2d Civil No. B145867

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

TRADEWINDS ESCROW, INC.

Plaintiff and Appellant,

vs.

TRUCK INSURANCE EXCHANGE

Defendant and Respondent.

On Appeal From
The Superior Court of Los Angeles County
Hon. Jean Matusinka, Judge
Case No. YC 036295

RESPONDENT'S BRIEF

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INTRODUCTION

In this insurance coverage dispute, the insured escrow company seeks coverage from its general liability carrier for claims arising out of a failed home sale escrow. The policy, however, specifically excludes coverage for any losses due to the rendering or failure to render escrow services. As there is nothing in the underlying complaint that could even plausibly seek potentially covered damages, the trial court properly granted summary judgment to the general liability carrier.

A home buyer sued appellant Tradewinds Escrow, Inc. for its role as escrow agent after the home sale failed. Tradewinds Escrow tendered defense to its errors-and-omissions carrier, which fully defended the lawsuit until resolution. Thirteen months after the lawsuit's filing and long after the errors-and-omissions carrier assumed a full defense, Tradewinds Escrow tendered the lawsuit to respondent Truck Insurance Exchange, purportedly under a commercial general liability policy. Truck declined coverage primarily because of a professional services exclusion.

Tradewinds Escrow and its errors-and-omissions carrier then settled the lawsuit, with the insurer paying almost all the settlement costs. Tradewinds Escrow then filed this action against Truck for breach of contract and bad faith. It sought reimbursement for the settlement costs and for $20,000 in attorney's fees that it incurred before tendering defense to its errors-and-omissions carrier, which that carrier refused to pay. The trial court granted summary judgment in Truck's favor, finding no potential coverage under the policy and no recoverable damages.

It doesn't take much to see that the summary judgment must be affirmed in its entirety. Under California law and the professional services

exclusion, the contractual breaches and business torts that the buyer alleged against Tradewinds Escrow are not the sort of claims that the commercial general liability policy covers. The policy made this abundantly clear by broadly excluding coverage for any damages or injuries due to Tradewinds Escrow's rendering, or failing to render, escrow services. Only the errors-and-omissions carrier owed defense and indemnification duties here.

Tradewinds Escrow tries to circumvent the undeniably applicable professional services exclusion with scattershot coverage arguments that are both legally and factually unfounded, and at times, utterly frivolous.

For example, because the buyer's 18-page complaint makes a solitary reference to *the sellers* maliciously parking *their* automobile as part of an intentional harassment campaign, Tradewinds Escrow suggests coverage could exist under the *escrow company's* business automobile policy. But the *sellers'* automobile is not a covered auto, and, regardless, the automobile coverage applies only to "accidents" and where the automobile was an injury's predominant cause.

Tradewinds Escrow similarly obfuscates the coverage issue by erroneously suggesting the professional service exclusion did not apply to the buyer's count for intentional infliction of emotional distress. Settled California law, however, shows there was no potential for coverage under that count even if one ignores the professional services exclusion.

Tradewinds Escrow further attempts to avoid the professional services exclusion by imputing the sellers' alleged misconduct to Tradewinds Escrow. The opening brief thus mostly discusses the buyer's accusations against the *sellers*, not allegations about Tradewinds Escrow's conduct. But it is undisputed, in terms of the complaint's allegations, extrinsic evidence, and plain common sense, that the sellers were not the

escrow company's agents. A conspiracy theory would have been the only way to conceivably hold Tradewinds Escrow accountable for the sellers' alleged misconduct. But there can be no coverage for a conspiracy theory because any harm is, by the nature of a conspiracy, inherently intended. Even more striking, the trial court granted summary judgment to the sellers before Truck declined coverage. *That* summary judgment precluded Tradewinds Escrow from using any imputed-liability theory to conjure up coverage.

Since there was no potential coverage under the general liability policy, Truck owed no duty to defend and Tradewinds Escrow's entire lawsuit fails. But the lawsuit is doomed for a second independent reason: Even if a duty to defend had been breached (it hadn't), there would be no damages recoverable under California law. There was no duty to reimburse Tradewinds Escrow for the attorney's fees it *voluntarily incurred* before tendering the lawsuit to Truck. Likewise, Tradewinds Escrow's settlement contribution is not recoverable because at the time of the settlement the errors-and-omissions carrier was providing a full defense and there was no potential indemnity coverage under Truck's policy.

The summary judgment must be affirmed.

STATEMENT OF THE CASE

A. The Relevant Facts.

1. A Home Buyer Sues The Sellers, The Lender And Tradewinds Escrow For Allegedly Preventing An Escrow From Closing.

A home buyer (Alison Feltus) sued appellant Tradewinds Escrow, Inc., for its role as escrow agent in a failed home purchase. (Clerk's Transcript ["CT"] 81-98.) The buyer also sued Tradewinds Escrow's owner (Michael Wuerth), the sellers of the home (Custom Financial Services, Arthur Levy and Bruce Levy), and the lender who had approved a purchase loan (Home Savings of America, F.S.B.). (CT 82-84.)[1]

Each count contained a hodgepodge of allegations against each defendant. The essence of the claims against the sellers was that they fraudulently concealed deficiencies in the home and made misrepresentations to induce the buyer to sign the purchase agreement; the sellers later delayed and sabotaged the escrow in order to sell the property to a third party at a higher price; the sellers "began a systematic course of harassment, oppression and verbal abuse" after the buyer, assuming escrow would close, took possession of the home; and the sellers wrongfully forced

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[1] For convenience, we refer to Mr. Wuerth and Tradewinds Escrow collectively as "Tradewinds Escrow." Also, technically the buyer, sellers and lender were actually the "putative" or "prospective" buyer, sellers and lender. For convenience, we refer to them without the putative or prospective adjective.

the buyer to vacate the home and to make payments to the sellers for her occupancy, obtaining a judgment of possession in an unlawful detainer action. (CT 84-88, 92, 94-95.)

The essence of the claims against the lender was that it improperly withdrew its loan funds from escrow, thus preventing the buyer from meeting her obligations. (CT 85-86, 89, 92.)

The claims and allegations specifically against Tradewinds Escrow were as follows:

Breach of Contract: Tradewinds Escrow breached the escrow instructions by "reversing the funding provided by [the lender] . . . and related errors and omissions," by refusing to provide an accounting of funds held in escrow or disbursed, and by converting remaining escrow funds for its own use. (CT 85.)

Intentional Misrepresentation: Tradewinds Escrow "conspired with" the sellers "to sabotage" the escrow closing date in order to allow the sellers to sell the property to a third party at a higher value. (CT 86-87.) Tradewinds Escrow also "fraudulently misrepresented" that a particular escrow provision and all the escrow deposits were legal and would allow the sale's funding, when in fact it secretly intended to repudiate the escrow deposits. (CT 87.)

