NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

ELAINE MCDONOLD et al., Plaintiffs and Petitioners, v. THE SUPERIOR COURT OF SACRAMENTO COUNTY, Respondent; LEXINGTON INSURANCE COMPANY et al., Real Parties in Interest and Defendants.	C082536 (Super. Ct. No. 34201400157903)

This pending action by insureds Silva Trucking, Inc. (Silva) and its employee Elaine McDonold, alleges insurance bad faith and legal malpractice in prelitigation

handling of underlying personal injury claims against the insureds. The insureds demand discovery of attorney-client communications between their *excess* insurer (Lexington Insurance Company or LIC) and its attorney (Ralph Zappala and law firm Lewis Brisbois Bisgaard and Smith LLP, collectively LBBS) during prelitigation settlement discussions about the personal injuries.

The trial court denied discovery and granted a protective order, concluding LIC and LBBS met their burden to establish a prima facie case that the documents were privileged attorney-client communications between excess insurer LIC and its attorney LBBS (Evid. Code, § 954), and that LBBS did not also represent the insureds -- who were represented by an attorney hired by the *primary* insurer. The court further concluded that the insureds did not meet their burden in this discovery dispute to prove that they were a joint client of LBBS in a "tripartite" relationship. (Evid. Code, § 917 ["opponent of the claim of privilege has the burden of proof to establish that the communication was not confidential"].) The trial court specified its conclusion was limited to the discovery dispute and did not constitute a determination for purposes of the merits of the current lawsuit.

The insureds petition this court for a writ of mandate and/or prohibition, arguing LBBS represented both excess insurer LIC and the insureds as joint clients in a tripartite relationship, and therefore the insureds are entitled to see all communications between LBBS and LIC. (Evid. Code, § 962 [joint client cannot claim privilege for matters of common interest to other joint client].) We issued an order to show cause returnable to this court, and the parties submitted written returns and traverse.

We conclude the trial court got it right under established law and did not abuse its discretion. Insureds may benefit from an attorney's representation of an excess insurer, without the insureds being joint clients of that attorney, because the attorney's duty to protect the excess insurer's interests includes protecting the insurer against liability for

failure to discharge the insurer's duty to the insureds. The evidence in this case does not compel a conclusion that the insureds were joint clients of LIC's attorney.

We deny the petition for writ of mandate and/or prohibition.

FACTS AND PROCEEDINGS

In January 2014, the insureds (Silva and McDonold) filed this complaint alleging:

--Bad faith and breach of contract against both primary insurer Carolina Casualty Insurance Company CCIC and excess insurer LIC, and

--Legal malpractice against the lawyer hired by *primary* insurer CCIC to represent the insureds (Kevin Cholakian, his associate Jennifer Kung, and law firm Cholakian & Associates -- collectively, Cholakian) and LBBS/Zappala.

As against the insurers, the pleading alleges the insureds were never told about an opportunity to settle the personal injury suit for the $5 million combined policy limits, and CCIC and LIC unreasonably rejected the offer and refused to effectuate a settlement within policy limits. As against the attorneys, the pleading alleges all attorneys represented the insureds as clients, failed to tell the insureds about the offer or the insurers' rejection of the offer, failed to settle the case for the policy limits when they had the opportunity to do so, failed to advise the insureds of the attorneys' conflict of interest in light of the insurers' refusal to settle, and failed to advise the insureds of their right to independent counsel. As a result, a $34.9 million judgment was entered against McDonold and Silva. That money judgment is now final, after we rejected a challenge to the validity of settlement offers in *Hackett v. Silva Trucking*, C076745, nonpublished opinion filed November 22, 2017, 2017 WL 5622970.

The underlying vehicle accident occurred in October 2010. McDonold, while driving a truck for Silva Trucking, collided with a vehicle causing major physical injuries to Debra Hackett and minor injuries to another motorist, Benjamin Curry, who veered off the road to avoid the collision.

Hackett was represented by Attorney Eliot Reiner and the law firm of Dreyer Babich Buccola Wood Campora LLP (Dreyer Babich, which now represents McDonold and Silva).

On December 16, 2011, Hackett's lawyer contacted Cholakian, demanding the $5 million policy limits ($1 million primary and $4 million excess) to settle the case, with conditions including payment within 30 days of the letter and the use of a structured settlement professional to be chosen by Hackett. Hackett's lawyer admitted there were unresolved issues about workers' compensation liens and Medicare set-aside (MSA) but indicated he would sort those out after CCIC and LIC paid the $5 million. There is some dispute, not at issue now, as to whether this was a valid demand.

Cholakian forwarded the letter to LIC and estimated liability exposure at $11 million at that time. LIC assigned the matter to Claims Representative Shannon Capobianco, who noted in the claim file that she "discussed with UCM/Tim Ray . . . in light of the pltf demand . . . for his own structure broker, medicare set aside, etc., he suggested we retain counsel to respond to this demand and *protect insured and Lex interests*. . . ." (Italics added.)

