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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

CITY ART, INC. et al., Petitioners, v. SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES, Respondent; TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, Real Party in Interest.	B256132 (Los Angeles County Super. Ct. No. BC445179)

ORIGINAL PROCEEDINGS in mandate. Robert L. Hess, Judge. Petition granted in part and denied in part.

Thomas & Elliott, Stephen L. Thomas and Jay J. Elliott for Petitioners, City Art, Inc., Ben Saiedian and David Saiedian; Ford & Serviss, William H. Ford, III and Michael D. Collins; Beitchman & Zekian, David P. Beitchman and Andre Boniadi, for Petitioners, DK Art Publishing, Inc. and Drita Kessler.

No appearance for Respondent.

Lewis Brisbois Bisgaard & Smith, Lane J. Ashley, Raul L. Martinez, Thomas Rittenburg and Shannon L. Santos for Real Party in Interest.

We issued an order to show cause in the instant case to address a single issue: whether an insurer which initially denied a duty to defend but eventually agreed to do so by means of paying the fees of independent counsel for its insured may take *retroactive* advantage of the rate limitations set forth in Civil Code section 2860.[1] We conclude that it may not. The rate limitations of section 2860 apply, if at all, only after the insurer actually commences paying for independent counsel. We therefore grant the insured's petition for writ of mandate and direct the trial court to reverse its grant of summary adjudication in favor of the insurer on the issue of the retroactive application of section 2860.

FACTUAL AND PROCEDURAL BACKGROUND

The named insured in this case is City Art, Inc., a business engaged in framing and selling art. City Art was insured under various policies issued by Travelers Property Casualty Company of America (Travelers). The policies also extended coverage to City Art's executive officers, acting within the scope of their duties.

1. *The Underlying Action*

On May 4, 2007, City Art and two of its officers, Ben and David Saiedian[2] (collectively, City Art) were sued by DK Art Publishing, Inc. and Drita Kessler (collectively, Kessler) in a wide-ranging complaint alleging 20 causes of action. Kessler's action alleged that, from late 2005 to late 2006, Kessler delivered to City Art thousands of pieces of art, many on consignment. Kessler alleged that City Art "sold, lost, damaged, and/or destroyed some of" the art. Kessler further alleged that City Art still retained possession of some of the art, and, despite demands to return it, refused to do so, or to compensate Kessler for the art. Kessler's causes of action against City Art, related to the lost, damaged, and missing art, included: breach of written contract (consignment); breach of written contract (bailment); breach of written contract (sale or

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[1] All subsequent undesignated statutory references are to the Civil Code.

[2] The record does not indicate the Saiedians's precise roles in City Art, although they were both identified as officers.

return); breach of oral contract; conversion; trespass to chattel; negligence; breach of fiduciary duty; money had and received; money paid; and goods sold and delivered. Additionally, Kessler alleged a cause of action for trade libel, based on statements City Art allegedly posted on its website, regarding its right to sell the art delivered to it by Kessler. Kessler also alleged, among other things, a cause of action for unpaid wages, alleging that, during the same time period in which she delivered the art to City Art, Kessler was employed by City Art, and City Art failed to pay all wages when due.[3]

2. *The Tender and Travelers's Initial Response*

On May 11, 2007, counsel for City Art tendered the Kessler complaint to Travelers for a defense and indemnification. On June 20, 2007, Travelers declined the tender in a 13-page letter which itemized five bases on which Travelers relied for its denial. Of relevance to our opinion are the following two bases raised by Travelers: (1) an exclusion for damage to personal property in the care, custody or control of the insured; and (2) an analysis of the policy's coverage provision for "Personal, Advertising, or Web Site Injury," which determined the cause of action for trade libel did not qualify as a covered claim.

Two further letters were exchanged in late 2008. City Art urged Travelers to reconsider its denial, challenging both of the grounds discussed above.[4] Travelers responded, disagreeing with City Art's arguments and again relying on the two grounds discussed above.

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[3] Although not relevant to the disposition of the instant writ petition, the record indicates that, in February 2012, the jury returned a verdict in the Kessler action in favor of Kessler in the amount of $8,277,135. The record also suggests that, at some point, City Art sought relief in bankruptcy. Finally, the record reflects that City Art assigned to Kessler all of its rights against Travelers, in exchange for Kessler's covenant not to execute on the judgment in the underlying action.

[4] However, City Art did not suggest, at this time, that the care, custody, or control exclusion did not apply on the basis that its care, custody, or control of the property was not exclusive.

