ALLIED FRAMERS, INC., Cross-complainant and Appellant,
v.
GOLDEN BEAR INSURANCE COMPANY, Cross-defendant and Respondent.
A129733
COURT OF APPEAL OF THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT DIVISION THREE
Dated: September 16, 2011
NOT TO BE PUBLISHED IN OFFICIAL REPORTS

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(San Mateo County Super. Ct. No. CIV 485635)

Allied Framers, Inc. (Allied) appeals after the trial court sustained, without leave to amend, a demurrer to Allied's second amended cross-complaint against its excess insurance carrier Golden Bear Insurance Company (Golden Bear). Allied contends its cross-complaint states valid claims for breach of written and oral contracts, breach of the implied covenant of good faith and fair dealing, indemnity and declaratory relief. The causes of action arise from Golden Bear's handling of a claim made by Allied after its primary insurance carrier became insolvent. We conclude the cross-complaint states a cause of action for breach of the implied covenant of good faith and fair dealing, but we reject Allied's remaining arguments. Accordingly, we affirm in part and reverse in part.

I. FACTUAL AND PROCEDURAL BACKGROUND[1]

A. The Golden Bear Excess Policy

1. Policy Limits and Underlying Insurance

Golden Bear issued to Allied an "Excess Liability Policy" (policy number GBX 24006) (the Golden Bear policy or the excess policy).[2] The Coverage section of the policy provides that Golden Bear will "indemnify [Allied] for *ultimate net loss* in excess of the underlying insurance . . . , but *not in excess of [Golden Bear's] limits of liability* stated in Item 3 of the Declarations." (Italics added.) The policy declarations specify that the underlying insurance is a commercial general liability policy with limits of $1 million per occurrence and $2 million in the aggregate. Golden Bear's per occurrence and annual aggregate limit is $2 million.

2. Investigation, Defense and Settlement

Section III of the Golden Bear policy states: "The Company [i.e., Golden Bear] shall not be obligated to investigate, defend or settle any claim or suit against the Insured, but the Company shall have the right and shall be given the opportunity to associate with

the Insured or its underlying insurers, or both, in the investigation, defense or settlement of any claim or suit which, in the opinion of the Company, involves or appears reasonably likely to involve the Company. If the Company avails itself of such right and opportunity, the insured, its insurers and the Company shall cooperate in such matters so as to effect a final determination thereof. The insured shall not make or agree to any settlement for an amount in excess of underlying insurance without the approval of the Company." (Italics added.)

Section III of the Golden Bear policy also allocates responsibility for "costs." "Subject to the above provision [i.e., the paragraph of section III addressing investigation, defense and settlement], costs incurred by the Insured shall be borne as follows: [¶] (a) all costs incurred by the Insured without the written consent of the Company shall be borne by the Insured; [¶] (b) if a claim or suit is settled for not more than the limits of underlying insurance, no costs shall be payable by the Company; [¶] (c) if the sum for which a claim or suit is settled exceeds the limits of underlying insurance, then the Company, if it approves such settlement or consents to the continuation of the proceedings, shall contribute to the costs incurred by the Insured in the proportion which the amount of ultimate net loss as finally determined to be payable by the Company bears to the total amount paid on such claim or suit by all interests . . . ." The definitions section of the policy specifies that "costs" include "legal expenses."

The policy obligates Golden Bear to indemnify Allied for up to $2 million of "ultimate net loss" in excess of the underlying insurance. "Ultimate Net Loss" is "the total of all sums which the Insured, or any organization as its insurer, or both, shall become legally obligated to pay, whether by reason of adjudication or settlement, because of an occurrence covered under the terms of the controlling underlying insurance policy and to which this Policy applies; ultimate net loss shall include costs . . . ." (Italics added.) Because the "costs" are defined in the policy to include "legal expenses," any defense costs owed by Golden Bear are credited toward its obligation to pay the $2 million policy limit.[3]

3. Insolvency

The Golden Bear policy specifies that it does not replace primary insurance in the event a primary insurer becomes insolvent. The insolvency endorsement states in part: "This insurance is modified by the following provisions: [¶] This insurance shall not take the place of any other insurance shown in the Schedule of Underlying Insurance policies which is or becomes invalid, uncollectible or otherwise unavailable due to the insolvency of the underlying insurer. The risk of such insolvency is retained by the Insured, and not by the Company. [¶] . . . [¶] The above provisions apply to both (1) the Company's obligation to indemnify or to pay on behalf of the Insured, and (2) the Company's obligation to defend."

B. The Ryland Action

1. Allied's Tenders and Ryland's Demand to Golden Bear

On or about October 25, 2003, a construction defect action was filed against Allied in San Mateo County Superior Court, entitled Ryland Homes v. A-1 Door, et al. (Case No. CIV 4321) (the Ryland action). Because Allied's primary carrier was insolvent, the California Insurance Guarantee Association (CIGA) provided and paid for Allied's defense until June 8, 2006. CIGA retained the law firm of Gray Duffy, LLP aka Gray, York & Duffy, LLP (Gray Duffy) to defend Allied.

In March 2006, Gray Duffy informed Allied that CIGA likely would stop paying for Allied's defense. On April 4, 2006, Allied first tendered defense of the Ryland action to Golden Bear. On or about April 18, 2006, Golden Bear acknowledged Allied's tender, but declined to provide coverage based on its understanding that Allied had not yet exhausted its $1 million of primary insurance. On May 8, 2006, CIGA notified Allied it would withdraw its defense effective June 8, 2006.

On May 11, 2006, counsel for Ryland wrote to Golden Bear and demanded the policy limits in settlement. The cross-complaint alleges that the letter and supporting information provided by Ryland demonstrated (1) that Allied's $1 million in primary coverage had been paid out (apparently through repairs or payments incurred by Ryland, an additional insured), and (2) Allied's liability would exceed the Golden Bear policy limits. On May 18, 2006, Golden Bear responded by letter to Ryland's counsel, stating in part: " 'It is our intention to provide each insured with every benefit they may be entitled to under the terms of the policy.' " Ryland's counsel copied Allied with the demand letter, but Golden Bear did not copy Allied with its reply. By May 26, 2006, Golden Bear retained counsel to investigate and analyze its potential exposure.

On June 6, 2006, Allied executed a retention letter to allow Gray Duffy to continue to defend Allied.

Allied tendered its claim directly to Golden Bear on June 14, 2006. In its letter, Allied stated that CIGA had withdrawn its defense and that the Ryland action threatened Allied's continued existence. Allied demanded that Golden Bear immediately settle the Ryland action. Golden Bear did not respond.

Allied retained coverage counsel on June 26, 2006. Its coverage counsel again tendered its claim to Golden Bear on July 17, 2006. Included with the tender was a proposed cross-complaint against Golden Bear in the Ryland action for breach of contract and breach of the implied covenant of good faith and fair dealing. Golden Bear did not provide a written response.

2. Golden Bear's Participation in the Ryland Action

On July 27, 2006, Golden Bear attended a mandatory settlement conference and offered to pay $500,000 on behalf of Allied to settle the Ryland action. Ryland rejected the offer.

The cross-complaint alleges that, during a telephone conference call on August 3, 2006, Golden Bear's counsel stated the company would pay for Allied's defense. On or about August 4, 2006, Golden Bear "advised [Allied] that it would be hiring Low, Ball &

Lynch (Low) to defend Allied in the matter but that [Gray Duffy] would remain involved in the case to help educate new counsel on the [Ryland action]." Low formally associated in as defense counsel for Allied on or shortly after August 7, 2006.

On several occasions between August 7, 2006, and August 21, 2006, Allied's coverage counsel wrote letters to Golden Bear expressing Allied's understanding that Golden Bear would be responsible for all attorney fees incurred by Allied in connection with the Ryland claim.

Between July and September 2006 Allied received invoices totaling $43,337.26 from Gray Duffy. Allied believed these invoices were for services rendered after Allied's initial tender to Golden Bear and CIGA's June 8, 2006 withdrawal. Allied forwarded the invoices to Golden Bear for payment.

