IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

COUNTRY MUTUAL INSURANCE COMPANY Plaintiff, v. THOMAS OLSAK; JOSEPH PECORARO; FREMD SCHOOL HOCKEY CLUB; members of the Board of Governors of the Fremd High School Hockey Club, specifically JAMES W. BALKONIS, FRANK BISKNER, WILLIAM DeGIRONEMO, JAMES LAPETINA, KENNETH J. NORDGREN, EDWARD J. PUDLO and MATTHEW M. SPRENZEL, Defendants.	No. 05 CH 2618 Hon. Michael T. Mullen
THOMAS OLSAK, individually, and as the Assignor of His Claims, Demands and Causes of Action to JOSEPH PECORARO, and JOSEPH PECORARO, as the Assignee under a Certain Settlement Agreement dated June 26, 2006, Defendants/Counter-Plaintiffs, v. COUNTRY MUTUAL INSURANCE COMPANY, Plaintiff/Counter-Defendant.	

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

This Court conducted a hearing as to the reasonableness of a settlement consistent with the requirements set forth in *Guillen v. Potomac Ins. Co.*, 203 Ill. 2d 141(2003), in addition to a trial on Defendants/Counter-Plaintiffs Joseph Pecoraro's ("Pecoraro") and Thomas Olsak's

("Olsak") Count III of the Counterclaim ("Counterclaim") against Country Mutual that seeks relief pursuant to section 155 of the Illinois Insurance Code. (215 ILCS 5/155).[1]

II. HISTORY OF THE PROCEEDINGS

This matter has been reviewed by numerous judges, including the appellate court on three separate occasions. See, *Pecoraro v. Balkonis*, 383 Ill. App. 3d 1028 (2008) (*Pecoraro I*); *Country Mut. Ins. Co. v. Olsak*, 391 Ill. App. 3d 295 (2009) (*Pecoraro II*); and *Country Mut. Ins. Co. v. Olsak*, 2014 IL App (1st) 121063-U (*Pecoraro III*). This Court is highly confident that this matter will soon be reviewed by the appellate court for a fourth time in light of this decision.

a. Pecoraro Is Injured

Although this legal odyssey which has generated some perplexing legal issues began on October 13, 2000, when Pecoraro filed his initial lawsuit, the factual genesis of this case is quite easily understood and relatively undisputed. On October 21, 1998, Pecoraro was the head coach of the Fremd High School Hockey Club's varsity team. Olsak was a seventeen-year-old member of the hockey team. Olsak had deliberately missed two consecutive conditioning sessions earlier in the week in violation of the team practice rules; consequently, Olsak was aware that he would not be allowed to play on October 21, 1998. Nonetheless, on that date Olsak reported to the locker room and dressed in his hockey equipment for the purpose of triggering a confrontation with Pecoraro. When Pecoraro entered the locker room, a verbal confrontation ensued. Pecoraro walked away from the confrontation, but Olsak followed and threw a hockey stick at Pecoraro's back. As Pecoraro turned around, Olsak struck Pecoraro with his fist in the temple area. Pecoraro stiffened and fell backwards, and struck his head on the locker room's floor. It was disputed as to

[1] Although Pecoraro had initially demanded a jury, Pecoraro waived his right to proceed to trial before a jury on Count III and elected to have this Court determine its merits.

whether the floor was padded or simply a concrete floor. Pecoraro alleged that due to his encounter with Olsak he sustained, *inter alia*, permanent brain damage, including the loss of certain sensory and cognitive functions.

b. Pecoraro Files His Lawsuit

On October 13, 2000, Pecoraro filed suit against Olsak, Edward Pudlo ("Pudlo"), who was Olsak's stepfather, and the Fremd High School Hockey Club ("the hockey club"). Pecoraro later amended his complaint on August 15, 2001 to add the individual members of the board of governors of the hockey club. In Count I, Pecoraro alleged assault and battery against Olsak. Although the allegations of Pecoraro's complaint were amended several times over the many years of litigation to add additional parties and different theories against existing parties, the allegations never changed relative to Olsak. In each version of Pecoraro's complaint, he identified Olsak as a defendant in Count I. In each version of the complaint, it was alleged that "without legal justification and with malicious intent to seriously injure, the defendant Tom Olsak, while standing behind the plaintiff ('Pecoraro'), struck the plaintiff ('Pecoraro') in the head with a closed fist." See Compl. ¶ 30. It was further alleged that Olsak "did not strike the plaintiff ('Pecoraro') in self-defense of any physical attack by the plaintiff ('Pecoraro')." Compl. ¶ 33.

In Count III, Pecoraro alleged a theory of negligent parental supervision against Pudlo. In Count IV, Pecoraro alleged that the hockey club was liable pursuant to the doctrine of *respondeat superior* as there was a master-servant relationship between the hockey club, the master, and Olsak, the servant at the time of the occurrence. Count V alleged negligence against the individual board members under the Sports Volunteer Immunity Act (745 ILCS 80/1(a)). In

Count II, Pecoraro alleged negligence on the part of the hockey club and the individual board members as they were obligated to observe, adopt and follow certain identified rules and regulations.

c. Country Mutual's Insurance Coverage

Country Mutual previously issued two separate insurance policies to Pudlo and Olsak's mother, Desiree Pudlo. More specifically, Country Mutual issued a homeowner's policy with limits of $1,000,000 and a separate personal and professional umbrella policy with limits of $2,000,000. The homeowner's policy provided that the "insured" includes "you and the following residents of your household: 1. your relatives and 2. persons under 21 under the care of those named above." Pl.'s Ex. 35. It was undisputed that Olsak lived with both Ed and Desiree Pudlo at the time of the occurrence and that Olsak was an insured pursuant to the terms of the policy as he was a "resident" of the "household."

The homeowner's policy further provided, "[Country Mutual] promise[s] to pay on behalf of an insured for damages resulting from bodily injury or property damage caused by an occurrence, if the insured is legally obligated." Pl.'s Ex. 35. The policy defined an "occurrence" as an "accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured." Pl.'s Ex. 35. The policy also excluded bodily injury or property damage "caused intentionally by or at the direction of the insured" from coverage. Pl.'s Ex. 35.

The umbrella policy defined "insured" as the named insured and "any relative or, if residents of the named insured's household, any other person under the age of twenty-one in the care of the named insured." Pl.'s Ex. 36. The policy provided that Country Mutual "agrees to

indemnify the insured for ultimate net loss in excess of the retained limit which the insured shall become legally obligated to pay as damages because of personal injury or property damage." Pl.'s Ex. 36. The policy defined "personal injury" as "assault and battery not committed by or at the direction of the insured, unless committed for the purpose of protecting persons or property, including death resulting therefrom, sustained by any person." Pl.'s Ex. 36. Coverage was excluded, however, for "any act committed by or at the direction of the insured with intent to cause personal injury or property damage." Pl.'s Ex. 36.

d. Country Mutual Denies Olsak Coverage

On October 9, 2000, Country Mutual issued Olsak a notice of denial of coverage on the basis that the allegations of the underlying complaint did not fall under the policies' definition of "occurrence" and that the intentional-acts exclusions applied. Defs.' Ex. 59. Pecoraro's case advanced against all of the defendants, including Olsak. TIG Insurance Company ("TIG"), the insurer for the hockey club, hired an attorney to represent the club, of which Pudlo was a member of the board of governors. Country Mutual hired the Shipley Law Group to represent Pudlo as a board member. Country Mutual also hired the law firm of Chilton, Yambert, Porter & Coghlan ("Chilton Yambert") to represent Pudlo individually relative to Count III, the negligent parental supervision claim. Olsak answered the complaint and denied the underlying allegations. In October 2001, Olsak asserted an affirmative defense alleging that Pecoraro instigated the altercation and further that Pecoraro had provoked him. On March 13, 2002, the court dismissed Count III with prejudice.

On April 18, 2003, the hockey club and individual board members filed a cross-claim against Olsak seeking contribution. In June 2003, Olsak filed an additional affirmative defense

alleging that Pecoraro approached Olsak, who "felt threatened and perceived imminent harm." This defense was based on Olsak's deposition testimony in which he denied acting intentionally, but had simply "snapped" or had a "mental lapse" after Pecoraro insulted him and his family. The case was assigned to the Honorable Judge Richard Elrod for trial on September 1, 2004. Despite being assigned for trial, the parties engaged in significant motion practice which ultimately led to the first appeal. See *Pecoraro v. Balkonis*, 383 Ill. App. 3d 1028, 1032 (2008) (*Pecoraro I*).

On February 9, 2005 and while the case was still assigned to Judge Elrod for trial purposes, Country Mutual filed a one-count complaint against Olsak, Pecoraro, the hockey club, and the members of the board. Country Mutual sought a declaratory judgment that it was under no obligation to defend or indemnify Olsak in connection with the underlying lawsuit brought by Pecoraro or the counterclaim brought by the hockey club and the board. Country Mutual asserted that although it had issued a homeowner's policy and a personal and professional umbrella policy to Ed and Desiree Pudlo, neither policy covered Olsak's actions as the policies did not cover damages caused by an insured's intentional acts, and any injuries Pecoraro sustained were caused by Olsak's intentional acts that the policies specifically excluded from coverage.

e. The 2006 Settlement Agreement

On June 26, 2006, Pecoraro settled his assault and battery claim with the unrepresented Olsak via a written settlement agreement. Defs.' Ex. 5. The agreement stated that Olsak did not have "any substantial assets with which to pay any judgment or settlement" to Pecoraro, but that Olsak had potential claims against Country Mutual, for denying him a defense, and against TIG, which was the insurer of the hockey club. Pursuant to the agreement, Olsak agreed to pay

Pecoraro $5,000, and transfer and assign to Pecoraro all claims Olsak may have had against Country Mutual and TIG in relation to the underlying lawsuit. In exchange, Pecoraro agreed to release and discharge Olsak from all claims arising from the incident. The agreement further provided that Pecoraro would be entitled to seek reinstatement of his claim against Olsak if Olsak breached the agreement. The agreement made clear that the amount of Pecoraro's compensatory damages would be subsequently determined by a jury or judge consistent with the holding in *Guillen v. Potomac Insurance Co. of Illinois*, 203 Ill. 2d 141 (2003).

On August 28, 2006, the circuit court dismissed Pecoraro's claim against Olsak pursuant to the terms and conditions of the settlement agreement, and found that the parties had reached the agreement in good faith pursuant to the Joint Tortfeasor Contribution Act (740 ILCS 100/2). The hockey club appealed the finding that the agreement was reached in good faith and asserted that the amount of the settlement was inadequate. The appellate court held that the circuit court did not abuse its discretion by finding that the agreement was in good faith. *Pecoraro*, 383 Ill. App. 3d at 1039 (*Pecoraro I*). The court noted that Olsak did not have any assets of consequence and that there was little or no probability that Olsak could ever satisfy a significant judgment against him. *Id.*

f. Pecoraro and Olsak's Counterclaim and Affirmative Defenses

Following the 2006 settlement with Olsak, counsel for Pecoraro assumed the further representation of Olsak. On March 15, 2007, Olsak and Pecoraro answered Country Mutual's declaratory judgment complaint and asserted various affirmative defenses. Olsak and Pecoraro also filed a three-count counterclaim against Country Mutual. In Counts I and II of the Counterclaim, they asserted, *inter alia*, that Country Mutual breached its duty to defend Olsak in

the underlying action by failing to disclose to Olsak the conflict of interest between Olsak and Pudlo and by failing to advise Olsak that he could retain independent counsel at Country Mutual's expense. Olsak and Pecoraro further asserted that Country Mutual was estopped from raising any policy defenses that it might otherwise have had due to its conduct. Olsak and Pecoraro requested an evidentiary hearing as to the amount of damages Pecoraro was entitled to receive for his injuries and also requested judgment in favor of Pecoraro. In Count III of the Counterclaim, Olsak and Pecoraro alleged that Country Mutual's conduct in failing to defend Olsak or advise him of the conflict of interest was vexatious and unreasonable. Olsak and Pecoraro and requested attorney fees and costs pursuant to section 155 of the Illinois Insurance Code (215 ILCS 5/155).