3. *Travelers Agrees to Defend Under a Reservation of Rights*

On April 20, 2009, Ben Saiedian of City Art wrote Travelers, asking Travelers to reconsider its denial of coverage. For the first time, City Art suggested that the art at issue in the Kessler litigation had not been in City Art's *exclusive* care, custody, or control. Ben Saiedian represented that "City Art never had exclusive custody or control of the artwork that Ms. Kessler claims was lost or damaged. At all times, Ms. Kessler retained and exercised substantial control over her artwork." Specific examples were provided.

Further letters were exchanged on this issue,[5] in which City Art cited authority providing that the care, custody, or control exclusion does not apply unless the insured's control was exclusive and complete. On February 12, 2010, Travelers wrote counsel for City Art, indicating that, based on the information provided, it would "agree to participate in the defense of [City Art], pursuant to a full reservation of rights." Travelers still took the position that there might be no coverage for the Kessler action. However, it advised City Art that it would pay defense fees dating back to April 20, 2009, the date that it first received extrinsic evidence that triggered a duty to defend.

4. *The Rates Travelers Paid*

Section 2860, subdivision (a) provides, in pertinent part, "If the provisions of a policy of insurance impose a duty to defend upon an insurer and a conflict of interest arises which creates a duty on the part of the insurer to provide independent counsel to the insured, the insurer shall provide independent counsel to represent the insured."[6]

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[5] In its writ petition, City Art states, "Inexplicably, Travelers waited from April 2009 until February 2010 to respond to City Art's renewed claim for a defense." In fact, Travelers responded to Ben Saiedian on June 11, 2009; City Art's counsel responded to Travelers on August 10, 2009; and Travelers then retained coverage counsel, who wrote City Art's counsel on September 21, 2009, seeking further information.

[6] "In 1987 the Legislature enacted section 2860 of the Civil Code which had the primary effect of codifying the decision in *San Diego Federal Credit Union v. Cumis Insurance Society, Inc.* (1984) 162 Cal.App.3d 358 []. The *Cumis* decision held that in

Subdivision (c) of the same section provides that "[t]he 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."

When Travelers agreed, on February 12, 2010, to provide a defense to City Art, it invoked section 2860, subdivision (c) to limit the attorney fees it would pay City Art's counsel.[7] Travelers indicated to counsel for City Art that the rate it actually paid attorneys in the ordinary course of business in the defense of similar actions in the area was $150 per hour. Ultimately, Travelers and counsel for City Art, who was, at that time, Attorney Ramin Azadegan, agreed on a rate of $200 per hour.[8] While it appears that Attorney Azadegan agreed to accept that rate going forward, the record does not

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the absence of consent by the insured, whenever there are differing interests between the insurance company and the insured brought about by a reservation of rights based upon possible noncoverage of the insurance policy, the insurer must pay the reasonable fees for hiring independent counsel selected by the insured and the control of the litigation must be in the hands of the insured. [Citation.]" (*Handy v. First Interstate Bank* (1993) 13 Cal.App.4th 917, 923.)

[7] Travelers suggests, in the instant proceeding, that a conflict of interest might not, in fact, have existed – or, more precisely, that the issue has not been adequately developed. For the purposes of the resolution of the instant writ proceeding, we assume that a conflict existed. Indeed, it was Travelers that initially invoked section 2860, and it is Travelers that continues to contend that section 2860 limited its obligation. Travelers is very likely estopped to argue that there was no conflict of interest, given the positions it has taken since February 2010. In any event, it appears that a conflict did exist. To the extent that City Art might be found liable in the underlying action for damaging the Kessler art, a finding that the art was in City Art's *exclusive* care, custody and control would be worse for City Art from a liability point of view (there would be, for example, no comparative negligence of Kessler), but advantageous to Travelers from a coverage point of view.

[8] The record indicates that Travelers proposed lesser rates for associates and paralegals. It does not indicate whether Attorney Azadegan agreed to these rates.

indicate that Attorney Azadegan accepted that rate in full satisfaction of his prior bills dating back to April 20, 2009.[9]

In January 2011, Attorney Azadegan withdrew as City Art's counsel. City Art then retained Attorney Tim Kenna as its independent counsel. Travelers agreed to reimburse Attorney Kenna at a rate of $235 per hour, with lesser rates for partners and associates.[10] Travelers reserved its right, however, to seek reimbursement from City Art for the additional $35 per hour it was reimbursing Attorney Kenna.