3. Settlement of the Ryland Action

On August 21, 2006, the parties reached a settlement of the Ryland action. Golden Bear agreed to pay its $2 million policy limit to Ryland on Allied's behalf. The cross-complaint alleges that, at the settlement conference, Golden Bear's counsel represented to Allied's president that the settlement would include all fees and costs incurred by Allied in the Ryland action. Allied understood this to mean that Golden Bear had paid or would pay all the Gray Duffy fees and costs. If Allied had understood that it was to be responsible for any of the fees incurred by either Gray Duffy or Low, "they would have demanded that the proposed settlement payment to Ryland be reduced in an amount equal to the defense costs incurred, thereby leaving sufficient insurance assets to pay the fees and costs" incurred. According to the cross-complaint: "Neither Golden Bear, [its counsel], nor the [Low] attorney in attendance suggested or in any way indicated that an attempt should be made to negotiate a settlement amount which would leave sufficient funds to pay the incurred defense costs . . ." and Allied "is informed and believes that no such attempt was in fact made . . . ." Allied also alleges, on information and belief, that Ryland would have agreed to such a reduced settlement amount.

Gray Duffy "continued to perform legal services after Golden Bear retained [Low] up to and including attending the August 21, 2006 Mandatory Settlement Conference." On August 21, 2006, Gray Duffy prepared a substitution of attorney form for Low, to reflect that Gray Duffy was withdrawing entirely from the Ryland matter.

On or about September 12, 2006, Golden Bear's counsel faxed a letter to Allied's coverage counsel, confirming that Golden Bear would pay the $2 million. The cross-complaint alleges that, in the letter, "[Golden Bear's lawyer] further wrote: 'The payment of $2,000,000 will exhaust the Golden Bear policy. **Once the payment is made** Golden Bear will owe no further or future obligations to [Allied].' [Emphasis added.] [Counsel] wrote that he had recently spoken with [Gray Duffy] attorney Tom Yen, advising Mr. Yen that Golden Bear would be paying for fees associated with work performed at the request of [Low] and that Mr. Yen had said that 'he would be segregating those fees and sending an invoice to' [Golden Bear's lawyer]." The cross-complaint alleges on information and belief that, despite this conversation, Gray Duffy never sent the invoices.

On September 20, 2006, Allied's coverage counsel wrote a letter responding to Golden Bear's confirmation of the $2 million payment. Allied expected Golden Bear would honor its obligation to pay all attorney fees and costs incurred after CIGA's withdrawal. Allied's coverage counsel never received a reply, and neither he nor Allied was ever told that the Gray Duffy bills forwarded to Golden Bear had not been paid.

Allied also sent copies to Low of the invoices it had received from Gray Duffy for fees and costs incurred after CIGA's withdrawal, as well as copies of invoices for fees and costs incurred in seeking coverage under the Golden Bear policy. Allied asked Low to forward the invoices to Golden Bear for payment. On September 21, 2006, Low advised Allied that it had forwarded the invoices as requested. Golden Bear did not return the invoices, and Allied assumed Golden Bear had paid Gray Duffy.

In October, Allied executed a final settlement agreement and release in the Ryland action, and Golden Bear issued its check for $2 million payable to Ryland's attorneys.

The cross-complaint alleges that, when Allied executed the settlement agreement, it "understood and believed that the settlement of the [Ryland action], and all related expenses, including the [Gray Duffy] invoices and the [Low] fees, had been or would be paid by Golden Bear." If Allied had known that Golden Bear had not paid and did not intend to pay the Gray Duffy invoices, Allied would not have signed the agreement. Instead, Allied "would have instructed defense counsel to reopen settlement negotiations with Ryland so as to reduce the proposed settlement payment by an amount sufficient to allow payment of [all] outstanding invoices to be made within the $2 million policy limit." Alternatively or additionally, Allied would have filed suit against Golden Bear, as it had contemplated in July 2006.

Golden Bear never sent Allied a letter reserving its rights to decline coverage.

C. The Present Action

1. Gray Duffy's Complaint

In November 2008, Gray Duffy informed Allied that it owed Gray Duffy approximately $86,000 in unpaid fees incurred in the Ryland action. (This amount apparently was later reduced to approximately $75,000 after Gray Duffy applied a $10,000 retainer provided by Allied.) Allied alleges that, from the time it signed the Ryland settlement agreement in October 2006 until the communication from Gray Duffy in November 2008, Allied "had no knowledge or indication whatsoever that Golden Bear had not in fact paid the [Gray Duffy] invoices."

Gray Duffy filed a suit against Allied. In July 2009, after it was served with Gray Duffy's complaint, Allied "repeatedly contacted" Golden Bear in an effort to confirm that Golden Bear had paid the 2006 Gray Duffy invoices. Golden Bear did not respond. Allied formally tendered the Gray Duffy complaint to Golden Bear. Golden Bear denied coverage.

2. Allied's Cross-complaint

Allied cross-complained against Gray Duffy and Golden Bear.[4] In the operative cross-complaint, Allied asserts causes of action against Golden Bear for (1) breach of written insurance contract—failure to indemnify, (2) breach of written insurance contract —failure to defend, (3) breach of the implied covenant of good faith and fair dealing—failure to indemnify, (4) breach of oral contract, (5) full equitable indemnity, (6) partial indemnity/apportionment of fault, and (7) declaratory relief. All the claims arise primarily from Golden Bear's failure to settle the Ryland action earlier than it did, and from Golden Bear's failure to pay Gray Duffy's fees and costs after CIGA's withdrawal.[5]

3. Golden Bear's Demurrer

Golden Bear demurred. In part, Golden Bear argued that (1) its $2 million settlement payment exhausted the Golden Bear policy, so Allied was entitled to no further policy benefits, (2) the Golden Bear policy expressly negates any duty to defend, (3) Allied could not maintain a claim for breach of the implied covenant of good faith and fair dealing because Golden Bear fully performed its contractual obligations, and (4) Allied's remaining causes of action were also defective.

The court sustained the demurrer without leave to amend. The court concluded Golden Bear had no obligation under the excess policy to "step in and do anything," but had paid its policy limits to protect Allied from significant potential exposure. As to Allied's argument that Golden Bear should have settled sooner, the trial court stated Golden Bear "had to take some reasonable time to evaluate what it should do." Because Golden Bear ultimately paid its policy limits, the court found no basis for a bad faith claim.

The court entered judgment dismissing the cross-complaint with prejudice. Allied timely appealed.

II. DISCUSSION

A. Standard of Review

In reviewing whether the trial court erred in sustaining Golden Bear's demurrer without leave to amend, we review the cross-complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory. (McCall v. PacifiCare of Cal., Inc. (2001),25 Cal.4th 412.) " ? "We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed." [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff.' " (Zelig v. County of Los Angeles (2002),27 Cal.4th 1112, citing Blank v. Kirwan (1985),39 Cal.3d 311.) " 'Where written documents are the

foundation of an action and are attached to the complaint and incorporated therein by reference, they become a part of the complaint and may be considered on demurrer.' " (Qualcomm, Inc. v. Certain Underwriters at Lloyd's, London (2008) 161 Cal.App.4th 184, 191 (Qualcomm).)

We will affirm a " 'trial court's decision to sustain a demurrer [if it] was correct on any theory. [Citation.]' [Citation.] Accordingly, 'we do not review the validity of the trial court's reasoning but only the propriety of the ruling itself.' " (Berg & Berg Enterprises, LLC v. Boyle (2009),178 Cal.App.4th 1020.)

B. Interpretation of Insurance Contracts

"Well-defined rules guide our interpretation of insurance policies: 'Insurance policies are contracts and, therefore, are governed in the first instance by the rules of construction applicable to contracts. Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs its interpretation. (Civ. Code, § 1636.)[6] Such intent is to be inferred, if possible, solely from the written provisions of the contract. (Id., § 1639.) . . . If the meaning a layperson would ascribe to the language of a contract of insurance is clear and unambiguous, a court will apply that meaning. [Citations.] [¶] In contrast, "[i]f there is ambiguity . . . it is resolved by interpreting the ambiguous provisions in the sense the promisor (i.e., the insurer) believed the promisee understood them at the time of formation. (Civ. Code, § 1649.)" . . . "This rule, as applied to a promise of coverage in an insurance policy, protects not the subjective beliefs of the insurer, but, rather, 'the objectively reasonable expectations of the insured.' [Citation.] Only if this rule does not resolve the ambiguity do we then resolve it against the insurer." ' " (Wells Fargo, supra, 38 Cal.App.4th at pp. 942-943.)

In addition, " '[i]n the insurance context, we generally resolve ambiguities in favor of coverage. [Citations.] Similarly, we generally interpret the coverage clauses of insurance policies broadly, protecting the objectively reasonable expectations of the insured. [Citations.] These rules stem from the fact that the insurer typically drafts policy language, leaving the insured little or no meaningful opportunity or ability to bargain for modifications. [Citations.] Because the insurer writes the policy, it is held "responsible" for ambiguous policy language, which is therefore construed in favor of coverage.' " (Wells Fargo, supra, 38 Cal.App.4th at p. 943.)

