

**United States District Court**  
Northern District of California

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IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

TRAVELERS PROPERTY CASUALTY	)	Case No. 11-3638-SC
COMPANY OF AMERICA, FIDELITY &	)	
GUARANTY INSURANCE COMPANY, THE	)	ORDER GRANTING IN PART AND
TRAVELERS INDEMNITY COMPANY OF	)	DENYING IN PART CROSS-
CONNECTICUT, AND ST. PAUL MERCURY	)	MOTIONS FOR PARTIAL
INSURANCE COMPANY,	)	<u>SUMMARY JUDGMENT</u>
Plaintiffs,	)	
v.	)	
CENTEX HOMES and DOES 1 through	)	
10 inclusive,	)	
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CENTEX HOMES,	)	
Counterclaimant,	)	
v.	)	
TRAVELERS PROPERTY CASUALTY	)	
COMPANY OF AMERICA, et al.,	)	
Counterdefendant.	)	
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INTRODUCTION & BACKGROUND

1  
2 This case arises out of an insurance dispute between the  
3 above-captioned plaintiffs (collectively, "Travelers") and  
4 defendant Centex Homes ("Centex"). Centex hires subcontractors to  
5 build residential developments throughout California. Pertinent to  
6 this case, Centex subcontracted with West Coast Countertops ("West  
7 Coast"), Fresno Precision Plastics ("Fresno Precision"), Executive  
8 Landscape, American Woodmark, and Foremost Superior Marble  
9 ("Foremost Superior") to install countertops, cabinets, tub and  
10 shower surrounds, and landscaping features in a number of homes.  
11 These subcontractors obtained commercial general liability  
12 insurance policies from Travelers, naming Centex as an additional  
13 insured. The Travelers' policies cover property damage arising  
14 from the subcontractors' work but does not provide coverage for  
15 replacement of the work itself. For example, Travelers will cover  
16 water damage caused by an improperly installed tub, but not cover  
17 the replacement cost of the tub itself.

18 Centex is now being sued for construction defects by over 100  
19 homeowners throughout California. These actions allege a large  
20 number of defects, including a few that may be related to the work  
21 performed by West Coast, Fresno Precision, Executive Landscape, and  
22 Foremost Superior. Centex has tendered at least five of these  
23 actions to Travelers as an additional insured under these  
24 subcontractors' policies: the Acupan action, the Adkins action, the  
25 Conner action, the Garvey action, and the Kent action  
26 (collectively, the "underlying actions").<sup>1</sup>

27  
28 <sup>1</sup> The actions are captioned: Acupan v. Centex Homes, Kern County  
Superior Court Case No. S-1500-CV-273392; Adkins v. Centex Homes,  
Sacramento County Superior Court; Conner v. Centex Homes, Imperial

1 Centex and Travelers appear to disagree about almost every  
2 relevant aspect of coverage, including whether the underlying  
3 actions are covered by the policies, whether Travelers has a duty  
4 to defend the underlying actions, what that duty to defend entails,  
5 whether Centex has a right to control its own defense, whether  
6 Centex has a right to Cumis counsel, whether Centex has a duty to  
7 seek coverage from other insurers, and whether the parties have  
8 timely responded to each other's requests for information. As a  
9 result, Travelers brought suit against Centex for, among other  
10 things, breach of contract, breach of the implied covenant of good  
11 faith and fair dealing ("bad faith"), reimbursement, and  
12 declaratory relief. Centex has also counterclaimed for breach of  
13 contract, bad faith, and declaratory relief. Now before the Court  
14 are fully briefed cross-motions for partial summary judgment  
15 brought by Travelers and Centex. ECF Nos. 128 ("Trav. MSJ"); 143  
16 ("Centex XMSJ/MSJ Opp'n"); 159 ("Trav. MSJ Reply/XMSJ Opp'n"); 162  
17 ("Centex XMSJ Reply"). Pursuant to Civil Local Rule 7-1(b), the  
18 Court finds these matters appropriate for resolution without oral  
19 argument. For the reasons set forth below, the cross-motions are  
20 GRANTED in part and DENIED in part.

21  
22 **LEGAL STANDARD**

23 Entry of summary judgment is proper "if the movant shows that  
24 there is no genuine dispute as to any material fact and the movant  
25 is entitled to judgment as a matter of law." Fed. R. Civ. P.  
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27 County Superior Court Case No. ECF06075; Garvey et al. v. Centex  
28 Homes, et al., Sacramento County Superior Court Case No. 34-2010-  
00073233; Kent v. Centex Homes, Sacramento County Superior Court  
Case No. 07AS04107.

1 56(a). Summary judgment should be granted if the evidence would  
2 require a directed verdict for the moving party. Anderson v.  
3 Liberty Lobby, Inc., 477 U.S. 242, 251 (1986). Thus, "Rule 56[]  
4 mandates the entry of summary judgment . . . against a party who  
5 fails to make a showing sufficient to establish the existence of an  
6 element essential to that party's case, and on which that party  
7 will bear the burden of proof at trial." Celotex Corp. v. Catrett,  
8 477 U.S. 317, 322 (1986). "The evidence of the nonmovant is to be  
9 believed, and all justifiable inferences are to be drawn in his  
10 favor." Anderson, 477 U.S. at 255. However, "[t]he mere existence  
11 of a scintilla of evidence in support of the plaintiff's position  
12 will be insufficient; there must be evidence on which the jury  
13 could reasonably find for the plaintiff." Id. at 252.

14  
15 **DISCUSSION**

16 **I. CENTEX'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT**

17 Centex asks the Court to enter partial summary judgment in its  
18 favor on five issues: (1) whether Travelers owes a duty to defend  
19 Centex in the Garvey, Adkins, Acupan, and Conner Actions; (2)  
20 whether Travelers has a duty to pay Centex's full defense costs;  
21 (3) whether Centex breached the cooperation clauses in its  
22 insurance contracts with Travelers by failing to tender to or sue  
23 other insurers; (4) whether Travelers' delay in responding to the  
24 Acupan and Conner actions divested it of the right to control those  
25 actions; (5) whether Travelers' claim for reimbursement fails. The  
26 Court addresses each of these issues below.

27 **A. Travelers' Duty to Defend Centex**

28 Under California law, an insurer's duty to defend an insured

1 in an underlying action "is determined by reference to the policy,  
2 the complaint, and all facts known to the insurer from any source."  
3 Montrose Chem. Corp. v. Super. Ct., 6 Cal. 4th 287, 300 (Cal.  
4 1993). "[O]nce the insured has established potential liability . .  
5 . the insurer must assume its duty to defend unless and until it  
6 can conclusively refute that potential. Necessarily, an insurer  
7 will be required to defend a suit where the evidence suggests, but  
8 does not conclusively establish, that the loss is not covered."  
9 Id. at 299 (quotations omitted).

10 Here, Centex argues that the undisputed evidence shows that  
11 Travelers had a duty to defend Centex in the Adkins, Acupan,  
12 Garvey, and Conner actions. Centex XMSJ/MSJ Opp'n at 29.  
13 Travelers argues that summary judgment should be denied on these  
14 issues because Centex fails to specify when the duty to defend  
15 arose in each action. Trav. MSJ Reply/XMSJ Opp'n at 22-23. Centex  
16 responds that its motion is sufficiently specific because the duty  
17 to defend arises immediately upon tender. Centex XMSJ Reply at 30-  
18 31. The Court disagrees.