5. *The Instant Action*

At some point, City Art brought the instant action against Travelers for breach of contract, bad faith, and declaratory relief.[11] City Art seeks declaratory relief with respect to many issues, including that: (1) Travelers is obligated to pay the reasonable and necessary fees and costs incurred by City Art's independent counsel; and (2) the obligation to do so is not subject to the rate limitation of section 2860 until such time as Travelers "start[s] adequately funding the defense of" the Kessler action.

Travelers filed a cross-complaint for declaratory relief against City Art.[12] Travelers sought declaratory relief with respect to several issues, including that

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[9] Ben Saiedian subsequently submitted a declaration stating that, prior to February 12, 2010, City Art "had been making payments on monthly invoices submitted to City Art" by Attorney Azadegan. While the record indicates Travelers made some effort to direct its payments for pre-February 12, 2010 attorney fees to the right individuals, there is no indication that City Art was fully reimbursed for the attorney fees it had paid Attorney Azadegan for the period between April 20, 2009 and February 12, 2010.

[10] While the record indicates Travelers agreed to pay these rates, it does not explicitly indicate that Attorney Kenna agreed to accept them as payment in full, although such a conclusion could perhaps be implied.

[11] The record in connection with the instant writ petition does not contain the original complaint. The first amended complaint was filed on November 2, 2010, while the underlying Kessler action was still pending.

[12] The operative cross-complaint was filed August 30, 2013, some two months after Travelers filed the motion for summary adjudication at issue in this writ proceeding.

section 2860 "applies to the defense of the [Kessler] [a]ction and operates to determine control of the defense and the attorney rates charged therefor[]."

Kessler also filed a complaint in intervention in the instant action,[13] based on City Art's assignment of its causes of action against Travelers.[14] Kessler pleaded, as City Art had, that the rate limitations of section 2860 only take effect "when an insurer is adequately funding the defense" of its insured.

6. *Travelers's Motion for Summary Adjudication*

On June 27, 2013, Travelers filed a motion for summary adjudication of four distinct issues which were raised by City Art's complaint and/or Travelers's cross-complaint. Only two of those issues are relevant to the disposition of the instant writ petition. Travelers sought summary adjudication of the issues that: (1) Travelers had no duty to defend prior to April 20, 2009; and (2) the rate limitations of section 2860 applied to the defense it provided.[15]

In arguing that there was no duty to defend prior to April 20, 2009, Travelers argued that there had been no potential for coverage due to the care, custody, and control exclusion, until such time as Ben Saiedian sent the letter indicating shared custody and control. As to the possibility of coverage for the trade libel cause of action, Travelers stated only that it had previously determined that there was no coverage for that cause of action and that "City Art has not challenged Travelers'[s] determination that there is no coverage for the underlying action under" the coverage provisions for advertising injury.

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[13] Kessler's complaint in intervention was filed on March 14, 2014, long after Travelers filed its motion for summary adjudication. Therefore, Travelers's motion did not address Kessler's complaint, even though Kessler sought the same relief as City Art had sought. Nonetheless, Kessler was a party to the action, as City Art had named Kessler as a defendant in its complaint.

[14] See footnote 3, *ante*.

[15] Assuming these two issues were resolved in its favor, Travelers sought summary adjudication of a third issue: that it did not breach the duty to defend.

In arguing that section 2860 applied, Travelers simply argued that it had provided an independent defense under a reservation of rights, which entitled it to the benefits of section 2860. At no point did Travelers make any specific argument regarding its entitlement to apply section 2860 *retroactively* to the fees it paid for the period from April 20, 2009 to February 12, 2010.

7. *Kessler's Opposition*

In her opposition to the summary adjudication motion, which City Art joined, Kessler argued that Travelers failed to conclusively negate any potential of coverage as of Travelers's initial, June 2007, refusal to defend. Kessler argued that her complaint in the underlying action itself gave rise to a possibility that the care, custody, and control of the art was not exclusive. Among other things, Kessler asserted that it was unclear from the complaint if, during the time she actually *worked at* the City Art facility, she shared possession of the art with City Art. Moreover, Kessler argued that Travelers did not perform a sufficient investigation, and that, if it had, it would have discovered the dispute over care, custody, and control, and, therefore, the potential for coverage. As to the issue of potential coverage for trade libel, Kessler took the position that Travelers's suggestion that City Art no longer challenged Travelers's denial of coverage on this basis was wholly insufficient to meet its burden on summary adjudication. Kessler argued, at some length, that the trade libel cause of action was, in fact, covered by the advertising injury coverage provision of the policy.

