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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

MERCURY INSURANCE COMPANY, Plaintiff and Respondent, v. ALLSTATE INSURANCE COMPANY, Defendant and Appellant.	B167291 (Los Angeles County Super. Ct. No. BC 278664)

APPEAL from a judgment of the Superior Court of Los Angeles County. Ralph W. Dau, Judge. Affirmed.

Sonnenschein Nath & Rosenthal, Ronald D. Kent, and Thomas E. Greiff for Defendant and Appellant.

Robie & Matthai, James R. Robie, Edith Matthai, Natalie Kouyoumdjian, Rebecca D. Lizarraga; Silva, Clasen & Raffalow, and Robert L. Clasen for Plaintiff and Respondent.

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Allstate Insurance Company appeals from a judgment requiring it to contribute to the costs of defense incurred by Mercury Insurance Company on behalf of an insured covered by Allstate and Mercury policies. We affirm.

FACTS

Mercury Insurance Company issued a policy of automobile liability insurance to Alex Tsiboukas for four vehicles with limits of $100,000 per person and $300,000 per accident. Allstate Insurance Company issued a personal umbrella policy to Alex Tsiboukas with a limit of $1 million per occurrence. Tsiboukas's daughter was involved in an accident during the coverage period of both policies wherein four people were seriously injured. Litigation ensued and the matter was eventually settled by both carriers paying policy limits for a total settlement of $1.3 million.

The policy provided by Mercury required Mercury to defend the action ". . . until the company has paid the applicable limit of liability for the accident which is the basis of a lawsuit, but not beyond that time." (Boldface omitted.) Allstate's policy provides that Allstate ". . . may assume control of the settlement and we may assume the defense of any claim or suit against an insured person if: [¶] 1. The limits of any Required Underlying Insurance or any other insurance have been exhausted by payment" (boldface omitted), or the issuer of the underlying insurance becomes bankrupt or insolvent. The Allstate policy requires the insured to maintain "underlying insurance."

Mercury incurred $23,656.59 in defense costs. Mercury brought the instant action against Allstate for contribution for part of the costs of defense. Mercury relied on Insurance Code section 11580.9, subdivision (g),[1] which provides in relevant part:

> "(g) Where two or more personal policies affording valid and collectible liability insurance apply to the same motor vehicle in an occurrence out of which a loss shall arise, and one policy, as defined in subdivision (a) of Section 660,[2] is primary, either by its terms or by operation of law, and one or more of the personal policies providing liability insurance, as

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1 All further statutory references are to the Insurance Code.

2 Section 660 is set forth and discussed in the main text, *post*.

defined in Section 108,[3] are excess, either by their terms or by operation of law, then the following shall apply:

"(1) Each insurer shall pay its share of the defense costs. Each insurer's share of the defense costs shall be the percentage of the total defense costs equal to the amount of damage paid by that insurer as a percentage of total damages paid by all insurers whose policies apply to that motor vehicle."

The trial court agreed with Mercury and awarded Mercury $18,197.38, which is Allstate's share of the defense costs, if the formula set forth in section 11580.9, subdivision (g)(1) is applied.

Allstate appeals, contending that Insurance Code section 11580.9 applies only to automobile liability policies, that the policy issued by Allstate is not an automobile liability policy, and that it was therefore error to require Allstate to contribute to the costs of defending the claim against the insured Tsiboukas.

Subdivision (g) of section 11580.9 has not as yet been the subject of a reported appellate court opinion.

DISCUSSION

1. The Statute Defines the Primary Policy as an Automobile Liability Policy and the Excess Policy As a General Liability Policy

The Legislature has made clear that section 11850.9 is intended to resolve the order in which two or more liability insurance policies are to apply to losses caused by the operation or use of motor vehicles.[4] Sections 11580.8 and 11580.9 were enacted in

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[3] Section 108 is set forth and discussed in the main text, *post*.

[4] Section 11580.8 states: "The Legislature declares it to be the public policy of this state to avoid so far as possible conflicts and litigation, with resulting court congestion, between and among injured parties, insureds, and insurers concerning which, among various policies of liability insurance and the various coverages therein, are responsible as primary, excess, or sole coverage, and to what extent, under the circumstances of any given event involving death or injury to persons or property caused by the operation or use of a motor vehicle. [¶] The Legislature further declares it to be the public policy of this state that Section 11580.9 of the Insurance Code expresses the total public policy of this state respecting the order in which two or more of such liability insurance policies

1970 for the purpose of resolving, so far as possible, conflicts and litigation over which, of two or more applicable policies, were to be deemed primary or excess. (*Hartford Accident & Indemnity Co. v. Sequoia Ins. Co.* (1989) 211 Cal.App.3d 1285, 1296.) "Section 11580.9, subdivisions (a), (b), (c) and (d), set forth the four basic rules for determining the order of priority of several automobile liability insurance policies which are applicable to a given loss. The statute, where applicable, makes a definitive imposition of primary and/or excess liability on insurers in given situations." (*Id.* at pp. 1296-1297.)