19 Courts frequently refer to the duty to defend as immediate.  
20 See Montrose, 6 Cal. 4th at 295. However, courts also recognize  
21 that an insurer has a right to conduct a reasonable investigation  
22 before to assuming a duty to defend. See Travelers Prop. v. Centex  
23 Homes, C 10-02757 CRB ("Travelers v. Centex I" or the "'57  
24 Action"), 2011 WL 1225982, at \*4 (N.D. Cal. Apr. 1, 2011). Thus,  
25 where an insured tenders an underlying action but fails to provide  
26 the insurer with necessary information relevant to a coverage  
27 determination, then the insurer need not defend the action upon  
28 tender.

1           In this case, there are disputed issues of material fact as to  
2 when Travelers had sufficient information to make an informed  
3 decision on Centex's tenders. For example, Travelers has submitted  
4 evidence showing that, in tendering the Acupan action under the  
5 Fresno Precision policy, Centex initially failed to provide its  
6 subcontracts with Fresno Precision, which were necessary to trigger  
7 coverage under the policy. See Lopez Decl. Exs. B-C. The issue of  
8 when Travelers had a duty to defend is central to the claims and  
9 counterclaims asserted by the parties. For example, if that duty  
10 arose well before Travelers provided Centex with a defense in the  
11 underlying actions, then Centex may be able to succeed on its  
12 claims for breach and bad faith. If it arose at the time Travelers  
13 provided a defense, then Centex's claims may lack merit. Further,  
14 if Travelers later discovered facts that conclusively refuted the  
15 potential for coverage under its policies, then Travelers would no  
16 longer have had a duty to defend.

17           Centex does not address these issues. Instead, it essentially  
18 asks the Court to render summary judgment on Travelers' duty to  
19 defend in a vacuum, without reference to any of the claims involved  
20 in this action. Even if the Court could find that Travelers had a  
21 duty to defend the underlying actions at some unspecified point in  
22 time, it is unclear how that would narrow the scope of the issues  
23 set for trial. Accordingly, the Court DENIES Centex's motion for  
24 summary judgment with respect to Travelers' duty to defend in the  
25 Adkins, Acupan, Conner, and Garvey actions.

26           **B. Travelers' Duty to Pay Centex's Full Defense Costs**

27           Centex next asks the Court to find Travelers has a duty to pay  
28 Centex's full defense costs, not simply a pro-rata share, and that

1 Travelers failed to meet this duty. Centex XMSJ/MSJ Opp'n at 40.  
2 Under California law, in actions where all the claims asserted  
3 against the insured are at least potentially covered, the insured  
4 has a duty to defend. Buss v. Super. Ct., 16 Cal. 4th 35, 46 (Cal.  
5 1997). Moreover, in "mixed actions" -- in which some claims are at  
6 least potentially covered by an insurer and the others are not --  
7 "the insurer has a duty to defend the action in its entirety." Id.  
8 at 47-48. "[A]lthough an insurer owing a duty to defend must  
9 defend the entire underlying action, allocation of defense costs  
10 may later be apportioned in certain situations involving multiple  
11 insurers." Cnty. of San Bernardino v. Pac. Indem. Co., 56 Cal.  
12 App. 4th 666, 689-90 (Cal. Ct. App. 1997). An insurer generally  
13 cannot use its right to seek contribution from other insurers to  
14 avoid fronting an insured's full defense costs. Armstrong World  
15 Indus., Inc. v. Aetna Cas. & Sur. Co., 45 Cal. App. 4th 1, 105-06  
16 (Cal. Ct. App. 1996).

17 Travelers argues that Centex cannot claim that it was provided  
18 with an incomplete defense because, from the beginning, either  
19 Travelers or some other insurer has paid Centex's defense costs in  
20 all of the underlying actions. Trav. MSJ Reply/XMSJ Opp'n at 27-  
21 29. Travelers also argues that Centex has failed to provide  
22 competent, admissible evidence of its actual reasonable and  
23 necessary defense fees. Id. at 29-31. Finally, Travelers argues  
24 that Centex engaged in improper billing practices through which it  
25 misrepresented the contribution of other insurers and induced  
26 Travelers to overpay for Centex's defense costs in the underlying  
27 actions. Id. at 31-32. In sum, Travelers contends that there  
28 exist triable issues of material fact as to whether Centex has

1 received all funds necessary to mount a reasonable defense. Id.

2 The Court agrees with Travelers, at least in part. Even if  
3 Travelers does have a duty to defend, there are triable issues of  
4 fact as to whether it has fulfilled that obligation. Both parties  
5 have presented declarations from their attorneys concerning the  
6 amounts Travelers has paid towards Centex's defense in the  
7 underlying actions. Travelers' evidence indicates that Travelers  
8 and other insurers have overpaid Centex's defense fees, while  
9 Centex's evidence indicates Travelers still owes Centex thousands  
10 of dollars. At summary judgment, the Court cannot determine which  
11 evidence is more credible. Further, Centex has failed to address  
12 Travelers' argument that Centex engaged in improper billing  
13 practices, other than to argue that Travelers is procedurally  
14 barred from raising such an argument. Centex has not explained why  
15 this argument is barred, and the Court fails to see why it is  
16 improper.

17 Accordingly, the Court declines to find that Travelers failed  
18 to provide a complete defense to Centex, and Centex's motion is  
19 DENIED as to this issue.

20 **C. The Cooperation Clause**

21 Travelers has alleged that Centex breached the cooperation  
22 clause in its policies by failing to (1) acknowledge Travelers'  
23 right to control Centex's defense in the underlying actions and (2)  
24 seek recovery of defense fees and costs incurred in underlying  
25 actions from other insurance carriers. See ECF No. 5 ("Am.  
26 Compl.") ¶ 66. Centex now moves for summary judgment on the second  
27 aspect of this claim on the ground that Centex was not required to  
28 seek recovery from other insurers. This argument has merit.

1           Neither party specifically directs the Court to the  
2 cooperation clauses in the relevant agreements; however, they  
3 appear to be referring to the clauses which provide that Centex  
4 must: (1) "cooperate with [Travelers] in the investigation,  
5 settlement, or defense of the claim or suit"; and (2) "do all  
6 that's possible after the loss to preserve for [Travelers] any . .  
7 . right of recovery [from a third party]; and cooperate with  
8 [Travelers] in any attempt to exercise any . . . right of recovery  
9 [from a third party]." <sup>2</sup> See Carrillo Decl. Ex. A at 28, 69.

10           Nothing in these cooperation clauses suggests that Centex had  
11 an obligation to tender a defense to other insurers. Under  
12 California law, Travelers was entitled to seek contribution for  
13 Centex's defense costs from other insurance carriers, even if  
14 Centex did not tender its defense or provide notice to those other  
15 carriers. "When multiple policies are triggered on a single claim,  
16 the insurers' liability is apportioned pursuant to the 'other  
17 insurance' clauses of the policies or under the equitable doctrine  
18 of contribution." Dart Indus., Inc. v. Commercial Union Ins. Co.,  
19 28 Cal. 4th 1059, 1080 (Cal. 2002) (citation and quotations  
20 omitted). Thus, Centex's refusal to tender its claims to other  
21 insurers did not affect Travelers' rights to seek contribution from  
22 other carriers who may have insured the losses alleged in the  
23 underlying actions. In fact, Travelers' own Rule 30(b)(6) witness  
24 admitted that Travelers does not believe that its insured have  
25 contractual obligations to provide notice of their claims to other

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26 <sup>2</sup> The parties are reminded that the Court is not required to  
27 independently search the record on motions for summary judgment.  
28 See Carmen v. San Francisco Unified Sch. Dist., 237 F.3d 1026, 1031  
(9th Cir. 2001). All future citations to the record should include  
pin cites.

1 carriers or to pursue insurance claims against other carriers.  
2 Hayes Decl. Ex. H8 at 245-49.

