2013 IL App (1st) 121979-U

FIFTH DIVISION
December 6, 2013

No. 1-12-1979

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

SAFETY NATIONAL CASUALTY COMPANY, Individually and as Assignee of Intergovernmental Risk Management Agency and Village of Glendale Heights, An Illinois Municipal Corporation, Plaintiff-Appellant, v. TIG SPECIALITY INSURANCE SOLUTIONS, Defendant-Appellee.	)	Appeal from the Circuit Court of Cook County 07 L 01053 Honorable Brigid Mary McGrath, Judge Presiding

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Gordon and Justice Palmer concurred in the judgment.

O R D E R

HELD: Insurer was not entitled to summary judgment on breach of contract and equitable claims against a purported co-insurer where key allegations could never be proven.

¶ 1 A municipal employee sought worker's compensation benefits for injuries to his left foot in 1991 and while the claim was pending before the Illinois Workers' Compensation Commission (Commission), he filed a new claim for injuring the same foot in 1998. TIG Insurance Company (TIG) was the municipality's excess workers' compensation insurer in 1991

and Safety National Casualty Company (Safety National) had that role in 1998. Safety National proposed that the claims be jointly settled or tried together with the expectation that Safety National would show that the 1998 claim was a continuation or aggravation of the 1991 injury for which TIG was solely liable. TIG responded that it was not liable for an injury or claim that occurred outside the effective dates of its policy and that its contract entitled TIG to settle the 1991 claim independently. After TIG settled, Safety National also settled, but Safety National sued TIG, individually and as the assignee of its insureds, contending the separate settlements disadvantaged them. The circuit court resolved crossmotions for summary judgment in favor of TIG. Safety National appeals.

¶ 2 The Village of Glendale Heights (Village) is a small suburban community located 25 miles west of Chicago in Du Page County, Illinois. In 1991 and 1998, it was one of at least 35 Illinois municipalities that obtained workers' compensation liability coverage by joining a risk-sharing management pool known as Intergovernmental Risk Management Agency (IRMA). As a member of IRMA, the Village limited its exposure in each loss to a $1,000 deductible. IRMA was self-insured for the first $350,000 of each loss in 1991 and the first $400,000 of each loss in 1998, and protected itself from larger claims by purchasing excess insurance coverage. IRMA was based in Oakbrook Terrace, Illinois, employed about 20 people, about half of whom were dedicated to handling claims, and as of 2002, which is the time frame relevant to this appeal, was headed by Larry Bush, who had considerable experience with workers' compensation claims and risk management.

¶ 3 IRMA purchased excess workers' compensation insurance from TIG that covered

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"loss resulting from an occurrence during the contract period" of January 1, 1991 to January 1, 1992. The TIG policy authorized the excess insurer to settle a claim without consulting its insureds (the Village and IRMA) or obtaining their consent: "[TIG] at its own election and expense *** shall have the right but not the duty to participate with the Insured in, or to assume in the name of the Insured control over, the investigation, settlement, defense or appeal of any claim, suit or proceeding which might involve liability of [TIG]." This authority, however, was one-sided, because the TIG policy also specified, "No assignment of the Insured's interest hereunder shall be binding upon the Company [TIG]" and "The Insured shall make no voluntary settlement involving loss to the Company except with written consent of [TIG's agent Wexford]." The Safety National policy that IRMA obtained seven years later was slightly different in that it covered "claims made" between January 1, 1998 and December 31, 1998 "due to an Occurrence taking place" within that policy period.

¶ 4 While the TIG policy was in force, 32-year-old John Urso, a maintenance worker who started his employment with the Village in 1985, purportedly injured himself on the job in late 1991 by twisting his left foot. Although Urso's injury seemed relatively minor at the time (a twist), he complained of persistent ankle and heel pain and underwent years of extensive medical care which ranged from having the ankle immobilized in a cast to undergoing surgery to be implanted with an epidural catheter through which he could self-administer pain medication (a "pain pump"). Urso was diagnosed with reflex sympathetic dystrophy or RSD, which is a chronic pain condition that is also known as complex pain syndrome or complex regional pain syndrome. We will detail his medical evaluations below. He timely filed a worker's

compensation claim with the Commission. When IRMA exhausted its self-insured retention it tendered the claim to TIG, and TIG accepted the 1991 claim without reserving any rights. Urso filed a separate compensation claim alleging he injured his left foot by twisting it while at work on August 4, 1998, during the effective dates of the Safety National coverage. His two claims together resulted in the largest compensation request that Bush, IRMA's executive director, could recall during his five years with the company.

¶ 5 After Urso filed the second claim, IRMA retained attorney John F. Power, III, to defend the interests of the insureds before the Commission.

¶ 6 In the current proceedings, the litigants have emphasized indications that the claims were perceived as two separate injuries or as one, more-or-less continuous injury. Urso considered his 1998 injury to be distinct from his 1991 injury, as indicated by the fact that he filed a separate claim even though his first claim and right to compensation for the 1991 injury was still open at the time. IRMA also opened and maintained two claim files and communicated to TIG on more than one occasion that TIG was liable for the first injury claim only. For instance, on September 22, 1999, IRMA claims representative Martha S. Glaza wrote to TIG's agent, Wexford, describing Urso's second accident as "a re-injury to his left heel/ankle on August 4, 1998" when "he was repairing a sewer pipe and got his foot stuck in the mud." Glaza referred to the incident as "a new on the job occurrence" which required "a completely new claim file" and said "[s]ince this re-injury occurred during the calendar year of 1998[,] you are obviously not responsible for the reinsurance of that file." "However, the permanency portion of the case remains unsettled and therefore your file must remain open." Glaza still viewed the claims as

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related but separate injuries implicating both insurers when she wrote to Wexford on March 20, 2000:

> "As I previously advised you[,] the claimant reinjured himself on 8/4/98, and all medical charges since that date have been paid on the new claim file for which you are not responsible. However, there may be legal bills or expense payments made on the file periodically as both files ultimately are for the same condition and at some future point will be resolved simultaneously. Unfortunately, there has been no settlement progress as the claimant continues to treat and his attorney will not even discuss settlement at this point in time."

