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

independent counsel after the duty to defend has ended], quoted in Supp. MJN, exh. A, p. 26].) And, the Court recognized that other unjust enrichment scenarios might arise: "Of course, the future may bring more numerous and/or more complex requests than we envision." (*Buss*, at p. 58 [noting that "the possible invocation of this right—or any other—is not a sufficient basis for its abrogation or disapproval"].)

Here, Hartford's complaint alleged that it was entitled to reimbursement from Squire Sanders because the firm billed for unnecessary and unreasonable fees and costs, leading to excessive payments from Hartford that unjustly enriched Squire Sanders. (1 AA 2, 12, 13.) In holding that Hartford could not seek reimbursement from Squire Sanders, and instead was limited to suing only the insureds for unnecessary and unreasonable fees, the Court of Appeal ran afoul of *Buss* and contravened the longstanding principles of restitution and unjust enrichment. Squire Sanders was the direct beneficiary of the excess fees and the law of restitution should permit Hartford to bring a direct claim to recover them.

II. THE COURT OF APPEAL ERRED IN CONCLUDING THAT *CUMIS* COUNSEL DOES NOT RECEIVE A BENEFIT WHEN IT IS PAID FOR UNREASONABLE OR UNNECESSARY SERVICES.

To justify its conclusion that Hartford could not bring a restitution claim against Squire Sanders, the Court of Appeal stated

that "Squire [Sanders] did not confer any benefit upon Hartford." (Typed opn. 15.) That is true—Squire Sanders' overcharges certainly conferred no benefit on Hartford—but the lack of a benefit to Hartford in no way supports the court's determination that Hartford could not seek restitution from Squire Sanders. The Court of Appeal appears to have simply confused the relevant legal standard.

Hartford has not claimed that Squire Sanders conferred a benefit on it. To the contrary, Hartford asserts that Squire Sanders' unreasonable and unnecessary services did not confer a benefit ***on anyone***, and that Squire Sanders thus was not entitled to payment for those services. The only party that benefitted was Squire Sanders itself, which submitted excessive billings and received payment for them. Hartford seeks restitution for the unjust benefit it conferred on Squire Sanders—not the other way around. (See *Buss*, *supra*, 16 Cal.4th at p. 51.) The Court of Appeal's error rests on a complete reversal of the public policy at the heart of the law of restitution.

III. THE COURT OF APPEAL ERRED IN CONCLUDING THAT AN ORDER STRIPPING AN INSURER OF ITS STATUTORY RIGHT UNDER SECTION 2860 TO CONTEMPORANEOUSLY ARBITRATE FEE DISPUTES WITH *CUMIS* COUNSEL SILENTLY STRIPS AN INSURER OF ITS COMMON LAW RIGHT TO SEEK RESTITUTION.

Section 2860 is silent about the procedures and remedies available if the arbitral mechanism of subsection (c) does not apply. The statute's silence, however, does not somehow abrogate the long-standing principles of the law of restitution. As this Court has held, "[u]nless expressly provided, statutes should not be interpreted to alter the common law, and should be construed to avoid conflict with common law rules. A statute will be construed in light of common law decisions, unless its language clearly and unequivocally discloses an intention to depart from, alter, or abrogate the common-law rule concerning the particular subject matter." (*California Assn. of Health Facilities v. Department of Health Services* (1997) 16 Cal. 4th 284, 297, internal quotation marks and citations omitted, bracket in original.)[5]

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[5] The principle has particular force in the context of common-law *equitable* principles. (See *Weinberger v. Romero-Barcelo* (1982) 456 U.S. 305, 313 [102 S.Ct. 1798, 1804, 72 L.Ed.2d 91] [" 'Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. "The great (continued...)

As this Court recognized in *Buss*, an insurer's common law right to reimbursement continues to exist independently of section 2860. (*Buss*, *supra*, 16 Cal.4th at p. 60, fn. 25 ["section 2860 speaks of the insurer's obligation to pay" but "is altogether silent on the insured's freedom to avoid repayment" and is therefore consistent with the insurer's claim for restitution].)

