

Reviving Stale Insurance Claims When the Contractual and Statutory Limitations Periods Have Run: If You Snooze, Do You Always Lose?

Robert M. Forni, Jr.



A plaintiff must bring a cause of action within the statutorily prescribed limitations period, which begins to run once the cause of action has accrued. Cal. CCP § 312; *Norgart v. Upjohn Co.*, 21 Cal. 4th 383, 389 (1999). Thus, the failure to file suit within the applicable statute of limitations is an affirmative defense to stale claims, regardless of their merits. *Norgart, supra*, 21 Cal. 4th at 396; *State Farm Fire & Cas. Co. v. Superior Court (Bolek)*, 210 Cal. App. 3d 604, 612 (1989).

In cases arising from the denial of insurance claims, California courts have recognized a narrow exception to this rule where the insured establishes that the insurer either neglected to advise the insured of any applicable contractual limitations periods on which the insurer relies to deny the claim, or affirmatively misled the insured as to his or her time to file suit. In those instances, the insurer may be equitably estopped from asserting that the action is time-barred. This article discusses the bases for this estoppel theory in first-party cases and the limited application of select insurance regulations (10 CCR §§ 2695.4(a) and 2695.7(f)) supporting it.

PUBLIC POLICY FAVORS STRICT ENFORCEMENT OF STATUTES OF LIMITATIONS

Public policy disfavors stale claims. “The statute of limitations is a statute of repose, enacted as a matter of public policy to fix a limit within which an action must be brought, or the obligation is presumed to have been paid, and is intended to run against those who

are neglectful of their rights, and who fail to use reasonable and proper diligence in the enforcement thereof. [Citation omitted.]” *Neff v. New York Life Ins. Co.*, 30 Cal. 2d 165, 169 (1947). Limitations periods are necessary and appropriate “to promote justice by preventing surprises through revival of stale claims, to protect defendants and courts from handling matters in which the search for truth may be impaired by loss of evidence, to encourage plaintiffs to use reasonable and proper diligence in enforcing their rights, and to prevent fraud. [Citation omitted.]” *State Farm Fire & Cas.*, *supra*, 210 Cal. App. 3d at 612. Courts of this State have long declared such statutes are ““among the most beneficial to be found in our books”” in that they ““rest upon sound policy, and tend to the peace and welfare of society,”” *Neff, supra*, 30 Cal. 2d at 169 (citation omitted), and stimulate plaintiffs to diligently prosecute their claims. *Flintkote Co. v. Gen. Accident Assur. Co.*, 480 F. Supp. 2d 1167, 1177 (N.D. Cal. 2007); *see, Fox v. Ethicon Endo-Surgery, Inc.*, 35 Cal. 4th 797, 806 (2005). Consequently, no California decision requires a showing of prejudice to enforce a statute of limitations. *State Farm, supra*, 210 Cal. App.3d at 612.

CONTRACT ACTIONS

The statute of limitations in insurance litigation depends upon the nature of the cause of action asserted. *Heighley v. J.C. Penney Life Ins. Co.*, 257 F. Supp. 2d 1241, 1257 (C.D. Cal. 2003). Consistent with the sound policy of this State, the statute of limitations on a claim for breach of a written contract in California is four years. Cal. Code Civ. Proc. § 337(1); *Krieger v. Nick Alexander Imports, Inc.*, 234 Cal. App. 3d 205, 220-21 (1991); *Perez-Encinas v. Amerus Life Ins. Co.*, 468 F. Supp. 2d 1127, 1133-1134 (N.D. Cal. 2006).

An insured cannot toll the statute of limitations by contending that he or she only belatedly discovered the policy might cover his or her claim, *Love v. Fire Ins.*

Exch., 221 Cal. App. 3d 1136, 1143 (1990), or delayed filing suit because of the insurer’s erroneous statement that the claim was not covered under the policy when in fact it was. *Vu v. Prudential Prop. & Cas. Ins. Co.*, 26 Cal.4th 1142, 1152 (2001). “It is the occurrence of some . . . cognizable event rather than knowledge of its legal significance that starts the running of the statute of limitations.” *Lawrence v. W. Mut. Ins. Co.*, 204 Cal. App. 3d 565, 573 (1988). Otherwise, “no insurer could deny liability without indefinitely suspending the statute of limitations.” *Neff, supra*, 30 Cal.2d at 172.

BAD FAITH ACTIONS

Under California law, all insurance contracts contain an implied covenant of good faith and fair dealing. *Egan v. Mutual of Omaha Ins. Co.*, 24 Cal. 3d 809, 818 (1979); *Perez-Encinas, supra*, 468 F. Supp. 2d at 1139. To establish a breach of the implied covenant of good faith and fair dealing, a plaintiff must show that benefits were denied and that the reason for the denial was unreasonable or without proper cause. *Gruenberg v. Aetna Ins. Co.*, 9 Cal. 3d 566, 574 (1973); *Love, supra*, 221 Cal. App. 3d at 1151. “The key to a bad faith claim is whether or not the insurer’s denial of coverage was reasonable. [Citation omitted.]” *Guebara v. Allstate Ins. Co.*, 237 F.3d 987, 992 (9th Cir. 2001) (applying California law); *see, Chateau Chamberlay Homeowners Ass’n v. Associated Intern. Ins. Co.*, 90 Cal. App. 4th 335, 346-47 (2001). Thus, in first-party cases,¹ a cause of action for breach of the implied covenant of good faith begins to run when the insurer withholds benefits allegedly due under the policy by denying the insured’s claim. *Frazier v. Metropolitan Life Ins. Co.*, 169 Cal.App.3d 90, 103-104 (1985).

A claim for breach of the implied covenant of good faith and fair dealing may sound in contract or

¹ For example, disability insurance is classified as first party insurance which provides coverage for loss or damages sustained directly by the insured. *CBS Broadcasting v. Fireman’s Fund Ins. Co.*, 70 Cal. App. 4th 1075, 1082 (1999).