3 Case law from other jurisdictions also suggests that insureds  
4 do not have an independent duty to seek contribution from other  
5 insurers. Specifically, the Seventh Circuit has stated:

6  
7 [Insureds] have the right to choose which insurer they  
8 want to defend them, and their doing so cannot be said  
9 to legally impair any right they had against any other  
10 insurers. Indeed, [the plaintiff insurer] has cited no  
11 cases from any jurisdiction holding that an insurer  
12 may force its insured, under the language of the  
13 insurance policy, to tender its claims to another  
14 insurance company as well.

15  
16 Emp'rs Ins. of Wausau v. James McHugh Const. Co., 144 F.3d 1097,  
17 1106 (7th Cir. 1998).

18 Travelers does not directly respond to these points. Instead,  
19 it asserts two new theories of how Centex allegedly breached the  
20 cooperation clause. Specifically, it argues that Centex impaired  
21 Travelers' right of recovery against other insurers by (1) failing  
22 to provide Travelers with requested information regarding other  
23 additional insured tenders in a timely manner, and (2) specifically  
24 directing other carriers to stop contributing to Centex's defense.  
25 Trav. MSJ Reply/XMSJ Opp'n at 17-18. These theories were not pled  
26 in Travelers' Amended Complaint, and it would be unfair to allow  
27 Travelers to assert them now.<sup>3</sup> Travelers has not sought leave to  
28 amend and the discovery cut-off passed long ago. See ECF No. 58.

3 In its opposition papers, Travelers also frames these new  
allegations as breaches of the covenant of good faith and fair  
dealing. However, according to Travelers' pleadings, its bad faith  
claim is predicated on "[Centex's] continuous refusal to  
acknowledge [Travelers'] right to select defense counsel thereby  
impeding [Travelers'] ability to provide a defense . . . ." Am.  
Compl. ¶ 111.

1 In any event, Travelers' second new claim fails as a matter of  
2 law. Centex's decision to seek 100 percent of its defense costs  
3 from Travelers does not affect Travelers' right to seek  
4 contribution from other insurance carriers. Travelers contends  
5 that these carriers can now argue that they have no contribution  
6 obligations because Centex represented that Travelers did not want  
7 them to contribute. MSJ Reply/XMSJ Opp'n at 17-18. But this  
8 argument is inconsistent with the evidence presented by Travelers,  
9 which merely shows that Centex told other carriers that Travelers  
10 had acknowledged a defense obligation and that Centex was not  
11 currently seeking contribution from anyone else. See Aguilera  
12 Decl. Exs. C, F. There is no indication that Centex informed its  
13 other insurers that Travelers had waived its right to seek  
14 contribution.

15 Accordingly, the Court GRANTS Centex's motion for partial  
16 summary judgment with respect to Travelers' claim for breach of the  
17 cooperation clauses and finds that Centex did not breach its duty  
18 to cooperate by failing to seek recovery of its defense fees from  
19 other carriers. Travelers' claim for breach of contract remains  
20 undisturbed in all other respects.

21 **D. Travelers' Right to Control Centex's Defense in the**  
22 **Acupan and Conner Actions**

23 Centex also asks the Court to find that Travelers' delay in  
24 responding to Centex's tenders of the Acupan and Conner actions  
25 divested Travelers of its right to control the defense of those  
26 actions. Centex XMSJ/MSJ Opp'n at 51. Centex first tendered the  
27 Acupan action to Travelers under the Fresno Precision policy on  
28 April 8, 2010. Lopez Decl. Ex. A. On September 13, 2010,

1 Travelers declined to provide coverage for the Acupan action, but  
2 it reversed course on June 28, 2011. Owens Decl. Ex. 014, 018.  
3 The delay associated with the Conner action was much shorter.  
4 Centex tendered the Conner action on September 8, 2010, and  
5 Travelers asked for additional information on September 22, 2010.  
6 Id. Exs. 027, 028, 038. After receiving and reviewing this  
7 additional information, Travelers agreed to provide an equitable  
8 defense on January 21, 2011. Id. Ex. 029. After Travelers  
9 accepted Centex's tenders in the Conner and Acupan actions,  
10 Travelers attempted to appoint its own counsel to defend those  
11 actions. Centex refused to cooperate with Travelers proposed  
12 counsel, and insisted that the law firm of Newmeyer and Dillion LLP  
13 ("Newmeyer") continue to manage its defense. Centex contends that  
14 Travelers lost its right to appoint new counsel by waiting too long  
15 to accept Centex's tenders. Travelers asserts that Centex's  
16 actions amount to breach of the cooperation clauses in the relevant  
17 insurance agreements.

18 This is not the first time this issue has been raised in this  
19 case. Centex previously moved for summary judgment on the grounds  
20 that Travelers' delay divested it of the right to control the  
21 Adkins and Garvey actions. ECF No. 21. That motion was granted.  
22 ECF No. 56 ("May 10, 2012 Order").<sup>4</sup> The Court held that Travelers  
23 lost the right to control the Adkins and Garvey actions because it  
24 waited over nine months to provide Centex with a defense in those  
25 actions and because Travelers only agreed to provide a defense  
26 after Centex brought suit for Travelers' failure to defend. Id. at

27 \_\_\_\_\_  
28 <sup>4</sup> Travelers Prop. Cas. Co. of Am. v. Centex Homes, 2012 WL 1657121,  
2012 U.S. Dist. LEXIS 65834 (N.D. Cal. May 10, 2012).

1 3-5, 10-11. The Court reasoned: "As the duty to defend arises  
2 immediately upon tender, Travelers' delay in providing Centex with  
3 a defense divested it of the right to control that defense." Id.  
4 at 10.

5 Having reviewed the parties' briefs and new authority offered  
6 by Travelers, the Court finds that its prior decision was in error  
7 and would work a manifest injustice.<sup>5</sup> The Court finds that an  
8 insurer cannot lose its right to control the defense of its insured  
9 through delay alone. Rather, it may only lose that right through  
10 waiver, forfeiture, or estoppel, none of which have been proven by  
11 Centex.

12 Under California law, an insurer's duty to defend is  
13 immediate, "arising on tender of defense and lasting until the  
14 underlying lawsuit is concluded or until it has been shown that  
15 there is no potential for coverage . . . . Imposition of an  
16 immediate duty to defend is necessary to afford the insured . . .  
17 the full protection of a defense on its behalf." Montrose Chem.  
18 Corp. v. Sup. Ct., 6 Cal. 4th 287, 295 (Cal. 1993). Once an  
19 insurer takes on the duty to defend, it generally has the absolute  
20 right to manage the defense and the insured is required to  
21 surrender all control. See Safeco Ins. Co. of Am. v. Super. Ct.,  
22 71 Cal. App. 4th 782, 787 (Cal. App. 1999). The insurer's right to  
23 control the insured's defense extends to the right to select legal  
24 counsel. Carolina Cas. Ins. Co. v. Bolling, Walter & Gawthrop, No.  
25 Civ. S-04-2445 FCD, 2005 WL 1367096, at \*7, 2005 U.S. Dist. LEXIS

26 \_\_\_\_\_  
27 <sup>5</sup> Under the law of the case doctrine, courts generally refuse to  
28 reopen issues that have already been decided. Gonzalez v. Arizona,  
677 F.3d 383, 390 n.4 (9th Cir. 2012). However, a court may depart  
from the law of the case where its prior decision was erroneous and  
would work a manifest injustice. Id.

1 20485, at \*21 (E.D. Cal. May 31, 2005). However, "[w]hen an  
2 insurer wrongfully refuses to defend, the insured is relieved of  
3 his or her obligation to allow the insurer to manage the litigation  
4 and may proceed in whatever manner is deemed appropriate." Eigner  
5 v. Worthington, 57 Cal. App. 4th 188, 196 (Cal. Ct. App. 1997).