In disregarding *Buss*'s holding that the common law of restitution operates alongside section 2860, the Court of Appeal was motivated by its belief that an insurer seeking reimbursement from *Cumis* counsel for excessive fees would somehow stand in a better position than insurers who arbitrate *Cumis* counsel fee disputes under section 2860, subdivision (c). (Typed opn. 13-14.) In essence, the Court of Appeal concluded that although the Legislature mandated arbitral resolution of *Cumis* fee disputes, and although *Buss* made plain that the law of restitution continued to operate alongside section 2860, it could displace both.

The Court of Appeal's policy choice has no foundation. It is simply not true that an insurer, deprived of the arbitration mechanism of section 2860 and forced to wait until the end of the underlying litigation to bring a common law restitution claim, somehow stands in a better position than an insurer who can bring prompt arbitral fee claims under section 2860. The Court of Appeal's view appears premised on the outdated—and repeatedly rejected—notion that litigation is superior to arbitration.

(...continued)
principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction." ' "].)

Arbitration is rather a *favored* dispute resolution mechanism because of its speed and efficiency. As this Court noted just last year, "public policy strongly favors arbitration as a speedy and relatively inexpensive means of dispute resolution." (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 245, internal quotation marks omitted.)

Rather than arbitrate its fee claims under section 2860, Hartford had to undertake a much slower and much more expensive means of dispute resolution—hardly putting it in a better position than it would have been in under section 2860, subdivision (c), which allows *Cumis* counsel and insurers to resolve fee disputes as they arise.[6] Early resolution of fee disputes allows insurers to plan properly for the litigation. In understanding more clearly its exposure to attorney's fees, the insurer can more accurately set aside appropriate reserves, and can make more informed decisions about possible settlements. (See Ins. Code, § 923.5 [insurers must reasonably estimate reserves necessary to pay losses and adjust or settle claims]; *Lipton v. Superior Court* (1996) 48 Cal.App.4th 1599, 1615 [same].) Just as important, early resolution of fee disputes ensures that initially small problems do not grow to enormous proportions. (Cf. Syverud, *The Ethics of Insurer Litigation Management Guidelines and Legal Audits* (1999) Vol. 21, No. 7, Ins. Litig. Rptr. 180 [insurer's setting up-front billing guidelines and

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[6] Section 2860, subdivision (c), confers benefits beyond arbitration. The insurer retains the right to limit *Cumis* counsel to collecting fees comparable to panel rates, which are ordinarily lower than market rates. (See Lower, *The Cumis Triangle* (May 1986) 6 Cal. Lawyer 44, 47.)

expectations facilitates efficient and effective defense and prevents billing abuses].) Here, by contrast, Hartford was forced by the Immediate Payment Order to pay *Cumis* counsel large sums up-front (approximately $13.5 million) and was allowed to seek reimbursement only at the end of the litigation, after all the money had been paid. As the trial court subsequently found, Hartford paid millions that it did not owe, excess payments which *Cumis* counsel has had the use of for years—both during the more than four years of the underlying litigation and during the subsequent years of litigation over this restitution action.

IV. PUBLIC POLICY STRONGLY FAVORS PERMITTING INSURERS TO SEEK RESTITUTION DIRECTLY FROM *CUMIS* COUNSEL FOR EXCESSIVE BILLS.

The Court of Appeal recognized that immunizing *Cumis* counsel from the ordinary principles of the law of restitution was novel. As it frankly acknowledged, it decided to "take[ ] the law" in a new direction, what it called "one slight step further." (Typed opn. 12.) To justify its creation of a new immunity freeing *Cumis* counsel from the consequences of its excessive billing, the Court of Appeal turned to public policy.

To be sure, policy considerations can inform the law of restitution. (See *McBride v. Boughton* (2004) 123 Cal.App.4th 379, 389 (*McBride*) [" '[d]etermining whether it is unjust for a person to retain a benefit may involve policy considerations' "].) Here, though, the policies the Court of Appeal invoked to immunize *Cumis* counsel

from the ordinary principles of restitution lack support and make no sense. Aside from its mistaken belief that insurers forced to litigate fee disputes years later would be in a better position than insurers allowed to arbitrate fee disputes contemporaneously (see *ante*, pp. 23-26), the Court of Appeal offered only one public policy in support of its conclusion: its concern that restitution claims by insurers against *Cumis* counsel would undermine counsel's independence and effectiveness in representing insureds. (Typed opn. 12-13.) That concern is unfounded. Moreover, the Court of Appeal overlooked compelling public policies that are advanced by making *Cumis* counsel directly responsible for counsel's excessive billings.

