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IN THE COURT OF APPEAL OF THE STATE OF  
CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

TRUCK INSURANCE  
EXCHANGE,

Plaintiff and Appellant,

v.

MOLDEX-METRIC INC. et al.,

Defendants and  
Respondents.

B272378

(Los Angeles County  
Super. Ct. No. BC534069)

APPEAL from a judgment and postjudgment order of  
the Superior Court of Los Angeles County, William F.

Highberger, Judge. Reversed and remanded for further proceedings.

Pia Anderson Moss Hoyt, Scott R. Hoyt and John P. Mertens, for Plaintiff and Appellant.

Liner, Kirk A. Pasich, Fiona A. Chaney; Moldex-Metric, Inc., James E. Hornstein; Chamberlin & Keaster, Kirk C. Chamberlin, Michael C. Denlinger; Karbal Cohen Economou Silk & Dunne, Wayne S. Karbal, Paul Parker; Schwartz & Janzen, Steven H. Schwartz, for Defendants and Respondents.

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Plaintiff and appellant Truck Insurance Exchange appeals from a judgment in favor of defendants and respondents Moldex-Metric, Inc., excess insurer Federal Insurance Company, and excess insurer First State Insurance Company in this action for declaratory relief. Truck also appeals from a postjudgment order awarding attorney fees to Moldex.

Moldex tendered third-party actions to Truck to defend, then asserted Truck settled the actions unreasonably. Moldex and Truck entered into a settlement agreement in which Moldex released bad faith claims arising from Truck's settlement of the third-party actions. In the instant case, Truck sought a declaration that the policy limits have been exhausted and for contribution from excess insurers Federal and First State. The trial court found Moldex did not release defenses based on breach of contract,

Truck settled the third-party actions unreasonably, and therefore, Truck's payments did not apply to exhaust the policy.

On appeal, Truck contends: 1) Moldex released its bad faith claims that Truck settled the third-party actions unreasonably; 2) the stipulated facts established that Truck's payments exhausted the policy limits; 3) the excess insurers are liable for Truck's overpayment of indemnity and defense costs; and 4) the award of attorney fees to Moldex under the settlement agreement should be reversed. We conclude Moldex unambiguously released bad faith claims arising from Truck's settlement of the third-party actions, including tort and contract remedies, which extinguished the claims. Truck is entitled to a declaration that the policy limits have been exhausted and Truck has no further duty to defend or indemnify Moldex. The judgment and postjudgment order awarding attorney fees must be reversed. Since the trial court did not reach the issue of Truck's right to contribution from the excess insurers, the matter is remanded for further proceedings on the cause of action for contribution.

## **FACTS**

Moldex manufactures respiratory protection products used by industrial workers. Federal issued a commercial umbrella policy to Moldex, which was in effect from August 1, 1982, to June 1, 1984, and provided policy limits of \$5

million. First State issued an umbrella policy that was effective from June 18, 1984, to June 18, 1985, which provided policy limits of \$15 million.

Truck issued a commercial liability policy to Moldex with a policy period from June 16 to July 25, 1986. The policy limits were \$500,000 per occurrence and in the aggregate, exclusive of defense costs. Under the policy, Truck had a duty to defend any suit against Moldex seeking bodily injury or property damages, even if the allegations were groundless, false or fraudulent. The policy provides, “[Truck] may make such investigation and settlement of any claim or suit as it deems expedient, but shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of liability has been exhausted by payment of judgments or settlements.”

Beginning in 1986, lawsuits were filed against Moldex alleging exposure to silica and other hazardous substances because the respiratory protection devices failed. Moldex gave notice of the claims to primary liability insurers other than Truck, who defended and indemnified Moldex. Moldex reached agreements with some insurers to pay for a master litigation calendar database and document warehouse. When the primary insurers’ liability limits were exhausted in 2003, Moldex gave notice of claims to umbrella and excess insurers, including Federal and First State.

In November 2003, Moldex entered into a settlement with the O’Quinn Law Firm, which represented 3,246 claimants in Texas and Mississippi. The settlement

required claimants to provide work histories, medical documentation, and product identification affidavits.