Applying these principles at the pleading stage, "an insurer [demurring] based on insurance policy language must establish conclusively that this language unambiguously negates beyond reasonable controversy the construction alleged in the body of the complaint. [Citation.] To meet this burden, an insurer is required to demonstrate that the policy language supporting its position is so clear that parol evidence would be inadmissible to refute it. [Citation.] Absent this showing, the court must overrule the demurrer and permit the parties to litigate the issue in a context that permits the development and presentation of a factual record, e.g., summary judgment or trial." (Palacin v. Allstate Ins. Co. (2004),119 Cal.App.4th 855 (Palacin); accord, Qualcomm, supra, 161 Cal.App.4th at p. 192.)

"Parol evidence is admissible to interpret an insurance policy if ' " relevant to prove a meaning to which the language of the instrument is reasonably susceptible." ' [Citation.] Although parol evidence may be admissible to determine whether the terms of a contract are ambiguous [citation], it is not admissible if it contradicts a clear and explicit policy provision." (Hervey v. Mercury Casualty Co. (2010),185 Cal.App.4th 954 (Hervey).) "When the facts are undisputed, as they are deemed to be when ruling on a demurrer, the interpretation of a contract, including whether an insurance policy is ambiguous . . . is a question of law." (Id. at pp. 962-963.)

In its cross-complaint, Allied alleges that Golden Bear, by failing to settle the Ryland action earlier and by failing to pay the Gray Duffy fees and costs, breached its express and implied contractual duties under the excess policy. We will assume those allegations satisfy the requirement that Allied must allege the meaning it ascribes to the policy (see Hervey, supra, 185 Cal.App.4th at p. 964; Hayter Trucking, Inc. v. Shell Western E&P, Inc. (1993) 18 Cal.App.4th 1, 18), and we will determine whether the policy is reasonably susceptible of such meaning.[7] (See Hervey, supra, at p. 964.)

C. Second Cause of Action: Breach of Written Contract—Failure to Indemnify

There is no dispute that Golden Bear paid its full $2 million policy limit to settle the Ryland action on Allied's behalf. However, Allied claims that Golden Bear breached the excess policy by failing to do so in a timely manner. Specifically, Allied says that, after Golden Bear received Allied's April 2006 tender and Ryland's May 11, 2006 demand, Golden Bear should have acted more promptly to investigate and settle the action or paid all the defense costs while considering its options. Allied alleges that it was forced to incur attorney fees and costs due to Golden Bear's delay.

Because we will separately consider, in part II.E of this opinion, whether Golden Bear's alleged delay could violate the implied covenant of good faith and fair dealing, we construe this cause of action for breach of written contract as alleging a claim based upon an express provision of the policy. (See Archdale v. American International Specialty Lines Ins. Co. (2007),154 Cal.App.4th 449 & fn. 18 (Archdale) [where insured asserted overlapping causes of action for breach of contract and breach of implied covenant, court construed breach of contract claim as asserting breach of express policy provisions].) The Golden Bear policy imposes no express duty upon the company to settle claims promptly. Instead, Golden Bear's duty was to indemnify for an ultimate net loss up to the policy limits. Since Golden Bear paid its policy limits to settle the claim, there is no cause of action for breach of any express duty to indemnify Allied. The court correctly sustained the demurrer to this cause of action.

D. Third Cause of Action: Breach of Written Contract—Failure to Defend

1. Golden Bear Had No Contractual Duty to Defend

"[U]nless a contrary intention appears" a defense obligation is implied in all indemnity agreements. (§ 2778; see Maryland Casualty Co. v. Nationwide Ins. Co. (1998),65 Cal.App.4th 21; Save Mart Supermarkets v. Underwriters at Lloyd's London (N.D. Cal. 1994) 843 F.Supp. 597, 602 (Save Mart) [applying California law].) If an

insurance policy unambiguously excludes such a duty, an insurer has no duty to defend. (See Maryland Casualty Co. v. Nationwide Ins. Co., supra, 65 Cal.App.4th at pp. 30-33; General Star Indemnity Co. v. Superior Court (1996),47 Cal.App.4th 1586 (General Star); Save Mart, supra, 843 F.Supp. at pp. 602-603 [no duty to defend where policy explicitly provides insurer with option to participate in defense]; Chubb/Pacific Indemnity Group v. Insurance Co. of North America (1987),188 Cal.App.3d 691 (Chubb) [excess policies "expressly exclude[d] the obligation to assume responsibility for the defense," while reserving insurer's right to participate if it chose to do so].) If the insured has excess coverage, the implied duty inures to the excess carrier after the primary policy limits are exhausted, unless the excess policy provides to the contrary. (Hartford, supra, 23 Cal.App.4th at pp. 1779-1780; Pacific Indemnity Co. v. Fireman's Fund Ins. Co. (1985) 175 Cal.App.3d 1191, 1198 (Pacific); Aetna Cas. & Surety Co. v. Certain Underwriters (1976),56 Cal.App.3d 791 (Aetna).)

The Golden Bear policy unambiguously excludes any duty to defend. The policy states Golden Bear "shall not be obligated to investigate, defend or settle any claim or suit against the Insured, but [Golden Bear] shall have the right and shall be given the opportunity to associate with the Insured or its underlying insurers, or both, in the investigation, defense or settlement of any claim or suit . . . ." The policy thus negates the implied duty to defend that otherwise would have arisen upon the exhaustion of the primary policy limits. (See Hartford, supra, 23 Cal.App.4th at pp. 1779-1780; Pacific, supra, 175 Cal.App.3d at pp. 1198-1200; Aetna, supra, 56 Cal.App.3d at pp. 800-801; see also Chubb, supra, 188 Cal.App.3d at pp. 698-699; Save Mart, supra, 843 F.Supp. at pp. 602-603.)

On appeal, Allied concedes this point and says the Golden Bear policy "provid[es] a right but not a duty to defend." Allied contends, however, that the policy language "assumes that there is an underlying carrier that has an obligation to defend," and that its primary insurer's insolvency required Golden Bear to "drop down and defend, or settle." If a primary carrier is insolvent, the express provisions of the excess policy determine whether the excess insurer is obligated to step into the primary carrier's shoes and fulfill its indemnity and defense obligations. (See Wells Fargo, supra, 38 Cal.App.4th at pp. 943-944; Span, Inc. v. Associated International Ins. Co. (1991),227 Cal.App.3d 463 (Span); see also Ticor Title Ins. Co. v. Employers Ins. of Wausau (1995),40 Cal.App.4th 1699 (Ticor) [applying insolvency analysis where primary carrier refused to defend].) "California case law has consistently protected the limited and shielded position of the excess carrier when the obligations of the excess carrier are set in clear phrases." (Ticor, supra, 40 Cal.App.4th at p. 1708.) The insolvency endorsement to the Golden Bear policy specifies that the policy "shall not take the place of any underlying primary policy if the primary carrier becomes insolvent. The insolvency of Allied's primary insurer did not trigger a defense obligation for Golden Bear. (See Wells Fargo, supra, 38 Cal.App.4th at pp. 944-945; Span, supra, 227 Cal.App.3d at pp. 477-478; see also Ticor, supra, 40 Cal.App.4th at pp. 1709-1710.)

Allied alleges in the cross-complaint that the policy obligates Golden Bear to reimburse defense costs. The portion of the policy that Allied quotes in the cross-complaint provides that, if a claim is settled for an amount in excess of the primary

policy limits, and Golden Bear "approves such settlement or consents to the continuation of the proceedings," then Golden Bear must contribute a portion of Allied's defense costs. No matter. Under the policy, any obligation to reimburse defense costs is subject to the $2 million policy limit. Because Golden Bear's settlement payment exhausted the policy limits, Golden Bear has no further contractual obligation to reimburse Allied for defense costs.[8]

2. Golden Bear Had No Equitable Duty to Defend

Allied contends that, even if there was no contractual duty to defend, Golden Bear had an "equitable" duty because there was a risk Allied otherwise would be left without a defense. In support of this argument, Allied relies on decisions addressing the allocation of defense costs among insurers, including Pacific, Aetna, and Signal Cos. v. Harbor Ins. Co. (1980),27 Cal.3d 359 (Signal). The concept of contribution among insurers invokes different considerations than the liability inherent in an insurer's relationship to its insured. Under those and other decisions, an excess carrier is not normally responsible for defense costs incurred prior to exhaustion of the primary coverage (Signal, supra, 27 Cal.3d at p. 368), but may have a duty to defend after the primary coverage is exhausted when the excess policy does not provide to the contrary. (See Hartford, supra, 23 Cal.App.4th at p. 1780; Pacific, supra, 175 Cal.App.3d at pp. 1198-1200; Aetna, supra, 56 Cal.App.3d at pp. 800-801.) If the primary carrier continues to defend after exhaustion of the primary policy under a reservation of rights, the excess carrier can have an equitable duty to reimburse the primary carrier for the excess carrier's share of defense costs. (Hartford, supra, 23 Cal.App.4th at p. 1780; Aetna, supra, 56 Cal.App.3d at pp. 800-801; Pacific, supra, 175 Cal.App.3d at pp. 1198-1201.) However, where the excess policy expressly excludes a duty to defend, the excess carrier has no equitable obligation to contribute to defense costs. (Chubb, supra, 188 Cal.App.3d at pp. 698-699.) Because the Golden Bear policy expressly excludes a duty to defend, there is no equitable basis for requiring it to defend or to pay defense costs.