WHEN CAUSES OF ACTION FOR BREACH OF CONTRACT AND BAD FAITH “ACCRUE”

tort. *Archdale v. American Internat. Specialty Lines Ins. Co.*, 154 Cal. App. 4th 449, 467, n.19 (2007). If the insured elects to proceed only in contract, then recovery is limited to those damages recoverable in contract. *Id.*; see, Civ. Code, § 3300. In that case, the applicable statute of limitations is four years (Cal. Code Civ. Proc., § 337, subd. 1), instead of the two-year period applicable to tort actions (Cal. Code Civ. Proc., § 339, subd. 1.). *Id.*

Where the plaintiff seeks tort remedies for an alleged breach of the implied covenant of good faith and fair dealing, the claim is governed under and is barred by the two-year statute of limitations under Code of Civil Procedure section 339, subdivision 1. *Heighley, supra*, 257 F. Supp. 2d at 1257; see, *Smyth v. USAA Prop. & Cas. Ins. Co.*, 5 Cal. App. 4th 1470, 1476-77 (1992); *Love, supra*, 221 Cal. App. 3d at 1144, n.4; *Richardson v. Allstate Ins. Co.*, 117 Cal.App.3d 8, 12-13 (1981). Such remedies include emotional distress damages, future policy benefits, punitive damages and attorneys’ fees. *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1013 (9th Cir. 2004); *Brandt v. Superior Court*, 37 Cal. 3d 813, 815 (1985); *Waters v. United Services Auto. Assn.*, 41 Cal. App. 4th 1063, 1074 (1996); *Pistorius v. Prudential Insurance Co.*, 123 Cal. App. 3d 541, 551 (1981). Thus, where the complaint alleges tort remedies for the defendant insurer’s alleged bad-faith investigation and denial of a claim for policy benefits (such as damages for “severe anxiety, and mental and emotional distress,” future policy benefits, punitive damages and attorneys’ fees), the plaintiff’s cause of action for breach of the implied covenant of good faith and fair dealing arising from the denial of the claim is governed by the two-year limitations period of § 339, subdivision (1). *Finnell v. Equitable Life Assur. Soc’y*, 2007 U.S. Dist. LEXIS 85355, *7-8 (E.D. Cal. 2007).

In actions arising from the breach of any contract, the cause of action accrues, and the statute of limitations begins to run, at the time of the alleged breach. *Franconia Assocs. v. United States*, 536 U.S. 129, 141 (2002); *Krieger, supra*, 234 Cal. App. 3d at 221. Thus, in an action to recover insurance policy benefits, a cause of action for breach of contract or bad faith accrues, and the statutes of limitations applicable to them begin to run, when the insurer notifies the insured in “unequivocal language” that it will not remit policy benefits to the insured, or pay his or her claim, *Neff, supra*, 30 Cal. 2d at 170; *Migliore v. Mid-Century Insurance Co.*, 97 Cal. App. 4th 592, 605 (2002); *State Farm Fire & Cas., supra*, 210 Cal.App.3d at 609, irrespective of when payment for the claim becomes due. See, *Wetzel v. Lou Ehlers Cadillac Group Long Term Disability Ins. Program*, 222 F.3d 643, 649-650 (en banc) (9th Cir. 2000); *Dillon v. Board of Pension Commrs.*, 18 Cal.2d 427, 430 (1941); accord, *Baillargeon v. Department of Water and Power*, 69 Cal. App. 3d 670, 684 (1977).

Extending an invitation to provide additional information supporting an insured’s claim does not render the denial of the claim equivocal. *Migliore, supra*, 97 Cal.App.4th at 605; *Singh v. Allstate Ins. Co.*, 63 Cal. App. 4th 135, 147-48 (1998)); see, *Heighley, supra*, 257 F. Supp. 2d at 1257. “Rather, this evidence suggests that the insurer was willing to reconsider its denial upon receipt of further pertinent information. A statement of willingness to reconsider does not render a denial equivocal.” *Migliore, supra*, 97 Cal. App. 4th at 605.

Once the insurer has notified the insured of the denial the claim, the insured is presumed to know all the facts essential to his or her action; namely, that

the insurer deprived him or her of benefits under the policy, to which the insured maintains he or she is entitled. *See, Neff, supra*, 30 Cal. 2d at 174-175; *Love, supra*, 221 Cal.App.3d at 1150. This presumption is inescapable where the insured affirmatively appeals the denial of the claim and offers to provide additional information to contest the insurer's decision. *See, e.g., Chuck v. Hewlett Packard Co.*, 455 F.3d 1026, 1038 (9th Cir. 2006); *Flintkote, supra*, 480 F. Supp. 2d 1180. If the insured fails to file suit timely for breach of contract or bad faith following the denial of the claim, then those claims may be time-barred as a matter of law under California Code of Civil Procedure sections 337 and 339. *See, Heighley, supra*, 257 F. Supp. 2d at 1257. In that instance, the defendant insurer should, absent additional evidence of its own misconduct, be entitled to judgment as to any subsequent cause of action by the insured for breach of contract or bad faith on the grounds that it is time-barred as a matter of law under California Code of Civil Procedure section 337 or 339.

INSURERS MAY BE ESTOPPED FROM ASSERTING THE STATUTES OF LIMITATIONS UNDER LIMITED CIRCUMSTANCES

This rule is not without exceptions. Under the doctrine of equitable estoppel, an insurer may be barred from asserting these statutes of limitations as a defense to an insured's action under limited circumstances.

The doctrine of equitable estoppel is well-established in California. *Flintkote, supra*, 480 F. Supp. 2d at 1179. The doctrine is a judicial doctrine that generally applies to misleading statements or misrepresentations concerning, among other things, the statute of limitations.²

² The doctrine is codified at California Evidence Code section 623. That section provides: "Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement

Equitable estoppel and tolling are extraordinary remedial measures that apply only when a plaintiff is prevented from filing suit despite exercising reasonable diligence. *See, Irwin v. Department of Veteran's Affairs*, 498 U.S. 89, 96 (1990). "An estoppel against a limitations defense usually 'arises as a result of some conduct by the defendant, relied on by the plaintiff, which induces the belated filing of the action. [Citations omitted.]" *Spray, Gould & Bowers v. Associated Int'l Ins. Co.*, 71 Cal.App.4th 1260, 1268 (1999). For example, equitable tolling has been held appropriate where plaintiff filed and served defective papers before the expiration of the statutory period, *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 558 (1974), and where the defendant induced the plaintiff to file suit late through trickery or deception. *Id.* at 559; *Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231, 235 (1959). Likewise, where an insurer is responsible for concealing the existence of an insured's cause of action, courts of this State have found that the insurer may be estopped from asserting statutory and contractual limitation periods. *See, Vu, supra*, 26 Cal.4th at 1152.

