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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

MARTIN LEFFLER, Plaintiff and Appellant, v. CAMICO MUTUAL INSURANCE COMPANY, INC., Defendant and Respondent.	B269275 (Los Angeles County Super. Ct. No. BC508429)

APPEAL from summary judgment of the Superior Court of Los Angeles County, Marc Marmaro, Judge. Affirmed.

Milstein Jackson Fairchild & Wade, Lee Jackson and Mayo L. Makarczyk, for Plaintiff and Appellant.

Wilson Elser Moskowitz Edelman & Dicker, Tae S. Um, for Defendant and Respondent.

This appeal arises from a dispute about coverage under an accountant's professional liability insurance policy. Plaintiff and appellant Martin Leffler (Leffler), an accountant, was insured by defendant and respondent Camico Insurance Company, Inc. (Camico) when Leffler asked Camico to defend him in a third-party action. Camico reviewed the claim and ultimately informed Leffler it had no duty to defend him in the lawsuit. After the third-party lawsuit concluded, Leffler sued Camico for breach of the insurance contract and breach of the covenant of good faith and fair dealing. The trial court granted summary judgment for Camico, finding Leffler's claim was excluded under the policy because the third-party lawsuit pertained to actions taken by Leffler when he was "managing, controlling or operating" an entity other than his accounting firm named in the policy. We are asked to decide whether the trial court correctly found there was no potential for coverage under the policy such that Camico was not obligated to defend Leffler.

I. BACKGROUND

A. Background Facts

When the events giving rise to the underlying third-party action took place, Leffler had been providing accounting services for one of his clients, Oscar Katz (Katz) and the Katz Family Trust for more than a decade. At the time, Leffler and two other accountants, Michael Miller and Jerome Ward, were operating a professional accounting firm called Leffler, Miller and Ward (LMW). Katz came to owe LMW a substantial sum of money.

Katz was involved in a real estate venture that aimed to purchase and develop certain property in Redondo Beach. As a means of repaying Katz's debt, Leffler became involved in the

real estate venture and enlisted one of his friends, Keith Taylor (Taylor), as well. Taylor was a financial advisor to Ralph Jackson (Jackson) and his wife Jane Jackson, who were also convinced to invest in the venture.

B. The Jackson Action

1. The Jacksons' original complaint

In May 2006, the Jacksons filed a complaint against Leffler; Taylor; Katz; nXa, LLC (nXa); and Quantum Capital Partners, Inc. (Quantum). Because the allegations in the Jacksons' complaint are important to determining whether Camico had a duty to defend Leffler, we describe them in some detail.

As alleged, 88 Palos Verdes, L.P. (88 Palos Verdes) and NewXarts, LLC (NewXarts) entered into an Agreement of Purchase and Sale of Real Property and Escrow Instructions pursuant to which 88 Palos Verdes agreed to sell the property located at 1700 Pacific Coast Highway in Redondo Beach to NewXarts. NewXarts, however, was ultimately unable to consummate the purchase.

In 2005, prior to the termination date of the purchase agreement, NewXarts and 88 Palos Verdes entered into an eleventh amendment to the agreement that substituted nXa as the buyer in place of NewXarts and extended the closing date of the sale by a few months in exchange for an additional $1 million deposit. According to the nXa Operating Agreement, nXa's ownership interests were divided as follows: Leffler held a 2.5% interest in nXa; the other partners in LMW collectively held a 2.5% interest; Taylor held a 5% interest; and the Katz Family Trust—of which Leffler and Taylor had been made co-trustees—

held a 90% interest. Taylor and Leffler were the "'General Manager[s]' of [nXa] with the power to unilaterally bind [nXa] to any transaction, including, but not limited to, executing contracts and consummating sales and purchases of real property." Though Leffler and Taylor were the co-managers of nXa, Katz retained ultimate control over nXa for purposes of making substantial and material management decisions.[1]

Taylor set up a meeting between Taylor, Katz, and Jackson. Taylor and Katz told Jackson that Katz was the developer for the property, which was in escrow. Taylor encouraged Jackson to invest in nXa by contributing the $1 million fee necessary to extend the closing date of the sale. Taylor represented to Jackson that nXa would purchase the property and then sell the property to a second purchaser, resulting in a profit to nXa.