In December 2004, Moldex tendered actions to Truck under the policy. A new medical criteria statute was enacted in Texas in 2005. O'Quinn had provided releases for approximately 700 claimants under the settlement agreement, but retrieved boxes of medical documentation that had been provided and failed to provide additional documentation.

In September 2007, Federal filed a complaint in *Federal Insurance Co. v. Moldex-Metric, Inc.*, Los Angeles Superior Court Case No. BC377842, to determine coverage for actions against Moldex that were tendered to Truck. In August 2011, the trial court ruled that Truck was required to reimburse Federal and First State for defense fees and indemnity, plus prejudgment interest. Federal was owed defense costs of \$3,854,390.61 and indemnity of \$98,212.50, while First State's costs were \$5,000,412. Truck appealed the trial court's ruling and began defending Moldex in the actions.

O'Quinn was sued for legal malpractice by more than 300 claimants who had signed releases under the 2003 settlement agreement without receiving settlement funds. In October 2011, O'Quinn contacted Moldex's counsel to discuss reviving the settlement agreement. Moldex's counsel informed Truck's claims handler that O'Quinn had made contact.

Moldex's defense counsel met with Truck's claims personnel to discuss legal fees charged to Truck by Moldex's defense counsel in Texas. At the time, Truck's representative said he did not believe there was any reason to pay settlements on cases on the inactive docket or engage in discussions with O'Quinn.

In December 2011, O'Quinn claimed the plaintiffs' medical conditions had deteriorated, but did not provide medical records. O'Quinn mentioned filing a breach of contract action against Moldex, joining Moldex in the malpractice action, and moving actions to the active docket.

On January 24, 2012, Truck's appeal in the coverage dispute was denied as premature, because there was no final appealable judgment. On January 30, 2012, Truck entered into a settlement agreement with O'Quinn (the O'Quinn Settlement), in which Truck offered to settle with several hundred Texas claimants who had filed actions against Moldex and were or had been represented by O'Quinn. Truck did not require further proof of product use, silica exposure, silica-related injury, or silicosis from approximately 700 claimants to whom the proposal was made. O'Quinn represented approximately 300 of the claimants at the time of the settlement. The settlement did not resolve actions in Mississippi. However, each claim or action resolved under the O'Quinn Settlement was one that was included in the original settlement agreement with O'Quinn, alleged damage potentially covered by the Truck policy, and was among the claims that Moldex had tendered

to Truck to defend. Truck had already paid \$10,000 to settle claims against Moldex, when Truck deposited \$500,000 in trust for O'Quinn to use to pay claimants in exchange for releases in favor of Moldex.

On February 14, 2012, Truck notified Moldex and the excess insurers that the claims had been settled. Truck stated that it had exhausted its policy limit of \$500,000, and was returning the defense and indemnity of Moldex to its excess insurers.

### **Settlement Between Truck and Moldex**

On September 20, 2012, Truck and Moldex entered into a settlement agreement and release. The recital of facts state Moldex's contention that Truck acted in bad faith by, among other things, refusing to promptly defend its interests in the underlying actions after Moldex tendered them in December 2004. Moldex also sought reimbursement from Truck for unreimbursed costs associated with the litigation database and document warehouse. In addition, the recitals state:

“H. Truck contends the O'Quinn Settlement was reasonable and entered into in good faith to protect Moldex's interests, and that the O'Quinn Settlement partially or totally exhausts Truck's Policy.

“I. Moldex contends the O'Quinn Settlement was not reasonable and that Truck acted in bad faith in entering into the O'Quinn Settlement, among other things, and that the

claims resolved by the O'Quinn Settlement lacked merit and should not have been settled for the amounts paid or at all.

“J. Truck is, as of the date of this Agreement, defending Moldex in still-pending Underlying Actions, and has agreed to continue defending Moldex in all Underlying Lawsuits that potentially trigger coverage under the Truck Policy until Truck establishes that its Policy has been exhausted.

