S211645

IN THE SUPREME COURT OF CALIFORNIA

J.R. MARKETING, L.L.C. et al.,
Cross-Defendants and Respondents,

v.

HARTFORD CASUALTY INSURANCE COMPANY,
Cross-Complainant and Appellant.

AFTER A DECISION BY THE COURT OF APPEAL,
FIRST APPELLATE DISTRICT, DIVISION THREE
CASE NO. A133750

OPENING BRIEF ON THE MERITS

[Supplemental Motion for Judicial Notice filed concurrently herewith.]

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STATEMENT OF THE ISSUE

Where an insurer has been denied the protection of Civil Code section 2860 (section 2860), may independent *Cumis* counsel shift to its clients liability for reimbursement of unreasonable and unnecessary legal fees? Or do the principles articulated in *Buss v. Superior Court* (1997) 16 Cal.4th 35 (*Buss*) and the established common-law remedies for money wrongfully received give an insurer a common law, quasi-contractual right to maintain a direct action against *Cumis* counsel for reimbursement of unreasonable and unnecessary defense fees and costs?

INTRODUCTION

Hartford Casualty Insurance Company (Hartford) paid over $15 million to defend its insureds, including $13.5 million to their independent (*Cumis*) attorneys, Squire Sanders & Dempsey LLP (Squire Sanders). After the close of litigation against its insureds, Hartford brought a reimbursement action against *Cumis* counsel and the insureds for unreasonable and unnecessary fees and costs paid by Hartford to Squire Sanders. The trial court and the Court of Appeal held as a matter of law that Hartford could not seek reimbursement directly against *Cumis* counsel, but could pursue such claims only against the insureds. The result is that the insured clients are left solely responsible to Hartford for their lawyers' rampant overbilling, and their *Cumis* lawyers face no responsibility to Hartford. A trial court has now issued a tentative statement of decision finding that Hartford is entitled to nearly $5 million in reimbursement from its insureds related to Squire Sanders' overbilling.

This Court has granted review to consider what the Court of Appeal characterized as a "slight step further" in the law. (Typed opn. 14.) Rather than moving the law forward, however, the Court of Appeal's holding takes a big step back—away from the long-standing common law of restitution, away from important public policies, and away from pragmatic resolution of disputes over *Cumis* fees.

The trial court, which made its tentative reimbursement award to Hartford after the Court of Appeal's decision, expressed

frank concern "about the effect of this decision on the insured[s], who will be required to pay this judgment." (See Supp. MJN, exh. A, p. 26.) The insureds likely never reviewed the bills with the "thought in mind that they actually might have to pay the bills" and did not have the "financial ability [to] pay this Court's order." (*Ibid.*) As the trial court noted, this put the insureds in an untenable position. They can file for bankruptcy, ask their former *Cumis* counsel to give them $5 million, or sue their former *Cumis* counsel (if they can find the lawyers and the money to do so). (*Ibid.*) If they sue their lawyers, they will have to contend that their former *Cumis* counsel's fees were unreasonable—a position directly contrary to what they argued in the reimbursement action below, where, still represented by Squire Sanders, they vigorously defended the reasonableness of Squire Sanders' fees. Though obviously reluctant to place this burden solely on the insureds, the trial court concluded that it was bound to do so "unless and until such time as the California Supreme Court rules differently." (*Ibid.*) Hartford asks this Court to do so now.

The courts below held that when an insurer initially disputes coverage, but is then found to have a duty to defend, it forfeits the right to invoke certain aspects of section 2860, even for fees incurred after the insurer begins defending. As relevant here, the courts below held that, although Hartford was required only to pay "reasonable and necessary" fees and costs, Hartford could not arbitrate fee disputes with *Cumis* counsel during the course of the case. Instead, it had to pay each bill as presented, and then bring a reimbursement action after the matter concluded. But when

Hartford tried to do exactly that, suing Squire Sanders for millions of dollars in unreasonable charges, the Court of Appeal took its "step further." It held that an insurer precluded from contemporaneous arbitration of fee disputes with *Cumis* counsel under section 2860 can ***never*** sue *Cumis* counsel, no matter how excessive and unreasonable its fees.