In referring to insurance policies, subdivisions (a) through (d) of section 11580.9 refer either to "two or more policies affording . . . automobile liability insurance" (subd. (a)), or to "two or more policies [applicable] to the same loss" (subds. (b) & (c)), or to "two or more policies affording valid and collectible liability insurance" (subd. (d)).

Subdivision (g) of section 11580.9 is more precise than subdivisions (a) though (d) in identifying the types of policies to which it refers. Subdivision (g) provides that one policy, stated to be the primary policy, is "as defined in subdivision (a) of Section 660." The other, or excess policy, is "as defined in Section 108."

Subdivision (a) of section 660 states:

> "'Policy' means an automobile liability, automobile physical damage, or automobile collision policy, or any combination thereof, delivered or issued for delivery in this state, insuring a single individual or individuals residing in the same household, as named insured, and under which the insured vehicles therein designated are of the following types only: [¶] (1) A motor vehicle of the private passenger or station wagon type that is not used as a public or livery conveyance for passengers, nor rented to others; or [¶] (2) Any other four-wheel motor vehicle with a load capacity of 1,500 pounds or less; provided, however, that this chapter shall not apply (i) to any policy issued under an automobile assigned risk plan, or (ii) to any policy insuring more than four automobiles, or (iii) to any policy covering garage, automobile sales agency, repair shop, service station, or public parking place operation hazards; or [¶] (3) A motorcycle."

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covering the same loss shall apply, and such public policy is not to be changed or modified by any provision of the Vehicle Code [providing for certain exceptions]."

Subdivision (a) of section 108 states:

> "Liability insurance includes: [¶] (a) Insurance against loss resulting from liability for injury, fatal or nonfatal, suffered by any natural person, or resulting from liability for damage to property, or property interests of others but does not include worker's compensation, common carrier liability, boiler and machinery, or team[5] and vehicle insurance."

Thus, section 11580.9, subdivision (g) provides that the primary policy referred to in subdivision (g) of section 11580.9 is an automobile liability policy, and further provides that the excess policy is a policy of general liability insurance, as such insurance is defined in section 108. Section 108, subdivision (a) excludes "vehicle insurance" from its definition of liability insurance. It appears to be clear therefore that the excess insurance referred to in section 11580.9, subdivision (g) is not an automobile liability policy, but is rather a general liability insurance policy.

2. The Reference to Section 108 in Subdivision (g) of Section 11580.9 Makes It Clear That an Excess Policy Is a General Liability Policy

Allstate attempts to lend the reference to section 108 in subdivision (g) of section 11580.9 an interpretation that is at variance with the plain text of the statute.

First, Allstate attempts to explain the presence, and meaning, of section 108 in subdivision (g) of section 11580.9 by speculating that the Legislature did not want to preclude primary automobile carriers from a "broader universe of personal primary automobile insurers than section 660's narrow range of policies." According to Allstate, this explains why section 11580.9, subdivision (g) "cross-references the broader definition of 'liability insurance' in section 108." Allstate goes on to contend: "In adopting that reference, the Legislature broadened the range of primary automobile policies obligated to contribute to defense expenses even when they are in an excess

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5 "Team" refers to two or more horses or other beasts harnessed together, and the vehicle that they customarily draw. (Black's Law Dict. (4th Ed. 1968) p. 1632, col. 1.) Automobiles may be included in the meaning of "team." (*Bragdon v. Kellogg* (Me. 1919) 105 A. 433, 434.)

position." Allstate concludes that this does not justify the application of subdivision (g) "to any and all liability policies."

The flaw in Allstate's suggestion is that if the Legislature intended to limit excess policies to automobile liability insurance policies, the Legislature could have done so by referring, not to section 108, but, to section 660 or, as an example, to section 11580.1, which defines automobile liability policies and sets forth their required contents. As it is, we cannot ignore the deliberate choice of section 108 to define excess policies, nor can we ignore that the Legislature defined a primary policy in terms of section 660. If the Legislature had intended an excess policy to be an automobile liability policy, it could have easily done so by defining both the primary and the excess policy in terms of section 660.

Next, Allstate claims that under the principle of *ejusdem generis*,[6] section 108 is limited by the phrase that precedes it. That phrase, according to Allstate, is "two or more personal policies affording viable and collectible liability insurance [that] apply to the same motor vehicle." The point of this argument is that the reference to section 108 in subdivision (g) of section 11580.9 is not really a reference to section 108 as it appears in the Insurance Code, but that it is a reference to some lesser version of section 108 that includes automobile liability insurance and excludes general liability insurance.