6 Centex argues that because the duty to defend is immediate, an  
7 insurer irrevocably loses its right to control an insured's defense  
8 if the insurer does not provide an immediate defense, even if the  
9 insurer later agrees to defend and offers to retroactively pay the  
10 insured's legal fees. Centex XMSJ/MSJ Opp'n at 52. But the  
11 authority cited by Centex stands for much more limited  
12 propositions. Specifically, this authority holds that (1) an  
13 insured has the right to control its own defense where the insurer  
14 refuses to provide one, Eigner, 57 Cal. App. 4th at 196; (2) an  
15 insured may settle a claim without the consent or approval of the  
16 insurer where the insurer denies liability and refuses to provide a  
17 defense, St. Louis Dressed Beef & Provision Co. v. Maryland Cas.  
18 Co., 201 U.S. 173, 181 (1906); and (3) an insurer may irrevocably  
19 waive its right to control an insured's defense through "a direct  
20 and positive written request by it to the insured to take charge of  
21 the litigation and defend the suit," Witt v. Universal Auto. Ins.  
22 Co., 116 S.W.2d 1095, 1098 (Tex. Civ. App. 1938). This authority  
23 is not applicable here. First, Travelers has since offered to  
24 provide a defense in each of the underlying actions. Second,  
25 Travelers is not challenging a settlement reached by Centex before  
26 Travelers offered to defend the underlying actions. Third,  
27 Travelers did not expressly waive its right to control Centex's  
28 defense. Rather, it has repeatedly reserved its rights under the

1 relevant insurance agreements.

2       The California Court of Appeal's decision in Chase v. Blue  
3 Cross of California, 42 Cal. App. 4th 1142 (Cal. Ct. App. 1996), is  
4 more on point. The issue in Chase was whether an insurer had lost  
5 its right to compel arbitration because its communications with the  
6 insured did not mention the arbitration provision in the parties'  
7 insurance contract. 42 Cal. App. 4th at 1149. The court found  
8 that an insurer could only lose a contractual right to arbitration  
9 under theories of waiver, forfeiture, or estoppel. Id. at 1151.  
10 While the Chase court was primarily concerned with an arbitration  
11 clause, its holding has broader implications. In reaching its  
12 conclusion, the Court relied on a number of authorities which dealt  
13 with other types of contractual rights provided by insurance  
14 policies. See id. at 1149-51 (citing Waller v. Truck Ins. Exch.,  
15 Inc., 11 Cal. 4th 1 (Cal. 1995); Intel Corp. v. Hartford Acc. &  
16 Indem. Co., 952 F.2d 1551 (9th Cir. 1991)). Further, the Court  
17 generally referred to the means by which an insurer may lose a  
18 contractual right, not just the right to arbitration.

19       There are also policy justifications for allowing an insurer  
20 to reserve its right to control an insured's defense and to assume  
21 control over the insured's defense after a delay. Since the  
22 insurer may have a duty to indemnify the insured, the insurer often  
23 has the most at stake in the outcome of the underlying litigation.  
24 As Centex points out, allowing an insurer to appoint new counsel in  
25 the middle of a case may not always be the best strategy. But  
26 since the insurer may be liable for any judgments rendered against  
27 the insured, the insurer is often in the best position to make  
28 decisions about selecting counsel. Additionally, the rule proposed

1 by the Court does not relieve an insurer of its duty to provide an  
2 "immediate defense." If an insured is forced to hire its own  
3 independent counsel due an insurer's delay, the insurer may later  
4 be liable for that independent counsel's fees. In fact, in this  
5 case, Travelers has offered evidence that it has paid Newmeyer for  
6 all of the time it devoted to the underlying actions, even the  
7 hours billed prior to Travelers' acceptance of Centex's tenders.  
8 Further, in certain circumstances, an insurer's refusal to provide  
9 an immediate defense may render it liable for breach of contract or  
10 breach of the covenant of good faith and fair dealing.

11 Accordingly, the Court DENIES Centex's motion for summary  
12 judgment on the issue of whether Travelers has lost its right to  
13 control the defense of the Acupan and Conner actions. The Court  
14 also VACATES its prior decision that Travelers lost its right to  
15 control the defense of the Adkins and Garvey actions.

16 **E. Travelers' Claim for Reimbursement**

17 Travelers has asserted a claim for reimbursement in connection  
18 with the Kent action. Am. Complaint. ¶¶ 113-117. Travelers agreed  
19 to defend Centex in the Kent action pursuant to the Foremost  
20 Superior policy and subsequently paid for a portion of Centex's  
21 defense fees in that action. Travelers alleges that it is entitled  
22 to reimbursement from Centex because Centex billed Travelers and  
23 other insurers for more than 100 percent of its defense costs and  
24 because Foremost Superior was ultimately dismissed from the Kent  
25 action without contributing toward any settlement amount.<sup>6</sup> Id. ¶  
26 116. Centex now moves for summary judgment on Travelers'

27 \_\_\_\_\_  
28 <sup>6</sup> The parties agree that Travelers is pursuing a claim for  
reimbursement, not a claim for misrepresentation or fraud. See  
Trav. MSJ Reply/XMSJ Opp'n at 62; Centex XMSJ Reply at 31.

1 reimbursement claim.

2 Insurers have a duty to defend every aspect of a mixed action,  
3 i.e., an action brought against the insured that includes claims  
4 that are covered (or at least potentially covered), as well as  
5 claims that are not potentially covered. Buss, 16 Cal. 4th at 48.  
6 The insurer may later seek reimbursement from the insured for  
7 defending claims that are not even potentially covered, but may not  
8 seek reimbursement for claims that are potentially covered. Id. at  
9 50. The insurer's right to reimbursement is limited to defense  
10 costs that can be allocated solely to claims that are not even  
11 potentially covered. Id. at 52. Thus, "[i]f [an insurer], after  
12 providing an entire defense, can prove that a claim was not even  
13 potentially covered because it did not even possibly embrace any  
14 triggering harm of the specified sort within its policy or periods  
15 caused by an included occurrence, it should have that opportunity."  
16 State v. Pac. Indem. Co., 63 Cal. App. 4th 1535, 1550 (Cal. Ct.  
17 App. 1998) (emphasis in the original) (internal quotations  
18 omitted).

19 Centex argues that Travelers is not entitled to reimbursement  
20 because Travelers failed to pay for all of Centex's defense costs  
21 in the Kent action. Centex XMSJ/MSJ Opp'n at 59-60. However,  
22 where, as here, multiple insurers contribute toward an insured's  
23 defense, an insurer does not need to pay for 100 percent of the  
24 insured's defense costs in order to provide an entire defense.  
25 Travelers v. Centex I, 2011 WL 1225982, at \*4 (citing San Gabriel  
26 Valley Water Co. v. Hartford Accident & Indem. Co., 82 Cal. App.  
27 4th 1230, 1241 (Cal. Ct. App. 2000)). Further, there are triable  
28 issues of fact as to whether Travelers paid its share of Centex's

1 defense fees. For example, because Centex may have overbilled its  
2 insurers for defense costs, the exact amount of Centex's actual  
3 defense costs remains unclear. There are also triable issues of  
4 fact as to whether Centex is trying to hold Travelers responsible  
5 for defense costs incurred before Centex tendered the Kent action  
6 to Travelers under the Foremost Superior policy and after Foremost  
7 Superior was dismissed from the Kent action.

