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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

UNITED STATES FIRE INSURANCE COMPANY, Plaintiff and Appellant, v. BUTTON TRANSPORTATION, INC., Defendant and Appellant.	A108419 (Solano County Super. Ct. No. 19560)

I. INTRODUCTION

United States Fire Insurance Company (U.S. Fire) appeals from the judgment following a jury trial, post-trial orders, and orders of the trial court that became final upon entry of judgment, in favor of its insured, Button Transportation, Inc. (Button). U.S. Fire instituted a declaratory relief action, seeking a determination that a liability policy it issued to Button provided coverage for a property damage claim filed against Button by one of its customers. In turn, Button and Bob Button (one of Button's owners and officers) filed a cross-complaint against U.S. Fire, alleging breach of contract, breach of the implied covenant of good faith and fair dealing, fraud, negligent misrepresentation, intentional infliction of emotional distress, and declaratory relief.

On appeal, U.S. Fire argues the judgment must be reversed because (1) there is no coverage as a matter of law for the claim; (2) U.S. Fire owed no duty to settle the claim; (3) the evidence did not support the judgment; (4) there were genuine issues about

coverage that precluded a finding of bad faith as a matter of law; (5) the jury erred in finding U.S. Fire liable for bad faith; (6) certain evidentiary rulings precluded U.S. Fire from receiving a fair trial; and (7) the damages awarded were excessive and not supported by the evidence.

Alternatively, U.S. Fire argues it is entitled to a new trial. In addition, U.S. Fire seeks entry of judgment against Bob Button on his individual claims asserted in the cross-complaint. Button has filed a protective cross-appeal to challenge the trial court's rulings (1) excluding evidence regarding U.S. Fire's investigation of the claim; (2) concluding that one of the liability policies did not apply to the claim; and (3) granting U.S. Fire's motion for nonsuit on Button's claim for punitive damages. We will reject the arguments made by U.S. Fire on appeal and thus do not reach the contentions contained in the cross-appeal.

II. FACTUAL AND PROCEDURAL BACKGROUND

Button is a trucking company located in Dixon, Solano County. U.S. Fire issued two insurance policies to Button, both of which were effective November 30, 2001: (1) a commercial general liability policy, Policy No. 5430879432 (CGL Policy);[1] and (2) a commercial automobile policy, Policy No. 1336672431 (Truckers Policy). The Truckers Policy provides $1 million coverage per accident or loss.

The insuring agreement in the Truckers Policy, Section II.A., provides: "We will pay all sums an 'insured' legally must pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies, caused by an 'accident' and resulting from the ownership, maintenance or use of a covered 'auto.'. . . [¶] We have the right and duty to defend any 'insured' against a 'suit' asking for such damages or a 'covered pollution cost or expense.' However, we have no duty to defend any 'insured' against a 'suit' seeking damages for 'bodily injury' or 'property damage' or a 'covered pollution cost or expense' to which this insurance does not apply. We may investigate and settle

[1] The trial court determined during trial that there was no coverage under the CGL Policy. That policy is not at issue here.

any claim or 'suit' as we consider appropriate. Our duty to defend or settle ends when the Liability Coverage Limit of Insurance has been exhausted by payment of judgments or settlements."

Section V.B.7 of the Truckers Policy states, "Under this Coverage Form, we cover 'accidents' and 'losses' occurring . . . [d]uring the policy period shown in the Declarations . . . ."

In Section VI, the Truckers Policy defines "accident" as "includ[ing] continuous or repeated exposure to the same conditions resulting in 'bodily injury' or 'property damage.'" "'Loss' means direct and accidental loss or damage." "Property damage" is defined as "damage to or loss of use of tangible property." "Suit" is defined as "a civil proceeding in which: [¶] (1) Damages because of 'bodily injury' or 'property damage'; or [¶] (2) A 'covered pollution cost or expense'; [¶] to which this insurance applies, are alleged."

Exclusion 7 of the Truckers Policy, entitled "Handling of Property," excludes coverage for "'[b]odily injury' or 'property damage' resulting from the handling of property: [¶] . . . After it is moved from the covered 'auto' to the place where it is finally delivered by the 'insured.'"

Exclusion 10 of the Truckers Policy, entitled "Completed Operations," excludes coverage for "'[b]odily injury' or 'property damage' arising out of your work after that work has been completed or abandoned."[2]

Blue Diamond Growers (Blue Diamond) is a cooperative of almond growers that processes and sells almonds on behalf of its members. On June 27, 2000, Button and Blue Diamond entered into a hauling contract under which Button agreed to transport Blue Diamond almonds to and from various central California locations.

[2] As conceded by counsel for U.S. Fire at oral argument, U.S. Fire did not rely on either of these exclusions in denying coverage under the policy in early 2002, prior to the filing of this action.

One location from which Button hauled almonds was a Blue Diamond processing facility, Chico Nut. Button provided pools of empty trailers which were loaded by Chico Nut employees with shelled almonds. A Button tractor would transport the trailers from Chico Nut to Blue Diamond's processing plant in Salida (Salida Plant). At the Salida Plant, the trailers were weighed by Blue Diamond and disconnected from the Button tractor. Button did not unload the almonds or perform any work at the Salida plant.

On or before November 29, 2001, Button delivered to Chico Nut two empty trailers that had previously contained wheat seed treated with a pesticide, pentachloronitrobenzene (PCNB). The trailers were not cleaned after the wheat seed was unloaded and PCNB residue remained in the trailers. On November 29, 2001, Chico Nut employees loaded approximately 52,000 pounds of almonds into the Button trailers (Trailer Almonds). The PCNB residue contaminated the Trailer Almonds.

On November 30, 2001, Button delivered the Trailer Almonds to the Salida Plant. After the trailers were weighed, they were disconnected from the Button tractor. The trailers were then parked at the Salida Plant over the weekend. After the trailers were delivered, Button took no further action with respect to the Trailer Almonds.

On December 3, 2001, a Blue Diamond employee unloaded the trailers by opening gates on the bottoms of the trailers. The almonds dropped into a receiving pit and then traveled by conveyor to a main production line inside the plant, where they were mixed with other almonds (Plant Almonds).

While unloading the second trailer, the employee noticed a colored residue on some almonds. At this point, Blue Diamond shut down its processing line and the affected almonds on the line, about 485,000 pounds, were removed from the plant. The line and processing equipment were cleaned. Blue Diamond concluded that all of the almonds were rendered unfit for human consumption and were unusable because the almonds contaminated with PCNB could not be separated from any not containing PCNB. The same day, December 3, Blue Diamond contacted Button regarding the damaged almonds.

Blue Diamond made a claim against Button for reimbursement (the Claim), estimating that it had suffered damages of $849,857.10. Blue Diamond never filed suit relating to the Claim.

Following the incident, Button continued to provide service for Blue Diamond under the hauling contract. Button continued to make deliveries between all of Blue Diamond's locations.

U.S. Fire received notice of the Claim on December 11, 2001. U.S. Fire assigned the handling of the Claim to claims examiner Joanne Chase, Chase's supervisor Mark Zuppa, and home office claims supervisor Dick Ryan. Ryan was supervised by U.S. Fire assistant vice president of liability claims Kevin McNamara.

Upon receipt of Button's Notice of Claim, Chase confirmed that the damage occurred during U.S. Fire's policy period, on December 3, 2001. Along with the notice, Chase received copies of two letters from Button's Ron Anstead, dated December 6 and 7, 2001. The first letter stated that the Button trailers had contained a seed coating which came into contact with Blue Diamond's almonds, that the almonds were unloaded into Blue Diamond's receiving bins, that almonds on the processing line had been affected, and that the processing line had been shut down. The second letter advised that Button had hauled 52,640 pounds of almond meats to Salida on November 30, that the trailers were unloaded by Blue Diamond on December 3, that the processing line was shut down, and that 475,000 pounds of almonds in the plant had been affected.

