *Scottsdale Insurance Co. v. M.V. Transportation*.<sup>42</sup> The facts in *Scottsdale* were similar to those in *Perdue Farms*. The insured, M.V. Transportation, was sued by a competitor alleging contractual breaches, unlawful business actions, misappropriation of trade secrets and unfair competition in the underlying case. None of these acts were covered by the Scottsdale policy.<sup>43</sup> Although the carrier did not believe the claims were covered by the policy's "advertising injury" provisions, the carrier nevertheless provided a defense because of the possibility of coverage, and advised in its reservation-of-rights letter that it would seek reimbursement of defense fees for causes of action raising no potential for coverage.<sup>44</sup>

The trial court in *Scottsdale*'s declaratory judgment action found a duty to defend and no right to reimbursement.<sup>45</sup> An intermediate appellate court affirmed, but the California Supreme Court reversed.<sup>46</sup> As in *Perdue Farms*, California law obligated the carrier to defend all claims if any involved are covered.<sup>47</sup> The court referenced the very broad existing case language that a potential for coverage is all that is required, and

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41. See, e.g., *Ivey v. Allstate Ins. Co.*, 774 So.2d 679, 684 (Fla. 2000) ("Florida law is clear that in 'any dispute' which leads to judgment against the insurer and in favor of the insured, attorney's fees shall be awarded to the insured."); DEL. CODE ANN. tit. 18, § 4102 (1999) (stating that in the context of property insurance, "[t]he court upon rendering judgment against any insurer . . . shall allow the plaintiff a reasonable sum as attorney's fees to be taxed as part of the costs"); GA. CODE ANN. § 33-7-15(b.1) (2000) (stating in the context of motor vehicle liability insurance "[i]n the event the insurer denies coverage and it is determined by declaratory judgment or other civil process that there is in fact coverage, the insurer shall be liable to the insured for legal cost and attorney's fees as may be awarded by the court").

42. *Scottsdale Ins. Co. v. M.V. Transp.*, 115 P.3d 460 (Cal. 2005).

43. *Id.* at 463. Most other commercial general liability policies do not cover such acts either. See BAKER, *supra* note 14, at 417 (reproducing a sample commercial general liability policy).

44. *Scottsdale*, 115 P.3d at 467.

45. *Id.* at 464.

46. *Id.* at 465.

47. *Id.* at 466.

[m]oreover, that the precise causes of action pled by the . . . complaint may fall outside policy coverage does not excuse the duty to defend where, under the facts alleged, reasonably inferable or otherwise known, the complaint could fairly be amended to state a covered liability.<sup>48</sup>

Under California law, a duty to defend exists until extinguished by case resolution or declaratory judgment, and the right to reimbursement was believed to be restricted to prospective costs only.<sup>49</sup> On a prior remand the intermediate appellate court determined the carrier was entitled to attorneys' fees only prospectively, because prior decisions by the court had found an obligation to defend, if not pay.<sup>50</sup> The California Supreme Court rejected this analysis and concluded that as no coverage existed for any claim, the carrier was entitled to reimbursement *ab initio*.<sup>51</sup>

The court's rationale is worth considering:

The insured pays for, and can reasonably expect, a defense against third party claims that are potentially covered by its policy, but no more. Conversely, the insurer does not bargain to assume the cost of defense of claims that are not even potentially covered. To shift these costs to the insured does not upset the contractual arrangement between the parties. Thus, where the insurer, acting under a reservation of rights, has prophylactically financed the defense of claims as to which it owed no duty of defense, it is entitled to restitution. Otherwise, the insured, who did not bargain for a defense of non-covered claims, would receive a windfall and would be unjustly enriched.<sup>52</sup>

The Fourth Circuit decision in *Perdue Farms* failed to either cite this case or reference the reasoning expressed. Common sense supports the *Scottsdale* court's point that:

Without a right of reimbursement, an insurer might be tempted to refuse to defend an action in any part—especially an action with many claims that are not even potentially covered and only a few that are—lest the insurer give, and the insured get, more than they agreed.<sup>53</sup>

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48. *Id.* (citing *Gray v. Zurich Ins. Co.*, 419 P.2d 168 (Cal. 1966) and *CNA Cas. of Cal. v. Seaboard Sur. Co.*, 861 P.2d 1153 (Cal. 1986)).

49. *Montrose Chem. Corp. v. Superior Court*, 861 P.2d 1153 (Cal. 1993); *Haskel Inc. v. Superior Court*, 39 Cal. Rptr. 2d 520 (1995); *Hartford Accident & Indem. Co. v. Superior Court*, 29 Cal. Rptr. 2d 32 (1994).