A. Holding *Cumis* counsel responsible for excessive billing does not interfere with their independent representation of the insured.

The Court of Appeal erroneously found that permitting a post-litigation quasi-contractual reimbursement action would interfere with *Cumis* counsel's independence. (See typed opn. 13.)[7]

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[7] As this section makes plain, a post-litigation reimbursement action would not interfere with *Cumis* counsel's independence. In any event, this Court has recognized, "the insurer will probably pursue [reimbursement] only in apparently exceptional cases." (*Buss, supra*, 16 Cal.4th at p. 58.) Where an exceptional case arises, such as a case in which *Cumis* counsel has overbilled by $5 million, the long-standing principles of the law of restitution overwhelm any conjectural and unsubstantiated concerns about interference with *Cumis* counsel.

1. In *Buss*, this Court considered whether permitting an insurer to seek reimbursement of defense costs would chill the representation provided by counsel to the insured; the Court did "not discern any such threat." (*Buss, supra*, 16 Cal.4th at p. 58.) *Buss* concluded that even if the insured might later have to reimburse the insurer, "[t]he insured's counsel remains free to represent the insured as he sees fit[ ], subject only to generally applicable legal provisions and professional standards." (*Ibid.*)

Those "generally applicable legal provisions and professional standards" represent proper checks on an attorney's conduct, and do not chill an attorney's ability to represent his client. Attorneys have a professional duty to exercise independent judgment and represent their clients competently. (Rules Prof. Conduct, rule 3-110; see also ABA Model Rules Prof. Conduct, rules 1.1, 1.2, 1.3, 5.4.) They also have a duty, when asked by those who pay them, to explain and defend the reasonableness of their fees. (E.g., *Bird, Marella, Boxer & Wolpert v. Superior Court* (2003) 106 Cal.App.4th 419, 430-431 (*Bird*); Rules Prof. Conduct, rule 4-200; ABA Model Rules Prof. Conduct, rule 1.5; see also *Chavez, supra*, 47 Cal.4th 970 [requiring victorious plaintiff's counsel to explain and defend reasonableness of fees sought from defendant, and holding that the trial court properly denied in its entirety plaintiff's counsel's demand for "grossly inflated" fees].) An insurer's ability to seek reimbursement from *Cumis* counsel for excessive billing adds nothing to these preexisting duties; it merely allows the wronged party to seek restitution when *Cumis* counsel's violations of these duties unjustly enrich them.

2. The Legislature too has also found that public policy supports resolution of fee disputes between insurers and *Cumis* counsel—not an immunity for *Cumis* counsel. When an insurer defends under a reservation of rights, section 2860, subdivision (c), requires the arbitration of fee disputes involving *Cumis* counsel. (Civ. Code, § 2860, subd. (c) ["Any dispute concerning attorney's fees not resolved by these [insurance policy] methods shall be resolved by final and binding arbitration by a single neutral arbitrator selected by the parties to the dispute"].)[8] The Legislature has thus determined that the adversarial resolution of fee disputes between an insurer and *Cumis* counsel poses no risk to counsel's independence or its representation of the insured.

In fact, section 2860, subdivision (c), requires the arbitration to take place contemporaneously, generally while the underlying litigation is still underway. If *Cumis* counsel can defend their fees in an adversarial arbitration that takes place *while the underlying action is proceeding* without undermining the independence of *Cumis* counsel, plainly *Cumis* counsel can defend their fees in a reimbursement action that takes place *after the underlying*

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[8] The term "parties" in section 2860, subdivision (c), includes *Cumis* counsel, which are one of the parties to any dispute over fees. (See Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2013) ¶ 7:809, p. 7B-106.11 [binding arbitration is required of the "*parties to the dispute*" over *Cumis* fees under Civil Code section 2860; " '[p]arties to the dispute' presumably includes the *Cumis* counsel, in addition to the insurer and the insured"]; see also *Long v. Century Indemnity Co.* (2008) 163 Cal.App.4th 1460, 1471; *Fireman's Fund Ins. Companies v. Younesi* (1996) 48 Cal.App.4th 451, 458; *Handy v. First Interstate Bank* (1993) 13 Cal.App.4th 917, 923.)