Allied contends that language in the Supreme Court's decision in Signal establishes this equitable duty. But in Signal the equitable considerations governed the relationships among insurers who had not contracted with each other. " 'The reciprocal rights and duties of several insurers who have covered the same event do not arise out of contract, for their agreements are not with each other . . . . Their respective obligations flow from equitable principles designed to accomplish ultimate justice in the bearing of a specific burden. As these principles do not stem from agreement between the insurers their application is not controlled by the language of their contracts with the respective policy holders.' " (Signal, supra, 27 Cal.3d at p. 369, italics added.) The Supreme Court emphasized, however, that requiring an excess insurer to reimburse a primary insurer "in contravention of [the excess insurer's] policy could only be justified . . . by some compelling equitable consideration." (Ibid., italics added.) The Signal court found no such consideration present, because the primary carrier had expended the defense costs in the performance of its own contractual duties to the insured, and because the insured was protected by the primary carrier's duty to defend. (Id. at pp. 369-370.)

Allied relies on the Signal court's reference to the allocation of defense costs among carriers based on "equitable principles" to assert that an excess carrier has an "equitable duty to defend" its insured, despite contrary policy language, whenever the primary carrier is insolvent or fails to defend. We disagree. The Signal court stated only that, as between insurers, whose relationships are not governed by contract, equitable considerations potentially could justify modifying the usual rule that an excess insurer need not contribute to defense costs incurred prior to exhaustion of the primary policy limits. (Signal, supra, 27 Cal.3d at p. 369.) The Signal court did not establish a rule that an excess carrier has an equitable duty to defend, regardless of its policy language, whenever the primary carrier is insolvent or otherwise fails in its duty. To recognize such a broad equitable responsibility would be contrary to the case law establishing that policy language controls a duty to defend (see General Star, supra, 47 Cal.App.4th at pp. 1592-1593; City of Oxnard v. Twin City Fire Ins. Co. (1995),37 Cal.App.4th 1072; Alex Robertson Co. v. Imperial Casualty & Indemnity Co. (1992),8 Cal.App.4th 338; Save Mart, supra, 843 F.Supp. at pp. 602-603; Chubb, supra, 188 Cal.App.3d at pp. 698-699) and any duty to drop down in the event of insolvency. (See Wells Fargo, supra, 38 Cal.App.4th at pp. 943-944; Span, supra, 227 Cal.App.3d at pp. 474-475; see also Ticor, supra, 40 Cal.App.4th at pp. 1708-1709.)

The Signal court stated that, where a carrier was "expressly designated as an excess insurer," there was "no reasonable basis for assuming that the reasonable expectations of either the insured or the primary carrier were that the excess carrier would participate in defense costs beyond the express terms of its policy." (Signal, supra, 27 Cal.3d at p. 369.) Similarly, here, Allied could not have had a reasonable expectation that Golden Bear would do so.

3. Golden Bear's Exercise of Its Contractual Right to Participate in the Defense Did Not Obligate Golden Bear to Defend the Entire Action

Allied alleges that in early August 2006 Golden Bear retained Low, which "associated in as defense counsel" in the Ryland action. Allied argues that once Golden Bear retained Low, Golden Bear "was required to defend the entirety of the matter" and to pay all defense fees, including the Gray Duffy fees.

However, according to the terms of the Golden Bear policy, Golden Bear's retention of Low did not trigger its obligation to pay the Gray Duffy fees. In addition to excluding a duty to defend, Golden Bear reserved the right to "associate with" Allied or its underlying insurers in defense of any claim. If Golden Bear "avails itself of such right and opportunity," Allied, its insurer, and Golden Bear are to "cooperate in such matters so as to effect a final determination thereof." The policy thus contemplates that Allied or its underlying insurer will continue to participate in the action and cooperate with Golden Bear. Accordingly, Golden Bear's exercise of its right to participate in the defense of a claim does not require Golden Bear to take charge of and pay for the entire defense.

In support of its argument to the contrary, Allied relies on Buss v. Superior Court (1997),16 Cal.4th 35 (Buss), and Presley Homes, Inc. v. American States Ins. Co. (2001),90 Cal.App.4th 571 (Presley). The Buss and Presley decisions are premised on

the rule that an insurer with a contractual duty to defend must defend the entirety of a "mixed" action, in which some claims are potentially covered and others are not. (Buss, supra, 16 Cal.4th at pp. 45, 48-49; Presley, supra, 90 Cal.App.4th at pp. 573, 575.) The duty to defend an entire "mixed" action does not arise out of the insurance policy, but is an "obligation imposed by law in support of the policy." (Buss, supra, 16 Cal.4th at p. 49.)

Buss and Presley do not assist Allied. The primary insurers in those cases each had a contractual duty to defend. As we have discussed, Golden Bear does not. The Golden Bear policy provides that Golden Bear may decline to defend, or may play a limited role in Allied's defense by associating with, and cooperating with, Allied and/or its underlying insurers.

4. Estoppel

Allied contends for the first time on appeal that because Golden Bear promised to defend Allied and to pay the Gray Duffy bills it is estopped to deny a duty to defend Allied. Allied argues it "relied upon [Golden Bear's] communications by continuing to use [Gray Duffy] as defense counsel, because Golden Bear agreed to defend, and never issued a reservation of rights."

Under the doctrine of equitable estoppel, when a party has, by its statement or conduct, intentionally led another party to believe a particular thing is true and to act upon that belief, the first party cannot take a contrary position in litigation. (Evid. Code, § 623; Supervalu, Inc. v. Wexford Underwriting Managers, Inc. (2009),175 Cal.App.4th 64 (Supervalu); Green v. Travelers Indemnity Co. (1986),185 Cal.App.3d 544 (Green).) "The doctrine operates defensively only. In other words, it protects a party from unfair advantage sought by another. It is not designed to permit a person, offensively, to thereby obtain unfair advantage." (Supervalu, supra, 175 Cal.App.4th at p. 77.) The elements of equitable estoppel are: (1) the party to be estopped has knowledge of the facts; (2) that party must intend that his or her conduct be acted on, or must so act that the party asserting the estoppel has a right to believe it was so intended; (3) the party asserting the estoppel must be ignorant of the true facts; and (4) the party asserting the estoppel must reasonably rely on the conduct to his or her detriment. (Honig v. San Francisco Planning Dept. (2005),127 Cal.App.4th 520 (Honig); Garamendi v. Golden Eagle Ins. Co. (2004),116 Cal.App.4th 694; Insurance Co. of the West v. Haralambos Beverage Co. (1987),195 Cal.App.3d 1308, disapproved on other grounds in Vandenberg v. Superior Court (1999),21 Cal.4th 815, fn. 13, and Buss, supra, 16 Cal. 4th at p. 50, fn. 12.) The burden of pleading and proving facts showing estoppel is on the insured. (Insurance Co. of the West v. Haralambos Beverage Co., supra, 195 Cal.App.3d at p. 1320.)

Allied failed to plead the theory of estoppel in the cross-complaint and failed to argue it in opposition to Golden Bear's demurrer. Nevertheless, assuming the equitable estoppel issue is cognizable in this appeal, it lacks merit. An estoppel claim is only viable if, as a result of Golden Bear's conduct, (1) Allied reasonably believed Golden Bear would pay the Gray Duffy fees, and (2) Allied reasonably relied on Golden Bear's

conduct to its detriment. (See State Farm Fire & Casualty Co. v. Jioras (1994),24 Cal.App.4th 1619; Ringler Associates Inc. v. Maryland Casualty Co. (2000),80 Cal.App. 4th 1165.) There are no allegations supporting these prerequisites for most of the Gray Duffy fees in issue. The cross-complaint does not allege any conduct by Golden Bear prior to August 3, 2006 that could have caused Allied to believe Golden Bear would defend Allied or pay the Gray Duffy fees. Allied's potential estoppel claim thus provides, at most, a ground for Allied to recover the Gray Duffy fees incurred between August 3 and August 21, 2006.

