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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

WAYNE B. LEW et al., Plaintiffs and Appellants, v. STATE FARM GENERAL INSURANCE COMPANY, Defendant and Respondent.	B282790 (Los Angeles County Super. Ct. No. BC633116)

APPEAL from a judgment of the Superior Court of Los Angeles County. Rafael A. Ongkeko, Judge. Affirmed.

Shernoff Bidart Echeverria LLP, Michael J. Bidart, Ricardo Echeverria, Steven Schuetze; and Howard S. Shernoff for Plaintiffs and Appellants.

Pacific Law Partners, LLP, Clarke B. Holland and Jenny J. Chu for Defendant and Respondent.

In an underlying lawsuit, a jury found appellants Wayne B. Lew, Maria M. Lew, and the Lew Family Trust (the Lews) liable for over $2.3 million in damages stemming from a tragic fire that killed two people. Under two applicable insurance policies, the Lews' insurance company, respondent State Farm General Insurance Company (State Farm), defended the Lews in the underlying lawsuit and unsuccessfully offered to settle that lawsuit before trial for $1 million. The Lews believed State Farm was obligated to accept the plaintiffs' competing offers to settle the underlying lawsuit for $1.5 million, which State Farm refused to do.

As a result of State Farm's refusal to settle the underlying lawsuit for $1.5 million, the Lews brought the instant action for breach of contract, breach of the implied covenant of good faith and fair dealing, and declaratory relief. The Lews alleged the applicable liability limit of each State Farm policy combined to create a total liability limit of $1.5 million. State Farm disagreed and instead argued the two policies carried a maximum $1 million liability limit applicable to the underlying lawsuit. The trial court agreed with State Farm and sustained State Farm's demurrer to the first amended complaint without leave to amend. The Lews appealed the ensuing judgment.

As discussed below, we conclude the two applicable State Farm insurance policies provided a maximum liability limit of $1 million applicable to the underlying lawsuit. As a result, we affirm.

BACKGROUND

Because this case comes to us after the trial court sustained State Farm's demurrer without leave to amend, the following factual background is taken from the operative complaint and documents attached to that complaint.

1. The Insurance Policies[1]

a. The Rental Policy ($500,000 Liability Limit)

In early 2011, the Lews renewed their "Rental Dwelling Policy" with State Farm (Rental Policy). The Rental Policy provided both property and business liability insurance for a home located in Hacienda Heights that the Lews owned and rented to others (Hacienda Heights property). The Rental Policy was divided into two general "sections"—section I detailed the property insurance coverage and section II detailed the business liability insurance coverage. The relevant liability limit under the Rental Policy was $500,000 per occurrence. Under the Rental Policy, State Farm was obligated to defend the Lews against any claim or lawsuit filed seeking damages under the policy.

The Rental Policy included an "other insurance" provision. The "other insurance" provision was the last paragraph of section II's "conditions" and stated in full: "8. Other Insurance – Coverage L – Business Liability. This insurance is excess over any other valid and collectible insurance except insurance written specifically to cover as excess over the limits of liability that apply in this policy."

b. The Apartment Policy ($1 Million Liability Limit)

Later in 2011, the Lews also renewed their "Apartment Policy" with State Farm (Apartment Policy). The Apartment Policy not only provided property insurance coverage for an apartment complex located in Whittier that the Lews owned but it also provided business liability insurance coverage for injuries caused by "occurrences" that took place in the "coverage territory." The Apartment Policy defined "coverage territory" to include the United States. Thus, the Hacienda Heights property

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[1] In the record before us, certain parts of the insurance policies are difficult to read or are missing letters. The parties do not dispute that the policies are written as stated here.

fell within the coverage territory for the Apartment Policy. The relevant liability limit under the Apartment Policy was $1 million. Under the Apartment Policy, State Farm was obligated to defend any claim or lawsuit seeking payment under the policy.

Although like the Rental Policy, the Apartment Policy included an "other insurance" provision, the Apartment Policy's "other insurance" provision differed from that in the Rental Policy. The Apartment Policy's "other insurance" provision had three parts, only the second and third of which are relevant here. The second part was an "anti-stacking" clause and stated: "(2) The total insurance provided under Coverage L – Business Liability and any other policy written by us will not exceed the largest limit of insurance applicable under any one of these policies written by us." The third part provided an exception to the "anti-stacking" clause and stated: "(3) [Item (2) above does] not apply to insurance written specifically [as ex]cess to cover over the Limits of Insurance applicable to Section II of this policy."[2]

2. The Underlying Lawsuit

a. August 2011 Fire and Ensuing Litigation

On August 21, 2011, a fire at the Hacienda Heights property killed a 49-year-old woman and a 3-year-old boy. After the fire, it was discovered that the Lews had failed to install smoke and carbon monoxide detectors at the Hacienda Heights property as required by law.