For estoppel to apply, "the party to be estopped must be apprised of the facts; the other party must be ignorant of the true state of facts; the party to be estopped must have intended that its conduct be acted upon, or so act that the other party had a right to believe that it was so intended; and the other party must rely on the conduct to its prejudice." *Hydro-Mill Co., Inc. v. Hayward Tilton & Rolapp Ins. Assoc., Inc.*, 115 Cal. App. 4th 1145, 1165-66 (2004). Thus, to estop an insurer from asserting a statute of limitations defense, the plaintiff insured must establish each of the following: (1) the insurer was aware of all pertinent facts; (2) the insurer intended that its words or conduct delay the insured's commencing suit; (3) the insured was ignorant of the true state of facts; and (4) the or conduct, permitted to contradict it." Cal. Evid. Code § 623 (Deering 2008).

insured reasonably relied on the insurer's words or conduct in failing to file suit within the statutory period.

Spray, supra, 71 Cal.App.4th at

1268; *American Cas. Co. v. Baker*, 22 F.3d 880, 892 (9th Cir. 1994).

“Key to any sort of estoppel is reliance.” *Flintkote, supra*, 480 F.

Supp. 2d at 1180; *see, Vu, supra*,

26 Cal. 4th at 1152-53; *see also*,

Cal. Evid. Code § 623. Where any

one of the elements of equitable

estoppel is absent, the claim must fail. *American Cas.*

Co., supra, 22 F.3d at 892; *Hill v. Kaiser Aetna*, 130

Cal. App. 3d 188, 195 (1982). The relevant question

in evaluating a claim for equitable estoppel is whether

a reasonable plaintiff in the same circumstances would

have been aware of the existence of a cause of action.

See, Chuck, supra, 455 F.3d at 1032; *see also, Veltri v.*

Bldg. Serv. 32b-J Pension Fund, 393 F.3d 318, 323 (2d

Cir. 2004); *I.V. Servs. of Am., Inc. v. Inn Dev. & Mgmt.,*

Inc., 182 F.3d 51, 57 (1st Cir. 1999); *Cada v. Baxter*

Healthcare Corp., 920 F.2d 446, 451 (7th Cir. 1990).

As the party seeking to invoke the doctrine of equitable estoppel, the insured bears the burden of proving that he or she had no notice of the applicable statutes of limitations. *See, I.V. Servs. of Am., supra*,

182 F.3d at 54; *Spray, supra*, 71 Cal.App.4th at 1268.

To establish that the defendant insurer is equitably

estopped from asserting that his or her claims are time-

barred under common law, the plaintiff insured must

prove by clear and convincing evidence not only that

the insurer was *aware* of all pertinent facts and *intended*

its words or conduct to delay the filing of the insured's

suit, but also that the insured *did not know* that his or

her claims had accrued and were subject to statutory

and policy limitation periods, and that the insured

reasonably relied on the insurer's words or conduct in

failing to file suit within those periods. *Spray, supra*, 71

Cal.App.4th at 1268; *Chase v. Blue Cross of Calif.*, 42

Cal.App.4th 1142, 1157 (1996); Croskey, Kaufman, *et*

al., Cal. Prac. Guide: Insurance

Litigation (The Rutter Group

2008), §6:151.

The insured will be hard-

pressed to meet that burden

absent evidence that the insurer

intentionally misled him or her

about the statutes of limitations

applicable to his or her causes of

action, or otherwise caused him or her to delay filing suit

until after they had expired. Estoppel cannot be based

solely on the fact that the insurer denied coverage of a

claim and the insured therefore did not timely pursue

the matter. *Matsumoto v. Republic Ins. Co.*, 792 F.2d

869, 872 (9th Cir. 1986); *Vu, supra*, 26 Cal.4th at 1152;

see, Neff, supra, 30 Cal.2d at 172-173.

Likewise, since it is the insured's burden to

establish that he or she relied on the conduct or the

silence of the insurer in failing to file suit before

the expiration of the statutes of limitations, the

insured cannot establish that the insurer is estopped

from asserting them where the insured recalls no

communications with the insurer regarding the claim

or any time limits applicable to his or her action. *See,*

Flintkote, supra, 480 F. Supp. 2d at 1180; *Smyth,*

supra, 5 Cal. App. 4th at 1478. Testimony that an

insured does not remember such communications at

best raises one possibility, among others, that they did

not occur. However, such a possibility is insufficient

to prove that, in fact, the insured was “ignorant of the

true state of facts” in that he was provided no notice

of any applicable contractual or statutory limitation

periods, an issue on which the insured bears the burden

of proof as the party advancing the theory that he or

she was ignorant of any time-bars applicable to his or

her causes of action. *See, I.V. Servs. of Am., supra*, 182

**THE RELEVANT QUESTION
IN EVALUATING A CLAIM
FOR EQUITABLE ESTOPPEL
IS WHETHER A REASONABLE
PLAINTIFF IN THE SAME
CIRCUMSTANCES WOULD HAVE
BEEN AWARE OF THE EXISTENCE
OF A CAUSE OF ACTION.**

F.3d at 56; *Spray, supra*, 71 Cal.App.4th at 1268.

Moreover, the insured cannot meet his or her burden of establishing that the insurer is estopped from asserting applicable time limits to file suit based on the insurer's alleged failure to disclose them after they had already expired. Acts of alleged concealment by insurers after the statutory and contractual limitations periods have run "cannot, as a matter of law, amount to a waiver or estoppel." *Prudential-LMI Commercial Ins. v. Sup.Ct.*, 51 Cal.3d 674, 690, n.5 (1990); *Marselis v. Allstate Ins. Co.*, 121 Cal.App.4th 122, 125 (2004).

Conversely, the insurer may defeat an estoppel argument by, for example, showing that the insurer unequivocally denied the insured's claim in writing; that, at the time it denied the claim, the insurer expressly reserved its right to assert all defenses, including all statutory and contractual limitation periods³; in each of its communications with the insured following the denial of the claim, the insurer consistently reiterated that the insured was not entitled to benefits under the policy; that the insured was aware that his or her causes of action arising from the denial of the claim had accrued when the insurer denied the claim because the insured acknowledged that her claim had been denied in appealing the claims determination; or that the insurer's claims personnel had no communications with the insured regarding any statute of limitations that may apply to any cause of action or lawsuit arising from the denial of the claim. *See, Chuck, supra*, 455 F.3d at 1037; *Heighley, supra*, 257 F. Supp. 2d at 1256, n.14; *Giles v. Reliance Std. Life Ins. Co.*, 1999 U.S. Dist. LEXIS 1847, *23 (N.D.