On January 17, 2012, Capobianco -- who is not a lawyer – e-mailed Cholakian: "I have associated counsel in on this case to respond to the demand, Ralph Zappala [of LBBS]." The parties dispute whether this constituted retention of LBBS to defend the insureds as clients under the clause in the excess insurance contract giving LIC the right "to associate with the Insured" in the defense, negotiation, and settlement of any claim. There is no evidence that the insureds knew about LBBS or had reason to think LBBS represented them.

Cholakian faxed a letter to Hackett's lawyer on January 17, 2012, stating:

"This letter shall confirm that we are working with counsel *for the excess carrier* [italics added] to resolve this matter within the available policy limits . . . . Mr. Zappala will be working closely with us to resolve these issues. [¶] . . . [T]here are a variety of

issues that need to be resolved prior to any discussion regarding issuance of payment, such as satisfaction of Mrs. Hackett's worker's compensation lien, satisfaction of Mr. Curry's claims, satisfaction of Mr. Curry's worker's compensation lien, the status of Mrs. Hackett's worker's compensation claim, and the issue of Medicare set-aside and/or allocation. [¶] To reach a resolution addressing these many concerns within the available policy limits as expeditiously as possible requires cooperation of all parties with claims upon the proceeds of [the] settlement. Mr. Zappala will take the lead in drafting an agreement addressing these matters for review by counsel and their clients."

The insureds claim Zappala "ghost-[wrote]" the entire letter for Cholakian to send on its own letterhead to Hackett's lawyer, confirming that Zappala would take the lead in negotiations. LBBS asserts it merely requested the language of the final paragraph, and in any event the letter does not say that Zappala would take the lead in negotiating but only in drafting the agreement. A lawyer who takes the lead in drafting a settlement agreement -- which necessarily covers opposing parties -- does not thereby create an attorney-client relationship with all parties to the agreement.

Also on January 17, 2012, LBBS wrote to Hackett's lawyer that LBBS had been "requested by [LIC] to determine if this matter can be resolved without filing suit and within the limits of the available insurance for Silva Trucking, Inc." LBBS noted the unresolved issues about workers' compensation and Medicare and said LIC was unable to comply with Hackett's condition that they have exclusive control over the choice of a settlement broker. And LIC was unable to submit payment within 30 days of Hackett's letter but could fund a settlement 60 days after execution of a settlement agreement and release of claiMs. LBBS requested documentation for all claims and "suggest[ed] we proceed with the task of drafting a Global Settlement Agreement to see if we can accomplish settlement of all claims . . . ."

The insureds allege, and LBBS denies, that Cholakian and LBBS thereafter exchanged a series of communications regarding how to divide up the remaining work

between the two firMs. The petition cites Cholakian's declaration, prepared for the discovery dispute, which says LBBS agreed to act as the point firm in communications with Hackett's lawyer and the attorneys for the lienholder so as to draft and finalize a settlement agreement, and "My firm [Cholakian] agreed to obtain such information from the Plaintiffs [McDonold and Silva] as would ultimately be necessary for Mr. Reiner [Hackett's lawyer] and the conservator to submit the settlement for approval by the probate court." This assertion by the insureds confirms it was Cholakian, not LBBS, that dealt with the insureds.

On January 18, 2012, Hackett's lawyer responded to Cholakian, with a copy to LBBS, that not all potential claimants had agreed to a global settlement for the $5 million. Reiner demanded documents including asset information about Silva Trucking.

On March 21, 2012, Hackett's lawyer wrote that, because he had not received the requested documents or even a conditional offer of the excess limits, Hackett would be filing a lawsuit. Cholakian responded that Zappala as "counsel for the excess carrier" had tendered LIC's excess policy limits "earlier this year" but there were "significant worker's compensation issues, Medicare issues, and property damage claims that need to be worked out . . . on [Reiner's] end as well."

On March 27, 2012, Zappala Faxed a letter to Hackett's lawyer (Reiner) on LBBS letterhead, with a copy e-mailed to Cholakian. Above the text of the letter, after Reiner's name and address and before the salutation "Dear Mr. Reiner," appeared the following: "Re: Your client: Deborah Hackett [¶] Our clients: Silva Trucking and Elaine McDonold."

After the salutation, the letter stated:

"As you know, I have been requested by [LIC] to work with the primary carrier [CCIC], and its counsel, Kevin Cholakian, in resolving all of the claims arising out of the subject auto accident within the available liability insurance for Silva Trucking Company and Elaine McDonold. [¶] Mr. Cholakian advises he will have available the information

you requested concerning the assets of Silva Trucking." The letter listed anticipated claimants seeking payment from the insurance policy proceeds and anticipated cooperation to resolve them.

On April 5, 2012, Attorney Jennifer Kung of the Cholakian law firm sent a letter to Zappala/LBBS, with a "cc" to "Clients," stating Hackett's lawyer "has raised the issue as to the ambiguity" of Cholakian's letter accepting Hackett's demand, which was a "qualified acceptance," and Cholakian viewed Zappala as responsible for any ambiguity because Cholakian had used specific language at Zappala's request.