“K. The Parties now desire to fully resolve all pending Bad Faith issues and claims and fully resolve all remaining contractual issues, including the Computer Database and Warehouse Lease Issues, as well as any other remaining issue not yet decided by the trial court in the Federal Action while leaving for future resolution matters pertaining to the O'Quinn Settlement and potential exhaustion of the Policy. However, Moldex expressly waives any claim of bad faith or other tort arising from Truck's participation in the O'Quinn settlement.”

In the next section of the agreement, Truck agreed to pay \$2,050,000 to Moldex, in exchange for settlement of Moldex's currently pending claims and certain releases, set forth as follows in pertinent part:

“B. Subject to the exceptions set forth in Paragraph C. below, in exchange from Truck's payment of \$2,050,000, Moldex releases Truck from any and all claims (whether statutory, contractual or extracontractual), acts, damages, costs, causes of action, attorneys fees, court costs or other liabilities it now has or ever had or may have in the future



arising out of or related to (1) the Computer Database Issue, (2) the Warehouse Lease Issue, and (3) any and all bad faith or other tortious claims Moldex may possess arising from alleged acts or omissions of Truck from December 1, 2004 through the Effective Date of this Agreement.

“C. Moldex specifically excepts from the releases in this Agreement and reserves all of its rights against Truck arising from or related to any and all contractual or bad faith claims arising from acts or omissions of Truck commencing after the Effective Date of this Agreement and also excepts from the releases in this Agreement any claim other than one in tort or bad faith arising from Truck’s entry into the O’Quinn Settlement.

“D. Moldex’s release of Truck includes all issues relating to the Computer Database and Warehouse Lease Issues, as well as any claim of bad faith or other tort arising from Truck’s decision to enter into the O’Quinn Settlement.

“E. Moldex and Truck agree that this Agreement will not preclude Truck or Moldex from filing after this Agreement is Effective an action for excepted claims including but not limited to a declaratory relief action seeking to establish whether payments Truck made to the O’Quinn claimants satisfy the requirements for policy exhaustion or apply to reduce the indemnity limits of the Policy, so long as any such action/motion is brought in Los Angeles County Superior Court before Judge Highberger if he has not retired from the bench. . . . [¶] . . . [¶]

“G. Moldex and Truck further agree that if Moldex *successfully* opposes a motion, claim, or other action in which Truck seeks to establish exhaustion based in whole or in part on payments Truck made as part of the O’Quinn Settlement, Truck will pay Moldex’s reasonable defense expenses, attorneys fees, and accosts in opposing that motion, claim or action, subject to a cap of \$300,000.

“H. Truck agrees that it will continue to defend Moldex until a final judgment by a court determines Truck has properly exhausted its policy limit or Truck and Moldex agree to such exhaustion. . . . [¶] . . . [¶]

“J. As part of Truck’s continuing defense obligation, Truck agrees it will not settle in the future any silica or mixed dust claims against Moldex unless the claimants provide evidence of a silica or mixed dust caused medical disability from a reputable physician not disqualified by U.S. District Court Judge Jack in the Silica MDL, and will require at a minimum the claimant’s submission of an affidavit of use of a Moldex respirator, and evidence of an exposure history that includes a period after Moldex commenced distribution of its respirators. Additionally, Truck agrees it will not settle with any Texas claimant who does not qualify under the Texas medical criteria statute to activate a case on the inactive docket. Truck shall consult with Moldex before entering into any future settlements, but Truck retains the right to make a final determination as to all future settlements, as long as the foregoing requirements are satisfied. Moldex does not waive its right to challenge

any such settlement entered into by Truck as a breach of Truck's duty to Moldex including but not limited to a claim for extra-contractual damages and injunctive relief.

"K. Moldex and Truck further agree that Moldex will be provided an opportunity to explain directly to Truck's decision-makers: (a) why Truck should not seek to use monies paid as part of the O'Quinn Settlement to establish exhaustion of its policy limit and (b) the harm Moldex believes it has suffered as a result of the O'Quinn Settlement."