litigation has concluded without undermining their independence. Here, the trial court stayed Hartford's cross-claim for reimbursement until the underlying litigation concluded. (2 AA 302-305.) When the underlying litigation ended, so did the potential conflict of interest between Hartford and the insureds (see *Cumis*, *supra*, 162 Cal.App.3d at pp. 369-370, 375).[9] It was only then, after Squire Sanders' role as *Cumis* counsel had ended, that Hartford brought its reimbursement claim.[10] (1 AA 88-90.) Hartford's reimbursement claim thus could not possibly have interfered with *Cumis* counsel's defense of the insureds in the underlying actions, or with the attorney-client relationship between *Cumis* counsel and the insureds. By the time Hartford brought its claim, the underlying litigation had finished, and the *Cumis* attorney-client relationship had ended.

3. While continuing to represent the insureds in the trial court, Squire Sanders argued to this Court that the insureds

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[9] See also *Swanson v. State Farm General Ins. Co.* (2013) 219 Cal.App.4th 1153, 1164-1165 [noting that "the duty to provide and pay for *Cumis* counsel arises only where a disqualifying conflict of interest exists" and holding that the duty ends when "the disqualifying conflict ceases to exist later in the litigation"]; see generally *Golden Eagle Ins. Co. v. Foremost Ins. Co.* (1993) 20 Cal.App.4th 1372, 1394 ["the *Cumis* rule is not based on insurance law but on the ethical duty of an attorney to avoid representing conflicting interests"].

[10] Squire Sanders continued to represent the insureds in their bad faith action against Hartford, but they did so as ordinary counsel, not *Cumis* counsel. (See *Cumis*, *supra*, 162 Cal.App.3d at pp. 369-370, 375 [defining independent counsel's role as representing the insured in the underlying litigation when an insurer's reservation of rights creates a potential conflict between insurer and insured].)

alone—not *Cumis* counsel— should have to defend allegations that Squire Sanders charged excessive and unreasonable fees because only insureds can waive the attorney-client privilege. (APFR 22.) However, *Cumis* counsel fee arbitrations occur routinely as part of the statutory scheme under section 2860, subdivision (c). Although section 2860, subdivision (d), provides that "[a]ny information disclosed by the insured or by independent counsel is not a waiver of the privilege as to any other party," the insureds are still the holders of the privilege and there is no evidence that *Cumis* counsel are unduly constrained in defending their fees because of privilege issues. If privilege issues do not impede *Cumis* counsel's defense of their fees in the arbitration setting, they likewise will not impede *Cumis* counsel's defense in a reimbursement action. Indeed, there should be nothing relevant to the reimbursement issue that remains confidential where, as here, the insurer has already received and paid the attorney's fee bills it is challenging.

4. As explained, an insurer's ability to resolve a dispute over fees directly with *Cumis* counsel does not adversely affect counsel's independence or its attorney-client relationship with the insured. Moreover, the scheme endorsed by the Court of Appeal does nothing to eliminate the possibility of a retroactive review of the reasonableness of *Cumis* counsel's fees. If, as the Court of Appeal concluded, an insurer must sue its insured to recover excess payments made to *Cumis* counsel, and the insured must then sue *Cumis* counsel, the same retroactive review of an attorney's conduct and billing will occur. The only difference is that it will occur twice,

once in an insurer's action against the insured and again in the insured's action against *Cumis* counsel.

In taking its "step further," the Court of Appeal ignores common law history and the traditional principles of restitution—and preserves nothing that those principles are designed to protect.

