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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

JERRY PIKOVER, Plaintiff and Appellant, v. LIBERTY MUTUAL FIRE INSURANCE COMPANY et al., Defendants and Respondents.	B283206 (Los Angeles County Super. Ct. No. BC623277)

APPEAL from judgments of the Superior Court of Los Angeles County, Elizabeth Allen White, Judge. Affirmed.

Law Offices of Janette Y. Freiberg and Janette Y. Freiberg for Plaintiff and Appellant.

Ropers, Majeski, Kohn & Bentley, Stephen J. Erigero, Terry Anastassiou and E. Lacey Rice for Defendant and Respondent Liberty Mutual Fire Insurance Company.

Law Offices of Julia H. Azrael, Julia Azrael, Thomas A. Blaylock and John S. Curtis for Defendant and Respondent United Financial Casualty Company.

Jerry Pikover was injured when the sports utility vehicle in which he was a passenger was struck by a second vehicle that had just collided with a big rig truck on the eastbound Interstate 210 freeway. The truck driver failed to stop at the scene.

After the SUV owner's insurance carrier, United Financial Casualty Company (UFCC), and Pikover's automobile insurer, Liberty Mutual Fire Insurance Company, denied his claims, Pikover sued both insurers for breach of contract and breach of the implied covenant of good faith and fair dealing. The trial court granted UFCC's and Liberty Mutual's motions for summary judgment and entered judgments in their favor, ruling the undisputed facts established that Pikover had failed to comply with Insurance Code section 11580.2, subdivision (i),[1] which sets forth three alternative prerequisites for bringing an action under the uninsured motorist provision of an insurance policy, and Pikover's arguments as to why section 11580.2, subdivision (i), did not apply failed as a matter of law. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Accident*

Pikover was riding in an SUV being driven by his friend Stanislav Krakovsky on Friday morning, January 11, 2013, heading eastbound on Interstate 210, when the SUV was struck by Hannah Maisel's vehicle. According to a report prepared by

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[1] Statutory references are to this code unless otherwise stated.

the California Highway Patrol, the collision occurred when Maisel, who was making a lane change, failed to notice a big rig truck occupying the second lane. Maisel's car struck the left rear of the big rig, spun out and collided with the SUV. The truck driver did not stop at the accident scene. Pikover and Krakovsky were both injured and transported to the hospital by ambulance.

The CHP report concluded Maisel was the cause of the collision when she engaged in an unsafe lane change. Follow-up with the truck driver was not possible due to lack of identifying information for the big rig.

2. *Wawanesa's Denial of Pikover's Claim*

Maisel was insured by Wawanesa General Insurance Company. On March 7, 2013 Pikover's attorney, Janette Freiberg, submitted a letter to Wawanesa stating that Pikover claimed damages for injuries sustained in the collision. On June 3, 2013 Wawanesa denied Pikover's claim, asserting the truck driver had been solely responsible for the collision. Wawanesa based its position on an alleged statement by Krakovsky that he had seen the truck enter Maisel's lane and on alleged physical damage (a tire mark on the passenger doors of Maisel's vehicle) that confirmed the truck had struck Maisel's car and pushed it across the lanes.

3. *Arbitration Between UFCC and Wawanesa*

The SUV was insured by a commercial automobile insurance policy underwritten by UFCC, an entity affiliated with Progressive Casualty Insurance Company. Krakovsky was a rated driver under the policy. UFCC initiated an arbitration proceeding against Wawanesa for property damage to the SUV for which UFCC had a subrogation claim. In December 2013 the

arbitrator awarded damages to UFCC, finding Krakovsky was an "innocent party," the unidentified truck driver was 50 percent negligent and Maisel was 50 percent liable. As a result of California's joint and several liability laws, the arbitrator awarded UFCC 100 percent of the claimed property damage against Wawanesa.

4. *UFCC's Communications Concerning Pikover's Claim*

The UFCC policy for the SUV included an uninsured/underinsured (UM/UIM) motorist bodily injury coverage endorsement providing coverage of $30,000 per person and $60,000 per accident.[2] On March 7, 2013 Freiberg submitted a letter to UFCC advising "that a claim for injuries and damages is hereby made on behalf of [Pikover]." On January 20, 2014 Freiberg submitted Pikover's settlement demand for $475,000 to UFCC.

On January 27, 2014 Emy L. Walker, the Progressive claims specialist who adjusts commercial casualty claims on behalf of Progressive entities including UFCC and who was responsible for handling Pikover's uninsured motorist claim, authored notes in the claim file stating, "RSVS Requested at 30K UMBI Limits." Walker also "opened" "UM/UIM exposure" for both Pikover and Krakovsky. On March 27, 2014 UFCC settled Krakovsky's uninsured motorist claim by paying him the policy limit of $30,000.

Pikover had his own automobile insurance policy with Liberty Mutual at the time of the accident, which included

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[2] The UFCC policy includes among its insureds for purposes of uninsured/underinsured motorist bodily injury coverage any person occupying the SUV.

uninsured motorist coverage of $1,000,000 per accident. On March 20, 2014 Marina Nemerovskaya, a nonattorney employee of Freiberg's law office, wrote to Liberty Mutual advising "a claim for injuries and damages" was "hereby made" on behalf of Pikover. In April 2014 UFCC contacted Liberty Mutual to discuss uninsured motorist coverage for Pikover. Because it appeared that pro rata coverage may apply, the two insurers agreed to exchange copies of their policies to determine the issue. On May 20, 2014 Liberty Mutual contacted UFCC and confirmed the applicability of pro rata coverage. On May 27, 2014 UFCC wrote to Freiberg, explaining, "Given that Liberty Mutual's policy is much larger than ours, we will await their subrogation demand following your client's UMBI settlement."

On July 14, 2014 Freiberg's office called UFCC, stated the law office was awaiting a settlement offer from Liberty Mutual and confirmed its understanding UFCC would wait for a subrogation demand from Liberty Mutual. On August 28, 2014 Nemerovskaya spoke to Walker. According to Nemerovskaya's notes of the conversation, Walker stated Pikover would "only get money from Liberty Mutual," and UFCC would "pay them percentage of fault (subrogation)." On September 10, 2015 UFCC sent a letter to Freiberg stating, "This letter confirms that we are closing the [UM] bodily injury exposure. Should the dual carrier send us a demand for a portion of the settlement, we will address it at that time."

On December 29, 2015 UFCC received a letter from Freiberg demanding a formal arbitration hearing. On February 12, 2016 UFCC responded to Freiberg stating UFCC's position "that there is no uninsured motorist coverage available to your client as you have neither timely demanded arbitration,

nor timely filed a complaint against the uninsured driver," as required by section 11580.2, subdivision (i).

5. *Pikover's Communications with Liberty Mutual*

After Pikover's uninsured motorist claim was opened with Liberty Mutual on March 20, 2014, Liberty Mutual began its investigation of his claim. On April 2, 2014 Liberty's senior claims specialist, Gerald Hammond, emailed Nemerovskaya stating the insurer needed Pikover's in-person statement and would be assigning an independent adjusting company to contact Freiberg's law office to make arrangements for the statement. Hammond also advised that Liberty Mutual required Pikover's medical records. On May 6, 2014 Liberty Mutual sent DMA Claims Services to take an in-person statement from Pikover. Pikover had previously given an in-person statement to Wawanesa in April 2013, a copy of which had been provided to Liberty Mutual. On July 23, 2014 Hammond emailed Nemerovskaya stating, "I will complete the review and final evaluation of the claim and contact Emy at Progressive to discuss a pro-rata offer on the uninsured motorist bodily injury claim for Mr. Pikover. I hope to be back in touch within the next couple weeks to discuss settlement of the claim." On August 6, 2014 Nemerovskaya emailed additional medical records to Hammond. On August 21, 2014 Nemerovskaya spoke to Hammond, who apologized for the delay and said he should have a settlement offer by the end of the next week. On August 28, 2014 Nemerovskaya attempted to contact Hammond and was informed he was out of the office until September 2, 2014.

On September 12, 2014 Hammond sent Freiberg a letter stating Liberty Mutual had completed its review of Pikover's medical records and needed Pikover to submit to an independent

medical examination. The examination, originally scheduled for January 14, 2015, was rescheduled due to the unavailability of the doctor. The only available date that worked for Pikover, his attorney and the physician was February 16, 2015, and the examination went forward on that date. The independent medical examination was the subject of notes in the UFCC claim file, which stated Hammond emailed Walker to request UFCC contribute half the cost of the examination and Walker had called Hammond to discuss the reason for the examination.