Constructive Trust: Tradewinds Escrow "wrongfully and maliciously refused to account" for moneys deposited in the escrow and converted over $5,000 of deposited funds for its own use. (CT 89.) It also conspired with the sellers to sabotage the escrow and permit the sellers to obtain a $250,000 windfall profit by re-selling the property to a third party. (*Ibid.*)

Accounting: An accounting of the "loan, escrow or other accounts under control" of Tradewinds Escrow is needed to determine what "sums accru[ed] to the defendants and their co-conspirators." (CT 90.)

Conversion: Tradewinds Escrow intentionally and maliciously engaged in a "systematic pattern" of converting escrow deposits for its own use, "motivated by racial animus or ill will." (CT 92-93.)

Unfair Business Practice: The acts and omissions "constituted a purposeful, planned program and design for unfair competition and/or unfair and fraudulent business practices . . . ." (CT 93.)

Intentional Infliction of Emotional Distress: "Whenever she attempted to obtain information about the status of the escrow, [Tradewinds Escrow] repeatedly harassed, verbally abused, threatened and otherwise demeaned [the buyer] . . . ." (CT 95.) When she requested that Tradewinds Escrow return some escrow funds, its owner physically menaced her, threw things, and told her—rudely using the term "bitch" and an expletive—that he didn't have to give her anything, that he spent the money, and that he wanted her to leave. (*Ibid.*) These acts allegedly were intentional, malicious and "motivated by racial animus, discriminatory and/or otherwise a wrongful and oppressive stratagem." (*Ibid.*)

2. Tradewinds Escrow Tenders The Lawsuit To Its Errors-And-Omissions Carrier, Which Fully Defends The Lawsuit And Pays All Legal Fees Except Certain Pre-Tender Fees.

At the time the lawsuit was filed, Tradewinds Escrow had two insurance policies, an errors and omissions policy with Media One Professional Insurance (the "E&O carrier") and a business-owners policy

with Truck Insurance Exchange ("Truck"), which provided commercial property, commercial general liability and commercial auto coverage. (CT 241, 258, 264, 325.)

Tradewinds Escrow chose to tender defense of the lawsuit only to the E&O carrier. (CT 242, 245, 263, 292.) It did so because it concluded that "the obvious coverage initially would be for the errors and omissions insurance carrier" and that the lawsuit "was more appropriately covered under the [errors and omissions] policy." (CT 263.) Its understanding was that that policy covered errors and omissions by Tradewinds Escrow in its business as an escrow officer, while Truck's policy covered liability against injury of persons on its premises and things like fire and theft. (CT 256-257.)

The E&O carrier agreed to fully defend Tradewinds Escrow and it subsequently paid all of the company's post-tender legal fees. (CT 242, 245-247, 249.) It did not reimburse Tradewinds Escrow for $20,000 in legal fees that it had incurred before its tender to the E&O carrier. (CT 245-246, 248, 292.) According to Tradewinds Escrow, the $20,000 in un-reimbursed pre-tender fees reflected a $10,000 deductible and an additional $10,000 that the E&O carrier refused to pay. (CT 292.)

3. Over A Year After The Lawsuit Was Filed And Long After Its Errors-And-Omissions Carrier Assumed A Full Defense, Tradewinds Escrow Tenders The Suit To Truck.

Thirteen months after the buyer filed suit, and well after the E&O carrier began fully defending Tradewinds Escrow, Tradewinds Escrow tendered defense of the lawsuit to Truck. (CT 263, 292, 442 ¶10.) It

tendered the suit because its insurance agent advised it to always submit a claim to Truck when sued; the agent did not say he believed the policy afforded coverage. (CT 253-255.)

4. The Sellers Obtain Summary Judgment.

One month after Tradewinds Escrow tendered defense to Truck and several months before Truck completed investigating the case and issued its response to tender, the sellers obtained summary judgment in the buyer's lawsuit. (CT 412, 442 ¶10, 515; ACT 693-697.)[2] The court entered summary judgment in the sellers' favor on July 29, 1998. (ACT 693-697.)

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[2] Truck properly requested that the trial court take judicial notice of the order granting summary judgment in the sellers' favor and the judgment for the sellers; the request was proper since a court may take judicial notice of any records of a California court. (Evid. Code, § 452.) Judicial notice of the court documents became compulsory under Evidence Code section 453; judicial notice is therefore compulsory on appeal under Evidence Code section 459, subdivision (a).

The Clerk's Transcript inadvertently omitted this Request For Judicial Notice, as well as another Request For Judicial Notice that Truck filed with its summary judgment motion. Thus, concurrently with its filing of this Brief, Truck is moving to augment the Clerk's Transcript to include those two Requests, and it is filing a proposed Augmented Clerk's Transcript (this Court could also take judicial notice of those judicial-notice requests instead of augmenting the Clerk's Transcript). The proposed Augmented Clerk's Transcript is consecutively paginated to follow the pagination of the Clerk's Transcript, and we cite to it as "ACT," followed by the page number.

5. Truck's Commercial General Liability And Business Auto Coverages.

a. CGL coverage for "bodily injury" and "property damage."

Under the commercial general liability ("CGL") coverage, Truck must pay the sums the insured "becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies" and must defend any lawsuit "seeking those damages." (CT 370.)

"Bodily injury" is "bodily injury, sickness or disease, sustained by a person . . . ." (CT 378.) "Property damage" is "[p]hysical injury to tangible property" and "[l]oss of use of tangible property that is not physically injured." (CT 381.)

The policy applies only to "bodily injury" or "property damage" "caused by an 'occurrence'" (CT 370), which "means an *accident*, including continuous or repeated exposure to substantially the same general harmful conditions" (CT 380, emphasis added). There is no coverage for any "'[b]odily injury' or 'property damage' expected or intended from the standpoint of the insured." (CT 370.)

b. CGL coverage for "personal injury."

The CGL coverage also obligates Truck to pay the sums the insured "becomes legally obligated to pay as damages because of 'personal injury' . . . to which this coverage part applies" and to defend any lawsuit "seeking

those damages." (CT 373.) "Personal injury" is "injury, other than 'bodily injury,' arising out of one or more of [five specific offenses]," including "[o]ral or written publication of material that slanders or libels a person" and "[t]he wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies by or on behalf of its owner, landlord or lessor." (CT 380.) The personal injury coverage only applies to offenses "arising out of [the insured's] business." (CT 373.)

c. The CGL professional services exclusion.

An endorsement to the CGL policy excludes coverage for professional services. After describing the professional services as "ESCROW AGENTS," it provides that "[w]ith respect to any professional services [described above], this insurance does not apply to 'bodily injury,' 'property damage,' 'personal injury,' or 'advertising injury' due to the rendering or failure to render any professional service." (CT 363.)

d. The Business Auto Coverage.

Truck also provided Tradewinds Escrow with business auto coverage. (See CT 383-397.) The annual premium for this coverage was $32. (CT 383, 385.) It affords liability coverage only for automobiles "used in connection with [Tradewinds Escrow's] business." (CT 383, 386.)

The business auto coverage only applies to sums the 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.'" (CT 387, emphasis added.) Coverage is excluded for "'[b]odily injury' or 'property damage' expected or intended from the standpoint of the 'insured.'" (CT 388.) There is no coverage under the business auto provisions for "personal injury." (See CT 383, 387.)

