Filed 9/25/13

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

KMART CORPORATION,

Plaintiff, Cross-defendant, and Appellant,

v.

HARTFORD FIRE INSURANCE COMPANY,

Defendant, Cross-complainant, and Appellant.

B233896

(Los Angeles County Super. Ct. No. BC399191)

APPEALS from the judgment of the Superior Court of Los Angeles County. Joseph R. Kalin, Judge. Affirmed in part and reversed in part.

Reed Smith, Margaret M. Grignon, Douglas C. Rawles, and Anne M. Grignon for Plaintiff, Cross-defendant and Appellant Kmart Corporation.

Berger Kahn, Sherman M. Spitz; Mendes & Mount LLP, Dean B. Herman, Catherine L. Rivard; Horvitz & Levy LLP, David M. Axelrad, and Andrea A. Ambrose for Defendant, Cross-complainant and Appellant Hartford Fire Insurance Company.

Kmart Corporation (Kmart) sued Hartford Fire Insurance Company (Hartford) for breach of contract and related claims, and Hartford cross-complained against Kmart. A jury found in favor of Hartford on Kmart's complaint, and the trial court subsequently decided in favor of Kmart on Hartford's cross-complaint. Kmart appealed, and Hartford cross-appealed. We conclude that Kmart's claims were correctly resolved in favor of Hartford, but we further conclude that Hartford should have prevailed on its cross-complaint as well. We accordingly affirm in part and reverse in part.

BACKGROUND

This insurance dispute arises out of a lawsuit filed in May 2006 by Antoinette Townsend and her mother. According to the third amended complaint in that action, Townsend was severely burned on or about February 7, 2006, when the Joe Boxer pajamas she was wearing, which had been purchased at a Kmart store, burst into flames after briefly coming into contact with the flame on the stove in her home. Townsend and her mother filed suit against multiple defendants, including their landlord, the manufacturer of the stove, and Joe Boxer Company LLC. The original complaint did not name Kmart as a defendant.

Intradeco Apparel, Inc. (Intradeco) was one of several manufacturers of Joe Boxer clothing, and Intradeco manufactured the Joe Boxer garment, sold by Kmart, that Townsend was wearing when she was injured. Intradeco is a named insured on a commercial general liability policy issued by Hartford covering bodily injury occurring between March 1, 2005, and March 1, 2006. The policy provides that if Intradeco has "agreed, in writing, in a contract or agreement that another person or organization be added as an additional insured on [Intradeco's] policy," and certain other conditions are satisfied, then the person or organization is insured under the policy. Intradeco was never named as a defendant in the Townsend action.

Five Y Clothing, Inc. was an intermediary that sold Intradeco products to Kmart. In 2004, Intradeco acquired Five Y Clothing, Inc.'s assets, including its agreement with Kmart, and began selling directly to Kmart. After the acquisition, Intradeco created a

new operating division of its business, called Five Y Clothing, Division of Intradeco Apparel, Inc. Intradeco's Hartford policy listed "5Y, Division of Intradeco, Apparel Inc." as a named insured. (Block capitals omitted.)

In June 2006, Joe Boxer tendered the Townsend lawsuit to Kmart's corporate parent, Sears Holdings Corporation, which agreed to defend Joe Boxer under a reservation of rights. Also, Kmart admits that it learned in 2006 that the garment allegedly worn by Townsend when she was injured was manufactured by Intradeco.

In September 2007, Townsend amended her complaint to substitute Kmart for a Doe defendant. On May 5, 2008, the trial court granted Townsend's motion to file a third amended complaint, and the court served all parties with notice of the ruling on the same day. The third amended complaint named both "Kmart Corporation" and "Sears Holdings Corporation dba Kmart Corporation" as defendants. (Block capitals omitted.) It is undisputed, however, that Kmart is a wholly owned subsidiary of Sears Holdings Corporation.