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[2] The first part of the Apartment Policy's "other insurance" clause was similar to that in the Rental Policy, except that it concerned only insurance written by insurers other than State Farm: "(1) The insurance provided under Coverage L – Business Liability is excess insurance over any other insurance not written by us which would apply if this policy had not been written." Thus, that part is not relevant here because we address only policies written by State Farm.

The decedents' heirs (plaintiffs) sued the Lews for damages related to the two deaths (underlying lawsuit). Both the Rental Policy and Apartment Policy were in effect when the fire occurred. State Farm hired counsel to defend the Lews in the underlying lawsuit. At some point before trial, the Lews also retained "a personal, independent attorney" (private counsel).

b. Attempts to Settle

Plaintiffs' counsel along with both the Lews' private counsel and State Farm appointed counsel all agreed the Lews faced significant liability in the underlying lawsuit well in excess of $1.5 million.

Thus, prior to trial, and in compliance with Code of Civil Procedure section 998 (section 998), plaintiffs twice offered to settle the underlying lawsuit for $1.5 million. Plaintiffs arrived at the $1.5 million amount by combining the liability limits of both the Rental Policy ($500,000) and the Apartment Policy ($1 million). Based on their reading of the two policies, plaintiffs believed State Farm was responsible for the combined amount of $1.5 million in coverage. Prior to making their second settlement offer, plaintiffs retained a separate law firm to issue a coverage opinion letter on the matter. The coverage firm agreed with plaintiffs' interpretation of the two policies and opined that State Farm's liability was the combined policy limits totaling $1.5 million.

The Lews' private counsel also agreed with plaintiffs' interpretation of the two insurance policies and repeatedly implored State Farm to accept the plaintiffs' $1.5 million settlement offer "in order to protect [the Lews] from a potential excess verdict."

State Farm steadfastly disagreed. Through its own counsel, and not through either counsel representing the Lews, State Farm asserted that its maximum coverage exposure for the underlying lawsuit was $1 million. Citing to the anti-stacking clause in the Apartment Policy, State Farm repeatedly argued

the Rental Policy limit and the Apartment Policy limit could not be stacked. As a result, State Farm did not accept either of plaintiffs' $1.5 million settlement offers. Instead, the Lews' State Farm appointed defense counsel offered to settle the underlying lawsuit for $1 million, which State Farm believed to be its liability limit. The plaintiffs did not accept that offer.

Eventually, prior to trial, the parties participated in mediation. Plaintiffs again offered to settle the case for $1.5 million (after first offering $2.5 million at the start of mediation). And the Lews' State Farm appointed counsel continued to offer $1 million. The parties could not agree and the case proceeded to trial.

c. Excess Verdict and Appeal

The jury returned a verdict in favor of the plaintiffs. The resulting judgment, including costs, totaled over $2.8 million. State Farm paid $1 million toward the verdict. In exchange for plaintiffs' agreement not to execute on the judgment until completion of the Lews' coverage lawsuit against State Farm (i.e., the instant case), the Lews paid $500,000 toward the judgment. Thus, $1.5 million of the judgment has been satisfied.

Although the Lews did not challenge on appeal the jury's verdict against them in the underlying lawsuit, they did appeal the trial court's award of costs under section 998. Earlier this year, Division Three of this court affirmed the trial court's award of costs. (*Gonzalez v. Lew* (2018) 20 Cal.App.5th 155.)

3. The Instant Lawsuit

Following the judgment against them in the underlying lawsuit, the Lews filed the instant lawsuit against State Farm. After State Farm successfully demurred to the original complaint, the Lews filed a first amended complaint, which is the operative complaint. The Lews alleged three causes of action against State Farm: (i) breach of contract, (ii) breach of the implied covenant of good faith and fair dealing, and (iii) declaratory relief.

More particularly, the Lews alleged the Apartment Policy provided primary coverage for the underlying lawsuit while the Rental Policy provided "coverage in excess of the Apartment Policy." The Lews claimed State Farm breached its contractual obligations to them by failing to settle the underlying lawsuit for $1.5 million, which the Lews alleged constituted the applicable policy limits. Specifically, the Lews claimed that State Farm was obligated to pay, but failed to pay, plaintiffs the combined maximum coverage amounts of both policies—$500,000 under the Rental Policy and $1 million under the Apartment Policy. The Lews also claimed State Farm breached its duty of good faith and fair dealing by, among other things, failing to accept plaintiffs' offers to settle the underlying lawsuit, placing its interests above those of the Lews, and failing to pay the entire verdict. Finally, the Lews requested a judicial determination that the available policy limits for the underlying lawsuit were $1.5 million and not the $1 million as argued by State Farm.