The affirmative defenses shared similar bases with the Counterclaim. In the Second Amended Affirmative Defense, Olsak and Pecoraro asserted that Country Mutual had maintained only one file and had one adjuster assigned to the incident alleged in the underlying complaint. They also alleged that Country Mutual made "false statements" in its denial letter, including a citation to a section of the policy that did not exist and noted that each of the three pages of the denial letter contained different dates. It was further asserted that Country Mutual only "reviewed, considered or relied on" the complaint, the recorded statement of Ed Pudlo and the initial investigatory materials in deciding whether Olsak was entitled to a defense, but did not obtain a statement from Olsak. Olsak and Pecoraro alleged that Country Mutual, therefore, failed to perform a complete investigation of the facts relating to whether Olsak should receive a defense in the underlying action.

The affirmative defense and Counterclaim further alleged that Olsak was left to defend himself with limited funds for five years, during which time Country Mutual failed to file a declaratory judgment action. Olsak was only able to obtain representation in the underlying litigation by using his own savings and the "limited financial assistance" provided by his mother and stepfather. Olsak and Pecoraro further alleged that the attorney Country Mutual had retained to defend Olsak was from Chilton Yambert, the same law firm Country Mutual had initially retained to defend Pudlo. That firm withdrew on October 8, 2004, leaving Olsak unrepresented. Olsak represented himself *pro se* in the underlying litigation from October 2004 until June 2006, when he reached the $5,000 settlement with Pecoraro.

Olsak and Pecoraro also alleged that Country Mutual accepted the defense of Pudlo as a potential excess carrier in connection with the claims alleged against him in his capacity as a member of the hockey club's board of governors. Such acceptance, according to Olsak and Pecoraro, made Country Mutual responsible for any judgment against Pudlo that exceeded the primary coverage afforded under the hockey club's insurance. Olsak and Pecoraro alleged that Country Mutual, in its role defending Pudlo, received reports from its counsel and was, therefore, monitoring the underlying action.

Country Mutual filed a summary judgment motion on its Complaint, a motion to dismiss the Second Amended Affirmative Defense and a motion for summary judgment on the Counterclaim. The circuit court dismissed the Second Amended Affirmative Defense with prejudice and granted Country Mutual summary judgment on its Complaint. The court also granted Country Mutual summary judgment on the entirety of the Counterclaim. In doing so, the court found that Country Mutual did not have a duty to defend or indemnify Olsak.

g. *Pecoraro II*

Olsak and Pecoraro appealed the circuit court's decisions asserting that the joint defense of Olsak and Pecoraro presented Country Mutual with a conflict of interest and Country Mutual should have obtained independent counsel to defend Olsak. The appellate court determined that the interests of Olsak and Pudlo were "diametrically opposed" in the underlying action and that Country Mutual failed to disclose to Olsak the existence of the conflict. *Country Mut. Ins. Co. v. Olsak*, 391 Ill. App. 3d 295, 304-05 (2009) (*Pecoraro II*). The court also determined that Country Mutual had a duty to defend Olsak as the allegations in Pecoraro's lawsuit against Olsak revealed a potential for coverage by Country Mutual pursuant to the policies issued to Pudlo and Olsak's mother. *Id.* at 307. The court concluded that the circuit court erred in granting summary judgment on the Complaint and Counterclaim and dismissing the Second Amended Affirmative Defense with prejudice. *Id.* The court remanded the matter to the circuit court for a final determination as to whether a conflict of interest existed between Olsak and Pudlo and, if so, whether Olsak was prejudiced by Country Mutual's failure to retain independent counsel to represent him. *Id.*

h. The 2010 Settlement Agreement

On May 31, 2010, following the appellate court's decision in *Pecoraro II*, Olsak and Pecoraro executed a modification to their 2006 settlement agreement. Defs.' Ex. 5. In this modified settlement agreement, the parties made clear that Olsak had not satisfied the $5,000 payment as required by the terms of the 2006 agreement. Olsak agreed to pay Pecoraro $6,000,000 for Pecoraro's injuries in exchange for a reaffirmation by Pecoraro of the release provided in the 2006 agreement and the forbearance by Pecoraro of his rights against Olsak arising from his default on the $5,000 payment. The parties also agreed that the $6,000,000

payment would be satisfied through the assignment of Olsak's rights under the relevant insurance policies issued by Country Mutual and TIG as set forth in the original agreement.

On June 16, 2010, Olsak and Pecoraro filed a motion requesting a finding that the modification to the 2006 agreement was reasonable and consistent with the holding in *Guillen*. Country Mutual then filed a motion to dismiss asserting that the circuit court did not have subject matter jurisdiction over the request for a finding of reasonableness as the August 28, 2006 "good faith" order had dismissed Pecoraro's claim against Olsak pursuant to the 2006 agreement. Country Mutual maintained that as the order was final, it could no longer be vacated or modified. The court granted Country Mutual's motion to dismiss finding that the August 28, 2006 order was a final order as it had dismissed Pecoraro's underlying claim against Olsak. The court concluded that it lacked subject matter jurisdiction over the request for a finding that the 2010 modification to the 2006 agreement was reasonable.

i. The "Conflict of Interest" Hearing

Beginning on January 9, 2012, the circuit court conducted a hearing to make a "final determination as to whether a conflict of interest existed between Olsak and Pudlo..." as required by the appellate court. See *Country Mutual*, 391 Ill. App. 3d at 308 (*Pecoraro II*). At the hearing, Jon Yambert, an attorney at Chilton Yambert, testified via an evidence deposition that on February 6, 2001 he filed an appearance on Olsak's behalf, and in October 2001 he filed an appearance on Pudlo's behalf. Yambert also testified that his firm represented Pudlo only as to Count III of the Counterclaim, the claim against Pudlo as an individual for failing to control or supervise Olsak, and his representation of Pudlo ended on March 13, 2002 when the court dismissed that claim. Yambert further testified that: his firm's representation of Olsak did not

occur at the request of Country Mutual; he did not believe his firm was ever paid for its representation of Olsak; and on July 7, 2004 his firm filed a motion to withdraw as counsel for Olsak.

Attorney Robert Shipley, of the Shipley Law Group, testified that Country Mutual retained him to represent Pudlo in Pudlo's capacity as a board member and to monitor the case. Shipley testified that although he had filed an appearance on behalf of Pudlo on May 11, 2004, he: did not take part in drafting any motions to dismiss the claims against the individual board members; never received any instructions from Country Mutual as to any arguments he should make on Pudlo's behalf; and never gave Pudlo any legal advice. On cross-examination, Shipley admitted that he had attended the circuit court hearing as to whether the original 2006 settlement agreement between Olsak and Pecoraro was reached in good faith and further admitted that he had argued against such a finding at that proceeding.

Pudlo testified that Country Mutual assigned Jon Yambert to represent him and he could not remember being in contact with Yambert after the court dismissed the claim brought against him as an individual. Pudlo also testified that he could not remember if he ever met with Shipley. Olsak testified that he could not remember if he paid anyone pursuant to the settlement agreement he had entered into with Pecoraro. Neil Napolitano, an assistant general counsel for Country Mutual, testified that Shipley had been retained to monitor the litigation and that Country Mutual was not involved in the representation of the board members in any way.

On March 16, 2012, the circuit court entered a written order dismissing the declaratory judgment claim filed by Country Mutual as moot and granted a $5,000 judgment in favor of Olsak and Pecoraro on their counterclaim. In doing so, the court found that a conflict of interest

existed between the defenses of Olsak and Pudlo during that period of time in which Country Mutual retained Shipley to monitor the litigation on Pudlo's behalf. The court also found that Olsak was prejudiced by Country Mutual's failure to appoint counsel to represent him to the extent he was required to settle with Pecoraro for $5,000. The March 16, 2012 decision was at issue in the third appeal in this case: *Country Mut. Ins. Co. v. Olsak*, 2014 IL App (1st) 121063-U (*Pecoraro III*).

f. *Pecoraro III*

In *Pecoraro III*, the appellate court made clear that in *Pecoraro II* it had determined Country Mutual had a duty to defend Olsak as Pecoraro's allegations in Pecoraro's underlying complaint "revealed a potential for coverage." See *Olsak*, 2014 IL App (1st) 121063-U, ¶ 19. The court stated that its decision in *Pecoraro II* was "now the law of the case" and was binding both on remand to the circuit court, as well as in a subsequent appeal. See *id.* The court concluded that the circuit court had properly found that Country Mutual's declaratory judgment complaint was moot.

In its review of Olsak and Pecoraro's Counterclaim, the court noted that on remand the circuit court had found that there was a conflict of interest between Olsak's and Pudlo's defenses and that Olsak was prejudiced by the conflict. The court concluded that Olsak and Pecoraro were entitled to judgment on Counts I and II of the Counterclaim as they "had established that Country Mutual breached its duty to defend Olsak in the underlying action." See *id.* ¶ 20.

The court then reviewed the circuit court's decision to award Olsak and Pecoraro $5,000 in damages, the amount identified in the 2006 settlement agreement, on Counts I and II of the Counterclaim. The court noted that Olsak and Pecoraro's Counterclaim had specifically

requested that the circuit court conduct an evidentiary hearing to determine the amount of damages Pecoraro was entitled to for his injuries and that the circuit court enter a judgment in Pecoraro's favor for compensatory damages. The court further noted that Olsak and Pecoraro had modified the 2006 agreement in 2010 such that Olsak had agreed to pay Pecoraro $6,000,000. That amount would be satisfied by the assignment of Olsak's claims against Country Mutual and TIG as provided in the original settlement agreement, in exchange for a reaffirmation of his release from all claims by Pecoraro and the forgiveness of his failure to pay $5,000 as required by the original agreement. The court found it significant that after Olsak and Pecoraro executed the 2010 modification to their settlement agreement, they filed a motion requesting a finding that the modification was reasonable pursuant to the *Guillen* decision. TIG and Country Mutual both vigorously opposed the motion.[2]

The court noted that in *Guillen*, our supreme court held that when an insurer, such as Country Mutual, breaches its duty to defend its insured, and then the insured subsequently reaches a settlement agreement with the plaintiff in the underlying action, the insurer is legally obligated to indemnify the insured and is required to pay the settlement amount so long as the plaintiff is able to establish that the settlement was reasonable. The court explained that to establish the reasonableness of the settlement agreement, Pecoraro had to establish that a prudent person in his position would have agreed to the settlement. The circuit court stated that in making its determination it was also required to consider both: a) whether the decision to settle was reasonable; and b) whether the amount of the settlement was reasonable.