Moldex and Truck further agreed that nothing in the agreement compromised their rights with respect to the excess insurers, or any rights of the excess insurers against each other. The agreement is expressly governed by the laws of California. Each party was deemed to have participated in drafting the agreement.

### **Settlement with Excess Insurers**

Four hundred eighty-three claimants received \$409,677.50 under the O'Quinn Settlement in return for releases between March 2012 and July 2013. The law firm holding the funds returned the remainder to Truck.

On February 28, 2013, trial court entered a final judgment against Truck in the coverage dispute, finding Truck had a duty to defend and indemnify Moldex with respect to the actions tendered. The judgment required Truck to reimburse Federal for defense costs of

\$3,854,390.61 and indemnity of \$98,212.50, and reimburse First State for defense costs of \$5,035,006.25 and indemnity of \$230,875, plus interest. Truck filed an appeal.

In July 2013, Truck entered into a settlement agreement and release with Federal and First State to resolve the coverage dispute. Truck agreed to pay a total of \$11,000,000 based on the judgment in the coverage dispute, which included \$8,889,396.86 of defense costs and \$329,087.50 of indemnity toward Truck's aggregate policy limit. Truck and the excess insurers released each other from any and all claims that are, were, or could have been asserted in the coverage dispute. The releases did not constitute a waiver, to the extent such rights exist, of any of Truck's rights to claim contribution for any indemnity paid over its limit and defense fees incurred therewith. "Truck agrees that it will continue to defend and indemnify Moldex for the Underlying Claims until such time as Truck establishes that it has properly exhausted the Truck Policy."

## **PROCEDURAL HISTORY**

On January 23, 2014, Truck filed a complaint for a declaration as to Moldex and the excess insurers that the policy limit had been exhausted in July 2013, a declaration as to Moldex that it owed no further duty to defend and indemnify Moldex because the policy had been exhausted, and reimbursement or contribution as against the excess insurers for indemnity of \$248,765 paid in excess of Truck's

limit. Truck also sought a declaration awarding it defense costs paid in the underlying lawsuits after Truck's policy was exhausted.

Moldex filed an answer raising the affirmative defenses of failure to state a cause of action, breach of the covenant of good faith and fair dealing, unclean hands and estoppel.

Truck filed a motion for partial summary adjudication based on the settlement agreement between Moldex and Truck. The trial court denied the motion on the ground that Moldex did not release claims for breach of contract, the reasonableness of payments under the O'Quinn Settlement and artificial exhaustion of the policy limits were breach of contract claims, and triable issues of fact existed as to whether the O'Quinn Settlement was reasonable.

Moldex filed a motion seeking an award of \$300,000 in attorney fees based on the attorney fees provision of the settlement agreement, which Moldex supported with declarations from Moldex's counsel that attorney fees had been incurred far in excess of \$300,000. The fees charged to Moldex were at or below market rates for attorneys with comparable skills and experiences. The case was staffed primarily by two partners who billed Moldex at rates of \$1,000 and \$585 per hour, respectively, which was discounted from their regular rates of \$1,300 and \$650 per hour, respectively. Research attorneys were utilized at rates of \$280 to \$390 per hour, and paralegals at \$230 to \$250 per

hour, which were also discounted rates. The trial court denied the motion for attorney fees without prejudice.

On April 23, 2015, Truck paid \$30,000 on a claim against Moldex which all parties stipulated impaired the policy limits.

A bench trial began on January 11, 2016. On March 25, 2016, the court entered a statement of decision finding the O'Quinn settlement was not reasonable and Truck intended to divest itself of the policy limits as quickly as possible. The court did not adopt Moldex's position that it had a right to approve settlements, but found Truck did not have an unlimited right to enter into settlements and charge the payments against the policy limits without establishing the reasonableness of the payments. Truck also could not settle claims by exceeding the policy limits. Following these findings, the court determined that the Moldex settlement agreement did not bar Moldex from raising bad faith as an affirmative defense to exhaustion of the policy. The court found Truck failed to provide evidence to meet its burden that payments came within the "deems expedient" clause. The trial court entered judgment in favor of Moldex, Federal, and First State on March 25, 2016.