On April 6, 2012, Cholakian faxed a letter to Hackett's lawyer, with copies to Zappala and other lawyers, stating Cholakian wanted "to pay out the policy limits as soon as we receive payment instructions from you (or the various entities) which include resolution of both worker's compensation liens, Mr. Curry's subrogation claim, Mr. Curry's personal injury claim, and the Medicare Set-Aside. [¶] We only need to know how to make the checks payable, in what amount, and to whom the checks are to be sent. . . . [¶] You mentioned that Mr. Zappala *on behalf of Lexington* [italics added] never communicated with you. We received a copy of a letter Mr. Zappala sent to you regarding resolving this matter within the policy limits and ensuring that all lien issues and the MSA [Medicare Set-Aside] are also resolved. [¶] . . . [¶] Regarding your comment regarding some manipulation of [Hackett's] demand, the matter remains clear: you demanded the policy limits, your demand was accepted however phrased, you demanded asset information, we have provided that information to you albeit not as quickly as you would have wished, we requested status updates on the resolution of the liens and MSA issues, you have not yet addressed that issue other than to acknowledge the necessity of making sure all liens and the MSA are satisfied. . . . [¶] Finally, as further evidence of . . . good faith . . . , I am open to your thoughts and ideas about some manner in which the defendant's primary and excess carriers put the combined limits of

$5,000,000 into some kind of trust account . . . with the understanding that it will bear interest and be disbursed when the liens and other issues are resolved. . . ."

Apparently, the issues were not resolved.

On April 20, 2012, LIC, through its attorney LBBS, filed a complaint in interpleader, naming as defendants Silva, McDonold, and Hackett. Silva and McDonold did not protest that LBBS was their lawyer. The interpleader complaint alleged that, by reason of multiple, potentially conflicting claims, LIC was in doubt as to how to distribute its insurance proceeds and therefore had deposited the $4 million with the court clerk.

In July 2012, Hackett filed the personal injury lawsuit; the workers' compensation carrier filed a complaint in intervention; and Mr. Curry filed suit.

After a jury trial, Hackett's lawsuit ended in a $34 million judgment against Silva and McDonold, entered in December 2013.

Before the insureds filed the insurance bad faith lawsuit, Attorney Karen Uno of the law firm, Meckler Bulger Tilson Marick & Pearson LLP, wrote to Dreyer Babich, that she was writing "on behalf of [CCIC] in response to your email . . . to Jeremy Jessup, defense counsel for Silva Trucking and Elaine McDonold." Of interest here is the admission by this attorney for CCIC that Zappala represented only LIC, not Silva or McDonold: "CCIC can agree that the entire prefiling negotiation process was conducted by and between plaintiffs' counsel Eliot Reiner and your firm on the one hand, and *defense counsel for Silva Trucking and Ms. McDonold, Cholakian & Associates on the other hand. In addition, Mr. Zappala was involved as Lexington's counsel*." (Italics added.)

In January 2014, the insureds filed suit alleging insurance bad faith and legal malpractice. LIC through its attorney LBBS filed a complaint for declaratory relief.

After filing suit, the insureds made a discovery demand on LIC and LBBS for production of LIC claim file entries and written communications between LIC and LBBS

relating to the handling of the underlying claim. LIC and LBBS objected on various grounds, including attorney-client privilege. The insureds filed a motion to compel discovery, and LIC/LBBS filed a motion for a protective order. The court had LIC and LBBS produce a "privilege log[]" identifying the documents being withheld.

The trial court referred the matter to a discovery referee and appointed Judge Cecily Bond (retired) to make an *advisory* report and recommendation. (Code Civ. Proc., §§ 639, 644, subd. (b).)

After a hearing, the discovery referee recommended that the trial court order disclosure because Zappala was more active and did more than merely "monitor" the case, and therefore Zappala "was in effect acting on behalf of the insureds as well as LIC . . . ."

The trial court on June 1, 2016, issued a minute order declining to adopt the referee's recommendation under Code of Civil Procedure section 644, subdivision (b), which states the referee's decision "is only advisory. The court may adopt the referee's recommendations, in whole or in part, after independently considering the referee's findings and any objections and responses thereto filed with the court." The court said the referee's conclusion -- that Zappala and LBBS acted on behalf of the insured simply because, at the point they became involved, the only remaining insurance was the excess policy, and Zappala was trying to settle the case -- was incorrect. The referee disregarded the fundamental question whether an attorney-client relationship was created at all. The court concluded there was no evidence of such relationship between Zappala/LBBS and plaintiffs; plaintiffs never requested LBBS to defend them; LBBS never provided any legal advice to plaintiffs and never made any appearance or representation on their behalf. The court said that, while Zappala "may have had" incidental contact with the insureds, there was no evidence that any legal confidences or advice were ever exchanged. (In this court, the insureds admit "LBBS/Zappala had no direct contact with" the insureds.) The trial court said the record reflected that LBBS/Zappala consistently

made clear their client was LIC only. LBBS's very presence in the case was made necessary solely by the existence of LIC's excess insurance policy, and when that policy came into play during settlement discussions, LIC required legal representation, provided by LBBS. Correspondence from Cholakian, retained by the primary insurer to represent the insureds, consistently referred to LBBS as counsel for LIC only.