Nothing in *Buss*—or any other authority—supports that conclusion. An insurer should be able to bring a single action for reimbursement against both its insureds and *Cumis* counsel.[1]

Long-standing common law principles support this approach, which Hartford followed here. The law of restitution requires one who has been unjustly enriched at the expense of another to restore the funds unjustly received. Squire Sanders received approximately $13.5 million in legal fees and costs from Hartford. To the extent those fees and costs were unreasonable and unnecessary, Squire Sanders was unjustly enriched at Hartford's expense, and Hartford should be able to bring a restitution claim directly against Squire Sanders.

The Court of Appeal appeared concerned that a direct reimbursement action would interfere with *Cumis* counsel's independence and relationship with the insured. That concern was unwarranted. By its very nature, a *post*-litigation reimbursement action occurs only after the underlying case is resolved, when there is no remaining attorney-client relationship between the insured and *Cumis* counsel that could be disrupted.

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[1] The extent to which Hartford has a claim for reimbursement against its insureds in this case is not at issue in this appeal.

The Court of Appeal was also influenced by its view that permitting Hartford to proceed against *Cumis* counsel directly through a reimbursement action would somehow place Hartford in a better position than insurers who arbitrate their fee claims against *Cumis* counsel under section 2860. But, from the insurer's perspective, contemporaneous arbitration under section 2860 is a far superior remedy to a post-litigation reimbursement action in the trial court. Section 2860 arbitration is speedy and efficient, and permits ***ongoing*** dispute resolution so that bills can be adjusted and issues addressed immediately. A post-litigation reimbursement action, by contrast, often will take place years after the conduct has occurred and the bills have been paid.

Under the Court of Appeal's rule, *Cumis* counsel can bill any amount, no matter how excessive, and pass on the burden of these excessive fees to its client or, if the client is judgment proof, to the client's insurer. Such a result puts the burden on the wrong parties, creates inefficiencies in the legal process by requiring two actions when one will do, and creates an incentive for rampant overbilling practices—all contrary to the public policy of this state. This Court should reverse the decision of the Court of Appeal.

STATEMENT OF THE CASE

A. Hartford is ordered to pay "reasonable and necessary" costs for its insureds' retention of Squire Sanders as *Cumis* counsel, subject to a right of reimbursement at the end of the underlying litigation.

Hartford issued business insurance policies to J.R. Marketing, LLC and Noble Locks Enterprises, Inc. (1 AA 8-9.) The policies insured the companies, as well as members and employees acting within the scope of their employment, against certain defamation and disparagement claims.(1 AA 59.)

Shortly after the policies were issued, in September 2005, Meir Avganim and others sued J.R. Marketing and several of its employees in Marin County Superior Court alleging defamation, among other things (the Marin Action). (1 AA 9, 60.) Related actions were filed in Nevada and Virginia involving many of the same parties. (1 AA 9-10.)

The Complaint in the Marin Action alleged that the plaintiffs learned for the first time in August 2005 that " 'on earlier dates,' " the defendants had made disparaging remarks, and that the conduct had begun " 'in or about 2004.' " (1 AA 63-64.) Hartford initially disclaimed coverage, and took the position that the Marin Action fell within a policy exception excluding from coverage injury " '[a]rising out of oral, written or electronic publication of material whose first publication took place before the beginning of the policy period.' " (1 AA 64.) Hartford invited the insureds to provide

additional information if they thought Hartford was wrong. (1 AA 60.) In January 2006, the insureds did so, sending Hartford information showing that some defamatory statements were made within the coverage period, and in March, Hartford agreed to defend the Marin Action subject to a reservation of rights. (1 AA 60, 65.) Hartford retained panel counsel and agreed to pay for the insureds' reasonable and necessary fees and costs going forward from the date they provided evidence supporting possible coverage. (See 1 AA 60.)