¶ 7 The record indicates that the idea of treating the claims as a single injury originated with Safety National. On July 22, 2003, IRMA's claim director, Miria Gasparro, notified Wexler about the most recent status of the 1991 claim:

> "Martha Glaza has been reporting to you on the above file, which is a 1991 claim for injuries. As you may know, Mr. Urso had another accident on 8-4-98, which is still open and on which she is making payments.
>
> Attached is a letter received from Mike Harris at Safety National regarding his position on Mr. Urso's 1998 claim, as you will read. It is his opinion, that the 1998 injury is a continuation of the 1991 injury. He is suggesting some cost sharing between Wexler [TIG's agent] and Safety National. A copy of this letter will be sent to Mike Harris, I am requesting that you discuss this issue with him.
>
> *** I am asking that you advise Martha for any additional information you

> may need to make a decision regarding your position on this matter.
>
> The 1991 claim and the 1998 claim have been consolidated [by attorney Power] and are scheduled for trial on 8-8-03 at the [Commission]. The trial is expected to last for 10 to 14 days.
>
> It is IRMA's position that we should receive reimbursement for any amount above our SIR. Therefore, we are requesting that you review these files and work out an agreement between the two carriers."

¶ 8 When deposed in the current case, attorney Power said a good part of his practice was workers' compensation defense and that he defended the Urso claims together with a view toward mitigating or eliminating them altogether. Power asked Urso to submit to an independent medical examination. In a four-page letter dated May 22, 2000, Dr. Armen S. Kelikian, M.D., Assistant Professor of Orthopaedic Surgery, Northwestern University Medical School gave his opinion: "My overall impression is recalcitrant complex regional pain syndrome. I would say the original injury had more to do with it in 1991 than the new injury in 1998, and it was an aggravation of a pre-existing condition and recurrence of his pain due to the primary problem." However, five years later, Dr. Kelikian reevaluated Urso and came to a contrary conclusion. In 2005, Dr. Kelikian had the benefit of five additional years of treatment and a comprehensive neurological and rehabilitative assessment from Dr. Richard B. Lazar, M.D. of Schwab Rehabilitation Hospital dated February 12, 2001. It was Dr. Lazar's opinion that Urso actually had "a severe personality disorder, major depression and Münchausen's Syndrome" and that there was little, if any, objective evidence that Urso ever had RSD. In fact, in a gait

evaluation, Urso "favored his left leg" (the one that was supposedly painful) and "walked with the assistance of a cane, again in the wrong hand (left)." Dr. Lazar wrote that Urso has "pain complaints that are being driven by psychosocial factors," that a "great deal of his behavior is geared toward securing high potency narcotics," and that Urso was in "a fairly advanced stage of substance addiction." Dr. Lazar reasoned that Urso had submitted to years of invasive procedures and operations due to "the bizarre nature of Münchausen's, characterized by severe emotional and personality imbalance that drives these patients' behavior to assume the sick role, in an unusual and strange dependency need." According to Dr. Lazar, "No procedure or operation is too dangerous or risky to perpetuate this strong dependency need." Dr. Lazar also reasoned that Urso's physicians failed to uncover his "factitious illness," because they lacked access to his complete medical history and had to rely on his untruthful statements and that Urso's psychiatrists relied on the physicians' opinions. Also:

> "In the reality of everyday practice, physicians, owing to time limitations, rarely take the time to embark on [a full investigation], for lack of time and compensation. They take each and every patient at face value. Once they are committed to a diagnosis and course of treatment, they rarely turn back[,] retrace their steps and reconsider their diagnosis. The assumption of the psychiatrists is that the hand me down diagnosis is correct, and if they adopt that assumption as a predicate for their treatment, they focus on the psychological aspects of the patient's presentation, such as, in this case, major depression."

In addition to reviewing Dr. Lazar's report, Dr. Kelikian also reviewed Dr. Pawl's report that

Urso was having "difficulty functioning in society" and did not demonstrate RSD. Similarly, Dr. Ronald Baron's psychiatric evaluation in 2002, led him to conclude Urso had Münchausen's Syndrome, "mixed personality disorder, schizoid and addictive type with factitious disorder" and that his prescription pain medication levels were "overdosed, if not toxic." Dr. Kelikian read notes from psychologist Dr. Mahoney who "thought the patient and his wife had chronic personality disorders and [that Urso expresses his mental illness in the form of physical symptoms]." Based on the various records and Dr. Kelikian's own independent reevaluation in 2005, he concluded: "My impression is that the patient does not have any evidence of RSD at this point, and I doubt he ever did have RSD or even type 1 or type 2 CRPS [Chronic Regional Pain Syndrome]. I *** agree with the psychiatric diagnoses forwarded in the previous notes as described."

¶ 9 Due to these medical and psychiatric opinions, attorney Power concluded Urso's claims were not credible and that Power would "global[ly] attack" them, by addressing "compensability relative to first and second incident," the "ultimate question about the nature and extent of injury," the diagnosis of [RSD], and the question of causation. We note that a negative ruling on causation would put an end to Urso's claim or claims and that his employer would have no liability for any past, present, or future medical care or disability. See *Hawley v. Human Service Center/Fayette*, 10 IL. W.C. 37994 (May 2, 2013) (where Commission directed employer to pay remaining medical bills associated with claimant's knee condition where condition was causally related to work accident and medical services were reasonable and necessary, but denied same claimant's petition for payment of medical bills associated with cervical spine condition

where condition was not causally related and treatment was not reasonable and necessary to cure or relieve effects of work injury). Power also said at his deposition in these proceedings that he knew the Commission could determine the relative compensability of the two claims or find that both, either, or neither case was compensable.

¶ 10 By March of 2004, IRMA's payments to Urso or his health care providers on the 1998 claim exceeded IRMA's $400,000 self-insured retention so it sought reimbursement through its excess policy with Safety National. Safety National retained attorney Mike Russin "to handle the 1998 injury on behalf of Safety National" and "protect [Safety National's] interest[s]." Safety National asked attorney Power to cooperate to "get him [attorney Russin] up to speed as soon as possible." Having handled both matters for six years, Power perceived a potential conflict of interest if he retained the 1991 case and he withdrew from the matter. Although Urso's medical expenses had passed the scrutiny of IRMA's experienced claims handling staff, Safety National announced that it wanted to "apportion[] some or all of the payments made on the 1998 injury to the 1991 injury" and thus, be reimbursed by the 1991 insurer, and that Safety National was reserving its rights "pending further investigation into the appropriate date of loss under which these payments should be made." (TIG never reserved any rights.) In a followup email, IRMA informed TIG's agent Wexford of Power's withdrawal and stated, "Since our limits have been exceeded in both cases, IRMA is looking to you for direction on defense of the 1991 case and the issues surrounding the accident date challenge to be raised by Safety National." Shortly after Safety National took control of the defense of the 1998 claim, TIG exercised its contractual right to take control of the defense of the 1991 claim and retained

attorney Daniel T. Crowe. TIG, however, still did not reserve any rights.

