issued pursuant to environmental statutes. Second, interpreting this policy language in context, as we must (*Palmer v. Truck Ins. Exchange, supra*, 21 Cal.4th at p. 1115.), the sentence in the Truckers Policy insuring agreement immediately following the language relied upon by U.S. Fire provides, "Our *duty to defend or settle* ends when the Liability Coverage Limit of Insurance has been exhausted by payment of judgments or settlements." (Emphasis added.) Read together, these sentences provide a "duty to settle" [9] under appropriate circumstances. Moreover, this "duty to settle" is expressly recognized in U.S. Fire's claims manual, which states: "With the payment of premium, the insured purchases a promise from us in which we agree to investigate, defend and settle covered claims in their best interests." Indeed, were we to accept U.S. Fire's argument that it has a right, but not a duty, to settle a *claim* based on the language that U.S. Fire "may investigate and settle any claim or 'suit' as [it deems] appropriate," then it would follow that U.S. Fire also has no duty to settle a *suit*, and settlement under any circumstances would be in the sole discretion of the insurance company, regardless of the best interests of the insured.

Accordingly, we reject U.S. Fire's argument that it was entitled to judgment as a matter of law on Button's cause of action for declaratory relief, in which it sought a judicial determination of the parties' rights with respect to the duty to defend, indemnify, and settle the Claim.

C. *Jury Verdict on the Bad Faith Claim*

At trial, Button claimed U.S. Fire unreasonably delayed settling the Claim, and that the delay injured Button. The jury returned a verdict in favor of Button. U.S. Fire contends the jury verdict on the bad faith claim must be reversed for a number of reasons.

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9 This "duty to settle" may perhaps more accurately be described as an obligation on the part of the insurer to protect the best interests of the insured pursuant to the covenant of good faith and fair dealing, with consequences for the failure to settle or attempt in good faith to settle under appropriate circumstances. For the sake of brevity, we refer to this obligation as the "duty to settle."

1. *Whether the Evidence Supported the Judgment*

U.S. Fire first argues that there was no admissible evidence that U.S. Fire's failure to settle the Claim earlier was unreasonable. U.S. Fire contends the only evidence pertaining to the timeliness of the settlement was a recital in the settlement agreement itself stating that the settlement was timely.

This assertion is simply incorrect. Our review of the record reveals evidence that Button provided information on the Claim to U.S. Fire promptly, made clear to U.S. Fire the importance of prompt resolution of the Claim, and suffered injury as a result of the delay. Button provided U.S. Fire with notification of the loss in December 2001. Button's expert, Guy Kornblum, testified that U.S. Fire's handling of the Claim did not comport with good faith claims handling practices, including taking "an adversarial posture from the beginning, as opposed to an objective evaluation process," initially relying on exclusions that did not apply to deny coverage, subsequently asserting different exclusions that also did not apply, and unreasonably delaying the negotiating process which should have begun in early 2002.

Upon being advised that U.S. Fire was denying the Claim, the broker urged U.S. Fire to reconsider based on his opinion that the Truckers Policy provided coverage and in light of the potential damage to Button from a delay in compensating Blue Diamond for its losses. David Baker, Blue Diamond's director of member relations, testified that the incident and the delay in receiving payment for the Claim impacted contract negotiations with Button with the result that Blue Diamond reduced the term of Button's contract from two years to one year and reduced its hauling rates by approximately 7%. Richard Nitzkowski, Button's vice president, testified regarding the importance of the Blue Diamond contract to Button from an operational as well as a financial standpoint, and quantified the loss of revenue to Button as a result of the rate reduction Blue Diamond imposed in early 2002. There was ample evidence before the jury that settlement negotiations should have begun sooner and that U.S. Fire's conduct in failing to do so was unreasonable.

As another reason the bad faith judgment should be reversed, U.S. Fire contends that, since it never had an obligation to pay for the Trailer Almonds, its failure to respond to Button's demand that it pay for all damages could not be considered unreasonable as a matter of law. Button counters that there was no evidence that Button demanded coverage from U.S. Fire for the Trailer Almonds and asserts that the evidence was in fact to the contrary. Button's counsel testified that Button never sought coverage from U.S. Fire for the Trailer Almonds because they were damaged prior to the inception of U.S. Fire's policy. Button's expert, Guy Kornblum, testified that whether Button sought coverage for the Trailer Almonds was unclear, but that Button submitted information about the Claim to U.S. Fire and asked "the insurance company to process the claim in accordance with whatever coverage is available," which is "what normally takes place." There is no evidence that U.S. Fire drew any distinction between the Trailer Almonds and the Plant Almonds in denying the Claim, and cannot now do so to shield itself from bad faith exposure.