B. Holding *Cumis* counsel responsible for excessive billing promotes ethical attorney conduct.

California has a strong interest in ensuring that its attorneys do not engage in overreaching or other forms of unethical conduct. That interest is embodied in the Rules of Professional Conduct, which " 'serve as an expression of public policy to protect the public.' " (*Bird, supra,* 106 Cal.App.4th at p. 431.) In particular, rule 4-200(A), provides that "[a] member shall not . . . charge[ ] or collect an illegal or unconscionable fee." (See also *Hensley v. Eckerhart* (1983) 461 U.S. 424, 433-434 [103 S.Ct. 1933, 1939-1940, 76 L.Ed.2d 40]; *Graham, supra,* 34 Cal.4th at p. 579; *Cotchett, Pitre & McCarthy v. Universal Paragon Corp.* (2010) 187 Cal.App.4th 1405, 1417 ["Fee agreements that violate the Rules of Professional Conduct may be deemed unenforceable on public policy grounds"]; ABA Model Rules Prof. Conduct, rule 1.5(a) ["A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses"], com. 5 ["A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures"].) Permitting an insurer to assert a quasi-contractual unjust enrichment claim against *Cumis* counsel

for charging unreasonable fees advances California's public policy to regulate attorney conduct consistent with the requirement of rule 4-200(A).

By contrast, the result reached by the Court of Appeal would adversely affect the policy interest expressed in rule 4-200(A) by effectively granting *Cumis* counsel license to charge unlimited fees without fear of having to answer directly to the one who must pay those fees. Although most attorneys abide by their ethical duty to charge reasonable fees, there are those who will not. Section 2860, subdivision (c), was designed, in part, to address the concern that independent counsel would take advantage of an insurer's obligation to pay for a defense it cannot control. (See Mazzarella, *Cumis Counsel: Going, Going, Gone?* (March 1988) Dicta: The Lawyer's Magazine, Vol. XXXV, No. 3, p. 7.)

These public policy concerns do not disappear just because the trial court here abrogated the arbitration mechanism of section 2860. Rather, they support Hartford's claim for restitution. (See *McBride, supra,* 123 Cal.App.4th at p. 389.) These public policy concerns would be severely undermined if, whenever section 2860 is inapplicable, *Cumis* counsel could collect fees in any amount without having to answer in equity to the insurer at whose expense they were unjustly enriched. (See *Hall, supra,* 199 Cal.App.3d at p. 557.) Immunizing lawyers from direct responsibility for their billing practices only incentivizes attorney misconduct.

C. Holding *Cumis* counsel responsible for bill padding furthers fundamental fairness and judicial economy.

Stripped of legal jargon, Squire Sanders' position is that even if it charged Hartford unreasonable fees, it should not have to pay back the fees. Instead, its former clients—who did not receive the money—should have to pay it back. There is something fundamentally wrong with a law firm's arguing that its client should be left solely responsible for its own unreasonable billing practices. That is especially true in the *Cumis* context. The purpose of *Cumis* counsel is to protect the insured against the *possibility* of his lawyer having a conflict between the insured's best interests and the interests of the insurer. (See *Cumis*, *supra*, 162 Cal.App.3d at pp. 368-375.) To eliminate that possible conflict of interest, the insureds had the right, under *Cumis*, to hire Squire Sanders, which now blithely seeks to shift responsibility to the very client it was hired to protect.

First, a law firm should not be allowed to saddle its own clients with primary liability for excessive fees and disbursements that the firm charged and collected from its clients' insurer. It is hard to imagine a doctrine that could engender more cynicism about lawyers. The three-step process envisioned by the Court of Appeal's decision advertises its own wrong: people hire lawyers as independent counsel to represent them when they have a potential conflict with their insurers; the lawyers then overbill the insurer and pocket the proceeds; and when the insurer finds out and sues, the clients, not the lawyers, have to defend and pay back the

insurer. This process runs contrary to the spirit, if not the letter, of the rules mandating an attorney's duty of loyalty to his or her clients. (See Rules Prof. Conduct, rule 3-310.)

Here, Squire Sanders succeeded in getting the claims against it thrown out by arguing that its own clients, the insureds, should face Hartford's claims alone, bearing the brunt of Squire Sanders' own billing practices. (See 1 AA 41-42.) Of course, to the extent those billing practices were unnecessary or unreasonable (as Hartford alleged), the excess billings did not benefit the insureds at all. And then, following a trial over the fees from which Squire Sanders had extricated itself, the insureds ended up with a tentative finding that they owe nearly $5 million to Hartford. As the trial court observed, that put the insureds in a "difficult" position—pay $5 million or declare bankruptcy. (MJN, exh. A, p. 26.) Traditional principles of restitution do not and should not require turning clients into bankrupt middlemen.