³ However, an insurer that fails to mention valid defenses in a denial letter will not be estopped it from asserting them later where no prejudice to the insured is shown. *Waller v. Truck Ins. Exch., Inc.*, 11 Cal.4th 1, 35 (1995).

Cal. 1999), rev'd on other grounds 242 F.3d 381 (9th Cir. 2000). Such evidence is critical to negating the element of reliance because a plaintiff who knows that her causes of action have accrued or that she has a right to sue may neither rely on equitable principles to defeat applicable time-bars, *Veltri, supra*, 393 F.3d at 326, nor avoid the running of the statutory or contractual limitation period applicable to her cause of action on the technical grounds that the insurer failed to advise her of her right to sue. *See, Chuck, supra*, 455 F.3d 1026, 1031, 1037; *I.V. Servs. of Am., supra*, 182 F.3d at 57.

For instance, in *I.V. Servs. of Am., Inc. v. Inn Dev. & Mgmt., Inc.*, 182 F.3d 51 (1st Cir. 1999), the plaintiff medical provider sued to recover expenses incurred to provide medical services to a former employee of the defendant employer from both the employer and the administrator of its employee health benefit plan under the Employee Retirement Income Security Act of 1974, ("ERISA"), 29 U.S.C. § 1001, *et seq.* The district court dismissed the action on summary judgment on the ground that the suit was barred by the plan's three-year limitation period, finding that the plaintiff waited over five years from the time its action had accrued before bringing suit. The plaintiff appealed, claiming the district court should have equitably tolled the contractual limitations period because the plan's denial letter failed to advise the employee of her administrative remedies under the plan and applicable regulations. The First Circuit affirmed the district court's ruling that equitable tolling was not warranted and summary judgment was appropriate. The Court found that the claimant knew as of the date the plan administrator denied the claim that it had a cause of action regarding the denial of its claim for reimbursement. Thus, the court concluded,

**INSURERS MAY NOT BE
EQUITABLY ESTOPPED FROM
ASSERTING THE STATUTES OF
LIMITATIONS APPLICABLE TO A
CAUSE OF ACTION ARISING FROM
THE DENIAL OF AN INSURANCE
CLAIM FOR FAILING TO ADVISE
THE INSURED OF THEM.**

“[t]he technical defect in the letter denying the claim in no way altered this critical fact.” *Id.* at 182 F.3d at 57.

Likewise, the Ninth Circuit has held that an action may be barred by the applicable statutes of limitation where the insured knew he had a cause of action, notwithstanding the fact that the defendant failed to advise the insured of his remedies under an employee welfare plan. In *Chuck v. Hewlett Packard Co.*, 455 F.3d 1026 (9th Cir. 2006), the Ninth Circuit confronted an issue of first impression: whether ERISA’s statute of limitations may bar a claim for benefits notwithstanding a plan’s failure to fulfill its disclosure and review obligations under ERISA § 503, 29 U.S.C. § 1133. *Id.* at 1029. The plaintiff in that case argued that his cause of action never accrued, and therefore the statute of limitations never began to run, because the defendant had failed to provide him with adequate information regarding the bases for denying his claim or his rights to an internal review of that denial. *Id.* at 1031. The central issue in that case was “whether [the plaintiff] *had reason to know of such a denial* more than six years before he filed suit in 2003,” regardless of the plan’s failure to advise him of his rights and remedies under the plan and ERISA. *Id.* at 1032 (emphasis added). The Court concluded that the plan in that case had failed to explain the bases for its decision, or provide the plaintiff with a reasonable opportunity for review, under the terms of the plan. *Id.* at 1032. Nevertheless, the Court held “that a plan’s violation of its notification and review obligations under ERISA is a highly significant factor, but not a dispositive one, in determining whether a claim has *accrued* for benefits under ERISA.” *Id.* at 1031 (emphasis added). Because the plaintiff’s cause of action had accrued when he learned of the plan’s denial of his claim in March 1992, over eleven years prior to filing suit, the Court concluded that his

action was time-barred under the applicable six-year statute of limitations, despite the defendant’s failure to provide proper notification and review under the plan and ERISA. *Id.* at 1031, 1037. Accordingly, the Court affirmed the entry of summary judgment for the defendants on the grounds that the plaintiff’s claim for benefits under 29 U.S.C. § 1132(a)(1)(B) was barred by ERISA’s statute of limitations. *Id.* at 1040.

In reaching this conclusion, the Court reasoned that, although the plan’s inadequate notice to the insured of the plan’s review procedures and provisions could prevent a *contractual* limitations period from running, failing to advise of the plan’s terms and the insured’s remedies would not prevent a *statute* of limitations from running. *Id.* at 1033. The Court refused to bar errant insurers from invoking statutory limitation periods against untimely actions, recognizing that “there is at least some difference between allowing a claim to be filed several years after the expiration of a plan’s time bar but before the expiration of ERISA’s statute of limitations (at least in cases in which ERISA’s limitations period ends later), and allowing a claim to be filed in perpetuity.” *Id.* at 1033. The Court rejected the notion that inadequate notice to an insured should preclude the insurer from asserting applicable statutes of limitation to future actions arising from the denial of a claim, because it would lead to “perpetual liability” and open “a door more widely to claims whose underlying events have long passed, elevating concerns regarding the plan’s abilities to anticipate its financial obligations adequately.” *Id.* at 1034. Where the plaintiff knows that his claim has been denied and his cause of action has accrued, the Court concluded there was no reason to expose insurers and plan administrators to such limitless exposure, because “there is diminished justification for indefinitely allowing the claimant to sit on the matter rather than bring his suit in federal court.” *Id.* at 1034.