Next, U.S. Fire takes issue with the testimony of Button's expert, Guy Kornblum, who testified that settlement negotiations should have begun earlier and should have commenced upon U.S. Fire's receipt of a March 11, 2002, letter from Button's counsel to Joanne Chase at U.S. Fire. U.S. Fire contends Kornblum admitted there was no evidence in support of his conclusion that the Claim could have settled sooner, and thus his testimony was speculative. (See, e.g., *Hyatt v. Sierra Boat Co.* (1978) 79 Cal.App.3d 325, 338 ["'[E]ven an expert witness cannot be permitted just to testify in a vacuum by [*sic*] things that he might think could have happened.'"]; *Lockheed Litigation Cases* (2004) 115 Cal.App.4th 558, 564 ["[A]n expert opinion based on speculation or conjecture is inadmissible."].)

Our reading of Kornblum's trial testimony is to the contrary. He testified that Button's letters of December 6 and 7, 2001, were sufficient to commence the claims handling process on the part of U.S. Fire. He testified that upon receiving the March 11, 2002, letter, which included a statement from Blue Diamond of the damages it had incurred, U.S. Fire should have begun settlement negotiations. Kornblum stated that the

Claim should have been settled in the time frame of April, May, or June 2002, and that delaying settlement until the insured has to hire a lawyer to obtain benefits due under the policy violates good faith claims handling practices. Kornblum felt there was no basis for asserting the care, custody, or control exclusion and the pollution exclusion in early 2002 as bases for denying the Claim, and similarly that there was no basis for asserting the handling exclusion and the completed operations exclusions in April 2003 as new bases for denying the Claim.

On cross-examination, Kornblum responded that he did not know how much Blue Diamond would have settled for in early 2002 and that there were no settlement negotiations during that time frame. These statements do not constitute admissions that there is no evidence the Claim could have settled sooner, and they do not render speculative Kornblum's testimony. They are merely statements of the obvious: that no one can know what the Claim might have settled for a year earlier, and that there were no settlement discussions in the spring of 2002.

In addition, U.S. Fire argues that Kornblum's testimony on the issue of the timing of the settlement should not have been considered because, despite being asked at deposition whether he had any opinion on this issue, Kornblum expressed no such opinion until trial. An expert may not offer opinion testimony at the time of trial that he did not offer at the time of his deposition. (See Evid. Code, §§ 801, subd. (b), 803; Code Civ. Proc., § 2034, subd. (f)(2)(D).) Without this protection, a party could conceal its expert's opinions, thereby impeding proper trial preparation and precluding effective cross-examination. (*Kennemur v. State of California* (1982) 133 Cal.App.3d 907, 919.)

Once again, we disagree with U.S. Fire's characterization of the record. At Kornblum's deposition, the following colloquy ensued:

"Q. Have you been asked to render any opinion about the timeliness of that settlement?

"A. I don't think I've been asked to, but it is part of my claims file analysis.

"Q. When we went through that whole list of opinions on -- your opinions of the claims handling, I must have missed it.

"A. Well, you did, because I said --remember there were things that went on in the lawsuit that impacted my judgment about how the claim was handled.

"Q. I'm sorry. I thought I asked you that tie-it-up question, and I must have not done it. I'm sorry.

"A. No. I assumed that it is part of the litigation mechanism that eventually led to that settlement. And so that settlement took place at a certain point in time, which is on my chronology. And I looked at that as part of my evaluation of how the claim was handled initially.

"Q. Well, it was a good idea for U.S. Fire to settle the claim, wasn't it?

"A. Absolutely.

"Q. That was a good thing:

"A. That was a good thing.

"Q. Okay. Very good thing?

"A. Well, I don't know if it was a good thing for them. It was a good thing for the insured.

"Q. That's what we're talking about. [¶] And do you intend to render any opinion as to the timeliness of that settlement?

"A. It is part of my evaluation of whether the good faith claims principles were complied with here. So to the extent that -- it's how it came about that represents a breach of the good faith claims principles, and what had to occur before that settlement took place that is not consistent with good faith principles.

"Q. When it happened you don't have a concern with?

"A. The fact it happened, I certainly don't have a concern with.

"Q. In fact, we've already established, that was a good thing that U.S. Fire did?