By letter dated July 30, 2008 (that is, more than two years after Sears Holdings Corporation began defending Joe Boxer in the Townsend action, more than one year after Kmart learned that Intradeco manufactured the garment in question, and 10 months after Kmart was added as a defendant), Kmart's attorneys contacted Intradeco's insurance broker and notified the broker of the Townsend litigation. The letter stated that "Kmart has vigorously defended this suit which is now set for trial on August 18, 2008," and it also advised that "[t]he parties have scheduled a mediation for August 15, 2008." The letter asked that Intradeco or its insurers "take over our defense of this lawsuit and confirm that [they] will also pay any damages that might be awarded," and it also invited them to attend the mediation. The broker forwarded the letter to Hartford, which, according to its records, received the letter on August 5, 2008.

Kmart's attorneys included the following materials with the letter: (1) the third amended complaint in the Townsend action, (2) contracts from 1996 and 2001 between Kmart and Five Y Clothing, Inc., and (3) 12 certificates of insurance concerning various

policies issued by various insurers from 1997 to 2005. As regards the contracts, only the 2001 contract requires that Kmart be added as an additional insured under Five Y Clothing, Inc.'s insurance, but it is a contract between Kmart and Five Y Clothing, Inc. (not Intradeco) and provides that it is assignable only with Kmart's prior written consent. The 1996 contract required Five Y Clothing, Inc. to "obtain adequate insurance" but did not require that Kmart be included as an additional insured. As regards the certificates of insurance, only one concerns a policy issued by Hartford to Intradeco; the others concern policies issued to Five Y Clothing, Inc. by various insurers, including Hartford. The one certificate pertaining to a Hartford policy issued to Intradeco provides that Sears Holdings Corporation is included as an additional insured; the certificate does not mention Kmart. All of the certificates, including the one concerning Intradeco's Hartford policy, state the following: "This certificate is issued as a matter of information only and confers no rights upon the certificate holder. This certificate does not amend, extend or alter the coverage afforded by the policies below." (Block capitals omitted.)

Hartford's records reflect that on August 5, 2008, the day that Hartford received Kmart's tender of the Townsend matter, the claims adjuster handling the tender attempted to reach both Intradeco and Kmart's insurance broker by phone and left voicemail messages for both. The following day, the adjuster spoke with a representative of Intradeco and requested relevant information and documents that would show whether Kmart was an additional insured under Intradeco's policy.

Also on August 6, 2008, the Hartford claims adjuster responded to Kmart's counsel both by telephone and by letter confirming the contents of their conversation. The letter stated, "In order to complete our investigation into coverage, there are numerous pieces of information that we need from you and our insured. We have requested information from our named insured already. As we discussed, we need the following documents and/or information from you: [¶] Product identification information (alleged product is Joe Boxer Pajamas). [¶] Documentation identifying the manufacturer of the involved product. [¶] A copy of the purchase order and corresponding payment for

the subject product. [¶] Any contract language in force during the applicable time frame." The letter continued, "As we also discussed, this matter was reported to us extremely late. Kmart has been litigating this matter for some time, not to mention that there is a mediation on August 15th and trial on August 18th. We must reserve our rights to enforce the policy conditions, which may ultimately preclude coverage in this matter due to the very late reporting." The letter later adds, "As discussed, in light of the late reporting, we have not been provided with sufficient time in which to complete our coverage investigation prior to the upcoming August 15th mediation date and August 18th trial date. Therefore, we will be unable to participate in either. Please do keep me posted as to the results of the mediation and trial. In the interim, our coverage investigation continues." The letter also advised Kmart's counsel of the "no voluntary payment" provision in Intradeco's policy, which provides as follows: "No insured will, except at their own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent."

Also on or about August 6, 2008, Hartford set a reserve for the claim.