Moldex filed another motion for attorney fees seeking an award of \$300,000 based on the settlement agreement between Truck and Moldex. After a hearing, the trial court granted the motion for attorney fees. Truck filed a timely notice of appeal from the judgment and the postjudgment order.

## DISCUSSION

### **Standard of Review and Principles of Contract Interpretation**

A settlement agreement is a contract governed by standard rules of contract interpretation. (*Canaan Taiwanese Christian Church v. All World Mission Ministries* (2012) 211 Cal.App.4th 1115, 1123.) “[T]he ‘interpretation of a contract is subject to de novo review where the interpretation does not turn on the credibility of extrinsic evidence.’ [Citations.]” (*People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2003) 107 Cal.App.4th 516, 520, footnote omitted (*R.J. Reynolds*).)

““When a dispute arises over the meaning of contract language, the first question to be decided is whether the language is ‘reasonably susceptible’ to the interpretation urged by the party. If it is not, the case is over. [Citation.] If the court decides the language is reasonably susceptible to the interpretation urged, the court moves to the second question: what did the parties intend the language to mean?” [Citation.] ‘In interpreting an unambiguous contractual provision we are bound to give effect to the plain and ordinary meaning of the language used by the parties.’ [Citation.] Thus, where “contract language is clear and explicit and does not lead to absurd results, we ascertain intent from the written terms and go no further.” [Citation.] ‘If the contract is capable of more than one reasonable interpretation, it is ambiguous [citations], and it is the

court's task to determine the ultimate construction to be placed on the ambiguous language by applying the standard rules of interpretation in order to give effect to the mutual intention of the parties [citation].’ [Citation.] However, the ‘mere fact that a word or phrase in a [contract] may have multiple meanings does not create an ambiguity.’ [Citation.]” (*R.J. Reynolds, supra*, 107 Cal.App.4th at pp.524–525.)

“The goal of contractual interpretation is to determine and give effect to the mutual intention of the parties.’ [Citations.]” (*R.J. Reynolds, supra*, 107 Cal.App.4th at p.525.) “The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.’ ([Civ. Code,] § 1641.) ‘A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties.’ ([Civ. Code,] § 1643.) ‘The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed.’ ([Civ. Code,] § 1644.) In sum, courts must give a “reasonable and commonsense interpretation” of a contract consistent with the parties’ apparent intent. [Citation.]” (*R.J. Reynolds, supra*, 107 Cal.App.4th at pp.525-526.) A word or phrase used in a certain sense in one part of a contract is deemed to have the



same meaning throughout the contract in the absence of anything in the contract suggesting otherwise. (*Id.* at p.526.)

### **Settlement Within Policy Limits as a Basis for Bad Faith Claim**

Moldex's policy gave Truck the right to settle "any claim or suit as it deems expedient." Under similar provisions, the insurer is entitled to control settlement negotiations without interference from the insured, and generally owes no liability to the insured for settling a claim or suit within the policy limits. (*Western Polymer Technology, Inc. v. Reliance Ins. Co.* (1995) 32 Cal.App.4th 14, 24 (*Western Polymer*).)

"In every contract, including policies of insurance, there is an implied covenant of good faith and fair dealing that neither party will do anything which will injure the right of the other to receive the benefits of the agreement." (*Archdale v. American Intern. Specialty Lines Ins. Co.* (2007) 154 Cal.App.4th 449, 463 (*Archdale*). "[T]he implied covenant will only be recognized to further the contract's purpose; it will not be read into a contract to prohibit a party from doing that which is expressly permitted by the agreement itself." (*Wolf v. Walt Disney Pictures and Television* (2008) 162 Cal.App.4th 1107, 1120.)