The Lews attached the Rental Policy and all but the declarations pages of the Apartment Policy to the first amended complaint. State Farm later provided the missing declarations pages as an attachment to its demurrer papers. The Lews also attached to their first amended complaint correspondence between the various attorneys involved in the underlying lawsuit detailing the failed settlement negotiations.

The trial court sustained State Farm's demurrer to the first amended complaint without leave to amend. The court found there was no ambiguity in the relevant policy language and held that the Lews' "claim for breach of contract fails as a matter of law based on the interpretation of the insurance policies. Given the failure of [the Lews'] underlying claim for breach of contract, their bad faith and declaratory relief claims also fail." In its ruling, the trial court stated: "The existence of an 'other insurance' clause in an otherwise primary policy of insurance does not transform that policy into a specific excess policy to

another policy covering the same risk." In addition, the court held that, assuming the Lews correctly alleged the Apartment Policy was the primary policy and the Rental Policy was an excess policy, the Lews' claims still failed. The trial court determined that the Rental Policy did not fall within the one exception to the Apartment Policy's anti-stacking clause because "[i]t is clear from [the] policy itself that the Rental Policy was not written *specifically* as excess to the Apartment Policy." Finally, because they were contradicted by the documents attached to the first amended complaint, the trial court rejected the Lews' allegations that State Farm was estopped from denying that the Rental Policy was excess to the Apartment Policy.

Following its order sustaining State Farm's demurrer without leave to amend, the trial court entered an order of dismissal and judgment in favor of State Farm. The Lews appealed.

DISCUSSION

1. Standard of Review

"On appeal from an order of dismissal after an order sustaining a demurrer, the standard of review is de novo: we exercise our independent judgment about whether the complaint states a cause of action as a matter of law." (*Stearn v. County of San Bernardino* (2009) 170 Cal.App.4th 434, 439.) In determining whether the Lews "stated a claim for relief, our standard of review is clear: ' "We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. . . ." Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context.' " (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126 (*Zelig*).) "Additionally, to the extent the factual allegations conflict with the content of the exhibits to the complaint, we rely on and accept as true the contents of the exhibits and treat as surplusage the pleader's allegations as to the legal effect of the exhibits."

(*Barnett v. Fireman's Fund Ins. Co.* (2001) 90 Cal.App.4th 500, 505 (*Barnett*).)

" 'When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff.' " (*Zelig*, *supra*, 27 Cal.4th at p. 1126.)

2. Applicable Law

a. Contract Interpretation

"In general, interpretation of an insurance policy is a question of law that is decided under settled rules of contract interpretation. [Citations.] ' "While insurance contracts have special features, they are still contracts to which the ordinary rules of contractual interpretation apply." [Citations.]' [Citation.] 'The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties.' [Citations.] 'Such intent is to be inferred, if possible, solely from the written provisions of the contract.' [Citations.] 'If contractual language is clear and explicit, it governs.' [Citation.] ' "The 'clear and explicit' meaning of these provisions, interpreted in their 'ordinary and popular sense,' unless 'used by the parties in a technical sense or a special meaning is given to them by usage' ([Civ. Code,] § 1644), controls judicial interpretation. (*Id.*, § 1638.)" ' " (*State of California v. Continental Ins. Co.* (2012) 55 Cal.4th 186, 194–195 (*Continental Ins.*).) "Courts must interpret contractual language in a manner which gives force and effect to *every* provision, and not in a way which renders some clauses nugatory, inoperative or meaningless." (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 473 (*City of Atascadero*); Civ. Code, § 1641.) " 'The policy

should be read as a layman would read it and not as it might be analyzed by an attorney or an insurance expert.' " (*Employers Reinsurance Corp. v. Phoenix Ins. Co.* (1986) 186 Cal.App.3d 545, 554 (*Employers Reinsurance*).)

" 'A policy provision will be considered ambiguous when it is capable of two or more constructions, both of which are reasonable.' [Citations.] A term is not ambiguous merely because the policies do not define it. [Citations.] Nor is it ambiguous because of '[d]isagreement concerning the meaning of a phrase,' or ' "the fact that a word or phrase isolated from its context is susceptible of more than one meaning." ' [Citation.] ' "[L]anguage in a contract must be construed in the context of that instrument as a whole, and in the circumstances of that case, and cannot be found to be ambiguous in the abstract." ' (*Continental Ins.*, *supra*, 55 Cal.4th at p. 195.) An insured's expectations cannot create an ambiguity where none exists. (*General Reinsurance Corp. v. St. Jude Hospital* (2003) 107 Cal.App.4th 1097, 1108.)