Kessler further argued that Travelers could not assert the rate limitation of section 2860 "for any defense fees paid or incurred prior to February 12, 2010, the date it finally agreed to defend." Kessler reasoned that section 2860 applies only when an insurer is *actually defending* under a reservation of rights, which did not occur until February 12, 2010. That Travelers belatedly realized that it should have been defending as early as April 20, 2009 did not allow it to take advantage of the rate limitations retroactive to this time.

8. *Travelers's Reply*

In reply to Kessler's arguments regarding the duty to defend, Travelers again argued that it was not required to defend until it was made aware of the facts suggesting that City Art's care, custody, and control of the art might not have been exclusive. Travelers also argued, for the first time, the merits of its position that the trade libel cause of action did not fall within the advertising injury coverage of its policy.

As to the issue of the applicability of section 2860, Travelers argued that "there is no doubt that Civil Code section 2860 rates apply as of the date Travelers agreed to defend on February 12, 2010," and noted that Kessler did not offer evidence or argument to the contrary. As to the period prior to April 20, 2009, Travelers argued that, as it had no duty to defend during this time, the issue of rates was moot. The key issue, according to Travelers, was whether section 2860 applied to the fees paid *after* February 12, 2010 for the period between April 20, 2009 and February 12, 2010 (henceforth, the retroactive fees). Travelers argued that, as to the retroactive fees, it "negotiated these rates with [Attorney] Azadegan resulting in an agreement for reimbursement based on section 2860 rates." (Underlining original.) While Travelers still believed that section 2860 applied to the retroactive fees, it argued that it was nonetheless undisputed that "Travelers and City Art agreed to the application of section 2860 rates."

9. *The Hearing on the Summary Adjudication Motion*

At the hearing on the summary adjudication motion, Travelers again argued that section 2860 rates applied to the retroactive fees because the parties agreed that such rates would apply. However, when asked where such an agreement was memorialized, Travelers could point to no document indicating that City Art or Attorney Azadegan agreed to accept those rates as payment in full for the fees incurred during that period.[16]

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[16] Counsel for Kessler argued that it was "not honorable for Traveler[s] to make that argument because they know that there was a conflict later. They know that absolutely." Counsel for Kessler conceded that documentation reflecting the conflict was not in the record, but represented, "I have right here, your honor, there's a whole

10. *The Trial Court's Ruling*

The trial court's ruling stated, in pertinent part, as follows: "The motion for summary adjudication of issues as to duty to defend is denied. The moving papers do not establish that there was no duty to defend on the trade libel claims, and that issue is not addressed in the separate statement. [¶] The motion for summary adjudication of the application of Civil Code section 2860 is granted. If the duty to defend is imposed when the [insurer] is aware of facts triggering that duty, the duty to pay is triggered as of the same date, and the rate limitations ought also to be effective that same day. The Court rejects the argument that the rate limitation only applies as of the date of acceptance, if the duty to pay is triggered earlier."[17]

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host of letters that went on between Traveler[s] and [Attorney] Azadegan. But I can't refer to those."

[17] In its response to the writ petition, Travelers argues that the court's order is uncertain as to its ruling on section 2860. Travelers argues the second and third sentences of the relevant paragraph of the trial court's ruling are inconsistent. Travelers argues: "The second sentence states that the rate limitation of section 2860 applies when the insurer is aware of facts triggering the duty to defend, which is simply a restatement of an insurer's duty to defend. The third sentence then states that it '*rejects* the argument' that the rate limitation only applies 'as of the date of acceptance,' thus suggesting that the court actually agreed with City Art that the rate limitation would *not* apply retroactively to the date of tender. Hence, whether in reality the trial court intended to grant or deny Travelers'[s] [m]otion for summary adjudication is open to serious question." (Footnote omitted.) We fail to see the ambiguity. This case presented the issue of an insurer which presently acknowledges that the duty to defend arose on one date (April 20, 2009), but which had not actually acknowledged that fact and agreed to defend until some ten months later (February 12, 2010). The issue presented was whether section 2860 rates went into effect when the duty to defend arose, or when the insurer later accepted the defense. The first sentence of the court's ruling *granted* Travelers's motion, indicating that the court accepted Travelers's argument that the section 2860 rates went into effect at the earlier date – when the duty to defend arose. The second sentence of the court's ruling expressly stated that the rate limitations went into effect "the same day" as the duty to defend. The third sentence of the court's ruling expressly *rejected* the argument that the rate limitations went into effect at the later date of the *agreement* to defend, when the actual *duty* had arisen earlier. All three sentences of the trial court's order meant precisely the same thing.