Freiberg's office and Liberty Mutual continued communicating more than two years after the January 2013 accident. On March 9, 2015 Nemerovskaya contacted Hammond to request an update, and Hammond responded he had received a copy of the independent medical examination report but had not yet had a chance to review it. Hammond then emailed Nemerovskaya on March 17, 2015 stating it did not appear the physician who performed the independent medical examination had reviewed certain medical records that had been provided but which Liberty Mutual was again forwarding to the doctor. On April 6, 2015 Hammond emailed Freiberg's office explaining he was still reviewing the claim and would need to coordinate a pro-rata offer with UFCC. His email further stated, "Due to my pending vacation for the remainder of the week, I hope to get back to your office by Monday April 27th with a settlement offer."

On April 22, 2015 Liberty Mutual indicated it was working to complete its investigation and final evaluation of Pikover's claim. Liberty Mutual requested confirmation from Freiberg's office that Pikover had protected the statute of limitations by filing suit against the appropriate parties. On April 23, 2015 Nemerovskaya replied, stating Freiberg's office had not filed suit

against Maisel, explaining its reasons for not doing so. On April 24, 2015 Liberty Mutual requested information as to whether Pikover had made a formal arbitration demand. On April 27, 2015 Nemerovskaya provided a copy of the settlement demand letter submitted on January 20, 2014 to UFCC. On April 28, 2015 Liberty Mutual replied the letter did not include a demand for arbitration as required by section 11580.2, subdivision (i)(1). Nemerovskaya responded that same day, explaining, when Freiberg's office sent the demand letter to UFCC, the arbitration proceedings between UFCC and Wawanesa had already been completed, the findings were unclear as to the liability of the truck driver and Maisel, and Wawanesa refused to admit any fault. The next day Liberty Mutual replied the intercompany arbitration on the vehicle property damage claim did not satisfy the requirements of the uninsured motorist statute.

On April 30, 2015 Freiberg wrote to Liberty Mutual asserting several reasons the two-year limitations period of section 11580.2, subdivision (i), did not bar recovery on Pikover's claim. On October 27, 2015 Liberty Mutual wrote to Freiberg's office denying Pikover's claim based on expiration of the limitations period. After Liberty Mutual's denial, Freiberg's office submitted a formal demand for arbitration.

6. *The Instant Lawsuit*

Pikover filed his complaint on June 10, 2016, alleging causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing arising from UFCC's and Liberty Mutual's denials of, and delay in paying, his uninsured

motorist claims.[3] On March 2, 2017 UFCC moved for summary judgment or, in the alternative, summary adjudication, arguing the undisputed facts established Pikover had not satisfied the requirements of section 11580.2, subdivision (i), for accrual of a cause of action under the uninsured motorist provisions in an automobile insurance policy and the cause of action for breach of the implied covenant of good faith and fair dealing was an action on the policy and subject to the same requirements. On March 17, 2017 Liberty Mutual also moved for summary judgment or, in the alternative, summary adjudication on essentially the same grounds.

In his oppositions to UFCC's and Liberty Mutual's motions Pikover argued he had complied with, or triable issues of material fact existed as to his compliance with, the statutory prerequisites for filing suit, either by taking an action required by the statute or such action being excused as impossible, impracticable or futile. Pikover also argued triable issues of material fact existed as to whether UFCC and Liberty Mutual were equitably estopped from relying on the statutory prerequisites by their conduct claiming settlement was imminent, whether UFCC and Liberty Mutual had waived any right to rely on the prerequisites and whether the statutory period for satisfying the prerequisites should be equitably tolled. Pikover also contended the statutory prerequisites applicable to actions under a policy that provides uninsured motorist coverage do not apply to his cause of action for breach of the implied covenant. Finally, in opposing Liberty Mutual's motion Pikover

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[3] Pikover's complaint named Progressive, rather than UFCC. UFCC filed an answer, stating it had erroneously been sued as Progressive.

made the additional argument his claims pertained to underinsured motorist coverage and thus do not fall within the scope of section 11580.2, subdivision (i). UFCC and Liberty Mutual each filed a reply brief.

The trial court granted both motions, issuing a separate ruling for each one. Judgments were entered in favor of UFCC and Liberty Mutual on June 16, 2017.

DISCUSSION

1. *Standard of Review*

A motion for summary judgment is properly granted only when "all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) We review a grant of summary judgment de novo and decide independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law. (*Hampton v. County of San Diego* (2015) 62 Cal.4th 340, 347; *Schachter v. Citigroup, Inc.* (2009) 47 Cal.4th 610, 618.) In our review we "consider[] all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports." (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.) The evidence must be viewed in the light most favorable to the nonmoving party. (*Ennabe v. Manosa* (2014) 58 Cal.4th 697, 703; *Schachter*, at p. 618.)

In reviewing a ruling on a motion for summary judgment, we first "'determine[] whether the moving party's showing has established facts which negate the opponent's claim and justify a judgment in movant's favor.'" (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1252.) If the moving party has made its

prima facie showing that a cause of action has no merit, the burden shifts to the nonmoving party to demonstrate, by reference to specific facts, not just allegations in the pleadings, the existence of a triable issue of material fact. (Code Civ. Proc., § 437c, subd. (p)(2); *Turner*, at pp. 1252-1253; *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849-850.)

2. *The Trial Court Properly Ruled in Favor of UFCC and Liberty Mutual on the Ground Pikover Failed To Satisfy the Requirements of Section 11580.2, Subdivision (i)*

a. *Overview of requirements of section 11580.2*

Section 11580.2 requires bodily injury liability policies in California to include insurance for sums recoverable from the owner or operator of an uninsured motor vehicle.[4] With respect to a dispute concerning an uninsured motorist claim, section 11580.2, subdivision (i)(1), provides, "No cause of action shall accrue to the insured under any policy or endorsement provision issued pursuant to this section unless one of the following actions have been taken within two years from the date of the accident: [¶] (A) Suit for bodily injury has been filed against the uninsured motorist, in a court of competent

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[4] Specifically, section 11580.2, subdivision (a)(1), provides, "No policy of bodily injury liability insurance covering liability arising out of the ownership, maintenance, or use of any motor vehicle . . . shall be issued or delivered in this state to the owner or operator of a motor vehicle . . . unless the policy contains, or has added to it by endorsement, a provision . . . insuring the insured, the insured's heirs or legal representative for all sums within the limits that he, she, or they, as the case may be, shall be legally entitled to recover as damages for bodily injury or wrongful death from the owner or operator of an uninsured motor vehicle. . . ."

jurisdiction. [¶] (B) Agreement as to the amount due under the policy has been concluded. [¶] (C) The insured has formally instituted arbitration proceedings by notifying the insurer in writing sent by certified mail, return receipt requested." That is, one of the three actions specified by section 11580.2, subdivision (i), must be taken as a condition precedent to the accrual of a cause of action against the insurer. (*Spear v. California State Auto. Assn.* (1992) 2 Cal.4th 1035, 1039.)

The requirements of section 11580.2, subdivision (i), are not absolute. "The doctrines of estoppel, waiver, impossibility, impracticality, and futility apply to excuse a party's noncompliance with the statutory timeframe, as determined by the court." (§ 11580.2, subd. (i)(3).)

The two-year period is also subject to the following statutory tolling provision: "Notwithstanding subdivision (i), any insurer whose insured has made a claim under his or her uninsured motorist coverage, and the claim is pending, shall, at least 30 days before the expiration of the applicable statute of limitation, notify its insured in writing of the statute of limitation applicable to the injury or death. Failure of the insurer to provide the written notice shall operate to toll any applicable statute of limitation or other time limitation for a period of 30 days from the date the written notice is actually given." (§ 11580.2, subd. (k).) If the insurer has received notice that the insured is represented by an attorney, the notice otherwise required by subdivision (k) is not necessary. (*Ibid.*)

b. *UFCC and Liberty Mutual met their initial burden of showing Pikover failed to satisfy the statutory prerequisite for his claims*

With their moving papers UFCC and Liberty Mutual presented evidence establishing (a) Pikover did not file suit for bodily injury against the uninsured motorist (the truck driver or Maisel)[5] within two years from the date of the accident, (b) Pikover did not come to an agreement with either UFCC or Liberty Mutual as to the amount due under either insurer's uninsured motorist policy within two years from the accident; and (c) Pikover did not make a formal arbitration demand within two years from the accident. Each insurer also introduced evidence establishing it had never advised Pikover it was relinquishing any of its coverage defenses.

