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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

SCHOLLE CORPORATION et al.,	
Plaintiffs and Appellants,	G044978
v.	(Super. Ct. No. 04CC08964)
AGRICULTURAL INSURANCE COMPANY et al.,	O P I N I O N
Defendants and Respondents.	

Appeal from a judgment of the Superior Court of Orange County, Steven L. Perk, Judge. Reversed in part, affirmed in part, and remanded.

Prenovost, Normandin, Bergh & Dawe, Michael G. Dawe, Paula M. Harrelson; and Gerald N. Shelley for Plaintiffs and Appellants.

Murchison & Cumming, Jean M. Lawler and Bryan M. Weiss for Defendants and Respondents.

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Plaintiffs and appellants Scholle Corporation and Scholle Industries, PTY, Ltd. (collectively, Scholle) appeal from the judgment entered in favor of their excess insurer, defendants and respondents Agricultural Insurance Company and Great American Assurance Company (collectively, AIC), in this insurance coverage and bad faith action. Scholle contends we should reverse the entire judgment because the trial court applied Illinois instead of California law, but Scholle fails to show Illinois and California law materially differ on any issue other than Scholle's tort claim for AIC's alleged unreasonable claims handling conduct.

We agree the court prejudicially erred in applying Illinois law to insurance bad faith because doing so denied Scholle the opportunity to seek tort remedies for AIC's alleged bad faith in handling the underlying claim. Accordingly, we reverse the trial court's decision to reject Scholle's bad faith tort claim based on California law. We also reverse the trial court's ruling granting AIC summary judgment on Scholle's breach of contract claim. AIC failed to meet its initial summary judgment burden because it failed to address Scholle's allegations that AIC breached the implied covenant of good faith and fair dealing, and therefore breached the insurance contract, by unreasonably withholding its consent to the underlying settlement for nearly two years.

We affirm the trial court's decision sustaining AIC's demurrer to Scholle's claims for fraud and violation of an Illinois consumer protection law. Although the court erred in sustaining the demurrer because it relied on Illinois bad faith law, we conclude the error was not prejudicial. The court sustained the demurrer because Scholle alleged these claims to circumvent Illinois's prohibition against tort claims for unreasonable claims handling conduct, but Scholle concedes these causes of action are unnecessary given our conclusion Scholle may state a tort claim for bad faith under California law.

We also affirm the trial court's disposition of Scholle's declaratory relief claim. The court found AIC had the duty to investigate and indemnify Scholle on the underlying claim, but did not have a separate duty to settle the claim as Scholle's excess insurer. The court also declared the dates on which AIC's duties to investigate and indemnify arose. Scholle failed to establish California law required a different result and our independent review of the undisputed facts supports the trial court's factual findings identifying the events that triggered AIC's duties.

Accordingly, we reverse in part, affirm in part, and remand for further proceedings consistent with the views expressed in this opinion.

I

FACTS AND PROCEDURAL HISTORY

A. *Scholle, the Insurance Policies, and the Underlying Claim*

Scholle Corporation and its subsidiary, Scholle Industries, manufacture a wide variety of products, including "bag-in-box" packaging their customers use to sell wine and other beverages. Scholle Corporation is headquartered in Irvine, California, and Scholle Industries is located in Australia. They sell their products throughout the world.

Scholle purchased a series of commercial general liability insurance policies from Royal Insurance Company of America (Royal). Each policy had a $900,000 per occurrence policy limit and $100,000 self-insured retention.[1] Scholle also purchased a series of excess or umbrella insurance policies from AIC with $50 million in policy limits.

One of Scholle's best Australian customers was BRL Hardy, a winemaker that used Scholle's bag-in-box product to package and sell wine. In July 2001, BRL Hardy reported to Scholle that the taps on some of Scholle's product leaked, forcing BRL Hardy to recall a significant amount of its wine. BRL Hardy sought reimbursement from Scholle.

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[1] All monetary figures are in U.S. dollars unless otherwise stated.

B. *Investigation and Eventual Settlement of the Claim*

In August 2001, Scholle hired an independent insurance adjuster and an Australian law firm to investigate BRL Hardy's claim. Scholle tendered the claim to Royal and AIC in January 2002, informing them the claim could exceed $6 million. AIC acknowledged receipt of the tender in February 2002.

In November 2002, Scholle's independent auditor issued a preliminary report explaining it found no evidence Scholle was "'actively responsible for any of the tap leakage or mold,'" but Scholle nonetheless was "legally liable to compensate BRL Hardy" because it used defective taps manufactured by an independent supplier. The report pointed out Scholle's contract with BRL Hardy included various disclaimers and other limits on Scholle's liability, but explained that if Scholle asserted those contractual defenses it would jeopardize its relationship with a key customer. The adjuster recommended obtaining a legal opinion on whether Australian law would enforce the contractual limits on liability and warned the failure to assert those limits could undermine Scholle's ability to recover from the tap manufacturer. Finally, the report identified the provisional amount of BRL Hardy's claim as nearly $7 million.

In January 2003, Scholle asked Royal to pay its $900,000 per occurrence policy limits because the adjuster's investigation established that liability was clear and the amount of the loss greatly exceeded those limits. Royal agreed and tendered its policy limits, but did not issue a check because Scholle had not reached a settlement on BRL Hardy's entire claim. Scholle promptly informed AIC of Royal's tender and asked AIC to contribute $5.5 million of its policy limits so Scholle could negotiate a full settlement.

AIC claimed it lacked sufficient information to act on Scholle's request because the adjuster's report suggested there might be more than one occurrence under Royal's primary policies — which would increase Royal's policy limits to $1.5 million — and Scholle might have contractual defenses that would reduce or eliminate its liability. AIC informed Scholle it would engage coverage counsel and an Australian attorney to advise it on the claim. AIC also requested Scholle provide additional information so AIC's accountant could evaluate the adjustor's report and the amount of damages BRL Hardy claimed.

Scholle and AIC continued to discuss and exchange information throughout 2003. At the same time, Scholle and BRL Hardy discussed an agreement on the total amount of the claim. Scholle prohibited AIC from directly participating in those discussions and from having any direct contact with BRL Hardy or Scholle's independent adjuster.

During this period Scholle repeatedly demanded AIC acknowledge coverage as Royal had done because Scholle could not settle with BRL Hardy unless AIC paid Scholle's claim. Scholle insisted its liability was "'reasonably certain'" based on the adjustor's investigation and argued Royal's decision to accept coverage compelled AIC to do the same. Scholle acknowledged its "technical right" to assert contractual defenses to BRL Hardy's claim, but its Australian counsel advised "there is a substantial likelihood such an assertion would fail in court." Finally, Scholle emphasized it did not intend to force one of its best customers to file suit just so Scholle could assert meritless defenses.