While Hartford was reviewing the materials, the insureds sued, alleging that Hartford's initial denial breached the insurance policies. (1 AA 9, 60.) On July 26, 2006, the trial court entered a summary adjudication order holding that Hartford had a duty to defend under the J.R. Marketing policy as of the date of the original tender (rather than as of the date when the insureds provided evidence supporting possible coverage). (See 1 AA 9-10.) The trial court also held that due to Hartford's reservation of rights, Hartford had a duty to provide independent *Cumis* counsel to defend its insureds in the Marin Action. (1 AA 10, 71.)

Just two weeks later, the insureds moved to enforce the order, arguing that Hartford had not adequately complied because it had paid some, but not all, of the defense costs incurred. (1 AA 10-11, 60.) The trial court granted the motion, ordering that "Hartford must pay all of the insureds' invoices tendered to Hartford as of August 1, 2006 within 15 days of the date of this Order. Hartford must pay all future reasonable and necessary defense costs within 30 days of receipt. To the extent Hartford seeks to challenge fees and costs as unreasonable or unnecessary, it may do so by way of

reimbursement after resolution of the [Marin] matter." (1 AA 2, 10-11 (hereafter Immediate Payment Order).) While the trial court held that Hartford could not invoke section 2860[2] to limit *Cumis* counsel to those rates regularly paid to Hartford's panel counsel, it also held that Squire Sanders' "bills still must be reasonable and necessary." (1 AA 2.) Squire Sanders, which had drafted the order for the court's signature (1 AA 1-2), was thus aware of this important limitation on Hartford's obligation.

The trial court's orders were upheld on appeal, including the portion of the order providing that Hartford could assert "any challenge to the reasonableness or necessity of defense bills . . . [in] an action for reimbursement following the conclusion of the [Marin action]." (1 AA 76; see 1 AA 2, 77-78.)

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[2] Section 2860, subdivision (c), provides in relevant part: "The insurer's obligation to pay fees to the independent counsel selected by the insured is limited to the rates which are actually paid by the insurer to attorneys retained by it in the ordinary course of business in the defense of similar actions in the community where the claim arose or is being defended. . . . Any dispute concerning attorney's fees not resolved by these methods shall be resolved by final and binding arbitration by a single neutral arbitrator selected by the parties to the dispute."

B. Four years and more than $15 million in legal fees later, the underlying action against Hartford's insureds concludes and Hartford files its reimbursement action.

Squire Sanders sent Hartford approximately $13.5 million in bills to defend the case, and Hartford paid them pursuant to the Immediate Payment Order. (Supp. MJN, exh. A, p. 9; see also 1 AA 11.)[3] After the underlying actions had settled, the insureds' bad faith claim against Hartford, which was stayed by agreement of the parties during the underlying litigation, resumed. (*Ibid.*) Consistent with the Immediate Payment Order, Hartford filed a first amended cross-complaint, asserting claims against both the insureds and Squire Sanders for reimbursement, unjust enrichment, an accounting of money had and received, and rescission. (1 AA 6-17, 89.) Hartford alleged that it was entitled to reimbursement of a significant portion of the legal fees and costs it paid because, among other reasons, Squire Sanders billed Hartford for unreasonable, unnecessary and unconscionable fees which were beyond Hartford's legal obligation to pay, in violation of Squire Sanders' professional and ethical obligations, and contrary to the trial court's order, which had required Hartford to pay only "***reasonable*** and ***necessary***" defense costs. (1 AA 2, emphasis added; see also 1 AA 12, 13.)

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[3] Hartford paid approximately $15 million in total to defend its insureds, but some amount of that was paid to firms other than Squire Sanders.

C. Squire Sanders successfully demurs to Hartford's cross-complaint on the ground that it is not a proper party to Hartford's reimbursement action.