"There are limits, though, to the latitude afforded insurers in effecting settlements pursuant to 'deems expedient' clauses and those of similar import." (*Western*

*Polymer, supra*, 32 Cal.App.4th at p. 24, examining *Ivy v. Pacific Automobile Ins. Co.* (1958) 156 Cal.App.2d 652 [insurer violated duty to act in good faith by stipulating to a judgment that exceeded the policy limits]; *Rothrock v. Ohio Farmers Ins. Co.* (1965) 233 Cal.App.2d 616, 618–623 [insurer violated duty to act in good faith by entering into property damage settlement that barred insured’s personal injury claim, which insurer did not have the right to compromise]; *Barney v. Aetna Casualty & Surety Co.* (1986) 185 Cal.App.3d 966, 974–978 [insurer violated duty to act in good faith through settlement that barred insured’s personal injury claim]; *Security Officers Service, Inc. v. State Compensation Ins. Fund* (1993) 17 Cal.App.4th 887, 890–896 [bad faith liability for claims adjustment practices that increased premium revenue].) “Another text writer, citing essentially the same authority, summarizes the applicable principle as follows: ‘. . . under some circumstances, a settlement arranged by the insurer may adversely affect the insured’s interests and constitute a breach of the duty of good faith.’ (Clifford, Cal. Insurance Disputes (1997) § 10.06C, p. 10–14.)” (*New Hampshire Ins. Co. v. Ridout Roofing Co.* (1998) 68 Cal.App.4th 495, 503–04.)

### **Moldex’s Release of Bad Faith Claims Arising from O’Quinn Settlement**

Moldex contends it released bad faith claims seeking tort damages arising out of the O’Quinn settlement, but not bad faith claims seeking contract damages. Moldex further

contends that it released claims for bad faith, but not the right to assert bad faith as an affirmative defense. We conclude that Moldex released all claims of bad faith arising out of the O'Quinn settlement, and the release is not reasonably susceptible to Moldex's interpretation.

The recitals set forth the parties' positions at the time of settlement. Truck contended that the O'Quinn settlement was reasonable and entered into in good faith to protect Moldex's interests, and partially or totally exhausted the policy limits. Moldex contended that the O'Quinn Settlement was not reasonable and that Truck acted in bad faith in entering into the O'Quinn settlement, among other things, and that the claims resolved by the O'Quinn settlement lacked merit and should not have been settled for the amounts paid or at all. Given this dispute, the parties stated their desire to "fully resolve all pending Bad Faith issues and claims," leaving matters pertaining to the O'Quinn settlement and potential exhaustion of the policy for future resolution, but expressly waiving any claim of bad faith or other tort arising from Truck's participation in the O'Quinn settlement.

Truck paid \$2,050,000 to Moldex in exchange for Moldex's release of Truck from "any and all claims (whether statutory, contractual or extracontractual), acts, damages, costs, causes of action, attorneys fees, court costs or other liabilities it now has or ever had or may have in the future arising out of or related to (1) the Computer Database Issue, (2) the Warehouse Lease Issue, and (3) any and all bad faith

or other tortious claims Moldex may possess arising from alleged acts or omissions of Truck from December 1, 2004 through the Effective Date of this Agreement.” Moldex did not release contractual or bad faith claims arising from future acts or omissions, and did not release any claim other than one in tort or bad faith arising from Truck’s entry into the O’Quinn settlement, but Moldex reiterated that the release included any claim of bad faith or other tort arising from Truck’s decision to enter into the O’Quinn Settlement.

The plain language of Moldex’s settlement with Truck released any and all claims of bad faith arising from Truck’s entry into the O’Quinn settlement, whether in tort or contract. “The insurer’s breach of this implied obligation “sounds in both contract and tort.” [Citation.] But the scope of the duty imposed upon the insurer by the implied covenant of good faith and fair dealing does not turn on whether its breach is characterized as contractual or tortious because, in either case, the duty itself springs from the contractual relationship between the parties. (*Ibid.*) Put another way, an insurer’s breach of the implied covenant of good faith and fair dealing constitutes what is commonly called ‘bad faith.’ Whether the insured’s remedy will be in contract or tort will depend on the nature of the relief or recovery sought by the insured.” (*Archdale, supra*, 154 Cal.App.4th at p.467.)