At trial, Chase testified she could not recall her understanding in December 2001 of the factual basis for the Claim or whether she had contacted anyone at Button or Blue Diamond in response to the notice of claim.

On December 20, 2001, Chase sent by email a draft Coverage Issue Report to her supervisor, Mark Zuppa, recommending that U.S. Fire deny liability coverage for the Claim based on the "care, custody and control" exclusion and the "pollution" exclusion.[3]

[3] As also conceded by counsel for U.S. Fire at oral argument, it is relying on neither of these exclusions in this litigation.

At that time, Chase did not believe any other exclusions applied to the Claim. On January 2, 2002, Chase sent the coverage issue report to Supervisor Ryan. Zuppa and Ryan concurred in Chase's analysis, and Ryan instructed Chase to deny coverage. Kevin McNamara approved the denial.

By letter dated January 14, 2002, U.S. Fire denied the claim under the Truckers Policy, citing the custody, care and control exclusion and the pollution exclusion as the grounds for denial.

By letter dated January 21, 2002, Button's broker advised U.S. Fire of his belief that the denial was wrongful and described the possible financial consequences to Button of any unreasonable delay or difficulty in servicing the Claim. In response, Zuppa discussed the matter with McNamara and then instructed Chase to reaffirm the denial. Zuppa instructed Chase to omit any reference in the denial letter to the pollution exclusion, and Chase sent out the letter dated February 1, 2002, as instructed. At that time, the only ground upon which U.S. Fire relied as the basis for denial of the Claim was the care, custody and control exclusion.

Button retained counsel to attempt to obtain policy benefits. On March 11, 2002, Button's counsel sent a letter to U.S. Fire explaining Button's belief that the Claim was covered and describing the harm to Button's business relationship with Blue Diamond as a result of the denial of the Claim. Enclosed with the letter was a statement from Blue Diamond regarding the facts of the incident and itemizing Blue Diamond's damages.

U.S. Fire responded that it would conduct a further review. Neither Chase nor Ryan could recall any actions that were taken by way of conducting a further review.

On April 22, 2002, U.S. Fire filed this action against Button seeking declaratory relief that its denial of the Claim was proper. Button and Bob Button (the Button cross-complainants) filed a cross-complaint against U.S. Fire for (1) breach of contract; (2) breach of the implied covenant of good faith and fair dealing; (3) fraud; (4) negligent misrepresentation; (5) intentional infliction of emotional distress; and (6) declaratory relief.

In June 2003, U.S. Fire and Clarendon National Insurance Company,[4] together with Blue Diamond's insurer, settled the Claim. In exchange for payment of $580,000,[5] a full release was obtained from Blue Diamond of all claims, of whatever nature, it had against the Button cross-complainants. Before making the settlement, U.S. Fire reserved its right to seek reimbursement from the Button cross-complainants. Following settlement of the Claim, U.S. Fire amended its complaint to add a cause of action for reimbursement and to add Bob Button as a defendant.

Before trial, U.S. Fire filed three motions seeking summary judgment or adjudication. On June 5, 2003, U.S. Fire filed Motion No. 1, seeking, inter alia, summary adjudication of Button's causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing on the ground that U.S. Fire owed no duty to defend or indemnify because no lawsuit had been filed against Button. It was argued on August 27, 2003, and taken under submission.

On August 22, 2003, U.S. Fire filed Motion No. 2 seeking summary adjudication that there was no merit to the Button cross-complainants' causes of action for fraud, negligent misrepresentation, and infliction of emotional distress. Motion No. 2 was argued on December 15, 2003, and taken under submission.

With Motion No. 1 still under submission and the deadline for filing dispositive motions approaching, U.S. Fire filed Motion No. 3 seeking summary judgment or adjudication of the Button cross-complainants' causes of action for breach of contract, bad faith, and declaratory relief on the ground that U.S. Fire owed no duty to defend or indemnify the Button cross-complainants for the Claim since no suit was ever filed and the Claim had been settled.

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[4] Clarendon insured Button under a policy that expired on November 30, 2001. Clarendon is not a party to this appeal.

[5] U.S. Fire paid $515,000; Clarendon paid $40,000; and Blue Diamond's insurer paid $25,000.

On January 12, 2004, the trial court ruled on Motion No. 1, granting summary adjudication to U.S. Fire. The court also ruled that there was no coverage under the Truckers Policy for the damage to the Trailer Almonds.

On January 23, 2004, the trial court granted U.S. Fire's Motion No. 2.

On February 10, 2004, U.S. Fire filed a motion seeking clarification of the court's ruling on Motion No. 1. On May 5, 2004, the trial court issued a clarified ruling: "The motion is granted as to Issue Nos. 1 through 5 set out in the motion for summary adjudication of issues, specifically, regarding the first cause of action for breach of contract (Issue No. 1), [and] the second cause of action for breach of the implied covenant of good faith and fair dealing (Issue No. 2) . . . . The court finds that U.S. Fire has established as a matter of law that U.S. Fire has no duty to defend or indemnify [the Button cross-complainants] as to the Blue Diamond claim at this time as no lawsuit that would trigger such a duty has been filed." The court also reconfirmed its ruling that there was no coverage under the Truckers Policy for the Trailer Almonds.

The matter was thereafter transferred to a different judge, who asked that the parties file supplemental briefs on Motion No. 3. U.S. Fire asserted that Motion No. 3 was moot with respect to the first and second causes of action because those causes of action had already been dismissed by the trial court's May 5 order, and that only the eighth cause of action for declaratory relief remained. The Button cross-complainants responded that their first and second causes of action, for breach of contract and bad faith, remained viable because, notwithstanding no duty to defend, indemnify, or investigate, U.S. Fire still owed a duty to settle.

On May 24, 2004, the trial court denied U.S. Fire's Motion No. 3, stating that "[i]n each cause of action, there remain triable issues of facts."

Trial commenced on August 24, 2004, and was divided into two phases: (1) the coverage phase; and (2) the breach of contract and bad faith phase. After oral argument on the coverage issues at the end of Phase I, the trial court ruled: (1) there was no coverage under the CGL Policy for the Claim; (2) there was coverage under the Truckers Policy for the Claim because an "accident" occurred within the meaning of the Truckers

Policy and Exclusions 7 and 10 did not exclude coverage; and (3) Bob Button was not an "insured" or Named Insured under either the Truckers Policy or the CGL Policy.

Thereafter, Phase II proceeded. The jury found that U.S. Fire was not liable for breach of contract, but that U.S. Fire was liable for bad faith. Damages in the amount of $443,848 were awarded to Button. Entry of judgment was served on September 14, 2004.

On September 29, 2004, U.S. Fire filed a motion for judgment notwithstanding the verdict and a motion for new trial and to vacate the judgment. On November 1, 2004, the trial court summarily denied these motions. On November 3, 2004, U.S. Fire filed its notice of appeal.

III. DISCUSSION

A. *Whether There Was Coverage for the Claim*

U.S. Fire contends the trial court erroneously concluded in Phase I of the trial that the Truckers Policy that took effect on November 30, 2001, provided coverage to Button for damage to Blue Diamond's Plant Almonds and machinery. The parties do not disagree about the underlying facts, and the issue of whether the Truckers Policy provides coverage involves questions of law as to the proper interpretation of the relevant policy provisions. Thus, we apply the de novo standard of review. (*Waller v. Truck Ins. Exchange, Inc*. (1995) 11 Cal.4th 1, 18 (*Waller*).)