8       Next, Centex argues that Travelers cannot seek reimbursement  
9 because it did not provide an immediate defense to Centex.  
10 However, Centex cites no California authority that would support  
11 such a proposition. As Centex points out, in Buss, 16 Cal. 4th at  
12 48-49, the California Supreme Court held that the insurer's duty to  
13 defend generally arises as soon as tender is made. However, Buss  
14 does not hold that an insurer irrevocably loses its right to seek  
15 reimbursement for payments made on a clearly uncovered claim if the  
16 insurer fails to provide an immediate defense. In fact, Buss  
17 arguably stands for the contrary proposition:

18               Under the policy, the insurer does not have a duty  
19 to defend the insured as to the claims that are not  
20 even potentially covered. With regard to defense  
21 costs for these claims, the insurer has not been  
22 paid premiums by the insured. It did not bargain to  
23 bear these costs. To attempt to shift them would not  
24 upset the arrangement. The insurer therefore has a  
25 right of reimbursement that is implied in law as  
26 quasi-contractual, whether or not it has one that is  
27 implied in fact in the policy as contractual. As  
28 stated, under the law of restitution such a right  
runs against the person who benefits from "unjust  
enrichment" and in favor of the person who suffers  
loss thereby. The "enrichment" of the insured by the  
insurer through the insurer's bearing of  
unbargained-for defense costs is inconsistent with  
the insurer's freedom under the policy and therefore  
must be deemed "unjust."

1 16 Cal. 4th at 50-51 (internal citations and footnotes omitted).  
2 Centex is essentially arguing that Travelers' alleged failure to  
3 provide an immediate defense gave Centex a blank check to overbill  
4 for defense costs. Such an outcome would be inequitable.

5 Even if an insured could lose its right to reimbursement by  
6 failing to provide an immediate defense, triable issues of fact  
7 exist as to whether Travelers provided a timely defense to Centex  
8 in the Kent action. Centex tendered the defense of the Kent action  
9 to Travelers on February 7, 2008. Imamura Decl. Ex. D. On  
10 February 19, 2008, Travelers indicated that it was still  
11 investigating the claim and requested additional information from  
12 Centex. Id. Ex. E. Centex subsequently provided at least some of  
13 the requested information. Id. Ex. F. On May 19, 2008, Travelers  
14 agreed to defend Centex as an additional insured, but it noted that  
15 it did not have sufficient information upon which to base its  
16 determination of coverage, and therefore requested additional  
17 information. Id. Ex. G. The Court declines to find that, as a  
18 matter of law, Travelers unduly delayed responding to Centex's  
19 tenders, especially in light of the fact that Travelers had a right  
20 to conduct a reasonable investigation to determine whether it had a  
21 duty to defend. Cf. State Farm Mut. Auto. Ins. Co. v. Flynt, 17  
22 Cal. App. 3d 538, 548 (Cal. Ct. App. 1971) ("[T]he duty to defend  
23 should be fixed by the facts which the insurer learns from the  
24 complaint, the insured, or other sources.")

25 Centex also argues that Travelers' reimbursement claim is  
26 barred because it was a compulsory counterclaim in an earlier  
27 action between Travelers and Centex pending before Judge Charles  
28 Breyer in this Court, Travelers v. Centex I, supra. In that

1 action, Centex counterclaimed against Travelers for breach of  
2 contract, declaratory relief, and bad faith because of Travelers'  
3 alleged failure to honor its defense obligations in the Kent  
4 Action. '57 Action ECF No. 37 ¶¶ 37-42, 70. Travelers filed an  
5 answer in November 2010, but did not assert a counterclaim for  
6 reimbursement. '57 Action ECF No. 42. Travelers asserts that it  
7 did not learn that Centex was overbilling for defense costs until  
8 Travelers deposed a number of Centex witnesses in April and May of  
9 2011. Trav. MSJ Reply/XMSJ Opp'n at 64-65. In May 2011, Centex  
10 moved to amend its counterclaim to dismiss its claims related to  
11 the Kent action, arguing that Travelers would not be prejudiced by  
12 such a dismissal. '57 Action ECF No. 306. On August 5, 2011,  
13 Judge Breyer stayed Travelers v. Centex I and ordered Centex to  
14 file an amended complaint. '57 Action ECF No. 365. The instant  
15 action was filed on July 25, 2011, and Travelers amended its  
16 complaint in this action to add a claim for reimbursement one month  
17 later. Over a year later, Judge Breyer dismissed Travelers v.  
18 Centex I pursuant to a settlement reached by the parties. '57  
19 Action ECF No. 413.

20 Under Federal Rule of Civil Procedure 13, a counterclaim  
21 arising out of the same transaction or occurrence that is the  
22 subject matter of the opposing party's claim is compulsory. Fed.  
23 R. Civ. P. 13(a)(1). However, "[n]othing in Rule 13 prevents the  
24 filing of a duplicative action instead of a compulsory  
25 counterclaim." Adam v. Jacobs, 950 F.2d 89, 93 (2d Cir. 1991)  
26 (citing 6 Wright & Miller, Federal Practice and Procedure § 1418  
27 (2d ed. 1990)). Ideally, the court in the first-filed action  
28 should stay the proceedings in the second-filed action once it

1 becomes aware that the second-filed action involves a compulsory  
2 counterclaim. Id. In this case, Travelers asserted its  
3 reimbursement claim in this action while the Travelers v. Centex I  
4 was still pending before Judge Breyer. There is no indication that  
5 either party alerted Judge Breyer to the duplicative claim.<sup>7</sup> Since  
6 Judge Breyer took no action to stay the Travelers' reimbursement  
7 claim in this action, Travelers is not barred from pursuing it now.

8 Accordingly, Centex's cross-motion for summary judgment is  
9 DENIED with respect to Travelers' claim for reimbursement.

10

11 **II. TRAVELERS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

12 Travelers moves for partial summary judgment on Centex's  
13 counterclaims for breach of contract and bad faith on three  
14 grounds: (1) Centex has not suffered damages that could support its  
15 claims for breach of contract and bad faith; (2) Centex cannot  
16 recover for breach of contract and bad faith with respect to the  
17 Conner action; (3) Centex is not entitled to independent counsel in  
18 any of the underlying actions because no significant conflict  
19 exists. The Court addresses each of these issues below.

20 **A. Centex's Damages**

21 Travelers first argues that Centex's counterclaims fail  
22 because Centex has not produced any evidence that it sustained  
23 damages. Travelers is essentially arguing that it fully  
24 compensated Centex for all claimed amounts submitted in connection

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25 <sup>7</sup> Travelers moved to relate the instant action to Travelers v.  
26 Centex I in August 2012, long after it asserted a claim for  
27 reimbursement in connection with the Kent action. '57 Action ECF  
28 No. 395. Centex opposed Travelers' motion to relate, representing  
that the two matters involved different underlying construction  
defect actions. '57 Action ECF No. 399 at 11. The motion was  
ultimately denied by Judge Breyer. '57 Action ECF Nos. 399, 406.

1 with the underlying actions. Centex disputes this claim on the  
2 ground that Travelers has refused to reimburse Centex's counsel,  
3 Newmeyer, at its full hourly rates.

4 It is undisputed that Centex paid Newmeyer out-of-pocket at a  
5 rate of \$225 per hour. Centex claims that this is only a fraction  
6 of Newmeyer's standard rates and that Newmeyer's attorneys bill as  
7 much as \$515 per hour. Centex also claims that it was merely  
8 fronting a portion of Newmeyer's rates until it could convince or  
9 compel Travelers to fund Centex's defense and pay the remainder of  
10 Newmeyer's fees. Travelers disputes this account, arguing that  
11 Newmeyer and Centex struck an under-the-table deal whereby Newmeyer  
12 would charge Centex one rate and then charge Travelers a  
13 significantly higher rate. Travelers contends that it is only  
14 obligated to reimburse Newmeyer at a rate of \$225 per hour, because  
15 that is the rate that Newmeyer was charging Centex.