The court said its conclusion that defendants established a prima facie basis for the attorney-client privilege was limited to the discovery dispute and "does not, and is not intended to, constitute a determination regarding whether an attorney-client relationship existed for purposes of . . . the merits of [the] claims and defenses [of the lawsuit]."

DISCUSSION

I

Standard of Review

"A trial court's determination of a motion to compel discovery is reviewed for abuse of discretion. [Citation.] An abuse of discretion is shown when the trial court applies the wrong legal standard. [Citation.] However, when the facts asserted in support of and in opposition to the motion are in conflict, the trial court's factual findings will be upheld if they are supported by substantial evidence. [Citations.] The party claiming the [attorney-client] privilege has the burden of establishing the preliminary facts necessary to support its exercise, i.e., a communication made in the course of an attorney-client relationship. [Citations.] Once that party establishes facts necessary to support a prima facie claim of privilege, the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish the communication was not confidential or that the privilege does not for other reasons apply. [Citations.])" (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 733 (*Costco*), citing Evid. Code, § 917 ["opponent of the claim of

privilege has the burden of proof to establish that the communication was not confidential"].)

The existence of an attorney-client relationship is generally a question of law. (*Houston General Insurance Company v. Superior Court* (1980) 108 Cal.App.3d 958, 964 (*Houston*).) However, when the evidence is conflicting, the factual basis for the determination must be determined before the legal question is addressed. (*Responsible Citizens v. Superior Court* (1993) 16 Cal.App.4th 1717, 1733 (*Responsible Citizens*).) And where the question is whether an attorney-client relationship was created by implied contract, the answer depends on identification of factors that support or undercut implication of an attorney-client relationship. (*Ibid*. [attorney representing partnership does not necessarily have attorney-client relationship with individual partner for conflict-of-interest purposes].)

The insureds urge de novo review on the ground that there are not really any disputed facts, making the issue one of law. However, undisputed facts do not necessarily make an issue one of law if those facts would support more than one reasonable inference or conclusion. As the insureds acknowledge, "When the facts, *or reasonable inferences from the facts*, shown in support of or in opposition to the claim of privilege are in conflict, the determination of whether the evidence supports one conclusion or the other is for the trial court, and a reviewing court may not disturb such finding if there is any substantial evidence to support it. [Citations.]" (*D.I. Chadbourne, Inc. v. Superior Court of San Francisco* (1964) 60 Cal.2d 723, 729, italics added.)

In *Responsible Citizens, supra*, the evidence gave rise to opposing inferences, but the appellate court did not apply substantial evidence review, because the record revealed the trial court based its ruling on an erronous interpretation of law. (*Id*. 16 Cal.App.4th at p. 1734.) Nevertheless, the appellate court did not decide the issue as one of law on undisputed facts but instead remanded for the trial court to determine whether an

attorney-client relationship was implied from the totality of circumstances. (*Id*. at p. 1735.)

Here, even if we accept the insureds' characterization of the facts as undisputed, the facts were susceptible to more than one reasonable inference, and the insureds fail to show grounds for reversal under any standard.

II

Attorney-Client Relationship and Privilege

With the exception of a court appointment, the relationship of lawyer and client is created by contract, express or implied. (*Houston, supra,* 108 Cal.App.3d at p. 964.)

The attorney-client privilege, set forth at Evidence Code section 954, confers a privilege on the client "to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer. . . ."

The attorney-client privilege " 'has been a hallmark of Anglo-American jurisprudence for almost 400 years.' [Citation.] Its fundamental purpose 'is to safeguard the confidential relationship between clients and their attorneys so as to promote full and open discussion of the facts and tactics surrounding individual legal matters. [Citation.] . . . [¶] Although exercise of the privilege may occasionally result in the suppression of relevant evidence, the Legislature of this state has determined that these concerns are outweighed by the importance of preserving confidentiality in the attorney-client relationship. As [the California Supreme Court] has stated: "[T]he privilege is given on grounds of public policy in the belief that the benefits derived therefrom justify the risk that unjust decisions may sometimes result from the suppression of relevant evidence." [Citations.]' [Citation.] 'The privilege is absolute and disclosure may not be ordered, without regard to relevance, necessity or any particular circumstances peculiar to the case.' [Citation.]" (*Costco, supra*, 47 Cal.4th at p. 732.)

III

No Showing of Tripartite Relationship

An attorney-client relationship clearly existed between LIC and LBBS, thereby entitling them to invoke the attorney-client privilege for communications between them. The question is whether LBBS also had an attorney-client relationship with the insureds as joint clients, triggering Evidence Code section 962: "Where two or more clients have retained or consulted a lawyer upon a matter of common interest, none of them, nor the successor in interest of any of them, may claim a privilege under this article as to a communication made in the course of that relationship when such communication is offered in a civil proceeding between one of such clients (or his successor in interest) and another of such clients (or his successor in interest)."

LIC and LBBS met their burden of showing an attorney-client relationship between themselves and, as found by the trial court, "made at least a prima facie showing that [LBBS] was *not* [the insureds'] counsel for purposes of settlement negotiations in the underlying personal injury lawsuit." The burden thus shifted to the insureds to show that the privilege does not apply for other reasons -- i.e., that the insureds also had an attorney-client relationship with LBBS in a "tripartite" relationship between LIC, LBBS, and the insureds.