Our Supreme Court has summarized the principles guiding this analysis: "'While insurance contracts have special features, they are still contracts to which the ordinary rules of contractual interpretation apply.'" (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264 (*Bank of the West*).) Thus, 'the mutual intention of the parties at the time the contract is formed governs interpretation.' (*AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 821 (*AIU Ins.*).) If possible, we infer this intent solely from the written provisions of the insurance policy. (See *id*. at p. 822.) If the policy language 'is clear and explicit, it governs.' (*Bank of the West, supra,* 2 Cal.4th at p. 1264.) [¶] When interpreting a policy provision, we must give its terms their '"ordinary and popular sense," unless "used by the parties in a technical sense or a special meaning is given to

them by usage."' (*AIU Ins., supra*, 51 Cal.3d at p. 822, quoting Civ. Code, § 1644.) We must also interpret these terms 'in context' (*Bank of the West, supra*, 2 Cal.4th at p. 1265), and give effect 'to every part' of the policy with 'each clause helping to interpret the other.' (Civ. Code, § 1641; see also *Holz Rubber Co., Inc*. v. *American Star Ins. Co.* (1975) 14 Cal.3d 45, 56.)" (*Palmer v. Truck Ins. Exchange* (1999) 21 Cal.4th 1109, 1115.)

We look first to the policy's coverage provisions to determine whether the claim falls within the scope of the insurance. (*Waller, supra*, 11 Cal.4th at p. 16.) The policy provides, "We will pay all sums an 'insured' legally must pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies, caused by an 'accident' and resulting from the ownership, maintenance or use of a covered 'auto.'" There is no dispute that Blue Diamond suffered "property damage" that resulted from the "ownership, maintenance or use of a covered 'auto.'" Here, the damage to the Plant Almonds and plant machinery occurred when the contaminated Trailer Almonds were combined with the Plant Almonds, and resulted from Button's having transported the Trailer Almonds in the unwashed trailer. The property damage was unintentional and unexpected, i.e., an accident. (See *Modern Development Co. v. Navigators Ins. Co*. (2003) 111 Cal.App.4th 932, 940, fn. 4 (*Modern Development*); *St. Paul Fire & Marine Ins. Co. v. Superior Court* (1984) 161 Cal.App.3d 1199, 1202.) The insuring agreement plainly encompasses the damage to the plant almonds and machinery.

In arguing that the policy provided no coverage, U.S. Fire first contends there was no evidence that an "accident" occurred during the policy period. U.S. Fire cites Condition B.7. of the policy, located under the heading "General Conditions," which states: "Under this Coverage Form, we cover 'accidents' and 'losses' occurring: [¶] a. During the policy period and [¶] b. Within the coverage territory." Citing testimony from Button's Director of Safety that Button's "mistake" was sending the trailer containing PCNB residue to Chico Nut without first washing it out, U.S. Fire maintains that the only "accident" involving its insured took place at the Chico Nut facility when the almonds

were loaded into the trailer containing PCNB on November 29, prior to the inception of the policy.

The argument is unpersuasive. It is well settled that "the time of occurrence of an accident refers to the event causing the actual injury and not an earlier event which created the potential for future injury." (*Hallmark Ins. Co. v. Superior Court* (1988) 201 Cal.App.3d 1014, 1018 (*Hallmark*), citing *Maples v. Aetna Cas. & Surety Co*. (1978) 83 Cal.App.3d 641, 647-650 (*Maples*).)[6] In *Hallmark*, the court held that the time of the accident, within the meaning of a liability policy issued to a manufacturer of hang gliders, was the time when the individual using the hang glider was actually injured, not the time when the allegedly defective hang glider was manufactured. (201 Cal.App.3d at pp. 1018-1019.) Similarly, in *Maples*, the court rejected the plaintiff's claim that a policy in effect when a boiler was negligently installed provided coverage for a fire caused by the boiler that occurred after the policy had expired. (83 Cal.App.3d at p. 650; see also *Armstrong World Industries, Inc. v. Aetna Casualty & Surety Co*. (1996) 45 Cal.App.4th 1, 39-40, and cases cited therein ["Case law has long established that the operative event triggering coverage is the injury. Because occurrence policies (as distinguished from claims-made policies) cover occurrences that result in injury 'during the policy period,' the courts in California and elsewhere have concluded that the policies are invoked, or 'triggered,' when the injury takes place."].) Here, the "accident," or event causing the actual injury to the Plant Almonds and the plant machinery, occurred when the tainted Trailer Almonds were commingled with the Plant Almonds inside the Salida Plant.

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[6] At oral argument, counsel for U.S. Fire relied on *Lockheed Martin Corp. v. Continental Ins. Co*. (2005) 134 Cal.App.4th 187 (*Lockheed*), in arguing that the Truckers Policy is an accident-based policy and not an occurrence-based policy. *Lockheed* involved an insured aerospace manufacturer seeking coverage under nonstandard CGL and excess insurance policies for pollution-related liability. The court of appeal upheld the trial court's ruling (based on the language of the applicable policies) that the accident and the immediately resulting damage must happen during the policy period. (*Id*. at pp. 207-208.) Nothing in the holding in *Lockheed* changes our analysis.

U.S. Fire next contends that two exclusions bar coverage under the policy. It is U.S. Fire's burden to prove that an exclusion applies to avoid coverage for a claim. (*MacKinnon v. Truck Ins. Exchange* (2003) 31 Cal.4th 635, 648.) First, U.S. Fire argues for the application of Exclusion 7, which states that the insurance does not apply to property damage "resulting from the handling of property . . . [¶] [a]fter it is moved from the covered 'auto' to the place where it is finally delivered by the 'insured.'"

Observing that the applicability of this exclusion appears to be an issue of first impression in California, U.S. Fire cites *Home State County Mutual Ins. Co. v. Acceptance Ins. Co*. (Tex.Ct.App. 1997) 958 S.W.2d 263 (*Home State*) in support of applying the exclusion to the circumstances presented here. In *Home State*, a trucking company delivered a load of rock and sand called "base" for a construction project. The driver left to pick up another load, and an employee of another company was injured when he collided with the load of base. Home State argued there was no coverage because its auto liability policy excluded coverage for bodily injury resulting from the handling of property "after it is moved from the covered auto to the place where it is finally delivered" by the insured. The Texas Court of Appeal agreed with Home State that the exclusion applied "because at the time of the accident the truckload of base had been finally delivered." (*Id.* at p. 267.)

Without expressing any opinion as to the persuasiveness of the reasoning in *Home State*, we conclude that Exclusion 7 is inapplicable here. To apply, the exclusion requires that the property be "moved from the covered 'auto' to the place where it is finally delivered by the 'insured,'" as, for example, where a driver for the insured unloads a product from a truck and delivers it to the customer's receiving area. By contrast, Button did not move the almonds from the trailer to any other place. The almonds were "finally delivered by the 'insured'" when Button's trailer was detached from the tractor and left for Blue Diamond to unload.

U.S. Fire also argues for the applicability of Exclusion 10, which provides that the insurance does not apply to property damage "arising out of your work after that work has been completed or abandoned. . . . [¶] Your work will be deemed completed at the

earliest of the following times: [¶] (1) When all of the work called for in your contract has been completed. [¶] (2) When all of the work to be done at the site has been completed if your contract calls for work at more than one site. [¶] (3) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project."