For its part, AIC neither accepted nor denied coverage. Instead, it repeatedly explained its Australian counsel believed Scholle had strong contractual defenses that could reduce or eliminate its liability, and therefore AIC would not acknowledge coverage until Scholle asserted those defenses. AIC also repeatedly instructed Scholle not to negotiate a settlement with BRL Hardy that entered AIC's layer of coverage without AIC's consent. If Scholle did so, AIC warned it would breach the policy provision prohibiting Scholle from making voluntary payments and the provision requiring Scholle to cooperate with AIC's claim adjustment.

In November 2003, following discussions among Scholle, Royal, and AIC, Royal paid its $900,000 per occurrence policy limits directly to Scholle in settlement of BRL Hardy's claim. AIC agreed Scholle could use those funds to settle part or all of the claim, but continued to insist Scholle would breach the policy if it agreed to a settlement that entered AIC's level of coverage without AIC's consent. Seeking an additional source of funds to settle the claim, Scholle filed suit in Australia against its tap manufacturer in February 2004.

In July 2004, Scholle notified AIC it would not wait any longer for AIC to accept its coverage obligations and therefore Scholle intended to negotiate a settlement with BRL Hardy. Because Scholle and BRL Hardy could not agree on the total amount of the claim, Scholle informed AIC it intended to propose an "interim resolution" that would allow Scholle to begin paying BRL Hardy on the claim while the two negotiated the total amount. Specifically, Scholle explained it intended to propose making a substantial downpayment on the claim with the balance spread over a payment schedule once the parties agreed on the final amount.

In November 2004, Scholle informed AIC it agreed with BRL Hardy to pay $4.5 million Australian as a downpayment.[2] The parties also agreed on a range for the final amount of the claim, but left the determination of the exact amount for future negotiations. AIC responded by reiterating it would not consent to any settlement that failed to account for Scholle's defenses. AIC made clear, "If Scholle expects reimbursement from AIC, it must allow the proper defenses to BRL Hardy's claim to be

[2] Australia uses the Australian dollar as its currency unit. (<http://www.dfat.gov.au/facts/currency.html [as of Sept. 21, 2012].) On our own motion, we take judicial notice that the average exchange rate for the Australian dollar in November 2004 was 0.772236 U.S. dollars to one Australian dollar. (Evid. Code, § 452, subd. (h); <http://www.x-rates.com/average/?from=AUD&to=USD&year=2004> [as of Sept. 21, 2012].) Accordingly, $4.5 million Australian was $3,475,062 U.S.

raised." AIC, however, emphasized its willingness to participate in settlement discussions.

In January 2005, Scholle notified AIC that BRL Hardy demanded Scholle agree to a final settlement amount before the end of February 2005. Scholle requested AIC authorize a total settlement of $9.178 million Australian (excluding interest), which would leave a balance of $4.678 million Australian based on Scholle's downpayment.[3]

AIC and Scholle met on February 3, 2005, to discuss BRL Hardy's settlement demand. At that meeting, AIC withdrew its claim Scholle would breach the policy by agreeing to a settlement with BRL Hardy. AIC also promised to promptly make a "formal proposal" to resolve AIC and Scholle's outstanding differences.

On February 14, 2005, Scholle and BRL Hardy agreed to a final settlement of $9.178 million Australian (excluding interest). That same day, Scholle informed AIC of the settlement and the amount of the annual installments Scholle agreed to pay each December from 2005 to 2008. The settlement left the amount of interest for future resolution.

On February 18, 2005, AIC made the following proposal to resolve its coverage dispute with Scholle: (1) pay Scholle $1.7 million as the unreimbursed portion of the downpayment made on the settlement; (2) guarantee the first installment payment due under the settlement in December 2005; (3) fund Scholle's litigation against its tap manufacture in Australia; and (4) pay Scholle the "first dollar recovery" from the tap manufacturer up to the total amount of the settlement.

AIC made clear it did not condition the offer on Scholle providing AIC a complete release, but it nonetheless requested Scholle do so. AIC also explained it did

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[3] We take judicial notice that the average exchange rate for the Australian dollar in February 2005 was 0.781772 U.S. dollars to one Australian dollar. (<http://www.x-rates.com/average/?from=AUD&to=USD&amount=1.00&year=2005> [as of Sept. 21, 2012].) Accordingly, $9.178 million Australian was $7,175,103.42 U.S. and $4.678 million Australian was $3,657,129.42 U.S.

not offer to pay the entire BRL Hardy settlement because it wanted Scholle to keep some "'skin in the game'" to ensure Scholle's cooperation in prosecuting the litigation against the tap manufacturer. Scholle accepted this partial indemnification offer on March 22, 2005, but emphasized it would not release AIC from its obligation to fully indemnify Scholle for the BRL Hardy settlement or from any bad faith liability.

On April 6, 2005, AIC offered to fully indemnify Scholle by paying the unreimbursed portion of the settlement downpayment and all remaining installments due under the settlement, including interest. In return, AIC asked Scholle to cooperate with AIC's prosecution of Scholle's claim against the tap manufacturer and release AIC from all potential claims. When Scholle refused to release AIC from liability for breach of contract or bad faith, AIC nevertheless agreed to fully indemnify Scholle.

In May 2005, AIC paid Scholle more than $2.1 million to reimburse it for the unreimbursed portion of the settlement downpayment. In December 2005, AIC paid BRL Hardy all outstanding payments due under the settlement, including interest, and thereby fully indemnified Scholle for BRL Hardy's claim.

C. *Litigation*

Scholle filed this lawsuit against AIC and Royal in August 2004, alleging claims for declaratory relief, breach of contract, and bad faith. Scholle alleged AIC breached its umbrella policy when it failed to investigate the BRL Hardy claim, failed to reimburse Scholle for the costs it incurred in resolving the claim, and failed to settle the claim on Scholle's behalf. Scholle also alleged AIC breached the implied covenant of good faith and fair dealing by (1) unreasonably withholding its consent to Scholle's efforts to settle the BRL Hardy claim while simultaneously warning Scholle any settlement without AIC's consent would breach the policy, and (2) seeking a release from Scholle for any bad faith liability in exchange for paying the BRL Hardy settlement.

In December 2005, the trial court granted AIC's motion to designate Illinois law as the controlling law in this action. The court found Civil Code section 1646 (section 1646) required the application of Illinois law because "[t]he parties entered into their contracts in Illinois and no specific place of performance was contemplated." Based on that ruling, Scholle filed an amended complaint alleging all of its claims under Illinois law.