Squire Sanders represented itself in the reimbursement action. (See 1 AA 18-47.) Squire Sanders also continued to represent the insureds, even as it argued that they—and not Squire Sanders—should be responsible for any obligation to repay unreasonable and unnecessary bills that it had submitted. (*Ibid.*)

The trial court permitted Hartford's reimbursement and rescission claims against the insureds to go forward. (2 AA 430-431.) But, it dismissed Hartford's claims against Squire Sanders, holding that Hartford could not bring a reimbursement action against a law firm hired as *Cumis* counsel to represent its insureds, and that Hartford was instead limited to seeking reimbursement solely from the insureds. (2 AA 430-431, 459; RT 3-4.)

D. The Court of Appeal affirms.

Hartford appealed the dismissal of the claims against Squire Sanders and the Court of Appeal affirmed. The Court acknowledged Hartford's right to seek reimbursement of unreasonable and unnecessary fees once the lawsuit was resolved. "However, having acknowledged this right . . . the question remains *against whom* may the insurer assert this right." (Typed opn. 11.) The court ultimately held that Hartford could not "maintain a direct suit against Squire [Sanders], independent counsel for certain cross-

defendants in the Marin action . . . for reimbursement of excessive or otherwise improperly invoiced defense fees and costs[.]" (Typed opn. 8.)

The Court of Appeal recognized that its conclusion was an expansion of existing law, which merely precludes insurers from controlling the defense when independent *Cumis* counsel is required. (Typed opn. 14.) The court offered three rationales for its novel conclusion.

First, the Court of Appeal concluded that it would be unfair to let Hartford sue *Cumis* counsel in a post-litigation reimbursement action when insurers who provide *Cumis* counsel must ordinarily arbitrate fee disputes under section 2860. Litigation, it thought, would give Hartford "more rights in a fee dispute with independent counsel" than it would have in arbitration, putting it in a better position than an insurer that had not breached its duty to defend. (Typed opn. 14.)

Second, the Court of Appeal theorized that permitting Hartford to bring a post-litigation reimbursement action to recover padded fees paid to *Cumis* counsel would amount to "[r]etroactively imposing the insurer's choice of fee arrangement" or strategy on the insured, undermining the insured's right to be defended by counsel independent of the insurer's control. (Typed opn. 13.) To avoid this perceived threat, the court concluded it must "take[ ] the law one slight step further," limiting an insurer who believes it was bilked by *Cumis* counsel to suing only its insured, instead of suing *Cumis* counsel. (Typed opn. 14.)

Finally, the court did not understand how Hartford could seek restitution from Squire Sanders because "Squire [Sanders] did not confer any benefit upon Hartford." (Typed opn. 15.) The court did not explain why it focused on the lack of benefits to Hartford, when Hartford's claim involved a benefit going the other way: money Hartford paid to Squire Sanders that Squire Sanders had unjustly kept.

E. A jury finds Hartford did not act in bad faith and the trial court tentatively finds the insureds must reimburse Hartford millions of dollars in excessive and unreasonable fees that Squire Sanders collected.

While this appeal was pending in the Court of Appeal, Hartford's reimbursement action against the insureds went to trial, as did the insureds' bad faith action against Hartford. (See Supp. MJN, exh. A, p. 1.) The trial court bifurcated the claims because the reimbursement action was equitable in nature (and thus triable to the court), but the bad faith claim was legal in nature (and thus triable to a jury). (See Supp. MJN, exh. A, p. 3.)

The jury found for the insureds on the breach of contract claim, but denied the bad faith claims, finding that Hartford had acted in good faith when it disputed coverage and in its handling of the tendered claims. (Supp. MJN, exh. A, p. 3.)