¶ 11 In June 2004, TIG and Safety National agreed to each contribute $21,000 to send Urso to a 3-week inpatient drug detoxification program ordered by one of his treating physicians. Urso successfully completed the program.

¶ 12 The attorneys' other negotiations were not as successful. Safety National proposed that the two excess insurers each pay 50% of Urso's settlement demand of $161,949, however, Safety National later insisted that TIG also pay $345,980 to Safety National so that the two excess insurers were equally contributing to Urso's 1998 claim. Safety National had a change of heart and reduced its additional demand from $345,980 to $100,000 – a decision that TIG attributed to statements made by Dr. Timothy Lubenow during an evidence deposition and his perceived credibility should he testify as to whether Urso sustained a compensable injury in 1998. Dr. Lubenow was Urso's treating physician, Urso's medical expert witness, and "an international authority" on the subject of RSD and CRPS. Dr. Lubenow said Urso's condition was in remission before the 1998 claim and could have remained that way, but the second incident, as minor as it might have been, reactivated the problem. There was also the opinion of Dr. Richard Blonsky, Urso's principal treating physician, who testified, "Mr. Urso was working. He was doing well. He came to see me after this [second] injury. I had seen him a month prior to that. He was doing just fine. So the concept that the second injury had no effect on him is ludicrous." TIG took a few weeks to consider Safety National's $100,000 demand, and then agreed to it, however, Safety National had another change of heart and rejected the $100,000 as inadequate. At this juncture, TIG negotiated a tentative settlement with Urso's attorney and

rebuffed Safety National's threats to litigate if TIG concluded the 1991 claim without Safety National's approval.

¶ 13 With the imminent failure of a global settlement, Safety National offered to withdraw its reservation of rights in exchange for the assignment of any rights IRMA and the Village might have against TIG. IRMA agreed to assign, however, IRMA's director of legal services, attorney Susan Garvey, stated in a deposition that she had no opinion as to whether TIG fulfilled its contractual obligations to IRMA when it handled and resolved the 1991 claim. IRMA was not the driving force behind the current litigation – it was Safety National that raised the issue as to whether Safety National was responsible for the 1998 claim and it was Safety National that "had the dispute with TIG." Garvey recalled, "Their dispute, potentially, meant that we paid an SIR that we didn't have to and [so] we agreed to assign our rights to that." Attorney Garvey was unfamiliar with the factual basis for Safety National's claims against TIG and when her boss, executive director Bush, asked her to look over Safety National's assignment contract, she reviewed only the language itself and told him that it "accomplished what it was supposed to accomplish." At his deposition, Bush also indicated he had no opinion about the way the Urso claims were handled by the insurers. Despite IRMA's assignment to Safety National, Bush was "not aware of anything that would result in money coming back to IRMA" after the exhaustion of IRMA's self-insured retention. Bush recalled that IRMA participated in the global settlement discussions only to "help resolve the dispute between the insurance companies" and did not "even see our interests as being affected." Furthermore, IRMA had assigned its interests to Safety National, even though Part 12 of the TIG insurance contract stated, "No assignment of the

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Insured's interest hereunder shall be binding on the Company."

¶ 14 On June 7, 2006, TIG settled the 1991 accident claim with Urso for a payment of $125,000 in addition to benefits previously paid. A total of $596,000 was paid on the 1991 claim. The settlement contract stated that after Urso sustained injury to his left leg, he experienced "Complex regional pain syndrome" and approximately 82% loss of use of his person as a whole within the meaning of Section 8(d)(2) of the Illinois Workers' Compensation Act. The contract specified:

> "Respondent [Village] to pay and Petitioner [Urso] to accept $125,000 in full and final settlement of any and all claims under the Workers' Compensation and Occupational Disease Acts for any and all accidental injuries allegedly incurred as a result of the accidental injury of on or about 10/21/1991 including any and all results and developments, fatal or non-fatal, allegedly resulting from such accidental injuries. Issues exist between the parties as to whether petitioner has incurred injuries to the degree alleged and whether or not such injuries are compensable, and this settlement is made to amicably settle all issues arising out of the alleged occurrence of 10/21/91. *** All rights under §8(a) and §19(h) of the Act [for future medical care] are expressly waived by the parties."

The contract further specified that Urso was voluntarily and knowingly giving up the "right to any further medical treatment, at the employer's expense, for the results of this injury" and the "right to any additional benefits if my condition worsens as a result of this injury." The executed settlement contract was submitted to the Commission and approved by Arbitrator Fratianni.

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¶ 15 In the current suit, Safety National has admitted TIG was within its rights "to unilaterally settle all liability of the Village and IRMA for the 1991 Urso Accident Claim." However, Safety National "further submits that said rights were limited by [TIG's] duties owed to its insured(s)." IRMA's executive director, Bush, also admitted TIG was within its contractual rights to settle without IRMA's consent, although he hoped he somehow misunderstood the policy language that gave TIG that latitude. He said he was "upset" when he heard TIG settled the claim, but he admitted that any expectation he had that TIG would consult with IRMA before settling was based on his experience in other cases involving other insurance contracts, rather than the language of IRMA's contract with TIG.

¶ 16 By the time TIG settled the 1991 claim, Safety National was prepared to try the issue of whether Urso suffered two separate injuries. The attorney who defended the 1998 claim for Safety National, Gregory Rode, said that even after the settlement of the 1991 claim, he

> "[could still] go to arbitration and try to defend the 1998 claim by pushing it all to the 1991 claim, that issue remained. I'm not precluded from defending the 1998 claim by saying it goes to the 1991 or that there was a temporary aggravation that resolved itself as of 1999 and then [Urso] went back to his pre-1998 state."

Rode also acknowledged that the 1998 claim could be defended before the Commission by arguing that Urso's condition was attributable to Münchausen's Syndrome and that the only potential difficulty in doing so would be "pointing to an empty chair." Similarly, the original defense attorney, Power, testified that there was nothing to prevent a trial of the 1998 claim after the 1991 claim was settled. IRMA's executive director, Bush, knew that when an employer

arbitrates a second injury claim for the same body part, the employer may obtain a setoff for money paid on the prior claim. Mark Walls, Safety National's regional claims manager, whose experience handling workers compensation claims dated to 1990, testified that a setoff for a second injury claim to the same body part was possible, however "it's not as clean as it sounds because you still have a lot of subjectivity in there with regard to how the Judge would award it." However, instead of disputing the claim and seeking a set-off, Safety National settled with Urso, purportedly for $1,081,885. We cannot confirm the settlement amount or summarize the rights Urso relinquished, because Safety National has never filed a copy of the contract in this action.