Second, the Court of Appeal's "step further" imposes a double litigation burden on the insured and the courts. The insureds must defend against the insurer's reimbursement claims, presumably at their own expense. Then, if they lose (as they did here), they must sue their lawyers. Even if they find less expensive lawyers than Squire Sanders, their costs will pile up. Law firms asked to disgorge millions in unreasonable fees fight hard, both to keep the money they have received and to preserve their reputations. Few insureds will have the capacity to fund effective litigation twice, first against an insurer and then against such law firms. The real fight, of course, is between the insurer and *Cumis* counsel. Yet the

Court of Appeal puts the insured alone in the middle of this battle, and tells him to fight both sides in two separate lawsuits.

Even if the insureds can afford to fight these new lawsuits, the Court of Appeal puts them in the position of having to defend the reasonableness of litigation staffing in the first case, against the insurer, and then having to take a diametrically opposing view in the second case against the law firm, where the insureds' words and actions in the first case may come back to preclude recovery in the second.

Third, the Court of Appeal's new scheme leaves insurers overcharged by *Cumis* counsel unable to recoup the money that *Cumis* counsel unjustly kept. Insureds put on the hook for their lawyer's excessive bills often will not be able to pay the money. (See, e.g., MJN, exh. A, p. 26.) Some of them, battered first by the underlying litigation, then by the Court of Appeal's requirement that their insurer sue them, will give up before suing their old lawyers. Insurers will be left with unfortunate choices: to foreclose on the property of small businesses and people in order to get back what little they can of what is owed them, or else to give up themselves, knowing that they were overcharged by lawyers who will forever enjoy their unjust enrichment. Some insureds will give up in a different way, declaring bankruptcy. (*Ibid.*) Again, insurers will have to decide whether to file claims against the bankrupt estate, pushing the bankruptcy trustee to sue former *Cumis* counsel (see 11 U.S.C. § 323), or else to give up and accept the injustice. These are not consequences that accord with the public policy of this state. They make plain that the Court of Appeal's "step further" is

really a step back: a step away from accountability, a step away from justice.

Finally, the Court of Appeal's scheme would radically multiply litigation over *Cumis* counsel fees. On its face, the scheme requires double litigation: insurer against insured, then insured against *Cumis* counsel. That does not even count potential bankruptcy litigation. By splitting into several pieces what can and should be settled in a single action, the Court of Appeal's scheme wastes judicial resources. Overburdened trial courts should not be required to try two lawsuits (or more) when one will do.

CONCLUSION

This Court should reverse the judgment of the Court of Appeal, reinstate Hartford's cross-complaint against Squire Sanders, and remand the case for further proceedings.

November 18, 2013

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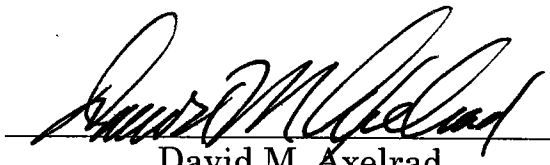
By: 
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CERTIFICATE OF WORD COUNT

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The text of this brief consists of 8,946 words as counted by the Microsoft Word version 2010 word processing program used to generate the brief.

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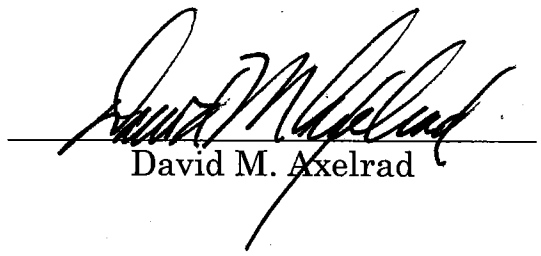

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PROOF OF SERVICE

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At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436-3000.

On November 18, 2013, I served true copies of the following document(s) described as **OPENING BRIEF ON THE MERITS** on the interested parties in this action as follows:

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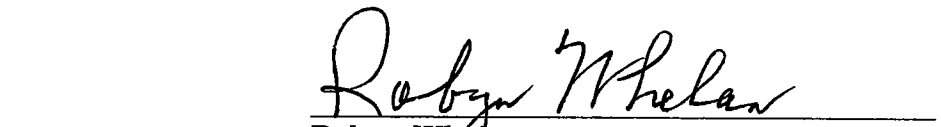

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