50. *Scottsdale*, 115 P.3d at 469–470.

51. *Id.* at 471.

52. *Id.* at 469.

53. *Id.* at 470.



### B. SIXTH CIRCUIT INTERPRETING OHIO LAW

In *United National Insurance Co. v. SST Fitness Corp.*,<sup>54</sup> the Sixth Circuit, interpreting Ohio law, concluded that attorneys' fees were recoverable by the insurer after defense of uncovered claims related to patent and trademark infringement. It distinguished both the Wyoming<sup>55</sup> and Third Circuit<sup>56</sup> opinions as predicated on imprecise or untimely reservations of rights and followed the majority rule.<sup>58</sup> The court thus limited its holding to cases, "where the insurer: 1) timely and explicitly reserves its rights to recoup . . . costs, and 2) provides specific and adequate notice of the possibility of reimbursement."<sup>59</sup> As the insured did not contest the carrier's specific notice of intent to recover fees/costs for uncovered claims, the court concluded an implied-in-fact contract between the parties existed, permitting recovery.<sup>60</sup> If the insured rejects this conditional defense, the court indicated the insured could proceed by itself with personal counsel defense of the underlying dispute, or file a declaratory judgment action.<sup>61</sup>

This appears too harsh and the conclusion is unrelated to reality. Experience indicates insureds will do neither and need not! The issue can be resolved when the third-party claim is settled or adjudicated. The alternative courses put all expense that appears to be extra-contractual and unnecessary on the insured. Yet the Sixth Circuit's underlying conclusion that a carrier should not be required to pay for the defense of uncovered claims is basically correct if adequate notice is given the insured.

### C. FLORIDA LAW

A Florida Court of Appeals decision in *Colony Insurance Co. v. G&E Tires & Service, Inc.*<sup>62</sup> approved reimbursement to a carrier for defending non-covered sexual discrimination claims under the insured's garage owners' policy which specifically excluded such a risk. It pointed out that a "duty to defend does not create coverage where coverage does not exist."<sup>63</sup> The carrier filed a declaratory judgment action on the coverage issue and prevailed.<sup>64</sup> The Florida appellate court then correctly concluded that the insurer was not entitled to fee reimbursement for its defense of partially

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54. *United Nat'l Ins. Co. v. SST Fitness Corp.*, 309 F.3d 914 (6th Cir. 2002).

55. *Shoshone First Bank v. Pac. Employers Ins. Co.*, 2 P.3d 510 (Wyo. 2000).

56. *Terra Nova Ins. Co. v. 900 Bar, Inc.*, 887 F.2d 1213 (3d Cir. 1989).

58. *United Nat'l Ins. Co.*, 309 F.3d at 918-919.

59. *Id.* at 919.

60. *Id.* at 920.

61. *Id.* at 921.

62. *Colony Ins. Co. v. G & E Tires & Serv., Inc.*, 777 So.2d 1034 (Fla. Dist. Ct. App. 2000).

63. *Id.* at 1038.

64. *Id.*

covered claims.<sup>65</sup> But, for those claims clearly and entirely not covered, reimbursement was appropriate. The court relied on the policy language and said:

With regard to defense costs for these claims, the insurer has not been paid premiums by the insured. . . . To attempt to shift them would not upset the arrangement. The insurer therefore has a right of reimbursement that is implied in law as quasi-contractual, whether or not it has one that is implied in fact in the policy as contractual.<sup>66</sup>

Perhaps more pertinently, it reasoned:

The courts should be consistent in encouraging insurance companies to properly meet their duty to defend [their] insured[s] against third party claims and minimize unnecessary claims to enforce policy coverage. However, where an insurer has properly met its duty 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.<sup>67</sup>

Years of experience on both sides of coverage litigation confirms this position is sound.

#### **D. CALIFORNIA LAW: “MIXED CLAIMS”**

The above landmark cases, except for *Perdue Farms*,<sup>68</sup> involved instances when an absence of coverage appeared to exist as to all claims.<sup>69</sup> Consequently, our survey closes with a review of another “mixed claims” circumstance addressed by a prominent court. In *Buss v. The Superior Court*,<sup>70</sup> the California Supreme Court decided an insurer was entitled to reimbursement of defense costs as to those claims not covered under its policy, as opposed to those potentially covered, on a theory of implied-in-law or quasi-contract recovery. It found that an “enrichment” of the insured by the insurer through the bearing of unbargained-for defense costs is inconsistent with the insurer’s duty under the policy and therefore

65. *Id.*

66. *Id.*

67. *Id.* at 1039 (quoting *Knapp v. Commonwealth Land Title Ins. Co.*, 932 F. Supp. 1169, 1172 (D. Minn. 1996)).