6. Truck Declines Coverage. The Errors-And-Omissions Carrier And Tradewinds Escrow Settle The Lawsuit, With Tradewinds Escrow Voluntarily Contributing $5,000.

Three months after Tradewinds Escrow tendered defense to Truck (and after summary judgment had been granted to the sellers), Truck formally denied the tender on the ground there was no potential coverage. (CT 4, 269, 412, 442 ¶10.) Truck relied primarily on the professional services exclusion and the lack of CGL coverage for economic losses from contractual breaches. (CT 272, 415.) The parties exchanged several coverage letters. (CT 419-437.)

Three months after Truck denied coverage, Tradewinds Escrow and its E&O carrier settled the lawsuit. (CT 249, 251, 406-410.) The buyer received $20,500; the E&O carrier paid $15,500 and Tradewinds Escrow paid the remaining $5,000. (CT 249-251, 265, 293, 407, 442.) Tradewinds Escrow also agreed to waive $4,500 in attorney's fees that it had a right to collect pursuant to court order, and to return $3,000 remaining in the escrow account. (CT 260, 267, 293, 407.)

B. Procedural History.

1. The Complaint.

Tradewinds Escrow sued Truck for breach of contract and breach of the covenant of good faith and fair dealing. (CT 1-7.) It alleged that Truck breached duties to defend and to indemnify Tradewinds Escrow against the buyer's lawsuit, thereby causing it to incur $25,000 in attorney's fees and settlement costs. (*Ibid.*)

2. The Summary Judgment In Truck's Favor.

Truck moved for summary judgment on grounds that there was no potential for coverage under the policy and that Truck's denial of a defense did not cause any recoverable damages. (CT 146-162.)

The trial court granted summary judgment in Truck's favor, finding there was no causal connection between Tradewinds Escrow's pre-tender legal fees and Truck's denial of a defense, and Truck owed no duty to indemnify the settlement payment because there was no coverage under Truck's policy. (CT 527-528; RT 4-5.)

The court entered judgment on September 6, 2000. (CT 527-528.) Tradewinds Escrow timely appealed. (CT 542.)[3]

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[3] The court actually entered judgment twice. It entered judgment on September 6, 2000, and then entered an identical judgment on September 25, 2000, after Tradewinds Escrow filed an objection to the first judgment. (CT 527-528, 533, 539-540.) Tradewinds Escrow's notice of appeal only mentioned the September 6, 2000 judgment.

ARGUMENT

I.

THERE WAS NO POTENTIAL FOR INDEMNITY COVERAGE AND THEREFORE NO DUTY TO DEFEND.

A. The Professional Services Exclusion Precluded Any Potential For Coverage.

"It is well established that CGL policies do not provide coverage for intangible property losses, including economic losses." (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 26-27.) It is equally settled that a CGL policy is intended to cover *general* liability, not an insured's professional or business skill. (*Ray v. Valley Forge Ins. Co.* (1999) 77 Cal.App.4th 1039, 1047.) The buyer's complaint leveled numerous accusations against Tradewinds Escrow. But the claims boiled down to the assertion that the buyer suffered economic losses (e.g., lost profits from the failed home purchase, forced rental payments) because Tradewinds Escrow breached its duties as an escrow agent. Truck's CGL policy was not intended to cover these types of claims.

The policy's broad exclusion for any injuries or damage "due to the rendering or failure to render any professional service" makes this abundantly clear. (See CT 363.) Under California law, the term "professional service" "signifies an activity done for remuneration as distinguished from a mere pastime"; it is not limited to activities that require a license or extensive training or technical skill. (*Hollingsworth v. Commercial Union Ins. Co.* (1989) 208 Cal.App.3d 800, 807, 809.) Thus,

for the purposes of a professional services exclusion, even something as mundane as "ear-piercing was a 'professional' service both in the sense that it constituted an aspect of the cosmetics sales profession and that it was done for and in anticipation of some form of financial gain." (*Id.* at p. 809.)

A professional services exclusion excludes coverage for a tortious act or omission that is not in itself a "professional service" so long as it occurred in connection with the insured's performing of, or failing to perform, professional services. *Antles v. Aetna Casualty & Surety Co.* (1963) 221 Cal.App.2d 438, for example, held that a professional services exclusion applied to preclude coverage when a negligently installed heat lamp detached from a wall, fell on a treatment table and burned a patient. (*Id.* at p. 443.) That the neglect in attaching the lamp did not involve any skilled act or professional service was of no moment; the critical fact was that the injury "occurred during the performance of professional services." (*Ibid.*; see also *Northern Insurance Co. v. Superior Court* (1979) 91 Cal.App.3d 541, 544 [although mistaken operation on a patient resulted from a clerical error that was not in itself a skilled or professional service, professional service exclusion applied because doctor owed professional duty to correctly identify a patient].) Thus, under California law, the professional service exclusion here applies if the alleged injury or damage occurs in connection with the insured's performance of escrow services.

Here, all of the buyer's causes of action fit squarely within the professional services exclusion. Although couched as various contract claims and business torts, the claims each asserted that Tradewinds Escrow intentionally or negligently breached duties that it owed the home buyer as the escrow agent for the sale. Tradewinds Escrow purportedly breached the written escrow instructions (CT 84-85); intentionally took steps to cause

defaults in escrow (CT 87-89, 93); refused to provide a proper accounting of the escrow funds (CT 85, 89-90); intentionally converted escrow funds for its own use (CT 85, 90, 92); and intentionally made rude, boorish comments to the buyer in rejecting her request to return funds remaining in escrow (CT 95; see also CT 400).[4]

The professional services exclusion plainly applies to each claim. It precludes any potential for coverage and thus defeats Tradewinds Escrow's entire lawsuit.

B. Even Disregarding The Professional Services Exclusion, Tradewinds Escrow Cannot Manufacture Potential Coverage.

1. The Business Auto Coverage Is Plainly Inapplicable.

Tradewinds Escrow tries to escape the professional services exclusion by arguing that potential coverage exists under the business auto coverage. (AOB 8-9.) The sole basis for this amazing argument is an allegation in the intentional infliction of emotional distress claim that the *sellers* "parked *their* vehicle outside the subject property." (CT 95; AOB 8, emphasis added.) Out of the complaint's 18-pages of detailed, kitchen-sink allegations, this is the only reference to an automobile. (See CT 81-98.)

The argument is frivolous.

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[4] At the time the purported boorish comments were made, the home purchase had fallen apart; but the escrow account was still open and it remained so until the parties' settlement resolved the disposition of the remaining escrow funds. (CT 259-260, 267-268, 400.) Tradewinds Escrow thus misstates the record in suggesting some of the alleged acts occurred "after the escrow had closed." (AOB 13.)

For starters, the business auto coverage does not cover the automobile that the complaint references. It applies only to automobiles "used in connection with [Tradewinds Escrow's] business." (CT 383, 386.) But the auto referenced in the complaint was owned, and being used, by *the sellers* in connection with *their* business. (See CT 95.)