By letter dated August 8, 2008, Kmart's counsel responded to Hartford's communications of August 6. Counsel requested copies of Hartford's "policies in effect during 2005 and 2006 insuring Intradeco, 5Y, or related entities." Counsel's letter also states, "This will also confirm our conversation in which you advised that The Hartford would not be in a position to do anything for the first couple of weeks and would not be attending the mediation set for August 15, 2008. I understand that your reference to not being able to do anything for a week or two was colloquial, and does not mean, nor did you intend to suggest, that you would be doing nothing during that time. I interpreted what you were saying to me in that you would not be able to give us a statement of your position about coverage or indemnity for a week or two. Although I described the basic facts of the case and its present posture to you in some detail, I will be happy to provide you with further information upon request." Counsel provided no other information or documentation. Hartford did not provide the policies requested by counsel.

The mediation took place as scheduled on August 15, 2008. Hartford did not attend, and the case did not settle. On August 18, 2008, the scheduled trial date, the matter was placed on trailing status.

By letter dated September 4, 2008, Kmart's counsel again wrote to Hartford. Attached to the letter were two documents that counsel had already provided when tendering the lawsuit in July: Sears Holdings Corporation's certificate of insurance for Intradeco's Hartford policy and the 2001 contract between Kmart and Five Y Clothing, Inc. Also attached to the letter was a photocopy of a photograph of "the bottom that matched the top that plaintiffs say Antoinette Townsend was wearing when she was burned." In the body of the letter, Kmart's counsel advised Hartford that "the case was not concluded at the mediation," and "[t]he trial is still in a trailing status." Counsel also reiterated his request for "a copy of the policy, including all endorsements, at your earliest convenience." According to Hartford's records, Hartford received the letter on September 9, 2008.

On September 8, 2008, while Kmart's counsel's September 4 letter apparently was in transit, Kmart settled the Townsend matter for $2.2 million, without Hartford's knowledge or consent. Hartford's claims adjuster apparently did not learn of the settlement until mid-October 2008.

Not knowing that the case had settled, Hartford's claims adjuster responded to Kmart's counsel's September 4 letter on September 11, 2008. The claims adjuster's response began, "Our coverage investigation remains in process with regard to your tender in this matter. Please provide us with an update of this case. Did trial take place? If so, what was the result of the trial? Or was the trial date continued? If so, please provide us with the new trial date information. [¶] As for your request for a copy of our insured's policy, we must decline your request at this time. Unless/until your client [i.e., Kmart] is determined to be an insured under the policy, we do not believe that you are entitled to a copy." The letter went on to request additional information that would assist in Hartford's coverage investigation. In particular, the letter stated, "You provided

a copy of a 2001 Purchase Order Terms and Conditions document which contains some indemnification language. As we currently understand it, this document was signed before our insured took over the Five Y Clothing name, thus, it was not signed by our insured. Also, the copy of the document that we received is very difficult to read.[1] Please send me a clearer copy if one exists. Perhaps a cleaner copy of the original can be obtained."

In "mid to late October" 2008, Hartford obtained from Intradeco a copy of a December 2005 contract between Kmart and "Five Y Clothing Div[.] of Intradeco Apparel Inc." The contract required Intradeco to include Kmart as an additional insured under Intradeco's commercial general liability insurance. Although the contract was not signed by any representative of Kmart, Hartford's claims adjuster gave "the benefit of the doubt to Kmart on that" and concluded that, pursuant to the terms of Intradeco's Hartford policy, Kmart was an additional insured under the policy. By letter dated November 7, 2008, Hartford agreed "to defend Kmart and reimburse it for its reasonable and necessary post tender defense costs, subject to a reservation of rights to deny defense and indemnity coverage." Hartford's claims adjuster testified that Hartford then paid Kmart's post-tender defense costs, in an amount "just short of $100,000, under a reservation of rights."

On October 1, 2008 (i.e., before Hartford had obtained from Intradeco a contract confirming Kmart's additional insured status under Intradeco's Hartford policy), Kmart sued Hartford for declaratory relief, seeking a judicial determination that Kmart was an additional insured under Intradeco's policy, that Hartford had a duty to defend and a duty to indemnify Kmart, and related matters. Kmart's operative second amended complaint includes claims for breach of contract and insurance bad faith.