In addition, it was undisputed that Pikover was represented by an attorney throughout the time his claims with UFCC and Liberty Mutual remained open and that the insurers had been made aware he was represented by counsel. Thus, the insurers were not required to provide written notice of any applicable limitations period, and any tolling pursuant to section 11580.2, subdivision (k), did not apply.

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[5] Section 11580.2, subdivision (b), defines "'uninsured motor vehicle'" to include a motor vehicle whose owner or operator is unknown, as well as a motor vehicle with respect to which there is applicable insurance but the company writing the insurance denies coverage.

c. *Pikover failed to establish a triable issue of material fact regarding his failure to satisfy at least one of the three preconditions for filing suit*

Pikover does not dispute he did not comply with section 11580.2, subdivision (i)(1)(A), that is, he did not file suit for bodily injury against the uninsured motorist(s) within two years from the date of the accident. He contends, however, there is at least a triable issue of material fact whether he timely satisfied at least one of the other two preconditions for filing suit—concluding an agreement with the insurer as to the amount due under the policy (subd. (i)(1)(B)) and formally instituting arbitration proceedings against the insurer (subd. (i)(1)(C)).

i. Concluding an agreement as to the amount due

Pikover argues he concluded agreements with UFCC and Liberty Mutual as to the amount due under the respective policies based on the following facts: (1) the UFCC insurance policy, of which he is a third party beneficiary, constitutes "an agreement concluded"; (2) it is uncontested the UFCC policy limit for the SUV was $60,000 per accident and $30,000 per person; (3) UFCC paid Krakovsky $30,000 under the policy; (4) it is uncontested UFCC reserved the full amount of $30,000 for Pikover after conclusion of its arbitration with Wawanesa; and (5) UFCC repeatedly represented to Pikover it would settle Pikover's uninsured motorist claim.

Pikover's evidence does not raise a triable issue of material fact whether an agreement as to the amount due under the policy was concluded. The UFCC insurance policy limits,[6] the payment

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[6] Pikover's argument the UFCC policy itself constituted the "agreement concluded" ignores the plain language of the statute and defies simple logic. The policy necessarily pre-dated the

of $30,000 to Krakovsky and creation of a reserve of $30,000 for Pikover[7] do not constitute substantial responsive evidence that UFCC agreed to pay $30,000, or any amount at all, to Pikover in connection with his uninsured motorist claims arising from the January 2013 accident. (See *Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 162-163 ["plaintiff must produce substantial responsive evidence sufficient to establish a triable issue of material fact;" "responsive evidence that gives rise to no more than mere speculation cannot be regarded as substantial, and is insufficient to establish a triable issue of material fact"]; see also *McGrory v. Applied Signal Technology, Inc.* (2013) 212 Cal.App.4th 1510, 1530 ["'a material triable controversy is not established unless the inference is reasonable'"]; *Annod Corp. v. Hamilton & Samuels* (2002) 100 Cal.App.4th 1286, 1298-1299 [""'[w]hen opposition to a motion for summary judgment is based on inferences, those inferences must be reasonably deducible from the evidence, and not such as are derived from speculation, conjecture, imagination, or guesswork'""].)

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accident and thus could not constitute an agreement made "within two years from the date of the accident" as required. (See § 11580.2, subd. (i)(1).) Moreover, that the agreement must be "as to the amount due under the policy" shows the concluded agreement must be one separate from the policy itself. (See § 11580.2, subd. (i)(1)(B).)

[7] Liability insurers are subject to complex regulations governing the establishment and maintenance of reserves. Thus, "'a reserve cannot accurately or fairly be equated with an admission of liability or the value of any particular claim.'" (*Lipton v. Superior Court* (1996) 48 Cal.App.4th 1599, 1613.)

Pikover produced no evidence UFCC agreed to pay $30,000 or any other amount to him. At best, the evidence, viewed in the light most favorable to Pikover, merely shows UFCC represented it would pay to Liberty Mutual a pro rata share of any settlement between Pikover and Liberty Mutual. This does not constitute an agreement to pay $30,000 or any other amount.

On appeal Pikover argues the UFCC policy term providing a limit of $1,000 for medical payments coverage, which is separate and independent from any uninsured motorist coverage, somehow constitutes evidence of an agreement as to the amount due that has been concluded for purposes of section 11580.2, subdivision (i)(1)(B). We need not reach this argument; for, as Pikover concedes, he did not raise it in the trial court. Moreover, although he referred to the $1,000 medical payments coverage for purposes of arguing UFCC had engaged in bad faith, he did not contend it constitutes an agreement concluded under section 11580.2, subdivision (i)(1)(B), until his reply brief. Pikover has forfeited this argument on appeal. (See *Kelly v. CB&I Constructors, Inc.* (2009) 179 Cal.App.4th 442, 452 ["point not raised in opening brief will not be considered"].)

As to Liberty Mutual, Pikover concedes there was no agreement as to the amount due under its policy, but argues he can rely on the agreement concluded with respect to his claims under the UFCC policy to satisfy the requirement of section 11580.2, subdivision (i)(1)(B). This novel argument is doubly flawed. First, as just discussed, Pikover failed to raise a triable issue of material fact that any such agreement existed with UFCC. Second, even if there were such an agreement, the term "policy" in the statutory language contained in subdivision (i)(1)(B), "[a]greement as to the amount due under

the policy," unquestionably refers to the same "policy" identified in the introductory language in subdivision (i)(1), "[n]o cause of action shall accrue to the insured under any policy . . . unless . . ."—that is, the cause of action accrues concerning the same policy under which the insured and insurer have agreed as to the amount due. An agreement between Pikover and UFCC would not permit Pikover to sue Liberty Mutual.

ii. Formally instituting arbitration proceedings

Pikover also argues the requirement of section 11580.2, subdivision (i)(1)(C), institution of formal arbitration proceedings, was satisfied by the arbitration between UFCC and Wawanesa concerning responsibility for damage to the SUV. The statute, however, pertains to institution of formal arbitration proceedings by the insured (Pikover) against the carrier against which the uninsured motorist claim has been made (UFCC and Liberty Mutual). UFCC's arbitration with Wawanesa fails to establish compliance with this precondition. (See *Quintano v. Mercury Casualty Co.* (1995) 11 Cal.4th 1049, 1057 ["[f]ormer section 11580.2(i)[8] states that the insured has no cause of action under the policy unless within a year he or she: (1) files suit against the tortfeasor; (2) agrees with his or her own carrier as to the amount due under the policy; or (3) formally institutes arbitration proceedings—again, with his or her own carrier"].)

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8 The text of former section 11580.2, subdivision (i)(1)(C) (Stats. 1988, ch. 1471, § 1, pp. 5191, 5198), differs from the current text of section 11580.2, subdivision (i)(1)(C), only insofar as the former text did not include language regarding notice to the insurer.

d. *Pikover failed to establish a triable issue of material fact regarding the impossibility or futility of compliance with the requirements of section 11580.2, subdivision (i)*

Pikover alternatively contends his noncompliance with the statutory prerequisites of section 11580.2, subdivision (i), was excused. He sets forth a variety of reasons filing suit for bodily injury against the uninsured motorist and concluding agreement as to the amount due under each carrier's policy was impossible or futile. Whatever the merit of Pikover's various arguments as to the impossibility or futility of complying with the first two options for satisfying section 11580.2, subdivision (i)(1), Pikover has failed to raise a triable issue of material fact to support his claim it would have been impossible or futile for him to formally institute arbitration proceedings against UFCC and Liberty Mutual within two years from the accident, thus satisfying the third option of section 11580.2, subdivision (i)(1).

Pikover contends under section 11580.2, subdivision (f), which is incorporated into the UFCC and Liberty Mutual policies, arbitration can be compelled only if there is a dispute between the insured and insurer as to liability or the amount of damages; and he asserts there was no such dispute. As discussed, however, there is no evidence of an agreement by the insurers as to the amount of damages, if any, to which Pikover may be entitled and consequently no bar to demanding arbitration.