Nothing in this rule of construction requires us to stand the reference to section 108 in section 11580.9, subdivision (g) on its head. Subdivision (g) unmistakably refers to a situation where, as here, the primary policy is an automobile liability insurance policy and the excess policy is one of general liability insurance. The Legislature intended to address situations where the excess policy is a general liability policy, and did so by referring to section 108. No rule of construction can undo what the Legislature clearly intended to, and did, accomplish.

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[6] Under the principle of *ejusdem generis*, when general words follow words of specific meaning, the general words are to be limited to the specific meanings that are enumerated.

We note that, prior to section 11580.9, subdivision (g), the general rule was that an excess carrier was not required to "drop down" and pay defense costs, unless the primary policy was exhausted. (*Community Redevelopment Agency v. Aetna Casualty & Surety Co.* (1996) 50 Cal.App.4th 329, 341-342.) It appears that the intent of the Legislature was to change the general rule when there is a primary and excess policy that apply "to the same motor vehicle in an occurrence out of which a loss shall arise." (§ 11580.9, subd. (g).)

Allstate points out that the cost of umbrella policies of the type at issue is influenced by the fact that such policies usually do not bear the costs of defense. It also appears that there is a potential that, under the formula set forth in subdivision (g)(1) of section 11580.9, the higher the settlement or award is, the greater is the excess carrier's share of the defense costs. The instant case illustrates this point, where the excess carrier paid policy limits, and where the excess policy was over three times the underlying primary policy.[7] On the other hand, where liability is clear and the damages can be expected to involve the excess carrier, this provision encourages the excess carrier to participate early in settling the case, in order to minimize the costs of defense. Be that as it may, it is clear that the Legislature intended the share of defense costs to be determined by the proportion that the sums paid under the policies bear to the total damages paid. (§ 11580.9, subd. (g)(1).)

In any event, the wisdom of this legislative choice is not for us to pass upon. Our responsibility is to apply the statute in accordance with its unambiguous provisions. We find that it is clear that subdivision (g) of section 11580.9 provides that an excess policy is a general liability policy, as such a policy is defined in section 108.

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[7] Assuming the costs of defense of this case of $23,656, if the total settlement had been $500,000, and Allstate would have contributed $200,000 under the excess policy, Allstate's share of the defense costs would have been $9,462, or 40 percent of the total defense costs. As it is, Allstate's share is $18,197 or approximately 77 percent of the total defense costs.

3. Allstate's Contention That Subdivision (g) of Section 11580.9 Refers Only to Automobile Liability Policies Is Without Merit

Allstate advances several arguments in support of its theory that section 11580.9 refers only to automobile liability insurance policies. None of these arguments has any merit.

First, Allstate contends that is does not make sense to apply section 11580.9, subdivision (g) to "any and all liability insurance," but only to insurance that satisfies "all of the listed criteria" (italics omitted) of subdivision (g), i.e., policies that apply to the same motor vehicle as the primary policy, which afford valid and collectible liability insurance. The point of this argument is that excess policy must be an automobile liability policy, since subdivision (g) lists the "criteria" of an automobile liability policy.

Section 11580.9, subdivision (g) does not list the criteria of an automobile liability policy. Those are found in section 11580.1, subdivision (b). Subdivision (g) of section 11580.9 refers to "to two or more personal policies affording valid and collectible liability insurance apply to the same motor vehicle in an occurrence out of which a loss shall arise . . . ." Allstate's umbrella policy in this case satisfies these criteria of subdivision (g). Allstate's umbrella policy applies to the same motor vehicle as Mercury's policy and it afforded valid and collectible liability insurance, as the settlement indicates.

Next, Allstate contends that since its policy is "specific" excess coverage, subdivision (g) does not apply since, according to Allstate's theory, subdivision (g) of section 11580.9 applies only to "incidental" excess policies. Allstate's theory is predicated on the circumstance that an incidental excess policy is actually a primary policy with the same coverage as the other primary policy, and becomes "excess" only by virtue of the incidental fact that there is another primary policy. Since, according to Allstate's theory, the excess policy under subdivision (g) is an incidental excess policy, it follows, according to Allstate, that the excess policy is the same as the primary policy, i.e., that it is an automobile liability policy.

Allstate is correct in its description of an incidental excess policy as a policy that is actually a primary policy but, by reason the existence of another primary policy, becomes "incidentally" excess to that policy. (*Hartford Accident & Indemnity Co. v. Sequoia Ins. Co.*, *supra*, 211 Cal.App.3d 1285, 1296.) Allstate is also correct in stating that its policy is "specific" excess coverage since it was specifically intended to be an excess or umbrella policy. (*Ibid*.)