Hartford's cross-claim for reimbursement proceeded as a bench trial several months later, from February 28, 2013 to March 11, 2013. (Supp. MJN, exh. A, p. 3.) After hearing the evidence, the

trial court ruled in its tentative statement of decision that Hartford is entitled to be reimbursed $4,997,395 that it paid for unreasonable and unnecessary legal services billed by Squire Sanders. (Supp. MJN, exh. A, p. 26.)

Because the Court of Appeal had previously held that Hartford could not sue *Cumis* counsel directly, the insureds bear the entire burden of this liability. The trial court noted that it was "concerned about the effect of this decision on the insured[s]." (Supp. MJN, exh. A, p. 26.) They operated a " 'mom and pop' type business," and seemingly lacked the ability and understanding "to review the attorney fee bills they were receiving to determine if the fees and costs were reasonable or necessary." (*Ibid.*) Indeed, the court doubted the insureds had any expectation that they would ever be responsible for paying the bills. (*Ibid.*) The evidence at trial "clearly showed that they did not have the financial ability to pay their own attorney fees." (*Ibid.*)

The court concluded, "[w]ithout the financial ability [to] pay this Court's order to reimburse Hartford, the insured[s] are being placed in the difficult position of having to ask their attorneys to pay the judgment or possibly filing for bankruptcy." (Supp. MJN, exh. A, p. 26.) The trial court recognized the injustice. But, the court observed that its hands were tied by the Court of Appeal's decision, at least until this Court held otherwise. (*Ibid.*)

LEGAL DISCUSSION

I. HARTFORD CAN PURSUE REIMBURSEMENT DIRECTLY AGAINST SQUIRE SANDERS, THE PARTY THAT RECEIVED THE EXCESS PAYMENT.

A. Basic principles of restitution require Squire Sanders to reimburse Hartford for excessive and unreasonable fees that Squire Sanders billed and collected.

An insurer's right to reimbursement of defense fees and costs is governed by the law of restitution. (*American Motorists Ins. Co. v. Superior Court* (1998) 68 Cal.App.4th 864, 874 [describing insurer's request for reimbursement as a "restitution" claim]; see also *Buss*, *supra*, 16 Cal.4th at pp. 50-51 [same].) The fundamental principles of the law of restitution thus control, and compel the conclusion that Squire Sanders was unjustly enriched when it received excess payments for unreasonable attorney fee bills, and that it must restore the excess payments.

The basic principles of the law of restitution are long-settled and universally followed. "A person who is unjustly enriched at the expense of another is subject to liability in restitution." (Rest.3d Restitution & Unjust Enrichment, § 1; accord, e.g., *Earhart v. William Low Co.* (1979) 25 Cal.3d 503, 510-511.) "A person is enriched if he receives a benefit at another's expense." (*Ghirardo v. Antonioli* (1996) 14 Cal.4th 39, 51.) Money is the most obvious kind of "benefit." (*County of Solano v. Vallejo Redevelopment Agency*

(1999) 75 Cal.App.4th 1262, 1278-1279 [summarizing rules; finding municipality was liable to restore $3.5 million in payments it received]; Rest., Restitution & Unjust Enrichment, § 150 ["In an action of restitution in which the benefit received was money, the measure of recovery for this benefit is the amount of money received"].)

Under these first principles, one who receives an overpayment is unjustly enriched if he keeps that overpayment. The law of restitution requires him to repay the excess. As this Court noted in *Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 174, the law of restitution requires "the return of the excess of what the plaintiff gave the defendant over the value of what the plaintiff received." In *Buss*, this Court stated the principle plainly: "*A* has a contractual duty to pay *B* $50. He has only a $100 bill. He may be held to have a prophylactic duty to tender the note. But he surely has a right, implied in law if not in fact, to get back $50." (*Buss, supra,* 16 Cal.4th at p. 51.)[4]

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[4] Likewise, the law requires restitution of benefits flowing from wrongdoing. (*Ward v. Taggart* (1959) 51 Cal.2d 736, 741 ["the public policy of this state does not permit one to 'take advantage of his own wrong' [citation], and the law provides a quasi-contractual remedy to prevent one from being unjustly enriched at the expense of another"]; Rest.3d Restitution & Unjust Enrichment, § 3 ["A person is not permitted to profit by his own wrong"]; cf. *Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116, 126-127 [restitution under the Unfair Competition Law requires the wrongdoer to "return money obtained through an unfair business practice to those persons in interest from whom the property was taken, that is, to persons who had an ownership interest in the property"].)