Pikover additionally asserts he was unable to initiate arbitration against the insurers within the required two-year period because there was no dispute to arbitrate until they issued a denial of coverage. Not so. The lack of agreement by the insurers as to the damages, if any, to which Pikover is entitled was a wholly adequate basis for an arbitration demand. For

example, in *Santangelo v. Allstate Ins. Co.* (1998) 65 Cal.App.4th 804, the insured's attorney wrote the insurer demanding arbitration pursuant to section 11580.2 to protect the insured's uninsured motorist claim while the parties awaited an independent medical examination. The letter indicated the attorney's intent to postpone scheduling the arbitration hearing, pursuant to the parties' agreement, until after the examination. The court held the letter constituted formal institution of arbitration pursuant to section 11580.2, subdivision (i). (See *Santangelo,* at pp. 807, 811-812.)[9]

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[9] Without any cognizable explanation, argument or citation to the record, Pikover contends it is uncontroverted that commencement of arbitration between UFCC and Wawanesa precluded him from initiating arbitration against UFCC or Liberty Mutual under those carriers' policies. We deem this contention forfeited. (See *In re S.C.* (2006) 138 Cal.App.4th 396, 406-407 ["[w]hen an appellant's brief makes no reference to the pages of the record where a point can be found," the court of appeal "need not search through the record in an effort to discover the point purportedly made" and "can simply deem the contention to lack foundation and, thus, to be forfeited"].)

In his reply brief on appeal Pikover argues for the first time there was virtual representation and identity of interest sufficient to establish privity between Pikover and UFCC for purposes of the arbitration against Wawanesa. This issue, too, is forfeited. (See *Kelly v. CB&I Constructors, Inc., supra,* 179 Cal.App.4th at p. 452.) In addition, this argument, whatever other flaws it may possess, appears to be based on the erroneous assumption arbitration against Wawanesa would satisfy the requirement of formally instituting arbitration in order to pursue claims against UFCC and Liberty Mutual. But, as discussed, subdivision (i)(1)(C) is satisfied only by arbitration between the insured and his or her own insurer.

e. *No triable issue of material fact exists regarding the applicability of equitable estoppel*

i. Requirements of equitable estoppel

"'[A] valid claim of equitable estoppel consists of the following elements: (a) a representation or concealment of material facts (b) made with knowledge, actual or virtual, of the facts (c) to a party ignorant, actually and permissibly, of the truth (d) with the intention, actual or virtual, that the ignorant party act on it, and (e) that party was induced to act on it.'" (*Behnke v. State Farm General Ins. Co.* (2011) 196 Cal.App.4th 1443, 1462; see *Advanced Network, Inc. v. Peerless Ins. Co.* (2010) 190 Cal.App.4th 1054, 1067, fn. 5 [same].) "'The essence of an estoppel is that the party to be estopped has by false language or conduct "led another to do that which he [or she] would not otherwise have done and as a result thereof that he [or she] has suffered injury."'" (*Steinhart v. County of Los Angeles* (2010) 47 Cal.4th 1298, 1315.) However, "'"[a]n estoppel may arise although there was no designed fraud on the part of the person sought to be estopped."'" (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 384.)

When "'the facts are undisputed, the existence of an estoppel is a question of law.'" (*Steinhart v. County of Los Angeles*, *supra*, 47 Cal.4th at p. 1315 [where defendant filed a demurrer to plaintiff's complaint, the Supreme Court concluded, based on undisputed facts, plaintiff's claim of estoppel failed as a matter of law]; see *Page v. City of Montebello* (1980) 112 Cal.App.3d 658, 666 [although the existence of circumstances justifying application of equitable estoppel generally is a question of fact, the "'question is appropriate for summary judgment

however . . . if, assuming all factual requirements have been met, no estoppel could exist as a matter of law'"].)

Although equitable estoppel has been held to apply where the defendant "'induc[ed] plaintiff to believe that an amicable adjustment of the claim will be made without suit'" (*Miles v. Bank of America Etc. Assn.* (1936) 17 Cal.App.2d 389, 398, italics omitted), "'[c]learly, an estoppel to plead the statute [of limitations] does not arise in every case in which there are negotiations for a settlement of the controversy.'" (*Lobrovich v. Georgison* (1956) 144 Cal.App.2d 567, 573.) Rather, reliance on the statement or conduct on which the estoppel is based must be reasonable. (See, e.g., *Lantzy v. Centex Homes, supra,* 31 Cal.4th at pp. 384-385 [requiring plaintiff to have been reasonably induced to forbear bringing suit within a statutory limitations period]; *Vu v. Prudential Property & Casualty Ins. Co.* (2001) 26 Cal.4th 1142, 1152-1153 [principle that "'[a]n insurer is estopped from asserting a right, even though it did not intend to mislead, as long as the insured reasonably relied to its detriment upon the insurer's action'" applies to whether an insurer is estopped from raising a statute of limitations defense]; *Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 34-35.) "'The representation, whether by word or act, to justify a prudent man in acting upon it, must be plain, not doubtful or matter of questionable inference. *Certainty* is essential to all estoppels.'" (*Steinhart v. County of Los Angeles*, *supra*, 47 Cal.4th at p. 1318.)

Estoppels are "'particularly'" disfavored "'where the party attempting to raise the estoppel is represented by an attorney at law.'" (*Steinhart v. County of Los Angeles*, *supra*, 47 Cal.4th at p. 1316.)

ii. Pikover's claim of estoppel against UFCC

In support of his contention UFCC is equitably estopped from asserting as a defense his failure to demand arbitration within two years from the date of the accident, Pikover argues he was reasonably convinced by UFCC's conduct, including settlement negotiations, not to do so. According to Pikover, he was persuaded to comply with all of UFCC's and Liberty Mutual's demands and conditions, even when those requirements extended past the limitations period. He explains UFCC's arbitration with Wawanesa, encouragement of Liberty Mutual to present a subrogation claim and pursuit of its own investigation of the accident and of Pikover's claim took time, during which UFCC consistently communicated to Pikover that a settlement of Pikover's uninsured motorist claim was imminent. Pikover principally relies on the parties' settlement negotiations, as well as UFCC's alleged promises of a settlement offer and alleged representations that he would eventually receive the benefits he was owed. According to Pikover, there was no basis under the UFCC policy to delay payment to Pikover until UFCC received a subrogation claim from Liberty Mutual, and UFCC knew its tactic would delay resolution of Pikover's claim beyond the limitations period.

Pikover has failed to identify evidence creating a triable issue of material fact as to whether UFCC is estopped from relying on the two-year statutory limitations period. There is no evidence UFCC asked Pikover to delay or refrain from formally

instituting arbitration proceedings or otherwise acting to protect his claims by complying with the requirements of section 11580.2. Specifically, there is no evidence UFCC asked Pikover to delay acting until resolution of the Wawanesa arbitration (which, in any event, occurred in December 2013, well before the expiration of the two-year period in January 2015), presentation by Liberty Mutual of a subrogation claim or completion of UFCC's investigation.[10]

No evidence suggests, despite Pikover's contention otherwise, that UFCC indicated a settlement was imminent or even that it would make a settlement offer. Indeed, Freiberg's office on July 14, 2014 acknowledged to UFCC it was awaiting a settlement offer from Liberty Mutual. In addition, there is no evidence UFCC made any representation Pikover's instituting arbitration or otherwise complying with the statutory requirements was unnecessary or would have any negative impact on ongoing discussions. Nor did UFCC advise Pikover it was waiving any of its coverage defenses. (See *Gaines v. Fidelity National Title Ins. Co.* (2016) 62 Cal.4th 1081, 1097-1100 [where defendants had agreed to 120-day stay of action, defendants were not equitably estopped from relying on statutory five-year period for plaintiff to bring action to trial notwithstanding stay because

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[10] Pikover's claim he was misled by UFCC's conduct is further belied by his acknowledgment he was represented by counsel during all claims and settlement discussions. (See *Kunstman v. Mirizzi* (1965) 234 Cal.App.2d 753, 758 ["[t]o permit one who has knowledge of the law to attempt to negotiate a settlement and subsequently plead estoppel would not only destroy the effect of the legislative statutes of limitation but would seriously impair the climate and effectiveness of the present method of encouraging settlement without litigation"].)

nowhere did the parties' communications reflect an understanding that the statutory period would be tolled]; *Kunstman v. Mirizzi* (1965) 234 Cal.App.2d 753, 757-758 [defendants were not estopped to rely on the statute of limitations in part because no affirmative promises had been made by the adjuster as to tolling the statute of limitations; defendant's demurrer without leave to amend to plaintiff's complaint alleging personal injuries in an automobile accident was properly sustained].)