This "completed operations" exclusion is also inapplicable to the circumstances of this case. Subdivisions (1) and (2) do not apply because Button's work under the hauling contract with Blue Diamond was not completed at the time the Plant Almonds and machinery were damaged. Subdivisions (2) and (3) do not apply because Button did not perform "work" at a "site." The hauling contract required Button to transport loaded trailers for Blue Diamond from one location to another, an activity that cannot reasonably be construed to mean work done at a job site that is either "completed" or that has "been put to its intended use." Further, the exception in subdivision (3) for "another contractor or subcontractor working on the same project," indicates that this exclusion was intended to apply to situations such as building projects that involve contractors and subcontractors. (See, e.g., *Pardee Construction Co. v. Insurance Co. of the West* (2000) 77 Cal.App.4th 1340, 1356-1358 [interpreting completed operations policy language in the context of litigation involving general contractor and subcontractors arising out of underlying suit for defective construction].)

Having concluded that the claim is covered by the insurance and that neither exclusion advanced by U.S. Fire applies to bar coverage, we reject U.S. Fire's argument that the trial court's judgment must be reversed and a new judgment entered that there is no coverage and, accordingly, no liability for bad faith breach of the implied covenant of good faith and fair dealing. Further, U.S. Fire is not entitled to reimbursement of the $515,000 it paid to settle the Claim.

B. *Whether U.S. Fire Owed a Duty to Settle*

U.S. Fire next argues that the judgment on the bad faith claim must be reversed because it was based on the trial court's erroneous ruling that U.S. Fire could still owe a duty to settle in the absence of any duty to defend or indemnify. According to U.S. Fire,

under the California Supreme Court's decisions in *Foster-Gardner, Inc. v. National Union Fire Ins. Co*. (1998) 18 Cal.4th 857 (*Foster-Gardner*) and *Certain Underwriters at Lloyd's of London v. Superior Court* (2001) 24 Cal.4th 945 (*Powerine I*), U.S. Fire owed no duty to settle in the absence of a lawsuit against its insured.

In *Foster-Gardner*, the Supreme Court examined the language of a comprehensive general liability (CGL) insurance policy and concluded that the duty to defend the insured in a "suit" was limited to a civil action brought in a court of law and did not extend to administrative agency proceedings such as environmental clean-up orders. (18 Cal.4th at p. 878-888.) In *Powerine I*, the court determined that an insurer's duty to indemnify the insured under a CGL policy for "all sums that the insured becomes legally obligated to pay as damages' is limited to money ordered by a court," and also did "not extend to any expenses required by an administrative agency pursuant to an environmental statute." (24 Cal.4th at pp. 951, 955.) Relying in part on *Foster-Gardner's* "syllogism," the *Powerine I* court explained: "The duty to defend is broader than the duty to indemnify. The duty to defend is not broad enough to extend beyond a 'suit,' i.e., a civil action prosecuted in a court, but rather is limited thereto. A fortiori, the duty to indemnify is not broad enough to extend beyond 'damages,' i.e., money ordered by a court, but rather is limited thereto. 'It is . . . well settled that because the duty to defend is broader than the duty to indemnify,' a determination that 'there is no duty to defend automatically means that there is no duty to indemnify.' [Citations.]" (*Id*. at pp. 961.)

Foster-Gardner and *Powerine I* established that the duty to defend and the duty to indemnify, respectively, are limited to the context of a civil action in a court of law. Based on these holdings, U.S. Fire argues it can have no bad faith liability: (1) Because no lawsuit was filed against Button, U.S. Fire owed no duty to defend or indemnify (citing *Foster-Gardner* and *Powerine I*); (2) Where there is no duty to defend, there can be no breach of contract (citing *Rosen v. Nations Title Ins. Co*. (1997) 56 Cal.App.4th 1489 (*Rosen*)); (3) Where there is no breach of contract, there can be no breach of the implied covenant of good faith and fair dealing (citing *Waller*, *supra*, 11 Cal.4th at pp.

35-36; *Modern Development , supra*, 111 Cal.App.4th 932). Further, U.S. Fire argues that where there is no lawsuit and no duty to defend or indemnify, there also can be no duty to settle. To conclude otherwise, according to U.S. Fire, would result in a duty to settle that is broader than the duty to defend. We reject these contentions for several reasons.

First, the cases U.S. Fire cites in contending that it owed no duty to settle the Claim have no applicability to a situation in which covered claims (or potentially covered claims) are made against the insured but no lawsuit is filed. All three cases, *Rosen*, *Waller*, and *Modern Development*, involved lawsuits against the insureds in which the injuries alleged were not covered under the policies. In all three cases, it was determined that the insurers owed no duty to defend the insureds and, as a result, the insureds could not maintain breach of contract or bad faith claims. (*Rosen*, *supra*, 56 Cal.App.4th at p. 1496; *Waller*, *supra*, 11 Cal.4th at pp. 35-36; *Modern Development*, *supra*, 111 Cal.App.4th at p. 943.)

Second, U.S. Fire's arguments that it owed no duty to settle as a matter of law are simply way off the mark. It is clear that, under the policy language examined by our Supreme Court in *Foster-Gardner*, *supra*, 18 Cal.4th 857 and *Powerine I*, *supra*, 24 Cal.4th 945, where there is no lawsuit filed against the insured, there is no duty on the part of the insurer to defend or indemnify the insured. However, contrary to U.S. Fire's contention at oral argument, it does not follow that an insurer is never obligated to settle or attempt to settle a claim in the absence of a lawsuit. The obligation to settle claims arises both from the insurance contract, and also from the covenant of good faith and fair dealing that is *implied* in the contract.[7] As *Comunale v. Traders & General Ins. Co*. (1958) 50 Cal.2d 654 (*Comunale*) made clear: "There is an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive the benefits of the agreement. [Citation.] This

[7] See also Insurance Code section 790.03, subdivision (h)(5) requiring insurers to promptly settle cases as and when "liability has become reasonably clear."

principle is applicable to policies of insurance. [Citation.] . . . It is common knowledge that a large percentage of the claims covered by insurance are settled without litigation and that this is one of the usual methods by which the insured receives protection. [Citation.] Under these circumstances the implied obligation of good faith and fair dealing requires the insurer to settle in an appropriate case although the express terms of the policy do not impose such a duty." (*Id*. at pp. 658-659, see also to the same effect *Gruenberg v. Aetna Ins. Co*. (1973) 9 Cal.3d 566, 573-575 and *Crisci v. Security Ins. Co*. (1967) 66 Cal.2d 425, 430-433.)[8]

These principles were applied by Division Four of this court in *Bodenhamer v. Superior Court* (1987) 192 Cal.App.3d 1472 (*Bodenhamer*), which involved an action by the insureds against their insurer for breach of the covenant of good faith and fair dealing. In *Bodenhamer*, the insured jewelry store was burglarized, and a number of its customers lost pieces of jewelry. The customers made claims against the store. The store in turn notified its insurer, but the insurer delayed any investigation into the claims, denied liability, and ultimately paid no claims until 15 months later, after several customers had sued the insured. The trial court granted the insurer's motion for summary adjudication of the bad faith cause of action on the basis that there was no adjudication of liability or excess judgment against the insureds. (*Id*. at pp. 1475-1476.) In reversing, the *Bodenhamer* court explained, "[The insured's] position is not simply that St. Paul failed to evaluate their customers' claims or failed to settle but that St. Paul with knowledge of the validity of the claims and the injury delay could do to [the insureds'] business, deliberately delayed settlement. [¶] The stress [the insurer] places on the fact that its contract was only to indemnify and to defend indicates a misunderstanding, not of their contract, but of a cause of action for breach of the implied covenant of good faith in that contract. 'The covenant of good faith and fair dealing imposes obligations on the

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8 Not only does *Powerine I* not contradict the holdings of *Comunale* and cases following it, but *Comunale* is cited approvingly in it. (See *Powerine I, supra*, 24 Cal.4th at p. 971.)

contracting parties separate and apart from those consensually agreed to; the obligations stemming from the implied covenant of good faith and fair dealing are imposed by law as normative values of society. [Citations.]' [Citation.] . . . [¶] [The insurer] stresses that it was dealing here with third party claims rather than a first party claim. Even were we to assume for the sake of argument that this distinction makes a difference, it is not supported factually because the gravamen of this lawsuit is the failure of [the insurer] to discharge its duty *to its own insured*, the petitioners. . . . It is the damage sustained to its own business which is the basis for the insured's claim against its insurer. . . . [¶] An express term of the liability contract is to pay claims of third parties where the insured is liable. An implied promise is to process the claims in a manner which will not injure the insured, which in this case includes injury to the business." (*Bodenhamer*, *supra*, 192 Cal.App.3d at pp. 1477-1479.)