On November 14, 2008, Hartford filed a cross-complaint against Kmart for declaratory relief and equitable reimbursement of the post-tender defense costs that Hartford had paid under a reservation of rights. Hartford's answer to Kmart's complaint

---

1 The copy contained in the record on appeal is largely illegible.

alleged numerous affirmative defenses, including one based on the "no voluntary payment" provision of the policy.

The matter proceeded to jury trial. At the close of Kmart's case-in-chief, Kmart moved for a directed verdict, arguing that the undisputed facts showed that Hartford breached its duty to defend and that Kmart's settlement of the Townsend action was reasonable. The trial court granted the motion in part, but the precise scope of the court's ruling is not clear. The court denied Kmart's motion as to the reasonableness of the settlement, concluding that it was an issue for the jury. Some passages in the reporter's transcript suggest that the court further ruled that Hartford breached its duty to defend, but other passages suggest that the court ruled only that Hartford had a duty to defend, or that Hartford's duty to defend was triggered on August 6. According to the court's minute order, the court ruled that Hartford's "duty to defend Kmart was triggered August 6, 2011, there being a potential for coverage." Thus it is possible that the court's intended ruling was that Hartford's duty to defend was triggered on August 6 but that the undisputed facts did not show whether Hartford breached the duty on that date (or ever).

The jury found by special verdict that (1) Kmart suffered a loss that was covered under a policy issued by Hartford, (2) Hartford was not "immediately provided copies of demands, notices, summonses, or legal papers as required by the policy," (3) Hartford was not "actually and substantially prejudiced" thereby, (4) Kmart paid the settlement voluntarily and without Hartford's consent, and (5) Kmart did not demonstrate that it was excused from complying with the "no voluntary payments" provision in the Hartford policy. The jury accordingly awarded no damages to Kmart.

Kmart moved for new trial and for judgment notwithstanding the verdict. Hartford moved for determination of its claim for equitable reimbursement. The court denied all of those motions.

On June 17, 2011, the trial court entered judgment in favor of Hartford on Kmart's complaint and in favor of Kmart on Hartford's cross-complaint, and the court determined that Hartford was the prevailing party and therefore was entitled to recover costs. Kmart

timely appealed from the judgment and from the order denying Kmart's motion for judgment notwithstanding the verdict. Hartford timely cross-appealed from the judgment.

DISCUSSION

Hartford argues that the judgment in its favor on Kmart's complaint should be affirmed on the ground that Hartford had no duty to defend before Kmart settled the Townsend action on September 8, 2008, because the information available to Hartford up to that time did not show a potential for coverage. Hartford further argues, on the same basis, that the trial court erred by rejecting Hartford's claim for equitable reimbursement. We agree with both of Hartford's contentions.

I. Duty to Defend

An insurer "must defend a suit which *potentially* seeks damages within the coverage of the policy." (*Gray v. Zurich Insurance Co.* (1966) 65 Cal.2d 263, 275.) "[T]he insurer must look to the facts of the complaint and extrinsic evidence, if available, to determine whether there is a potential for coverage under the policy and a corresponding duty to defend." (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 25.) The "potential for coverage" that triggers the duty to defend is the result of factual disputes—if the allegations of the complaint and the evidence available to the insurer disclose a factual theory that, if proved, would result in a covered liability, then there is a duty to defend. Thus, if the only possibility of coverage depends on a dispute over a legal issue, and that issue is resolved in favor of the insurer, then there is no duty to defend. (*Id.* at pp. 25-26.)

Moreover, "[a] person or entity must be an insured under the policy before the insurer owes a duty to defend." (Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2012) ¶ 7:609, p. 7B-36.4; see *Alex Robertson Co. v. Imperial Casualty & Indemnity Co.* (1992) 8 Cal.App.4th 338, 343-346.) That is, if the defendant in the underlying litigation is not insured under the policy, then there is no potential for coverage and hence no duty to defend.