The court observed that Country Mutual's arguments that there was a lack of consideration for the 2010 modification to the 2006 agreement and that the modification was a

[2] TIG entered into a settlement agreement with Pecoraro following the appellate court's decision in *Pecoraro III*.

product of collusion between Olsak and Pecoraro was the "exact type of issue" a reasonableness hearing was designed to address. *Olsak*, 2014 IL App (1st) 121063-U, ¶ 26. The court then reversed the portion of the March 16, 2012 order that awarded Pecoraro $5,000 and, importantly, remanded the case to this Court for a hearing to determine whether Olsak's decision to enter into the 2010 modification to the 2006 agreement was reasonable and whether the $6,000,000 settlement amount was reasonable. Additionally, the court remanded the case to this Court for a ruling on Count III of the Counterclaim against Country Mutual, in which Pecoraro requested an award of attorney fees and costs under section 155 of the Insurance Code. See *id.* ¶ 28.

III. FINDINGS OF FACT

During the combined trial and reasonableness hearing, all parties were represented by very experienced and able attorneys, who vigorously, zealously and professionally advocated their respective client's positions. During the combined trial and hearing, this Court heard testimony from eighteen witnesses, namely, Joseph Pecoraro, Jody Pecoraro, Glenn Pecoraro, Jennifer Pecoraro Striepling, Raymond Peters, James Messineo, Norman Lerum, Thomas Olsak, Anthony Garaffalo, Juan Alvarado, Neil Napolitano, Faustin Pipal, Frederick Bylsma, Ph.D., Craig Farmer, William Cormack, James McGovern, Fritz Huszagh and Walter Jay, M.D. The Court also received eleven evidence depositions that memorialized the testimony of Nick Lazzaretto, Lynn Wallace, John Yambert, Stewart Kusper, Massarat Bala, M.D., Kanu Panchal, M.D., Paul Mikulski, D.C., CCN, Theodore Viti, Jr., D.C., Daniel Davison, D.O., Matthew Ross, M.D. and Daniel Wynn, M.D. This Court carefully and thoroughly considered the testimony of each witness, including the identified evidence depositions, in an effort to judge his or her credibility, as well as to determine the amount of weight, if any, that should be afforded to his or her testimony. This Court specifically considered each witness's opportunity to observe the

relevant occurrences, his or her memory, his or her manner, and the choice of language he or she used while testifying. In evaluating each witness, this Court considered, where applicable, evidence that on some other occasion the witness made a statement or acted in a manner inconsistent with his or her memory on a matter material to the issues in this case. In this opinion, although this Court does, on occasion, specify that a particular witness was credible, if any of this Court's findings are contrary to a particular witness's or several witnesses' testimony, this Court has specifically rejected the contrary testimony as being either not credible and/or unreliable and/or incompetent and/or simply unconvincing.

Additionally, this Court admitted into evidence numerous and voluminous exhibits at the request of the parties and this Court heard testimony from the various witnesses relative to the significance of certain exhibits. This Court carefully and thoroughly examined and considered each exhibit and its significance prior to arriving at its findings of fact and conclusions of law. This Court having considered the facts, testimony of the witnesses, and all exhibits admitted into evidence makes the following findings of fact and conclusions of law. Further, although certain of this Court's findings of fact may appear in the conclusions of law section of this decision, they have no less significance and are set forth solely for clarity's sake.

In order to properly evaluate whether there was sufficient consideration for the 2010 modified settlement agreement, as well as to determine if there was collusion by the parties when they entered into it, a brief review of the events that led to both the 2006 and 2010 settlement agreements is necessary. The following events are specific findings of fact by this Court.

A. The 2006 Settlement Agreement

On June 26, 2006, Olsak and Pecoraro reached an agreement entitled *Settlement Agreement, Assignment of Causes of Action, and Release Between Joseph Pecoraro and Thomas*

Olsak. When Olsak and Pecoraro entered into the 2006 settlement agreement, Olsak was represented by Stewart Kusper. Pecoraro was represented by Norman Lerum and James Messenio. At the time that the 2006 agreement was executed, both Lerum and Messenio had filed appearances in Country Mutual's declaratory judgment action.

Kusper testified via his evidence deposition pursuant to the agreement of the parties and approval of this Court. According to Kusper's unrefuted testimony, he initially raised the issue of a settlement between Olsak and Pecoraro. Kusper and Lerum negotiated the terms of the settlement agreement over several months. The agreement indicated that Pecoraro had sustained: "serious and permanent" brain and back injuries; the loss of smell and loss of taste; and the "loss of peripheral vision in one eye." Defs.' Ex. 5. The agreement also reflected that Pecoraro had sustained "approximately $800,000 in lost income and lost value to his business as a result of his injuries." Defs.' Ex. 5.

The agreement required that Olsak "pay Joseph Pecoraro, and his attorneys, Norman J. Lerum and James M. Messenio the sum of FIVE THOUSAND DOLLARS ($5,000.00) within forty-five (45) days after the entry of a Good Faith Order." Defs.' Ex. 5. The agreement stated that the purpose of the $5,000 that Thomas Olsak would pay would be to "*defray attorney's fees and expenses incurred by Joseph Pecoraro in the Country Mutual Action.*" Defs.' Ex. 5 (emphasis in original). The "*Country Mutual Action*" was a reference to the 2005 declaratory judgment action filed by Country Mutual.

According to Kusper, it was the clear intent of the parties that the inclusion of the $5,000 provision in the agreement was to be Olsak's contribution toward attorneys' fees, given the expectation that attorneys Lerum and Messineo would be expending a significant amount of time in the future on Olsak's behalf, as Olsak remained a defendant in the declaratory judgment

action. Kusper further testified that the intent of the parties was to settle the matter in order to provide relief to both Pecoraro for his personal injuries and economic losses, as well as to provide relief to Olsak from the "nightmare" that Olsak had been living with. This "nightmare" was a reference to Olsak's status when he was both unrepresented by counsel and an uninsured individual in the underlying lawsuit.

Kusper further testified that he, as Olsak's attorney, believed that the most appropriate way to determine the correct amount of damages was to leave it in the hands of a third-party in the event that it was ultimately determined that either Country Mutual and/or TIG breached a duty to defend Olsak. Consequently, the parties specified in paragraph 2.3 that both Pecoraro and Olsak agreed to be bound by a determination of Pecoraro's damages by a court or jury as contemplated by our supreme court in *Guillen v. Potomac Ins. Co. of Illinois*, 203 Ill. 2d 141 (2003). The parties understood that before any settlement amount could be enforced against either Country Mutual or TIG, such a hearing was required as a matter of law to determine its reasonableness.

Olsak further agreed to assign his rights under the TIG and Country Mutual insurance policies to Pecoraro. Defs.' Ex. 5. Kusper noted that Olsak's most valuable and only real asset in the case was the assignment of his rights against Country Mutual and TIG. Kusper concluded that it would have been impossible for him or anyone else to effectively represent Olsak at trial in the underlying action following five years of extensive litigation and deposition testimony. Without contradiction, Kusper testified that Olsak suffered emotionally and mentally as a result of not being effectively represented by counsel in the underlying case.

In return for Olsak's promises and assignments, Pecoraro forever released and discharged Olsak from all claims, actions, causes of action, debts, and obligations that Pecoraro had or may

have had against Olsak that arose from Olsak's October 21, 1998 acts or omissions and which resulted in Pecoraro's injuries, losses, or damages. See Defs.' Ex. 5, ¶ 3.2. Pursuant to paragraph 4.2, Olsak further agreed to cooperate with Pecoraro and his attorneys. Defs.' Ex. 5.

A finding of good faith was made by the Honorable Judge William Taylor on September 12, 2006. The good faith finding was appealed by the hockey club. The appellate court affirmed that the 2006 agreement had been made in good faith. See *Pecoraro I.*

B. The 2010 Modified Settlement Agreement

The 2006 agreement had been found by both a trial court and the appellate court in *Pecoraro I* to be enforceable as it was entered into in good faith. In 2009, the appellate court reversed the trial court's summary judgment decision that had been entered in Country Mutual's favor. See *Pecoraro II.* The court determined that Country Mutual had breached its duty to defend Olsak. See *id.* After the 2009 *Pecoraro II* decision, Country Mutual raised a collateral argument that the 2006 settlement agreement was unenforceable as it was without a specific settlement amount.

On May 31, 2010, Olsak and Pecoraro entered into an agreement to modify the 2006 agreement entitled *Amendments to June 26, 2006 Settlement Agreement, Assignment of Causes of Action, and Release Between Joseph Pecoraro and Thomas Olsak.* Defs.' Ex. 5. The 2010 agreement was drafted by Lerum and Messenio. Paragraph 1.4 of the 2010 agreement stated that Olsak had failed to pay the required $5,000. Defs.' Ex. 5. As of the date that the 2010 agreement, Olsak had only paid $1,500 of the $5,000 obligation to Pecoraro and/or Pecoraro's attorneys. In paragraph 2.1 of the 2010 agreement, a narrative of Pecoraro's medical condition, medical expenses and his economic losses was set forth in detail in the section entitled the "Nature and Extent of Joseph Pecoraro's Injuries." Defs.' Ex. 5.

Paragraph 1.1 of the 2010 agreement indicated that there had been significant developments and changes in the circumstances that had led both Pecoraro and Olsak to enter into a modification of the 2006 agreement. The 2010 agreement described the changes, including the 2009 appellate court opinion (*Pecoraro II*), Olsak's failure to pay the required $5,000 toward attorneys' fees pursuant to paragraph 2.1 of the 2006 agreement, Pecoraro's ability to default Olsak and reinstate him as a party in the pending underlying litigation, and Country Mutual's refusal to settle the case for the identified $3,000,000 policy limits and the demand for same. Defs.' Ex. 5, 71, 72, 73.

Paragraph 2.1 of the 2010 agreement summarized certain of the medical evidence and further summarized Pecoraro's economic losses. Defs.' Ex. 5. Paragraph 2.2 refers to several Jury Verdict Reporters and settlements of cases before May 31, 2010 where individuals sustained traumatic brain and cervical injuries and economic losses that were comparable to Pecoraro's injuries and losses. Defs.' Ex. 5.

In paragraph 3.1 of the 2010 agreement, Olsak agreed to pay $6,000,000 to Pecoraro. Defs.' Ex. 5. The agreement made clear that "Thomas Olsak's obligation" to pay $6,000,000 to Pecoraro was "subject to the condition that it would be satisfied solely through the Assignment by Thomas Olsak to Joseph Pecoraro of Olsak's right to payment from Country Mutual Insurance Company and/or TIG Insurance Company as fully described" in the 2006 agreement. Defs.' Ex. 5. Paragraph 3.1 of the 2010 agreement stated that it "has been made in good faith and after careful consideration of all of the elements in evidence relating to the injuries and damages that have been, and will be, suffered by Joseph Pecoraro for the balance of his lifetime." Defs.' Ex. 5.

Messineo credibly testified the only reason that the 2006 agreement was being modified was because both Country Mutual and TIG had taken the position that the 2006 agreement was invalid as the agreement had not set forth a specific settlement amount. Messineo credibly testified that the decision to modify the 2006 agreement was made to avoid having the 2006 agreement declared a nullity as it did not contain a dollar amount. Messineo credibly testified that he was well aware of the *Guillen* case and its requirements before he drafted the 2006 and 2010 agreements. Messineo noted that in 2009 and before the 2006 agreement was modified on May 31, 2010, Country Mutual had rejected a $3,000,000 policy demand. Defs.' Ex. 71, 72.

