

THE WILSHIRE DECISION: REVISITING CALIFORNIA INSURANCE CODE SECTION 11580.9
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In November of 2004, the California Appellate Courts, 4th District, covering the Southern portion of the State of California, decided the case of Wilshire Insurance Company, Inc. v. Sentry Select Insurance Company (2004) 124 Cal.App.4th 27, 21 Cal.Rptr. 3d 60. In that decision, the Justices dealt with the Application of California Insurance Code Section 11580.9. California Insurance Code Section 11580.9 was found to identify four different circumstances under which two or more policies of automobile or motor vehicle insurance may afford coverage to the same loss. The Court dealt specifically with subsection (d) of the statute which states as follows:

“(d) Except as provided in subdivisions (a), (b), and (c), where two or more policies afford valid and collectible liability insurance applied to the same motor vehicle or vehicles in an occurrence out of which a liability loss shall arise, it shall be conclusively presumed that the insurance afforded by the policy in which the motor vehicle is described or rated as an owned automobile shall be primary and the insurance afforded by any other policy or policies shall be excess.”

We first reviewed this decision in 2005. Its applicability to the trucking industry is significant and the Wilshire Court went to great lengths to confirm that pursuant to findings in Mission Insurance Company v. Hartford Insurance Company (1984) 155 Cal.App.3d 1199, 202 Cal.Rptr. 635, and Transport Indemnity Company v. Royal Insurance Company (1987) 189 Cal.App.3d 250, 234 Cal.Rptr. 516, the tractor-trailer unit shall be viewed as the “same motor vehicle” for purposes of the insurance coverage. In other words, the tractor-trailers are considered one vehicle for purposes of applying this Insurance Code.

The Insurance Code Section pays no deference to the specific wording of the insurance policies involved. So long as separate policies on the trailer and tractor afford coverage for the “vehicle” (be it the tractor or the trailer) any superfluous language contained therein requiring that the policy be secondary or supplemental to any other available policies is irrelevant. California Insurance Code Section 11580.9 considers the policies to be “co-primary”. The Insurance Section does not take into account the manner in which the accident occurred or what portion of the tractor or trailer was involved in the subject accident. Indeed, so long as the “vehicle”, whether it be the tractor or trailer is listed in the policy, said policy is presumed under California Insurance to be a primary insurer. Furthermore, the Court in Wilshire determined that it was the California Legislature’s intent to have Insurance Code Section 11580.9 express the total public policy of the State of California respecting the order in which two or more of the validity of the insurance policies covering the same loss shall be applied. Hence, while the Court agreed with equitable arguments presented by Sentry Select Insurance Company on appeal in the Wilshire case, it once again confirmed that the language of the policies was irrelevant, as was the

intent of the parties. Indeed, the trial court had noted that it had to apply Insurance Code Section 11580.9(d) despite the fact that “it may not be the most equitable result in view of the circumstances of this case...” Similarly, the Appellate Court in Wilshire recognized the anomaly and confirmed an inequity in the Code, but noted that it was powerless to rewrite it and thus applied California Insurance Code Section 11580.9(d), confirming the trial court’s ruling.

Since the Wilshire decision, and despite the fact that California has six separate appellate court districts, each with a number of divisions, no further cases have dealt with the application of California Insurance Code Section 11580.9 as it applies to tractor-trailers involved in accidents. Indeed, the only references to the Wilshire case were wholly unrelated to the Insurance Code Section. In one case involving the Regents of the University of California v. Benford (2005) 128 Cal.App.4th 867; 27 Cal.Rptr.3d 441, the Court merely cited the Wilshire case for the proposition that [the Court is powerless to rewrite] a Code Section, even if it contains inequities. The only other cite to Wilshire dealt with the parameters for review by the Appellate Court in a case that was decided on a motion for summary judgment at the trial level.

Despite apparent inequities in the Insurance Code and a failure to recognize the intent of parties, no courts have made any findings distinguishing any case from the Wilshire opinion or contradicting the Wilshire opinion on appeal. Nor, has the issue been taken to the California Supreme Court for a final determination. More importantly, despite the Wilshire Court’s apparent finger-pointing at the legislature for these inequities, there does not appear to have been any activity on the part of the legislature to correct or remedy inequities that can be presented in applying California Insurance Code Section 11580.9.

While deciding the Wilshire case, the Court did note that there was one way to overcome the conclusive presumptions of Insurance Code Section 11580.9. However, this cumbersome procedure noted that the presumption can only be overcome by a written agreement signed by all of the insurers and all of the insureds. This would however, require a great deal of oversight and additional paperwork which not only appear to be economically unfeasible, but also impossible from a real world standpoint of attempting to monitor and obtain the necessary signatures where tractors and trailers are mated on a daily basis.

Without any further determinations to the contrary, Wilshire remains controlling law. However, it is noteworthy that the Wilshire case was decided on an appellate level and can thus be overruled or distinguished by any other California Appellate Court, and even the Appellate Court that made the original decision. Further, even if a case is decided on appeal and follows the Wilshire decision, it can be appealed to the California Supreme Court for final/ultimate determination. Moreover, and absent any additional Court review, the California Legislature can be petitioned for further explanations and/or amendment to the existing Insurance Code to address any previous inequities in the Code and to allow for exceptions based on the intent of the parties.

Not surprisingly, California Insurance Code Section 11580.9 provides for broad and generalized relief in the truest California tradition to find whatever insurance is available and make it available to the aggrieved or injured party without considering the application or harm to the business. Hence, insurers providing coverage for trailers operating in the State of California should remain vigilant of possible claims being prescribed pursuant to California Insurance Code Section 11580.9 and write their risks accordingly.