Applying these principles here, we conclude that the undisputed facts show that the allegations of the Townsend complaint and the extrinsic evidence available to Hartford before September 8, 2008, when Kmart settled the Townsend matter, did not show that Kmart was insured under Intradeco's Hartford policy. The allegations and available information therefore did not disclose a potential for coverage, and there was accordingly no duty to defend at that time.

Kmart was not a named insured under Intradeco's policy, but the policy also provided that if Intradeco "agreed, in writing, in a contract or agreement that another person or organization be added as an additional insured on [Intradeco's] policy," and certain other conditions were satisfied, then the person or organization was insured under the policy. Thus, in order to confirm that Kmart was an additional insured under that policy provision, Hartford needed evidence of a contract between Kmart and Intradeco that required that Kmart be added as an additional insured on Intradeco's policy in 2006.

No such evidence was included with the original tender.[2] The contracts submitted with the tender were between Kmart and Five Y Clothing, Inc., not between Kmart and Intradeco. Moreover, only the 2001 contract required Five Y Clothing, Inc., to add Kmart as an additional insured, and that contract expressly provided that it was assignable only with Kmart's prior written consent. But Hartford was provided with no evidence that Kmart had consented to the assignment of the contract to Intradeco. In any event, the 2005 contract between Kmart and Intradeco expressly provided that it superseded all previous agreements, so even if the 2001 contract ever was validly assigned to Intradeco, it was no longer in effect when Townsend was injured in 2006. The contracts provided with the tender consequently failed to show that Kmart was an additional insured under Intradeco's policy.

---

[2] The third amended complaint in the Townsend action did not mention Intradeco, and Kmart does not contend that the allegations of the complaint showed that Kmart was an additional insured under Intradeco's policy.

The certificates of insurance likewise did not show that Kmart was an additional insured. Only one of the certificates concerned a Hartford policy issued to Intradeco, and that certificate stated that Sears Holdings Corporation, not Kmart, was an additional insured.[3]

Hartford did not receive confirmation of the existence of a contract between Kmart and Intradeco showing that Kmart was an additional insured until mid-October, approximately five weeks after Kmart settled the case on September 8 without Hartford's knowledge or consent. Thus, because neither the allegations of the complaint nor the information available to Hartford before September 8 showed that Kmart was an additional insured under Intradeco's policy, Hartford had no duty to defend Kmart at that time.[4]

Kmart's arguments to the contrary are not persuasive. First, Kmart argues as follows: "Hartford does not overtly challenge the trial court's directed verdict ruling that Hartford had a duty to defend on August 6, 2008 and breached it. [Citation.] And it does not ascribe error to that ruling. Nor can it, because Hartford cannot appeal from a judgment in its favor." We disagree for several reasons. First, Hartford need not file its own appeal in order to argue that the judgment should be (partially) affirmed on a ground not relied upon by the trial court—as a general matter, the judgment may be affirmed on any theory supported by the record. (See, e.g., *Perlin v. Fountain View Management, Inc.* (2008) 163 Cal.App.4th 657, 663-664.) Second, there is just one final judgment in

---

[3] Townsend's third amended complaint refers to "Sears Holdings Corporation dba Kmart Corporation," but Kmart's counsel's letter accompanying the tender informed Hartford of the undisputed fact that Kmart is a wholly owned subsidiary of Sears Holdings Corporation.

[4] Nor can the delay in obtaining the necessary information be attributed to Hartford. Hartford's claims adjuster responded promptly to the tender and requested relevant contract language from both Kmart and Intradeco. Kmart did not respond until September 4, when it merely resubmitted some of the same documents that it had included with the tender. Hartford's claims adjuster responded promptly to that communication as well, but by then Kmart had already settled.

this action, and Hartford was aggrieved by it insofar as it rejected Hartford's claim for equitable reimbursement; Hartford could and did appeal from that one final judgment. (Code Civ. Proc., § 902 ["Any party aggrieved may appeal . . ."].) Third, Hartford does ascribe error to the trial court's ruling on the duty to defend—the trial court ruled that the undisputed facts showed that Hartford had a duty to defend on August 6, but Hartford argues that the undisputed facts showed that Hartford had no duty to defend up to and including September 8, when Kmart settled. For all of these reasons, we reject Kmart's first argument.