" 'If an asserted ambiguity is not eliminated by the language and context of the policy, courts then invoke the principle that ambiguities are generally construed against the party who caused the uncertainty to exist (i.e., the insurer) in order to protect the insured's reasonable expectation of coverage.' " (*Continental Ins.*, *supra*, 55 Cal.4th at p. 195.) " 'Any ambiguity or uncertainty in an insurance policy is to be resolved against the insurer.' " (*Employers Reinsurance*, *supra*, 186 Cal.App.3d at pp. 553–554.) Thus, "[t]he general rule is that if coverage is available under any reasonable interpretation of an ambiguous clause of an insurance policy, the insurer cannot escape its obligations." (*Chamberlin v. Smith* (1977) 72 Cal.App.3d 835, 844 (*Chamberlin*).)

Nonetheless, "an insurance company has an unquestionable right to limit the coverage of the policy issued by it; and, when it has done so, the plain language of the limitation

must be respected. [Citations.] When the noncoverage clause appears in clear and conspicuous terms in the policy, it must be given effect." (*Chamberlin*, supra, 72 Cal.App.3d at p. 850.) " 'An exclusionary clause must be conspicuous, plain and clear.' " (*Employers Reinsurance*, *supra*, 186 Cal.App.3d at p. 554.)

b. Primary and Excess Insurance Coverage

Primary insurance and excess insurance provide different levels of insurance coverage. On the one hand, "[p]rimary insurance is coverage under which liability 'attach[es] to the loss immediately upon the happening of the occurrence.' " (*North River Ins. Co. v. American Home Assurance Co.* (1989) 210 Cal.App.3d 108, 112 (*North River*).) On the other hand, excess insurance is coverage under which liability "attaches only after all primary coverage has been exhausted." (*Ibid.*) When excess insurance "is written to be excess to identified policies, it is said to be 'specific excess.' " (*Olympic Ins. Co. v. Employers Surplus Lines Ins. Co.* (1981) 126 Cal.App.3d 593, 598 (*Olympic Ins.*).)

"Apart from these classifications, however, several policies applicable to the same loss may be deemed 'primary' or 'excess' with respect to each other depending on a variety of factors including statutory presumptions, the 'other insurance' clauses of the policies, etc., regardless of whether the policy is classified as 'primary' or 'specific excess.' In this context, a 'primary' type policy which is excess to another 'primary' type policy may be termed an 'incidental excess' policy since it is designed to be primary but is only incidentally excess by reason of the existence of other coverage; in contrast to a 'specific excess' (umbrella) policy which is specifically intended to be an excess policy." (*Hartford Accident & Indemnity Co. v. Sequoia Ins. Co.* (1989) 211 Cal.App.3d 1285, 1296 (*Hartford Accident & Indemnity*).)

c. "Other Insurance" Clauses

When two or more policies apply at the same level of coverage, as is the case here, problems can arise. "Most insurance contracts include some provision attempting to limit

the insurer's liability in the event that another insurance policy covers the same loss. [¶] There are several typical forms of 'other insurance' clauses: [¶] 1. Pro rata. This clause provides that if there is other valid and collectible insurance, then the insurer shall not be liable for more than his pro rata share of the loss. [¶] 2. Excess. This clause provides that if there is other valid and collectible insurance, then the insurer shall not be liable except to the extent that the loss exceeds such other valid and collectible insurance (i.e., this policy shall be excess to other valid and collectible insurance). [¶] 3. Escape. This clause provides that the insurer is not liable for any loss that is covered by other insurance (i.e., the existence of other insurance extinguishes insurer's liability to the extent of such other insurance)." (*Olympic Ins.*, *supra*, 126 Cal.App.3d at p. 598.)

Generally, courts are skeptical of "other insurance" clauses that purport to limit or bar an insurer's coverage liability at the expense of the insured. Although historically "other insurance" clauses " 'were designed to prevent multiple recoveries when more than one policy provided coverage for a particular loss[,]' . . . 'other insurance' clauses that attempt to shift the burden away from one primary insurer wholly or largely to other insurers have been the objects of judicial distrust. '[P]ublic policy disfavors "escape" clauses, whereby coverage purports to evaporate in the presence of other insurance. [Citations.] This disfavor should also apply, to a lesser extent, to excess-only clauses, by which carriers seek exculpation whenever the loss falls within another carrier's policy limit.' [Citations.] Partly for this reason, the modern trend is to require equitable contributions on a pro rata basis from all primary insurers regardless of the type of 'other insurance' clause in their policies." (*Dart Industries, Inc. v. Commercial Union Ins. Co.* (2002) 28 Cal.4th 1059, 1079–1080.)