The trial court sustained AIC's demurrer to Scholle's amended complaint without leave to amend in August 2006 and Scholle appealed. In an April 2008 unpublished decision we reversed the trial court's ruling, finding Scholle adequately alleged claims for breach of contract, declaratory relief, and relief under Illinois Insurance Code, 215 ILCS 5/155 (section 155), which allows an insured to recover attorney fees and a statutory penalty for certain vexatious and unreasonable claims handling conduct. We also agreed Scholle could not allege a claim for bad faith or tortious breach of insurance contract because section 155 barred those tort claims. (*Scholle Corp. v. Agricultural Ins. Co.* (Apr. 9, 2008, G037847) [nonpub. opn.] (*Scholle I*).)

In November 2008, Scholle filed a motion asking the trial court to reconsider its ruling designating Illinois law as the controlling law in this action. Scholle also filed an amended complaint alleging claims under both Illinois and California law, including claims for declaratory relief, breach of contract, fraud, violation of the Illinois Consumer Fraud and Deceptive Business Practices Act (Illinois Consumer Act), and bad faith. The complaint included a claim under section 155 as part of its breach of contract cause of action. AIC filed a demurrer and motion to strike portions of the complaint.

In January 2009, the trial court denied Scholle's motion for reconsideration, sustained AIC's demurrer without leave to amend on the fraud and Illinois Consumer Act claims, and granted without leave to amend AIC's motion to strike the bad faith claim.

The parties agreed to bifurcate trial with the court hearing the declaratory relief claim first and followed by a jury trial on the breach of contract claim. In March 2010, the court conducted phase I of the trial based on a list of controverted issues, stipulated facts, exhibits, and argument the parties presented. As relevant, the trial court ruled (1) AIC had a duty to investigate the BRL Hardy claim and that duty arose in November 2003 when Royal paid Scholle its $900,000 per occurrence policy limits; (2) AIC had a duty to indemnify Scholle for the BRL Hardy settlement and that duty arose on February 14, 2005, when Scholle notified AIC of the settlement's final terms; and (3) AIC had no duty to settle the BRL Hardy claim.

After the trial court issued its phase I ruling, AIC moved for summary judgment on the breach of contract claim. The trial court granted AIC's motion and entered judgment against Scholle. Scholle timely appealed.

II

DISCUSSION

Scholle challenges the trial court's rulings on (1) Scholle's reconsideration motion; (2) AIC's most recent demurrer and motion to strike; (3) the phase I trial regarding Scholle's declaratory relief claim; and (4) AIC's summary judgment motion. Scholle primarily contests the trial court's decision to apply Illinois law. Scholle contends that if we agree the trial court should have applied California law rather than Illinois law, we need not address the merits of its other challenges because that error requires us to send the entire case back to the pleading stage. Scholle oversimplifies the issues because any error in applying Illinois law is harmless unless Scholle establishes a reasonable probability it would have obtained a more favorable result if the trial court applied California law. (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800 (*Cassim*).)

Accordingly, we start by identifying the governing choice-of-law principles. Next, we address whether Scholle properly preserved its choice-of-law challenge by filing a motion for reconsideration. We then address whether the trial court erred in applying Illinois law and whether applying California law likely would have changed the trial court's ruling on AIC's demurrer and motion to strike, the phase I trial, and AIC's summary judgment motion.

A. *Governing Choice-of-Law Principles*

California courts apply California law unless a party properly invokes the law of another state or country. (*Washington Mutual Bank v. Superior Court* (2001) 24 Cal.4th 906, 919 (*Washington Mutual*); *Hurtado v. Superior Court* (1974) 11 Cal.3d 574, 581 (*Hurtado*) ["'[normally], even in cases involving foreign elements, the court should be expected, as a matter of course, to apply the rule of decision found in the law of the forum'"].) The party asking a California court to apply foreign law bears the burden to establish the applicable foreign law and that its application is appropriate in the present case. (*Ibid*.)

To resolve choice-of-law questions, California courts generally apply the governmental interest approach. (*Kearney v. Salomon Smith Barney, Inc.* (2006) 39 Cal.4th 95, 107 (*Kearney*).) That approach typically involves three steps. First, the court determines whether any material difference exists between California's law and the foreign jurisdiction's law. (*Ibid*.) If there is no material difference, the analysis ends and the court applies California law. (*Washington Mutual, supra*, 24 Cal.4th at pp. 919-920; *Frontier Oil Corp v. RLI Ins. Co.* (2007) 153 Cal.App.4th 1436, 1454 (*Frontier Oil*).)

Second, if a material difference exists, "the court examines each jurisdiction's interest in the application of its own law under the circumstances of the particular case to determine whether a true conflict exists." (*Kearney, supra*, 39 Cal.4th at pp. 107-108.) If only one jurisdiction has an interest in the application of its law to the case at hand, then the analysis ends and the court applies that jurisdiction's law. (*Washington Mutual, supra,* 24 Cal.4th at p. 920; *Hurtado, supra,* 11 Cal.3d at p. 580.)

"Third, if the court finds that there is a true conflict, it carefully evaluates and compares the nature and strength of the interest of each jurisdiction in the application of its own law 'to determine which state's interest would be more impaired if its policy were subordinated to the policy of the other state' [citation], and then ultimately applies 'the law of the state whose interest would be the more impaired if its law were not applied.' [Citation.]" (*Kearney*, *supra*, 39 Cal.4th at p. 108.)

The governmental interest approach, however, does not govern all choice-of-law questions in California. Section 1646 establishes a separate choice-of-law rule for contract interpretation issues. (*Frontier Oil*, *supra*, 153 Cal.App.4th at pp. 1442-1443, 1459-1460.) Section 1646 provides that "[a] contract is to be interpreted according to the law and usage of the place where it is to be performed; or, if it does not indicate a place of performance, according to the law and usage of the place where it is made." Accordingly, section 1646 governs all choice-of-law questions involving contract interpretation while the governmental interest approach governs all other choice-of-law questions. (*Frontier Oil*, at pp. 1442-1443, 1459-1460.)

Neither the governmental interest approach nor section 1646 requires a court to apply the same state's laws to all issues in a case. Rather, "a separate conflict of laws inquiry must be made with respect to each issue in the case." (*Washington Mutual*, *supra*, 24 Cal.4th at p. 920.) "Issue" for choice-of-law purposes is not synonymous with a cause of action. Indeed, choice-of-law questions often arise in the context of finite legal issues rather than entire causes of action. (See, e.g., *Frontier Oil*, *supra*, 153 Cal.App.4th at pp. 1447-1448 [in action alleging claims for declaratory relief, breach of contract, and bad faith, court conducted separate choice-of-law analysis to determine governing law on whether an insurance policy included a duty to defend certain types of claims and whether the underlying claims triggered that duty to defend].)