Relying on *Bodenhamer*, Division One of this court in *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc*. (2000) 78 Cal.App.4th 847 (*Shade Foods*) noted that "an insurer may breach the implied covenant by unreasonably coercing an insured to contribute to a settlement [citation] *or by delaying payment until the insured is subject to loss of business goodwill*." (*Id*. at p. 906, emphasis added.) In addition, the court in *Boicourt v. Amex Assurance Co*. (2000) 78 Cal.App.4th 1390 observed that, just as a timely settlement offer by a liability insurer precludes a bad faith suit, an untimely settlement offer may serve as the basis for such a suit. (*Id*. at p. 1400, citing Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 1999) ¶ 12:399, p. 12B-45 (rev. #1 1998) ["'The insurer's belated tender of its policy limits does *not* absolve it of liability for an earlier bad faith refusal to settle.'"].) U.S. Fire unsuccessfully attempts to distinguish *Shade Foods* and *Boicourt* on the ground that these cases involved lawsuits against the insureds and duties to defend and indemnify. However, the principle of bad faith liability where an insurer unreasonably delays settlement to the detriment of its insured does not depend on the existence of an underlying suit against the insured.

Thus, the implied covenant of good faith and fair dealing requires an insurer to settle a covered claim rather than simply wait to see if a lawsuit is filed and to pay a

judgment, if settlement is necessary to protect the interests of its insured. Put another way, a liability insurer may be liable for breach of the implied covenant when it delays or refuses to settle a covered claim and that delay or refusal causes damage to the insured. In such a case, the insurer is liable for all damages caused by its tortious conduct. (See, e.g., *Johansen v. California State Auto. Assn. Inter-Ins. Bureau* (1975) 15 Cal.3d 9, 12, 17 [insurer was liable in bad faith for "all damages" caused by its refusal to settle, despite having complied with duty to defend and having paid a portion of judgment within policy limits]; *Brandt v. Superior Court* (1985) 37 Cal.3d 813, 817 [insured may recover attorney fees expended in seeking benefits due under the insurance policy as bad faith damages].)

Citing a discussion in *Powerine I*, U.S. Fire contends that the language of the policy itself precludes finding a *duty* to settle. The insuring agreement in the Truckers Policy provides in part that "We may investigate and settle any claim or 'suit' as we consider appropriate." In *Powerine I*, Powerine, the insured, argued that limiting the duty to indemnify to money ordered by a court would give the insured a deterrent against compromise and an incentive toward litigation, in contravention of public policy. Our Supreme Court replied that it would not rewrite the policy provision for this reason, and that the concern seemed insubstantial since "compromise is regularly achieved, and litigation is regularly avoided. Recall that, in the same provision in which it imposes on the insurer a duty to defend the insured, the standard policy grants the insurer a right to settle any at least potentially covered dispute involving the insured. We may infer that, in a 'large percentage' of such disputes, insurers exercise their right. [Citations.] That is because we know that, in a 'large percentage' of such disputes, they in fact achieve compromise and avoid litigation. [Citations.]" (*Powerine I*, *supra*, 24 Cal.4th at p. 971.) U.S. Fire contends that this discussion in *Powerine I* confirms that the insurer has a discretionary *right* to settle, but not a *duty* to do so.

The argument lacks merit. First, the context of the discussion in *Powerine I* was entirely different, i.e., Powerine's attempt to persuade the court to expand the duty to indemnify to include costs incurred in complying with administrative agency orders

issued pursuant to environmental statutes. Second, interpreting this policy language in context, as we must (*Palmer v. Truck Ins. Exchange, supra*, 21 Cal.4th at p. 1115.), the sentence in the Truckers Policy insuring agreement immediately following the language relied upon by U.S. Fire provides, "Our *duty to defend or settle* ends when the Liability Coverage Limit of Insurance has been exhausted by payment of judgments or settlements." (Emphasis added.) Read together, these sentences provide a "duty to settle" [9] under appropriate circumstances. Moreover, this "duty to settle" is expressly recognized in U.S. Fire's claims manual, which states: "With the payment of premium, the insured purchases a promise from us in which we agree to investigate, defend and settle covered claims in their best interests." Indeed, were we to accept U.S. Fire's argument that it has a right, but not a duty, to settle a *claim* based on the language that U.S. Fire "may investigate and settle any claim or 'suit' as [it deems] appropriate," then it would follow that U.S. Fire also has no duty to settle a *suit*, and settlement under any circumstances would be in the sole discretion of the insurance company, regardless of the best interests of the insured.

Accordingly, we reject U.S. Fire's argument that it was entitled to judgment as a matter of law on Button's cause of action for declaratory relief, in which it sought a judicial determination of the parties' rights with respect to the duty to defend, indemnify, and settle the Claim.

C. *Jury Verdict on the Bad Faith Claim*

At trial, Button claimed U.S. Fire unreasonably delayed settling the Claim, and that the delay injured Button. The jury returned a verdict in favor of Button. U.S. Fire contends the jury verdict on the bad faith claim must be reversed for a number of reasons.

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9 This "duty to settle" may perhaps more accurately be described as an obligation on the part of the insurer to protect the best interests of the insured pursuant to the covenant of good faith and fair dealing, with consequences for the failure to settle or attempt in good faith to settle under appropriate circumstances. For the sake of brevity, we refer to this obligation as the "duty to settle."

1. *Whether the Evidence Supported the Judgment*

U.S. Fire first argues that there was no admissible evidence that U.S. Fire's failure to settle the Claim earlier was unreasonable. U.S. Fire contends the only evidence pertaining to the timeliness of the settlement was a recital in the settlement agreement itself stating that the settlement was timely.

This assertion is simply incorrect. Our review of the record reveals evidence that Button provided information on the Claim to U.S. Fire promptly, made clear to U.S. Fire the importance of prompt resolution of the Claim, and suffered injury as a result of the delay. Button provided U.S. Fire with notification of the loss in December 2001. Button's expert, Guy Kornblum, testified that U.S. Fire's handling of the Claim did not comport with good faith claims handling practices, including taking "an adversarial posture from the beginning, as opposed to an objective evaluation process," initially relying on exclusions that did not apply to deny coverage, subsequently asserting different exclusions that also did not apply, and unreasonably delaying the negotiating process which should have begun in early 2002.

Upon being advised that U.S. Fire was denying the Claim, the broker urged U.S. Fire to reconsider based on his opinion that the Truckers Policy provided coverage and in light of the potential damage to Button from a delay in compensating Blue Diamond for its losses. David Baker, Blue Diamond's director of member relations, testified that the incident and the delay in receiving payment for the Claim impacted contract negotiations with Button with the result that Blue Diamond reduced the term of Button's contract from two years to one year and reduced its hauling rates by approximately 7%. Richard Nitzkowski, Button's vice president, testified regarding the importance of the Blue Diamond contract to Button from an operational as well as a financial standpoint, and quantified the loss of revenue to Button as a result of the rate reduction Blue Diamond imposed in early 2002. There was ample evidence before the jury that settlement negotiations should have begun sooner and that U.S. Fire's conduct in failing to do so was unreasonable.