Messineo credibly testified that prior to modifying the 2006 agreement, he reviewed many of the depositions, relevant case law and reports of jury verdicts and settlements of cases involving injuries that were similar to Pecoraro's. More specifically, Messineo testified that he reviewed approximately 30 to 40 Jury Verdict Reporters and sifted through and paired them down to those that had injuries most similar to Pecoraro's injuries. Messineo credibly testified that he had assisted in preparing the summaries of medical testimony that were contained within the 2010 agreement and considered in formulating a $6,500,000 settlement demand which was conveyed in conjunction with a 2003 mediation.

Olsak credibly testified that sometime in 2010 he was made aware that the 2006 agreement was potentially null and void as it did not contain a specific dollar value. Olsak credibly testified that sometime prior to May 31, 2010 he traveled to Chicago, Illinois and met with attorneys Messineo and Lerum at Messineo's office where they had a long discussion about modifying the 2006 agreement. When the modified settlement agreement was in draft form, Olsak was telephonically contacted by Messineo so that a meeting could be set up to review the proposed modified settlement agreement. As Olsak lived and worked in Aspen, Colorado, Olsak

informed Messineo that he was unable to again meet in Chicago to further discuss the proposed modification to the 2006 agreement.

On May 31, 2010, Olsak met Messineo in Aspen. Soon thereafter, they began to discuss the proposed modified settlement agreement. During the meeting, Messineo presented the modified agreement to Olsak and Olsak reviewed it for forty-five to sixty minutes. During this time period, there was little discussion while Olsak read the modified agreement. After Olsak's initial review, they discussed the modified agreement for approximately six hours. Olsak had quite a few questions about the medical summaries that were contained in the modified agreement. As Olsak credibly put it, he had about "four hours' worth" of questions about the modified agreement. Olsak was clearly impressed by the nature and extent of Pecoraro's injuries. Messineo and Olsak went through every single Jury Verdict Report of verdicts and settlements and that were attached to the modified agreement. Olsak actually questioned Messineo as to whether the referenced verdicts and settlements were for injuries that were similar to Pecoraro's injuries. Olsak clearly understood that there was a range of verdicts that were both above and below the proposed $6,000,000 settlement amount contained in the modified agreement.

Both Messineo and Olsak credibly testified that Messineo specifically informed Olsak multiple times that Olsak could: hire an attorney to review the modified agreement; call his former attorney Stewart Kusper to assist with the review of the modified agreement; or even take the modified agreement under advisement. Despite being advised as to his options, Olsak indicated that he was comfortable with the modified settlement agreement and signed it sometime in the afternoon of May 31, 2010.

C. Was There Consideration for the 2010 Modified Settlement Agreement?

The actual question that should be before the Court is whether or not any modification to the 2006 agreement was needed to enforce the 2006 agreement, and by doing so bind Country Mutual to a judgment that this Court believes to be fair and reasonable in light of Pecoraro's established injuries? The 2006 agreement was clearly supported by adequate consideration. It was also found to have been entered into in good faith. It further made clear that any determination as to the value of Pecoraro's injuries would be made at a later time by either a judge or a jury.

The animating concern that drove the *Guillen* decision was that parties could unilaterally determine the value of an individual's or an entity's injury and then foist that decision, whether arbitrary or otherwise, upon an insurance carrier that was never present at any bargaining table. That did not happen in this case as the entirety of the 2006 agreement was revealed to the court and parties prior to the court ruling as to whether or not it was entered into in good faith. So why was the 2006 agreement modified?

It is uncontradicted that after the 2009 *Pecoraro II* decision, both Country Mutual and TIG's somewhat conveniently took the position that the 2006 agreement was invalid as it lacked a specific settlement amount. In other words, the carriers took the unsupported position that the 2006 agreement never actually existed. However, as the agreement clearly contemplated that any determination of Pecoraro's damages would be made by a judge or jury, an actual dollar amount was not required. In reaction to the carriers' position, Pecoraro's attorneys modified the 2006 agreement to include the specific dollar amount of $6,000,000, which was the amount of money they believed was fair to compensate Pecoraro for his injuries.

This modification has led to confusion. In reaction to the 2010 agreement, Country Mutual somewhat surprisingly pivoted and argued that the 2010 agreement was an inappropriate

modification to the 2006 agreement as it was not supported by consideration and was collusive in nature. More specifically, Country Mutual argued and continues to argue that as the 2006 agreement required Olsak to pay $5,000, he was prohibited from agreeing to the $6,000,000 (or any other amount) unless there was additional consideration for what Country Mutual now acknowledges was a valid settlement agreement.

Country Mutual's current argument is somewhat tongue-in-cheek as it initially had argued that the 2006 agreement was invalid as it did not contain a specific dollar amount. When the 2006 agreement was modified by the 2010 agreement to include a specific dollar amount for Pecoraro's injuries, Country Mutual cried foul. Following Country Mutual's argument to its logical conclusion, if the 2006 agreement was invalid, then there should truly not be much of a discussion as the 2010 agreement would be the one and only agreement that existed between Olsak and Pecoraro.

In any event, Messineo credibly testified that the "only" reason the 2006 agreement was modified was due to the position that both Country Mutual and TIG had taken after they were on the receiving end of a clear loss in *Pecoraro II*. The Court does not understand why Pecoraro and Olsak have not argued that Country Mutual should be equitably estopped from making its current argument due to the uncontradicted facts that are before this Court, and especially since there was no need to modify the 2006 agreement as the determination of Pecoraro's damages was to be made by a judge or jury and not by Pecoraro's attorneys. In the 2010 agreement, Pecoraro's attorneys set forth a dollar figure that they recognized would necessarily be scrutinized by the Court. Country Mutual now criticizes the conduct it invited. This is amazing hutzpah.

IV. CONCLUSIONS OF LAW

A. The 2010 Modified Settlement Agreement Was Supported By Consideration

Country Mutual argues that the 2010 modified settlement agreement was illusory in nature as there was no additional consideration for it. When determining whether a document is a binding contract, it must be determined whether the three basic elements of a contract are present, namely, an offer, acceptance, and consideration. *A. Epstein & Sons Int'l v. Eppstein-Uhen Architects*, 408 Ill. App. 3d 714, 720 (2011). Many contracts have been reviewed in past cases to determine whether there was sufficient consideration. This has resulted in consistent principles that are used to determine what consideration is and what it is not. "Consideration consists of some detriment to the offeror, some benefit to the offeree, or some bargained-for exchange between them." *Id.* Consideration is "some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss of responsibility given, suffered or undertaken by the other." *Lindy Lu LLC v. Illinois Central R.R. Co.*, 2013 IL App (3d) 120337, ¶ 22. "'Consideration' is the 'bargained-for exchange' of promises or performances, and may consist of a promise, an act or a forbearance.' *DiCosola v. Ryan*, 2015 IL App (1st) 150007 ¶ 16. "A bargained-for exchange exists if one party's promise induces the other party's promise or performance." *Ross v. May Co.*, 377 Ill. App. 3d 387, 391 (2007) (citing *Boomer v. AT & T Corp.*, 309 F.3d 404, 416 (7th Cir. 2002) (applying Illinois law)).

Although some consideration is necessary, "'[a] court's inquiry into whether a contract is supported by consideration does not extend to examining the adequacy of the consideration.'" *Rohr Burg Motors, Inc. v. Kulbarsh*, 2014 IL App (1st) 131664 ¶ 48; *Hurd v. Wildman, Harrold, Allen & Dixon*, 303 Ill. App. 3d 84, 93 (1999) (quoting *Gavery v. McMahon & Elliot*, 283 Ill. App. 3d 484, 490 (1996)). "It is not [the] court's function to review the amount of consideration unless the amount is so grossly inadequate as to shock the conscience," and thus "[m]ere

inadequacy of consideration, in the absence of fraud or unconscionable advantage, ordinarily is insufficient to justify setting aside a contract." *Hurd*, 303 Ill. App. 3d at 93 (internal quotation marks omitted). In fact, it is well-settled that valid consideration exists for a release when a party promises not to file suit against another party in exchange for payment. See *Amer. Nat'l Trust Co. v. Kentucky Fried Chicken of Southern California, Inc.*, 308 Ill. App. 3d 106, 120 (1999). If the parties agree to a contract modification, the same elements for a valid contract (offer, acceptance, and consideration) must be satisfied and preexisting obligations do not suffice for consideration. *All Am. Roofing, Inc. v. Zurich Am. Ins. Co.*, 404 Ill. App. 3d 438, 450 (2010); *Watkins v. GMAC Financial Services*, 337 Ill. App. 3d 58, 64 (2003). However, an illusory promise appears to be a promise, but in actuality the promisor has not agreed to do anything. *W.E. Erickson Construction, Inc. v. Chicago Title Insurance Co.*, 266 Ill. App. 3d 905, 909 (1994). "If the alleged consideration for a promise has been conferred prior to the promise upon which alleged agreement is based, there is no valid contract." *Johnson v. Johnson*, 244 Ill. App. 3d 518, 528 (1993).

Here, the 2006 settlement agreement was a complete and binding contract between Olsak and Pecoraro as it clearly reflected that there had been an offer and an acceptance and that it was supported by consideration. As of May 2010, Olsak was in default of the 2006 agreement. Pecoraro had a clear right to seek to enforce the 2006 agreement and hold Olsak in default. Pecoraro could have reinstated Olsak as a defendant in the underlying tort action, which was still pending against the hockey club or Pecoraro could have brought a new breach of contract action against Olsak. Pecoraro did neither. Instead, Pecoraro entered into a forbearance agreement with Olsak in May 2010 that modified the terms of the 2006 agreement.

The Court finds that the 2010 modified settlement agreement contained an offer and an acceptance, and was, importantly, supported by consideration. Pecoraro received certainty in demanding a *Guillen* hearing in exchange for forbearing his litigation rights against Olsak. It is not this Court's function to examine the adequacy of such consideration, unless the consideration is so grossly inadequate as to shock the conscience. Yet, inadequate consideration will ordinarily not justify setting aside a contract, unless fraud or an unconscionable advantage are present.

First, the consideration supporting the 2010 modification is not so grossly inadequate as to shock the conscience. In the forbearance agreement, Pecoraro and Olsak agreed that Pecoraro would forbear his clear rights to renew his tort action against Olsak or pursue any further litigation such as a breach of contract action against Olsak. Pecoraro and Olsak also agreed that Olsak would avoid any judgment against him. Olsak received a benefit in avoiding any judgment in the underlying tort action or a new contract action, especially considering that he would be, as he had in the past, unrepresented by counsel. This was a real concern for Olsak, especially as he was still without funds to either continue with or begin anew litigation.

In exchange for forbearing his rights against Olsak, Pecoraro received certainty that he could successfully demand a *Guillen* hearing as the agreement was modified to set forth what he and his attorneys determined was a fair and reasonable settlement amount, i.e., $6,000,000, given the nature and extent of Pecoraro's injuries. Additionally, with the inclusion of the $6,000,000 amount, as well as Olsak's acknowledgment of the amount, Pecoraro clearly strengthened his position vis-a-vis Country Mutual and TIG at any future *Guillen* hearing. Accordingly, the Court finds that the consideration supporting the 2010 modification is not so grossly inadequate as to shock the conscience.