A provision in an insurance policy requiring the insured to permit the insurer's lawyer to defend claims against the insured amounts to an advance consent by the insured to have such attorney defend such claims. (*Houston, supra*, 108 Cal.App.3d at p. 964.) An insurer's employment of an attorney to *defend* a claim against the insured establishes a joint client relationship -- a "tripartite" relationship between attorney-insurer-insured. (*Id*. at pp. 964, 966-967.) When an insurer, as required by its insurance contract, employs counsel to defend the insured, any communication with the lawyer concerning the handling of the claim against the insured is necessarily a matter of common interest to

both the insured and the insurer. (*Ibid*., citing *Glacier Gen. Assurance Co. v. Superior Court* (1979) 95 Cal.App.3d 836, 842.) However, in such a tripartite relationship, the attorney's primary duty is to the insured. (*Glacier*, at p. 839.)

Houston, supra, 108 Cal.App.3d 958, held in an insurance bad faith action that the plaintiff (the insured's assignee) did not meet his burden of establishing that communication between the insurer and an attorney was not confidential, as there was no showing that the attorney was ever employed by the insurer to defend its insured. (*Id*. at pp. 964-967.) Accordingly, the tripartite relationship which would have imposed on the attorney the dual obligation to the insured and the insurer never materialized. (*Ibid*.) Thus, the lawyer-client privilege was governed by the confidential communications provisions of Evidence Code section 952, and the joint client exception (Evid. Code, § 962) was inapplicable. (*Ibid*.)

Here, the insureds argue the undisputed facts show a tripartite relationship as a matter of law, or the evidence compels a factual finding of tripartite relationship. We disagree on both counts.

A. No Tripartite Relationship as Matter of Law

The insureds suggest an excess insurer cannot inject its own lawyer into settlement discussions unless the lawyer also represents the insureds as clients, and therefore LBBS's involvement created an attorney-client relationship with the insureds as a matter of law. We disagree that an excess insurer's lawyer is limited to merely monitoring the case to avoid creating an attorney-client relationship with the insured.

Where an insured is represented by a lawyer hired by a primary insurer, and settlement may invade an excess insurance policy, the excess insurer might decide it needs its own counsel, since its interests are not protected by the attorney hired by the primary insurer. (*Lysick v. Walcom* (1968) 258 Cal.App.2d 136, 150 (*Lysick*); Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2017) ¶ 7:842, p. 7B-

140.) At the same time, however, the excess insurer "owes its insureds a duty of good faith when faced with an offer of settlement that exhausts the underlying policy limits." (*Fuller-Austin Insulation Co. v. Highlands Ins. Co*. (2006) 135 Cal.App.4th 958, 986.)

The insureds cite *Diamond Heights Homeowners' Assn. v. National American Ins. Co*. (1991) 227 Cal.App.3d 563, for the proposition that an excess insurer cannot participate in settlement discussions without exercising its contractual option to associate with the primary insurer in the defense. However, the issue there was whether the primary insurers were entitled to settle the case for an amount that invaded excess coverage without the excess insurer's consent. (*Id*. at p. 580.) The appellate court explained that an excess insurer could not object to a reasonable settlement within total policy limits and force the primary insurer to continue defending the action; rather, once the primary insurer tendered its full policy limits, the excess insurer had to take over the defense and conduct its own settlement negotiations or defend the case at trial. (*Id*. at p. 582.)

Here, LIC as excess insurer did not object to the settlement. Both the primary and excess insurers appeared to agree to settle the case for the policy limits, but the devil was in the details, and attorneys for both insurers wanted the settlement to resolve all claims. The insureds argue in their traverse to this court that unresolved issues about lien claimants or Medicare set-aside did not justify the insurers' delay in tendering the $5 million, since Hackett's lawyer invited the insurers to make the checks payable to both Hackett and the workers' compensation carrier and offered to hold the money in trust until all matters were resolved. While such matters will be material to litigation of the bad faith claims, they do not serve to make LBBS the legal representative for the insureds.

Thus, LIC had no duty to retain counsel to represent the insureds.

Where an insured is represented by a lawyer hired by a primary insurer, and settlement may impact an excess insurance policy, the excess insurer may retain an

attorney for itself, unless circumstances indicate the insured may be misled into thinking he or she is also being represented by the lawyer. (*Lysick, supra*, 258 Cal.App.2d at p. 150.) This does not leave the insured out in the cold, because the excess insurer has a duty to its insured. The lawyer represents the excess insurer's interests, but the excess insurer's interests include protecting itself from a bad faith claim by its insured.

"[W]here an attorney is employed to represent both the insurance company and the insured his duty is commensurate with the extent of his employment. He may be employed with respect to all matters associated with the claim, or he may be employed solely for the defense in court. Professor Keeton (*Liability Insurance and Responsibility for Settlement* [(1954) 67 Harv. L.Rev. 1136,] 1167-1171), noting that the task of representing both the insured and the insurance company is an impossible task, suggests that *the parties may create a relationship under which the attorney has no duty to the insured in the matter of settlement*. In such a situation, Keeton points out that the settlement decision has no significance between the insured and the attorney who is representing the defense in court. *It is essential in such case, however, that the parties clearly understand that the client-attorney relationship does not extend to the matter of settlement, and if circumstances indicate that the insured may be misled, the attorney has the duty to make it clear to the insured that he represents only the company with respect to settlement.* [Citation.]" (*Lysick supra*, 258 Cal.App.2d at pp. 149-150, italics added.)