Later that month, Taylor provided Jackson with a draft loan agreement between nXa and Jackson. Jackson refused to sign the document and insisted he would contribute the money only if nXa would agree to accept an offer for the sale of the property of no less than $26 million; Jackson submitted proposed changes to the agreement reflecting the $26 million amount with a 40 percent return. Taylor thereafter told Jackson that Taylor and Leffler, on behalf of nXa, had signed the revised version of

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[1] Jackson discovered this after the pertinent events described here transpired.

the agreement incorporating Jackson's conditions.[2] Jackson contributed the $1 million.

nXa subsequently received at least two offers to purchase the property for more than $26 million. One offer required nXa to execute a letter of intent by a certain date. Leffler, as a general manager of nXa, informed the prospective purchaser that nXa would not substantively respond to the offer until after that deadline. That offer was then withdrawn. Leffler also rejected the other offer on behalf of nXa. The Jacksons' complaint alleged "Katz was the driving force" behind the refusals, "notwithstanding his alleged lack of any official position with nXa." The refusals of the property purchase offers were either motivated by other efforts Katz was pursuing with respect to the property, or by the existence of substantial debt that had not previously been disclosed to the Jacksons.

The complaint alleged several causes of action against Leffler, including negligence, fraud, and breach of fiduciary duty.

2. The Jacksons' First Amended Complaint

The Jacksons filed a First Amended Complaint (FAC) in early 2007. The amended complaint revised certain allegations and purported to assert causes of action against LMW, but it did not substitute LMW in for any "Doe" defendant.[3]

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[2] An executed copy of the agreement between nXa and Jackson, signed by Leffler as a "Manager" of nXa, was attached as an exhibit to Jackson's First Amended Complaint.

[3] The Jacksons also filed a Second Amended Complaint, but that complaint was never tendered to Camico.

3. Resolution of the Jackson action

In 2008, Leffler filed a motion for summary judgment, which the trial court granted. The Jacksons appealed, and Division Eight of this court reversed the trial court's ruling, finding triable issues of material fact existed as to the Jacksons' claims against Leffler.[4] (*Jackson v. Hackman* (June 1, 2010, B210156) [nonpub. opn.].) In October 2011, the Jacksons settled with Leffler in exchange for his partial assignment of claims he would be entitled to assert against Camico.[5] The parties also stipulated to an uncontested trial of the negligent misrepresentation claim against Leffler. The trial court entered judgment against Leffler in the amount of $1,456,821.76.

C. The Camico Policy

When the Jackson action was filed in 2006, LMW was a named insured on an "Accountants Professional Liability Insurance Policy" (the Policy) issued by Camico.

The Policy provided claims-made and reported coverage for "*Claim*[*s*] arising out of an *Insured's* negligent act, error, or omission in rendering or failing to render *Professional Services* . . . ."

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[4] In the course of setting forth the facts in its unpublished opinion, Division Eight included an observation that "[o]n the face of [nXa's] Operating Agreement, it was to be managed by [Taylor] and [Leffler], but in accord with the side agreements, was in reality under the near complete control of [Katz]."

[5] Leffler and the Jacksons later rescinded the assignment and reached a different agreement regarding the distribution of any sum Camico might be ordered to pay Leffler in this action.

The Policy defined "insureds" to include "[e]ach of the following *Persons* . . . but only while performing *Professional Services* for the benefit of the *Named Insured* or a *Predecessor Firm* on or after the *Retroactive Date*: . . . [a] current or former owner, partner, shareholder or employee of a *Named Insured* . . . ." "Professional Services" were defined as "any professional services performed by an *Insured* as long as the fees or commissions, if any, or other benefits from such services inure to the benefit of the *Named Insured,*" as well as services on certain accounting-related boards or committees.

The Policy also contained several exclusions, including the following:

"(d) ***Insured* Acting In Another Capacity:** Any *Claim* in connection with or arising out of the services of any *Person* who is an *Insured* acting as an employee, officer or director of any company, business, entity or charitable organization other than the *Named Insured*.