Second, Kmart argues that "[t]o the extent Hartford argues that there is no substantial evidence to support the trial court's duty to defend finding, such an argument contradicts Hartford's position in the trial court, where Hartford conceded that it had a duty to defend and that the issue of when that duty arose was a question of fact for the jury." Kmart's own citation to the record shows that the argument is unsound. At the hearing on Kmart's directed verdict motion, Hartford's counsel stated, "[O]ur position is that to whatever extent a duty to defend arose in this case, number one, it didn't arise until sometime after September 8, and the reason it didn't arise is because first we need to determine the insured status of Kmart." That is the position Hartford is advancing on appeal, with which we agree—the duty to defend did not arise until after September 8, if ever.

Third, Kmart argues that "Hartford ignores the veritable mountain of information in its possession that Kmart was an additional insured under the Intradeco/Five Y policy[.]" Apart from the documents we have already discussed (namely, the certificates of insurance and the contracts between Kmart and Five Y Clothing, Inc.), the only information in Hartford's possession before September 8, 2008, that Kmart cites as showing that it was an additional insured is a document in Hartford's underwriting file for the Intradeco policy. The document is an email sent to Hartford by Intradeco's insurance broker in 2004, when Intradeco purchased Five Y Clothing, Inc.'s assets. The broker informed Hartford of the purchase, addressed certain insurance-related

consequences of the acquisition, and stated the following: "There will be no new corporate name as a result of the acquisition. The company will operate as Five Y a Division of Intradeco Apparel, Inc. This is simply a d/b/a for Intradeco. Most if not all of the sales for 5Y were to Kmart and will continue to be so in the future. We will be issuing a certificate in the name of the d/b/a to Kmart to satisfy their requirements."

We are not persuaded that the 2004 email from the broker provided Hartford with sufficient information to determine whether Kmart was an additional insured under Intradeco's policy when Townsend's injury occurred in 2006. The email was not a contract between Intradeco and Kmart requiring Intradeco to include Kmart as an additional insured under Intradeco's policy in 2006. Nor did the email from the broker state or imply that such a contract existed. The email merely stated that the broker would issue a certificate of insurance to Kmart "to satisfy their requirements," whatever those requirements might have been in 2004, when the email was sent. The contracts that Kmart had previously provided to Hartford showed that Kmart's insurance requirements varied over time—the 2001 contract required that Kmart be included as an additional insured on Five Y Clothing, Inc.'s insurance, but the 1996 contract required only that Five Y Clothing, Inc. carry insurance. Kmart never provided Hartford with a certificate of insurance stating that Kmart (as opposed to Sears Holdings Corporation) was an additional insured under Intradeco's Hartford policy; indeed, *the record contains no such certificate for any time period*. Again, Townsend was injured in 2006. In order to confirm that *Kmart* (rather than Sears Holdings Corporation) was an additional insured under Intradeco's policy *at the time of Townsend's injury* and that there was therefore even a potential for coverage, Hartford needed to confirm that there was a contract between Intradeco and Kmart that was in force at the relevant time and that required Intradeco to include Kmart as an additional insured under Intradeco's policy. The email from the broker did not provide that confirmation.[5]

---

[5] In its briefs and at oral argument, Kmart also noted that Hartford set a reserve on August 6, and Kmart cited *Samson v. Transamerica Ins. Co.* (1981) 30 Cal.3d 220, 240

Finally, Kmart argues that "Hartford disregards its failure to participate in settlement negotiations, which also rendered the ['no voluntary payment'] provision unenforceable, a ground separate and independent of Hartford's antecedent breach of the duty to defend. Thus, Hartford cannot establish by its duty to defend argument that it was entitled to judgment." We disagree. When the Townsend matter settled on September 8, 2008, Hartford did not yet possess information showing that Kmart was an insured under Intradeco's Hartford policy. Hartford therefore did not yet have a duty to defend Kmart and likewise did not yet have a duty to participate in settlement negotiations.