Second, even if the Court had found the consideration inadequate, there was no evidence presented, as will be discussed below, that established that there was any fraud related to the 2010 modification. Both Messineo and Olsak credibly testified about the full and thorough discussions they had, including the several hours of Olsak's questions and Messineo's answers, before Olsak agreed to and signed the 2010 modification. Similarly, no evidence was presented that established that the modification conferred an unconscionable advantage to either Pecoraro or Olsak. While Olsak was unrepresented during the discussions with Messineo, the evidence established that Olsak completely understood the proposed modification and was aware of his right to be represented, as well as his right to essentially walk away from the proposed agreement and take his chances in future court proceedings. The bargained-for terms of the modification did not confer an unfair advantage to either party.

In sum, the Court finds, after a careful review, that the 2010 modified settlement agreement was supported by consideration, in addition to containing an offer and acceptance. The consideration in the modification was not so inadequate as to shock the conscience and there was no evidence presented that established fraud or unconscionable advantage. Thus, no basis exists for setting aside the modification. The Court, therefore, finds that the 2010 modified settlement agreement is a valid and enforceable contract.

B. There Was No Collusion Between the Parties

Country Mutual has argued that in addition to being an agreement that was unsupported by consideration, the 2010 settlement agreement was collusive in nature. As such, Country Mutual urges this Court to essentially consider it a nullity. The question becomes when can the conduct of parties who have entered into a settlement agreement be considered collusive, fraudulent and/or bad faith?

A settlement "becomes collusive when the purpose is to injure the interests of an absent or nonparticipating party, such as an insurer or nonsettling defendant." *Cent. Mut. Ins. Co. v. Tracy's Treasures, Inc.*, 2014 IL App (1st) 123339, ¶ 80. "Among the indicators of bad faith and collusion are unreasonableness, misrepresentation, concealment, secretiveness, lack of serious negotiations on damages, attempts to affect the insurance coverage, profit to the insured, and attempts to harm the interest of the insurer." *Id.* Bad faith and collusion both involve unfairness to the insurer, "which is probably the bottom line in cases in which collusion is found." *Id.*

Collusion occurs when "the insured and a third[-]party claimant work together to inflate the third party's recovery to artificially increase damages flowing from the insurer's breach" of the duty to defend. *Id.* ¶ 81. "Several factors are relevant to a determination whether a settlement is collusive, including 'the amount of the overall settlement in light of the value of the case...; a comparison with awards or verdicts in similar cases involving similar injuries...; the facts known to the settling insured at the time of the settlement...; the presence of a covenant not to execute as part of the settlement...; and the failure of the settling insured to consider viable available defenses...'" *Id.* (quoting *Safeco Ins. Co. of Amer. v. Parks*, 170 Cal. App. 4th 992, 1013 (2009)).

Certain of this Court's mandated responsibilities in this case clearly overlap. In order to fully determine whether the settlement was collusive in nature, the Court necessarily has to evaluate the nature and extent of Pecoraro's injuries. The Court is required to make a similar evaluation if the Court has determined that both there was consideration to support the 2010 settlement agreement and also that there was no evidence of collusion. Consequently, there may be some duplication in the Court's analysis. See *infra*.

Pecoraro has maintained that as a direct result of being struck by Olsak in 1998, he sustained a brain injury, as well as cervical injuries. Pecoraro has specifically asserted that his brain injury has led to, *inter alia*, a loss of taste and smell, memory loss, vision loss, cognitive deficits and head pain. Pecoraro further maintained that his cervical injuries were also very painful. It was specifically asserted that the injuries, including his associated symptoms and deficits were permanent in nature. Pecoraro further asserted that his business sustained significant losses as he was unable to work in the manner he had worked prior to becoming injured. Country Mutual asserted that Pecoraro's injuries, both physical and financial, were minimal and/or contrived.

At trial, this Court heard and/or read testimony from many well-credentialed medical providers and retained witnesses from different medical specialties, including neurosurgery, neuro-ophthalmology, neurology and neuropsychology. In addition to Pecoraro's lengthy testimony, the Court heard testimony from Pecoraro's friends and family members and individuals who had worked with him at his place of business. Each of the witnesses described and compared the Pecoraro they knew before he was injured to the Pecoraro they have come to know during the last twenty years. The Court also heard testimony from Craig Farmer and James McGovern who had evaluated Pecoraro's business and assessed any losses that they believed Pecoraro sustained following the 1998 occurrence. The Court also heard testimony from Faustin Pipal who summarized various settlements and jury verdicts in cases where individuals had similar injuries to Pecoraro's and then compared the settlements with the settlement that Olsak had entered into with Pecoraro. Defs.' Ex. 79.

This Court meticulously reviewed, *inter alia*, the voluminous medical records, discovery and evidence depositions, as well as the often-times conflicting testimony that was introduced to determine whether: the 2010 settlement agreement was reasonable; there were any misrepresentations as to any aspect of the agreement; there was anything concealed and/or kept secret; and there were any serious negotiations relative to damages. The Court also carefully reviewed all of the materials to determine if the 2010 agreement had been entered into with the goal of harming Country Mutual. In other words, the Court assessed all of the information that was made available to it by using its experience, as well as its common sense, so as to properly evaluate the totality of all the circumstances that led to the 2010 agreement.

After carefully reviewing all of the testimony and exhibits, this Court concludes that the $6,000,000 settlement amount was fair and reasonable in light of the injuries that Pecoraro sustained due to the 1998 occurrence with Olsak. The Court gives significant weight to Pecoraro's credible description of the nature and extent of his injuries, including his daily pain and suffering due to said injuries. The Court also concludes that due to the nature and extent of Pecoraro's injuries, he sustained significant business losses. Although the Court was not tasked with assessing what the exact verdict or even what the potential range of verdicts for Pecoraro could have been, if this Court were the trier of fact, the verdict certainly would have been in excess of $6,000,000. The Court arrived at this conclusion due to Olsak's clear liability, Pecoraro's young age at the time of the occurrence, Pecoraro's active lifestyle prior to the date of the occurrence and lack of any significant intervening event that followed the occurrence. Of course, significant weight was given to the nature and extent of Pecoraro's injuries which have been previously described. These injuries were real and impressive. The Court has fully

considered and rejects Country Mutual's arguments to the contrary. Thus, this Court concludes, with significant confidence, that a $6,000,000 settlement agreement was fair and reasonable.

Additionally, the Court finds that at no time were any misrepresentations made relative to any aspect of the settlement. Country Mutual has also argued, without any support, that Pecoraro was essentially required to give it notice of any potential modification or possibly even that there would be a meeting with Olsak relative to the terms of the proposed 2010 agreement. Country Mutual apparently took this position as it had filed a declaratory judgment action against Pecoraro and Olsak and concluded that notice was an obligation of the parties. By making this argument, Country Mutual essentially has tried to revise the history of the case by ignoring its previous abandonment of Olsak and its continuing defense of the identified policy limits despite the *Pecoraro II* decision. The conversations and meetings between Olsak and Pecoraro's attorneys were fully appropriate. Certainly, nothing was either concealed and/or kept secret as Country Mutual has suggested.

In terms of negotiations, there clearly were serious and lengthy discussions between Olsak and James Messineo, as well as Norman Lerum before they entered into the 2010 agreement. Both Olsak and Messineo testified relative to their contacts and meetings with each other, as well as the details of their discussions. Lerum did the same. Olsak, Messineo and Lerum were all highly credible. Keeping in mind that he had pled guilty to a criminal charge for the 1998 occurrence, Olsak was acutely aware during the 2010 discussion that there was and had been no defense to Pecoraro's claim. It was also apparent to the Court that Olsak was extremely inquisitive as to the nature and extent of Pecoraro's injuries. There is no evidence that Messineo ever exaggerated and/or embellished the nature and/or extent of Pecoraro's injuries when he

described the injuries to Olsak and which were accurately set forth in the 2010 agreement. The only credible evidence was that Messineo accurately laid out Pecoraro's injuries and accurately estimated the value of Pecoraro's injuries.

Country Mutual also refers to the covenant not to sue clause that was contained in the 2010 agreement. The Court fully recognizes the negative potential of such a clause. However, Olsak was a young man who was essentially judgment proof. Essentially his sole asset was his right to pursue TIG and Country Mutual. That right truly only had questionable value until the *Pecoraro II* decision. Olsak knew and agreed that he would have to truthfully testify if called upon and that his testimony would be scrutinized by a judge and/or jury. The existence of the covenant not to sue clause does not establish collusion.

Although there was potential insurance coverage due to the existence of the TIG policy, Olsak was fully aware that the agreed upon settlement amount was far beyond the identified Country Mutual policy limits. There is no doubt that Olsak, as a lay person, did not have the sophistication of an experienced negotiator. However, it was clear that Olsak was specifically informed that he did not have to agree to the terms of the agreement, that he could confer either with his prior attorney, Stewart Kusper, or any other attorney or take time to think about the proposed 2010 agreement before he signed it. Olsak clearly was not pressured into agreeing to it. Although Olsak never suggested an alternative settlement amount, it must again be noted that Olsak was put in the position of being an uninsured person due to Country Mutual's prior coverage decision. Even if there were no negotiations relative to the value of the Pecoraro's injuries, this Court concludes that the serious, candid and truthful discussions constituted serious settlement negotiations.

In any event, this was but one factor that the Court has considered in determining whether there was any collusion between Olsak and Pecoraro. Further, there was no credible evidence that the purpose of the settlement was to injure the interests of either Country Mutual or TIG. This Court concludes with significant confidence that there was no collusion and/or fraud between Olsak and Pecoraro or Pecoraro's counsel relative to the 2010 modified settlement agreement that was entered into in good faith. So it is clear, this Court specifically finds that Olsak acted prudently and reasonably as an uninsured individual in entering into the 2010 modified settlement agreement that was fair and reasonable given the totality of the circumstances, including the merits of Pecoraro's claim.

C. Reasonableness of the Settlement

The determination of whether a settlement was reasonably necessary must be made on a case-by-case basis. The reasonableness requirement has two prongs: 1) the insured's decision to settle must be reasonable; and 2) the amount of the settlement must be reasonable. *Guillen*, 203 Ill. 2d at 163. "With respect to the insured's decision to settle, the litmus test must be whether, considering the totality of the circumstances, the insured's decision conformed to the standard of a prudent *uninsured*." *Id.* (internal quotation marks omitted and emphasis in original). The aspect of the reasonableness inquiry relative to the insured's decision to settle "involves a commonsense consideration of the totality of facts bearing on liability and damage aspects of plaintiff's claim, as well as the risks of going to trial." *Id.* (internal quotation marks omitted). "Similarly, with respect to the amount of damages that were agreed to, the test is what a reasonably prudent person in the position of the [insured] would have settled on the merits of the plaintiff's claim." *Id.* (internal quotation marks omitted). The burden of proving the reasonableness falls on the insured, Olsak, and the underlying claimant, Pecoraro, and not on the

insurer, Country Mutual. *Guillen*, 203 Ill. 2d at 163-64. Despite this burden on the insured and the claimant, the insurer, Country Mutual, "retains the right to rebut any preliminary showing of reasonableness with its own affirmative evidence bearing on the reasonableness of the settlement agreement." *Id.* at 164. It must be stressed is that an insured does not need the insurer's consent to settle a lawsuit where the insurer has breached its duty to defend the insured. *Id.* at 149.