And even if Tradewinds Escrow could somehow transform the sellers' automobile into a covered auto, there still couldn't be coverage. The business auto policy plainly requires that the "bodily injury" or "property damage" must be "caused by an 'accident,'" cannot be "expected or intended from the standpoint of the 'insured,'" and must result from "the ownership, maintenance or use of a covered 'auto.'" (CT 387-388.)[5] The complaint does not allege any auto-related "accident"—instead, it claims the sellers' "maliciously and oppressively parked their vehicle outside of the subject property" as part of a "systematic course of harassment, oppression and verbal abuse" designed to *intentionally* cause anguish. (CT 94-95; see *Interinsurance Exchange v. Flores* (1996) 45 Cal.App.4th 661 [drive by shooting not an accident within meaning of auto policy].) "[W]here damage is the direct and immediate result of an intended or expected event, there is no accident." (*Shell Oil Co. v. Winterthur Swiss Ins. Co.* (1993) 12 Cal.App.4th 715, 751.)

Moreover, this Court has expressly recognized that to avoid converting automobile liability policies "into general liability insurance contracts," an automobile "must be a substantial factor or predominating cause" of an alleged injury to satisfy an auto policy's requirement that the injury result from the automobile's "ownership, maintenance or use."

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[5] There is no business auto "personal injury" coverage.

(*Continental Heller Corp. v. Amtech Mechanical Services, Inc.* (1997) 53 Cal.App.4th 500, 506, fn. 2; accord, *American Nat. Property & Casualty Co. v. Julie R.* (1999) 76 Cal.App.4th 134 [auto policy does not cover rape in car parked in such a way so that plaintiff could not exit]; *Farmers Ins. Exchange v. Reed* (1988) 200 Cal.App.3d 1230, 1233 [husband's auto policy did not cover injury to wife from husband's negligent failure to provide transportation home].) Here, the purported parking of the automobile was a minor link in an alleged chain of intentional harassment by the sellers—it was not a predominating cause of anything. Tradewinds Escrow's auto coverage argument rests on an attenuated causation nexus that "would make even Mrs. Palsgraf recoil." (*Turner v. State Farm Fire & Casualty Co.* (2001) 92 Cal.App.4th 681, 684 [finding no duty to defend under rental dwelling policy even though injury arose out of an argument over the rental property].)

The business auto policy is irrelevant.[6]

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[6] Tradewinds Escrow asserts "the trial court erred in finding that [Truck] did not owe a defense obligation" under the business auto policy because Truck "did not even evaluate coverage under [it]." (AOB 9.) That misconstrues California law. "'[T]he burden is on the insured to bring the claim within the basic scope of coverage, and (unlike exclusions) courts will not indulge in a forced construction of the policy's insuring clause to bring a claim within the policy's coverage.'" (*Waller v. Truck Ins. Exchange, Inc.*, *supra*, 11 Cal.4th at p. 16.) Further, a denial need not be on the correct ground if it is right for any reason. (*Id.* at pp. 26, 30-31.)

2. The Emotional Distress Claim Did Not Create Any Potential For Coverage.

Tradewinds Escrow tacitly concedes that the professional services exclusion bars coverage for the first six counts in the buyer's complaint; it has never once argued or even intimated that those counts did not involve Tradewinds Escrow's provision of escrow services. (See AOB 13-14; CT 287, 420.) Indeed, Tradewinds Escrow's owner expressly admitted in his deposition that he believed the contract, conspiracy, constructive trust, accounting and conversion allegations all involved escrow services. (CT 261-262.)

The *only* count that Tradewinds Escrow has ever claimed was outside the professional service exclusion is the claim for intentional infliction of emotional distress, the seventh cause of action. (CT 287, 420; see also CT 468, 485 [interrogatory answer identifying only the seventh cause of action as creating a duty to defend].)[7] As shown above, the professional services exclusion *does* govern that count as the alleged crude

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[7] In any event, there are a myriad reasons, in addition to the professional services exclusion, why the other counts create no potential for coverage. For example, other than the breach of contract count (which plainly falls within the professional services exclusion and seeks only non-covered economic losses), the other counts all allege intentional, non-accidental wrongdoing (e.g., intentional misrepresentation, conspiracy, malicious acts) for which an express policy exclusion (CT 370) and Insurance Code section 533 preclude any potential coverage (see cases at pp. 19-21, 28, below); and they seek equitable relief for purely economic losses (e.g., an accounting, constructive trust, unfair business practices claim), not damages for bodily injury, property damage or personal injury (see, e.g., *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1266-1267 [no CGL coverage for claims under Bus. & Prof. Code, § 17200 et seq.]; see cases at pp. 21-22, below.)

remarks of Tradewinds Escrow's owner occurred in the context of his breaching his duty to return escrow funds to the buyer. But, as we show below, even if the exclusion didn't apply, the count still did not create any potential for coverage.

a. The claimed emotional distress affords no potential for "bodily injury" or "property damage" coverage.

For five independent reasons, the emotional distress count creates no potential for "bodily injury" or "property damage" coverage, even if the professional services exclusion was inapplicable.

First, Truck's policy provides coverage only for bodily injury or property damage caused by an "accident." (CT 370, 380.) The crude speech on which the emotional distress claim rested was not an "accident" within the meaning of a CGL policy. There is no way to read the complaint as alleging that the claimed conduct or speech was not intended, regardless whether Tradewinds Escrow intended harm or not. "Since insurance is designed to protect against contingent or unknown risks of harm, rather than harm that is certain or expected, it is well settled that intentional or fraudulent acts are deemed purposeful rather than accidental and, therefore, are not covered under a CGL policy." (*Chatton v. National Union Fire Ins. Co.* (1992) 10 Cal.App.4th 846, 860-861, citations omitted.)[8]

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[8] See also *Miller v. Western General Agency, Inc.* (1996) 41 Cal.App.4th 1144, 1150 (no potential for CGL coverage because intentional or negligent misrepresentations about home not an "accident" under CGL policy); *Gunderson v. Fire Ins. Exchange* (1995) 37 Cal.App.4th 1106, 1116 (no CGL coverage for damage from fence's intentional destruction: "'An

(continued...)

Second, the count claims, and is inherently limited to, only emotional distress that was *intentionally* inflicted. Truck's policy expressly excludes coverage for bodily injury or property damage "expected or intended from the standpoint of the insured." (CT 370.) This necessarily excludes coverage for intentionally inflicted emotional distress. (*Waller*, *supra*, 11 Cal.4th at p. 42 (conc. & dis. opn. of Kennard, J.) ["Because the intentional infliction of emotional distress is an injury that is either 'calculated' by the insured or that the insured knew was 'substantial[ly] certain[]' to result ([citation omitted]), policy language that, as here, excludes from coverage acts that the insured 'expected or intended' thereby excludes coverage of any cause of action for the intentional infliction of emotional distress"].)