"Accordingly, where the attorney properly represents only the insurance company in the matter of settlement, it is his duty to protect the interests of the insurance company in that respect including protection against liability for failure to discharge its [the insurer's] duties to the insured." (*Lysick, supra*, 258 Cal.App.2d at p. 150.) Thus, the insured may benefit from the attorney's efforts, even though the attorney does not represent the insured and has no attorney-client relationship with the insured. "In such a situation, if the attorney fails to give proper consideration to the interests of the insured in his recommendations with respect to the settlement of the case and the insurance

company acts upon that recommendation causing loss to the insured, there is no cause of action against the attorney because he owes no duty in that respect to the insured. In that case the insured's cause of action is only against the insurance company. [Citation.]" (*Lysick*, at p. 150.)

The insured in *Lysick* was administrator for the estate of a motorist (Rardin) who died in the accident that killed the Lysicks. (*Id*. 258 Cal.App.2d at pp. 141-142.) Rardin's insurer, Allstate, retained attorney Leo Walcom in August 1957 "to represent [Rardin's] estate" in the Lysicks' wrongful death action. (*Id*. at pp. 142, 151.) However, for six months Walcom did not tell the estate's lawyer that he (Walcom) was representing the estate but instead proceeded during that time as if he were representing Allstate only (except it appears he filed an answer for the estate). (*Id*. at pp. 142-143, 151-152.) Walcom relayed to the Lysicks' lawyer Allstate's offer of $9,500 -- even though the insured's liability was conceded and there was a clear risk of recovery beyond the $10,000 policy limits. (*Ibid*.) The Lysicks' lawyer rejected the offer. (*Ibid*.) Not until six months later, February 1958, did Allstate advise the Rardin estate's lawyer that Allstate had retained Walcom to represent the insured (Rardin's estate), i.e., "to defend the wrongful death action" and that Walcom was seeking to settle the suit. (*Id*. at p. 143.)

The appellate court held Walcom represented both the insurer and the insured's estate, but failed to disclose to the estate's attorney that an offer to settle within policy limits had been made but rejected. (*Id*. at pp. 151-152.) This created a conflict of interest between insurer and insured, since the case was one of conceded liability and there was a clear risk of recovery beyond the policy limits. (*Ibid*.) Walcom failed to make full disclosure of the conflict and failed to obtain consent to represent the dual interests when the interests diverged. (*Ibid*.)

To the extent McDonold and Silva argue LIC and/or LBBS had a duty affirmatively to state to Cholakian that LBBS "represents LIC only," they cite no authority imposing such a requirement. Neither LIC nor LBBS ever said to Cholakian

that LBBS was representing McDonold or Silva. *Lysick* says only that the attorney hired to represent the insurer only has the duty to make it clear "to the insured." Moreover, the contemporaneous evidence shows Cholakian knew LBBS was representing LIC only and are not undermined by subsequent revisionist declarations to the contrary.

Thus, LIC's hiring of a lawyer to represent LIC's interests did not as a matter of law create an attorney-client relationship between LIC's lawyer and LIC's insureds.

We next consider and reject the insureds' arguments that the facts compel a finding of tripartite relationship.

B. Evidence Does Not Compel Factual Finding of Tripartite Relationship

To the extent the insureds argue that evidence compels a factual finding of a tripartite relationship, we disagree.

Everyone knew Cholakian represented the insureds and LBBS represented LIC. Cholakian referred to LBBS as lawyer for LIC. During settlement discussions, no one suggested LBBS represented the insureds. The insureds do not contend that LBBS/Zappala had any involvement at trial.

Unlike *Lysick*, there is no evidence that LIC ever hired LBBS to represent McDonold or Silva, nor is there any evidence that McDonold or Silva even knew about LBBS or had any reason to think they were being represented by LBBS. The insureds argue it is not necessary for the client to be aware of the lawyer, citing *Streit v. Covington & Crowe* (2000) 82 Cal.App.4th 441 (*Streit*). However, that case merely found an attorney-client relationship where a lawyer who was unknown to the client made a court appearance for the client, appearing specially at a hearing on a summary judgment motion, at the request of the client's attorney of record. (*Id*. at p. 443.) Here, in contrast, the purported client's awareness of the lawyer is relevant to the question whether the insureds and excess insurers are joint clients of an attorney because "if circumstances indicate that the insured may be misled, the attorney has the duty to make it clear to the

insured that he represents only the company with respect to settlement." (*Lysick, supra*, 258 Cal.App.2d at pp. 149-150.) Where the insured knows nothing about the attorney and never communicates with the attorney, it is difficult to imagine how the insured may be misled.

The insureds point to three evidentiary items as proof of a tripartite relationship: Notes in LIC's claims about (1) "associat[ing]" counsel to (2) "protect insured," and (3) Zappala's letter referring to McDonold and Silva as "clients." We address each in turn.