Contrary to Pikover's assertion, no evidence was presented that UFCC represented Pikover would eventually receive the benefits he was owed. At best, the evidence shows UFCC stated it would pay to Liberty Mutual its pro rata share of any settlement between Pikover and Liberty Mutual. Pikover, however, was only to receive payment from Liberty Mutual, and no such payment was guaranteed. Even viewed most favorably to Pikover, nothing in this record supports the claim any conduct by UFCC reasonably induced him or his counsel to refrain from demanding arbitration within the two-year statutory period. (See *Lantzy v. Centex Homes*, *supra*, 31 Cal.4th at pp. 384-385 [demurrer based on statutory limitations period was properly sustained without leave to amend where factual allegations of first amended complaint were insufficient to establish equitable estoppel; in plaintiff's action for construction defect, it was not reasonable for plaintiff to delay filing suit based on defendant's attempts at various times to make repairs where there was no suggestion that the repair attempts, if successful, would have obviated the need for suit]; cf. *Steinhart v. County of Los Angeles*, *supra*, 47 Cal.4th at pp. 1314-1318 [defendant's written notices on which plaintiff based her claim of estoppel were, at most,

ambiguous and confusing, and the interpretation of the notices asserted by plaintiff was but one "possible" construction that could be adopted; the Supreme Court concluded the fact the notices did not clearly indicate the interpretation urged by plaintiff "weigh[ed] against a finding of estoppel," which must be "clearly deducible" from the facts to justify a prudent man in acting upon it, and the Court held plaintiff's estoppel claim thus failed as a matter of law].)

Holdgrafer v. Unocal Corp. (2008) 160 Cal.App.4th 907, on which Pikover relies, does not compel a contrary conclusion. In *Holdgrafer* a jury found Unocal was equitably estopped from asserting the statute of limitations as a defense based on representations made by Unocal in the course of settlement negotiations that induced the plaintiffs to believe they need not file a lawsuit in order to receive an amicable settlement of their claims. Affirming the jury's finding, the court of appeal determined, because Unocal had promised to pay any actual future damages and because plaintiffs could bring only one lawsuit for all of their damages—including their past, present and future damages—the plaintiffs had acted reasonably in refraining from filing suit as long as Unocal was complying with its promise. (See *id.* at pp. 918, 925-927.) Here, in contrast, UFCC, as explained, never made any promises to pay Pikover.

Wind Dancer Production Group v. Walt Disney Pictures (2017) 10 Cal.App.5th 56, the other estoppel case on which Pikover relies, is also distinguishable. In *Wind Dancer* writers and producers had entered into a profit participation agreement with Walt Disney Pictures. The parties' agreement included an incontestability clause requiring a participant to object in specific detail to Disney's quarterly participation statements within

24 months. In 2008, after an audit of Disney's books, the producers objected to the participation statements sent between June 2001 and March 2006. Disney filed a summary adjudication motion on the ground the producers' audit claims were time-barred under the incontestability clause, and the producers opposed on the ground Disney was estopped to assert the defense. This court found, based on the totality of the evidence—which included, among a multitude of other facts, oral tolling agreements between the parties, prior failures by Disney to enforce the incontestability clause for a variety of audits spanning a period of several years, and Disney's practice of allowing only one audit to proceed at a time, which rendered the producers unable timely to object in specific detail to the participation statements—there were triable issues of material fact as to whether Disney may be estopped from asserting the contractual limitations period. Here, in contrast, there is no evidence (1) the parties ever entered into any agreement to suspend the two-year statutory period; (2) the insurers ever failed to enforce the statutory period against Pikover in the past (or that they even had an opportunity to do so); or (3) any acts or omissions of the insurers ever rendered Pikover unable to initiate arbitration proceedings within the statutory period.

Although Pikover contends there are "numerous" issues of disputed material fact precluding the grant of summary judgment, he identifies only the reasonableness of his reliance as one such purported dispute. For any other alleged factual disputes, by failing to support his contention with reasoned discussion or citation to the record, Pikover has forfeited the issue. (*EnPalm, LLC v. Teitler* (2008) 162 Cal.App.4th 770, 775.) With respect to the reasonableness of Pikover's purported

reliance on UFCC's statements and conduct, Pikover has failed to show any triable issue of an underlying fact that is material to this element of his estoppel claim. As discussed, viewing all the evidence most favorably to Pikover, UFCC did not do or say anything upon which Pikover could reasonably have relied in deciding to delay or refrain from complying with the requirement to timely demand arbitration.[11]

iii. Pikover's claim of estoppel against Liberty Mutual

Pikover contends there are at least triable issues of material fact concerning his claim Liberty Mutual is equitably estopped from denying coverage based on his failure to timely demand arbitration. Pikover relies on evidence of Liberty Mutual's settlement negotiations with UFCC and Pikover and its promises of imminent settlement.

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[11] On appeal Pikover argues he has stated claims against UFCC because there was no basis under the UFCC policy for UFCC to delay payment until it had received a subrogation demand from Liberty. Left unexplained is how this theory negates UFCC's defense that Pikover failed to timely demand arbitration. In any event, Pikover failed to advance this argument before the trial court. Accordingly, we decline to consider it. (See *In re Marriage of Nassimi* (2016) 3 Cal.App.5th 667, 695 [""[a]s a general rule, theories not raised in the trial court cannot be asserted for the first time on appeal""].) Similarly, Pikover forfeited the argument in his reply appellate brief that under the UFCC policy UFCC owed Pikover $1,000 regardless of any investigation because he failed to raise it in his opening appellate brief or before the trial court. (See *Kelly v. CB&I Constructors, Inc., supra,* 179 Cal.App.4th at p. 452.)

The circumstances of the parties' settlement negotiations, including negotiations between UFCC and Liberty Mutual, do not support a claim of estoppel. Pikover was represented by an attorney at all times. There is no evidence Liberty Mutual ever requested Pikover delay or refrain from formally instituting arbitration proceedings, filing suit against the uninsured motorist(s) or otherwise acting to ensure compliance with section 11580.2. Nor did Liberty Mutual advise Pikover it was waiving any of its coverage defenses. Similarly, contrary to Pikover's assertion, there is no evidence Liberty Mutual made any statements to Pikover suggesting he would be paid for his injuries.

Pikover points to Walker's declaration in which she explained that she contacted Liberty Mutual in April 2014 to discuss coverage and Liberty Mutual subsequently agreed it had pro rata exposure for Pikover's claims. This statement, however, merely describes communications between UFCC and Liberty Mutual regarding their respective coverage exposure. There is no evidence Pikover was involved in these discussions or was advised of them by Liberty Mutual within two years of the accident, if at all. Pikover thus could not have relied on those discussions in refraining from or delaying initiating arbitration proceedings. More importantly, Liberty Mutual's recognition it had pro rata exposure does not constitute an agreement or admission it would pay Pikover.

Hammond's July 23, 2014 email that he hoped "within the next couple weeks to discuss settlement of the claim" cannot reasonably be construed as a representation the matter would be settled without the necessity of Pikover complying with the requirements of section 11580.2, subdivision (i). (See *Lobrovich*

v. Georgison, *supra*, 144 Cal.App.2d at p. 572 [finding defendant was not estopped by settlement negotiations from relying on the statute of limitations notwithstanding suggestion by defendant's attorney to plaintiff's attorney to explore possible settlement, which included stating, "'I have in mind a realistic approach to this thing . . . and I will get out the arithmetic and show [plaintiff] how she would save money by settling'"].) In fact, the only promise of a settlement offer prior to expiration of the two-year limitations period, as shown by the evidence, was Hammond's August 21, 2014 conversation with Nemerovskaya in which he stated he should have a settlement offer by the end of the following week. Even if it were arguably reasonable for Pikover to have initially relied on the August 21, 2014 promise of a settlement offer to delay or refrain from demanding arbitration, no settlement offer materialized within the late August timeframe. To the contrary, instead of a settlement offer, Hammond wrote on September 12, 2014 that Liberty Mutual had completed its review of Pikover's medical records and needed him to submit to an independent medical examination. There is no evidence of any additional suggestion by Liberty Mutual that a settlement offer would be made until after expiration of the two-year limitations period on January 11, 2015.