¶ 17 Nonetheless, in its complaint against TIG, Safety National alleged TIG breached duties to IRMA and the Village of (a) good faith and fair dealing in contractual performance; (b) giving equal consideration to the interests of itself and its insureds; (c) defending, investigating, settling, or appealing for the benefit of its insureds, and (d) providing separate counsel when TIG's interests appeared to conflict with the interests of the insureds. Safety National alleged TIG was always aware of "medical and other evidence" that the 1998 injury was only an aggravation or temporary exacerbation of the 1991 injury or TIG knew the 1991 injury was the "sole precipitator of Urso's condition of ill being" after August 4, 1998. Consequently, no deductible, SIR or excess coverage should have been expended under the Safety National policy. Also, while both applications for benefits were pending, the Village had a right to a trial (arbitration) before the Commission addressing causation and compensability, including which insurer was liable for the 1998 claim. However, TIG's unilateral settlement of the 1991 claim, over IRMA's objection, "irrevocably prejudiced" Safety National and forced it to settle the 1998

claim" in order to avoid a trial before the Commission and "to mitigate its damages."

¶ 18 Based on these general allegation, Safety National asserted six claims. As the assignee of the insureds' rights under the TIG policy, Safety National sought damages for TIG's breach of its alleged duties which effectively "[d]enied its Insured its day in Court," and wrongfully caused expenditures on the 1998 claim (count I). Safety National sought penalties as assignee for vexatious and unreasonable claims handling within the meaning of section 155 of the Illinois Insurance Code (count II). See 215 ILCS 5/155 (West 1994). Safety National further complained as assignee that TIG's refusal to go to trial amounted to "a separate and independent tort," warranting the imposition of "punitive damages based on TIG's net worth" (count III). Safety National sought damages in its own name on grounds that the duties alleged in Count I were also owed to Safety National (count IV). Safety National next alleged the two insurers were coinsurers from August 4, 1998, to the date of Urso's second settlement in 2006, however, TIG was primarily liable for the loss and Safety National was entitled to full reimbursement under the theories of equitable contribution (count V) and equitable subrogation (count VI).

¶ 19 TIG brought a counterclaim against Safety National seeking damages for intentional interference with contract relations and breach of contract.

¶ 20 The circuit court resolved crossmotions for summary judgment in favor of TIG as to Safety National's complaint, but denied TIG's motion for summary judgment to the extent TIG sought relief on TIG's counterclaim.

¶ 21 Safety National appeals, first arguing we should enter summary judgment for Safety National on its contract-based counts (Counts I, II, III, and IV) because TIG breached any duty of

good faith contractual performance when TIG did not "take steps to involve itself with the defense of the 1998 claim," "discuss this potential liability with its insured," "provide its insured with conflict counsel," and seek a declaratory judgment to resolve the issue of coverage. Safety National argues TIG stood by "even after it was given clear evidence (through records and testimony) that the two claims of URSO (1991 and 1998) could be so inter-related such that the TIG policy might have liability for both claims." Safety National further argues that settling the 1991 claim "denied IRMA/Village the right to present the entire case before the Arbitrator whereupon a factual and evidentiary determination of relatedness could have been made as between the two claims." And, although TIG has "made much of the idea that [Safety National] 'should have' and 'could have' let the [1998] matter continue to trial before the Arbitrator and *** received a decision [that the claims were causally related or separate]," Safety National had "no option but to settle" because the arbitrator would not " 'award' on a closed claim (1991) where no recovery would be possible for Petitioner."

¶ 22 Before proceeding to the breach-of-good-faith argument, we point out that general principles of law would bar judgment for this plaintiff. First, by settling with Urso, Safety National gave up its only opportunity to adjudicate whether his claims were causally related and thus were TIG's responsibility under the 1991 policy. Safety National's claims involve factual issues about Urso's accidents, the causal connection between his job and his injuries, the nature and extent of his injuries, and his employer's defenses, which are all subjects that only the Commission may decide. *Hollywood Trucking, Inc. v. Watters*, 385 Ill. App. 3d 237, 245, 895 N.E.2d 3, 11 (2008). The legislature has vested the Commission with exclusive jurisdiction over

benefit determinations and limited the courts' role to appellate review of the Commission's decisions. *Hastings Mutual Insurance Co. v. Ultimate Backyard, LLC*, 2012 IL App (1st) 101751, ¶ 31 (legislature may vest exclusive jurisdiction in an administrative agency by explicitly enacting a comprehensive administrative system); 820 ILCS 305/18 (West 2008) (stating "All questions arising under this Act, if not settled by agreement of the parties interested therein, shall, except as otherwise provided be determined by the Commission"); 820 ILCS 305/19(f) (West 2008) (authorizing the Commission's arbitration system and granting power to the circuit courts to review all questions of law and fact disclosed by the record compiled before the Commission). In other words, the courts lack subject matter jurisdiction to address key allegations in Safety National's claims. *Hollywood Trucking*, 385 Ill. App. 3d at 245, 895 N.E.2d at 11 (because benefit determinations can be made by the Commission only, circuit court lacked subject matter jurisdiction over trucking company's action to recoup benefits on grounds that driver fraudulently misrepresented his health when he was hired); *Hartlein v. Illinois Power* Co., 151 Ill. 2d 142, 157, 601 N.E.2d 720, 727 (1992) (because benefit determinations are to be made by the Commission only, circuit court lacked jurisdiction to enjoin power company from discontinuing benefits for injured lineman). Furthermore, all lump settlement agreements like Safety National's agreement with Urso must be approved by the Commission and approval renders the parties' agreement to be a decision by the Commission and to have the legal effect of an award. 820 ILCS 305/23 (West 2004) ("No employee *** shall have power to waive any of the provisions of this Act in regard to the amount of compensation which may be payable to such employee *** except after approval by the Commission"); *Hoshor v. Industrial Comm'n*, 283 Ill.

App. 3d 295, 671 N.E.2d 347 (1996) (Commission's approval of a settlement agreement becomes a final award); *Alvarado v. Industrial Comm'n*, 216 Ill. 2d 547, 837 N.E.2d 909 (2005) (Commission has no jurisdiction to reopen or reconsider a final award); 820 ILCS 305/19(f)(1) (West 1994). We are not aware of any legal principle that would allow Safety National to agree to compensate Urso in one forum and then argue in another forum that it should not have compensated Urso. In short, if Safety National ever wanted to dispute whether Urso was entitled to benefits from Safety National on the 1998 claim, then Safety National should have gone through the Commission's arbitration system instead of settling. Safety National's voluntary settlement was the last word on its liability.