“Unlike with any other contract (see *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 684), the breach of an insurance contract (by the insurer) of the implied

covenant of good faith and fair dealing will give rise to an action in tort by the insured, as well as one in contract, at the election of the insured (or assignee). An action for recovery on either theory is what is commonly referred to as one for 'bad faith.' There is a significant difference, however, in the available remedies. If the insured elects to proceed in tort, recovery is possible for not only all unpaid policy benefits and other contract damages, but also extra-contractual damages such as those for emotional distress, punitive damages and attorney fees. An insured electing to proceed in tort, however, is burdened with a significantly shorter statute of limitations, as this case illustrates.” (*Archdale, supra*, 154 Cal.App.4th at p.467, fn.19.)

Moldex did not limit its release to tort remedies for bad faith claims. It did not exclude contract remedies from the release. In plain English it released all bad faith claims, which encompasses both tort and contract remedies.

Moldex also contends it released bad faith claims, but did not release defenses based on the same bad faith conduct. The release is not susceptible to this interpretation either.

The phrase “cause of action” is often used inexactly to refer to the counts in a complaint, but under the primary rights doctrine, a cause of action is based on the harm suffered, as opposed to the particular theory asserted. (*Villacres v. ABM Industries Inc.* (2010) 189 Cal.App.4th 562, 576.) “Even where there are multiple legal theories upon which recovery might be predicated, one injury gives

rise to only one claim for relief.’ [Citation.]” (*Ibid.*) “Claim preclusion ‘prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them.’ [Citation.]” (*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 824.) “[A] release agreement is designed to effect an abandonment, relinquishment or surrender of a known right or claim operating to extinguish a cause of action.” (*Hastings v. Matlock* (1980) 107 Cal.App.3d 876, 882.)

Moldex released all bad faith claims arising from Truck’s entry into the settlement with O’Quinn. Any bad faith claims that Moldex had in connection with the O’Quinn settlement were extinguished by the release. Moldex did not except the right to assert affirmative defenses based on bad faith. The settlement between Moldex and Truck anticipated that Truck could file a declaratory relief action to establish exhaustion of the policy limits. Under Moldex’s construction of the settlement agreement, Moldex released bad faith claims arising from the O’Quinn settlement, but anticipated Truck would be forced to file a declaratory relief action to establish exhaustion of the policy, in which Moldex would be able to litigate the same issues of bad faith that it had agreed to release. The language of the settlement agreement is not reasonably susceptible to Moldex’s interpretation.

The parties agreed that the settlement would not preclude either party from filing an action for excepted claims, including a declaratory relief action to establish

whether payments Truck made to the O'Quinn claimants satisfied the requirements for policy exhaustion or applied to reduce the indemnity limits of the Policy. The stipulated facts show that at the time of the settlement, although Truck had provided \$500,000 for the O'Quinn settlement, funds were distributed in an ongoing claims process and a significant portion were eventually returned to Truck. Although Moldex released bad faith claims, Moldex preserved its right to an accounting of the amount that Truck paid to settle third-party claims and actions to reduce the indemnity limits.

Since Moldex released bad faith claims arising from Truck's entry into the O'Quinn settlement, the trial court should not have applied bad faith law to evaluate Truck's settlement decisions. The undisputed facts showed that Truck exhausted the policy limits in July 2013, and Truck owed no further duty to defend and indemnify Moldex because the policy had been exhausted. The judgment must be reversed. A new judgment must be entered declaring as to Moldex and the excess insurers that Truck's policy limit was exhausted in July 2013, and declaring as to Moldex that Truck owes no further duty to defend and indemnify Moldex, because the policy was exhausted. Because the court never reached the issue of whether the excess insurers were liable for contribution, the cause of action for contribution as against the excess insurers is remanded to the trial court for further proceedings.

## DISPOSITION

The judgment and the postjudgment order awarding attorney fees are reversed. The matter is remanded for further proceedings in accordance with the opinion. Appellant Truck Insurance Exchange is awarded its costs on appeal as against defendants and respondents Moldex-Metric, Inc., Federal Insurance Company, and First State Insurance Company.

KRIEGLER, Acting P.J.

We concur:

BAKER, J.

KUMAR, J.\*

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\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.