As a matter of law, it was not reasonable for Pikover, who was represented by counsel, to refrain from demanding arbitration or seeking Liberty Mutual's agreement to extend section 11580.2, subdivision (i)'s two-year limitations period in purported reliance on the superseded August 21, 2014 promised settlement offer after September 12, 2014. (See *Lobrovich v. Georgison*, *supra*, 144 Cal.App.2d at pp. 573-574 ["[i]f there is still ample time to institute the action within the statutory period

after the circumstances inducing delay have ceased to operate, the plaintiff who failed to do so cannot claim an estoppel"].) Pikover still had four months after the September 2014 demand for an independent medical examination to comply with the requirements of section 11580.2, subdivision (i). This was sufficient time to initiate arbitration proceedings. His failure to do so precludes his ability to assert an estoppel. (See *Santee v. Santa Clara County Office of Education* (1990) 220 Cal.App.3d 702, 716 [finding two months before expiration of the limitations period a sufficient period to file suit; plaintiffs' failure to do so precluded their ability to assert estoppel]; *Lobrovich*, at pp. 573-574 [five weeks constituted a sufficient period].)

Although Pikover asserts Liberty Mutual engaged in a series of unjustified stalling tactics, including requiring an independent medical examination, scheduling the examination after expiration of the limitations period, delaying turnover of the results of the examination and delaying discussion of final settlement figures with Pikover, any statements or conduct by Liberty Mutual after the January 11, 2015 expiration date of the limitations period cannot form the basis of an estoppel. None of those after-the-fact actions or omissions could have affected Pikover's timely compliance with the prerequisites for his uninsured motorist claims.

Similarly, the fact the independent medical examination was scheduled prior to January 11, 2015 to occur after that date is an insufficient basis on which to assert estoppel: "The fact that yet another doctor's examination had been scheduled does not demonstrate an implied agreement to extend any limitations period." (*Santangelo v. Allstate Ins. Co.*, *supra*, 65 Cal.App.4th at p. 817 [insured failed to establish any basis for estoppel where

she asserted reliance on an implied agreement to extend March 1996 due date for compliance with five-year statutory limitations period until after a doctor's examination in June 1996].) There is no evidence Liberty Mutual requested at any time Pikover delay or refrain from complying with any limitations period for any reason, including pending the independent medical examination. This case is thus distinguishable from cases where estoppel was found because the party to be estopped requested the plaintiff wait or delay in protecting his or her rights. (See, e.g., *Benner v. Industrial Acc. Com.* (1945) 26 Cal.2d 346, 349 [employer was estopped from asserting the statute of limitations as a defense where, in discussions with employee's husband, the employer had expressed a preference to settle, and the employer and its insurance carrier made repeated requests for "more time" to complete their investigation and asked the husband "to wait" until the medical examination]; *Union Oil Co. of California v. Greka Energy Corp.* (2008) 165 Cal.App.4th 129, 138 [estoppel found where party to be estopped "urged" plaintiff to suspend legal action pending completion of settlement negotiations]; *Miles v. Bank of America Etc. Assn.*, *supra*, 17 Cal.App.2d at pp. 397-398 [defendants were estopped from asserting defense of statute of limitations where plaintiff was "urged not to 'start anything by going to any attorneys'; to 'lay low and they would do just like they promised'"].)

f. *Equitable tolling is not available to excuse the failure to timely comply with the requirements of section 11580.2, subdivision* (*i*)

In addition to arguing UFCC and Liberty Mutual are equitably estopped from asserting his failure to timely demand arbitration as a defense to his uninsured motorist claims, Pikover contends the two-year period for demanding arbitration was

equitably tolled by his good faith pursuit of one of several available legal remedies (making a claim of loss and thereafter engaging in settlement discussions) (see, e.g., *Addison v. State of California* (1978) 21 Cal.3d 313, 317),[12] as well as by his notice of loss to the insurers and their investigation of his claims prior to denial (see, e.g., *Prudential-LMI Com. Insurance v. Superior Court* (1990) 51 Cal.3d 674). Whatever merit these theories of equitable tolling may have in other contexts, equitable tolling is not available to Pikover to excuse his failure to comply with section 11580.2, subdivision (i), by initiating arbitration proceedings within two years from the accident.

The Legislature in enacting section 11580.2, subdivision (i), not only prescribed specific alternative actions that the insured must do within two years from the date of the accident for an uninsured motorist claim to accrue but also identified those doctrines that may apply to excuse the insured's noncompliance with the statutory timeframe: "The doctrines of estoppel, waiver,

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[12] According to the Supreme Court in *Addison v. State of California*, *supra*, 21 Cal.3d at page 317, "courts have adhered to a general policy which favors relieving plaintiff from the bar of a limitations statute when, possessing several legal remedies he, reasonably and in good faith, pursues one designed to lessen the extent of his injuries or damage." Pikover in his complaint relied on this statement of general policy to support the proposition Liberty Mutual's communications that settlement was imminent triggered equitable tolling. As the trial court ruled in granting the summary judgment motions, to the extent Pikover predicates his claim of equitable tolling on settlement negotiations, rather than formal legal action, such as pursuing relief in federal court or an administrative proceeding before filing a state court lawsuit, his argument conflicts with the holding of *65 Butterfield v. Chicago Title Ins. Co.* (1999) 70 Cal.App.4th 1047.

impossibility, impracticality, and futility apply to excuse a party's noncompliance with the statutory timeframe, as determined by the court." (§ 11580.2, subd. (i)(3).) Equitable tolling is not enumerated among those doctrines. "'Under the maxim of statutory construction, *expressio unius est exclusio alterius*, if exemptions are specified in a statute, we may not imply additional exemptions unless there is a clear legislative intent to the contrary.'" (*Rojas v. Superior Court* (2004) 33 Cal.4th 407, 424; accord, *Blankenship v. Allstate Ins. Co.* (2010) 186 Cal.App.4th 87, 93-95 [concluding the insured's status as a minor did not excuse noncompliance with the two-year statutory timeframe of section 11580.2, subdivision (i)(1), because minority is not enumerated among the permitted statutory excuses].)[13]

Pikover provides no citation to any legislative history, and we are aware of none, that indicates an intent to include equitable tolling among the available excuses for noncompliance with section 11580.2, subdivision (i)'s timeframe, even though omitted from the statutory list of such excuses. To the contrary, the statute indicates the Legislature intentionally excluded equitable tolling from the excuses enumerated in subdivision (i)(3). As explained, section 11580.2, subdivision (k),

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[13] We review de novo questions of statutory construction. (*California Building Industry Assn. v. State Water Resources Control Bd.* (2018) 4 Cal.5th 1032, 1041.) "Our primary task 'in interpreting a statute is to determine the Legislature's intent, giving effect to the law's purpose. [Citation.] We consider first the words of a statute, as the most reliable indicator of legislative intent.'" (*Ibid.*) The words of the statute are to be given "'their usual and ordinary meaning.'" (*Imperial Merchant Services, Inc. v. Hunt* (2009) 47 Cal.4th 381, 387.)

provides, "[n]otwithstanding subdivision (i)," for any insured who is not represented by an attorney and who has made an uninsured motorist coverage claim that is still pending, the insurer must provide notice to the insured in writing of the applicable statute of limitation. Failure of the insurer to provide the required notice operates to toll any applicable time limitation for a period of 30 days from the date the written notice is given. That the Legislature contemplated and provided a narrowly defined condition in which tolling does apply—and, moreover, referred specifically to subdivision (i) when doing so—indicates its failure to include equitable tolling among the exemptions of subdivision (i)(3) was not the result of oversight, but instead accurately reflected the Legislature's intent.

g. *Pikover did not allege any cause of action against Liberty Mutual based on a claim for underinsured motorist coverage*

i. Section 11580.2, subdivision (i)'s requirements do not apply to underinsured motorist claims

Pikover contends his action against Liberty Mutual arises from a claim of underinsured motorist coverage, not uninsured motorist coverage, and argues the requirements of section 11580.2, subdivision (i), do not apply to underinsured motorist claims. Accordingly, he asserts, the trial court erred in granting Liberty Mutual's motion. We agree with a part of Pikover's contention, but not his conclusion.