As another reason the bad faith judgment should be reversed, U.S. Fire contends that, since it never had an obligation to pay for the Trailer Almonds, its failure to respond to Button's demand that it pay for all damages could not be considered unreasonable as a matter of law. Button counters that there was no evidence that Button demanded coverage from U.S. Fire for the Trailer Almonds and asserts that the evidence was in fact to the contrary. Button's counsel testified that Button never sought coverage from U.S. Fire for the Trailer Almonds because they were damaged prior to the inception of U.S. Fire's policy. Button's expert, Guy Kornblum, testified that whether Button sought coverage for the Trailer Almonds was unclear, but that Button submitted information about the Claim to U.S. Fire and asked "the insurance company to process the claim in accordance with whatever coverage is available," which is "what normally takes place." There is no evidence that U.S. Fire drew any distinction between the Trailer Almonds and the Plant Almonds in denying the Claim, and cannot now do so to shield itself from bad faith exposure.

Next, U.S. Fire takes issue with the testimony of Button's expert, Guy Kornblum, who testified that settlement negotiations should have begun earlier and should have commenced upon U.S. Fire's receipt of a March 11, 2002, letter from Button's counsel to Joanne Chase at U.S. Fire. U.S. Fire contends Kornblum admitted there was no evidence in support of his conclusion that the Claim could have settled sooner, and thus his testimony was speculative. (See, e.g., *Hyatt v. Sierra Boat Co.* (1978) 79 Cal.App.3d 325, 338 ["'[E]ven an expert witness cannot be permitted just to testify in a vacuum by [*sic*] things that he might think could have happened.'"]; *Lockheed Litigation Cases* (2004) 115 Cal.App.4th 558, 564 ["[A]n expert opinion based on speculation or conjecture is inadmissible."].)

Our reading of Kornblum's trial testimony is to the contrary. He testified that Button's letters of December 6 and 7, 2001, were sufficient to commence the claims handling process on the part of U.S. Fire. He testified that upon receiving the March 11, 2002, letter, which included a statement from Blue Diamond of the damages it had incurred, U.S. Fire should have begun settlement negotiations. Kornblum stated that the

Claim should have been settled in the time frame of April, May, or June 2002, and that delaying settlement until the insured has to hire a lawyer to obtain benefits due under the policy violates good faith claims handling practices. Kornblum felt there was no basis for asserting the care, custody, or control exclusion and the pollution exclusion in early 2002 as bases for denying the Claim, and similarly that there was no basis for asserting the handling exclusion and the completed operations exclusions in April 2003 as new bases for denying the Claim.

On cross-examination, Kornblum responded that he did not know how much Blue Diamond would have settled for in early 2002 and that there were no settlement negotiations during that time frame. These statements do not constitute admissions that there is no evidence the Claim could have settled sooner, and they do not render speculative Kornblum's testimony. They are merely statements of the obvious: that no one can know what the Claim might have settled for a year earlier, and that there were no settlement discussions in the spring of 2002.

In addition, U.S. Fire argues that Kornblum's testimony on the issue of the timing of the settlement should not have been considered because, despite being asked at deposition whether he had any opinion on this issue, Kornblum expressed no such opinion until trial. An expert may not offer opinion testimony at the time of trial that he did not offer at the time of his deposition. (See Evid. Code, §§ 801, subd. (b), 803; Code Civ. Proc., § 2034, subd. (f)(2)(D).) Without this protection, a party could conceal its expert's opinions, thereby impeding proper trial preparation and precluding effective cross-examination. (*Kennemur v. State of California* (1982) 133 Cal.App.3d 907, 919.)

Once again, we disagree with U.S. Fire's characterization of the record. At Kornblum's deposition, the following colloquy ensued:

"Q. Have you been asked to render any opinion about the timeliness of that settlement?

"A. I don't think I've been asked to, but it is part of my claims file analysis.

"Q. When we went through that whole list of opinions on -- your opinions of the claims handling, I must have missed it.

"A. Well, you did, because I said --remember there were things that went on in the lawsuit that impacted my judgment about how the claim was handled.

"Q. I'm sorry. I thought I asked you that tie-it-up question, and I must have not done it. I'm sorry.

"A. No. I assumed that it is part of the litigation mechanism that eventually led to that settlement. And so that settlement took place at a certain point in time, which is on my chronology. And I looked at that as part of my evaluation of how the claim was handled initially.

"Q. Well, it was a good idea for U.S. Fire to settle the claim, wasn't it?

"A. Absolutely.

"Q. That was a good thing:

"A. That was a good thing.

"Q. Okay. Very good thing?

"A. Well, I don't know if it was a good thing for them. It was a good thing for the insured.

"Q. That's what we're talking about. [¶] And do you intend to render any opinion as to the timeliness of that settlement?

"A. It is part of my evaluation of whether the good faith claims principles were complied with here. So to the extent that -- it's how it came about that represents a breach of the good faith claims principles, and what had to occur before that settlement took place that is not consistent with good faith principles.

"Q. When it happened you don't have a concern with?

"A. The fact it happened, I certainly don't have a concern with.

"Q. In fact, we've already established, that was a good thing that U.S. Fire did?

"A. Absolutely. How it was brought about is a different issue.

"Q. When you say 'how it was brought about,' what do you mean?

"A. In order to get U.S. Fire to the negotiating table to recognize that it should resolve this claim, and it took [Button's counsel's] letters, [Button's counsel's] pressure, to get Blue Diamond to recognize -- I'm sorry, to get U.S. Fire to recognize that it should

step in and resolve the Blue Diamond claim to avoid any serious financial consequences to Mr. Button and his company. [¶] I think it should have been apparent from the outset that that was the appropriate way to proceed in handling the claim, and to require Mr. Button to expend the money for a lawyer to put the pressure on the insurance company to do what I believe it was already obliged to do was not consistent with good faith claims practices."

It is apparent from this exchange that Kornblum took issue with how the Claim was handled and the fact that Button had to hire an attorney to pursue litigation before U.S. Fire would discuss settlement. The inference that the Claim should have settled sooner and that U.S. Fire should have begun settlement negotiations earlier is clear. Later in the deposition, U.S. Fire's counsel asked whether the settlement agreement was provided to Kornblum and whether it was "at all relevant to the opinions that you expressed today and intend to express at trial?" Kornblum responded, "It's relevant because it shows that eventually the -- U.S. Fire did what I thought it should have done much earlier, and that is, resolve the claim with Blue Diamond, and then work out its difference with its insured."

U.S. Fire's counsel also asked Kornblum about the recital in the settlement agreement concerning the timing of the settlement:

"Q. The settlement agreement includes a representation and warranty by Blue Diamond, that any issues or potential issues relating to the timing or amount of settlement will have no impact on the course of dealings between Blue Diamond and Button, and it goes on.

"A. Yeah, I remember seeing that.

"Q. And that was a good thing for U.S. Fire to negotiate, was it not?

"A. I don't know who negotiated it. I think -- what I understood was that there was a concern about the continuing relationship between Button and Blue Diamond, and Mr. Button wanted to preserve that relationship. And he was significantly financially impacted if that relationship did not continue, and that Button Transportation was concerned with getting the claim resolved so it wouldn't have an impact. So I don't

know who negotiated that in or thought that was what should be done, but I guess that's what that addressed."

It is abundantly clear from the foregoing that the timing of the settlement was at issue at the deposition and that Kornblum was of the opinion that the Claim should have settled sooner. If U.S. Fire had wanted to explore the specifics of Kornblum's opinion in that regard, it could have but didn't.