Thus, in certain circumstances, courts essentially ignore "other insurance" clauses. For example, courts have refused to enforce such clauses in cases where two primary insurance

policies not only cover the same loss but also include "other insurance" provisions that purport to make each policy excess to the other. "Under these circumstances California courts have consistently ignored the conflicting clauses and prorated the loss among the primary insurers." (*Olympic Ins.*, *supra*, 126 Cal.App.3d at p. 599.) " ' "[T]he general rule, when multiple policies share the same risk but have inconsistent 'other insurance' clauses, is to prorate according to the policy limits." ' " (*Century Surety Co. v. United Pacific Ins. Co.* (2003) 109 Cal.App.4th 1246, 1258.)

3. The trial court correctly sustained State Farm's demurrer without leave to amend with respect to the Lews' breach of contract cause of action.

"[T]he elements of a cause of action for breach of contract are (1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff." (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821.) As we discuss below, the Lews cannot demonstrate that State Farm breached either the Rental Policy or the Apartment Policy. Accordingly, the trial court properly sustained State Farm's demurrer as to the breach of contract cause of action.

a. Both the Rental Policy and Apartment Policy provide primary business liability insurance coverage.

As a matter of contract interpretation, we conclude the Rental Policy and the Apartment Policy are both primary insurance policies. This conclusion cannot reasonably be disputed. It is clear the business liability coverage under both the Rental Policy and the Apartment Policy was intended to apply immediately to losses suffered as a result of the fire at the Hacienda Heights property. The Rental Policy took effect in February 2011 and provided primary coverage specific to the Hacienda Heights property. The Apartment Policy took effect in

June 2011 and, although not specific to the Hacienda Heights property, provided primary coverage for a broad "territory" (i.e., the United States) within which the Hacienda Heights property fell. Thus, the August 2011 fire and resulting damages immediately triggered the Lews' business liability coverage under both the Rental Policy and the Apartment Policy.

Although in the first amended complaint the Lews allege the Rental Policy was an excess policy, these allegations neither control nor change our interpretation of that policy. On review of an order sustaining a demurrer, we do not "accept the truth of contentions or conclusions of fact or law" as stated in the complaint. (*Barnett*, *supra*, 90 Cal.App.4th at p. 505.) Rather, "we rely on and accept as true the contents of the exhibits and treat as surplusage the pleader's allegations as to the legal effect of the exhibits." (*Ibid.*) Moreover, in an apparent about face, the Lews state in their reply brief on appeal that the "policies cover the same risk at the same level of insurance." Thus, it appears the Lews now concede the conclusion that both policies provide primary level insurance coverage.

b. The Apartment Policy's anti-stacking provision explicitly prohibits combining the maximum available coverage of the Rental Policy ($500,000) with the maximum available coverage of the Apartment Policy ($1 million).

By renewing the Apartment Policy, the Lews purchased primary insurance coverage for the Hacienda Heights property in addition to that provided by the Rental Policy. Importantly, however, the second part of the Apartment Policy's "other insurance" provision explicitly limited that additional primary insurance coverage to the "largest limit of insurance applicable under any one of" the policies written by State Farm. Here, there were two applicable policies written by State Farm—the Rental Policy and the Apartment Policy. The largest limit of insurance applicable under those two policies was the Apartment Policy's

$1 million liability limit. Thus, under the express terms of the Apartment Policy, State Farm's exposure in the underlying lawsuit was capped at $1 million.

As noted above, "an insurance company has an unquestionable right to limit the coverage of the policy issued by it; and, when it has done so, the plain language of the limitation must be respected. [Citations.] When the noncoverage clause appears in clear and conspicuous terms in the policy, it must be given effect." (*Chamberlin*, *supra*, 72 Cal.App.3d at p. 850.) We conclude the Apartment Policy's anti-stacking clause is " 'conspicuous, plain and clear' " and, therefore, must be given effect. (*Employers Reinsurance*, *supra*, 186 Cal.App.3d at p. 554.)

c. The Apartment Policy's one exception to its anti-stacking provision does not apply here.

The Apartment Policy provided one exception to its anti-stacking provision. As noted above, the third part of the Apartment Policy's "other insurance" provision allowed stacking with other insurance that was "written specifically [as ex]cess to cover over the Limits of Insurance applicable to Section II of this policy." Thus, if the Lews had valid excess insurance that was written specifically to cover over the comprehensive business liability limit of the Apartment Policy, the coverage of that specific excess insurance could have been stacked or combined with the Apartment Policy's $1 million liability limit. The Lews argue strenuously that the Rental Policy's "other insurance" provision qualified as such excess insurance. We do not agree.