As of August 3, 2006, Allied alleges that Golden Bear's counsel informed Allied that "Golden Bear was going to pay for [Allied's] defense in the [Ryland action]," and "was going to pay all attorney fees incurred by [Gray Duffy] as part of getting [Low] up to speed[.]" On August 4, 2006, Golden Bear told Allied it was going to hire Low to defend Allied but that "[Gray Duffy] would remain involved in the case to help educate new counsel on the [Ryland action]." As to detrimental reliance, Allied's cross-complaint alleges that, if Golden Bear had not promised to pay all attorney fees incurred by Gray Duffy as part of getting Low up to speed, Allied "would have terminated [Gray Duffy] immediately . . . ."

But even as to fees incurred between August 3 and August 21, Allied's estoppel claim is not viable. Once liability has been incurred or a loss sustained, the doctrines of implied waiver and estoppel, based on the conduct or action of the insurer, are not available to bring within the policy's coverage risks not covered by its terms or those expressly excluded. (Advanced Network, Inc. v. Peerless Ins. Co. (2010),190 Cal.App. 4th 1054 (Advanced Network); Supervalu, supra, 175 Cal.App.4th at p. 77 [insurer's treatment of past claims could not be used to establish coverage through estoppel]; Manneck v. Lawyers Title Ins. Corp. (1994),28 Cal.App.4th 1294 (Manneck) [defendant title insurer's handling of insureds' claim without reserving rights or denying coverage could not establish coverage through estoppel].) While an insurer may waive or be estopped to assert grounds for forfeiture of policy benefits, the doctrines of waiver and estoppel may not be used to expand coverage not otherwise afforded by the policy. (Advanced Network, supra, 190 Cal.App.4th at p. 1066; Supervalu, supra, 175 Cal.App. 4th at p. 77.)

A ruling that Golden Bear is estopped to deny any duty to defend Allied or responsibility to Gray Duffy for fees would expand its coverage obligation. The policy expressly excludes a duty to defend. Moreover, to the extent the policy covers defense costs, those costs are subject to the $2 million policy limit, which has been exhausted. Allied, by seeking to use the estoppel doctrine to require Golden Bear to pay defense costs in excess of the policy limit, is seeking to expand its coverage.

An exception to the rule prohibiting use of the estoppel doctrine to expand coverage was stated in Miller v. Elite Ins. Co. (1980),100 Cal.App.3d 739 (Miller): " '[I]f a liability insurer, with knowledge of a ground of forfeiture or noncoverage under the policy, assumes and conducts the defense of an action brought against the insured, without disclaiming liability and giving notice of its reservation of rights, it is thereafter precluded in an action upon the policy from setting up such ground of forfeiture or

noncoverage. In other words, the insurer's unconditional defense of an action brought against the insured constitutes a waiver of the terms of the policy and an estoppel of the insurer to assert such grounds.' " In Miller, the insurer defended for over nine months without reserving its right to deny coverage. (Id. at pp. 749-750, 755.) The insured's detrimental reliance was evidenced by his failure to retain an attorney or to negotiate with the insurer or with the injured parties. (Id. at p. 755.) The insurer thus was estopped to deny its coverage defenses. (Id. at pp. 755-756.)

The facts of this case differ from Miller. Unlike the insurer in Miller, Golden Bear was not seeking to deny coverage for the Ryland action. Allied also does not allege that it was misled by Golden Bear to forego retention of an attorney or to otherwise protect itself against the claims asserted in the Ryland action. Instead, Allied contends that Golden Bear's alleged August 3, 2006 promise to pay the Gray Duffy fees misled Allied into continuing with Gray Duffy until the settlement was reached on August 21, 2006. If anything, continued retention of Gray Duffy provided Allied with additional protection against the Ryland claims. The alleged detriment suffered by Allied (i.e., having to pay the Gray Duffy fees between August 3 and August 21) differs in substance from the detriment in Miller, where in reliance on his insurer, the insured failed to protect himself from potential liability. We decline to extend to the circumstances of this case the Miller exception to the general rule against the use of estoppel to create coverage. (See, e.g., Supervalu, supra, 175 Cal.App.4th at p. 77; Manneck, supra, 28 Cal.App.4th at p. 1303.)

E. Fourth Cause of Action: Breach of Implied Covenant—Failure to Indemnify

Allied alleges Golden Bear breached the implied covenant of good faith and fair dealing by failing to promptly investigate and settle the Ryland action and by failing to act reasonably once it became involved in the defense and settlement of that action. Golden Bear argues this claim fails because it had no express or implied duty to settle. We conclude Allied can state a viable cause of action for breach of the implied covenant as to some of Golden Bear's alleged conduct.

"California law recognizes in every contract, including insurance policies, an implied covenant of good faith and fair dealing. [Citations.] In the insurance context the implied covenant requires the insurer to refrain from injuring its insured's right to receive the benefits of the insurance agreement. [Citation.] '[T]he covenant is implied as a supplement to the express contractual covenants, to prevent a contracting party from engaging in conduct that frustrates the other party's rights to the benefits of the agreement.' " (Brehm v. 21st Century Ins. Co. (2008) 166 Cal.App.4th 1225, 1235.) The implied duty of good faith applies to both primary and excess insurers. (Schwartz v. State Farm Fire & Casualty Co. (2001),88 Cal.App.4th 1329.)

The implied covenant imposes on a liability insurer a duty to accept a reasonable offer to settle a claim against its insured. (Archdale, supra, 154 Cal.App.4th at p. 464.) It thus obligates the insurer to " 'make reasonable efforts to settle a third party's lawsuit against the insured. If the insurer breaches the implied covenant by unreasonably refusing to settle the third party suit, the insured may sue the insurer in tort to recover

damages proximately caused by the insurer's breach.' " (Howard v. American National Fire Ins. Co. (2010),187 Cal.App.4th 498 (Howard).) When an insurer evaluates the reasonableness of a settlement offer, " 'the only permissible consideration . . . becomes whether, in light of the victim's injuries and the probable liability of the insured, the ultimate judgment is likely to exceed the amount of the settlement offer. Such factors as [1] the limits imposed by the policy, [2] a desire to reduce the amount of future settlements, or [3] a belief that the policy does not provide coverage, should not affect a decision as to whether the settlement offer in question is a reasonable one.' " (Archdale, supra, 154 Cal.App.4th at p. 464.)

While an excess insurer ordinarily has no duty to initiate settlement negotiations, just like a primary insurer, it must act in good faith in connection with the settlement of third party claims against its insured. (See Continental Casualty Co. v. Royal Ins. Co. of America (1990),219 Cal.App.3d 111 ["excess carrier has no duty to investigate settlement options"].) "[A]n excess insurer, although not contractually obligated to take an active part in the defense of an insured, still owes its insured a duty of good faith when faced with an offer of settlement that exhausts the underlying policy limits." (Fuller-Austin Insulation Co. v. Highlands Ins. Co. (2006),135 Cal.App.4th 958 (Fuller-Austin); accord, Diamond Heights Homeowners Assn. v. National American Ins. Co. (1991),227 Cal.App.3d 563 (Diamond Heights); Kelley v. British Commercial Ins. Co. (1963),221 Cal.App.2d 554 [excess insurer "obviously under a duty to exercise good faith toward its insured in considering any offer of compromise within the limits of its policy"].) The excess carrier must evaluate settlement options realistically and in good faith where a claim may exceed primary limits. (Fuller-Austin, supra, 135 Cal.App. 4th at p. 987; Diamond Heights, supra, 227 Cal.App.3d at p. 580.)

A policy provision requiring the excess insurer's consent to a settlement does not confer on the excess insurer an absolute right to withhold it. (Diamond Heights, supra, 227 Cal.App.3d at pp. 580-581; see Fuller-Austin, supra, 135 Cal.App.4th at p. 987.) "Consistent with its good faith duty, the excess insurer does not have the absolute right to veto arbitrarily a reasonable settlement and force the primary insurer [or the insured] to proceed to trial, bearing the full costs of defense. A contrary rule would impose the same unnecessary burdens upon the primary insurer [or insured] and the parties to the action, among others, as does the primary insurer's breach of its good faith duty to settle: ' ". . . [I]t imperils the public and judicial interests in fair and reasonable settlement of lawsuits . . . ." ' "[9] (Diamond Heights, supra, 227 Cal.App.3d at pp. 580-581; see Fuller-Austin, supra, 135 Cal.App.4th at p. 987.)