INSURERS OWE NO COMMON LAW OR STATUTORY DUTY TO ADVISE INSUREDS OF APPLICABLE STATUTES OF LIMITATION

Insurers may not be equitably estopped from asserting the statutes of limitations applicable to a cause of action arising from the denial of an insurance claim for failing to advise the insured of them. An estoppel may arise from silence only where there is a legal duty to speak. *Juarez v. 21st Century Ins. Co.*, 105 Cal. App. 4th 371, 375 (2003); *Spray, supra*, 71 Cal. App. 4th at 1268; *Muraoka v. Budget Rent-A-Car, Inc.*, 160 Cal. App.3d 107, 116 (1984); *Elliano v. Assurance Co. of America*, 3 Cal. App. 3d 446, 451 (1970). At common law, one party generally has no duty to disclose the applicable statutes of limitations to another. *Muraoka, supra*, 160 Cal. App. 3d at 117-118. A duty to speak does not arise out of a regulation promulgated by the Insurance Commissioner. See, *California Service Station etc. Assn. v. American Home Assurance Co.*, 62 Cal.App.4th 1166, 1175 (1998). Moreover, an insurer's failure to explain legal remedies available to the insured and the insured's ignorance of those remedies will not extend the insured's time to sue, because an insurer owes no obligation to explain to the insured all possible laws or legal theories under which the insured may challenge the denial of the claim. *Neff, supra*, 30 Cal.2d at 172-173; *Juarez, supra*, 105 Cal. App. 4th at 375-376; *Love, supra*, 221 Cal.App.3d at 1144-1145; *Lawrence, supra*, 204 Cal. App. 3d at 574.

DISCLOSURE OBLIGATIONS UNDER 10 CCR SECTION 2695.4(A)

Nevertheless, relying on *Spray, Gould & Bowers, supra*, 71 Cal.App.4th 1260 and *Neufeld v. Balboa Ins. Co.*, 84 Cal.App.4th 759 (2000), insureds of late have attempted to argue that insurers are obligated to notify insureds of all statutes of limitations applicable to any cause of action potentially arising

from the denial of an insurance claim under California Code of Regulations, title 10, sections 2695.4(a) and 2695.7(f). Pursuant to California Insurance Code section 790.03(h), the Insurance Commissioner has promulgated the Fair Claims Settlement Practices Regulations to administer the Unfair Practices Act, codified at Article 6.5 of the California Insurance Code. Ins. Code § 790, *et seq.*; Cal. Code Regs., tit. 10, § 2695.1, *et seq.*; *Moradi-Shalal v. Fireman's Fund Ins. Companies*, 46 Cal.3d 287, 292 (1988). Among the Fair Claims Settlement Practices Regulations is California Code of Regulations, title 10, section 2695.4(a). This regulation provides that "Every insurer shall disclose to a first party claimant or beneficiary, all benefits, coverage, *time limits* or other provisions of any *insurance policy* issued by that insurer that may apply to the claim presented by the claimant." 10 CCR § 2695.4 (2007) (emphasis added). It is apparent on its face that this regulation "requires disclosure of time limits contained in an *insurance policy* rather than time limits set forth in a statute." *Juarez, supra*, 105 Cal.App.4th at 375 (emphasis added); see, *Flintkote, supra*, 480 F. Supp. 2d at 1180; *Giles v. Reliance Std. Life Ins. Co.*, 1999 U.S. Dist. LEXIS 1847, *20-21 (N.D. Cal. 1999), rev'd on other grounds 242 F.3d 381 (9th Cir. 2000). Courts interpreting this language are bound by the interpretation of the California Court of Appeal, the highest state court to have considered it. *Hicks v. Feiock*, 485 U.S. 624, 629 (1988); *West v. Am. Tel. & Tel. Co.*, 311 U.S. 223, 237-38 (1940). "It is well established that a state court's interpretation of its statutes is binding on the federal courts unless a state law is inconsistent with the federal Constitution." *Hangarter, supra*, 373 F.3d at 1012; see, *Adderley v. Florida*, 385 U.S. 39, 46 (1966). For that reason, section 2695.4(a) has been consistently construed to apply only to time limits within the insurance policy, and -- as with other applications of estoppel -- to

require a lack of actual knowledge of the time limits by the insured. *Flintkote, supra*, 480 F. Supp. 2d at 1180; *Juarez, supra*, 105 Cal. App. 4th at 376; *Doheny Park Terrace Homeowners Assn., Inc. v. Truck Ins. Exchange*, 132 Cal. App. 4th 1076, 1091(2005).

Section 2695.4(a) does not compel the disclosure of statutes of limitations, or even contractual limitations periods, that may apply to subsequent legal actions or causes of action arising from the denial of a claim. Reading the entire section in context, this regulation requires only that an insurer give claimants notice of *policy* provisions limiting the time to submit an *insurance claim* in order to subsequently assert such time limit as a bar to any action arising from the denial of the claim. *Heighley, supra*, 257 F. Supp. 2d at 1258, n.18. Thus, to establish that an insurer is estopped from asserting a contractual limitation period under his section, the insured must still demonstrate that he or she was unaware of the time limits of the policy. *Flintkote, supra*, 480 F. Supp. 2d at 1180.

Moreover, no disclosure obligations under section 2695.4(a) arises unless the insurer denies the insured's claim on the grounds that it was barred by any statute of limitations or time limit in the policy. Where the insurer denies the claim on the grounds that the insured was not entitled to benefits under the policy, the insurer is not estopped from asserting that any subsequent cause of action arising from the denial of the claim is barred by the applicable statutes of limitations based solely on the insurer's alleged failure to comply with section 2695.4(a). *Heighley, supra*, 257 F. Supp. 2d at 1258, n.18.

For instance, the Central District of California held that the plaintiff's tort causes of action were barred by the applicable statutes of limitations,

notwithstanding the plaintiff's contention that the defendant insurers were estopped from asserting them because they had not complied with 10 CCR section 2695.4(a). In *Heighley v. J.C. Penney Life Ins. Co.*, 257 F. Supp. 2d 1241 (C.D. Cal. 2003), the plaintiff alleged claims against the defendant insurer for, among other things, breach of contract, breach of the implied covenant of good faith and fair dealing and negligence, arising from the denial of a claim for benefits under an "accidental death" policy. The Court granted the defendant's motion for partial summary judgment, holding that the negligence and bad faith

causes of action were barred by the two-year statute of limitations set forth in California Code of Civil Procedure section 339, because the Complaint was filed nearly three years after the claim was denied. In reaching this conclusion, the Court observed that section 2695.4(a) "requires only that an insurer give a claimant notice of policy provisions limiting the time to file a *claim* in order to subsequently assert such time limit as a bar to the action." *Id.* at 1258, n.18 (emphasis added). Thus, since the defendants did not deny the plaintiff's insurance claim on the grounds that it was time-barred by any policy provisions, this section neither applied nor precluded them from asserting any statutes of limitations applicable to her causes of action. *Id.* at 1258, n.18.