11. *The Instant Writ Petition*

Kessler and City Art (collectively, petitioners) filed a timely petition for writ of mandate challenging the trial court's grant of summary adjudication on the issue of the application of section 2860. The petition represented that, while the trial court granted Travelers's motion for summary adjudication of the application of section 2860, the court "denied Travelers'[s] other motions, ruling that Travelers had a duty to defend before April 20, 2009 and that Travelers did not properly discharge its duty to defend."[18] Starting from that premise, petitioners argued that, as Travelers breached the duty to defend by not paying defense costs, Travelers was liable for the reasonable costs of defense City Art incurred. Petitioners further argued that section 2860 provides protection only for insurers that perform their duties; when an insurer violates its duty (as Travelers purportedly was found to have done), that insurer forfeits its right to *ever* rely on section 2860. Thus, petitioners argued that the section 2860 rates did not apply *even after February 12, 2010*.

We issued an order to show cause.[19] Travelers filed a response in which it argued that the order to show cause should be discharged as improvidently granted, on the basis that it is premature to consider the issues regarding the application of section 2860 in the absence of a trial court ruling on the duty to defend. To the extent

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[18] Only in a footnote do petitioners argue that this is an *inference* they are making from the trial court's ruling, not an express ruling of the trial court. As we shall discuss, we disagree with the inference.

[19] Our order to show cause specifically requested briefing on two issues: "(1) If a liability insurer fails to provide a defense to its insured after a duty to do so has arisen, can it thereafter assert any right under Civil Code section 2860 when it later agrees to provide the required defense? [¶] (2) In this case, what is the relationship between the factual dispute on which Travelers bases its claim of no coverage and the factual issues that are raised by the claims asserted against the [insureds] in the underlying action?" Having reviewed the record in its entirety, we now decline to reach the first issue (which, as we shall discuss, was waived by insureds), and conclude the second issue is irrelevant (given the basis for the trial court's denial of summary adjudication on the duty to defend).

Travelers addressed the application of section 2860, it argued that it had reached an agreement with City Art's counsel that such rates were to be paid.[20]

In petitioners' reply, they argued that the issue of whether section 2860 applies retroactively is ripe for resolution in the instant proceeding. They also again argued that the trial court found that Travelers had a duty to defend prior to April 20, 2009, and that, if the court did not make such a determination, we could do so in the instant proceeding.

ISSUE BEFORE THE COURT

As we shall discuss, the sole issue ripe for resolution in the instant writ proceeding is whether the trial court erred in determining that the section 2860 rate limitations apply as of the date the duty to defend arises, regardless of whether the insurer acknowledges the duty at the time. We conclude the trial court erred; the rate limitations of section 2860 apply no earlier than when the insurer actually *begins paying*[21] the defense costs.

We decline petitioners' invitation to determine, in the first instance, whether the duty to defend arose prior to April 20, 2009. We also conclude that the issue of whether Travelers forfeited the right to rely on section 2860 is not ripe for our resolution.

DISCUSSION

1. *The Issue of When the Duty to Defend Arose Has Not Been Resolved*

Preliminarily, we must reject petitioners' premise that the trial court actually ruled that the duty to defend *did arise* prior to April 20, 2009.

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[20] Travelers failed to address the issue of whether section 2860 rights can be *forfeited*; it simply argued that petitioners failed to establish that it had *waived* the application of section 2860 or was *estopped* to argue that it applied.

[21] We use the language "begins paying" rather than "agrees to pay" so as to make clear that an insurer which agrees on date B to pay the fees retroactive to date A can only take advantage of the section 2860 rate limitation, if at all, for fees incurred from date B onward – even when the agreement relates to fees incurred as early as date A. However, we note that if the insurer agrees on date B to pay defense costs, but does not actually begin writing checks until date C, a reasonable time later, there is no reason why the section 2860 limitation would not apply to the fees incurred between date B and date C.