Here, the appellate court has already determined that Country Mutual had a duty to defend Olsak as he was Country Mutual's insured and breached that duty for the reasons set forth in *Pecoraro II* and *III*. The appellate court's decision is the law of the case and binding upon this Court. This Court is prohibited from reconsidering issues, either factual or legal, that have been previously decided by the appellate court. See *People v. Christopher K. (In re Christopher K.)*, 217 Ill. 2d 348, 363 (2005); see also *Bjork v. Draper*, 404 Ill. App. 3d 493, 501 (2010). As made clear by our supreme court, "once an insurer breaches its duty to defend, the insured may enter into a reasonable settlement agreement without foregoing its right to seek indemnification." *Guillen*, 203 Ill. 2d at 158.

1. Olsak's Decision to Settle Was Reasonable

Olsak struck Pecoraro without warning and Pecoraro was injured. Olsak was criminally charged for the occurrence and, wisely or otherwise, pled guilty. The "affirmative defenses" that were asserted on Olsak's behalf appear to have been contrived. They certainly were not supported by any evidence. Olsak's liability was clear.

Additionally, Olsak was a young man without any real assets. According to Country Mutual, Olsak was uninsured for the occurrence. The only true asset that Olsak had was what many might consider to be his long shot "bad faith" case against TIG and Country Mutual. Olsak

was faced with a bleak financial future due to a potential judgment stemming from his altercation with Pecoraro. A trip to the bankruptcy court and/or supplemental proceedings following what would have been a guaranteed judgment against him, were looming. At trial, Olsak credibly described the somewhat constant stress that he felt was weighing on him due to the ongoing litigation.

Further, during his settlement discussions with Messineo, it was uncontradicted that Olsak was provided with specific information about the nature and extent of Pecoraro's injuries. Olsak asked questions about the injuries and was provided with accurate information in response. Olsak believed that it was a good decision to settle his case with Pecoraro, via the assignment of his rights to pursue TIG and Country Mutual, in order to end the litigation and escape any personal financial liability.

This Court carefully listened to and evaluated Olsak's testimony. It was highly credible. Olsak's decision to settle was reasonable due to the totality of the circumstances and it conformed in all respects with the standard of a prudent uninsured individual.

2. The Settlement Amount Was Reasonable

Almost the entirety of the evidence that was offered by Pecoraro relative to the nature and extent of his injuries and business losses was vigorously contested. In fact, during cross-examination, Country Mutual's skilled counsel, if the opportunity arose, inquired into what he perceived to be a witness's inconsistent and/or uncorroborated and/or biased testimony. Pecoraro's equally skilled counsel did the same. In other words, the shortcoming of any witness was clearly highlighted so that the Court could carefully assess the merits and/or lack of merits of the evidence.

Pecoraro maintained that as a direct result of being struck by Olsak in 1998, he sustained a brain injury, as well as cervical injuries. Pecoraro specifically asserted that his brain injury has led to, *inter alia*, a loss of taste and smell, memory loss, vision loss, cognitive deficits and head pain. Pecoraro further maintained that his cervical injuries were also very painful. It was specifically asserted that the injuries, including his associated symptoms and deficits were permanent in nature. Pecoraro further asserted that his business sustained significant losses as he was unable to work in the manner he had worked prior to becoming injured. Country Mutual asserted that Pecoraro's injuries, both physical and financial, were minimal and/or contrived.

At trial, this Court heard and/or read testimony from many well-credentialed medical providers and retained witnesses from different, medical specialties, including neurosurgery, neuro-ophthalmology, neurology and neuropsychology. In addition to Pecoraro's lengthy testimony, the Court heard testimony from Pecoraro's friends and family members and individuals who had worked with him at his place of business. Each of the witnesses described and compared the Pecoraro they knew before he was injured to the Pecoraro they have come to know during the last twenty years. The Court also heard testimony from Craig Farmer and James McGovern who had evaluated Pecoraro's business and assessed any losses they believed Pecoraro sustained following the 1998 occurrence. The Court also heard testimony from Faustin Pipal who summarized various settlements and jury verdicts in cases where individuals had similar injuries to Pecoraro's and then compared the settlements with the settlement that Olsak entered into with Pecoraro. Defs.' Ex. 79.

It is unnecessary for the Court to laboriously summarize each of the many witnesses' testimony as the parties have done so in the hundreds of pages of their submissions following the

Guillen hearing and section 155 trial. This Court has strived mightily to review, *inter alia*, the voluminous medical records, discovery and evidence depositions, as well as the often-times conflicting trial testimony so as to determine whether the underlying settlement agreement was reasonable.

After having carefully reviewed all of the testimony and exhibits, this Court concludes that the $6,000,000 settlement amount was fair and reasonable in light of the injuries that Pecoraro sustained due to the 1998 occurrence with Olsak. The Court gave significant weight to Pecoraro's credible description of the nature and extent of his injuries, including his daily pain and suffering due to said injuries. The Court also concludes that due to the nature and extent of Pecoraro's injuries, he sustained significant business losses. Although the Court was not tasked with assessing what the exact verdict or even what the potential range of verdicts for Pecoraro could have been, if this Court were the trier of fact, the verdict certainly would have been in excess of $6,000,000. The Court arrived at this conclusion due to Olsak's clear liability, the nature and extent of Pecoraro's substantial and established injuries, Pecoraro's young age at the time of the occurrence, Pecoraro's active lifestyle prior to the date of the occurrence and lack of any significant intervening event that followed the occurrence. The Court considered and rejects Country Mutual's arguments to the contrary. Thus, this Court concludes, with significant confidence, that a $6,000,000 settlement agreement was fair and reasonable.

D. Olsak's Recovery Against Country Mutual is Limited to the Identified Policy Limits

This Court has determined that the 2010 settlement agreement was supported with sufficient consideration and was neither fraudulent nor collusive. Does this now mean that Country Mutual is obligated to pay $6,000,000 rather than the total identified policy limits of $3,000,000 ($1,000,000 under the homeowner's policy and $2,000,000 under the umbrella

policy)? This question is properly before the Court due to the pendency of Counts I and II of the Counterclaim. The Court finds that Country Mutual is not obligated to pay a judgment amount greater than $3,000,000.

Pecoraro argues that Country Mutual is essentially exposed to "extra-contractual" liability based upon the doctrine of estoppel. Although Pecoraro does not cite any authority for this proposition, it should be made clear that an insurer's breach of its duty to defend does not expose the insurer to liability greater than the policy limits, but only estops it from raising policy defenses to the coverage that already exists. *Guillen v. Potomac Ins. Co. of Illinois*, 323 Ill. App. 3d 121, 137 (2001) aff'd as modified and remanded, 203 Ill. 2d 141 (2003) (citing *Gould v. Country Mut. Cas. Co.*, 37 Ill. App. 2d 265, 290 (1962)). This is in accord with Illinois courts following the general rule that the doctrine of estoppel cannot be used to create primary liability or to increase coverage provided under an insurance policy. e.g., *Nationwide Mut. Ins. Co. v. Filos* 285 Ill. App. 3d 528, 534 (1996). The rule exists because an insurer should not be made to pay for a loss for which it has not charged and collected a premium. *Id.* "Estoppel is defensive in nature; its function is to preserve rights, not to create a cause of action." *Id.* at 533 (quoting 18 Couch Insurance 2d. § 71:41, at 268 (rev.1982)).

Here, the appellate court's findings in *Pecoraro II and III* that Country Mutual breached its duty to defend Olsak in the underlying tort action does not, by itself, expose Country Mutual to liability greater than the limits of the two policies at issue. However, the *Nationwide* decision identified two exceptions to the general rule. *Nationwide Mut. Ins. Co.*, 285 Ill. App 3d at 534.

The first exception arises from the doctrine of promissory estoppel where an insurer misrepresents the extent of coverage. *Id.* As Country Mutual denied Olsak coverage from the outset, this exception does not apply. Additionally, no persuasive evidence was offered by Olsak

to support this exception as it was not demonstrated that Country Mutual was aware of facts that reflected non-coverage. The second exception arises where an insurer "defends an action on behalf of an insured, with knowledge of facts that would provide a defense to coverage, but without a reservation of rights." *Nationwide Mut. Ins. Co.*, 285 Ill. App 3d at 534. As Country Mutual never provided Olsak with a defense and actually denied Olsak any coverage, this exception also does not apply.

Additionally, and for clarity's sake, the reasoning the court employed in *Delatorre v. Safeway Ins. Co.*, 2013 IL App (1st) 120852 does not apply to this case. In *Delatorre,* the court noted that the case was about "whether an insurer that has retained counsel to defend its insured, may, in certain limited circumstances, still be found to have breached its duty to defend." *Id.* ¶ 20. In this case, Country Mutual did not retain counsel to defend Olsak. Also, *Delatorre* involved a default judgment entered against the insured and not, as here, a negotiated settlement. *Id.* ¶ 30. The *Delatorre* Court found that the insurer breached its contractual duties to the insured as the carrier-appointed counsel and then did nothing to ensure that counsel effectuated the defense being paid for by the insurer. *Id.* ¶ 26. Unlike in *Delatorre,* Country Mutual never provided Olsak with a defense. See *id.* ¶ 20. Further, Country Mutual affirmatively made it clear to Olsak that it had denied Olsak with a defense via its denial of coverage letter sent to Olsak in November 2000. Olsak certainly never relied upon an appointed attorney who dropped the representation ball, as no such representation was ever provided.

Further, Country Mutual also argued that it would not be obligated to pay *any* amount of money if this Court determined that Pecoraro's injuries were less than $6,000,000. The idea behind this argument was essentially that unless Pecoraro established the value of his injuries as being at least $6,000,000, any agreement would essentially be nullified if the value of the injuries

was actually less than the agreed upon settlement amount, such as $5,999,999. Due to this Court's prior finding that the $6,000,000 settlement was fair and reasonable, the Court does not reach this argument.

Last, the Court acknowledges that Illinois allows an insured or an assignee, such as Pecoraro, to receive an extra-contractual recovery if the insured prevails pursuant to a "bad faith" claim brought pursuant to section 155 of the Insurance Code which is a statute that preempts bad faith claims involving breaches of the insurance contract. See *Cramer v. Ins. Exchange Agency*, 174 Ill. 2d 513, 519 (1996). This Court will specifically address Olsak's section 155 claim in a subsequent analysis.

In sum, County Mutual's breach of its duty to defend does not expose it to liability greater than the two policy limits at issue, and neither of the two *Nationwide* exceptions nor the *Delatorre* decision apply to this case. Thus, the Court finds that Country Mutual is not obligated to pay a judgment amount greater than $3,000,000.

E. Section 155 Bad Faith Determination

In Count III of the Counterclaim, Olsak asserted that Country Mutual's conduct included its failure to: defend Olsak; advise Olsak of a conflict of interest; and advise Olsak that Country Mutual would pay for the defense counsel of Olsak's choice. Olsak also asserted that Country Mutual acted in its own "self-interest" in order to avoid and/or minimize its own risk in the underlying tort action. Olsak asserts that all of Country Mutual's identified conduct was vexatious and unreasonable and in violation of section 155 of the Illinois Insurance Code (215 ILCS 5/155).