The lack of a direct contractual relationship between an insurer and *Cumis* counsel does not defeat a claim for restitution. A restitution claim is an equitable claim developed by courts specifically to address situations where a contract does not determine the rights of the parties. It is a quasi-contractual remedy implied by law. (*Buss*, 16 Cal.4th at p. 51.)

As the courts below recognized, Hartford's obligation to defend its insureds was limited to paying "reasonable and necessary" defense fees and costs. (1 AA 2, 76.) In fact, Squire Sanders itself drafted the proposed order, granted by the trial court, stating that although Hartford could not invoke section 2860 to limit *Cumis* counsel's rates to those rates customarily paid to panel counsel, Squire Sanders' "bills still must be reasonable and necessary." (1 AA 1-2.) "While *Cumis* may prohibit an insurer from dictating the tactics of litigation, it does not delegate to *Cumis* counsel a meal ticket immunized from judicial review for reasonableness." (*United Pacific Ins. Co. v. Hall* (1988) 199 Cal.App.3d 551, 557 (*Hall*).)

Hartford alleged that Squire Sanders egregiously overbilled when serving as *Cumis* counsel. It is thus Squire Sanders who received millions of dollars more than Hartford owed, was unjustly enriched by those millions of dollars, and should be responsible to Hartford for the restitution of those millions of dollars. (See *Hirsch v. Bank of America* (2003) 107 Cal.App.4th 708, 721-722 ["Appellants have stated a valid cause of action for unjust enrichment based on Banks' unjustified charging and retention of excessive fees which the title companies passed through to them.

Banks received a financial advantage—excessive fees charged to the title companies—which they unjustly retained at the expense of appellants, who absorbed the overage."].)

B. *Buss* supports Hartford's right to seek restitution of excessive and unreasonable fees directly from Squire Sanders, who received the excess payment.

Buss makes plain that the law of restitution applies to situations where insurers pay more than they owe. (*Buss, supra,* 16 Cal.4th at p. 51; see also *Aerojet-General Corp. v. Transport Indemnity Co.* (1997) 17 Cal.4th 38, 69-71.) In *Buss*, this Court held that an insurer must defend an entire " 'mixed' " action involving both covered and uncovered claims, paying *Cumis* counsel for both. (*Buss*, at pp. 48-49.) The Court imposed this implied-in-law obligation "prophylactically," to make sure that insureds received a prompt defense of the claims that *were* covered in their policies. (*Id.* at p. 49.) But, the Court also recognized that the insurance policy itself did not impose an obligation on the insurer to defend the entire action. As a result, the implied-in-law prophylactic obligation to defend an entire "mixed" action would sometimes result in an insured receiving more than it bargained for in the insurance policy: it would also get a defense (provided by *Cumis* counsel and paid for by the insurer) for claims that were ***not*** covered. (*Id.* at pp. 50-51.) That amounted to what *Buss* called " 'enrichment' of the insured by the insurer through the insurer's bearing of unbargained-for defense costs," a consequence that *Buss* found "inconsistent with the

insurer's freedom under the policy and [that] therefore must be deemed 'unjust' " enrichment. (*Id.* at p. 51.) To remedy the unjust enrichment, *Buss* held that the insurer could seek reimbursement of the fees paid for the defense of uncovered claims: "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." (*Ibid.*)