Nor could the alleged facts even potentially support a claim for *negligent* infliction of emotional distress. If Tradewinds Escrow's owner had yelled at the buyer not intending, or realizing, that the alleged remarks would cause emotional distress, that conduct would not independently support a viable negligence claim. "[T]he law in California" is that "there is no duty to avoid negligently causing emotional distress to another, and that damages are recoverable only if the defendant breached some other

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[8] (...continued)
intentional act is not an 'accident' within the plain meaning of the word'"); *Loyola Marymount University v. Hartford Accident & Indemnity Co.* (1990) 219 Cal.App.3d 1217, 1224 (intentional discharge of employee not an "accident" under CGL policy even if it caused unintended damages); *Collin v. American Empire Ins. Co.* (1994) 21 Cal.App.4th 787, 806 (no CGL coverage for conversion: "It is fundamental that allegations of intentional wrongdoing do not allege an 'accident'"); *Hurley Construction Co. v. State Farm Fire & Casualty Co.* (1992) 10 Cal.App.4th 533, 539 (conspiracy to engage in fraudulent billing practices not an "accident" under CGL policy).

duty to the plaintiff." (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 984.) And even assuming a negligence claim were viable, the sole conceivable source for the requisite independent duty of care would be Tradewinds Escrow's provision of escrow services to the buyer, and that would trigger the professional services exclusion.

Third, Insurance Code section 533 further precludes any potential for coverage for the alleged intentionally inflicted emotional distress. (*Michaelian v. State Comp. Ins. Fund* (1996) 50 Cal.App.4th 1093, 1107 [holding Insurance Code section 533 barred coverage for intentional infliction of emotional distress]; *Shell Oil Co.*, *supra*, 12 Cal.App.4th at p. 743 ["section 533 precludes indemnification for liability arising from deliberate conduct that the insured expected or intended to cause damage"].)[9]

Fourth, the emotional distress claim did not allege any physical injury. Cases interpreting the "bodily injury" definition in Truck's policy (CT 378), "overwhelmingly hold that the phrase 'bodily injury, sickness or disease' is plain and unambiguous and that coverage under the bodily injury clause is limited to physical injury to the body and *does not include nonphysical, emotional or mental harm.*" (*Chatton v. National Union Fire Ins. Co.*, *supra*, 10 Cal.App.4th at p. 854, emphasis added; accord, *Aim Insurance Co. v. Culcasi* (1991) 229 Cal.App.3d 209, 219-224 [no duty

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[9] The rule that section 533 "does not bar indemnity of an insured who does not personally commit the act but who is vicariously liable for another person's act" is irrelevant here. (*Downey Venture v. LMI Ins. Co.* (1998) 66 Cal.App.4th 478, 512.) Tradewinds Escrow's *owner* purportedly committed the intentionally harmful act; the act must be considered an intentional act by Tradewinds Escrow. (*Coit Drapery Cleaners, Inc. v. Sequoia Ins. Co.* (1993) 14 Cal.App.4th 1595, 1602-1605.)

under CGL policy to defend infliction of emotional distress claim]; *Devin v. United Services Auto. Assn.* (1992) 6 Cal.App.4th 1149, 1162 [same re emotional distress damages sought under misrepresentation claims].)

Fifth, although the emotional distress claim contained some general allegations regarding the buyer incurring economic losses (CT 95-96), those allegations did not create coverage. Cases interpreting Truck's "property damage" definition (physical injury to, or loss of use of, tangible property (CT 64)), "unanimously hold that [it] does not include coverage for economic interests or property rights (such as damages for lost profits or loss of investment)." (*Chatton*, *supra*, 10 Cal.App.4th at pp. 857-858.) It also is "clearly settled in California that occurrence-based liability policies were never intended to cover emotional distress damages that flow from an uncovered occurrence and an insured *cannot* reasonably expect coverage or a defense merely because a claim of emotional or physical distress is alleged as a result of an economic loss." (*Miller*, *supra*, 41 Cal.App.4th at pp. 1151-1152 [finding no duty to defend], citing *Waller*, *supra*, 11 Cal.4th at p. 23; accord, *Aim Insurance Co.*, *supra*, 229 Cal.App.3d at p. 218 [no duty to defend under bodily injury/property damage coverage where only economic injury, plus emotional distress, alleged]; *Devin*, *supra*, 6 Cal.App.4th at p. 1159 [same].)

Thus, even if the professional services exclusion did not apply to the emotional distress claim, there still was no potential for "bodily injury" or "property damage" coverage.

b. The claimed emotional distress affords no potential for "personal injury" coverage.

Nor is there any potential for personal injury coverage. In suggesting otherwise, Tradewinds Escrow recasts the emotional distress claim as a defamation claim, trying to shoehorn it into the personal-injury coverage for "[o]ral or written publication of material that slanders or libels a person." (CT 63, 285, 420, 429; see AOB 10, 13.)

But the emotional distress claim did not accuse Tradewinds Escrow of defamation. In terms of both title and facts alleged, it was only a claim for intentional infliction of emotional distress. (See CT 94-96.) The count accused Tradewinds Escrow's owner of intentionally subjecting the buyer to verbal abuse when she requested the return of escrow funds. (CT 95.) It did not allege the factual elements of a defamation claim; most glaringly, it did not allege "intentional publication," which "is defined as a[n] [intentional] communication to some *third person* who understands both the defamatory meaning of the statement and its application to the person to whom reference is made." (*Ringler Associates, Inc. v. Maryland Casualty Co.* (2000) 80 Cal.App.4th 1165, 1179, emphasis added.) The count alleged that Tradewinds Escrow's owner made the crude remarks directly to the buyer; there was no allegation of *any* publication to a third person, let alone an intentional one. (CT 95.) It thus creates no potential for personal-injury coverage. (*Liberty Bank of Montana v. Travelers Indem. Co. of America* (9th Cir. 1989) 870 F.2d 1504, 1508 [insured could not create potential for personal-injury coverage by characterizing complaint's damage-to-reputation allegations as defamation, since the complaint contained no defamation count and the facts alleged did not set forth every

requisite element of defamation]; compare *Barnett v. Fireman's Fund Ins. Co.* (2001) 90 Cal.App.4th 500, 509-510 & fn. 5 [complaint's allegations gave rise to a potentially covered defamation claim because plaintiff alleged defendants "told numerous persons" allegedly disparaging remarks about plaintiff's business methods, which damaged plaintiff's reputation].)

Tradewinds Escrow claims that the emotional distress count accused it of having "'systematically defamed'" the buyer. (AOB 10.) But the count didn't say that. The allegations specific to Tradewinds Escrow did not use the word "defamation," "libel" or "slander." More importantly, they did not allege the requisite factual elements. (CT 95.) The "systematic defamation" reference that Tradewinds Escrow seizes upon was in a cursory, boilerplate accusation about alleged misconduct by "*[t]he remaining defendants*." (CT 95, emphasis added.) This reference to "remaining defendants"—as the buyer's own trial attorney admitted under oath (CT 509-510)—plainly meant defendants *other than Tradewinds Escrow and its owner*. That same attorney further admitted that the buyer was simply claiming that Tradewinds Escrow's owner intentionally caused her emotional distress by "us[ing] this abusive and degrading language to her" and that she was *not* claiming publication to a third party. (CT 510-511.)