However, there is nothing in section 11580.9, subdivision (g) that supports the view that this provision is meant to apply only to two primary automobile liability policies, one of which is an incidental excess policy. The plain text of subdivision (g) states that the excess coverage is liability coverage as that is defined in section 108. Liability insurance, as defined in section 108, broadly ensures against "loss resulting from liability for injury, fatal or nonfatal, suffered by any natural person, or resulting from liability for damage to property, or property interests of others," and specifically excludes vehicle insurance, among other types of insurance. It appears that section 11580.9, subdivision (g) specifically excludes automobile liability insurance from its definition of an excess policy.[8] Thus, Allstate's suggestion that the excess policy referred to in subdivision (g) is actually a primary automobile liability policy is untenable.[9]

In advancing its next contention, Allstate points to the circumstance that section 11580.9, subdivision (g) speaks of "loss" in the singular. Allstate contends that since "loss" is identified not as an injured party's damages, but as a "sum to be identified by a

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[8] The term "vehicle insurance" in section 108 appears to include automobile liability insurance, as well as "motor vehicle liability" insurance. (See *Empire Fire & Marine Ins. Co. v. Bell* (1997) 55 Cal.App.4th 1410, 1415-1416 [explaining the difference between these two types of insurance].)

[9] We note in the margin that subdivisions (a) through (d) of section 11580.9 deal, at least in part, with "incidental" excess policies, i.e., with situations where two primary policies appear to afford coverage for the same loss. As we have shown, this is not what the Legislature had in mind in subdivision (g).

particular policy," subdivision (g) applies only when two primary policies are involved, since it is only then that there is a single "loss."

The term "loss" is not necessarily limited to mean the amount that the insurer is obligated to pay. As an example, there is the right to equitable contribution "'. . . when several insurers are obligated to indemnify or defend the same loss of claim, and one insurer has paid more than its share of the loss . . . .'" (*Truck Ins. Exchange v. Unigard Ins. Co.* (2000) 79 Cal.App.4th 966, 974.) Thus, "loss" is not defined invariably as narrowly as Allstate suggests.

The interpretation that Allstate is placing on the word "loss" in subdivision (g) of section 11580.9 leads to a result that is at odds with the plain text of subdivision (g). As noted, in subdivision (g) the Legislature has provided for a primary and an excess policy, and not two primary policies, one of which is an incidentally excess policy.

Finally, Allstate points to cases that have held that section 11580.9 regulates automobile insurance, or automobile insurance policies, and not general liability policies, such as the Allstate policy in question. (E.g., *Century Surety Co. v. United Pacific Ins. Co.* (2003) 109 Cal.App.4th 1246, 1259 [§ 11580.9 applies only to "automobile cases"].) The thrust of this argument is that section 11580.9 applies only to *automobile liability* insurance, and no other kind of policy.

There are two reasons why Allstate's contention is not well taken.

First, as we have shown, subdivision (g) of section 11580.9 clearly provides that excess policies are general liability policies.

Second, the Legislature could have decided to limit section 11580.9 to automobile liability insurance. However, it chose not to do so. This is clear not only in subdivision (g), as we have shown, it is also apparent from subdivisions (a), (b), (c) and (d) of section 11580.9. Subdivision (a) specifically addresses "automobile liability insurance," while subdivisions (b), (c) and (d) deal with "two or more policies [applicable] to the same loss" (subds. (b) & (c)), or to "two or more policies affording valid and collectible liability insurance" (subd. (d)). Thus, while it is undoubtedly true that the Legislature intended to address in section 11580.9 cases involving "death or injury to persons or

property caused by the operation or use of a motor vehicle" (§ 11580.8; see also fn. 4, *ante*), it intended to regulate all insurance covering such losses, and not limit itself to regulating *automobile* liability insurance. In light of the stated objectives of the legislation (§ 11580.8), this makes eminent sense.

It is, of course, also true that for subdivision (g) of section 11580.9 to apply, the excess liability policy must afford "valid and collectible liability insurance [that applies] to the same motor vehicle" as the primary policy. In this sense, it remains true that section 11580.9 governs automobile insurance cases, and not liability insurance cases generally.

We decline to consider evidence of legislative intent, since the language of the statute is clear and unambiguous. (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 800, 801.) We note, however, that Allstate's references to Assembly Committee Reports and to titles given to various enactments as they wound their way toward passage of a final bill add nothing of value, even if we were to consider such items as pertinent legislative history. The most that is shown by these items is that the Legislature intended to regulate the interaction of various levels of insurance that cover death or injury to persons or property caused by the operation or use of motor vehicles, and that much is apparent from the text of the statute itself. (§ 11580.8; see also fn. 4, *ante*.)

DISPOSITION

The judgment is affirmed. Mercury is to recover its costs in this appeal.

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FLIER, J.

We concur:

RUBIN, Acting P.J.

BOLAND, J.