¶ 23 Second, Safety National's action depends upon the flawed premise that Safety National had to settle. Safety National contends it was forced to settle, because once the 1991 claim was closed, no arbitrator would be willing to attribute Urso's 1998 claim to his 1991 injury and effectively deny Urso any further compensation. It seems Safety National is arguing an arbitrator would base his or her ruling on sympathy instead of the facts and law that Safety National presented in its defense. In our opinion, if Safety National had evidence of a causal connection between the 1991 accident and the 1998 claim, then it was imperative for Safety National to present it because even if an arbitrator did base his or her decision on sympathy, Safety National would have complied a record before the arbitrator which could be addressed by the Commission, and if need by, reviewed by the circuit court. *Ford Motor Co. v. Industrial Comm'n*, 55 Ill. 2d 549, 304 N.E.2d 601 (1973) (Commission is not bound by findings of arbitrator and it shall consider all evidence presented to it and the arbitrator in reaching a

decision). Thus, ultimately sympathy would not trump Safety National's purportedly "clear evidence" that there was but one compensable injury. Safety National was not forced into a settlement with Urso and if there was any substance to the allegation of a causal connection between the two claims, then Safety National " 'should have' " and " 'could have' " protected the interests of its insureds and itself by refuting the 1998 claim at arbitration.

¶ 24 Although these grounds were not argued in the circuit court, we are addressing the record *de novo* (*Nicor*, 223 Ill. 2d at 416, 860 N.E.2d at 285-86), we may affirm on any basis disclosed by the record (*Cwik v. Giannoulias*, 237 Ill. 2d 409, 424, 930 N.E.2d 990 (2010)), and the record in this instance indicates the defendant was entitled to judgment as a matter of law (See *Founders Insurance Co.*, 366 Ill. App. 3d at 69, 851 N.E.2d at 125 (summary judgment is warranted when the plaintiff fails to create an issue of material fact and the defendant is entitled to judgment as a matter of law); 735 ILCS 5/2-1005(c) (West 2010)). Accordingly, we affirm summary judgment on all six counts in the defendant's favor.

¶ 25 We could stop our analysis here, but TIG correctly points out that Counts I, II and III are further flawed because they rely on assignment of the insureds' interests under an insurance contract which expressly precludes assignment. The parties' respective rights regarding the TIG settlement are controlled by the terms of the TIG policy and in order to construe this policy, we apply the rules of construction that we apply to other contracts. *Nicor, Inc. v. Associated Electric & Gas Insurance Services Ltd.*, 223 Ill. 2d 407, 416, 860 N.E.2d 280, 285 (2006).

"[W]hen construing an insurance contract, the court's primary objective is to give

> effect to the intent of the parties at the time of contracting. To ascertain the intent of the parties and the meaning of their insurance policy, the court construes the contract as a whole, with due regard to the risk undertaken, the subject matter that is insured, and the purposes of the entire contract. If the words used in the policy are unambiguous, they must be given their plain, ordinary and popular meaning. The interpretation of *** an insurance contract, and the entry of summary judgment are *** questions of law that are reviewed *de novo* without any deference to the trial court's interpretation." *Founders Insurance Co. v. American Country Insurance Co.*, 366 Ill. App. 3d 64, 69, 851 N.E.2d 120, 125 (2006).

¶ 26 The TIG policy plainly states, "No assignment of the Insured's interest hereunder shall be binding upon [TIG]." Safety National's reply brief was its opportunity to explain why this contract clause should have been disregarded in the trial court and again in this appellate court, but Safety National concedes the argument by ignoring it entirely. In our *de novo* review, we find that policy provisions that are clear and unambiguous like this prohibition on assignment must be applied as written (*Nicor*, 223 Ill. 2d at 416, 860 N.E.2d at 285-86; *Illinois State Bar Ass'n Mutual Insurance Co. v. Frank M. Greenfield & Associates*, P.C., 2012 IL (1st) 110337, ¶19, 980 N.E.2d 1120), and that for this additional reason, judgment in favor of TIG as to the first three counts of Safety National's pleading was properly granted.

¶ 27 Turning to the merits of the first appellate argument, we find that Safety National failed to adequately brief its main theory for reversal when it did not cite any authority about the principle of good faith contractual performance. An appellant is obligated to present well-

reasoned argument that is supported by citation to relevant legal authority and the pertinent pages of the record. *Vincent v. Doebert*, 183 Ill. App. 3d 1081, 1087, 539 N.E.2d 856 (1989) (an issue that is not sufficiently presented fails to satisfy the standards of appellate practice), and it is not our role, nor is it the appellee's role, to develop an appellant's arguments. Disregard of the appellate standard leads us to conclude that Safety National waived its good faith argument. *Vincent*, 183 Ill. App. 3d at 1087, 539 N.E.2d 856.

¶ 28 Waiver aside, the argument lacks merit and would not have persuaded us to upset the trial court's ruling. We reach this conclusion because (a) the duties of good faith and fair dealing in performing the terms of a contract are duties that are implied in every contract, but they do not prevent a party from enforcing agreed-upon terms and (b) in this instance, TIG's handling of the 1991 claim was consistent with its contractual rights. *Bank One, Springfield v. Roscetti*, 309 Ill. App. 3d 1048, 1059-60, 723 N.E.2d 755, 763 (1999) (indicating that the duties of good faith and fair dealing are implied in the performance of every contract but are not a basis for overriding or modifying the express terms of an agreement). IRMA contracted with TIG for excess coverage for 1991 only, thus, the only duties of good faith and fair dealing that TIG owed were in connection with Urso's 1991 claim. The contention that TIG was also liable for the 1998 claim relies on medical evidence which could have been addressed at arbitration and was under the exclusive jurisdiction of the Commission. The contract at issue expressly authorized to TIG to settle any claim and the premium that IRMA paid would have reflected that IRMA did not retain the right to veto TIG's unilateral resolution of any claim.

¶ 29 More specifically, TIG's policy gave it "the right but not the duty to participate with

the Insured in, or to assume in the name of the Insured control over, the investigation, settlement, defense or appeal of any claim, suit or proceeding which might involve liability of the Company." Insurance policy language which gives the insurer the right to settle a claim without the consent of the insured is enforceable in Illinois. See *e.g.*, *Casualty Insurance Co. v. Town & Country Pre-School Nursery, Inc.*, 147 Ill. App. 3d 567, 670, 498 N.E.2d 1177, 1178 (1986) (rejecting contention that a question of good faith arose when insurer proceeded to settle claim for minor's injuries on school premises). In fact, if the policy language gives the insurer the unconditional right to settle a case, then the insurer has the right to proceed with a settlement, even if the insured objects and contends the settlement is burdensome.