DISCLOSURE OBLIGATIONS UNDER 10 CCR SECTION 2695.7(F)

The contention that insurers may be estopped from asserting the applicable statutes of limitations under section 2695.7(f) is also unavailing. This regulation requires every insurer to "provide written notice of any statute of limitation or other time period requirement *upon which the insurer may rely to deny*

NO DISCLOSURE OBLIGATIONS UNDER SECTION 2695.4(A) ARISES UNLESS THE INSURER DENIES THE INSURED'S CLAIM ON THE GROUNDS THAT IT WAS BARRED BY ANY STATUTE OF LIMITATIONS OR TIME LIMIT IN THE POLICY.

a claim” to an unrepresented claimant with whom the insurer is negotiating not less than sixty days prior to the expiration date. 10 CCR §2695.7(f) (Deering 2008). On its face, this regulation only requires insurers to provide written notice to unrepresented claimants of any statute of limitation or other time period requirement in the policy on which they may rely to deny an insurance claim, not to defeat a subsequent lawsuit arising from the denial of the claim. See, *Taylor v. Equitable Life Assur. Soc’y*, Case No. C 03-01334 CRB (N.D. Cal. 2003); accord, *Cates Constr. v. Talbot Partners*, 21 Cal. 4th 28, 49 (1999).

Where the insurer does not deny a claim on the grounds that it was barred by any statute of limitations or time limit in the policy, section 2695.7(f) imposes no duty on the insurer to provide written notice of any statutory or contractual limitations periods that may apply to any future action arising from the denial of the claim. See, *Finnell, supra*, 2007 U.S. Dist. LEXIS 85355, n.7. Absent a duty to notify plaintiff of the statutory limitations periods applicable to causes of action arising from the denial of a claim, the insurer cannot be estopped from asserting them in any subsequent action by the insured. *Id.*

Courts across this Circuit have reached the same conclusions. For instance, in *Giles v. Reliance Std. Life Ins. Co.*, 1999 U.S. Dist. LEXIS 1847 (N.D. Cal. 1999), rev’d on other grounds 242 F.3d 381 (9th Cir. 2000), the plaintiff filed suit against the defendant insurer to recover disability benefits under a group disability insurance plan pursuant to the Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C.S. § 1132(a)(1)(b). The defendant moved to

dismiss the action pursuant to Fed. R. Civ. P. 12(b)(6) on the grounds that the statute of limitations had run on the plaintiff’s ERISA claim. The plaintiff argued that the statute was tolled because the defendant had failed to inform her of the applicable statute of limitations under 10 C.C.R. sections 2695.4 and 2695.7(f). The Northern District of California held that the plain language of section 2695.4(a) did not extend the statute of limitations because it only obligated the defendant insurer to disclose the “time limit” in the policy, not the statute of limitations applicable to causes of

action arising from the denial of the plaintiff’s claim. *Id.* at 1999 U.S. Dist. LEXIS 1847, *20. Therefore, the court found that section 2595.4(a) did not extend the statutes of limitations applicable to the plaintiff’s claims under ERISA. *Id.* at 1999 U.S. Dist. LEXIS 1847, *21. The court also rejected the plaintiff’s contention that the statute of limitations was tolled under section 2695.7(f) until she retained counsel to advise her, concluding that “[t]here is no explicit tolling provision in section 2695.7(f),” the plaintiff knew or should have known that the defendant had denied her claim, and therefore the the defendant “did not lull her into a sense of complacency as it denied her benefits in writing.” *Id.* at 1999 U.S. Dist. LEXIS 1847, *23. Accordingly, the court found that section 2695.7(f) did not toll the statute of limitations, and the plaintiff’s claims were time barred.

The Northern District of California again found that insurers had no duty to inform insureds of the applicable statute of limitations under 10 CCR sections 2695.4(a) and 2695.7(f) in *Taylor v. Equitable Life Assurance Society, et al.*, Case No. C 03-01334 (N.D.

WHERE THE INSURER DOES NOT DENY A CLAIM ON THE GROUNDS THAT IT WAS BARRED BY ANY STATUTE OF LIMITATIONS OR TIME LIMIT IN THE POLICY, SECTION 2695.7(F) IMPOSES NO DUTY ON THE INSURER TO PROVIDE WRITTEN NOTICE OF ANY STATUTORY OR CONTRACTUAL LIMITATIONS PERIODS THAT MAY APPLY TO ANY FUTURE ACTION ARISING FROM THE DENIAL OF THE CLAIM.

Cal. 2003). In that case, the plaintiff alleged claims for breach of contract and bad faith arising from the defendant insurer's determination that she was only partially disabled, not totally disabled, and its continuing failure to pay the full amount of monthly disability benefits to which she alleged she was owed under the terms of her disability policy. Notwithstanding the fact that the Complaint was filed nearly six years after the statutes of limitations applicable to these claims began to run, the plaintiff argued that the defendant was estopped from asserting that her causes of action were time-barred, because she had not received notice of the applicable statutes of limitations that she contended the defendant was obligated to provide under sections 2695.4(a) and 2695.7(f). The Court found that sections 2695.4(a) and 2695.7(f) only obligated insurers to advise of contractual, not statutory, limitations periods. *Id.* at 5-6. Therefore, the Court held that the defendant was not estopped from asserting the applicable statutes of limitations as a defense to the plaintiff's untimely causes of action. *Id.* at 6.