1. "Protect Insured"

Capobianco's notation in the LIC claims file -- that someone at LIC suggested "retain[ing] counsel to respond to [Hackett's] demand and *protect insured* and [LIC's] interests [italics added]" -- is entirely consistent with LIC needing its own legal representation to ensure that its obligations to both itself and its insureds were met during the settlement process, even though LIC was not hiring an attorney to represent the insureds. "[W]here the attorney properly represents only the insurance company in the matter of settlement, it is his duty to protect the interests of the insurance company in that respect including protection against liability for failure to discharge its [the insurer's] duties to the insured." (*Lysick, supra*, 258 Cal.App.2d at p. 150.) Thus, the insured benefits even though the attorney does not represent the insured and has no attorney-client relationship with the insured.

McDonold and Silva acknowledge LIC could retain an attorney to represent LIC *only* but claim LIC did not do so in this case because LIC and/or LBBS did not expressly tell McDonold and Silva that LIC hired LBBS to represent "LIC only." However, as indicated *ante*, they cite no authority requiring such express advisement. Under *Lysick*, such advisement would have been necessary only if circumstances created an ambiguity, e.g., if LIC or LBBS told McDonold and Silva that LIC hired LBBS to be attorney for McDonold and Silva. The rule that the insured must be told that the attorney represents

only the insurer assumes that the insured *knows* about that attorney. Only if the insured knows about that attorney can there be a potential that "the insured may be misled." (*Lysick, supra*, 258 Cal.App.2d at p. 150.)

Here, there is no evidence that LIC, LBBS, Zappala, or anyone else, even told Silva or McDonold that LBBS or Zappala existed. There is no evidence that McDonold or Silva knew that LIC had retained LBBS. The trial court said, "While Zappala *may* have had incidental contact with Plaintiffs," there was no evidence of any exchange of legal confidences or advice. In this court, no one cites *any* evidence of *any* contact or communications between Zappala or LBBS and Silva or McDonold, and again Silva/McDonold admit in their traverse that "LBBS/Zappala had no direct contact with" Silva or McDonold. Therefore, neither Silva nor McDonold could have been misled, and there was no need to tell them expressly that LBBS was representing LIC only. Although we notice an indication in the record that McDonold may have sustained brain damage in the accident, no one argues it as a factor in resolution of this petition.

2. Notation in Claims File About Hiring Lawyer to "Associate"

The insureds argue that, because the excess insurance contract gave LIC "the right to associate with the insured in the defense, negotiation and settlement of any Claim that might result in our obligation to pay any amount of such Claim under this policy" (italics omitted), and because claims representative Capobianco e-mailed Cholakian -- "I have associated counsel in on this case to respond to the demand, Ralph Zappala [of] [LBBS]" -- LIC must have hired LBBS to defend the insureds as co-counsel of the lawyer hired by the primary insurer to represent the insureds. We disagree.

To the extent the insureds think LIC had to exercise its contractual right to associate a co-counsel to defend Silva and McDonold before it could participate in settlement discussions, we have explained we disagree. An attorney may "properly represent[] *only* the insurance company in the matter of settlement," in order "to protect

the interests of the insurance company in that respect including protection [of the insurer] against liability for failure to discharge its duties to the insured." (*Lysick, supra*, 258 Cal.App.2d at p. 150, italic added.)

Thus, LIC's contract did not require it to retain LBBS to defend the insureds.

Moreover, Capobianco attested she did not use "associate" to mean that Zappala would represent the insureds. She is not a lawyer, did not understand "associate" as a legal term of art and did not use it that way. She just meant LIC had retained Zappala to represent LIC; she was simply informing Cholakian that LBBS would be working with LIC to respond to the proposal.

Although Capobianco wrote her declaration long after the fact, after filing of the bad faith suit, the dispute did not arise until after the fact, and therefore the declarations necessarily come after the fact. Here, all contemporaneous evidence shows no hint whatsoever that anyone thought that Zappala or LBBS represented the insureds during the prelitigation attempts to settle the underlying personal injury claims (or even during trial of those claims). Capobianco's after-the-fact declaration is consistent with the contemporaneous evidence.

The insureds submitted their own after-the-fact evidence, but it was inconsistent with the contemporaneous evidence or otherwise insufficient to compel a conclusion that Zappala/LBBS represented Silva or McDonold. For example, declarations from lawyers who practice insurance law, that they would use the term "association" to mean retention of a second firm to represent an insured in addition to an attorney already appointed by the primary carrier, did not compel the judge (who himself had over 34 years' experience in insurance defense litigation) to construe Capobiano's lay reference as a legal term of art.

Cholakian's declaration that he and Zappala "divided" tasks is not evidence that Zappala represented the insureds or that Cholakian believed Zappala was co-counsel for the insureds, because there is no indication that Zappala assumed any tasks that would

lead anyone to think the insureds were his clients. Cholakian merely said he handled getting information from Silva -- which is consistent with Cholakian's job as Silva's lawyer. Zappala worked with getting information about lien claims, etc., from Hackett's side of the equation. The insureds cite *Streit, supra*, 82 Cal.App.4th 441, that associated attorneys divide up the duties sometimes without the client being aware. However, in *Streit*, the associated attorney made a court appearance for the client, appearing for her at a hearing on a summary judgment motion. (*Id*. at p. 443.) Here, LBBS did nothing similar to establish an attorney-client relationship with McDonold or Silva.