¶ 30 An illustrative case is *American Protection Insurance Co. v. Airborne, Inc.*, 476 F. Supp. 985, 988 (2007), in which the primary insurer, American Protection, issued a $2 million automobile liability insurance policy for a parcel delivery company, Airborne (now known as DHL Express), which included a deductible of $1 million per accident. Similar to the language in the TIG policy currently at issue, the American Protection contract stated:

> "A. We shall have the right, but not the duty or obligation to:
>
> 1. defend or participate in the defense of any 'suit' against the insured and
>
> 2. investigate and *settle any 'accident,' claim or suit*." (Emphasis in original.) *Airborne*, 476 F. Supp. 2d at 990.

Airborne was sued in Nevada state court because one of its delivery truck drivers allegedly collided with a motorcyclist, causing significant injuries. *Airborne*, 476 F. Supp. at 988.

Airborne thought it had strong arguments for avoiding liability altogether, such as that the delivery driver was an independent contractor instead of an employee (*Airborne*, 476 F. Supp. 2d at 988) and Airborne wanted to pursue these defenses through trial if necessary (*Airborne*, 476 F. Supp. 2d. at 989). American Protection initially sat back and allowed Airborne to control the litigation because American Protection mistakenly believed and advised Airborne that Airborne had authority over whether the case was settled or tried. *Airborne*, 476 F. Supp. 2d. at 988-89. Meanwhile, Airborne's excess insurer was concerned about its potential exposure and repeatedly urged Airborne (the primary insurer) to make its $1 million deductible available so the excess insurer could settle the case. *Airborne*, 476 F. Supp. 2d. at 989. Airborne refused to consider this option. The case continued on this path for about two years, at which point the motorcyclist offered to settle for $2.999 million. *Airborne*, 476 F. Supp. 2d at 989. Shortly after this, the excess insurer gave its opinion to American Protection that the American Protection contract gave American Protection the power to settle without Airborne's consent and then force Airborne to contribute its $1 million deductible. *Airborne*, 476 F. Supp. 2d at 989. The excess insurer encouraged American Protection to settle even under these circumstances. *Airborne*, 476 F. Supp. 2d at 989. The next month, American Protection advised Airborne that it intended to settle, with or without Airborne's consent. *Airborne*, 476 F. Supp. 2d at 989. Then, over Airborne's objection, American Protection reached a final settlement with the motorcyclist for $2.85 million and filed suit to recoup Airborne's $1 million deductible. *Airborne*, 476 F. Supp. 2d at 989. The court sided with American Protection and ruled that the contract unambiguously gave it the right to settle the motorcyclist's claim without Airborne's approval. *Airborne*, 476 F.

Supp. 2d at 990. The court pointed out that a majority of jurisdictions, including Illinois, have "held that an insured cannot complain that such a provision inevitably allows an insurer to commit an insured's funds – the policy deductible – without the insured's consent, because that is exactly the bargain that the insured struck under the policy that it bought and paid for." *Airborne*, 476 F. Supp. 2d at 990 (citing *Casualty Insurance Co. v. Town & Country Pre-School Nursery, Inc.*, 147 Ill. App. 3d 567, 569, 70, 498 N.E.2d 1177, 1178-79 (1986), and other authority). Airborne argued that, regardless of the explicit terms of a contract, when an insured has a financial stake in the settlement, like a significant deductible, the insurer should obtain the insured's consent to settle. *Airborne*, 476 F. Supp. 2d at 990, n.4. The court found no Illinois law to support Airborne's argument and rejected it. *Airborne*, 476 F. Supp. 2d at 990, n.4.

¶ 31 Similar facts and arguments appear in *Orion*, where an aviation liability insurance contract indicated the insurer must "defend any suit against the insured," and "may make such investigation, negotiation, and settlement of any claim or suit as it deems expedient", but "may *** pay any part or all of [the insured's] 'deductible' to effect settlement *** [and be] promptly reimburse[d] [by the insured]." *Orion Insurance Co. v. General Electric Co.*, 129 Misc. 2d 466, 471, 493 N.Y.S. 2d 397, 401 (N.Y. Sup. Ct. 1985). The insured in *Orion* was an aircraft engine manufacturer that retained its own independent counsel to defend a lawsuit concerning a DC-10 aircraft that was destroyed by fire after an aborted takeoff in New York in 1975. *Orion*, 129 Misc. 2d at 467. Accident investigators attributed the plane's destruction to engines manufactured by the insured as well as tires and landing gear manufactured by another defendant. *Orion*, 129 Misc. 2d at 467. During court-supervised negotiations, the engine

manufacturer repeatedly offered to settle for $4,999,999, which was $1 less than its $5 million deductible, based on its belief that this amount would allow the insured to retain control and preclude its insurer from paying on the policy and increasing the cost of coverage in the future. *Orion*, 129 Misc. 2d at 469. After the trial got underway, the various insurers banded together and negotiated a settlement. *Orion*, 129 Misc. 2d at 469. The engine manufacturer's independent attorney was vehemently opposed to the settlement, arguing that he was likely to succeed on a motion to dismiss for failure to make out a *prima facie* case at trial and that the insurers had no right to supersede the insured's express wishes not to settle the case. *Orion*, 129 Misc. 2d at 469. Nonetheless, the court approved the proposed settlement and the insurer filed a separate suit to collect the engine manufacturer's deductible. *Orion*, 129 Misc. 2d at 472. In this secondary suit, the New York court found that the policy language unambiguously "place[d] total control over settlement" in the hands of the insurer, with or without the consent of the insured, even though the insured was contributing considerably more than the insurer contributed to the final settlement amount. *Orion*, 129 Misc. 2d at 472. The court reasoned:

> "[The insured] did indeed have the option, if it truly believed that it was going to succeed in the ONA [underlying] action, of continuing its defense to the bitter end. In order to do so, however, it would have had to assume all of the risks attendant in such a position. It would have had to withdraw its demand on its insurers to indemnify it in the event of a plaintiff's verdict. [The insured] could not have it both ways. It had bargained away the right to control settlement offers in return for protection from large verdicts. It could not insist on exercising that

> control to the exclusion of its insurers, and at the same time look to them for indemnification if it turned out to be wrong." *Orion*, 129 Misc. 2d at 476.