"[¶] . . . . [¶]

"(f) **Other Business Entities:** Any *Claim*, whether or not related to *Professional Services*, made by, in the right of, against, in connection with or arising out of any entity not named in the Declarations in which:

"1. any *Person* who is an *Insured* (or an *Affiliate* or *Related Individual* of that *Person*) is or was at any time managing, controlling or operating the entity; or

"2. the aggregate ownership of all *Persons* who are *Insureds* (including *Affiliates* and *Related Individuals* of such *Persons*) at any one time was or is more than twenty percent (20%).

D. Camico's Denial of Defense

Leffler initially tendered defense of the Jackson litigation to Camico in June 2006. Camico reviewed the Jackson complaint, additional information Leffler provided to Camico, and the Policy. Camico's claim notes indicate a claims manager, Mark Aubrey (Aubrey), spoke to Leffler during Camico's consideration of the claim and asked Leffler about his role as co-managing member of nXa. Leffler responded he and Taylor were responsible for running nXa, but everything was done with Katz's approval. Leffler also told Aubrey the professional services he performed included writing checks, providing business management services, preparing projections of the proceeds from purchase offers, preparing tax returns, and advising Katz on various issues.

By letter dated November 7, 2006, Camico denied having any duty to defend or indemnify Leffler on a number of grounds, including the ground that the claim was made "'in connection with or arising out of' business entities not named in the CAMICO policy declarations in which you held an ownership interest and/or managed, operated and controlled" because coverage for such a circumstance was excluded under the Policy's Other Business Entities exclusion. The letter explained the purpose of the exclusion was to avoid coverage for liability claims arising in whole or in part from an insured's personal business interests, and the Jackson action was not covered because nXa and the Katz Family Trust were entities that Leffler was allegedly managing or controlling and that were not named in the Policy declarations.

Camico also reviewed the amended complaint in the Jackson litigation at Leffler's request and again concluded coverage was excluded under the Policy.

E. This Action

Leffler sued Camico in May 2013, asserting breach of contract based on Camico's refusal to defend Leffler in the Jackson action and breach of the covenant of good faith and fair dealing. The complaint sought both compensatory and punitive damages, as well as attorney fees and costs.

Leffler moved for summary adjudication, arguing (1) Camico owed him a duty to defend and indemnify, (2) none of the Policy's exclusions defeated the duty, and (3) Camico failed to conduct an adequate investigation. Camico moved for summary judgment or summary adjudication arguing, in pertinent part, that Policy exclusions (f)(1) (Other Business Entities) and (d) (Insured Acting In Another Capacity) barred coverage and Leffler did not have a viable claim for breach of contract and bad faith.

With the cross-motions, both parties submitted evidence that had not been provided to Camico when Leffler tendered the claim. Among the evidence Leffler presented were three "side agreements" related to nXa and the Katz Family Trust. One of the agreements provided Taylor and Leffler, as trustees of the Katz Family Trust, would "obtain prior approval of Mr. Katz with respect to significant Trust decisions, including but not limited to voting the interests of the Trust with respect to matters under [nXa], any other investment of Trust assets and discretionary distributions to Trust beneficiaries." Another agreement provided Taylor and Leffler, as managers of nXa, would "obtain prior approval of Mr. Katz, or, in his absence or inability to act,

the Trustees of the Katz Family Trust, with respect to significant LLC [d]ecisions, including but not limited to amendments to the LLC's Operating Agreement, distributions of LLC funds, execution and amendment of loan, construction and other significant LLC contracts, and admission of new Members to the LLC." Among the evidence submitted by Camico were declarations and letters signed by Leffler as a "managing" or "co-managing" member of nXa and an excerpt from Leffler's deposition in the Jackson action in which he testified his duties as a co-manager of nXa included locating investors for the property deal.

Finding that subdivision (f)(1) of the Policy (excluding coverage for a claim concerning an unnamed entity that Leffler "is or was at any time managing, controlling or operating") unambiguously precluded coverage for Leffler's claim, the trial court granted Camico's motion for summary judgment and denied Leffler's summary adjudication motion.