Like the insurer in *Buss*, Hartford seeks reimbursement of payments it did not owe: here, millions in overbilled legal fees. As in *Buss*, Hartford had a duty to defend its insureds and to provide them with *Cumis* counsel. (See Civ. Code, § 2860; *San Diego Federal Credit Union v. Cumis Ins. Society, Inc.* (1984) 162 Cal.App.3d 358, 369 (*Cumis*).) By virtue of the trial court's Immediate Payment Order here, Hartford also had an obligation to pay *Cumis* counsel immediately, without the ordinary ability under section 2860, subdivision (c), to challenge unreasonable and unnecessary bills as they are incurred. Instead, the order stated that Hartford could not challenge excessive fees until the end of the underlying litigation. As in *Buss*, where the prophylactic requirement to defend entire actions means that the insurer might pay more than it should, the trial court's unilateral elimination of the contemporaneous dispute resolution mechanism and its deferral of any *Cumis* counsel fee disputes necessarily meant that Hartford might pay more than it should if Squire Sanders charged more than *reasonable* fees, which is all the law requires an insurer to pay *Cumis* counsel. (*Cumis*, at p. 375; see also 1 AA 2 [trial court Immediate Payment Order].)

The commonsense requirement that lawyers' fees be reasonable serves as a check against some lawyers' tendency to overbill. As one commentator has noted: "Even when independent [*Cumis*] counsel control the defense, an insurer is only obligated to pay ***reasonable*** defense costs. This requirement protects insurers against 'runaway legal fees.' " (Richmond, *Independent Counsel in Insurance* (2011) 48 San Diego L.Rev. 857, 881, emphasis added.) Courts routinely apply the reasonableness restraint in a variety of contexts, such as requests for attorney's fees under fee-shifting contract provisions or fee-shifting statutes. (See *Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970, 976 (*Chavez*) [trial court reasonably concluded that plaintiff's counsel had sought "grossly inflated" fees, and upheld trial court decision to deny plaintiff all statutory attorney's fees, even though the plaintiff had obtained a verdict]; see also *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 579 (*Graham*) [in determining prevailing party fees, courts must determine what is reasonable, which excludes "padding" in the form of inefficient or duplicative efforts].) The reasonableness restraint serves a particularly important function where, as here, a lawyer provides services to one party but is paid by another party who cannot question the reasonableness or necessity of the lawyer's services when the services are rendered. A lawyer who does not abide by the reasonableness restraint and collects excessive fees is unjustly enriched, and has a direct obligation to return the excess fees to the party that paid them. (See, *ante*, p.15.)

In *Buss*, this Court, applying basic principles of restitution, stated that "a right [to restitution] runs against the person who benefits from 'unjust enrichment' and in favor of the person who suffers loss thereby." (*Buss*, *supra*, 16 Cal.4th at p. 51.) In that case, the insurer paid to defend claims not covered by the policy. This Court did not consider whether an insurer may assert a right of reimbursement directly against *Cumis* counsel because the insurer in *Buss* did not allege that *Cumis* counsel's bills were excessive and therefore did not contend that its excess payments unjustly enriched *Cumis* counsel. The excess payments unjustly enriched only the insured, who received a defense for claims not covered in his policy, i.e., a defense he had not bargained or paid to receive.

The question here is whether *Cumis* counsel is somehow immunized from the ordinary and long-standing principles of restitution and unjust enrichment in the case where the insurer does allege that *Cumis* counsel's bills were excessive. Certainly nothing in *Buss* supports the Court of Appeal's conclusion that *Cumis* counsel cannot be required to make restitution. To the contrary, *Buss* returned to first principles, noting that "a right [to restitution] runs against the person who benefits from 'unjust enrichment' and in favor of the person who suffers loss thereby." (*Buss*, *supra*, 16 Cal.4th at p. 51; see also American Law Institute, Principles of the Law of Liability Insurance: Management of Potentially Insured Liability Claims (May 2013 Tentative Draft) ch. 2, Topic 1, Defense, p. 120, b. Reasonable Fees [recognizing right of insurer to seek reimbursement of unreasonable fees directly from