B. *The Trial Court Abused Its Discretion by Denying Scholle's Reconsideration Motion*

Scholle did not appeal from the trial court's original choice-of-law ruling in December 2005, and did not challenge that ruling in *Scholle I* when we relied on Illinois law to reverse the trial court's decision sustaining AIC's demurrer. Instead, Scholle first challenged the trial court's choice-of-law ruling when it filed its reconsideration motion in November 2008.

Scholle asked the trial court to reconsider its choice-of-law ruling because the *Frontier Oil* decision — which was published after the parties completed briefing in *Scholle I*, but before oral argument — changed the law by requiring courts to separately analyze choice-of-law questions involving contract interpretation under section 1646 and all other choice-of-law issues under the governmental interest approach. According to Scholle, whether it could assert a tort claim for bad faith was a noncontract interpretation issue governed by the governmental interest approach, which required the trial court to decide the issue under California law. The trial court denied Scholle's reconsideration motion.

Code of Civil Procedure section 1008, subdivision (c) (section 1008(c)), provides, "If a court at any time determines that there has been a change of law that warrants it to reconsider a prior order it entered, it may do so on its own motion and enter a different order." A trial court also has the inherent power to reconsider its prior rulings on its own motion at any time before entry of judgment. (*Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1107-1108 (*Le Francois*).)

A "change of law" under section 1008(c), "is always an appropriate basis, up until a final judgment is entered, for changing an interim order." (*Blake v. Ecker* (2001) 93 Cal.App.4th 728, 739, fn. 10 (*Blake*), disapproved on other grounds in *Le Francois, supra*, 35 Cal.4th at p. 1107, fn. 5.) An appellate decision published during an action's pendency may be a change of law under section 1008(c) and requires a trial court to reconsider its earlier ruling if the decision materially changed the law. (*Valdez v. Himmelfarb* (2006) 144 Cal.App.4th 1261, 1275-1276 (*Valdez*); *Blake, supra*, 93 Cal.App.4th at pp. 738-739; *International Ins. Co. v. Superior Court* (1998) 62 Cal.App.4th 784, 787-788 (*International Ins.*) ["we think [section 1008(c)] means exactly what it says — when a trial court concludes there has been a change of law that warrants reconsideration of a prior order, it has jurisdiction to reconsider and change its order"].)

In *Valdez*, the trial court granted a defendant's summary judgment motion based on the statute of limitations and sanctioned the plaintiff for bringing the action in bad faith. (*Valdez*, *supra*, 144 Cal.App.4th at p. 1265.) The appellate court reversed the summary judgment ruling because the trial court applied the wrong statute of limitations and the limitations period was equitably tolled. (*Id*. at pp. 1269-1275.) The *Valdez* court also noted it lacked jurisdiction to reverse the sanction order because the plaintiff failed to appeal that order, but its "decision on the statute of limitations issue in this case constitutes a 'change of law' for purposes of [section 1008(c)]." (*Valdez*, at p. 1275.) Accordingly, the Court of Appeal concluded "it would be an abuse of discretion for the trial court, after remand, not to reconsider its order under [section 1008(c)]." (*Valdez*, at pp. 1265, 1275-1276.)

In *Blake*, the defendant successfully moved to compel the plaintiff to arbitrate her claims, but then neither side took any action to commence arbitration for nearly two years. (*Blake*, *supra*, 93 Cal.App.4th at p. 735.) Because the Supreme Court in the interim issued a decision resolving a conflict in the law regarding arbitration agreements, the plaintiff filed a motion under section 1008(c) asking the court to reconsider its prior ruling. (*Blake*, at p. 736 & fn. 5.) The trial court refused to consider the motion, but the Court of Appeal reversed: "We hold that the trial court was bound to grant such reconsideration in light of the conflict among prior authorities that was resolved by [the Supreme Court's decision]." (*Id*. at pp. 737, 739.)

Here, *Frontier Oil* changed the legal analysis on how to apply section 1646 to choice-of-law issues. Some earlier cases applied section 1646 as a choice-of-law rule, but those cases provided little guidance on how section 1646 applied. (*Frontier Oil*, *supra*, 153 Cal.App.4th at p. 1451.) Indeed, several cases applied section 1646 as a choice-of-law rule for issues other than contract interpretation without analyzing how a court could do so when section 1646 expressly limited its application to contractual interpretation issues. (*Frontier Oil*, at pp. 1453-1454.) Nevertheless, based on those earlier cases, some federal decisions concluded California's use of the governmental interest approach supplanted section 1646 as a choice-of-law rule. (*Frontier Oil*, at pp. 1458-1459.) Accordingly, *Frontier Oil* changed the law by clearly defining section 1646 as the choice-of-law rule for all contract interpretation issues in California and emphasizing the governmental interest approach remained the controlling choice-of-law rule for all other issues, even when the same action presented both issues. (*Frontier Oil*, at pp. 1459-1460 & fn. 15.)

Frontier Oil was published more than a year and one-half *after* the trial court made its original choice-of-law ruling. Based on the then-current state of the law, the trial court applied section 1646 as the choice-of-law rule for the entire case without considering whether the issues involved contract interpretation. *Frontier Oil* changed the analytical framework and required the trial court to grant Scholle's reconsideration motion. (*Valdez*, *supra*, 144 Cal.App.4th at pp. 1275-1276; *Blake*, *supra*, 93 Cal.App.4th at p. 739; *International Ins.*, *supra*, 62 Cal.App.4th at p. 787.) Indeed, this change of law required the trial court to grant Scholle's motion and reconsider its prior choice-of-law ruling even if the court ultimately made the same ruling regarding which state's law applied. (See *Standard Microsystems Corp. v. Winbond Electronics Corp.* (2009) 179 Cal.App.4th 868, 890; *Corns v. Miller* (1986) 181 Cal.App.3d 195, 202 ["If the requirements have been met to the satisfaction of the court but the court is not persuaded the earlier ruling was erroneous, the proper course is to grant reconsideration and to reaffirm the earlier ruling"].)

AIC contends the trial court properly denied the reconsideration motion because Scholle failed to meet section 1008's strict time constraints. Section 1008(c), however, allows a trial court to reconsider a prior ruling "at any time" based on "a change of law." (*Blake, supra*, 93 Cal.App.4th at pp. 735-736, 739 [two years between original ruling and motion to reconsider based on change of law]; *International Ins., supra*, 62 Cal.App.4th at pp. 786-787 [six years between original ruling and motion to reconsider based on change of law].) Code of Civil Procedure section 1008, subdivision (a), requires a reconsideration motion "based upon new or different facts, circumstances, or law" to be brought within 10 days after notice of the challenged order is served. That time limitation does not apply to a motion based on a change of law.