16 Both parties point to the deposition testimony of Centex's  
17 Assistant General Counsel, Jarrett Coleman. Mr. Coleman testified  
18 that Newmeyer bills Centex at a discounted rate of \$225 per hour,  
19 but Newmeyer ultimately expects that it will collect its full  
20 hourly rate from Centex once Centex is reimbursed for defense costs  
21 by its insurance carriers. Myron Decl. Ex. F at 70. When asked  
22 what would happen if Centex's insurance claims were unsuccessful,  
23 Mr. Coleman responded: "You know, we ultimately will have a  
24 discussion about where that ends . . . depending on how much  
25 recovery. It really has not been an issue with us." Id. at 71.  
26 Centex argues that this testimony shows that Newmeyer and Centex  
27 never agreed to a rate of \$225 per hour. Travelers argues that  
28 this testimony shows that Centex was never obligated to pay

1 Newmeyer anything more than \$225 per hour.

2 The Court finds that there is a triable issue of fact as to  
3 exactly what rate was agreed to by Newmeyer and Centex. Thus,  
4 there is also a triable issue of fact as to Travelers'  
5 reimbursement obligations in the underlying actions, as well as  
6 Centex's damages. Accordingly, Travelers' motion for summary  
7 judgment on this issue is DENIED.

8 **B. The Conner Action**

9 Next, Travelers argues that Centex cannot sustain its burden  
10 on its counterclaims for breach of contract and bad faith with  
11 respect to the Conner action because Travelers promptly agreed to  
12 provide a full and complete defense of that action. It is  
13 undisputed that Centex refused to accept the defense offered by  
14 Travelers because of a dispute over the selection of legal counsel.  
15 Centex wanted to appoint Newmeyer, its own independent counsel.  
16 Travelers wanted to appoint David Lee of the Law offices of Lee,  
17 Hernandez, Brooks, Garafalo & Blake. Centex contends that  
18 Travelers breached its duty to defend in the Conner action by (1)  
19 failing to immediately defend Centex and (2) refusing to provide a  
20 full and complete defense.<sup>8</sup>

21 **i. The duty to provide an immediate defense**

22 As discussed at length in Section I.D, the duty to defend is  
23 immediate. Buss, 16 Cal. 4th at 49. However, California courts  
24 have yet to enunciate exactly what an immediate defense entails.  
25 In Travelers v. Centex I, Judge Breyer found that Travelers  
26 provided Centex with an immediate defense in a number of other

27 \_\_\_\_\_  
28 <sup>8</sup> Centex also argues that Travelers breached its duty to defend by  
failing to appoint independent counsel. This issue is discussed in  
Section II.C infra.

1 construction defect actions when it waited three to four months to  
2 accept Centex's tenders. 2011 WL 1225982, at \*4. Judge Breyer  
3 reasoned that "an insurer must reasonably investigate to determine  
4 if a duty to defend exists" and, "if there was any unreasonable  
5 delay in [Travelers'] response to [Centex's] tenders, it occurred  
6 because [Centex] failed to promptly provide the reasonable,  
7 requested information to facilitate [Travelers'] investigation."  
8 Id. The facts here are similar. Centex tendered the Conner action  
9 on September 8, 2010, and Travelers asked for additional  
10 information on September 22, 2010. Owens Decl. Exs. 027, 028, 038.  
11 After receiving and reviewing this additional information,  
12 Travelers agreed to provide an equitable defense on January 21,  
13 2011. Id. Ex. 029.

14 Centex argues that the 135-day delay in the Conner action is  
15 unreasonable, pointing to the California Fair Claims Settlement  
16 Practices ("Fair Claims") regulations. Centex XMSJ/MSJ Opp'n at  
17 54. The Fair Claims regulation cited by Centex provides: "Upon  
18 receiving proof of claim, every insurer . . . shall immediately,  
19 but in no event more than forty (40) calendar days later, accept or  
20 deny the claim . . . ." Cal. Code Regs. tit. 10, § 2695.7(b).  
21 Travelers argues that Centex submitted a "notice of legal action,"  
22 not a "proof of claim," and thus the forty-day requirement is  
23 inapplicable here. Trav. MSJ Reply/XMSJ Opp'n at 41.

24 The Fair Claims regulations define "proof of claim" as "any  
25 evidence or documentation in the possession of the insurer, whether  
26 as a result of its having been submitted by the claimant or  
27 obtained by the insurer in the course of its investigation, that  
28 provides any evidence of the claim and that reasonably supports the

1 magnitude or the amount of the claimed loss." Cal. Code Regs. tit.  
2 10, § 2695.2(s). The regulations define "notice of legal action"  
3 as "notice of an action commenced against the insurer with respect  
4 to a claim, or notice of action against the insured received by the  
5 insurer, or notice of action against the principal under a bond,  
6 and includes any arbitration proceeding." Id. § 2695.2(o). The  
7 regulations require insurers to respond to communications regarding  
8 claims within certain time periods, but they relieve insurers from  
9 those requirements where a notice of legal action is involved. Id.  
10 § 2695.5(b), (e).

11 Travelers interpretation of the regulations is more  
12 convincing, especially since the "magnitude or the amount of the  
13 claimed loss" is generally unknown at the time that an insured asks  
14 an insurer to defend a legal action. See id. § 2695.2(s). In any  
15 event, regardless of whether Centex's tender constitutes a notice  
16 of legal action or a proof of claim, the regulations are not  
17 dispositive. They do not provide that a delay exceeding forty days  
18 constitutes evidence of bad faith on the part of the insurer. Nor  
19 do they provide that an insurer may delay responding to a notice of  
20 legal action for 135 days and escape liability for breach of  
21 contract or bad faith.

22 The Court finds that the best course would be to allow the  
23 jury, considering the totality of the evidence, to determine  
24 whether Travelers breached its duty to defend or engaged in bad  
25 faith in handling Centex's claim. Accordingly, the Court declines  
26 to find that Travelers provided Centex with an immediate defense as  
27 a matter of law.

28 ///

1                   ii. The duty to provide a full and complete defense

2           Under California law, "[i]t is settled that where an insurer  
3 has a duty to defend, the obligation generally applies to the  
4 entire action, even though the suit involves both covered and  
5 uncovered claims, or a single claim only partially covered by the  
6 policy." Presley Homes, Inc. v. Am. States Ins. Co., 90 Cal. App.  
7 4th 571, 575 (Cal. Ct. App. 2001) (citing Buss, 16 Cal. 4th at 48-  
8 49). Centex argues that Travelers breached its duty to defend by  
9 failing to offer a full and complete defense in the Conner action.  
10 Centex XMSJ/MSJ Opp'n at 56-58, 81. Specifically, Centex points to  
11 the fact that, in agreeing to defend the Conner action, Travelers  
12 reserved its rights under the Executive Landscape policy:

13                   [P]lease be advised that the additional insured coverage  
14 for Executive [Landscape] is limited to covered damages  
15 arising out of the Executive[] [Landscape's] work as a  
16 landscape subcontractor . . . . Please be advised that  
17 Travelers as an additional insured carrier for Centex  
18 will only consider reasonable and necessary fees and  
costs on an equitable basis from 09/08/10 (post tender)  
forward to fund and/or resolve the additional insured  
obligation for this matter.

19 Id. (citing Owens Decl. Ex. 029). Lacking from Centex's discussion  
20 is any indication that Travelers withheld defense funds requested  
21 by Centex. In fact, Travelers has submitted evidence that it made  
22 defense payments in connection with the Conner action and offered  
23 to appoint counsel to represent Centex. See Shaw Decl. Ex. A. The  
24 Court is aware of no authority which holds that an insurer fails to  
25 provide a full and complete defense when it merely reserves its  
26 rights under the policy.