Finally, if an excess carrier has no contractual duty to participate in the settlement or defense of an action against its insured, but exercises its contractual right to do so, the excess insurer must act in good faith in conducting negotiations. (See Diamond Heights, supra, 227 Cal.App.3d at pp. 574, 578.) "Any insurer, whether excess or primary, in conducting settlement negotiations, is subject to an implied duty of good faith and fair dealing, which requires it to consider the interests of the insured equally with its own and evaluate settlement proposals as though it alone carried the entire risk of loss." (Id. at p. 578.)

The terms of the Golden Bear policy are consistent with these principles. The provision specifying that Golden Bear "shall not be obligated to investigate, defend or settle" any claim is consistent with the rule that an excess carrier ordinarily is not obligated to initiate settlement negotiations or explore settlement options. (See Continental Casualty Co. v. Royal Ins. Co. of America, supra, 219 Cal.App.3d at p. 119.) Accordingly, before Golden Bear received Ryland's May 11, 2006 settlement demand, it had no express or implied duty to seek to settle the Ryland action. To the extent the cross-complaint can be construed as alleging that Golden Bear had an obligation to settle immediately upon receipt of Allied's initial tender on April 4, 2006, that allegation fails to state a cause of action for bad faith.

However, contrary to Golden Bear's argument, the policy does not eliminate any duty of good faith in connection with settlement. Section III of the policy provides that (1) Golden Bear has no obligation to "investigate, defend or settle" any claim, and (2) Allied may not agree to a settlement for an amount in excess of the underlying policy limits without Golden Bear's "approval." Read as a whole, this provision is reasonably susceptible of a construction that, even though Golden Bear is not obligated to initiate settlement discussions, it still has a role in the settlement process by granting or withholding its "approval" of a settlement that exceeds the primary limits. As this court explained in Diamond Heights, this right of approval does not confer an absolute right to veto arbitrarily a reasonable settlement. Instead, Golden Bear was obligated to act in good faith when presented with a reasonable settlement offer. (See Diamond Heights, supra, 227 Cal.App.3d at pp. 574, 580-581; Fuller-Austin, supra, 135 Cal.App.4th at p. 987; Barney v. Aetna Casualty & Surety Co. (1986),185 Cal.App.3d 966; see generally Carma Developers (Cal.), Inc. v. Marathon Development California, Inc. (1992),2 Cal.4th 342 ["The covenant of good faith finds particular application in situations where one party is invested with a discretionary power affecting the rights of another. Such power must be exercised in good faith."].)

In the cross-complaint, Allied alleges that Golden Bear breached its duty of good faith by failing to properly evaluate and promptly accept Ryland's settlement demand. Because the policy does not unambiguously negate Golden Bear's duty to act in good faith upon receipt of a settlement demand, Allied has stated a cause of action for breach of the implied covenant of good faith and fair dealing following Golden Bear's receipt of Ryland's demand.[10] (See Palacin, supra, 119 Cal.App.4th at p. 862; Qualcomm, supra, 161 Cal.App.4th at p. 192; see also Hervey, supra, 185 Cal.App.4th at pp. 961-964.)

The Golden Bear policy also does not clearly negate Golden Bear's duty to act in good faith in conducting settlement negotiations once it exercises its contractual right to participate in the defense. (Diamond Heights, supra, 227 Cal.App.3d at pp. 574, 578.) To the contrary, the policy provides that, if Golden Bear exercises its right to participate in the defense or settlement of any claim, Allied and Golden Bear "shall cooperate in such matters so as to effect a final determination thereof." In the cross-complaint, Allied alleges Golden Bear acted in bad faith in connection with settlement negotiations by, for example, (1) refusing to pay defense fees "after promising [Allied] such costs would be paid in full," (2) failing to advise Allied about "actual or potential negative consequences of agreeing to the proposed settlement" (apparently including issues relating to whether

a policy limits settlement could eliminate Golden Bear's obligation to pay defense costs), and (3) retaining and controlling defense counsel (Low) who "failed to protect [Allied's] interests in the negotiation of the Ryland settlement . . . ." These allegations provide a second basis for Allied's cause of action for breach of the implied covenant.

Golden Bear contends that its "settlement actions" cannot support a bad faith claim because the excess policy provided Golden Bear with a discretionary right to settle. Golden Bear relies principally on New Hampshire Ins. Co. v. Ridout Roofing Co. (1998), 68 Cal.App.4th 495 (Ridout). In Ridout, the governing policy (a standard commercial general liability policy) obligated the insurer to defend potentially covered claims, and provided that the insurer " 'may investigate and settle any claim or "suit" at our discretion.' " (Id. at pp. 500-501.) The policy required the insured to pay a $5,000 per occurrence deductible, and permitted the insurer to pay the deductible to effect settlement and to seek reimbursement of the deductible from the insured. (Id. at p. 501.) After defending and settling several claims, the insurer sued the insured to recover the deductibles. (Id. at pp. 499-500.) In affirming a grant of summary judgment in favor of the insurer, Division Two of this district rejected the insured's argument that the implied covenant of good faith and fair dealing restricted the insurer's discretion to enter settlements that consumed the insured's deductibles. (Id. at pp. 504-505.) The appellate court stated: "The parties to this insurance contract gave the insurer the express right to settle claims and, if such settlements included the insured's deductible, to thereafter seek reimbursement from the insured. The exercise of such an express grant cannot, in our view, be limited by the implied covenant of good faith and fair dealing." (Id. at p. 505; accord, Solomon v. North American Life & Casualty Ins. Co. (1998),151 F.3d 1132 [under California law, "a party cannot be held liable on a bad faith claim for doing what is expressly permitted in the agreement"].)

To the same effect is this court's decision in Western Polymer Technology, Inc. v. Reliance Ins. Co. (1995),32 Cal.App.4th 14 (Western Polymer), discussed in Ridout. In Western Polymer, after the insurer settled a suit within policy limits, the insured sued for bad faith, claiming the settlement hurt the insured's reputation. (Id. at pp. 18, 26-27.) The governing policy gave the insurer the right and duty to defend any suit against the insured, and stated the insurer may " 'make such investigation and settlement of any claim or suit as it deems expedient . . . .' " (Id. at p. 18.) We noted that this type of clause is not unusual in liability insurance policies, and that, "[i]n general, the insurer is entitled to control settlement negotiations without interference from the insured." (Id. at p. 24.) We held that, although the implied covenant may limit a liability insurer's discretion to settle in some circumstances, it did not protect the insured's interest in safeguarding its business reputation. We concluded that extending bad faith liability in the circumstances would "excis[e] insurers' contractual right to control settlements . . . ." (Id. at pp. 26-28.)

Ridout and Western Polymer do not support Golden Bear's contention. Even a primary liability insurer with a contractual defense obligation and an accompanying contractual right to control settlements does not have the right to do so with unfettered discretion. (See Western Polymer, supra, 32 Cal.App.4th at pp. 24-26.) And, in contrast to the policies considered in Ridout and Western Polymer, the Golden Bear policy

neither imposes a defense obligation nor grants Golden Bear sole control over settlements. Instead, the policy affords Golden Bear the discretionary right to "associate with" Allied or its primary insurers in defending and settling an action. If Golden Bear exercises this right, Allied and Golden Bear must "cooperate" to effect a resolution of the matter. The policy also requires Golden Bear's "approval" of settlements negotiated by Allied. These provisions do not give Golden Bear unlimited discretion regarding settlement. Rather they are consistent with the implied duty to act in good faith when considering settlement demands and conducting negotiations.