More recently, the Eastern District of California rejected the plaintiff's estoppel theory in granting the defendants' motion for summary judgment on the ground that the plaintiff's causes of action were time-barred under the applicable limitations periods. In *Finnell v. Equitable Life Assur. Soc'y*, 2007 U.S. Dist. LEXIS 85355 (E.D. Cal. 2007), the plaintiff filed suit against his disability insurer, alleging causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing arising from the termination of disability benefits under the "sickness" provision of his policy. The plaintiff argued that the defendant insurer was equitably estopped from asserting a statute of limitations defense because it never provided written notice of the applicable limitations periods under sections 2695.4(a) and 2695.7(f). However, the Court found that the defendant had no duty to notify

him of any statutory limitations periods, and *Spray, Gould & Bowers, supra*, 71 Cal. App. 4th 1260 did not hold otherwise. *Id.* at 2007 U.S. Dist. LEXIS 85355, *14-15, n.7.

Conversely, neither *Spray, Gould & Bowers* nor *Neufeld* supports the contention that insurers are obligated to advise insureds of the statutes of limitations applicable to their causes of action under section 2695.4(a) or 2695.7(f). In both of those cases, the Court of Appeal held that the defendant insurer was estopped from asserting that the insured's lawsuit was time-barred under section 2695.4(a) because the insurer had failed to notify the insured of a *contractual* limitation period in the insured's policy, not the statutes of limitations applicable to the causes of action alleged in the insured's lawsuit. *Spray, supra*, 71 Cal. App. 4th at 1263; *Neufeld, supra*, 84 Cal. App. 4th at 760; *see, Finnell, supra*, 2007 U.S. Dist. LEXIS 85355, n.7. Those courts reasoned that the insurer could be estopped from raising the defense because section 2695.4(a) "imposes on insurers an unmistakable duty to advise its claimant insureds of applicable *claim* time limits." *Spray, supra*, 71 Cal. App. 4th at 1269 (emphasis added.). Those cases had no occasion to consider, and did not address, the duty of insurers to advise insureds of statutory limitations periods generally or under 10 CCR section 2695.7(f). Thus, *Spray* and *Neufeld* simply stand for the unremarkable proposition that an insurer may be estopped from raising a *contractual* time limitation set forth in the policy if the insurer failed to disclose the time limits that might apply to *claims* presented by the insured. *Spray, supra*, 71 Cal. App. 4th at 1269; *Neufeld, supra*, 84 Cal. App. 4th at 761.

This rule only applies where the insurer denies a claim, or maintains that a subsequent action arising from the denial of the claim is untimely, on the grounds that it is time-barred under the policy. Where

the insurer denies a claim on its merits or for some other reason, the insurer is not estopped from asserting that a subsequent action arising from the denial of the claim is barred by the applicable statutes of limitations, because the insurer owes the insured no duty under common law, section 2695.4(a) or section 2695.7(f) to advise insureds of time limits on which the insurer did not rely to deny their claims. *See, Sapiro v. Encompass Ins.*, 2004 U.S. Dist. LEXIS 22054, *26, n.4 (N.D. Cal. 2004); *Heighley, supra*, 257 F. Supp. 2d at 1258.

10 CCR SECTIONS 2695.4(A) AND 2695.7(F) MAY BE UNCONSTITUTIONAL

The enforceability of sections 2695.4(a) and 2695.7(f) is also subject to debate in that, to the extent these regulations are interpreted to create a duty to disclose statutes of limitations, they constitute an unconstitutional delegation of legislative and judicial power under Article III, section 3, of the California Constitution.⁴ An administrative agency regulation may not create a duty to disclose statutes of limitations that may give rise to an equitable estoppel or tolling. *California Service Station, supra*, 62 Cal.App.4th at 1175. The question of whether a legislatively promulgated statute of limitations may be tolled is an issue of fundamental public policy that is subject to the Legislature's exclusive authority and control. *See, Valley Circle Estates v. VTN Consolidated, Inc.*, 33 Cal.3d 604, 615 (1983); *Zastrow v. Zastrow*, 61 Cal. App. 3d 710, 715 (1976). Fundamental policy decisions cannot be delegated to an administrative agency. *California Service Station, supra*, 62 Cal.App.4th at 1175-1176. Thus, sections 2695.7(f) and 2695.4(a) may not contravene the terms or exceed the scope of Insurance Code section 790.03 of the Unfair Practices Act, under which they have been promulgated, by

⁴ This section provides: "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." Cal Const., Art. III § 3 (Deering 2008).

purporting to impose a legal duty to disclose statutory or contractual limitations periods, or authorize a remedy for failing to do so, that the Legislature has not imposed and is not recognized at common law. *Id.*; *see, Association for Retarded Citizens v. Department of Developmental Services*, 38 Cal.3d 384, 391 (1985); *Juarez, supra*, 105 Cal. App. 4th at 376; *Cal. Teachers Ass'n v. Comm'n on Teacher Credentialing*, 7 Cal. App. 4th 1469, 1475 (1992).

Here, Insurance Code section 790.03 only prohibits insurers from "knowingly" misleading claimants about the applicable statutes of limitations, "with such frequency as to indicate a general business practice." To that end, section 790.03 provides in part:

The following are hereby defined as unfair methods of competition and unfair and deceptive acts or practices in the business of insurance.

.....

(h) *Knowingly* committing or performing *with such frequency as to indicate a general business practice* any of the following unfair claims settlement practices:

.....

(15) *Misleading* a claimant as to the applicable *statute of limitations*.

Cal. Ins. Code § 790.03, subd. (h)(15) (Deering 2008) (emphasis added). On its face, this statute prohibits intentional misrepresentations regarding statutory, not contractual, limitation periods that rise to the level of fraud, not negligence, and occur on a regular basis. *See, Cal. Serv. Station, supra*, 62 Cal. App. 4th at 1176. It neither creates a duty to disclose all potential statutes of limitations that may apply to actions arising from the denial of an insurance claim, nor authorizes any additional penalty for failing to disclose them that is not among the sanctions the Legislature has

already imposed against insurers for violating existing prohibitions against unfair and deceptive claims settlement practices. *See*, Cal. Ins. Code, §§ 790.035, 790.05, 790.07, 790.09; *accord*, *Cates Constr.*, *supra*, 21 Cal. 4th at 50-51.

Courts shall defer to the literal construction of a statute “unless they can be reasonably assured that the legislature meant to say something different from what it appears to have said,” without resorting to speculation. *Glashoff v. Glashoff*, 57 Cal. App. 2d 108, 113 (1942). In this instance, there is no reason to speculate that, in adopting section 790.03(h)(15), the Legislature intended to impose an affirmative duty to disclose statutory limitations periods applicable to causes of actions arising from the denial of insurance claims, or to toll them until such notice is given. Had the Legislature desired to do so, it presumably would have stated its intentions explicitly, as it has done on other occasions.