The trial court explained that the preamble of subdivision (f) "defines the universe of entities to which the exclusion might apply" to "those not named in the insurance policy" and that subdivision (f)(1) narrowed the scope of that universe to entities "managed, controlled, or operated by the insured." The court also determined Policy subdivision (f)(1) could apply to more than one entity but was sufficient to exclude coverage if it applied to only one. The trial court looked to dictionary definitions of the terms "manage," "operate," and "control," as well as the facts regarding Leffler's relationship with nXa and the Katz Family Trust, and found the exclusion was not ambiguous.

The trial court concluded Leffler had been managing or operating nXa and the Katz Family Trust under the plain

meaning of the Other Business Entities exclusion and Camico had correctly determined there was no potential for coverage of the claim. It correspondingly found Leffler could not maintain a cause of action for breach of the implied covenant of good faith and fair dealing because there was no possibility of coverage.

II. DISCUSSION

Though Leffler challenged the viability of Camico's policy exclusions on several grounds below, the key question he presents to us is narrower: Is the phrase "managing, operating or controlling" in the subdivision (f)(1) "Other Business Entities" exclusion ambiguous such that it should be construed in favor of the insured? We conclude it is not because a layperson would understand the phrase "managing, operating or controlling the entity" to apply in the context of this Policy and the facts of this case. Because we conclude the exclusion is not ambiguous and Camico had no duty to defend, we conclude Leffler cannot maintain his cause of action for breach of the implied covenant of good faith and fair dealing. Summary judgment in Camico's favor was proper.

A. Standard of Review

"'Because this case comes before us after the trial court granted a motion for summary judgment, we take the facts from the record that was before the trial court when it ruled on that motion. (*State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1034-1035.) "'We review the trial court's decision de novo, considering all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained.'" (*Id.* at p. 1035.) We liberally construe the

evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party. (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142[ ].)' (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037[ ])." (*Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 716-17.)

B. Camico Had No Duty to Defend Leffler

1. The duty to defend

"'[A] liability insurer owes a broad duty to defend its insured against claims that create a potential for indemnity . . . . "[T]he carrier must defend a suit which *potentially* seeks damages within the coverage of the policy." [Citation.] Implicit in this rule is the principle that the duty to defend is broader than the duty to indemnify; an insurer may owe a duty to defend its insured in an action in which no damages ultimately are awarded. [Citations.]' [Citation.]" (*Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287, 295.) "To protect the interests of the insured, coverage provisions are interpreted broadly, and exclusions are interpreted narrowly. (*MacKinnon v. Truck Ins. Exchange* (2003) 31 Cal.4th 635, 648[ ].)" (*Stellar v. State Farm General Ins. Co.* (2007) 157 Cal.App.4th 1498, 1503.)

"'[T]he determination whether the insurer owes a duty to defend usually is made in the first instance by comparing the allegations of the complaint with the terms of the policy. Facts extrinsic to the complaint give rise to a duty to defend when they reveal a possibility that the claim may be covered by the policy.' (*Waller v. Truck Ins. Exchange, Inc.*[(1995)] 11 Cal.4th[1,] 19[(*Waller*)].) 'If, at the time of tender, the allegations of the complaint together with extrinsic facts available to the insurer

demonstrate no potential for coverage, the carrier may properly deny a defense.' (*We Do Graphics, Inc. v. Mercury Casualty Co.* (2004) 124 Cal.App.4th 131, 136[(*We Do Graphics*)].)" (*Medill v. Westport Ins. Corp.* (2006) 143 Cal.App.4th 819, 828.)