"An insurer must defend its insured against claims that create a *potential* for indemnity under the policy. [Citations.] The duty to defend is broader than the duty to indemnify, and it may apply even in an action where no damages are ultimately awarded. [Citation.]" (*Scottsdale Ins. Co. v. MV Transportation* (2005) 36 Cal.4th 643, 654.) "[I]n an action wherein all the claims are at least potentially covered, the insurer has a duty to defend. [Citations.]" (*Buss v. Superior Court* (1997) 16 Cal.4th 35, 47.) "Conversely, in an action wherein none of the claims is even potentially covered, the insurer does not have a duty to defend. [Citations.]" (*Ibid.*) "It follows that, in a 'mixed' action, in which some of the claims are at least potentially covered and the others are not, the insurer has a duty to defend as to the claims that are at least potentially covered, having been paid premiums by the insured therefor, but does not have a duty to defend as to those that are not, not having been paid therefor." (*Id*. at p. 48.) Nonetheless, our Supreme Court has held that, "in a 'mixed' action, the insurer has a duty to defend the action in its entirety. [Citations.]" (*Ibid.*) This duty is imposed prophylactically, as an obligation imposed by law.[22] (*Id*. at p. 49.)

Petitioners argue that a duty to defend has been established in the instant case because "[w]here disputed factual issues preclude summary judgment in the insurer's favor, denial of the motion establishes the insurer's duty to defend the underlying action as a matter of law." Petitioners' statement of the law is correct. (*Horace Mann Ins. Co. v. Barbara B.* (1993) 4 Cal.4th 1076, 1085.) An insurer could not reasonably argue otherwise, because the very existence of a disputed issue of fact on the issue of a potential for coverage *establishes* the existence of a potential for coverage, and thus the duty to defend.

However, we reject petitioners' application of this principle to the denial of summary adjudication in this case. The trial court did not deny Travelers's motion for

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[22] Because the duty to defend includes the duty to defend claims that were never potentially covered, "the insurer may unilaterally condition its proffer of a defense upon its reservation of a right later to seek reimbursement of costs advanced to defend claims that are not, and never were, potentially covered by the relevant policy." (*Scottsdale Ins. Co. v. MV Transportation*, *supra*, 36 Cal.4th at p. 656.)

summary adjudication on the duty to defend on the basis of "disputed factual issues"; the trial court denied the motion because Travelers's motion had addressed only a denial of coverage for *some* of the causes of action in the Kessler action (those it argued to be barred by the care, custody and control exclusion) and had failed to address another (the trade libel) cause of action. In other words, the court did not decide that triable issues of fact existed to preclude summary adjudication; it simply concluded that Travelers's motion failed to establish that the *entirety* of the underlying Kessler action was not covered as a matter of law.[23]

In their reply brief in connection with the instant writ petition, petitioners suggest that this court can resolve the issue of when the duty to defend arose as a matter of law. We decline to do so for two reasons. First, petitioners raised the argument for the first time in their reply brief; they did not seek writ relief on this basis. Second, the issue of when the duty to defend arose, in this matter, appears to depend on what Travelers knew or reasonably should have known at any particular time. "Before an insurer rejects a tender, it must make an adequate investigation of the facts." (*Stalberg v. Western Title Ins. Co.* (1991) 230 Cal.App.3d 1223, 1233.) These are factual issues, which are best resolved by the trial court in the first instance.

Therefore, in our discussion of the issue regarding section 2860, it is not known whether Travelers had a duty to defend as of: (1) the date of tender in May 2007; (2) Ben Saiedian's April 20, 2009 letter indicating City Art's care, custody and control might not have been exclusive; or (3) some other date in between. It is also therefore unknown whether Travelers *breached* the duty to defend by not paying defense costs at all for nearly three years; or whether, to the contrary, Travelers properly acknowledged a duty to defend retroactive to April 20, 2009, and its only possible breaches of the duty

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[23] Indeed, Travelers had argued the merits of the lack of coverage for the trade libel cause of action in its reply memorandum. That the trial court's ruling did not address the merits of this argument, and instead simply noted that Travelers did not make the argument in its *motion* or address it in its *separate statement,* supports the conclusion that the trial court's ruling was based on a failure of affirmative argument, and not the existence of disputed facts.

to defend were the ten-month delay in acknowledging this duty and underpayment of the retroactive fees.

2. *The Rate Limitations of Section 2860 Do Not Apply Retroactively*

We next turn to the issue resolved by the trial court, whether the rate limitations of section 2860 apply retroactively. In order to properly address this issue, a brief discussion of the principles governing a breach of the duty to defend is necessary.