"A. Absolutely. How it was brought about is a different issue.

"Q. When you say 'how it was brought about,' what do you mean?

"A. In order to get U.S. Fire to the negotiating table to recognize that it should resolve this claim, and it took [Button's counsel's] letters, [Button's counsel's] pressure, to get Blue Diamond to recognize -- I'm sorry, to get U.S. Fire to recognize that it should

step in and resolve the Blue Diamond claim to avoid any serious financial consequences to Mr. Button and his company. [¶] I think it should have been apparent from the outset that that was the appropriate way to proceed in handling the claim, and to require Mr. Button to expend the money for a lawyer to put the pressure on the insurance company to do what I believe it was already obliged to do was not consistent with good faith claims practices."

It is apparent from this exchange that Kornblum took issue with how the Claim was handled and the fact that Button had to hire an attorney to pursue litigation before U.S. Fire would discuss settlement. The inference that the Claim should have settled sooner and that U.S. Fire should have begun settlement negotiations earlier is clear. Later in the deposition, U.S. Fire's counsel asked whether the settlement agreement was provided to Kornblum and whether it was "at all relevant to the opinions that you expressed today and intend to express at trial?" Kornblum responded, "It's relevant because it shows that eventually the -- U.S. Fire did what I thought it should have done much earlier, and that is, resolve the claim with Blue Diamond, and then work out its difference with its insured."

U.S. Fire's counsel also asked Kornblum about the recital in the settlement agreement concerning the timing of the settlement:

"Q. The settlement agreement includes a representation and warranty by Blue Diamond, that any issues or potential issues relating to the timing or amount of settlement will have no impact on the course of dealings between Blue Diamond and Button, and it goes on.

"A. Yeah, I remember seeing that.

"Q. And that was a good thing for U.S. Fire to negotiate, was it not?

"A. I don't know who negotiated it. I think -- what I understood was that there was a concern about the continuing relationship between Button and Blue Diamond, and Mr. Button wanted to preserve that relationship. And he was significantly financially impacted if that relationship did not continue, and that Button Transportation was concerned with getting the claim resolved so it wouldn't have an impact. So I don't

know who negotiated that in or thought that was what should be done, but I guess that's what that addressed."

It is abundantly clear from the foregoing that the timing of the settlement was at issue at the deposition and that Kornblum was of the opinion that the Claim should have settled sooner. If U.S. Fire had wanted to explore the specifics of Kornblum's opinion in that regard, it could have but didn't.

2. *Whether There Were Genuine Issues Regarding Coverage*

U.S. Fire next maintains that it cannot be found to have acted in bad faith because there was a genuine issue as to whether the Claim was covered. "'The mistaken [or erroneous] withholding of policy benefits, if reasonable or if based on a legitimate dispute as to the insurer's liability under California law, does not expose the insurer to bad faith liability.' (*Tomaselli v. Transamerica Ins. Co*. (1994) 25 Cal.App.4th 1269, 1280-1281; *Nager v. Allstate Ins. Co*. (2000) 83 Cal.App.4th 284, 288; *Opsal v. United Services Auto. Assn*. [1991] 2 Cal.App.4th [1197,] 1205.) Without more, such a denial of benefits is merely a breach of contract. Moreover, the reasonableness of the insurer's decisions and actions must be evaluated as of the time that they were made; the evaluation cannot fairly be made in the light of subsequent events that may provide evidence of the insurer's errors. (Cf. *Filippo Industries, Inc. v. Sun Ins. Co*. (1999) 74 Cal.App.4th 1429, 144.) [¶] Thus, before an insurer can be found to have acted tortiously (i.e., in bad faith), for its delay or denial in the payment of policy benefits, it must be shown that the insurer acted unreasonably or without proper cause. (*Dalrymple v. United Services Auto. Assn*. (1995) 40 Cal.App.4th 497, 520; *Opsal v. United Services Auto. Assn*., *supra*, 2 Cal.App.4th at p. 1205.) However, where there is a genuine issue as to the insurer's liability under the policy for the claim asserted by the insured, there can be no bad faith liability imposed on the insurer for advancing its side of that dispute. (*Dalrymple*, *supra*, at p. 520; *Opsal*, *supra*, at pp. 1205-1206.)'" (*Chateau Chamberay Homeowners Assn. v. Associated Internat. Ins. Co*. (2001) 90 Cal.App.4th 335, 347 (*Chateau Chamberay*).)