2. Policy exclusion (f)(1) unambiguously excluded the Jackson action from coverage

Because this appeal turns on whether the exclusion in subdivision (f)(1) was ambiguous,[6] we look first to principles of contract interpretation. "The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties." (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264 (*Bank of the West*).) Courts "look first to the language of the contract in order to ascertain its plain meaning or the meaning a layperson would ordinarily attach to it. [Citations.]" (*Waller*, *supra*, 11 Cal.4th at p. 18.) The parties' "intent is to be inferred, if possible, solely from the written provisions of the contract. [Citation.] The 'clear and explicit' meaning of these provisions, interpreted in their 'ordinary and popular sense,' unless 'used by the parties in a technical sense or a special meaning is given to them by usage' [citation], controls judicial interpretation. [Citation.] Thus, if the meaning a lay person would ascribe to contract language is not ambiguous, we apply

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[6] During the proceedings below, Camico confirmed that for purposes of summary judgment it was only relying on the exclusions and was not disputing coverage under the insuring clause. We accept the concession for purposes of this appeal and do not address the scope of the insuring clause.

that meaning." (*AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 822.)

"'A policy provision will be considered ambiguous when it is capable of two or more constructions, both of which are reasonable.' (*Waller*[, *supra*,] 11 Cal.4th [at p.] 18; *Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Ins. Co.* (1993) 5 Cal.4th 854, 867[(*Bay Cities*)].) . . . . "'[L]anguage in a contract must be construed in the context of that instrument as a whole, and in the circumstances of that case, and cannot be found to be ambiguous in the abstract.'" (*Bank of the West*, *supra*, 2 Cal.4th at p. 1265, italics omitted.)" (*Foster-Gardner, Inc. v. National Union Fire Ins. Co.* (1998) 18 Cal.4th 857, 868.) "'Courts will not adopt a strained or absurd interpretation in order to create an ambiguity where none exists.' [Citation.]" (*La Jolla Beach & Tennis Club, Inc. v. Industrial Indemnity Co.* (1994) 9 Cal.4th 27, 37.)

Keeping these principles in mind, we turn to the language of exclusion (f)(1). Critically, the key words of that exclusion—"managing, controlling or operating"—are connected by the disjunctive "or" and have as their object "the entity." The plain meaning of this language is that the exclusion applies if an insured is either managing an entity other than that named in the Policy, controlling the entity, or operating the entity. The insured need not be doing all three for the exclusion to apply.

Though the words "managing, controlling or operating" are not defined in the policy, the absence of definitions does not alone create ambiguity. (*Bay Cities*, *supra*, 5 Cal.4th at p. 866; *Bank of the West*, *supra*, 2 Cal.4th at p. 1264; *Castro v. Fireman's Fund American Life Ins. Co.* (1988) 206 Cal.App.3d 1114, 1120.) All three words are commonly used and understood; none are

technical terms. With respect to the usage relevant here, Webster's Third New International Dictionary defines "manage" as "to direct or carry on business or affairs." (Webster's 3d New Internat. Dict. (1981) p. 1372, col. 2.) It defines "operate" as "to exert power or influence." (*Id.* at p. 1580, col. 3.) And it defines "control" as "to exercise restraining or directing influence over" or to "have power over." (*Id.* at p. 496, col. 3.) Neither the individual words nor the phrase as a whole is ambiguous.

The remaining consideration is whether the words are ambiguous as to the specific issue in this case: whether Leffler was "managing, operating or controlling" nXa. We conclude they are not.[7] As alleged in the Jacksons' FAC and stated in the nXa Operating Agreement, Leffler was a co-manager of nXa. In his capacity as co-manager, Leffler signed an agreement with the Jacksons purporting to bind nXa to its terms, and sent letters to two potential purchasers of the property on behalf of nXa. In a basic, ordinary usage sense, these are the actions of someone who is "operating" a business. These are also actions that conform

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[7] This result is consistent with the recognized purpose of such exclusions. (See *Admiral Ins. Co. v. Adges* (S.D.N.Y. June 27, 2012) 2012 U.S.Dist.LEXIS 89355, at *6-8 ["Courts have described such business enterprise exclusions as having two purposes: [¶] 1) to prevent collusive suits whereby malpractice coverage could be used to shift a lawyer's business loss onto the malpractice carrier and 2) to avoid the circumstance where an insured so intermingles his business relationships with his law practice that an insurance carrier incurs additional risk of having to cover the insured for legal malpractice claims relating to the conduct of business, rather than solely out of the professional practice"].)