27           Nevertheless, for the reasons set forth in Section II.B.i  
28 supra, the Court DENIES Travelers motion for summary judgment on

1 Centex's claims for breach of contract and bad faith with respect  
2 to the Conner action.

3 **C. Centex's Right to Cumis Counsel**

4 In California, an insured is entitled to independent counsel,  
5 a.k.a. Cumis counsel, where a conflict exists because of an  
6 insurers' control over the litigation.<sup>9</sup> Cal. Civ. Code § 2860. "A  
7 mere possibility of an unspecified conflict does not require  
8 independent counsel. The conflict must be significant, not merely  
9 theoretical, actual, not merely potential." Dynamic Concepts, Inc.  
10 v. Truck Ins. Exch., 61 Cal. App. 4th 999, 1007 (Cal. Ct. App.  
11 1998). Centex asserts a right to Cumis counsel in the underlying  
12 actions based on Travelers' reservations of rights, as well as  
13 perceived ethical conflicts on the part of Travelers' counsel.  
14 Travelers now moves for summary judgment on this issue, arguing  
15 that the potential conflicts cited by Centex do not justify the  
16 appointment of Cumis counsel. Trav. MSJ at 29-33. For the reasons  
17 set forth below, the Court agrees with Travelers.

18 **i. Travelers reservation of rights**

19 Cumis counsel is generally required "where the insurer  
20 reserves its rights on a given issue and the outcome of that  
21 coverage issue can be controlled by the insurer's retained  
22 counsel." James 3 Corp. v. Truck Ins. Exch., 91 Cal. App. 4th  
23 1093, 1101 (Cal. Ct. App. 2001). However, "there is no entitlement  
24 to independent counsel where the coverage issue is independent of,  
25

26 <sup>9</sup> The term "Cumis counsel" is derived from the California Court of  
27 Appeal's decision in San Diego Navy Fed. Credit Union v. Cumis Ins.  
28 Soc'y, Inc., 162 Cal. App. 3d 358 494 (Cal. Ct. App. 1984),  
superseded by statute, Cal. Civ. Code § 2860, as recognized in  
United Enters., Inc. v. Super. Ct., 183 Cal. App. 4th 1004, 1010  
(Cal. Ct. App. 2010).

1 or extrinsic to, the issues in the underlying action." Gafcon,  
2 Inc. v. Ponsor & Assocs., 98 Cal. App. 4th 1388, 1422 (Cal. Ct.  
3 App. 2002) (quotations omitted). "Stated otherwise, 'where the  
4 reservation of rights is based on coverage disputes which have  
5 nothing to do with the issues being litigated in the underlying  
6 action, there is no conflict of interest requiring independent  
7 counsel.'" Id.

8 In support of its right to Cumis counsel, Centex points to a  
9 number of reservations of rights on the part of Travelers. First,  
10 Centex points out that Travelers reserved its right to deny  
11 coverage on the grounds that there is either no property damage or  
12 that the only property damage was to Centex's subcontractor's own  
13 work. Centex XMSJ/MSJ Opp'n at 91-92. Under Travelers' policies,  
14 Centex bore the risk of repairing or replacing faulty workmanship,  
15 while Travelers bore the risk that faulty workmanship would give  
16 rise to other types of property damage. Centex argues that  
17 Travelers' reservations create an incentive for Travlers' defense  
18 counsel to show that Centex's subcontractor's work was merely  
19 faulty and did not give rise to property damage that would be  
20 covered under the policy. Id.

21 This same argument was considered and rejected by the  
22 California Court of Appeal in Blanchard v. State Farm Fire &  
23 Casualty Co., 2 Cal. App. 4th 345 (Cal. Ct. App. 1991). Like this  
24 case, Blanchard involved an insurance dispute over an underlying  
25 construction defect action concerning subcontractors' work. 2 Cal.  
26 App. 4th at 348-49. Like this case, the insurance policy at issue  
27 in Blanchard did not cover the risk of repairing or replacing  
28 faulty workmanship by the subcontractors. Id. at 348. Like this

1 case, the general contractor in Blanchard argued that it was  
2 entitled to Cumis counsel because the insurer reserved its rights  
3 to deny coverage excluded by the policy. Id. The court rejected  
4 this argument, reasoning that "insurance counsel had no incentive  
5 to attach liability to [the general contractor]. [The insurer]  
6 recognized its liability for certain damages flowing from [the  
7 general contractor]'s liability; thus it was to the advantage of  
8 both [the general contractor] and [the insurer] to minimize [the  
9 general contractor]'s underlying liability." Id. at 350.

10 In any event, Centex's argument is unpersuasive. The work of  
11 Centex's subcontractors either caused other property damage or it  
12 did not. If the subcontractors' work did cause other property  
13 damage, then that property damage is covered under Travelers'  
14 policies. If it did not, then neither Travelers nor Centex is  
15 liable for that property damage. Thus, the interests of Centex and  
16 Travelers are aligned. Centex has failed to point to any conflict,  
17 either theoretical or actual. Further, under Centex's reasoning,  
18 an insured would be entitled to Cumis counsel whenever an insurer  
19 chooses to reserve its right to deny coverage for losses not  
20 covered by its policies. This is not the law.

21 Next, Centex argues that it has a right to Cumis counsel  
22 because Travelers reserved its right to deny coverage for work  
23 performed by Centex or work performed by subcontractors other than  
24 those insured by Travelers. Centex XMSJ/MSJ Opp'n at 91. Centex  
25 reasons that this reservation creates an incentive for Travelers to  
26 pin the fault on parties other than covered subcontractors in order  
27 to eliminate coverage. Id. Centex contends that the issue of who  
28 caused the damage to the homeowners' properties in the underlying

1 actions is currently being litigated, pointing to cross complaints  
2 it filed against its subcontractors, including West Coast, Fresno  
3 Precision, Executive Landscape, American Woodmark, and Foremost  
4 Superior. Id. (citing Owens Decl. Exs. 053, 056).

5 The Court finds that the conflicts cited by Centex are either  
6 non-existent or theoretical. Travelers' counsel could not possibly  
7 attribute the alleged construction defects to Centex, because it is  
8 undisputed that Centex did not perform any work of its own.  
9 Further, Centex has failed to enunciate how Travelers' chosen  
10 counsel could possibly manipulate the evidence to pin the alleged  
11 construction defects on subcontractors who are not insured by  
12 Travelers. Travelers' insureds, West Coast, Fresno Precision,  
13 Executive Landscape, American Woodmark, and Foremost Superior,  
14 installed countertops, cabinets, landscaping, and tub and shower  
15 surrounds. It is unclear how Travelers' counsel could, for  
16 example, attribute property damage arising from American Woodmark's  
17 allegedly defective cabinets to some other construction defect or  
18 some other contractor. As Travelers points out, a broken cabinet  
19 cannot be transformed into a broken pipe. These are facts beyond  
20 the control of counsel. Moreover, the fact that Centex elected to  
21 file a cross complaint against dozens of its subcontractors does  
22 not show that there is a dispute over which subcontractor caused  
23 what damage. It merely shows that Centex may be able to recover  
24 from third parties, regardless of who is at fault.

25 Centex also claims that it is entitled to Cumis counsel  
26 because Travelers reserved its right to deny coverage for property  
27 damage that occurred outside of the policy period. Centex XMSJ/MSJ  
28 Opp'n at 92-93. Specifically, Travelers concluded that the

1 property damage alleged in some instances must have occurred after  
2 the policy period because the homes at issue were completed after  
3 the policy period. See Owens Decl. 018. Once again, it is unclear  
4 how Travelers' counsel could possibly manipulate these facts to  
5 affect coverage. Centex has failed to present any evidence that  
6 there is a dispute about when the subject homes were completed.