¶ 32 The engine manufacturer also raised a good faith argument against its insurer, contending that the underlying case was settled just before it would have been won, so that the insurer would not lose the benefit of the insured's deductible. *Orion*, 129 Misc. 2d at 474. The New York court first rejected the invitation to consider and weigh all the trial evidence that was and would have been presented in the underlying case, stating, "A determination of good faith cannot be made to turn on an unavoidably speculative prognostication of the outcome of an unfinished trial." *Orion*, 129 Misc. 2d at 475. The New York court next considered whether the insured had made " 'an extraordinary showing of a disingenuous or dishonest failure to carry out a contract.' " *Orion*, 129 Misc. 2d at 475 (quoting *Gordon v. Nationwide Mutual Insurance Co.*, 30 NY2d 427, 437). Illinois law specifies that good faith requires a party that is vested with contractual discretion to exercise it reasonably and not in a manner that is arbitrary, capricious, or inconsistent with reasonable expectation of the parties. *Bank One, Springfield v. Roscetti*, 309 Ill. App. 3d 1048, 723 N.E.2d 755 (2000). A creditor, for instance, has a good-faith obligation to inform a guarantor of new facts known to the creditor that materially increase the guarantor's risk. *Bank One*, 309 Ill. App. 3d at 1060, 723 N.E.2d at 764. Looking at whether the insurer had been disingenuous or dishonest in its performance of its written duties, the New York court held:

> "[The insurer] cannot be charged with bad faith if the settlement was arguably prudent in light of the posture of the [underlying] case. In this connection, [independent counsel's] insistence that a crucial element was missing from the

> [underlying] plaintiff's proof is immaterial. It is an unfortunate but unavoidable fact of life in the courts that the cases are sometimes decided wrongly, by both judges and juries. A prudent insurer will sometimes settle a case it believes to be nonmeritorious, in order to avoid the possibility of greater exposure to loss. In order to raise a factual issue as to [the insurer's] bad faith, [the insured] would have to make a showing, not merely that its view of the case was right and [the insurer's] was wrong, but that no reasonable observer could have viewed the situation as [the insurer] did. [The insured] has not made such a showing.
>
> Indeed, [the insured's] own settlement offer [of $4,999,999] is strong evidence that it was at least arguably at risk in the [underlying] action. The settlement offer was certainly not an admission of liability, but the fact that it was made, and the fact that the offer was as high as it was, shows clearly that [the insured] itself recognized that a verdict against it was a significant possibility. This is so even if the offer was withdrawn during trial, as [the insured] contends. Since [the insured] offered essentially (if not exactly) all of the $5 million deductible, it cannot be said that the eventual settlement figure of $8 million was wholly unreasonable.
>
> Therefore, the court concludes that [the insured] has failed to make a sufficient factual showing to raise a triable issue of fact as to [the insurer's] bad faith in participating in the settlement." *Orion*, 129 Misc. 2d at 475.

¶ 33 It has also been said, " 'Anyone involved in handling claims quickly learns that the

evaluation of liability and amount of damages is not an exact science, and reasonable professional judgement may vary (substantially in larger claims) on where to draw the line in settlement negotiations.' " *Teague v. St. Paul Fire & Marine Insurance Co.*, 2006-1266, p. 17 (La. App. 1st Cir. 4/7/09), 10 So. 3d 806, 820 (quoting William Shelby McKenzie & H. Alston Johnson III, *Louisiana Civil Law Treatise: Insurance Law and Practice* §218 (3rd ed. 2006)).

¶ 34 The New York court's reasoning was influential in *Town & County* – an Illinois case of first impression as to whether an insurer owes a duty to consider the interests of the insured when settling a claim fully within the deductible portion of a policy, that is, when the insurer is committing its client's funds but none of its own. *Town & Country*, 147 Ill. App. 3d at 569. The insured school protested that its liability insurer "acted in a self-serving manner" when it settled a claim "at no cost to itself." *Town & Country*, 147 Ill. App. 3d at 568-69. Even so, the court held that the insurer had an absolute right to settle claims, due to a contract clause stating: "[T]he company shall have the right and duty to defend any suit against the insured *** even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient." *Town & Country*, 147 Ill. App. 3d at 570, 498 N.E.2d at 1178. See also *Teague*, 2006-1266 p. 15 (La. App. 1 Cir. 4/7/09), 10 So. 3d at 819 (surveying authority and concluding that even where an insured opposes settlement, "[t]he consensus of the courts that have considered this question is that, absent a policy rider to the contrary, such settlement is the exclusive prerogative of the carrier"); *Geisler v. Everest National Insurance Co.*, 2012 IL App (1st) 103834, 980 N.E.2d 1170 (2012) (recent Illinois case holding that medical malpractice policy which conferred settlement consent rights only to "the general

counsel of the named insured," a hospital, did not convey any consent rights to the hospital employee/neurosurgeon accused of malpractice).

¶ 35 Another illustrative case is *Caplan v. Fellheimer Eichen Braverman & Kaskey*, 68 F. 3d 828 (3rd Cir. 1995), in which the insureds sought to enjoin their insurer from settling a civil action, despite policy language similar to the TIG policy language currently at issue. The insureds contended the proposed settlement was negotiated "behind [their] backs," contrary to their interests, and should not be effective unless they were a party to it. *Caplan*, 68 F. 3d at 835. The court remarked, "[w]hat defendants overlook, however, is that in their contract *** for insurance coverage, they have authorized [the insurer] to act as their agent to settle claims or suits as [the insurer] thinks 'appropriate.' " *Caplan*, 68 F. 3d at 835. By entering into this contract, the insureds "permit[ted] the outcome which they find unacceptable." *Caplan*, 68 F. 3d at 839. "If *** an insured wishes to control the settlement of cases, policies are available which provide that protection. It is not appropriate for us to amend the policy here in order to give [an insured] a type of coverage for which it didn't contract." *Caplan*, 68 F. 3d at 839-40.

¶ 36 Also relevant is the fact that public policy favors the settlement of claims and that the trial court's enforcement of the TIG clause furthered this public policy. See *Carlile v. Snap-On Tools*, 271 Ill. App. 3d 833, 838, 648 N.E.2d 317, 321 (1995) (Illinois public policy favors settlement and it is important that once claims are fairly resolved they not be resurrected); *McGrath v. Chicago & Northwestern Transportation Co.*, 190 Ill. App. 3d 276, 280, 546 N.E.2d 670, 673 (1989) (Illinois public policy encourages settlements and furthers this interest by barring questions at trial on liability about prior attempts to settle); *Teague*, 10 So. 3d at 819-20

("the law favors compromise and voluntary settlement of disputes out of court with the attendant savings of time and expenses to both the litigants and the court" and judicial impairment of an insurer's exclusive right to settle would "impede rather than advance this public policy"); *Webb v. Witt*, 379 N.J.Super 19, 33-34, 876 A.2d 858, 867 (N.J. App. 2005) (observing that reforming a medical malpractice policy to give the physician veto power over settlements would be "counter to New Jersey's public policy of encouraging the settlement of litigation").