Tradewinds Escrow's defamation argument thus violates the settled rule that "[a]n insured may not trigger the duty to defend by speculating about extraneous 'facts' regarding potential liability or ways in which the third party claimant might amend its complaint at some future date." (*Gunderson v. Fire Ins. Exhange*, *supra*, 37 Cal.App.4th at p. 1114; accord, *Hurley Construction Co.*, *supra*, 10 Cal.App.4th at p. 538 [an "insured may not speculate about unpled third party claims to manufacture coverage"].)

Since the buyer did not allege the requisite factual elements for defamation against Tradewinds Escrow, let alone sue it for defamation, the complaint created no potential for personal-injury coverage.

3. Tradewinds Escrow Cannot Manufacture Coverage By Imputing To Itself The Sellers' Alleged Misconduct.

Rather than focusing on the buyer's allegations against Tradewinds Escrow, virtually the entire opening brief is devoted to discussing the buyer's allegations against *the sellers*. (See AOB 8, 9, 10, 11, 12.) For example, the opening brief suggests that personal-injury coverage might exist because the complaint alleges that *the sellers* wrongfully subjected the buyer "to a judgment of possession in an unlawful detainer action." (AOB 9.)[10] Tradewinds Escrow's coverage theory appears to be that the professional services exclusion does not bar coverage because *the sellers'* conduct was "outside the rendering of 'escrow' services" and *the sellers* were the "alleged agents of Tradewinds [Escrow] and [its owner]." (AOB 13.)

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[10] The opening brief creates enormous confusion by repeatedly using the wrong surnames when discussing the complaint's allegations. For example, the brief states that the buyer alleged that Tradewinds Escrow and its owner "'repeatedly intimidated and attacked'" her, "'wrongfully parked their vehicle outside the subject property,'" "'verbally harassed'" her, and "'wrongfully subjected (her) to a judgment of possession in an unlawful detainer action,'" all while acting as agents for the sellers. (AOB 8-9.) But the complaint actually alleged that the *sellers* engaged in this misconduct, not Tradewinds Escrow and its owner. (See CT 85, 94-95.) The opening brief gets it right elsewhere. (See, e.g., AOB 10, 13 [stating the complaint alleged that the sellers parked on the buyer's property and made threats against her].)

This is the same, well-trod and erroneous vicarious-liability theory of potential coverage that Tradewinds Escrow repeatedly asserted below. (See, e.g., CT 419-420 [coverage letter claiming Tradewinds Escrow and its owner "are alleged to be vicariously liable" for the sellers' conduct]; CT 284-286 [argument opposing summary judgment]; 468-473, 486-488, 490-493 [Tradewinds Escrow interrogatory answers identifying "vicarious liability" as basis for Truck's defense duty].) For three independent reasons, Tradewinds Escrow's imputed-liability theory does not defeat the professional services exclusion or otherwise create a potential for coverage.

a. The sellers were not Tradewinds Escrow's agents.

The entire basis for Tradewinds Escrow's argument that the sellers were the "alleged agents of" Tradewinds Escrow and its owner (AOB 13), is a single boilerplate, general allegation in the complaint that all the defendants "were the agents, employees, partners and privies of each of the other defendants" (CT 82; see also CT 419, 484, 493, 500). But the *specific factual* allegations in the remainder of the complaint showed that Tradewinds Escrow merely acted as the escrow agent for the transaction. (See CT 82-96.) Undisputed extrinsic evidence likewise confirmed that Tradewinds Escrow was merely the escrow agent, an independent party. (CT 261, 423-424, 430.) As escrow agent, Tradewinds Escrow was the *sellers'* agent, not vice versa.

And, the complaint's more specific allegations—i.e., that Tradewinds Escrow was merely the sellers' and buyer's escrow agent—control over the complaint's conclusory, boilerplate "agency" allegation. (*Wood v. Elling Corp.* (1977) 20 Cal.3d 353, 364 [demurrer

properly granted on ground complaint's specific allegations indicated one party had no ownership interest in another party even though complaint contained general allegations of a "unity of interest and ownership" between the parties]; *Garton v. Title Ins. & Trust Co.* (1980) 106 Cal.App.3d 365, 376 [general allegations of agency are insufficient to withstand a demurrer "where the specific allegations of [the] complaint overcome the general allegation of agency by showing that no such relationship existed"]; *La Jolla Village Homeowners' Assn. v. Superior Court* (1989) 212 Cal.App.3d 1131, 1149 [for purposes of assessing claim's viability, more specific allegations stating a typical general subcontractor-subcontractor relationship controlled over mere conclusory allegations that attempted to place all defendants on "an equal footing"].)[11]

It is well settled that an insurer is entitled to consider all of the complaint's allegations and also undisputed extrinsic facts in determining the duty to defend. (*Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287, 300.) Here, the complaint *viewed in its entirety*, the undisputed extrinsic evidence, and plain common sense, confirmed that the sellers were *not* Tradewinds Escrow's agents. The co-defendants consisted of separate and independent parties—the escrow company, the sellers, and lender. (CT 83-85, 261.) Tradewinds Escrow may have been the buyer's and the sellers' agent, but the buyer and sellers were not Tradewinds Escrow's agents.

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[11] See also *Stowe v. Fritzie Hotels, Inc.* (1955) 44 Cal.2d 416, 422 ("Where there is an inconsistency between the specific allegations upon which a conclusion must be based and the conclusion, the specific allegations control"); *B& P Development Corp. v. City of Saratoga* (1986) 185 Cal.App.3d 949, 953 ("[i]n evaluating a [complaint], . . .[s]pecific factual allegations modify and limit inconsistent general statements").

b. Tradewinds Escrow could have been liable for the sellers' misconduct only under a conspiracy theory, and no potential for coverage exists for a conspiracy claim.

As the sellers were not the agents of the escrow company, the only way Tradewinds Escrow could have been accountable for the sellers' misconduct would have been under a conspiracy theory. The complaint did contain conspiracy allegations. (See CT 86-87, 93.) But there was no potential coverage for such conspiracy claims, because "[a]s a matter of law, a civil conspiracy cannot occur by accident." (*Fibreboard Corp. v. Hartford Accident & Indemnity Co.* (1993) 16 Cal.App.4th 492, 507, 511 [no CGL coverage for alleged conspiracy to conceal information]; *Hurley Construction Co. v. State Farm Fire & Casualty Co.*, *supra*, 10 Cal.App.4th at p. 539 [no CGL coverage for conspiracy to engage in fraudulent billing practices].) "Liability based on a conspiracy to defraud others is not an unexpected or unintended 'occurrence.'" (*North County Contractor's Assn. v. Touchstone Ins. Services* (1994) 27 Cal.App.4th 1085, 1093.)

Likewise, Insurance Code section 533 would bar any potential coverage for such a conspiracy, as it "precludes indemnification for liability arising from deliberate conduct that the insured expected or intended to cause damage." (*Shell Oil Co.*, *supra*, 12 Cal.App.4th at p. 743.)

c. The summary judgment in the sellers' favor further defeats Tradewinds Escrow's vicarious-liability argument.