7 Finally, Centex argues that it is entitled to Cumis counsel  
8 because Travelers has reserved its right to seek reimbursement for  
9 defense fees that do not arise out of Centex's subcontractors'  
10 work. XMSJ/MSJ Opp'n at 93-95. This issue was addressed by the  
11 California Court of Appeal in James 3 Corporation. The court  
12 refused to adopt a per se rule that independent counsel was  
13 required whenever an insurer reserved its right to seek  
14 contribution. James 3 Corp., 91 Cal. App. 4th at 1107-08. The  
15 court ultimately held that the insured was not entitled to  
16 independent counsel, reasoning: "[T]he allocation of defense costs  
17 between covered and noncovered claims is not an issue that will be  
18 litigated in the underlying . . . action. Moreover, there is  
19 nothing in the record to suggest that defense counsel would violate  
20 his ethical duties to completely defend the insureds . . . ." Id.  
21 at 1109 (internal quotations and citations omitted).

22 Likewise, Centex has failed to point to any actual conflict  
23 that would arise as a result of Travelers' reservation of its  
24 contribution rights. Centex argues that because Travelers only  
25 intends to pay for an equitable share of the defense based on the  
26 liability of its subcontractors, it may seek to orchestrate a  
27 smaller settlement on behalf of its subcontractors so that it can  
28 seek more money back from Centex. However, it is entirely unclear

1 how Travelers' counsel could possibly manipulate the plaintiffs in  
2 the underlying actions into settling for a smaller amount.

3 Centex further argues that Travelers' refusal to give up its  
4 reimbursement rights could delay settlement, pointing to the  
5 settlement negotiations in Allie v. Centex (the Allie Action), a  
6 construction defect case at issue in Travelers v. Centex I. Centex  
7 XMSJ/MSJ Opp'n at 94 (citing Ferrentino Decl. ¶¶ 26-35). At a  
8 settlement conference, the Allie plaintiffs and the subcontractors  
9 involved in the action indicated that they were willing to settle  
10 so long as Centex waived its claims for defense fees against the  
11 subcontractors. Ferrentino Decl. ¶ 26. Centex's counsel was  
12 concerned about giving up Centex's subrogation rights because  
13 Travelers had threatened to seek reimbursement for defense fees  
14 paid in that action. Id. As a result, the settlement was delayed.  
15 Id. ¶¶ 27-35.

16 There are several problems with this line of argument. First,  
17 Centex has pointed to no evidence that Travelers' right to  
18 contribution has affected the settlement of any of the underlying  
19 actions at issue here. Second, Travelers' right to contribution  
20 would have been an issue regardless of who represented Centex in  
21 the Allie action and thus was extrinsic to the underlying action.  
22 See Novak v. Low, Ball & Lynch, 77 Cal. App. 4th 278, 285 (Cal. Ct.  
23 App. 1999) ("[A]lthough independent counsel controls the insured's  
24 defense, that control does not extend to preventing the insurer  
25 from exercising its contractual right to settle claims."). Third,  
26 Travelers intervention resulted in a favorable settlement in the  
27 Allie action: the Allie subcontractors ultimately agreed to allow  
28 Centex to reserve its right to seek defense contributions in the

1 event that Travelers pursued Centex for reimbursement of defense  
2 fees. Lee Decl. ¶ 17.

3 Accordingly, the Court finds that Travelers' reservations of  
4 rights did not give Centex the right to retain Cumis counsel.

5 **ii. Ethical conflicts**

6 In addition to Travelers' reservations of rights, Centex  
7 points to a number of other purported ethical conflicts which it  
8 claims justify the appointment of Cumis counsel. First, Centex  
9 argues that Travelers is seeking to control the defense of two  
10 adverse parties. XMSJ/MSJ Opp'n at 96. As noted above, Centex  
11 filed cross complaints against a number of its subcontractors,  
12 including West Coast, Fresno Precision, Executive Landscape,  
13 American Woodmark, and Foremost Superior. Travelers wants to  
14 appoint its own counsel to represent both Centex and the  
15 subcontractors in these related actions. Although different  
16 attorneys would represent Centex and the subcontractors, Centex  
17 contends that these attorneys are conflicted because they both  
18 report to Travelers. This argument was addressed and rejected in  
19 Travelers v. Centex I:

20 [Centex]'s cross-complaints against the subcontractors  
21 are for indemnification. [Centex]'s liability to the  
22 plaintiffs in the Allie and Agles Actions will be  
23 derivative from the liability of the subcontractors who  
24 performed the work. Although [Travelers] insures  
[Centex], American Woodmark, and Foremost [Superior], it  
will have the same interest in defending all three  
entities against plaintiffs' general allegations in both  
lawsuits. [Centex]'s claim that a conflict of interest  
exists on this basis is "merely theoretical.

25 2011 WL 1225982, at \*8. The facts in this case are practically  
26 identical, and there is no indication that the legal standards have  
27 changed.

28 Next, Centex argues that it is entitled to Cumis counsel

1 because it is being sued by Travelers in a number of other actions.  
2 Centex XMSJ/MSJ Opp'n at 98-99. Centex cites to Truck Insurance  
3 Exchange v. Fireman's Fund Insurance Co., 6 Cal. App. 4th 1050  
4 (Cal. Ct. App. 1992), for the proposition that an insured is  
5 entitled to independent counsel whenever it is sued by its insurer.  
6 Id. But Truck merely holds that an attorney may not concurrently  
7 represent clients whose interests conflict. 6 Cal. App. 4th at  
8 1055. Moreover, the rule proposed by Centex is circular. Under  
9 Centex's logic, anytime an insured wishes to obtain Cumis counsel,  
10 it need only sue its insurer to create a conflict of interest.

11 Finally, Centex argues that Travelers' chosen counsel, Mr.  
12 Lee, faces many conflicts because his website identifies  
13 "relationships" with a number of insurance carriers against which  
14 Centex has claims for defense and indemnity. Centex XMSJ/MSJ Opp'n  
15 at 99. But there is no indication that Mr. Lee actually represents  
16 any of these insurance companies. Centex also argues that its  
17 expert report confirms Mr. Lee's conflicts. But the only reference  
18 to Mr. Lee in this report is completely irrelevant. See Hayes  
19 Decl. Ex. H28 at 5 n.2. ("My opinions are not directed towards the  
20 professional conduct or integrity of Mr. Lee or his law firm; nor  
21 do my opinions state or imply any breach of any professional  
22 standard by Mr. Lee or his law firm, since I do not have sufficient  
23 information to opine on Mr. Lee's or his firm's conduct.").

24 For these reasons and the reasons set forth in Section II.C.i,  
25 the Court GRANTS Travelers' motion for partial summary judgment  
26 with respect to Centex's claim that it is entitled to Cumis  
27 counsel.

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CONCLUSION

For the foregoing reasons, the Court GRANTS in part and DENIES in part Centex's and Travelers' cross-motions for partial summary judgment. The Court GRANTS Centex's motion to the extent that it seeks dismissal of Travelers' claim that Centex breached its duty to cooperate by failing to seek recovery of defense fees and costs incurred in underlying actions from other insurance carriers. The Court GRANTS Travelers motion to the extent that it seeks a determination on Centex's entitlement to Cumis counsel. The cross-motions for partial summary judgment are DENIED in all other respects. The Court also VACATES its May 10, 2012 Order, ECF No. 56, and DENIES Centex's November 4, 2011 motion for partial summary judgment, ECF No. 21.

IT IS SO ORDERED.

Dated: April 8, 2013



UNITED STATES DISTRICT JUDGE