2. *Whether There Were Genuine Issues Regarding Coverage*

U.S. Fire next maintains that it cannot be found to have acted in bad faith because there was a genuine issue as to whether the Claim was covered. "'The mistaken [or erroneous] withholding of policy benefits, if reasonable or if based on a legitimate dispute as to the insurer's liability under California law, does not expose the insurer to bad faith liability.' (*Tomaselli v. Transamerica Ins. Co*. (1994) 25 Cal.App.4th 1269, 1280-1281; *Nager v. Allstate Ins. Co*. (2000) 83 Cal.App.4th 284, 288; *Opsal v. United Services Auto. Assn*. [1991] 2 Cal.App.4th [1197,] 1205.) Without more, such a denial of benefits is merely a breach of contract. Moreover, the reasonableness of the insurer's decisions and actions must be evaluated as of the time that they were made; the evaluation cannot fairly be made in the light of subsequent events that may provide evidence of the insurer's errors. (Cf. *Filippo Industries, Inc. v. Sun Ins. Co*. (1999) 74 Cal.App.4th 1429, 144.) [¶] Thus, before an insurer can be found to have acted tortiously (i.e., in bad faith), for its delay or denial in the payment of policy benefits, it must be shown that the insurer acted unreasonably or without proper cause. (*Dalrymple v. United Services Auto. Assn*. (1995) 40 Cal.App.4th 497, 520; *Opsal v. United Services Auto. Assn*., *supra*, 2 Cal.App.4th at p. 1205.) However, where there is a genuine issue as to the insurer's liability under the policy for the claim asserted by the insured, there can be no bad faith liability imposed on the insurer for advancing its side of that dispute. (*Dalrymple*, *supra*, at p. 520; *Opsal*, *supra*, at pp. 1205-1206.)'" (*Chateau Chamberay Homeowners Assn. v. Associated Internat. Ins. Co*. (2001) 90 Cal.App.4th 335, 347 (*Chateau Chamberay*).)

In support of its argument, U.S. Fire first cites the facts that Button sought coverage for all the damaged almonds, including the Trailer Almonds, and sought coverage under both the Truckers Policy and the CGL Policy. The trial court concluded there was no coverage for the Trailer Almonds, and that the CGL Policy did not cover the Claim. However, neither of these facts creates a genuine dispute about coverage under the Truckers Policy for damages occurring during the policy period, i.e., damage to the Plant Almonds occurring on December 3, 2001.

Next, U.S. Fire argues there was a genuine issue about coverage because, at the time U.S. Fire denied coverage, "California law was unsettled as to whether the pollution exclusion applied . . . ." However, to enable it to haul hazardous materials, Button had purchased an endorsement to the Truckers Policy which afforded "Broadened Coverage" for pollution claims. In addition, although U.S. Fire's motions for summary judgment included claims that the pollution exclusion applied to bar coverage, it appears that U.S. Fire stopped relying on the pollution exclusion on or before February 1, 2002, long before the suit was filed. In a February 1, 2002, letter to the broker, Jim Hawes, Joanne Chase referred only to the "care, custody and control" exclusion as a basis for denying the Claim. Ms. Chase had emailed a draft of this letter to Mark Zuppa, her supervisor, for his review. In that email, she stated, "Mark, here is a draft of my response. I just resummarized the two policies and the conclusions drawn as I did in my disclaimer letter, leaving out the pollution in this letter as we discussed."

Finally, U.S. Fire also asserts that its expert, Alan Windt, "testified that there were genuine issues of coverage regarding the application of the exclusions" and that there was no testimony to the contrary. This is plainly false, as Button's expert, Kornblum, testified that U.S. Fire's purported reliance on the various coverage exclusions was not reasonable or in good faith because those exclusions were factually inapplicable.

We conclude there was no genuine dispute regarding coverage sufficient to insulate U.S. Fire from a bad faith claim. (See *Chateau Chamberay*, *supra*, 90 Cal.App.4th at pp. 347-348.) In *Chateau Chamberay*, an insured sued his insurer for bad faith based on the insurer's decision that the covered damage to the insured's home was

significantly less than the total amount claimed. The insurer conducted an immediate investigation and a further investigation at the insured's request. The court held there was no bad faith liability where the insurer reasonably relied on the conclusions of its investigators concerning the scope of covered losses and the cost of repair. (*Chateau Chamberay, supra*, 90 Cal.App.4th at pp. 349-350.) *Fraley v. Allstate Ins. Co*. (2000) 81 Cal.App.4th 1282 (*Fraley*) provides another example of a case in which a genuine dispute existed. In *Fraley*, the insurer promptly investigated the insured's property damage claim but the parties' contractors could not agree on the scope or cost of repair. The insurer paid what it believed was owed within seven months. The court concluded that, as a matter of law, the insurer did not act in bad faith because there was a genuine dispute concerning the policy benefits owed. (*Id*. at pp. 1292-1293.)

Unlike *Chateau Chamberay* and *Fraley*, the undisputed evidence here does not demonstrate that U.S. Fire promptly investigated the claim and merely disagreed with Button about the scope of coverage. Rather, there is substantial evidence that U.S. Fire denied the claim without having a factual basis for its denial. For example, U.S. Fire's claims examiner, Joanne Chase, could cite to no evidence in support of the exclusions she initially relied upon to deny coverage. (See *Shade Foods, supra*, 78 Cal.App.4th at p. 882 [substantial evidence supported bad faith verdict against liability insurer that denied coverage and then declined to take any initiative in pursuing settlement negotiations, denied coverage without a factual basis for doing so and without having conducted a meaningful investigation; at trial, the insurer's claims adjuster could cite no evidence to support the exclusion relied upon to deny coverage].) Thus, whether U.S. Fire acted reasonably in handling the Claim was properly a question for the jury.

In a related argument, U.S. Fire contends that the trial court abused its discretion in failing to instruct the jury with its Special Instruction No. 10 regarding the "genuine issue" doctrine, and that this error necessitates reversal. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566 [abuse of discretion standard applies to court's discretionary rulings].) Special Instruction No. 10 reads: "The existence of a disagreement between the insurer and the insured over the interpretation of the policy does not establish bad

faith. If the disagreement involves a genuine issue concerning the insurer's obligation to provide benefits, the insurer does not act in bad faith by refusing to pay the insured's claims." However, the court had already determined that the Truckers Policy provided coverage for the Plant Almonds, and instructed the jury accordingly. Under the circumstances, the requested instruction was not supported by the facts and would have confused the jury. (See *DeGeorge v. Crimmins* (1967) 254 Cal.App.2d 544, 547; *Ernest W. Hahn, Inc. v. Sunshield Insulation Co*. (1977) 68 Cal.App.3d 1018, 1024.)

3. *Whether Certain Evidentiary Rulings Were Error*

Next, U.S. Fire argues the trial court prejudicially erred in allowing testimony relating to U.S. Fire's investigation and handling of the Claim, over U.S. Fire's objections. Prior to trial, U.S. Fire moved in limine to exclude expert testimony concerning U.S. Fire's investigation of the Claim, on the ground that the trial court had previously ruled that U.S. Fire owed no duty to investigate the Claim because no lawsuit had been filed against Button. The court granted this motion, believing it was constrained by the earlier ruling of a different judge.[10] At trial, U.S. Fire objected several times to evidence on the ground that it pertained to U.S. Fire's investigation. The court excluded evidence on that basis, the jury was instructed that U.S. Fire had no duty to investigate, and U.S. Fire stressed this point to the jury. Where the court admitted the contested evidence, it did so based on the relevance of the evidence to U.S. Fire's decisions regarding settlement of the Claim. We discern no abuse of discretion.