Section 155 of the Illinois Insurance Code provides in relevant part:

> (1) In any action by or against a company wherein there is in issue the liability of a company on a policy or policies of insurance or the amount of the loss payable

> thereunder, or for an unreasonable delay in settling a claim, and it appears to the court that such action or delay is vexatious and unreasonable, the court may allow as part of the taxable costs in the action reasonable attorney fees, other costs, plus an amount not to exceed any one of the following amounts:
>
> (a) 60% of the amount which the court or jury finds such party is entitled to recover against the company, exclusive of all costs;
>
> (b) $60,000;
>
> (c) The excess of the amount which the court or jury finds such party is entitled to recover, exclusive of costs, over the amount, if any, which the company offered to pay in settlement of the claim prior to the action.
>
> 215 ILCS 5/155(1)(a)-(c).

As has been previously noted, "[t]he statute provides an extra contractual remedy to policyholders whose insurer's refusal to recognize liability and pay a claim under the policy is vexatious and unreasonable." *Cramer v. Ins. Exch. Agency*, 174 Ill. 2d 513, 519 (1996). It is intended to penalize vexatious delay or the rejection of legitimate claims by insurance companies. *Estate of Price v. Universal Cas. Co.*, 334 Ill. App. 3d 1010, 1012 (2002). Put another way, the purpose of section 155 is "to punish insurance companies for vexatiously delaying or rejecting legitimate claims by holding insurers responsible for the expense resulting from the insured's efforts to prosecute the claim, and discouraging them from using their superior financial position by delaying payment of legitimate contractual obligations to profit at the insured's expense." *Cook v. AAA Life Ins. Co.*, 2014 IL App (1st) 123700, ¶ 46 (quoting *Neiman v. Econ. Preferred Ins. Co.*, 357 Ill. App. 3d 786, 797 (2005)).

In deciding whether an insurer's conduct is vexatious and unreasonable, the totality of the circumstances, including the insurer's attitude, whether the insured was forced to sue to recover, and whether the insured was deprived of the use of his property should be considered. *Statewide Ins. Co. v. Houston Gen. Ins. Co.*, 397 Ill. App. 3d 410, 426 (2009). Other factors to consider

include "the extent of the insurance company's evaluation and investigation of the claim, and the adequacy of communications between the insurance company and the insured." *Cook*, 2014 IL App (1st) 123700, ¶ 48. Neither the length of time, the amount of money involved, nor any other single factor taken by itself is dispositive of whether the insurer's conduct was vexatious and unreasonable. *Rosalind Franklin Univ. of Med. & Sci. v. Lexington Ins. Co.*, 2014 IL App (1st) 113755, ¶ 110. Thus, courts must consider the totality of the circumstances "taken in broad focus." *Deverman v. Country Mut. Ins. Co.*, 56 Ill App. 3d 122, 124 (1977). However, if the evidence demonstrates that a *bona fide* dispute about coverage existed between the insurer and insured, a delay in settling a claim does not warrant section 155 damages. See *Golden Rule Ins. Co. v. Schwartz*, 203 Ill. 2d 456, 469 (2003). A *bona fide* dispute is one that is real, actual, genuine and not feigned. *Illinois Founders Ins. Co. v. Williams*, 2015 IL App (1st) 122481, ¶ 32. As made clear in *Neiman*, section 155 is only applicable in insurance cases where one of three issues remains undecided: "the liability of a company on an insurance policy or the amount of loss to be paid under a policy or an unreasonable delay in '*settling a claim.*'" *Neiman*, 357 Ill. App. 3d at 794 (emphasis in original) (quoting 215 ILCS 5/155).

1. Findings of Fact as to the Section 155 Bad Faith Determination

Here, Olsak appears to assert all three theories in the sprawling Counterclaim. Consequently, it is again necessary to review the history of this litigation. Although the majority of the following facts have been and are undisputed, if any of the following events which are outlined by the Court have been disputed, the Court has specifically rejected the contrary conclusion. So it is clear, the following are the Court's specific findings of fact, based upon all the evidence that has been submitted for the Court's consideration.

Olsak struck Pecoraro on October 21, 1998. On October 13, 2000, Pecoraro filed a complaint against Olsak. In the sole count of the complaint that was directed against Olsak, Pecoraro alleged that Olsak struck him and that Olsak committed intentional wanton and malicious conduct that was not undertaken in self-defense. Pecoraro further alleged that as a direct result of Olsak's conduct, Pecoraro was seriously injured. As a result of the October 21, 1998 incident, Olsak was criminally charged with and plead guilty to battery.

On or about November 8, 2000, Country Mutual informed Olsak via written correspondence that "unfortunately, there is no coverage under" either the home or umbrella policies that had been issued to Edward Pudlo. Defs.' Ex. 59. In his correspondence, Neil Napolitano, assistant general counsel for Country Mutual, specifically noted that Pecoraro's complaint was seeking damages for Olsak's conduct that Pecoraro characterized as assault and battery and alleging that Olsak had struck him "without legal justification and with malicious intent to seriously injure." Defs.' Ex. 59. Napolitano further noted that Olsak had pled guilty to the charge of battery. Defs.' Ex. 59. Napolitano made clear that the allegations "do not fall under the definition of occurrence" as defined in section 1 of Pudlo's homeowner's policy. Defs.' Ex. 59. Consequently, Napolitano informed Olsak that Country Mutual would not be providing Olsak with a defense and that it would not pay any settlement amount or judgment that was entered against Olsak as a result of the lawsuit that had been filed by Pecoraro. Defs.' Ex. 59. Following its denial of coverage to Olsak, Country Mutual neither defended Olsak under a reservation of rights, nor did it initially file a declaratory judgment action.

Subsequently, Edward Pudlo, Olsak's stepfather, was named as a respondent in discovery in Pecoraro's lawsuit. Pudlo and his wife timely provided notice of the complaint to Country

Mutual. Country Mutual then retained Chilton Yambert to represent the Pudlos. Pudlo, as a member of the hockey club's board, was being separately represented by the Cassiday Schade & Gloor law firm. Cassiday Schade & Gloor had been hired to represent Pudlo and the other board members by TIG, which was the hockey club's insurance carrier. Neither TIG nor the Cassiday Schade & Gloor law firm was associated with Country Mutual.

In December 2000, Chilton Yambert was separately retained by Pudlo and his wife to represent Olsak in the lawsuit. Defs.' Ex. 4, at 22; Defs.' Ex. 49. In a December 14, 2000 letter from Chilton Yambert, it identified potential conflicts of interest between Pudlo and Olsak that counsel believed might arise in the future. It was specifically stated that if at any point the law firm determined that the interests of Pudlo and Olsak diverged, the law firm would withdraw from its representation of Olsak. Defs.' Ex. 49. Country Mutual was copied on the Chilton Yambert December 14, 2000 letter. Defs.' Ex. 49. Country Mutual did not object to Pudlo's request to privately hire Chilton Yambert to represent Olsak. Defs.' Ex. 64, at 28-29.

On July 19, 2001, Pudlo was converted from a respondent in discovery to an individual defendant in the lawsuit, while Desiree Pudlo was not. On August 15, 2001, Pecoraro filed his second amended complaint against Olsak and again alleged that Olsak's conduct was intentional, wanton and malicious. Defs.' Ex. 19. In fact, at no time in this litigation has Pecoraro ever alleged that Olsak's conduct was anything other than an intentional assault and battery. In Count III of the second amended complaint, Pecoraro alleged that Pudlo was negligent and that his negligence was a proximate cause of Pecoraro's injuries. Defs.' Ex. 18. On March 13, 2002 and after a motion to dismiss had been filed on Pudlo's behalf by Chilton Yambert, count III of the second amended complaint was dismissed with prejudice. Consequently, Pudlo was dismissed as

a defendant as of that date. Defs.' Ex. 64, at 11. Following Pudlo's dismissal, Chilton Yambert no longer represented him and no longer made any reports to Country Mutual. Defs.' Ex. 64, at 14. Additionally, once Pudlo was dismissed, Country Mutual closed its file that pertained to Pudlo, his wife and Olsak.

Olsak's answer to Pecoraro's complaint was filed by Chilton Yambert on February 6, 2001. Defs.' Ex. 64, at 15. In his answer, Olsak asserted as an affirmative defense that Pecoraro instigated the altercation and provoked him. On April 8, 2003, the hockey club and the individual members of the board of governors filed a counterclaim against Olsak seeking contribution. At the time that the counterclaim was filed, Chilton Yambert did not represent Pudlo. Defs.' Ex. 64, at 82. On June 10, 2003, Chilton Yambert filed an additional affirmative defense of provocation on behalf of Olsak indicating that Olsak "felt threatened and perceived imminent harm." Pl.'s Ex. 52.

Country Mutual never received any reports regarding Chilton Yambert's defense of Olsak. Defs.' Ex. 64, at 23. Chilton Yambert never reported to Country Mutual regarding its defense of Olsak. Defs.' Ex. 64, at 23, 25, 45. Country Mutual never intentionally paid Chilton Yambert for any of its work on behalf of Olsak and only mistakenly paid the law firm for less than one hour of its work on behalf of Olsak due to a billing error by the law firm, which included two minor entries on an incorrect invoice. Defs.' Ex. 64, at 16. The Pudlos and Olsak were billed by the Chilton Yambert firm. However, neither the Pudlos nor Olsak ever paid any of the legal bills which had been generated. Defs.' Ex. 64, at 23.

On May 11, 2004, attorney Robert Shipley, of the Shipley Law Group, appeared in the lawsuit to represent Pudlo as an individual member of the hockey club's board. Defs.' Ex. 66, at

6. Shipley was hired by Country Mutual to monitor the lawsuit due to a potential for excess liability against Pudlo due to his capacity as a member of the board. Pudlo was already being defended by the hockey club's carrier, i.e., TIG. During his involvement, Shipley never spoke with Pudlo, Olsak or Jon Yambert, the attorney from Chilton Yambert representing Olsak. Defs.' Ex. 66, at 8.

On October 6, 2004, the trial court granted Chilton Yambert firm's motion to withdraw as Olsak's counsel. Defs.' Ex. 56. On February 9, 2005, Country Mutual filed a declaratory judgment complaint against Olsak, Pecoraro, the hockey club, and the members of the board. Defs.' Ex. 60. In October 2005, the trial court dismissed the individual board members, including Pudlo, from the lawsuit. Following his dismissal, Pudlo was never again a defendant.

On June 26, 2006, Olsak and Pecoraro reached an agreement entitled *Settlement Agreement, Assignment of Causes of Action, and Release Between Joseph Pecoraro and Thomas Olsak.* Defs.' Ex. 5. On August 1, 2007, the Honorable Judge Nancy Arnold granted Country Mutual's motion for summary judgment, finding that Country Mutual did not have a duty to defend Olsak. On May 13, 2009, the appellate court reversed and remanded Judge Arnold's order of August 1, 2007. See *Country Mut. Ins. Co. v. Olsak*, 391 Ill. App. 3d 295 (2009) (*Pecoraro II*).

2. Conclusions of Law as to the Section 155 Bad Faith Determination

The Court has carefully considered the testimony of both Country Mutual's expert witness, Fritz Huszagh, as well as Olsak's expert witness, William Cormack. Huszagh essentially testified that all of Country Mutual's decisions were timely, reasonable and in compliance with the insurance industry standards. The essence of Cormack's testimony was that Country

Mutual's conduct fell far below industry standards in the manner that it handled the underlying claim, as it both failed to properly investigate the claim and also that it made misrepresentations as to the basis for its denial of the claim. See Defs.' Ex. 46. The testimony of both of these witnesses was very helpful to the Court in evaluating the parties' positions, as well as in the deciphering of the voluminous exhibits.