AIC also argues Scholle should be estopped from appealing the trial court's original choice-of-law ruling because Scholle did not challenge that ruling when it appealed the court's demurrer ruling in November 2006. This argument fails because it relies on a fundamental misconception about Scholle's present appeal. Scholle does not challenge the original choice-of-law ruling. It challenges the trial court's later refusal to reconsider that ruling after *Frontier Oil* changed the law on which the trial court previously relied. The original choice-of-law ruling and the reconsideration ruling are separate rulings raising separate issues. The original choice-of-law ruling decided which state's laws applied to Scholle's claims based on the law existing at that time. The reconsideration ruling decided whether *Frontier Oil* changed that law and required the trial court to reconsider its prior ruling even if it ultimately reached the same conclusion regarding which state's law applied.

In a related argument, AIC asserts Scholle's failure to cite *Frontier Oil* to this court during *Scholle I* should estop Scholle from relying on that case because Scholle's failure lead to six years of litigation under Illinois law, including the appeal in

Scholle I, a bench trial on the declaratory relief claim, and a summary judgment motion. This argument misrepresents the record.

AIC did not seek to invoke Illinois law until nearly 15 months after Scholle filed this action and *Frontier Oil* was not published until three years after Scholle filed this lawsuit. Moreover, *Frontier Oil* was published only after the parties completed their briefing in *Scholle I* and Scholle brought *Frontier Oil* to the trial court's attention shortly after we remanded *Scholle I*. The trial court heard Scholle's reconsideration motion over a year before the bench trial in this action and nearly two years before AIC's summary judgment motion. Under these circumstances, it is disingenuous to suggest Scholle caused six years of litigation under Illinois law by failing to timely cite *Frontier Oil* to this court or the trial court. We find Scholle acted reasonably.

Accordingly, we conclude the trial court abused its discretion in denying Scholle's reconsideration motion. *Frontier Oil* changed the law regarding how choice-of-law issues must be analyzed in cases involving contracts and required the trial court to reexamine its earlier decision to apply Illinois law to the entire action.

C. *The Trial Court Erred in Applying Illinois Law on Bad Faith*

Frontier Oil required the trial court to conduct a separate choice-of-law analysis for each issue in the case. (*Frontier Oil*, *supra*, 153 Cal.App.4th at pp. 1442-1443, 1458.) Accordingly, the first step in the analysis is to identify all issues raising a potential conflict of law. (*Id*. at pp. 1447-1448.) Next, the court must determine whether each conflict-of-law issue involves contract interpretation. Finally, the court applies the proper choice-of-law rule for each issue — section 1646 for contract interpretation issues and the governmental interest approach for all other issues. (*Frontier Oil*, at pp. 1464-1467.)

Scholle challenges the trial court's decision to apply Illinois law to this entire action, but it seeks to show an actual conflict between California and Illinois law on only one issue: whether Scholle may state a tort claim for bad faith based on how AIC handled the BRL Hardy claim. Scholle failed to identify a conflict between California and Illinois law on any other issue the trial court decided. Consequently, we do not address whether the trial court erred in applying Illinois law to any issue other than bad faith.

California and Illinois law conflict on the availability of a tort claim for bad faith. California recognizes a tort claim when an insurer unreasonably delays or withholds policy benefits owed to the insured. (*Major v. Western Home Ins. Co.* (2009) 169 Cal.App.4th 1197, 1209-1210.) The insured is entitled to present its bad faith claim to a jury and may recover tort damages, punitive damages, and attorney fees without any arbitrary limitation on the amount recoverable. (*Jordan v. Allstate Ins. Co.* (2007) 148 Cal.App.4th 1062, 1073 (*Jordan*) [tort remedies, including punitive damages, recoverable on bad faith claim]; *Essex Ins. Co. v. Five Star Dye House, Inc.* (2006) 38 Cal.4th 1252, 1258 [attorney fees incurred to obtain policy benefits recoverable on bad faith claim].) In contrast, Illinois does not allow a tort claim for bad faith. (*Cramer v. Ins. Exch. Agency* (1996) 174 Ill.2d 513, 527-528 (*Cramer*).) Instead, Illinois enacted section 155, which provides "the court may allow as part of the taxable costs in the action reasonable attorney fees, other costs, plus [a penalty up to $60,000]" when an insurer denies, delays, or settles an insurance claim in a "vexatious and unreasonable" manner. (215 Ill. Comp. Stat. 5/155; *Cramer*, at pp. 519-520.)

Under *Frontier Oil*, whether Scholle may state a tort claim for bad faith is *not* a contract interpretation issue because the question turns on a rule of law established for public policy reasons, not on how the court interprets the insurance contract. (See, e.g., *Frontier Oil*, *supra*, 153 Cal.App.4th at pp. 1460-1461 [whether insurer may indemnify insured against punitive damages *not* a contract interpretation issue because question turns on public policy rather than contract interpretation].)

AIC argues Scholle's bad faith claim presents a contract interpretation issue because it requires an underlying breach of the insurance contract and arises from the covenant of good faith and fair dealing implied in the contract. The distinction between a choice-of-law issue involving contract interpretation and all other choice-of-law issues, however, does not depend on whether the issue arises from or relates to a contract. Instead, courts must consider whether the issue turns on what the parties intended when they entered into the contract (a contract interpretation issue) or on public policy or other reasons that apply regardless of what the parties intended when they entered into the contract (a noncontract interpretation issue). (*Frontier Oil*, *supra*, 153 Cal.App.4th at p. 1464.) Whether to allow a tort claim for bad faith is a policy determination. (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 684 ["in the context of insurance contracts . . . , for a variety of *policy* reasons, [California] courts have held that breach of the implied covenant will provide the basis for an action in tort" (italics added)]; *Cramer*, *supra*, 174 Ill.2d at pp. 527-528 [Illinois courts do not allow a tort claim for bad faith because Legislature adopted statute that "allows an extracontractual award and specifically defines the limits of this award"].)