As we concluded above, and as the Lews seem to concede on appeal, the Rental Policy is a primary insurance policy. Thus, in order for the Lews' stacking argument to succeed, we must interpret the Rental Policy's "other insurance" provision as transforming the otherwise primary policy into a specific excess policy. This we cannot do.

First, an "other insurance" provision does not transform a primary policy into an excess policy. (*North River*, *supra*, 210

Cal.App.3d at p. 113.) Although in certain circumstances, by virtue of its "other insurance" provision, the Rental Policy may provide incidental excess coverage, such excess coverage is not the same as specific excess coverage. (*Hartford Accident & Indemnity*, *supra*, 211 Cal.App.3d at p. 1296.)

Second, this case is factually distinct from cases on which the Lews rely. (E.g., *Olympic Ins.*, *supra*, 126 Cal.App.3d at p. 599; *American Motorists Ins. Co. v. Underwriters at Lloyd's London Subscribing Certificates etc.* (1964) 224 Cal.App.2d 81, 87 (*American Motorists*).) Although those cases are similar to this case in that multiple primary insurance policies covered the same risk, those cases differ from this case in that the "other insurance" provisions there were irreconcilable and the conflicting policies were written by different insurers. For example, in *Olympic Ins.*, the two primary insurance policies contained excess "other insurance" clauses that purported "to be excess to each other, and if the terms of each policy are enforced, the insured is deprived of protection." (126 Cal.App.3d at p. 599.) Similarly, in *American Motorists*, two primary policies purported "to be excess insurance over the other, thus creating a situation impossible of literal resolution." (224 Cal.App.2d at p. 87.) As noted above, in such circumstances, courts ignore the competing "other insurance" clauses and prorate the liability amongst the various primary insurers. (*Olympic Ins.*, *supra*, 126 Cal.App.3d at p. 599; *Fireman's Fund Ins. Co. v. Maryland Casualty Co.* (1998) 65 Cal.App.4th 1279, 1304–1305 ["where two or more primary insurers' policies contain excess 'other insurance' clauses purporting to be excess to each other, the conflicting clauses will be ignored and the loss prorated among the insurers on the ground the insured would otherwise be deprived of protection"].)

In contrast, here, the "other insurance" provisions in the Rental and Apartment Policies do not purport to be excess to the other such that their enforcement would result in no coverage to the Lews and multiple insurers would escape their contractual

obligations to their insureds. Rather, the Rental Policy's "other insurance" provision is fairly generic, while the Apartment Policy's "other insurance" clause more specifically states that, in certain circumstances applicable here, State Farm will provide coverage but limit that coverage to the maximum amount provided by any one of its own policies that apply to the same loss. And in contrast to the "other insurance" cases on which the Lews rely, this case does not concern the equitable distribution of liability coverage amongst different insurers. Instead, we are concerned only with State Farm's obligations to the Lews under its own policies. State Farm conspicuously and unambiguously limited its coverage in certain circumstances applicable here, which State Farm "has an unquestionable right" to do. (*Chamberlin*, *supra*, 72 Cal.App.3d at p. 850.)

Finally, and importantly, as State Farm accurately explains, the Lews proffer an incomplete reading of the Apartment Policy's one exception to its anti-stacking clause. According to the Lews, in order to fall within the anti-stacking exception, the only requirement is insurance "written specifically as excess." The Lews claim the Rental Policy's "other insurance" provision is written specifically as excess coverage. This reading is incomplete, however, because it disregards the remainder of the Apartment Policy's anti-stacking exception, which requires the appropriate insurance not only to be "written specifically [as ex]cess" but also "to cover over the Limits of Insurance applicable to Section II [i.e., business liability] of this policy." Indeed, the Lews concede that their interpretation of the anti-stacking exception makes a portion of it "arguably superfluous." As such, it is an interpretation that cannot stand. (*City of Atascadero*, *supra*, 68 Cal.App.4th at p. 473; Civ. Code, § 1641.)

Neither the Rental Policy as a whole nor its "other insurance" provision is ambiguous and neither can reasonably be interpreted to have been written specifically as excess insurance over the Apartment Policy's business liability coverage. Although

the Rental Policy's "other insurance" provision clearly states the Rental Policy "is excess over any other valid and collectible insurance" that language is general and not specific to any policy let alone the Apartment Policy. Thus, as a matter of contract interpretation, neither the Rental Policy as a whole nor its "other insurance" provision falls within the exception to the Apartment Policy's anti-stacking prohibition. And as a result, the two policy limits cannot be stacked.