68. *Perdue Farms, Inc. v. Travelers Cas. & Sur. Co. of Am.*, 448 F.3d 252, 255 (4th Cir. 2006) (“The parties agree that the policy covers claims for relief under ERISA, but that it does not extend to claims for violations of wage and hour laws.”).

69. See also *Shoshone First Bank v. Pac. Employers Ins. Co.*, 2 P.3d 510, 514 (Wyo. 2000) (“Pacific acknowledged that the coverage of its policy extended to the claim for invasion of privacy because, at least potentially, that claim would qualify under the ‘personal injury’ coverage. . . . Pacific contends that it is responsible for those defense costs attributable to the claim for invasion of privacy only.”).

70. *Buss v. The Superior Court*, 939 P.2d 766 (Cal. 1997).

“unjust.”<sup>71</sup> It correctly placed the burden of proof on the insurer by a preponderance of the evidence to show the proper allocation.<sup>72</sup> The opinion is thorough and detailed; written by the generally liberal Justice Mosk.

The *Buss* case involved some twenty-seven (27) claims, with the not-unusual mix of some covered and some non-covered allegations.<sup>73</sup> It presents the most realistic scenario or real-world circumstances facing claims professionals and attorneys for both sides. Unlike most such cases, however, given California law on potential conflicts of interest when coverage issues arise, the carrier initially agreed to—and did—pay for personal counsel for the insured’s defense.<sup>74</sup> The case settled ultimately for \$8.5 million with attorneys’ fees in excess of \$1 million.<sup>75</sup>

The trial and intermediate appellate courts found that the insurer was entitled to reimbursement of defense costs as to those claims not covered under its policy.<sup>76</sup> In affirming, Justice Mosk, in an exhaustive recitation of California case law, made the wise point that the insurer has a duty to *defend* all claims if some are covered in a typically “mixed” scenario, but with a potential for repayment as to some:

[W]e can, and do, justify the insurer’s duty to defend the entire “mixed” action prophylactically, as an obligation imposed by law in support of the policy. To defend meaningfully, the insurer must defend immediately. To defend immediately, it must defend entirely. It cannot parse the claims, dividing those that are at least potentially covered from those that are not. . . . The “plasticity of modern pleading” allows the transformation of claims that are at least potentially covered into claims that are not, and vice versa. The fact remains: As to the claims that are at least potentially covered, the insurer gives, and the insured gets, just what they bargained for, namely, the mounting and funding of a defense. But as to the claims that are not, the insurer may give, and the insured may get, more than they agreed, depending on whether defense of these claims necessitates any additional costs.<sup>77</sup>

The court went on to point out that without the right to ultimately seek some reimbursement of extended costs in defending non-covered claims, an insurer might risk not defending any claims. Given a fair chance at some recovery, however, the economic risk of defending decreases; consequentially the instinct to “refuse to defend an action in any part” also

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71. *Id.*

72. *Id.* at 778.

73. *Id.* at 769.

74. *See* San Diego Fed. Credit Union v. Cumis Ins. Soc’y, Inc., 208 Cal. Rptr. 494 (1984).

75. *Buss*, 939 P.2d at 770.

76. *Id.* at 771.

77. *Id.* at 775 (internal citations omitted).

decreases.<sup>78</sup> Justice Mosk recognized the economic motive prevalent in such disputes:

It is as to defense costs that can be allocated solely to the claims that are not even potentially covered that the insurer has not been paid premiums by the insured. By contrast, the insurer has in fact been paid as to costs that can be allocated solely to the claims that are at least potentially covered.<sup>79</sup>

The court's decision brims with very sound, elemental reasoning and balances what is fair to both the insurer and the insured.

#### IV. COMPARISON AND CONCLUSION

It is apparent the law governing the obligation of insurer and/or insured to pay attorneys' fees in insurance policy coverage defenses will continue to develop without much consistency. The significant choices and issues presented remain to be resolved in most jurisdictions. A cautious application of the majority rule, as articulated by the California and Florida courts,<sup>80</sup> is the better-balanced approach. However, the more absolutist denial of fees to insurers under any circumstances, as seen in *Perdue Farms* and the other court decisions adhering to the minority position,<sup>81</sup> provides the virtue of simplicity. But this simplicity comes at a steep price. Practically, denial of attorneys' fees to a carrier for defending uncovered claims encourages an insurer to refuse to defend the insured on borderline cases in order to minimize costs, often with the insured either financially unable or otherwise unwilling to contest such a decision.

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78. *Id.* at 778.

79. *Id.*

80. *See supra* Part III.

81. *See supra* Part II.