Even assuming Capobianco's use of the word "associated" could potentially create ambiguity, there is no evidence that the insureds ever saw her e-mail or were otherwise told or led to understand that they now had two lawyers -- Cholakian and Zappala. The duty to make it clear to the insured that an attorney represents only the insurer with respect to settlement arises only when "circumstances indicate that the insured may be misled." (*Lysick, supra*, 258 Cal.App.2d at p. 150.) Here, there is no evidence that the insureds may have been misled.

3. "Our Clients"

The insureds argue there is evidence that Zappala/LBBS represented them because Zappala's March 27, 2012, letter to Hackett's lawyer, with a copy to Cholakian, stated, before the salutation: "Re: Your client: Deborah Hackett [¶] Our clients: Silva Trucking and Elaine McDonold." Thus, the letter referred to Silva and McDonold as "clients" rather than "insureds."

In this court, the insureds urge this as significant evidence, but its insignificance is reflected in the fact that their attorneys never even noticed it. It was the discovery referee who noticed it.

The record supports the trial court's implied finding that the reference to "our clients" was without consequence. The passing reference in Zappala's March 27th letter

to Silva and McDonold as "clients" rather than "insureds" was obviously clerical error in the shell created for insertion of the letter's text. The insureds accuse LBBS of dishonesty because Zappala did not characterize it as clerical error for over three years after writing the letter. The insureds' accusation is disingenuous, since *no one* noticed it for years, until the discovery referee noticed it.

Moreover, there was no evidence that the insureds ever even saw the March 27th letter, which was not "cc'd" to them, and therefore no evidence they were misled. Zappala later attested he and LBBS were never hired to represent Silva or McDonold and never formed an attorney-client relationship with them. The bulk of the evidence -- not only from Zappala/LBBS but also from the attorneys for the Hacketts and CCIC -- consistently referred to Zappala/LBBS as attorneys for LIC. The insureds cite no authority requiring Zappala/LBBS to add a qualifier -- LIC "only" -- in their correspondence in order to avoid a conclusion that they also represented Silva and McDonold.

"Loose language" was held not to create an attorney-client relationship in *Koo v. Rubio's Restaurants, Inc*. (2003) 109 Cal.App.4th 719, 729. *Koo* held a trial court abused its discretion in disqualifying a law firm from defending a corporation in a class action suit for overtime wages for managers, where there was no evidence -- other than defense counsel's declaration in opposing a discovery motion for names of all managers -- that the law firm in fact represented managers both as representatives of the corporate defendant and as potential class members. (*Id*. at pp. 729-737.) The declaration opposing discovery said the rule prohibiting ex parte communications with a represented party prevented the plaintiff from contacting current managers, because defense counsel had been hired to represent the corporation and its managers. (*Id*. at pp. 724-725.) In opposition to the disqualification motion, the defense submitted declarations that the attorney represented the managers only in their representative capacity as managerial agents of the corporation. (*Id*. at pp. 727-728.) Defense counsel attested his first

declaration was "simply the result of imprecise wording." (*Id*. at p. 727, fn. 4.) The appellate court indicated the lawyer's "loose language" in the first declaration could not serve to create an attorney-client relationship if no express or implied contract existed between the lawyer and the individual managers, and there was no evidence that the individual managers agreed to be represented by the lawyer. (*Id*. at p. 729.) An "attorney's unilateral declaration regarding representation cannot, by itself, create an attorney-client relationship when none otherwise exists." (*Id*. at p. 723.) The initial declaration "may have been merely sloppy, or may have been crafted when the writer's attention was focused on winning the immediate discovery battle." (*Id*. at p. 724.)

Here, the inadvertent reference to "clients" rather than "insureds" did not show an attorney-client relationship as a matter of law. And where, as here, there is substantial evidence in favor of the trial court's finding, we affirm the finding, regardless the existence of some evidence that might support a contrary finding. (*Costco, supra*, 47 Cal.4th at p. 733; *City National Bank, supra,* 96 Cal.App.4th at p. 330.)

Silva and McDonold fail to show any legal error or abuse of discretion as grounds to reverse the trial court's orders denying the motion to compel and granting the motion for protective order.

DISPOSITION

The petition for writ of mandate and/or prohibition is denied. Real parties in interest (LIC, LBBS, and Zappala), shall recover costs on appeal. (Cal. Rules of Court, rule 8.493 [unless otherwise ordered by this court, prevailing party in an original proceeding is entitled to costs if the court resolves the proceeding by written opinion after

issuing an alternative writ, an order to show cause, or a peremptory writ in the first instance].)

HULL, J.

We concur:

RAYE, P. J.

RENNER, J.

IN THE

Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

MAILING LIST

Re: McDonold et al. v. The Superior Court of Sacramento County
C082536
Sacramento County
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