For all of the foregoing reasons, we agree with Hartford that the record does not contain substantial evidence that Hartford had a duty to defend Kmart at any time up to and including September 8, 2008, when the Townsend matter settled. On that basis we affirm the judgment in favor of Hartford on Kmart's complaint.

II. Equitable Reimbursement

We turn now to Hartford's argument that it should have prevailed on its claim for equitable reimbursement of the payments it made, under a reservation of rights, toward Kmart's post-tender defense costs. Hartford argues that up to and including September 8, 2008, when Kmart settled the Townsend action, Hartford had no duty to defend, and Hartford likewise had no such duty after the settlement, because Kmart violated the "no voluntary payment" provision of the policy by settling without Hartford's consent.

(*Samson*), for the proposition that the setting of a loss reserve constitutes "prima facie evidence of [an] insurer's recognition of a potential for coverage." The cited case does not support Kmart's contention that a duty to defend arose before the settlement. In *Samson*, the insurer argued that it "did not refuse to defend the lawsuit," because its insured "never demanded a defense." (*Samson, supra*, 30 Cal.3d at p. 239.) The Court rejected the argument because the insurer's setting of a reserve *for defense* indicated the insurer's awareness that it had been called upon to defend—"[t]he mere fact that an insurance company established a reserve fund for defense of a case, as Transamerica did in this case, has been held to be an indication that the company was aware of its responsibility to defend its insured." (*Id.* at p. 240.) *Samson* thus does not stand for the proposition that the setting of a reserve constitutes evidence of a potential for coverage and a duty to defend.

Kmart concedes that when an insurer provides a defense under a reservation of rights and is later determined to have had no duty to defend, "the insurer, having reserved its right, may recover from its insured the costs it expended to provide a defense which, under its contract of insurance, it was never obliged to furnish." (*Scottsdale Ins. Co. v. MV Transportation* (2005) 36 Cal.4th 643, 658.) In light of our holding that Hartford had no duty to defend up to and including September 8, 2008, it follows that Hartford is entitled to recover the costs it expended to provide Kmart with a defense through September 8, 2008. And because Kmart violated the "no voluntary payment" provision on September 8, 2008, by settling the Townsend matter without Hartford's knowledge or consent, Hartford had no duty to pay defense costs incurred thereafter (also without Hartford's consent) to enforce that settlement. Hartford is therefore entitled to reimbursement for those costs as well.

Apart from reiterating its argument that Hartford had a duty to defend, Kmart's only remaining argument on this point is that "a voluntary payment of expenses or claims without the insurer's consent would not invalidate the insurance policy as Hartford claims [citation], it would simply mean that the insured was not entitled to reimbursement or indemnification of the non-consensual voluntary payment." Again, we conclude that Kmart's concession is dispositive—Kmart concedes that it was not entitled to reimbursement or indemnification from Hartford for voluntary payments to which Hartford did not consent. Hartford is consequently entitled to equitable reimbursement of its payment of Kmart's post-tender defense costs, because Kmart, having incurred those costs voluntarily and without Hartford's consent, was not entitled to those payments.

Our resolution of the foregoing issues makes it unnecessary to address the remaining arguments raised by the parties.

DISPOSITION

The judgment in favor of Hartford on Kmart's complaint is affirmed. The judgment in favor of Kmart on Hartford's cross-complaint is reversed with directions to enter judgment in favor of Hartford on its claim for equitable reimbursement, in an amount to be determined by the superior court on remand. Hartford shall recover its costs of appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

CHANEY, J.