"The defense duty arises upon tender of a potentially covered claim and lasts until the underlying lawsuit is concluded, or until it has been shown that there is no potential for coverage. [Citation.]" (*Scottsdale Ins. Co. v. MV Transportation*, *supra*, 36 Cal.4th at p. 655.) "The general measure of damages for breach of [the] duty to defend consists of the insured's cost of defense in the underlying action, including attorney fees. [Citation.]" (*Intergulf Development LLC v. Superior Court* (2010) 183 Cal.App.4th 16, 20.) This is so because "[a]n insurance company may not wrongfully refuse to defend its insured and thus force the insured into the position of having to engage outside counsel, and then, because the defense was not handled in a manner to the liking of the company, refuse to hold the insured harmless against payment of fees for all services reasonably performed in such defense." (*Arenson v. National Auto. & Cas. Ins. Co.* (1957) 48 Cal.2d 528, 538.) Thus, even if the insurer could have provided a defense at its own expense at a lesser cost, if it breaches the duty to defend, it is responsible to pay for all of the attorney fees reasonably incurred by its insured in obtaining a defense.

The rate limitations of section 2860 provide that "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." (Civ. Code, § 2860, subd. (c).) In other words, when the insurer is obligated to satisfy its duty to defend by the provision of independent counsel, rather than by retaining counsel itself, the amount the insurer is obligated to pay is no more than it would be if it retained counsel for the insured itself. The issue presented by this

case is if this limitation on the fees the insurer must pay independent counsel applies *only* when the insurer is timely satisfying its duty to defend, or if, to the contrary, it also limits the amount the insurer retroactively must pay after it failed to timely satisfy the duty.

Several California appellate opinions have reached the issue, and they have all decided the issue the same way: when the insurer breaches the duty to defend, and its obligation to pay defense costs would have otherwise been limited by section 2860, the section 2860 limitation *does not apply* to the attorney fees the insurer failed to pay. Instead, the insurer must pay the usual measure of damages for breach of the duty to defend, the reasonable attorney fees actually incurred by its insured in obtaining a defense. (*Janopaul + Block Companies, LLC v. Superior Court* (2011) 200 Cal.App.4th 1239, 1249; *The Housing Group v. PMA Capital Ins. Co.* (2011) 193 Cal.App.4th 1150, 1157; *Intergulf Development LLC v. Superior Court, supra,* 183 Cal.App.4th at p. 20. See also *Atmel Corporation v. St. Paul Fire & Marine* (N.D. Cal. 2005) 426 F.Supp.2d 1039, 1047.)

There are at least two reasons why this is the correct result. First, it is mandated by the language of the statute. Section 2860, subdivision (a) provides, in pertinent part, "[i]f the provisions of a policy of insurance impose a duty to defend upon an insurer and a conflict of interest arises which creates a duty on the part of the insurer to provide independent counsel to the insured, the insurer shall provide independent counsel to represent the insured." In other words, section 2860 is not triggered at all unless there is first a duty to defend and a conflict of interest requiring the provision of independent counsel. Without the establishment of these requirements, there is no duty to provide independent counsel, and the cost limitations of section 2860 never come into play. "[The insurer] argues that [section] 2860 applies because *if* it had defended [the insured] in the [underlying a]ction, it would have done so under a reservation of rights. This argument misses the point, however, because as numerous courts have recognized, '[t]o take advantage of the provisions of [section] 2860, an insurer must meet its duty to defend and accept tender of the insured's defense, subject to a reservation of rights.'

[Citations.] Here, it is undisputed that [the insurer] did not defend [its insured] in the [underlying a]ction, and thus the Court concludes defendant cannot avail itself of the protections and limitations set forth in [section] 2860." (*Atmel Corp. v. St. Paul Fire & Marine, supra,* 426 F.Supp.2d at p. 1047.)

Second, policy reasons support the conclusion that section 2860's rate limitations cannot apply retroactively to attorney fees incurred by the insured when the insurer was not providing a defense. "If [the insurer] owes any defense burden it must be fully borne [citation] with allocations of that burden among other responsible parties to be determined later. [Citations.] As the trial court here reasoned, an acceptance of [the insurer's] position—that 'insurers always can take advantage of [section] 2860 despite immediately failing to meet their burden to defend'—would encourage insurers to reject their *Cumis* obligations for as long as they chose because they knew they could invoke the limitations and remedies of section 2860 at any time." (*The Housing Group v. PMA Capital Ins. Co., supra,* 193 Cal.App.4th at p. 1157.)

We note an additional policy reason for the result. As a general rule, an insurer who breaches the duty to defend is liable for the reasonable attorney fees incurred by the insured in obtaining a defense. If an insurer could retroactively rely on section 2860, an insurer that breached the duty to defend could reduce the damages it owed simply by establishing that it *also* breached the duty to provide independent counsel. This is nonsensical. An insurer that breached the duty to defend must make its insured whole with respect to defense costs reasonably incurred; an insured should not be left with partial recovery simply because the insurer *would have had* a conflict of interest requiring it to provide independent counsel, had the insurer accepted its duty to defend.