4. The trial court correctly sustained State Farm's demurrer without leave to amend with respect to the Lews' remaining claims.

a. Breach of the Implied Covenant of Good Faith and Fair Dealing

"An insurer is said to act in 'bad faith' when it not only breaches its policy contract but also breaches its implied covenant to deal fairly and in good faith with its insured. 'A covenant of good faith and fair dealing is implied in every insurance contract. [Citations.] The implied promise requires each contracting party to refrain from doing anything to injure the right of the other to receive the agreement's benefits. To fulfill its implied obligation, an insurer must give at least as much consideration to the interests of the insured as it gives to its own interests. When the insurer unreasonably and in bad faith withholds payment of the claim of its insured, it is subject to liability in tort.' " (*Jordan v. Allstate Ins. Co.* (2007) 148 Cal.App.4th 1062, 1071–1072 (*Jordan*).)

"Before an insurer can be found to have acted in bad faith for its delay or denial in the payment of policy benefits, it must be shown that the insurer acted *unreasonably* or *without proper cause*. Where there is a *genuine issue* as to the insurer's liability under the policy for the claim asserted by the insured, there can be no bad faith liability imposed on the insurer for advancing its side of that dispute. [Citation.] Moreover, it must be remembered that 'an insurer is not required to pay every claim

presented to it. Besides the duty to deal fairly with the insured, the insurer also has a duty to its other policyholders and to the stockholders (if it is such a company) not to dissipate its reserves through the payment of meritless claims. Such a practice inevitably would prejudice the insurance seeking public because of the necessity to increase rates, and would finally drive the insurer out of business.' " (*Jordan*, *supra*, 148 Cal.App.4th at p. 1072.) Thus, an " 'insurer has a duty to accept a reasonable settlement offer only with respect to a *covered* claim' (i.e., a claim for which the insurer owes the insured a duty of indemnity). [Citation.] The failure of a liability insurer to perform its implied duty to accept a reasonable settlement offer of a covered claim gives rise to a claim for the insured against the insurer for breach of the covenant of good faith and fair dealing, or a 'bad faith' claim, based on the insurer's refusal to settle the third party claim." (*DeWitt v. Monterey Ins. Co.* (2012) 204 Cal.App.4th 233, 236.)

It is well known that "an insurer who refuse[s] a reasonable settlement offer, on the ground of no coverage, does so at its own risk, so that the insurer has no defense that its refusal was in good faith if coverage is, in fact, found." (*Marie Y. v. General Star Indemnity Co.* (2003) 110 Cal.App.4th 928, 958. See also *Johansen v. California State Auto. Assn. Inter-Ins. Bureau* (1975) 15 Cal.3d 9, 19 (*Johansen*); *Archdale v. American Internat. Specialty Lines Ins. Co.* (2007) 154 Cal.App.4th 449, 465 (*Archdale*).)

Here, as noted above, State Farm refused to accept plaintiffs' repeated offers to settle the underlying lawsuit for $1.5 million. It is undisputed that $1.5 million was a reasonable settlement offer given the potential liability facing the Lews in the underlying lawsuit. However, State Farm's refusals were not based on a belief that the settlement offers were unreasonable. Rather, State Farm took the position that the settlement offers exceeded its liability on the underlying claims by $500,000.

Indeed, State Farm offered to settle the underlying lawsuit for what it believed to be its full liability limit of $1 million. As the Lews correctly state, State Farm took this position at its own risk. If State Farm's settlement position turned out to be incorrect—i.e., State Farm in fact was liable for the combined $1.5 million of liability under the Rental and Apartment Policies—State Farm would have been liable for the entire excess judgment against the Lews. (*Johansen*, *supra*, 15 Cal.3d at p. 12; *Archdale*, *supra*, 154 Cal.App.4th at p. 465.)

However, that is not what transpired. Rather, as discussed above, State Farm's coverage position was correct—namely, the Rental Policy and Apartment Policy together afforded the Lews a total of $1 million in coverage for the underlying lawsuit. Thus, because the plaintiffs' settlement offers exceeded State Farm's coverage liability, State Farm did not act in bad faith in refusing to accept those offers. "Clearly, if [the insurer's] belief that the policy did not provide coverage . . . [is] vindicated, it would not be liable for damages flowing from its refusal to settle." (*Johansen*, *supra*, 15 Cal.3d at p. 19.) Accordingly, the Lews cannot state a cause of action for bad faith against State Farm for its failure to accept a settlement offer in excess of its policy limits.