Finally, even if—contrary to the facts and the law—Tradewinds Escrow theoretically could have been vicariously liable for the sellers' misconduct, its imputed-liability theory of coverage would still fail. On July 29, 1998, one month after Tradewinds Escrow tendered defense to Truck and several months *before* Truck issued its coverage denial, the sellers obtained summary judgment in the underlying action. (CT 412, 442 ¶10, 515; ACT 693-697.) It is axiomatic that a principal cannot be liable where its purported agent is exonerated. (*Hilts v. County of Solano* (1968) 265 Cal.App.2d 161, 176; BAJI No. 13.03 (8th ed. 1994).) The summary judgment exonerating the sellers was binding on *all* parties in the action. (*Columbus Line, Inc. v. Gray Line Sight-Seeing Companies Associated, Inc.* (1981) 120 Cal.App.3d 622, 631; Code Civ. Proc., § 437c, subd. (k).)

Thus, the summary judgment in the sellers' favor abrogated any imputed-liability theory as a potential basis for claiming Truck owed a duty to defend or to indemnify. A carrier's duty to defend ceases when any potential for covered liability has been judicially determined to no longer exist. (*Buss v. Superior Court* (1997) 16 Cal.4th 35, 46; *California Union Ins. Co. v. Club Aquarius, Inc.* (1980) 113 Cal.App.3d 243, 247.) Thus, even if a potential for coverage ever existed under an imputed-liability theory, that potential ceased as of July 29, 1998, and Truck had every right to subsequently deny both defense and indemnity.

II.

EVEN IF TRUCK OWED A DUTY TO DEFEND, THERE ARE NO RECOVERABLE BENEFITS OWING.

Even had Truck breached a duty to defend, the contract claim would still fail because California law does not allow Tradewinds Escrow to recover any of the damages that it claims.

A. Tradewinds Escrow Cannot Recover Its Pre-Tender Legal Fees As Damages Because Truck's Denial Of A Defense Did Not Cause Those Fees And The Fees Violated The Policy's No-Voluntary-Payments Provision.

As a matter of law, Tradewinds Escrow cannot seek reimbursement from Truck for the $20,000 in attorney's fees that it incurred before tendering defense to Truck—fees the E&O carrier refused to pay.

Those pre-tender fees could never be recoverable from Truck as damages for breaching a duty to defend, since Truck's denial of a defense did not cause Tradewinds Escrow to incur those pre-tender fees. "'The duty to defend arises when the insured *tenders defense* of the third party lawsuit to the insurer.'" (*Foster-Gardner, Inc. v. National Union Fire Ins. Co.* (1998) 18 Cal.4th 857, 886, emphasis added.) If Truck owed a duty to defend Tradewinds Escrow, its duty to incur reasonable defense costs ran from "as early as tender of the defense through as late as conclusion of the action." (*Aerojet-General Corp. v. Transport Indemnity Corp.* (1997) 17 Cal.4th 38, 60.) A fortiori, Truck had no duty to pay defense costs incurred before Tradewinds Escrow tendered the lawsuit to it.

Moreover, California courts routinely enforce policy provisions that prohibit the insured from seeking reimbursement for expenses that it voluntarily incurred without the insurer's consent, such as pre-tender expenses. (See, e.g., *Truck Ins. Exchange v. Unigard Ins. Co.* (2000) 79 Cal.App.4th 966, 976 [insurer not liable "where an insured has made a voluntary payment in defending an action or resolving a claim" before tendering defense]; *Jamestown Builders, Inc. v. General Star Indemnity Co.* (1999) 77 Cal.App.4th 341, 345-346 [insurer not liable for reparation costs that the insured incurred in trying to pacify claimants before tendering the lawsuit]; *Faust v. The Travelers* (9th Cir. 1995) 55 F.3d 471, 472-473 [applying California law; insurer had no duty to reimburse insured for defense costs it voluntarily incurred before tendering the lawsuit].)

Truck's policy unambiguously required Tradewinds Escrow to notify Truck, as soon as possible, about any third party lawsuit. (CT 376-377 [insured must notify Truck "as soon as practicable" whenever a claim is made or lawsuit brought and "immediately" send copies of any legal papers].) And it unambiguously stated that Tradewinds Escrow had no right to reimbursement for *any* expense that it voluntarily incurred without Truck's consent. (CT 377 ["No insureds will, except at their own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent"].)

This voluntary-payment provision undeniably includes pre-tender defense costs: "[I]f hiring and paying an attorney is not 'incurring an expense,' it is hard to imagine what is." (*Faust, supra*, 55 F.3d at p. 473.) Thus, under both the policy's language and California law, Truck owed no duty to reimburse Tradewinds Escrow for its pre-tender legal fees. (*Ibid.* [holding, under California law and under the same voluntary-payment

provision as in Truck's policy, that the insurer as a matter of law owed no duty to reimburse the insured for attorney's fees incurred before tender].)

Tradewinds Escrow tries to circumvent the voluntary-payment prohibition by claiming Truck did not show it was prejudiced by late notice. (AOB 15.) But "unlike a notice provision or a cooperation clause, a no-voluntary-payment provision can be enforced without a showing of prejudice." (*Truck Ins. Exchange*, *supra*, 79 Cal.App.4th at p. 977.)

> "'[T]he existence or absence of prejudice to [the insurer] is simply irrelevant to [its] duty to indemnify costs incurred *before* notice. The policy plainly provides that notice is a *condition precedent* to the insured's right to be indemnified; a fortiori the right to be indemnified cannot relate back to payments made or obligations incurred before notice. . . . The prejudice requirement . . . applies only to the insurer's attempt to assert lack of notice as a *policy defense* against payment even of losses and costs incurred *after* belated notice.'" (*Jamestown Builders, Inc.*, *supra*, 77 Cal.App.4th at p. 350, citations omitted.)

A narrow exception to the bar against reimbursing pre-tender expenses exists where the insured was legitimately unaware of the insurer's identity or the insured had no choice but to incur the expenses for reasons beyond its control; in such circumstances, the expenses are *involuntary*. (*Truck. Ins. Exchange*, *supra*, 79 Cal.App.4th at p. 977, fn. 15; *Jamestown Builders, Inc.*, *supra*, 77 Cal.App.4th at p. 346; see, e.g., *Fiorito v. Superior Court* (1990) 226 Cal.App.3d 433, 438-440 [insured had to incur pre-tender defense costs to avoid default before it could locate insurance policies].)

But that narrow exception is inapplicable here because Tradewinds Escrow's owner *admitted* that (1) at the time the lawsuit was served, he fully knew about Tradewinds Escrow's CGL policy with Truck; (2) he always knew how to get in touch with his Truck agent; and (3) he delayed tendering defense to Truck because he *chose* to initially tender the lawsuit only to his E&O carrier, not because he forgot about the CGL policy. (CT 263-264; see *Faust*, *supra*, 55 F.3d at p. 473 [no triable issue as to voluntariness of pre-tender legal fees where insured "admitted that it knew on the day it was served with [the lawsuit] that it had [the] general liability insurance policy"].)[12]

The most Tradewinds Escrow could claim here is that it delayed tender to Truck for thirteen months because it initially assumed no basis for coverage existed under Truck's policy. But that "does not suffice to excuse [Tradewinds Escrow's] obligation to make a tender if there was any potential basis for coverage." (*Jamestown Builders, Inc.*, *supra*, 77 Cal.App.4th at p. 349 [rejecting insured's argument that its payments were involuntary because it erroneously believed there was no coverage under the policy].)