We therefore conclude that section 2860 does not apply retroactively to attorney fees incurred prior to the time Travelers began paying defense costs. To the extent the

trial court ruled that the section 2860 rate limitations applied when the duty to defend arose, it was in error.[24]

3. *The Issue of Whether Travelers Forfeited the Right to Rely on Section 2860 Is Not Ripe*

In their petition, petitioners argue that, by breaching the duty to defend, Travelers forfeited the right to *ever* rely on the section 2860 rate limitations. We conclude that this issue is not ripe for our resolution for a number of reasons.

First, the issue was not presented to the trial court. Travelers moved for summary adjudication on the issue that section 2860 applied to its obligations in this case. In opposition, Kessler (joined by City Art) argued only that Travelers could not assert the rate limitation of section 2860 "for any defense fees paid or incurred prior to February 12, 2010, the date it finally agreed to defend." It made no argument that Travelers had forfeited the right to rely on section 2860 for fees it paid after February 12, 2010.

Second, it has not yet been determined when, if at all, the duty to defend was breached by Travelers in this case. If the duty to defend arose in May 2007, an

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[24] Travelers does not argue against this legal analysis. Instead, it argues, as it did in its reply memorandum in support of summary adjudication, that the retroactive application of section 2860 is not properly at issue, as it actually reached an agreement with Attorney Azadegan on rates. We disagree for four reasons. First, it has not yet been established whether Travelers's duty to defend arose earlier than April 20, 2009; if it did, there was clearly no agreement as to attorney fees for the period prior to April 20, 2009. Second, even accepting Travelers's argument that Attorney Azadegan agreed to accept $200 per hour for his fees retroactive to April 20, 2009, there is no evidence that agreement was reached on rates for Attorney Azadegan's associates or paralegals. Third, there is no evidence that City Art was fully reimbursed for the attorney fees it paid Attorney Azadegan for the period from April 20, 2009 to February 12, 2010, or that it agreed to accept the $200 per hour rate in full satisfaction of the retroactive fees. Fourth and finally, Travelers did not seek summary adjudication of the issue that its duty to defend was satisfied because it paid Attorney Azadegan and Attorney Kenna *agreed-upon* fees; it sought summary adjudication of the issue that its duty to defend was satisfied because section 2860 *applied* to this matter for attorney fees incurred from April 20, 2009 onward. Travelers cannot now avoid our resolution of the issue when Travelers pursued the issue on its motion, and the trial court resolved it.

argument can be made that the nearly three-year period in which Travelers paid no defense costs worked a forfeiture of Travelers's right to rely on the section 2860 fee limitation when it ultimately started paying defense costs. (E.g., *Intergulf Development LLC v. Superior Court, supra,* 183 Cal.App.4th at p. 20 ["Breach of duty to defend . . . results in the insurer's forfeiture of the right to control defense of the action or settlement, including the ability to take advantage of the protections and limitations set forth in section 2860."].) However, if the duty to defend arose in April 2009 and Travelers satisfied any obligation to pay retroactive attorney fees by agreement with counsel for City Art, there would be no breach and no forfeiture. If the duty to defend arose in April 2009, and Travelers was guilty of, at most, a delay in payment and an improper reduction of the rate for 10 months, forfeiture of its statutory rights under section 2860 might not be appropriate.[25] Thus, a determination as to when the duty to defend arose, and whether it was breached, is necessary before the issue of forfeiture can be addressed.

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[25] Indeed, from a policy point of view, it would certainly provide an incentive for insurers to step up and properly provide a defense by independent counsel, even if somewhat late, if they could thereafter rely on the rate limitations of section 2860. If, on the contrary, an insurer waived section 2860 by a delay in accepting the obligation to defend, the insurer would have little financial incentive to accept the obligation to defend, as its damages for the breach would be the same (all attorney fees reasonably incurred by its insured) regardless of whether it ultimately accepted its obligation.

DISPOSITION

The petition is granted in part and denied in part. Let a peremptory writ of mandate issue directing the trial court to vacate that portion of its order granting Travelers's motion for summary adjudication on the issue of the retroactive application of section 2860, and to enter a new and different order denying the motion for summary adjudication of that issue. The parties shall bear their own costs in connection with this writ proceeding.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, J.*

WE CONCUR:

KLEIN, P. J.

ALDRICH, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.