Section 11580.2, subdivision (p), applies when bodily injury has been "caused by an underinsured motor vehicle." It provides in its second sentence, "If the provisions of this subdivision conflict with subdivisions (a) through (o), the provisions of this subdivision shall prevail." One such conflicting provision is set forth in subdivision (p)(3), which states, "This coverage does not

apply to any bodily injury until the limits of bodily injury liability policies applicable to all insured motor vehicles causing the injury have been exhausted by payment of judgments or settlements, and proof of the payment is submitted to the insurer providing the underinsured motorist coverage." As the Supreme Court explained in *Quintano v. Mercury Casualty Co., supra*, 11 Cal.4th 1049, to apply both section 11580.2, subdivisions (i), and (p)(3), to underinsured motorists claims "would be anomalous because it would require the insured who seeks to settle with the tortfeasor to make a claim on the underinsured motorist policy within the same time period as he or she is allotted to fulfill a condition precedent to the accrual of coverage under the policy. . . . [¶] In some cases it would actually prove *impossible* for the insured to fulfill the conditions established by section 11580.2(p)(3) in time to meet the conditions set out in former subdivision (i), through no fault of the insured." (*Quintano*, at pp. 1057-1058.) The *Quintano* Court held, as Pikover asserts, the requirements of section 11580.2, subdivision (i), do not apply to underinsured motorist claims. (*Quintano*, at pp. 1066-1067.) The trial court's ruling to the contrary was error.

ii. Pikover's complaint does not allege entitlement to recovery based on an underinsured motorist claim against Liberty Mutual

Although the trial court erred in concluding section 11580.2, subdivision (i), applies to underinsured motorist claims, we nevertheless affirm its ruling in favor of Liberty Mutual if correct on any ground. (See *Schmidt v. Bank of America, N.A.* (2014) 223 Cal.App.4th 1489, 1498 [the trial court's decision must be affirmed "'so long as any of the grounds urged

by [defendants], either here or in the trial court, entitle [them] to summary judgment'"].) Liberty Mutual argues the trial court properly ruled in its favor because Pikover's complaint does not allege entitlement to recovery based on an underinsured motorist claim. Moreover, Liberty Mutual contends, under California law a claim of loss for injuries caused by an unidentified hit-and-run driver does not constitute a claim under underinsured motorist coverage. In response Pikover contends his complaint alleges facts sufficient to support a theory of underinsured motorist coverage, which Liberty Mutual had to confront in its summary judgment motion, because he has alleged fault on the part of an insured driver (Maisel), not just the unidentified truck driver, and an insurance claim against Maisel's policy.

"To create a triable issue of material fact, the opposition evidence must be directed to issues raised by the pleadings." (*Distefano v. Forester* (2001) 85 Cal.App.4th 1249, 1264; see *Turner v. Anheuser-Busch, Inc.*, *supra*, 7 Cal.4th at p. 1252 [an appellate court reviewing a ruling on a motion for summary judgment "'identif[ies] the issues framed by the pleadings'"].) Although a court is "empowered to read the pleadings broadly," the pleadings must "give fair notice to the opposing party of the theories on which relief is generally being sought." (*Howard v. Omni Hotels Management Corp.* (2012) 203 Cal.App.4th 403, 422.) "In assessing whether the issues raised by [the] plaintiff in opposing summary judgment are encompassed by the controlling pleading, . . . the pleading must allege the essential facts ""with reasonable precision and with particularity sufficient to acquaint a defendant with the nature, source and extent of [the] cause of action."'" (*Soria v. Univision Radio Los Angeles, Inc.* (2016) 5 Cal.App.5th 570, 585). "'"[A] party cannot successfully resist

summary judgment on a theory not pleaded.'"" (*Comunidad en Accion v. Los Angeles City Council* (2013) 219 Cal.App.4th 1116, 1125.)

Section 11580.2, subdivision (p), applies when an underinsured motor vehicle causes the bodily injury. Pursuant to section 11580.2, subdivision (p)(2), an underinsured motor vehicle is "a motor vehicle that is an insured motor vehicle but insured for an amount that is less than the uninsured motorist limits carried on the motor vehicle of the injured person." A vehicle operated by an unidentified hit-and-run driver is not an underinsured motor vehicle, and a plaintiff seeking to recover from his or her carrier for a bodily injury liability insurance claim arising from an accident caused by a hit-and-run driver must therefore comply with the requirements of section 11580.2, subdivision (i). (See § 11580.2, subd. (b) [definition of uninsured motor vehicle includes a motor vehicle "the owner or operator thereof be unknown"]; *Kortmeyer v. California Ins. Guarantee Assn.* (1992) 9 Cal.App.4th 1285, 1288-1289, 1294 [where accident involved a hit-and-run driver, plaintiff's suit arising from a bodily injury liability insurance claim was dismissed for plaintiff's failure to comply with section 11580.2, subdivision (i)].) Thus, Pikover's allegations regarding the fault of the unidentified hit-and-run truck driver do not support an underinsured motorist claim.

As for any theory based on Maisel as the purported responsible underinsured motorist, the allegations of the complaint make repeated and consistent reference to an uninsured motorist (UM), rather than an underinsured motorist, claim against Liberty Mutual. Not once does the complaint specifically allege Pikover is asserting an underinsured motorist

claim. Moreover, although Pikover's complaint alleges Maisel was insured by a carrier (Wawanesa), it fails to allege the limits of Maisel's Wawanesa policy are less than those of the Liberty Mutual policy,[14] an essential element of the definition of an underinsured motor vehicle.[15]

The complaint also fails to allege Pikover pursued an action against Maisel, obtained settlement with or judgment against Maisel, or submitted proof of any payment made on behalf of Maisel to Liberty Mutual, all requirements for an underinsured motorist claim. (See § 11580.2, subd. (p)(3); *Hartford Fire Ins. Co. v. Macri* (1992) 4 Cal.4th 318, 327 ["[t]he effect of section 11580.2(p)(3) is to require . . . the insured to prosecute actions against the underinsured, to obtain a settlement and/or judgment and to submit proof of payment to the insurer"].) Nor does Pikover suggest, let alone present evidence, that he could satisfy these requirements. Indeed, Pikover has argued he did

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[14] The complaint at paragraph 18 alleges Progressive (that is, UFCC) insisted Pikover file a claim with Liberty Mutual "as there was a policy limits issue." This allegation, however, relates to the limits of the UFCC policy, which covered the SUV, not the Wawanesa policy. There is no allegation in the complaint the driver of the SUV insured by UFCC (Krakovsky) caused the accident.

[15] As noted, section 11580.2, subdivision (b), includes in the definition of an "uninsured motor vehicle" a motor vehicle with respect to which "there is the applicable insurance or bond but the company writing the insurance or bond denies coverage thereunder." Pikover's allegation that Wawanesa denied his claim of loss thus supports his claim of uninsured motorist coverage, not underinsured motorist coverage.

not file an action against Maisel because of his belief it would be futile or impossible to do so.

In sum, Pikover has not merely failed to plead facts essential to support a theory of underinsured motorist coverage; he is unable to do so. Pikover's action against Liberty Mutual does not, and cannot, arise from a claim of underinsured motorist coverage. The trial court's ruling, even if not its reasoning, was correct.

3. *The Trial Court Properly Ruled in Favor of UFCC and Liberty Mutual on Pikover's Second Cause of Action for Breach of the Implied Covenant of Good Faith and Fair Dealing*

Emphasizing that section 11580.2, subdivision (i), governs a cause of action "under any policy . . . issued pursuant to this section," Pikover contends his bad faith cause of action against UFCC and Liberty Mutual does not arise "under the policy" and the requirements of subdivision (i), therefore, are inapplicable and do not preclude his claim. According to Pikover, the bad faith claim arises not only from UFCC's and Liberty Mutual's contractual duties but also from their statutory duties—specifically, their duties under section 790.03, subdivision (h), which requires insurers to refrain from "unfair claims settlement practices." Relying on *Hightower v. Farmers Ins. Exchange* (1995) 38 Cal.App.4th 853, 863, which recognized an insurer's potential tort liability for failing to attempt to effectuate a prompt and fair settlement in violation of the insurer's statutory duties, Pikover argues the insurers' violation of their statutory duties, which exist outside of any contractual relationship, creates tort liability that does not arise under the insurers' policies.