with accepted dictionary definitions of "managing," i.e. directing or carrying on nXa's business or affairs. That everything was done with Katz's approval does not alter the nature of Leffler's actions. One can certainly be said to be "operating" a business by taking actions of the type Leffler undertook here even if the actions are undertaken with the consent of someone who would be entitled to countermand them,[8] and in any event, the exclusion does not state the insured must be wholly or exclusively managing, operating, or controlling the entity in order for it to apply.[9]

Leffler's argument that these terms are susceptible to multiple interpretations because the Policy does not specify what degree of managerial authority, operational responsibility, or control is required to trigger the exclusion is, at heart, an

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[8] A Chief Operating Officer of a corporation, for instance, would obviously be said to be "operating" the corporation even if his or her actions were taken at the behest of a Chief Executive Officer whose approval was necessary.

[9] Neither the side agreements, nor any other documents or evidence that Leffler did not provide to Camico in connection with Camico's investigation, have a role in this analysis without some evidence those facts were known to Camico. (See *Monticello Ins. Co. v. Essex Ins. Co.* (2008) 162 Cal.App.4th 1376, 1388-1389; *We Do Graphics*, *supra*, 124 Cal.App.4th at p. 136 ["The duty to defend is not measured by hindsight, but turns "'upon those facts known by the insurer at the inception of a third[-]party lawsuit'"'].) In any event, the additional evidence is of at best marginal significance to the complaints and evidence provided to Camico. They do not affect the conclusion that Leffler was managing or operating nXa.

argument that the exclusion is broader than he prefers it to be. However, "[a]n insurer may select the risks it will insure and those it will not, and a clear exclusion will be respected. [Citation.]" (*Legarra v. Federated Mutual Ins. Co.* (1995) 35 Cal.App.4th 1472, 1480.) As applied to the circumstances here, we conclude a layperson would find the disputed provisions clearly and unambiguously exclude coverage.[10]

Having determined the subdivision (f)(1) exclusion is unambiguous, we need not address Leffler's arguments concerning his reasonable expectations of coverage because "'[i]t is settled in this state that "the doctrine of reasonable expectation of coverage comes into play *only* where there is an ambiguity in the policy." [Citations.]' (*Lumbermens Mut. Cas. Co. v. Vaughn* (1988) 199 Cal.App.3d 171, 179[ ]; cf. *Producers Dairy Delivery Co. v. Sentry Ins. Co.* (1986) 41 Cal.3d 903, 912[ ].)" (*Elliott v. Geico Indemnity Co.* (2014) 231 Cal.App.4th 789, 802-803.)

3. Because Camico had no duty to defend, there can be no action for breach of the covenant of good faith and fair dealing

Leffler contends there are triable issues of material fact concerning Camico's duty to conduct a reasonable investigation of Leffler's claim that preclude summary judgment on his cause of action for breach of the implied covenant of good faith and fair

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[10] Because subdivision (f)(1) applies to exclude all claims when an insured is acting as described to any entity not named in the declaration, we need not separately consider whether Leffler would be excluded on the basis of his position as co-trustee of the Katz Family Trust.

dealing. However, a bad faith action may only be maintained when policy benefits are due under the insuring agreement. (*Waller*, *supra*, 11 Cal.4th at p. 35.) "[I]f there is no *potential* for coverage and, hence, no duty to defend under the terms of the policy, there can be no action for breach of the implied covenant of good faith and fair dealing because the covenant is based on the contractual relationship between the insured and the insurer. [Citation.]" (*Id*. at p. 36; see also *Benavides v. State Farm General Ins. Co.* (2006) 136 Cal.App.4th 1241, 1250 ["an insured cannot maintain a claim for tortious breach of the implied covenant of good faith and fair dealing absent a covered loss"].) As we have determined that Camico owed no duty to defend, summary judgment was proper.

DISPOSITION

The judgment is affirmed. Respondent shall recover its costs on appeal.

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BAKER, J.

We concur:

KRIEGLER, Acting P.J.

DUNNING, J.*

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