Golden Bear's remaining arguments challenging the breach of covenant cause of action are not persuasive. First, Golden Bear contends Allied cannot establish a breach of the implied covenant unless it first establishes a breach of an express provision of the policy. As a general matter, there can be no breach of the implied covenant if no benefits are due under the policy. (Waller v. Truck Ins. Exchange, Inc. (1995),11 Cal.4th 1; Love v. Fire Ins. Exchange (1990),221 Cal.App.3d 1136.) However, "the principle that no breach of the covenant of good faith and fair dealing can occur if there is no coverage or potential for coverage under the policy is quite different from the argument that no breach of the implied covenant can occur if there is no breach of an express contractual provision . . . ." (Brehm v. 21st Century Ins. Co., supra, 166 Cal.App.4th at p. 1236.) Breach of a specific policy provision is not a prerequisite to a claim for breach of the implied covenant. (Ibid.; Schwartz v. State Farm Fire & Casualty Co., supra, 88 Cal.App.4th at p. 1339.) "[E]ven an insurer that pays the full limits of its policy may be liable for breach of the implied covenant, if improper claims handling causes detriment to the insured." (Schwartz v. State Farm Fire & Casualty Co., supra, 88 Cal.App.4th at p. 1339; accord, Carma Developers (Cal.), Inc. v. Marathon Development California, Inc., supra, 2 Cal.4th at p. 373 ["breach of a specific provision of the contract is not a necessary prerequisite" to an action for breach of the implied covenant of good faith]; Archdale, supra, 154 Cal.App.4th at pp. 456, 463-466 [although insurer fully performed its express contractual duties by defending insured and paying policy limits to satisfy judgment, summary judgment improperly entered on claim insurer breached its implied obligation to accept a reasonable settlement offer].)

Allied's allegations that Golden Bear engaged in dilatory or otherwise improper conduct in handling the Ryland action state a cause of action for breach of the implied covenant, whether or not the alleged conduct violated an express provision of the policy.

Next, Golden Bear argues Allied cannot maintain a cause of action for breach of the implied covenant unless a judgment is entered against Allied that exceeds Golden Bear's policy limits. In most cases, an excess judgment is needed to establish liability and damages for wrongful refusal to settle. (See Howard, supra, 187 Cal.App.4th at pp. 526-527; Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2010) | 12:355, pp. 12B-32 to 12B-33 (rev. # 1, 2010).) This is because if the ultimate judgment or settlement is within policy limits, the insurer has properly evaluated the claim and the insured is not harmed by the failure to settle. But an excess judgment is not the only way for an insured to establish liability and damages when an insurer fails to settle.

An insurer's wrongful failure to settle may be actionable even where no excess judgment is entered. (Howard, supra, 187 Cal.App.4th at p. 527; Croskey et al., Cal. Practice Guide: Insurance Litigation, supra, ¶¶ 12:391-12:391.2, p. 12B-37; see Camelot by the Bay Condominium Owners' Assn. v. Scottsdale Ins. Co. (1994) 27 Cal.App.4th 33, 48-49 ["there is no explicit requirement for bad faith liability that an excess judgment is actually suffered by the insured"]; see also Larraburu Brothers, Inc. v. Royal Indemnity Co. (1979),604 F.2d 1208 (Larraburu Bros.).) "An insured may recover for bad faith failure to settle, despite the lack of an excess judgment, where the insurer's misconduct goes beyond a simple failure to settle within policy limits or the insured suffers consequential damages apart from an excess judgment." (Howard, supra, 187 Cal.App.4th at pp. 527-528 [as a result of insurer's wrongful failure to settle, insured was forced to make payments to settle third-party action and incurred postjudgment attorney fees and accounting expenses]; see, e.g., J.B. Aguerre, Inc. v. American Guarantee & Liability Ins. Co. (1997),59 Cal.App.4th 6 [insurer allegedly used insured's fear of punitive damages to coerce contribution to settlement]; Bodenhamer v. Superior Court (1987),192 Cal.App.3d 1472 [insurer's misconduct allegedly damaged insured's business goodwill]; Barney v. Aetna Casualty & Surety Co., supra, 185 Cal.App.3d at pp. 976-978 [insurer settled claim without insured's consent]; Larraburu Bros., supra, 604 F.2d at pp. 1211, 1215 [insurer's conduct damaged insured's credit].)[11]

Here, Allied alleges that, as a result of Golden Bear's delay and other misconduct in settling the Ryland action, Allied suffered consequential damages, including fees and costs to defend that action. These allegations state a cause of action for bad faith despite the absence of an excess judgment.

Finally, Golden Bear contends it could not have committed bad faith by rejecting a settlement demand before it had a reasonable opportunity to evaluate the claim. (See Walbrook Ins. Co. v. Liberty Mutual Ins. Co. (1992),5 Cal.App.4th 1445 ["The relevant scope of the inquiry, both for the jury and here on appeal, is thus restricted to those settlement offers within defendant's policy limits presented after defendant became capable of making an informed decision to accept or reject them"].) However, Allied alleges in the cross-complaint that Ryland's May 11, 2006 demand included information establishing Allied's liability in excess of Golden Bear's policy limits. At the demurrer stage, we may not determine factual questions such as whether and when Golden Bear actually had enough information to make an informed decision on settlement, or how much time Golden Bear needed to consider Ryland's settlement demand.

For the foregoing reasons, Allied has failed to state a cause of action for breach of the implied covenant of good faith and fair dealing as to Golden Bear's failure to initiate settlement efforts upon receipt of Allied's initial tender. However, Allied can state a cause of action for breach of the implied covenant as to (1) Golden Bear's alleged failure to act in good faith in considering Ryland's May 11, 2006 settlement demand, and (2) Golden Bear's alleged failure to act in good faith in conducting settlement negotiations after it became involved in the defense and settlement of the Ryland action.

F. Fifth Cause of Action: Breach of Oral Contract

Allied alleges that, at the mandatory settlement conference, Golden Bear and Allied orally agreed that Golden Bear would pay all defense costs and fees incurred in the Ryland action, including the Gray Duffy fees. In exchange, Allied agreed not to file its proposed cross-complaint against Golden Bear for breach of contract and breach of the implied covenant of good faith and fair dealing. Golden Bear counters that (1) the alleged agreement would be an invalid oral modification of the Golden Bear policy, (2) the evidence supporting the alleged agreement is inadmissible, and (3) this cause of action is barred by the statute of limitations. We agree this claim fails because the alleged agreement would be an invalid oral modification of the policy.

Section 1698 addresses the permissible methods of modifying a written contract.[12] Subdivision (c) of section 1698 specifies that a written contract may be modified by an oral agreement supported by new consideration, "[u]nless the contract otherwise expressly provides . . . ." The Golden Bear policy cannot be orally modified under section 1698, subdivision (c), because it expressly prohibits oral modifications.

Section II of the Golden Bear policy ("Application of Underlying Insurance") states: "Except for the limits of liability and any provisions in the underlying insurance policy which are inconsistent with this Policy, including any endorsements attached hereto, the terms, conditions, agreements, definitions, exclusions and limitations of the controlling underlying insurance policy are incorporated by reference as a part of this Policy." The declarations page of the Golden Bear policy identifies the underlying commercial general liability policy. That policy, in turn, includes an integration clause (condition B, in "Common Policy Conditions"), which states:[13] "This policy contains all the agreements between you and us concerning the insurance afforded. The first Named Insured shown in the Declarations is authorized to make changes in the terms of this policy with our consent. This policy's terms can be amended or waived only by endorsement issued by us and made a part of this policy." (Italics added.) Condition B in the primary insurance policy is not inconsistent with the Golden Bear policy. Accordingly, this condition is incorporated into the Golden Bear policy and it governs.

The requirement in condition B that an endorsement be "issued" unambiguously requires that it be in writing. The term "issued" in the context of an insurance policy is used in different senses, " ? "sometimes as meaning the preparation and signing of the instrument by the officers of the company, as distinguished from its delivery to insured, and sometimes as meaning its delivery and acceptance . . . ." ' " (Hartford Accident & Indemnity Co. v. McCullough (1965),235 Cal.App.2d 195 (Hartford Accident); accord, Ahern v. Dillenback (1991),1 Cal.App.4th 36, fn. 4 (Ahern).) In Hartford Accident, the court distinguished between the preparation and issuance of a policy and the subsequent conditional delivery of the policy. (Hartford Accident, supra, 235 Cal.App.2d at pp. 199, 204-205.) In Ahern, the court, discussing the requirement under Insurance Code section 11580.2 for uninsured motorist coverage in policies "issued or delivered" in California, held that under "the well-established meaning of 'issuance' in insurance law, the policy was issued in Texas . . . when the insurer's officials countersigned the policy." (Ahern, supra, 1 Cal.App.4th at pp. 48-49.) Under either meaning of "issued" discussed in these cases, only a written endorsement can be issued, either through preparation and signing by the officers of the insurer, or through the delivery of the

document to the insured. Allied does not allege a written endorsement relating to Golden Bear's obligation to pay defense costs was ever prepared, signed or delivered. Accordingly, the oral agreement alleged by Allied was not a valid modification under section 1698, subdivision (c).[14]

In its reply brief, Allied suggests in passing that extrinsic evidence may be relevant to interpret the integration clause in the primary insurance policy. However, Allied does not allege, either in the cross-complaint or before this court, an alternate meaning it ascribes to that provision. (See Hervey, supra, 185 Cal.App.4th at p. 964; Hayter, supra, 18 Cal.App.4th at p. 18.) In any event, the policy language is unambiguous and is not reasonably susceptible of a construction that the policy may be amended by oral agreement.