Because Scholle's right to state a bad faith claim in tort is not a contract interpretation issue, the three-step governmental interest approach provides the controlling choice-of-law rule. (*Frontier Oil*, *supra*, 153 Cal.App.4th at pp. 1459-1460.) As described above, the first step of that approach examines whether California and Illinois law materially differ on whether Scholle may state a tort claim for bad faith. (*Kearney*, *supra*, 39 Cal.4th at p. 107.) A material difference clearly exists based on the difference in the type and amount of damages recoverable for an insurer's improper claims handling conduct, whether a jury or the court decides the claim, and the showing the insured must make to recover. (Compare *Jordan*, *supra*, 148 Cal.App.4th at p. 1073 and 215 Ill. Comp. Stat. 5/155.)

The second step of the governmental interest approach requires us to examine each state's interest "in the application of its own law under the circumstances of the particular case." (*Kearney*, *supra*, 39 Cal.4th at pp. 107-108.) The analysis focuses on a state's interest in having its law on the particular issue applied to the specific fact pattern involved, not simply the general interest the state relied on in adopting its law. (See, e.g., *Hurtado, supra,* 11 Cal.3d at pp. 580-581 [Mexico had no interest in applying its law protecting defendants in wrongful death actions from excessive damages to a California action when the plaintiff was the only party to the action from Mexico].) As the party requesting the court to apply Illinois law, AIC bore the burden to establish Illinois's interest in having its law applied. (*Washington Mutual*, *supra*, 24 Cal.4th at p. 920; *Frontier Oil, supra*, 153 Cal.App.4th at p. 1465.)

AIC and Scholle both contend Illinois adopted section 155 to protect insurers from excessive damage awards. They are mistaken. Illinois originally limited an insured to a contract claim when the insured sought to obtain policy benefits from its insurer. Illinois enacted section 155 to allow insureds to also recover their attorney fees so that lawsuits against insurers would be economically feasible, and later amended that statute to also allow insureds to recover a limited penalty from insurers. (*Cramer*, *supra*, 174 Ill.2d at pp. 520-521.) Illinois courts refuse to allow a common law tort recovery for bad faith because the Legislature already determined the appropriate relief for that conduct. (*Id*. at pp. 527-528.) Accordingly, Illinois's interest regarding its bad faith law is to protect insureds, not insurers. (*Uhlich Children's Advantage Network v. Nat'l Union Fire Co.* (2010) 398 Ill.App.3d 710, 722-723; *Estate of Price v. Universal Cas. Co.* (2002) 334 Ill.App.3d 1010, 1016.) Because California law provides insureds even greater protection by allowing a tort claim for bad faith without any limits on recovery, Illinois has no interest in having its bad faith law applied to Scholle's claim against AIC in this case. (See *Hurtado*, *supra*, 11 Cal.3d at pp. 580-581.)

Even assuming the policy underlying Illinois's bad faith law is to protect insurers, AIC failed to show Illinois has any interest in having its bad faith law applied to Scholle's claim. Scholle's bad faith claim is based on how AIC handled the underlying BRL Hardy claim. As AIC acknowledges, the BRL Hardy claim arises from a defective product distributed in Australia and manufactured by Scholle in Australia for a customer located in Australia. Australian claims professionals investigated the claim in Australia and liability turned on Australian law. Scholle ultimately settled the claim in Australia by paying Australian dollars and executing a release in Australia. No aspect of the claim or the claim handling process occurred in Illinois or had any connection to Illinois. Accordingly, AIC failed to show Illinois has any interest in having its bad faith law applied to Scholle's claim.[4]

Finally, AIC contends California has no interest in having its bad faith law applied to Scholle's claims, but AIC ignores California's greater connection to the claims handling process than Illinois. The American employees for Scholle who handled the claim and the American attorneys for both Scholle and AIC who worked on the claim were located in California. More importantly, AIC ignores that it bore the burden to establish Illinois had an interest in having its law applied, not that California lacked an interest. (*Washington Mutual*, *supra*, 24 Cal.4th at p. 920.)

California courts apply California law unless a party establishes a foreign jurisdiction has a superior interest in having its law applied to the particular dispute. AIC

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[4] In an effort to establish Illinois's interest, AIC requested we judicially notice various governmental filings Scholle made identifying an Illinois address and also a lawsuit Scholle filed in the Illinois courts. We deny that request because the documents are irrelevant. (*Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063 ["Although a court may judicially notice a variety of matters [citation], only *relevant* material may be noticed" (original italics)], overruled on other grounds in *In re Tobacco Cases II* (2007) 41 Cal.4th 1257, 1276.) The question is not whether Scholle or even AIC's policy has some connection to Illinois, but whether Illinois has an interest in having its law applied to this specific claims handling dispute between Scholle and AIC.

failed to meet that burden and therefore the trial court erred in applying Illinois law to decide whether Scholle could state a tort claim based on AIC's claims handling conduct. (*Washington Mutual*, *supra*, 24 Cal.4th at p. 920 ["the trial court may properly find California law applicable without proceeding to the third step in the analysis if the foreign law proponent fails to . . . establish the other state's interest in having its own law applied"].)

D. *The Trial Court Erred in Striking Scholle's Tort Claim for Bad Faith and Granting AIC's Summary Judgment Motion*

Contrary to Scholle's contention, the trial court's error in applying Illinois law to Scholle's bad faith claim does not require us to reverse the entire judgment. Indeed, we may not reverse the court's judgment or any other ruling unless Scholle shows "the error was prejudicial in that it resulted in a miscarriage of justice." (*Hoffman Street, LLC v. City of West Hollywood* (2009) 179 Cal.App.4th 754, 772; Cal. Const., art. VI, § 13; Code Civ. Proc., § 475.) "'[A] "miscarriage of justice" should be declared only when the court, "after an examination of the entire cause, including the evidence," is of the "opinion" that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.' [Citation.]" (*Cassim*, *supra*, 33 Cal.4th at p. 800; *Hoffman*, *supra*, 179 Cal.App.4th at p. 773.)

We therefore examine each of the trial court's rulings on the merits of Scholle's claims — that is, the trial court's ruling on AIC's demurrer and motion to strike, its ruling at the phase I trial on Scholle's declaratory relief claim, and its ruling on AIC's summary judgment motion — to determine whether Scholle likely would have obtained a more favorable outcome in the absence of the trial court's error in applying Illinois bad faith law.

1. AIC's Demurrer and Motion to Strike

At the same time it denied Scholle's reconsideration motion the trial court also granted AIC's motion to strike and sustained AIC's demurrer to Scholle's complaint. The court struck Scholle's claim for bad faith or tortious breach of insurance contract under California law based on the finding Illinois law applied and did not allow a tort claim for bad faith. The court sustained AIC's demurrer to Scholle's fraud and Illinois Consumer Act claims because the facts alleged related solely to AIC's claims handling conduct and therefore failed to allege any claim other than the one Scholle already alleged under section 155.