The cases on which the Lews rely do not persuade us otherwise. The Lews recite the general proposition that an insurer should evaluate a settlement offer without reference to policy limits: "[I]n deciding whether or not to compromise the claim, the insurer must conduct itself as though it alone were liable for the entire amount of the judgment. [Citation.] Thus, the only permissible consideration in evaluating the reasonableness of the settlement offer becomes whether, in light of the victim's injuries and the probable liability of the insured, the ultimate judgment is likely to exceed the amount of the settlement offer. Such factors as the limits imposed by the policy, a desire to reduce the amount of future settlements, or a belief that the policy does not provide coverage, should not affect a

decision as to whether the settlement offer in question is a reasonable one." (*Johansen*, *supra*, 15 Cal.3d at p. 16.) However, this quote and similar language in other cases concern the reasonableness of a settlement offer, which is not disputed here. Rather, we are concerned with whether State Farm acted in bad faith in rejecting settlement offers that exceeded its policy limits. As explained above, the answer is no.

The Lews have not cited a case, and we have found none, that holds an insurer liable for bad faith refusal to settle based on the insurer's refusal to advance funds in excess of policy limits to settle a lawsuit. Rather, case law is clear that the threshold issue in a bad faith refusal to settle action is whether the policy or policies at issue cover the claim to be settled. If the claim is not covered, the insured has no duty to settle it. Here, although State Farm refused to settle the underlying lawsuit for an amount beyond policy limits, it did offer to settle for its full policy limits. Because State Farm's coverage position was vindicated, it cannot be held liable for a breach of the implied covenant of good faith and fair dealing. (*Johansen*, *supra*, 15 Cal.3d at p. 19.)

b. Declaratory Relief

Our decision with respect to the Lews' first and second causes of action compels the conclusion that there is no actual or present controversy with respect to the parties' rights and duties under the insurance policies. Thus, the Lews' third cause of action for declaratory relief fails as a matter of law as well.

DISPOSITION

The judgment is affirmed. Respondent is awarded its costs on appeal.

NOT TO BE PUBLISHED.

LUI, P. J.

I concur:

CHAVEZ, J.

Lew v. State Farm General Insurance Company, B282790
ASHMANN-GERST, J., Concurring.

While I agree with my colleagues' summary of the facts and law, I have a different view of the application of the law of "other insurance" clauses.

As the majority concludes, some insurance contracts include a provision that attempts to limit the insurer's liability in the event that another insurance policy covers the same loss. One type of "other insurance" clause is an "Excess" clause. "This clause provides that if there is other valid and collectible insurance, then the insurer shall not be liable except to the extent that the loss exceeds such other valid and collectible insurance (i.e., this policy shall be excess to other valid and collectible insurance)." (*Olympic Ins. Co. v. Employers Surplus Lines Ins. Co.* (1981) 126 Cal.App.3d 593, 598.)

That is the type of "other insurance" clause in the Rental Policy, and it is enforceable here. Thus, I differ with the majority's conclusion on page 13 that the "Rental Policy and the Apartment Policy are both primary insurance policies." (Maj. opn., at p. 13.) In light of the unambiguous "other insurance" clause in the Rental Policy, in my view, the Apartment Policy is the primary policy, and the Rental Policy acts as the excess policy in this case.

But, the anti-stacking provision in the Apartment Policy prevents the Lews from recouping any monies over $1 million. Under the plain language of the Apartment Policy's anti-stacking provision, State Farm was only obligated to pay up to $1 million, "the largest limit of insurance applicable under any one of these policies written by us." (Maj. opn., at p. 4.)

I reach this number as follows: The anti-stacking provision has the effect of reducing the monies due under the Apartment Policy by the monies due under the Rental Policy. As a result, the Lews are entitled to $500,000 under the Apartment Policy, the primary policy, and $500,000 under the Rental Policy, which is the excess policy under the terms of the "other insurance" provision. Calculating the monies due in this fashion gives the Lews everything they were entitled to under both policies. The only other way to view the interaction of these policies is to find that the Lews were entitled to $1 million under the Apartment Policy alone. But then they would have been paying for illusory coverage under the Rental Policy—they would have been making payments for a policy that never yielded them coverage. My interpretation of the interaction of the two policies ensures that the Lews received the full coverage that they paid for: (1) $500,000 under the Rental Policy, and (2) $1 million for multiple properties under the Apartment Policy, as limited by the anti-stacking provision as to the Hacienda Heights property. (Maj. opn., at p. 3.)

I agree that the one exception to the anti-stacking provision does not apply here because the "other insurance" provision did not transform the Rental Policy into a specific excess policy. (Maj. opn., at pp. 16–18.)

_____, J.
ASHMANN-GERST