¶ 37 This line of authority leads us to conclude that the TIG contract entitled it to settle as it did without seeking an insured's consent. The clear and unambiguous policy gave TIG the *unconditional* right to settle any claim made against the 1991 policy. The settlement that TIG reached with Urso completely absolved the insureds of any liability for the 1991 claim. In our opinion, TIG effectively and fully discharged its contractual obligations by defending IRMA and the Village from the 1991 claim without reserving any rights and securing Urso's full release in consideration for a final settlement within the limits of the TIG policy. Safety National has taken the position that TIG should have (a) resolved the 1991 claim at trial, (b) resolved the 1991 claim only in conjunction with the 1998 claim and only with Safety National's approval, or (c) voluntarily assumed liability for Urso's 1998 claim, but there is no basis in the contract language that any of these steps were required. Nor is there any basis in the law to conclude that TIG's defense and settlement of the 1991 claim only was a breach or bad faith evasion of its contractual duties. IRMA, a sophisticated insured, purchased a policy which included the settlement language and it paid a premium which reflected this delegation of authority. IRMA had the experience and expertise to analyze Urso's claims and decide whether there was one continuing

claim or two claims. IRMA was headed by a well-seasoned executive director, staffed with experienced claims-handling personnel, and assisted by defense counsel of its own choosing. TIG points out:

> "It would have been to IRMA's financial benefit to attempt to foist liability for [the 1998 claim onto the 1991 claim] to save its own $400,000 [self-insured retention] if there was any opportunity for it to do so. Nevertheless, it always and affirmatively took the unequivocal position that TIG was 'not responsible' for the 1998 [claim]. [Citation to correspondence.] Acting as the insurer for the Village, IRMA had every right to take whatever coverage position it determined to be supportable under IRMA's agreements with the Village for [the two claims]."

¶ 38 In any event, TIG's settlement did not preclude Safety National from proceeding to arbitrate the 1998 claim with the argument that the 1998 injury was only a temporary exacerbation of the 1991 injury for which Urso had already been fully compensated by TIG, or that the 1998 injury was actually psychosomatic, not causally connected to Urso's work, and thus, not compensable by Safety National. See *e.g.*, *Burch v. General Telephone Co., GTE North*, 04 I.I.C. 0792 (November 24, 2004) (finding petitioner failed to prove causal relationship between condition of ill-being and alleged work accident where medical records failed to document "ongoing difficulties with petitioner's low back" and one doctor diagnosed petitioner with psychosomatic illness, perhaps as profound as Münchausen's); *Cook v. Rehkemper & Son Building Co.*, 11 Ill. W.C. 21179 (April 29, 2013) (finding that petitioner's injury was causally related but alleged reflex sympathetic dystrophy was not causally related to a work accident and,

therefore, referral to a pain management specialist was not reasonably necessary to cure or relieve the effects of the accident). In fact, by its own account, Safety National could have gone to arbitration but made a strategic decision to settle in order to mitigate its expenses. Safety National has also admitted that TIG had the contractual right to settle all liability for the 1991 claim. We adhere to the authority above indicating we should not speculate about the correctness of TIG's decision to settle rather than try the 1991 case, where the record indicates the settlement was arguably prudent (*Orion*, 129 Misc. 2d at 475) and the evaluation of liability and the specific amount of damages could never be "an exact science" (*Teague*, 2006-1266, p. 17 (La. App. 1st Cir. 4/7/09), 10 So. 3d at 820).

¶ 39 We also reject the appellant's contention that TIG should have provided IRMA with independent or "conflict" counsel. As the court explained in *Teague*, an insured with no contractual right to object to settlement of a claim by its insurer suffers no loss by virtue of not having independent counsel. *Teague*, 2006-1266, p. 44 (La. App. 1st Cir. 4/7/09), 10 So. 3d at 835. Citing an opinion of the Alabama Supreme Court, the *Teague* court stated:

> " '[W]e believe that the insurance contract does affect the attorney-client relationship with respect to settlement of an action brought against an insured. If the insured has contracted away the right to require his consent prior to a settlement of a claim against him, no real conflict of interest exists between the insured and the insurer, at least where the claim or settlement is within policy limits and there has been no reservation of rights by the insurer.' " *Teague*, 2006-1266, p. 44-45 (La. App. 1st Cir. 4/7/09), 10 So. 3d at 835 (quoting *Mitchum v.*

Hudgens, 533 So.2d 194, 201 (Ala., 1988)).

In other words, "the insured, by contracting away the right to require such consent, has thereby impliedly consented to the settlement of claims against him, within policy limits, by appointed counsel at the direction of the insurer." *Teague*, 2006-1266, p. 45 (La. App. 1st Cir. 4/7/09), 10 So. 3d at 835 (quoting *Mitchum,* 533 So.2d 194, 201 (Ala., 1988).

¶ 40 Furthermore, Safety National has failed to cite any authority indicating TIG should have both defended and obtain a declaratory judgment indicating it was required to defend. Typically, an insurer will pursue a judicial declaration when the insurer disagrees with the insured's claim for coverage. See *Employers Insurance of Wausau v. Ehlco Liquidating Trust,* 186 Ill. 2d 127, 150-51, 708 N.E.2d 1122 (1999) (indicating that when an insurer takes the position that it owes no duty to defend, (a) it must either defend the suit under a reservation of right or seek a declaratory judgment that there is no coverage, and (b) the failure to do either may estop the insurer from raising policy defenses). But the record does not indicate plausible grounds for extending TIG coverage to the 1998 claim.

¶ 41 For these many reasons, we affirm the entry of summary judgment as to TIG's contractual performance (counts I, II, III, and IV). Having reached these conclusions, we do not need to also analyze Safety National's arguments regarding the latter two counts of its complaint (counts V and VI) that the theories of equitable subrogation and equitable contribution entitled Safety National to be reimbursed for the 1998 settlement because the insurers were co-insurers for the 1998 injury. The record does not indicate TIG had any liability for the 1998 claim.

¶ 42 Accordingly, we affirm the circuit court's resolution of the cross-motions for

summary judgment in favor of TIG and against Safety National.

¶ 43 Affirmed.