We conclude the trial court erred in striking Scholle's tort claim for bad faith because California law permits that cause of action and, as explained above, the court erred in applying Illinois bad faith law in this action. Striking an entire cause of action is prejudicial error when it deprives the plaintiff of the opportunity to prove its claim. (See *Deeter v. Angus* (1986) 179 Cal.App.3d 241, 251 [erroneously sustaining demurrer to cause of action is prejudicial error].) Here, the court's ruling striking Scholle's bad faith claim deprived Scholle of the opportunity to prove its claim for tort remedies based on AIC's claims handling conduct and therefore constituted prejudicial error.[5]

AIC contends any error in applying Illinois bad faith law was not prejudicial because Scholle's bad faith claim failed under California law. According to AIC, an insurer's breach of the underlying insurance contract is a prerequisite to a bad faith claim under California law and the trial court's summary judgment grant demonstrated Scholle could not establish AIC breached its insurance contract. AIC,

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5 Scholle also challenges the trial court's decision to strike numerous allegations regarding the connection between California and AIC's claim handling process that Scholle added to its pleading to establish California law applied. We find no error in the trial court's decision to strike those allegations because they are irrelevant. Choice-of-law is not a pleading issue and therefore allegations regarding a particular state's interest in applying its law are not determinative.

however, fails to recognize breach of the implied covenant of good faith and fair dealing is a breach of contract and supports a tort claim for bad faith regardless of whether the insurer also breached an express contractual provision. (*Schwartz v. State Farm Fire & Casualty Co.* (2001) 88 Cal.App.4th 1329, 1339 (*Schwartz*).)

To support its argument, AIC cites *Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1 and *Love v. Fire Ins. Exchange* (1990) 221 Cal.App.3d 1136. Those cases hold a bad faith claim may not be maintained unless benefits are due under the insurance policy, but they do not hold the insured must show the insurer breached the policy's express terms before permitting a bad faith claim to proceed. (*Waller*, at p. 36; *Love*, at p. 1153.) As the *Love* court explained, "the covenant [of good faith and fair dealing] is implied as a *supplement* to the express contractual covenants, to prevent a contracting party from engaging in conduct which (while not technically transgressing the express covenants) frustrates the other party's rights to the benefits of the contract. Thus, when benefits are due an insured, delayed payment based on inadequate or tardy investigations, oppressive conduct by claims adjusters seeking to reduce the amounts legitimately payable and numerous other tactics may breach the implied covenant because it frustrates the insured's *primary* right to receive the benefits of his contract — i.e., prompt compensation for losses." (*Love*, at p. 1153, original italics; see also *Waller*, at p. 36.)

Schwartz specifically rejected the argument that breach of an express contractual provision is a prerequisite to a claim for bad faith: "[B]reach of a specific provision of the contract is not a necessary prerequisite to a claim for breach of the implied covenant of good faith and fair dealing. [Citations.] Similarly, even an insurer that pays the full limits of its policy may be liable for breach of the implied covenant, if improper claims handling causes detriment to the insured." (*Schwartz, supra*, 88 Cal.App.4th at p. 1339 & fn. 8.) Here, as explained below, the trial court erred in granting AIC's summary judgment motion because AIC failed to address whether its claims handling conduct breached the implied covenant.

The trial court also erred in sustaining AIC's demurrer to Scholle's fraud and Illinois Consumer Act claims because it relied on Illinois law to sustain the demurrer. That error, however, is not prejudicial because it does not deprive Scholle of the opportunity to prove its underlying claim. As the trial court found, Scholle attempted to allege these two claims as a means to circumvent Illinois's bar on tort claims for bad faith, but failed to allege sufficient facts to state a claim for anything other than improper claims handling conduct under section 155. By reversing the trial court's decision on the motion to strike, we provide Scholle the opportunity to prove a tort claim for bad faith under California law and therefore these claims are unnecessary. Indeed, Scholle concedes these claims are moot if we conclude California bad faith law applies.

Accordingly, we find the trial court prejudicially erred in granting AIC's motion to strike Scholle's bad faith claim under California law, but not in sustaining AIC's demurrer to Scholle's fraud and Illinois Consumer Act claims.

2. Phase I Trial Ruling on Scholle's Declaratory Relief Claim

The trial court bifurcated Scholle's declaratory relief claim regarding the duties AIC owed under its umbrella policy and when those duties arose. After conducting a bench trial based on the parties' stipulated facts, exhibits, and arguments, the court ruled: (1) AIC had a duty to investigate the BRL Hardy claim once the "'possibility'" of Royal exhausting its coverage became clear; (2) the duty to investigate arose on November 11, 2003, when Royal paid Scholle its $900,000 per occurrence policy limits; (3) AIC had a duty to "'promptly'" indemnify Scholle because the claim was "'finally determined'" when Scholle settled with BRL Hardy; (4) the duty to indemnify arose on February 14, 2005, when Scholle notified AIC of the settlement's final amount; and (5) AIC owed no duty to settle the BRL Hardy claim on its own.

Scholle only challenges the trial court's ruling that AIC's duty to indemnify arose on February 14, 2005. Scholle's opening brief also challenged the trial court's ruling AIC did not owe a duty to settle, but Scholle dropped that challenge in its supplemental brief by stating "[t]he only Phase I issue challenged by Scholle with respect to AIC is the trial court's factual determination that AIC's duty to indemnify did not first arise until February 14, 2005."[6] We review the trial court's ruling regarding the duty to indemnify de novo because it presents a question of law based on undisputed facts. (*State Farm Fire & Casualty Co. v. Superior Court* (2008) 164 Cal.App.4th 317, 323.)

In *Scholle I*, we concluded AIC's umbrella policy imposed a duty to indemnify Scholle once the amount of the BRL Hardy claim was "'finally determined'" through Scholle's settlement with BRL Hardy. (*Scholle I, supra*, G037847 at pp. 13-14.) Scholle contends that duty to indemnify arose not later than November 2004 when Scholle informed AIC it had agreed to a settlement with BRL Hardy and paid $4.5 million Australian as a downpayment. The record, however, reveals the agreement Scholle reached with BRL Hardy in November 2004 did not finally determine the amount of BRL Hardy's claim. Indeed, Scholle's brief concedes that agreement left the settlement's final amount to future negotiations. Scholle and BRL Hardy did not reach a final settlement, and therefore the amount of the claim was not finally determined until February 14, 2005, when Scholle informed BRL Hardy it agreed to $9.178 million Australian as the final settlement amount.