It is well settled that in order to determine whether an insurer has a duty to defend an action against the insured, one must compare the allegations of the complaint to the relevant portions of the insurance policy. *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 154 Ill. 2d 90, 108 (1992); *Dixon Distrib. Co. v. Hanover Ins. Co.*, 161 Ill. 2d 433, 438 (1994); *Am. Zurich Ins. Co. v. Wilcox & Christopoulos, L.L.C.*, 2013 IL App (1st) 120402, ¶ 28; *Viking Const. Mgmt. v. Liberty Mut. Ins. Co.*, 358 Ill. App. 3d 34, 41 (2005) ("The duty of an insurer to defend an insured is determined by the allegations of the underlying complaint.") (quoting *Lyons v. State Farm Fire & Cas. Co.*, 349 Ill. App. 3d 404, 406 (2004)). If the underlying complaint alleges facts that fall "within or *potentially* within" the coverage of the policy, the insurer is obligated to defend its insured even if the allegations are "groundless, false, or fraudulent." *United States Fid. & Guar. Co. v. Wilkin Insulation Co.*, 144 Ill. 2d 64, 73 (1991) (emphasis in original); *State Farm Fire & Cas. Co.*, 349 Ill. App. 3d at 406 ("A duty to defend arises if the complaint's allegations fall within or potentially within the coverage provisions of the policy."). In other words, an insurer may not justifiably refuse to defend an action against the insured "unless it is *clear* from the face of the underlying complaint[] that the allegations fail to state facts which bring the case within, or potentially within, the policy's coverage." *Wilkin Insulation Co.*, 144 Ill. 2d at 73 (emphasis in original); *Aetna Cas. & Sur. Co. v. Prestige Cas. Co.*, 195 Ill. App. 3d 660,

664 (1990) ("Unless the complaint, on its face, clearly alleges facts which, if true, would exclude coverage, the potentiality of coverage is present and the insurer has a duty to defend.").

Moreover, if the underlying complaint alleges several theories of recovery against the insured, the duty to defend arises even if only one such theory is within the potential coverage of the policy. *Wilkin Insulation Co.*, 144 Ill. 2d at 73; *Ill. Emasco Ins. Co. v. Nw. Nat'l Cas. Co.*, 337 Ill. App. 3d 356, 361 (2003) ("...the insurer has the duty to defend unless the allegations of the underlying complaint demonstrate that the plaintiff in the underlying suit will not be able to prove the insured liable, under any theory supported by the complaint, without also proving facts that show the loss falls outside the coverage of the insurance policy. The insurer may simply refuse to defend only if the allegations of the underlying complaint preclude any possibility of coverage."). Accordingly, the threshold that an underlying complaint must satisfy to present a claim of potential coverage is low, and for coverage to exist, the complaint need only present a possibility of recovery, not a probability of one. See *Bituminous Cas. Corp. v. Gust K. Newberg Constr. Co.*, 218 Ill. App. 3d 956, 960 (1991).

In determining whether the allegations in the underlying complaint meet that threshold requirement, both the underlying complaint and the insurance policy must be liberally construed in favor of the insured. *Wilkin Insulation Co.*, 144 Ill. 2d at 73; *Lyons*, 349 Ill. App. 3d at 407. Where the words in the policy are clear and unambiguous, "a court must afford them their *plain, ordinary, and popular meaning.*" *Outboard Marine Corp.*, 154 Ill. 2d at 108 (emphasis in original); *Travelers Ins. Co. v. Eljer Mfg.*, 197 Ill. 2d 278, 292-93 (2001). However, if the words in the policy are susceptible to more than one reasonable interpretation, they will be considered ambiguous and will be strictly construed in favor of the insured and against the insurer who drafted the policy. *Outboard Marine Corp.*, 154 Ill. 2d at 108; *Travelers Ins. Co.*,

197 Ill. 2d at 293; *Wilkin Insulation Co.*, 144 Ill. 2d at 74 ("All doubts and ambiguities must be resolved in favor of the insured.").

Here, in comparing the complaint to the policy, Country Mutual was presented with only a single count that was directed at Olsak and alleged that Olsak had committed an intentional act. This specified assault was also alleged to have been committed willfully, maliciously and not in self-defense. Neither the home or umbrella policies covered damages caused by an insured's intentional acts. Additionally, at the time of the initial coverage analysis, there was nothing presented to Country Mutual to suggest a potential conflict of interest due to Country Mutual's separate and distinct responsibilities relative to Pudlo.

Thus, the Court finds that Country Mutual's decision that it did not have any duty to defend Olsak at that time was reasonable due to the allegations contained within Pecoraro's complaint and the terms of the home and umbrella policies, as well as the absence of any information presented to Country Mutual suggesting a potential conflict.

The Court's section 155 analysis, however, does not end there. The Court must also determine whether Country Mutual's conduct subsequent to its initial coverage decision to deny coverage was vexatious and unreasonable. In this determination, the Court must examine the relationship between Country Mutual, Chilton Yambert, the Pudlos and Olsak, as well as Country Mutual's filing of its declaratory judgment complaint.

In the underlying tort litigation, Country Mutual hired Chilton Yambert to defend Olsak's mother and stepfather, Desiree and Edward Pudlo. Olsak and the Pudlos took it upon themselves to separately engage and privately pay Chilton Yambert to represent Olsak. Although Country Mutual eventually became aware of the arrangement between Chilton Yambert, Olsak and the Pudlos, Country Mutual neither consented nor objected to the arrangement.

While this dual representation was occurring, Country Mutual was receiving reports on the Pudlo's defense in the underlying tort litigation. Country Mutual never, at any time, controlled the defense of Olsak. Country Mutual never, at any time, received reports on Olsak's defense. When Pudlo was dismissed on March 13, 2002, Chilton Yambert's involvement in the case relative to Pudlo, along with any reporting requirements of the case to Country Mutual, ended. Country Mutual did not again have any knowledge of the case until May 11, 2004, when it retained Robert Shipley, on behalf of Pudlo, to monitor the case. Consequently, Country Mutual was not immediately aware of the affirmative defense of provocation filed on behalf of Olsak on June 10, 2003 by Chilton Yambert in response to the hockey club's counterclaim for contribution. Country Mutual did not become aware of the affirmative defenses that had been previously filed on Olsak's behalf until after May 2004 when Shipley appeared.

While it is true that Chilton Yambert was representing Olsak at the time and could have forwarded the specifics of the affirmative defense to Country Mutual, it did not. Chilton Yambert's knowledge of the affirmative defense is not properly imputed to Country Mutual as Chilton Yambert was not being paid by Country Mutual to represent Olsak. Further, Country Mutual's file had been previously closed. Insufficient evidence relative to imputation was provided to the Court to find otherwise.

After Olsak's claim was denied and well into the seemingly never-ending lawsuit, a counterclaim for contribution was filed against Olsak by the hockey club on April 8, 2003. After this counterclaim was filed, Country Mutual analyzed the new pleading, sought a coverage opinion and filed its declaratory judgment complaint based on the filing of the counterclaim. Country Mutual retained separate coverage counsel to address the legal issues raised by the new pleading and due to the multi-party representation by Chilton Yambert. In February 2005,

Country Mutual filed its declaratory judgment complaint through separate coverage counsel. Although Country Mutual's declaratory judgment complaint was filed more than four years after the initial filing of Pecoraro's complaint, its conduct was not vexatious or unreasonable. Country Mutual filed the declaratory judgment complaint due to a new development, the filing of hockey club's contribution counterclaim, and what was clearly a true and genuine *bona fide* dispute relative to whether Country Mutual had a duty to defend Olsak. Country Mutual reviewed the new facts and pleadings, analyzed the matter and filed a complaint for declaratory judgment. This conduct was reasonable. Thus, the Court finds that Country Mutual did not act in bad faith relative to the filing of its declaratory judgment complaint and its conduct was not vexatious or unreasonable.

For the sake of clarity, it is incumbent on this Court to address certain arguments that Olsak has made. Olsak has argued that as the appellate court decisions in this case are binding on this Court, the Court should, based on these decisions alone, award Olsak attorneys' fees, expenses and damages. In 2009, the appellate court found that Country Mutual had a duty to defend Olsak due to a potential conflict of interest between Olsak and Pudlo, who was a defendant. Although Country Mutual's coverage position was subsequently rejected by the appellate court, it does not necessarily follow that Country Mutual's position was either vexatious or unreasonable and in violation of section 155 of the insurance code. The appellate court anticipated that this Court would make such a determination only after having conducted a trial and a thorough analysis of all appropriate evidence.

Olsak additionally argued that Country Mutual's refusal decision to settle this case for the identified $3,000,000 policy limits in 2009 was vexatious and unreasonable. This Court disagrees. The nature and extent of Pecoraro's injuries were understandably at issue. In fact, all

the way through trial, the nature and extent of Pecoraro's injuries were understandably disputed and properly contested. Due to the significant and valid questions relative to the nature and extent of Pecoraro's injuries, Country Mutual's decision not to settle for the identified $3,000,000 policy limits in 2009 was neither vexatious nor unreasonable. Further, this Court finds that Country Mutual did not act either vexatiously or unreasonably at any time after the appellate court decisions in *Pecoraro I*, *Pecoraro II*, or *Pecoraro III*, despite Country Mutual's clear disagreement with those decisions. The Court arrived at this conclusion as there was no credible evidence presented that Country Mutual ever ignored any clear mandate from the appellate court at any time.

The Court understands and acknowledges all of the arguments made by Olsak relative to Country Mutual's perceived deficiencies. The Court has carefully considered the totality of the circumstances. The totality of the circumstances includes, but has not been limited to, a consideration of Country Mutual's attitude, its overall conduct, its evaluation and investigation of the underlying claim, its communication with Olsak and the Pudlos, as well as all of the litigation that has occurred over the last twenty years. This Court has carefully considered all of the testimony and evidence that has been introduced and concludes that there was a *bona fide* dispute relative to Olsak's claim.

Based on a careful consideration of the evidence, the Court finds that Country Mutual's conduct throughout the course of this case was not vexatious or unreasonable. Rather, Country Mutual acted reasonably at each stage of this case. First, Country Mutual's decision not to defend Olsak was reasonable. Second, Country Mutual acted in good faith relative to the filing of its declaratory judgment complaint. Third, the totality of the circumstances does not support the

arguments made by Olsak relative to Country Mutual's conduct as Olsak failed to establish that Country Mutual acted in bad faith or was vexatious or unreasonable.

Accordingly, the Court concludes that Country Mutual's conduct was neither vexatious nor unreasonable. Put another way, the Court concludes that Country Mutual exercised ordinary care and good faith at all times towards Olsak. Thus, Country Mutual did not violate section 155 of the Illinois Insurance Code. Judgment is entered in favor of Country Mutual and against Olsak and Pecoraro on Count III of the Counterclaim. Pecoraro and Olsak's request for attorneys' fees and expenses is denied.

V. CONCLUSION

For the foregoing reasons,

IT IS HEREBY ORDERED:

1. Country Mutual is ordered to pay $3,000,000 to Joseph Pecoraro;
2. Judgment is entered in favor of Country Mutual and against Joseph Pecoraro and Thomas Olsak on Count III of the Counterclaim; and
3. Any previously set dates are hereby stricken.

IT IS SO ORDERED.

THIS IS A FINAL AND APPEALABLE ORDER

ENTERED:

ENTERED
Judge Michael Mullen
APR 29 2020
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

Judge Michael T. Mullen, No. 2084