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[12] Tradewinds Escrow's reliance on *Shell Oil Co. v. National Union Fire Ins. Co.* (1996) 44 Cal.App.4th 1633 is wholly misplaced. (See AOB 15.) There, the insured was legitimately unaware "of it's insurer's identity, the contents of the policy, or both" at the time it was sued, and after it discovered the policy, it unsuccessfully sought through another party's counsel to secure coverage from the insurer for several months before making its formal tender. (*Id.* at pp. 1648-1649.) Under the circumstances, the court found the "period of self-defense . . . cannot be characterized as voluntary." (*Id.* at p. 1649.) There are no such circumstances here.

Thus, even if Truck breached a duty to defend Tradewinds Escrow, Tradewinds Escrow could not recover the $20,000 in pre-tender attorney's fees, which is almost all of the damages it claims.

B. Tradewinds Escrow's Only Purported Post-Tender Damages—Its Settlement Contribution—Were Neither Caused By Truck's Defense Denial Nor Covered Under Truck's Policy.

Nor could Tradewinds Escrow recover any post-tender damages for any purported breach of the duty to defend. "The basic measure of damages for such a breach 'is that amount which will compensate the insured for the harm or loss caused by the breach of the duty to defend, i.e., the cost incurred in defense of the underlying suit.'" (*Ringler Associates, Inc. v. Maryland Casualty Co.*, *supra*, 80 Cal.App.4th at p. 1187.) But Truck's denial of a defense did not cause Tradewinds Escrow to incur *any* such costs.

From the date defense was tendered to Truck until the lawsuit's resolution, Tradewinds Escrow never had to defend itself. Its E&O carrier covered *all* costs of defense. Where, as here, an insured "was adequately protected by other insurers, and [the defense denial] did not enhance [the insured's] defense liability or increase the costs it incurred in defense of the underlying lawsuit[]," there are no damages "as a matter of law" from breach of the duty to defend. (*Id.* at pp. 1187-1188 [holding insurer could not be liable for damages even assuming it breached a duty to defend, because the insured "was fully protected from having to pay *any* costs of its own defense by other insurers who were on the risk"].)

Recognizing the absence of defense costs, Tradewinds Escrow suggests that the $5,000 it paid to settle the lawsuit and its waiver of a $4,500 attorney fee order against the buyer could be recoverable as damages for Truck's purported breach of the duty to defend. (AOB 16.) It is wrong. This is not a case where an insured was forced to mount its own defense and to then settle to avoid further costs. Tradewinds Escrow was never compelled to contribute anything to settlement to avoid defense costs. It was full defended by its E&O carrier, and the only reason it contributed to the settlement was to consummate a deal after its E&O carrier refused to pay the buyer more than $15,500.

The settlement costs, thus, were voluntary. Had Tradewinds Escrow declined the settlement, the E&O carrier simply would have continued defending the lawsuit. Tradewinds Escrow, thus, was never "faced with 'an undue financial burden' or deprived 'of the expertise and resources available to insurance carriers in making prompt and competent investigations as to the merits of lawsuits filed against their insureds.'" (*Ceresino v. Fire Ins. Exchange* (1989) 215 Cal.App.3d 814, 823 [finding failure to defend "of no consequence" to insured since another insurer undertook representation].)

As Tradewinds Escrow could not recover any breach of c ntract damages based upon Truck's refusal to defend, the only possible basis for contract damages would be a breach of Truck's duty to indemnify. But that would require Tradewinds Escrow to demonstrate that coverage *actually existed* under Truck's policy *and* that the settlement costs it personally incurred were for covered matters. (*Buss v. Superior Court, supra*, 16 Cal.4th at p. 46 ["insurer's duty to indemnify runs to claims that are actually covered, in light of the facts proved" and "arises only after liability

is established"].) Tradewinds Escrow never demonstrated that even a potential for coverage ever existed, let alone at the time of settlement. To the contrary, for example, by the time of settlement any prospect for vicarious liability for the sellers' actions had been eliminated by summary judgment and any claims for emotional distress were limited to intentional misconduct. (See Sections I.B.2. and I.B.3.c., above.) Under the circumstances, Tradewinds Escrow's settlement contribution is not recoverable even assuming Truck breached a duty to defend.

III.

GIVEN THE ABSENCE OF ANY BENEFITS OWING, TRADEWINDS ESCROW HAS NO CLAIM FOR BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING.

Besides defeating Tradewinds Escrow's claim for breach of contract, the lack of potential coverage under Truck's policy and the absence of recoverable damages also defeat the claim for breach of the covenant of good faith and fair dealing. "[I]f there is no potential for coverage, and, hence no duty to defend under the terms of the policy, there can be no cause of action for breach of the implied covenant of good faith and fair dealing." (*Waller v. Truck Ins. Exchange, Inc.*, *supra*, 11 Cal.4th at p. 36, emphasis omitted; accord, *Bernstein v. Consolidated American Ins. Co.* (1995) 37 Cal.App.4th 763, 773 ["a prerequisite to an actionable breach of the implied covenant of good faith and fair dealing is the denial of benefits due under the policy"], disapproved on another ground in *Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 841, fn. 13.)

But the claim for bad faith also fails for a second independent reason. As a renowned insurance treatise explains: "Where a second insurer also owes a duty to defend the insured and does so, the first insurer's refusal to defend is not actionable as bad faith." (3 Croskey & Kaufman, Cal. Practice Guide: Insurance Litigation (The Rutter Group 2000) § 12:614.) "Since [Tradewinds Escrow] was adequately protected under the [E&O] policy, the refusal by [Truck] to defend [Tradewinds Escrow] did not enhance [Tradewind's] liability or exposure to liability." (*Donahue Constr. Co. v. Transport Indem. Co.* (1970) 7 Cal.App.3d 291, 304.) Thus, as a matter of law, there was no actionable claim for bad faith. (*Ibid.* [finding no actionable bad faith where insured was fully defended under other insurer's policy]; *Ringler Associates, Inc. v. Maryland Casualty Co.*, *supra*, 80 Cal.App.4th at pp. 1187-1188 [finding no actionable damages for breach of duty to defend where other insurers fully defended the insured].)

CONCLUSION

Tradewinds Escrow's initial instincts were correct. Only its errors-and-omissions policy provided potential coverage for the buyer's lawsuit. But even if Tradewinds Escrow could somehow manufacture potential coverage under Truck's CGL policy, its lawsuit against Truck still would fail. Even assuming Truck breached a duty to defend, under California law there would be no recoverable damages.

The summary judgment must be affirmed.

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Respectfully submitted,

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