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[6] Assuming Scholle did not drop its challenge to the trial court's ruling regarding the duty to defend, we nonetheless conclude Scholle failed to establish the trial court erred. The only argument Scholle made regarding the duty to defend was that *Scholle I* held AIC had a duty to settle. Scholle misreads our decision in *Scholle I*. Our decision merely concluded Scholle's allegations that AIC unreasonably withheld its consent to Scholle's settlement with BRL Hardy adequately alleged a breach of the policy's implied covenant of good faith and fair dealing. (*Scholle I, supra*, G037847 at pp. 14-15.) We did not conclude AIC's umbrella policy included a duty to settle.

Scholle also contends it would have reached a final settlement with BRL Hardy as early as mid-2003, and therefore AIC's duty to indemnify would have arisen much earlier, but for AIC's unreasonable refusal to agree to any settlement. AIC's refusal to agree to an earlier settlement, however, does not change the time at which the amount of Scholle's loss was finally determined and AIC's duty to indemnify arose. The argument AIC unreasonably prevented Scholle from settling earlier potentially supports a claim that AIC breached the implied covenant of good faith and fair dealing, but it does not establish an earlier date for finally determining the loss.

The trial court's decision to apply Illinois law had no impact on the phase I ruling regarding when the duty to indemnify arose because, as Scholle concedes, that was a factual determination. Scholle made no showing it would have obtained a more favorable result on the issue if the trial court applied California law. Accordingly, the trial court did not err in its phase I rulings.

3. AIC's Summary Judgment Motion

After the phase I trial, the court granted AIC summary judgment on Scholle's sole remaining cause of action for breach of contract, which included Scholle's request for relief under section 155 based on AIC's unreasonable claims handling conduct. The court found AIC "met its initial burden of proof by showing that AIC met[] its duty to investigate and indemnify" and Scholle failed to "present sufficient evidence to create a triable issue of material fact on either of the issues." The court's order did not specifically address Scholle's claim for relief under section 155.

As a defendant moving for summary judgment, AIC bore the initial burden to show Scholle's cause of action lacked merit. (*Teselle v. McLoughlin* (2009) 173 Cal.App.4th 156, 168-169.) To meet its burden, AIC must present sufficient evidence to show it is entitled to judgment as a matter of law because there is no factual basis for relief on any theory reasonably contemplated by Scholle's complaint. (*Eriksson* *v. Nunnink* (2011) 191 Cal.App.4th 826, 847-848.) Scholle had no burden to present any evidence until AIC met its initial burden. (*Hawkins v. Wilton* (2006) 144 Cal.App.4th 936, 940.) We review the trial court's ruling on AIC's summary judgment motion de novo. (*Id*. at pp. 939-940.)

Scholle's breach of contract cause of action included a claim that AIC breached the implied covenant of good faith and fair dealing by unreasonably delaying Scholle's settlement with BRL Hardy. Specifically, Scholle alleged AIC unreasonably refused to consent to the settlement from early 2003 until February 2005 despite the conclusion of Scholle's independent adjuster that Scholle's liability was reasonably certain. Scholle further alleged that AIC repeatedly warned Scholle it would deny coverage if Scholle settled the BRL Hardy claim without AIC's consent.

In *Scholle I*, we explained these allegations adequately alleged a breach of the implied covenant and therefore stated a claim for breach of contract under Illinois law. (*Scholle I*, *supra*, G037847 at pp. 14-15 ["exercising in an arbitrary and capricious manner its right to consent to a settlement and thereby deny Scholle all rights under the AIC contract would breach the implied covenant and form a further basis for breach of contract"].) These allegations similarly state a claim for breach of contract under California law. (See, e.g., *Schwartz*, *supra*, 88 Cal.App.4th at p. 1339 ["even an insurer that pays the full limits of its policy may be liable for breach of the implied covenant, if improper claims handling causes detriment to the insured"]; *Lincoln Property Co., N.C., Inc. v. Travelers Indemnity Co.* (2006) 137 Cal.App.4th 905, 914 (*Lincoln Property*) [implied covenant imposes liability for unreasonable delays in processing and resolving claim].) Accordingly, to meet its initial burden on its summary judgment motion, AIC had to present evidence to negate this breach of contract theory. It failed to do so.

AIC's motion only addressed the reasonableness of AIC's claims handling conduct in the context of Scholle's claim for relief under section 155. Specifically, AIC argued Scholle's section 155 claim failed because AIC did not unreasonably delay in paying the BRL Hardy settlement. According to AIC, "'the clock started ticking'" on its duty to pay the claim when its duty to indemnify arose on February 14, 2005, and therefore the reasonableness of AIC's conduct depends solely on what occurred *after* February 14, 2005. Because it promptly agreed to pay the BRL Hardy settlement once its duty to indemnify arose, AIC contends Scholle's section 155 claim fails as a matter of law.

This argument does not satisfy AIC's initial burden because it fails to address all of Scholle's allegations regarding AIC's claims handling conduct. The allegations described above allege AIC unreasonably withheld its consent to the settlement *before* AIC's duty to indemnify arose on February 14, 2005, but AIC's motion limits itself to the reasonableness of its conduct *after* February 14, 2005.

We acknowledge AIC generally argues in this action that it acted reasonably in refusing to consent to the settlement earlier because Scholle refused to assert its contractual defenses to BRL Hardy's claim. That argument, however, fails to meet AIC's initial burden because AIC did not raise the argument in its summary judgment motion and also failed to present any evidence showing either Scholle refused to assert its defenses or AIC based its refusal to consent to the settlement on Scholle's refusal to assert the defenses. Moreover, whether Scholle acted reasonably in refusing to assert its defenses and whether AIC acted reasonably in refusing to consent to the settlement are questions of fact that cannot be resolved on summary judgment.

Because AIC's failure to address even one breach of contact theory alleged in Scholle's complaint prevented the trial court from granting AIC's summary judgment motion, we do not address whether AIC met its initial burden to negate any other breach of contract theory Scholle alleged. This error requires reversal regardless of whether we apply California or Illinois law because both states recognize breach of the implied covenant as a breach of contract. Accordingly, we reverse the trial court's decision granting AIC's summary judgment motion.

III

DISPOSITION

The judgment is reversed in part and affirmed in part. We reverse the trial court's rulings denying Scholle's reconsideration motion, granting AIC's motion to strike Scholle's bad faith claim based on California law, and granting AIC's summary judgment motion. We affirm the trial court's rulings sustaining AIC's demurrer to Scholle's fraud and Illinois Consumer Act claims and declaring AIC's duties under its umbrella policy and the dates on which those duties arose. We remand this matter for further proceedings consistent with the views expressed in this opinion. Scholle shall recover its costs on appeal.

ARONSON, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

IKOLA, J.