The trial court did not err in ruling in favor of the insurers on Pikover's bad faith cause of action. As a preliminary matter, no private right of action exists for any alleged violation by an insurer of statutory duties under section 790.03, subdivision (h). (*Moradi-Shalal v. Fireman's Fund. Ins. Companies* (1988) 46 Cal.3d 287, 292, 304.) Of the cases cited by Pikover, only *Murphy v. Allstate Ins. Co.* (1978) 83 Cal.App.3d 38 (*Murphy*) and *Frazier v. Metropolitan Life Ins. Co.* (1985) 169 Cal.App.3d 90 support the argument a cause of action in tort for breach of the

implied covenant of good faith and fair dealing does not arise under the policy. But both *Murphy* and *Frazier* have been rejected in more recent cases to the extent they relied on the nature of the bad faith cause of action as sounding in tort to conclude the cause of action did not arise under the policy. (See, e.g., *Jang v. State Farm Fire & Casualty Co.* (2000) 80 Cal.App.4th 1291, 1301 ["[t]o the extent that *Murphy* and *Frazier* stand for the proposition that an insured may avoid the policy's statute of limitations by simply recasting contractual claims as claims sounding in tort . . . *Murphy* and *Frazier* were wrongly decided"; "the *Frazier* court's reliance on the hybrid nature of bad faith actions in reaching its result has been thoroughly discredited by subsequent courts"].)

Since the decisions in *Murphy* and *Frazier*, courts have considered whether "the gravamen of the bad faith action pertained to the insurer's handling of the initial claim for loss" and held "that where the bad faith action is based on allegations relating to the handling of a claim or the manner in which it is processed, it is an action 'on the policy.'" (*Velasquez v. Truck Ins. Exchange* (1991) 1 Cal.App.4th 712, 719-720; see, e.g., *Lawrence v. Western Mutual Ins. Co.* (1988) 204 Cal.App.3d 565, 575.) If "the essence" of a cause of action "is an attempt to recover '[d]amages for failure to provide benefits under subject contract of insurance,'" the cause of action is "'fundamentally a claim on the policy.'" (*Magnolia Square Homeowners Assn. v. Safeco Ins. Co.* (1990) 221 Cal.App.3d 1049, 1063.) Thus, "[w]here denial of the claim in the first instance is the alleged bad faith and the insured seeks policy benefits, the bad faith action is on the policy." (*Velasquez*, at p. 721.) The fact the insured seeks damages other than policy benefits does not require a contrary finding. The

inquiry is whether the damages sought are derived from the handling of the claim. (See *Jang v. State Farm Fire & Casualty Co.*, *supra*, 80 Cal.App.4th at p. 1303 [although an action seeking damages recoverable under the policy constitutes an action on the policy, "the mere fact that appellant's causes of action sound in tort, thereby entitling her to seek punitive damages, is insufficient to transform her action into an action outside of the policy"]; *Prieto v. State Farm Fire & Casualty Co.* (1990) 225 Cal.App.3d 1188, 1191, 1196 [concluding plaintiffs' bad faith cause of action based on insurer's failure to pay benefits—which alleged a variety of damages other than policy benefits including loss of business income and loss of credit—and plaintiffs' cause of action for intentional infliction of emotional distress—which alleged plaintiffs suffered severe emotional distress and entitlement to punitive damages as a result of the insurer's denial of coverage—both constituted actions on the policy]; *Velasquez*, at p. 722 [holding a bad faith action based on denial of a claim constituted an action on the policy even though the insureds sought not just policy benefits but other damages; the additional damages sought by the insureds related to denial of their claim and wrongful cancellation of the policy].)

Here, the gravamen of Pikover's cause of action for breach of the implied covenant of good faith and fair dealing is UFCC's and Liberty Mutual's handling of his uninsured motorist claims under the policies—specifically, their delay in paying and refusal to pay policy benefits. Pikover's bad faith cause of action is thus on, or arises under, the policies of the two insurers. For example, at paragraph 32 Pikover alleges the insurers unreasonably withheld benefits due under the respective policies. At paragraph 39 he alleges he did not receive the benefits of his

insurance contract because his valid claim was not settled by either of the insurers. At paragraph 40 Pikover alleges he incurred damages "[a]s a result of" the insurers' "refusal to pay on the claim." As the cases cited in the preceding paragraph explain, that Pikover alleges damages resulting from the insurers' refusal to pay on his uninsured motorist claim that may not constitute benefits under the policy, such as punitive damages, does not alter the conclusion Pikover's bad faith cause of action arises under each insurer's policy.

Pikover disputes this analysis, contending wrongdoing by the insurers occurring after his loss caused damages unrelated to any insured risk and, therefore, are not recoverable "under the policy." Pikover appears to base this contention on dicta in *Abari v. State Farm Fire & Casualty Co.* (1988) 205 Cal.App.3d 530, 536.[16] But the court in *Abari* was merely quoting language from *Murphy.*, *supra*, 83 Cal.App.3d 38, which, as discussed and like *Frazier v. Metropolitan Life Ins. Co.*, *supra*, 169 Cal.App.3d 90, other courts have declined to follow. (See, e.g., *Jang v. State Farm Fire & Casualty Co.*, *supra*, 80 Cal.App.4th at pp. 1298-1302.)

Murphy is, in any event, distinguishable. In *Murphy* the alleged wrongdoing by the insurer was not denial of coverage under the policy. Instead, the insurer was sued for its actions

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[16] The court of appeal in *Abari v. State Farm Fire & Casualty Co.*, *supra*, 205 Cal.App.3d at page 536 affirmed an order of dismissal following the sustaining of a demurrer to Abari's second amended complaint, holding Abari's "bad faith and unfair practices claims are a transparent attempt to recover *on the policy*, notwithstanding his failure to commence suit within one year of accrual."

occurring after it had accepted policy coverage—specifically, for hiring unqualified and incompetent persons and firms who performed shoddy restoration and repair work and then filing an interpleader action when some of these same person(s) and firm(s) claimed entitlement to sums admittedly due the insureds. (See *Murphy*, *supra*, 83 Cal.App.3d at pp. 41-43, 46-47.)

Causes of action for bad faith denial of insurance coverage necessarily allege wrongdoing by the insurers occurring after the loss triggering coverage. Thus, while some types of insurer wrongdoing after the loss may not give rise to claims "under the policy," other allegations of bad faith misconduct, including, as here, charges that the insurer improperly denied coverage, do. (See, e.g., *Velasquez v. Truck Ins. Exchange, supra,* 1 Cal.App.4th at p. 722 ["Appellants claim that their action for wrongful cancellation of the policy and denial of their claim refers to events occurring before and after the loss and is not, therefore, an action on the policy. This assertion does not withstand close scrutiny"].)

There is no merit to Pikover's additional suggestion that the fact his bad faith claim was based on the insurers' denial of coverage, which occurred more than two years after the accident, rendered impossible his compliance with section 11580.2, subdivision (i)'s preconditions for accrual of this cause of action. As discussed, in his January 2014 settlement demand to UFCC, Pikover claimed damages of at least $475,000. Separate from issues of liability and coverage, neither UFCC nor Liberty Mutual agreed with Pikover as to the amount of his loss. A denial of coverage, therefore, was not necessary for Pikover to demand arbitration during the statutory two-year period (that is, prior to January 11, 2015) to determine the amount of damages

to which he might be entitled for his injuries. *Spear v. California State Auto. Assn.*, *supra*, 2 Cal.4th 1035 illustrates the point.

In *Spear* the Supreme Court held the insured's cause of action to compel arbitration against his insurer for refusal to settle his uninsured motorist claim did not accrue until the insurer refused to arbitrate, not when the insured had earlier satisfied section 11580.2, subdivision (i). The Supreme Court explained, "[W]hile . . . cases agree that the one-year period within which the insured must act to preserve his or her cause of action cannot be extended or tolled, they do not state that accrual occurs, and the statute of limitations begins to run, at the time that one of the preconditions of section 11580.2, subdivision (i) is met." (*Spear v. California Auto. Assn.*, *supra*, 2 Cal.4th at p. 1041.)[17] The Supreme Court's decision thus envisioned a cause of action could accrue through events separate from, and occurring after, compliance with the preconditions of section 11580.2, subdivision (i).

Because Pikover's cause of action for breach of the implied covenant of good faith and fair dealing arises under UFCC's and Liberty Mutual's uninsured motorist policies, the requirements of section 11580.2, subdivision (i), applied to his second cause of action, as well as to his first. Because he failed to satisfy those requirements, summary judgment was properly granted in favor of UFCC and Liberty Mutual.

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[17] The Supreme Court noted that, while section 11580.2, subdivision (i), establishes preconditions to accrual, "it does not state a *time* of accrual." (*Spear v. California State Auto Assn.*, *supra*, 2 Cal.4th at p. 1041.)

DISPOSITION

The judgments are affirmed. UFCC and Liberty Mutual are to recover their costs on appeal.

PERLUSS, P. J.

We concur:

SEGAL, J.

FEUER, J.