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10 On January 23, 2004, the trial court issued an order on U.S. Fire's motion for summary judgment or summary adjudication of issues. In part, that order stated, "In addition, cross-complainants have not submitted sufficient evidence that U.S. Fire's handling of the Blue Diamond claim constitutes outrageous conduct. Button contends that U.S. Fire's alleged failure to properly investigate the claim was outrageous. However, under the language of the policies, U.S. Fire had no duty to investigate the claim until legal action was filed [citations]." In response to U.S. Fire's motion for clarification of this order, on May 5, 2004, the trial court issued a revised order stating in part, "The court finds that U.S. Fire has established as a matter of law that U.S. Fire has no duty to defend or indemnify Button as to the Blue Diamond claim at this time as no lawsuit that would trigger such a duty has been filed. [Citations.]"

4. *Whether Bad Faith Liability Can Exist in the Absence of a Breach of Contract*

Finally, U.S. Fire argues that the bad faith judgment must be reversed because there can be no liability for breach of the implied covenant of good faith and fair dealing in the absence of any breach of contract. The argument has no merit. It is recognized that there are circumstances in which an insured may have a bad faith claim against its insurer even where the insurer has paid or settled the claim: "There may be cases in which the insurer's delay in paying the claim or other misconduct causes special harm to the insured even though the claim is ultimately paid or settled. Such payment fulfills the insurer's contractual obligations. However, under appropriate circumstances, tort liability may still be imposed for the insurer's misconduct apart from performance of its contract obligation." (Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 1995) ¶ 12:812, pp. 12C-3 to 12C-4, italics omitted, citing *Dalrymple v. United Services Auto. Assn., supra,* 40 Cal.App.4th at p. 515.)

U.S. Fire cites several cases for the proposition that where a breach of contract cannot be shown, there can be no bad faith liability. However, these cases all involved no coverage under the relevant policies and not, as here, settlements by insurers of the third-party property-damage claims after litigation had commenced. In *Waller, supra,* 11 Cal.4th at page 35, which involved a business dispute, the court held that in the absence of any potential for coverage under the CGL policy, there could be no bad faith liability. In *San Diego Housing Com. v. Industrial Indemnity Co*. (1998) 68 Cal.App.4th 526, 544, the plaintiffs obtained a default judgment against a contractor for construction defects in a housing project that the plaintiffs had already paid to have repaired. The plaintiffs then sued the contractor's insurer as third-party judgment creditors and additional insureds under the policy. The court of appeal reversed the trial court, holding that the policy provided no coverage because the repair costs were not damages the plaintiffs were liable to pay to a third party injured by plaintiffs' negligence. Since plaintiffs could not seek breach of contract damages, the court also reversed the portion of the verdict based on bad faith liability. (*Ibid*.) Finally, *Shaw v. Hughes Aircraft Co*. (2000) 83 Cal.App.4th 1336 is a wrongful termination case and has no applicability here.

D. *Whether U.S. Fire is Entitled to a New Trial on Damages*

U.S. Fire contends it is entitled to a new trial on damages because the damages awarded were excessive. In closing arguments, Button's counsel sought bad faith damages for attorney's fees ($104,342), the reduction in the Blue Diamond hauling contract rate ($84,877 for past reductions; $42,438 for future loss of revenue due to rate reduction), and the loss of goodwill ($575,000). The jury returned a verdict in the amount of $443,848. U.S. Fire argues there was no evidence to support damages for the reduction in the Blue Diamond hauling contract rate and the loss of business goodwill.

A new trial should be granted on the ground of excessive damages if "after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the court or jury clearly should have reached a different verdict or decision." (Code Civ. Proc., § 657, subd. (7).) If damages are determined to be "excessive," the court may grant a new trial on that limited issue upon condition that the motion for new trial will be denied if the prevailing party consents to a reduction of damages in an amount determined by the court. (Code Civ. Proc., § 662.5, subd. (b).) We review a denial of a motion for new trial under the abuse of discretion standard. (*People v. Navarette* (2003) 30 Cal.4th 458, 526; *People v. Seaton* (2001) 26 Cal.4th 598, 693.)

The record belies U.S. Fire's contention that there is no evidence that the hauling contract rates were reduced because of U.S. Fire's denial of coverage and delay in settling the Claim. Blue Diamond's director of member relations, David Baker, testified that he reduced Button's hauling rates "due to a delay in response to our claim for the damages that we incurred because of the PCNB that was in the trailers that were dumped." Richard Nitzkowski, Button's vice president and a certified public accountant, testified that Blue Diamond reduced Button's hauling rates approximately seven percent and calculated the loss of revenue to Button based on this reduction.

U.S. Fire also argues there was no admissible evidence in support of an award of damages for loss of goodwill. However, Baker also testified that in June 2002 he was concerned that Button lacked liability coverage for the Claim, that he did not allow

Button to bid on another trucking route, that he reduced Button's hauling rates and kept them low even after entering into the settlement with U.S. Fire. Bob Button also testified regarding the damage to Button's reputation among its customers, some of whom concluded that Button was an uninsured carrier because of U.S. Fire's denial of coverage and delay in settlement. Valuation of goodwill is a question of fact for the jury, "taking all the circumstances, including the testimony of persons familiar therewith, into consideration." (*Burton v. Burton* (1958) 161 Cal.App.2d 572, 577.) The jury was entitled to conclude that Button suffered a loss of goodwill and to include such in the economic damages awarded.

The jury could also have awarded damages for lost profits in addition to lost goodwill. Where lost profits are shown, recovery will not be denied because the amount cannot be established with mathematical precision. (See *Shade Foods, supra*, 78 Cal.App.4th at p. 890.) The evidence supports the imposition of future damages based on Blue Diamond's continued imposition of lower hauling rates in order to recoup its losses and take advantage of Button's weakened position in the market. The economic damages awarded by the jury are neither excessive nor speculative.

U.S. Fire also contends it is entitled to a new trial on damages because of improper argument by Button's counsel that "ignited the passion of the jury" and resulted in an excessive damage award. During closing argument, Button's counsel contended that U.S. Fire considered its conduct to be reasonable and an example of good claims handling practices. Counsel told the jury, "you're the judges," and asked them to "send a message" to U.S. Fire. U.S. Fire's objection was sustained. Button's counsel also argued that the jury should tell U.S. Fire to "stop suing insureds for making claims." Again, the objection was sustained. However, U.S. Fire did not request that the jury be admonished. "'"[A] claim of misconduct is entitled to no consideration on appeal unless the record shows a timely and proper objection and a request that the jury be admonished."'" (*Menasco v. Snyder* (1984) 157 Cal.App.3d 729, 733.) Moreover, we have already rejected the assertion that the damages imposed in this case were excessive, and there is no support for U.S. Fire's claim of prejudice.

E. *Entry of Judgment Against Bob Button*

Finally, U.S. Fire asks this court to enter judgment in favor of U.S. Fire on the claims asserted in the cross-complaint by Bob Button. The cross-complaint was filed by both Button and Bob Button. During trial, the court determined that Bob Button was not an "insured" under either the Truckers Policy or the CGL Policy. Apparently, no evidence was submitted regarding Mr. Button's claims and they did not go to the jury. The judgment that was entered in this case contained no reference to his claims. U.S. Fire subsequently requested that the trial court amend its judgment to reflect that judgment was entered in favor of U.S. Fire on these claims. The trial court denied the request "without prejudice" because the case was on appeal. U.S. Fire offers no authority for its request, and we deny it.

IV. DISPOSITION

The judgment is affirmed.

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Haerle, J.

We concur:

_____
Kline, P.J.

_____
Lambden, J.