We note that section 1698 applies only to contract modifications. Section 1698, subdivision (d) specifies that the statute does not preclude the application of rules of law concerning such matters as estoppel[15] or "oral independent collateral contracts." The cross-complaint characterizes the alleged oral agreement as an "oral contract," and thus could be construed to mean that the alleged agreement was an "oral independent collateral contract" falling within section 1698, subdivision (d). Even so, "an independent collateral agreement cannot contradict the terms of a prior written contract." (Malmstrom v. Kaiser Aluminum & Chemical Corp. (1986),187 Cal.App.3d 299.) The Golden Bear policy expressly addresses the duty to defend and the reimbursement of defense costs. The alleged oral agreement addressing those issues could not be valid as an independent collateral agreement.

Because the oral agreement alleged by Allied would be an invalid oral modification of the Golden Bear policy, we need not address Golden Bear's other arguments regarding this cause of action.

G. Sixth, Seventh, and Eighth Causes of Action: Indemnity and Declaratory Relief

The cross-complaint includes causes of action against Golden Bear for full equitable indemnity, partial indemnity or apportionment of fault, and declaratory relief. In its demurrer, Golden Bear argued these causes of action failed because they were inconsistent with Allied's cause of action for breach of oral contract. The trial court did not separately discuss the indemnity and declaratory relief claims when it sustained the demurrer as to all causes of action.

In its opening brief on appeal, Allied presents no argument as to why the trial court's dismissal of the indemnity and declaratory relief causes of action was erroneous. In its reply brief, Allied presents a short argument.

The trial court's judgment is presumed to be correct, and the appellant has the burden to overcome that presumption by demonstrating reversible error. (State Farm Fire & Casualty Co. v. Pietak (2001),90 Cal.App.4th 600.) " ' "A point not presented in a party's opening brief is deemed to have been abandoned or waived." ' " (Supervalu, supra, 175 Cal.App.4th at p. 84, fn. 5; see also REO Broadcasting Consultants v. Martin

(1999),69 Cal.App.4th 489; Reichardt v. Hoffman (1997),52 Cal.App.4th 754.) By failing to present any arguments about the indemnity and declaratory relief causes of action in its opening brief, Allied has forfeited any challenge to the trial court's ruling sustaining the demurrer, without leave to amend, as to these causes of action.

H. Leave to Amend Contract Claims

The trial court did not abuse its discretion in denying leave to amend as to Allied's causes of action for breach of written and oral contract (second, third and fifth causes of action). Allied has not met its burden to show there is a reasonable possibility the defects in these causes of action could be cured by amendment. (See Zelig v. County of Los Angeles, supra, 27 Cal.4th at p. 1126.) Allied contends it should have been allowed to file a third amended cross-complaint attaching "[a] copy of the Ryland policy limits demand and proof of Allied's exposure in excess of Golden Bear's policy limits . . . ." But attaching these documents would not cure the defects in the causes of action for breach of written or oral contract. Regardless of the content of Ryland's demand, these causes of action fail, because (1) Golden Bear fulfilled its express contractual duty to indemnify by paying its $2 million policy limits (second cause of action), (2) Golden Bear had no contractual or equitable duty to defend Allied (third cause of action), and (3) the alleged oral contract was an invalid oral modification of the Golden Bear policy (fifth cause of action).

III. DISPOSITION

The judgment of dismissal in favor of Golden Bear is reversed. The trial court's order sustaining Golden Bear's demurrer to the cross-complaint is affirmed in part and reversed in part. The order is reversed as to the ruling sustaining the demurrer to Allied's fourth cause of action for breach of the implied covenant of good faith and fair dealing— failure to indemnify, without leave to amend. The order is affirmed as to the rulings sustaining, without leave to amend, the demurrer to all other causes of action against Golden Bear. The trial court shall enter a new order granting Allied leave to amend its fourth cause of action in a manner consistent with part II.E. of this opinion. The parties shall bear their own costs on appeal.

Siggins, J.

We concur:

McGuiness, P.J.

Jenkins, J.

Notes:

[1] In summarizing the facts, we rely on the allegations of the cross-complaint, and on the Golden Bear insurance policy, which is attached to the cross-complaint.

[2.] An excess policy provides coverage only after a predetermined amount of underlying coverage is exhausted. (See Wells Fargo Bank v. California Ins. Guarantee Assn. (1995),38 Cal.App.4th 936, fn. 2 (Wells Fargo); Hartford Accident & Indemnity Co. v. Superior Court (1994),23 Cal.App.4th 1774 (Hartford).)

[3.] In its opening brief on appeal, Allied agrees that "the policy terms and conditions provided defense was within limits."

[4.] Gray Duffy is not a party to this appeal. Golden Bear states in its brief that Allied has settled with Gray Duffy.

[5.] Allied alleges that CIGA withdrew effective June 8, 2006, and Gray Duffy withdrew as counsel for Allied on August 21, 2006. The disputed fees apparently were incurred during that period.

[6.] All statutory references are to the Civil Code unless otherwise stated.

[7.] In its reply brief, Allied notes that extrinsic evidence, such as custom and trade usage, may be admissible both to identify ambiguities in contract language and to interpret ambiguous contract terms. (See Wolf v. Superior Court (2004),114 Cal.App.4th 1343 & fn. 15.) However, if the policy provisions at issue are not reasonably susceptible of the constructions alleged by Allied in the cross-complaint, then the demurrer may be sustained, and there is no need to resort to extrinsic evidence. (See Hervey, supra, 185 Cal.App.4th at pp. 961-962; see also Qualcomm, supra, 161 Cal.App.4th at p. 192; Palacin, supra, 119 Cal.App.4th at p. 862.)

[8.] In light of this conclusion, we need not determine whether the policy would require reimbursement of defense costs if the policy limits had not been exhausted.

[9.] The Fuller-Austin court noted that this court's decision in Diamond Heights has been criticized because of "its further conclusion that Central [an excess carrier in Diamond Heights] was bound" as a " 'co-obligor' " by the trial court's determination that the settlement negotiated by the primary carrier in that case was made in good faith. (Fuller-Austin, supra, 135 Cal.App.4th at p. 987, fn. 11.) In Hartford Accident & Indemnity Co. v. Superior Court (1995),37 Cal.App.4th 1174, we reviewed our decision in Diamond Heights and clarified that an excess insurer is not conclusively bound by a good faith determination in which it did not participate. The portion of Diamond Heights relating to the preclusive effect of a good faith settlement determination has no bearing on the issues we address in this opinion.

[10.] Of course, our review of the demurrer expresses no view on whether Golden Bear in fact acted unreasonably or breached its duty of good faith.

[11.] Golden Bear argues these cases are inapplicable because Golden Bear had no express or implied duty to settle. However, as discussed above, Golden Bear had an implied duty to act in good faith in evaluating settlement offers and conducting settlement negotiations.

12. Section 1698 provides in part: "(b) A contract in writing may be modified by an oral agreement to the extent that the oral agreement is executed by the parties. [¶] (c) Unless the contract otherwise expressly provides, a contract in writing may be modified by an oral agreement supported by new consideration. . . . [¶] (d) Nothing in this section precludes in an appropriate case the application of rules of law concerning estoppel, oral novation and substitution of a new agreement, rescission of a written contract by an oral agreement, waiver of a provision of a written contract, or oral independent collateral contracts."

13. The cross-complaint attaches only the Golden Bear policy, not the primary insurer's policy. However, at the trial court's request, and without objection from Allied, Golden Bear submitted a copy of the policy for the trial court's consideration in connection with its ruling on the demurrer.

14. The alleged agreement also was not valid as an "executed" oral agreement under section 1698, subdivision (b). An executed contract is one that has been fully performed on both sides. (§ 1661; Klein Norton Co. v. Cohen (1930),107 Cal.App. 325.) Allied alleges Golden Bear did not pay the Gray Duffy fees, and thus did not perform its obligations under the alleged oral agreement.

15. As discussed in part II.D.4 above, Allied's estoppel argument is not viable.