For instance, the Legislature imposed both a disclosure obligation and a tolling provision in Insurance Code section 11583. That section states in relevant part:

Any person, including any insurer, who makes such an advance or partial payment, shall . . . *notify* the recipient thereof *in writing* of the *statute of limitations* applicable to the *cause of action* which such recipient may bring against such person as a result of such injury or death Failure to provide such *written notice* shall operate to *toll* any such *applicable statute of limitations or time limitations* from the time of such advance or partial payment until such written notice is actually given. That notification shall not be required if the recipient is represented by an attorney.

Cal. Ins. Code § 11583 (Deering 2008) (emphasis added). The Legislature intended this statute to protect third-party claimants from being lulled into a sense of complacency about filing suit against a tortfeasor

because of the cooperativeness of the tortfeasor’s insurance company. *Associated Truck Parts v. Superior Court*, 228 Cal. App. 3d 864, 870 (1991). This statute thus expressly obligates automobile insurers to advise third-party claimants of the statutes of limitations applicable to specific causes of action that they may bring against their insureds, and tolling them until such notice is given or the claimant retains counsel, whichever occurs first. *Id.*

In contrast, neither Insurance Code section 790.03(h)(15) nor its implementing regulations (i.e., 10 CCR §§ 2695.4(a) and 2695.7(f)) express any intent by the Legislature to impose any obligation on insurers to notify their insureds of any statute of limitations, or to toll them until notice is given. *See, Giles, supra*, 1999 U.S. Dist. LEXIS 1847, *23. These omissions reflect the rational judgment of the Legislature that such an obligation is unreasonable and unduly burdensome given that the potential causes of action that may arise from the denial of a first-party insurance claim, and the statute of limitations applicable to them, depend on numerous factors. Such factors include the insured’s theory of liability; the nature of the insured’s damages; the remedy sought; the nature of the underlying insurance claim; whether the cause of action and relief sought sound in tort, contract, law, or equity; whether the policy is a group or individual insurance contract; whether the policy is part of an employee benefit plan and, if so, whether the plan may be deemed an insurer under state law; whether the cause of action is preempted by federal statute (e.g., the Employee Retirement Income Security Act of 1974, 29 U.S.C.S. § 1001 *et seq.*), or governed by state common law; the law of the forum state under whose laws the cause of action arises; and whether the state law regulates employee benefit plans or insurance generally. *See, e.g., Moore v. Provident Life & Acci. Ins. Co.*, 786 F.2d 922, 926-927 (9th Cir. 1986); *Heighley, supra*, 257 F.

Supp. 2d at 1257. Whether a cause of action sounds in tort or in contract, in turn, depends upon the facts of each case, and eludes easy categorization. *Eisenberg v. Insurance Co. of North America*, 815 F.2d 1285, 1292 (9th Cir. 1987); *Smyth, supra*, 5 Cal. App. 4th at 1476. Under these circumstances, it is manifestly unreasonable to expect lay persons administering a first-party insurance claim to discern the correct statute of limitation applicable to each cause of action arising from its denial under the laws of each state.

Moreover, it is arguably illegal for lay persons who are not active members of the State Bar to advise insureds of applicable statutes of limitations, and unconstitutional for a state agency to require them to do so. Cal. Bus. & Prof. Code, §§ 6125, 6126. Such advice may constitute a legal opinion and the practice of law insofar as determining the correct statutes of limitations involves an analysis of complicated factual and legal issues that requires resources and advanced legal training not ordinarily possessed by lay persons. *See, Bluestein v. State Bar of California*, 13 Cal. 3d 162, 173-174 (1974); *Baron v. Los Angeles*, 2 Cal. 3d 535, 543 (1970); *Ortega v. Pajaro Valley Unified Sch. Dist.*, 64 Cal. App. 4th 1023, 1039, n.6 (1998); *see also, Johnson v. Grim-Smith Hospital*, 326 F. Supp. 537, 539 (E.D. Mo. 1971), *aff'd* by 453 F.2d 1253 (8th Cir., 1972). The judiciary has the exclusive right and inherent power to determine who is qualified to practice law in California. *Merco Constr. Engineers, Inc. v. Municipal Court*, 21 Cal. 3d 724, 727, 731 (1978). Neither the Legislature nor the Insurance Commissioner may constitutionally vest in a person not licensed to practice law the right to do so. *Id.* Thus, insofar as sections 2695.4(a) and 2695.7(f) purport to authorize claims personnel to provide legal advice

concerning statutes of limitations, they may implicate the separation of powers clause of Cal. Const., art. III, § 3. *Id.*

CONTRACTUAL LIMITATIONS PERIODS DO NOT SUPERSEDE STATUTORY ONES; INSURED MUST COMPLY WITH BOTH

For any action arising from the denial of an insurance claim to be timely, the insured must have filed suit within the time prescribed by both the statutory and contractual limitations periods. Contractual limitations periods that shorten an insured's time to sue are well-accepted. In the absence of a controlling statute to the contrary,

“a provision in a contract may validly limit, between the parties, the time for bringing an action on such contract to a period *less* than that prescribed in the general statute of limitations, provided that the shorter period itself shall be a reasonable period.” *Order of United Commercial Travelers v. Wolfe*, 331 U.S. 586, 608 (1947) (emphasis added); *see, Hambrecht & Quist Venture Partners v. Am. Medical Internat.*, 38 Cal. App. 4th 1532, 1548 (1995). Consistent with California Insurance Code section 10350.11, insurance policies issued in this State typically provide that “any legal action” arising from the denial of claim must be commenced within “three years after the time written proof of claim is required.” Such a provision has long been recognized as valid in California. *See, NN Investors Life Ins. Co. v. Superior Court*, 208 Cal. App. 3d 1070, 1073 (1989). It creates an enforceable contractual limitations period for bringing suit based on the policy, *Wetzel, supra*, 222 F.3d at 647, and bars both contract and bad faith claims arising from the denial of a claim for benefits under it. *CBS Broadcasting v. Fireman's Fund Ins. Co.*, 70 Cal. App. 4th 1075, 1086 (1999).

FOR ANY ACTION ARISING FROM THE DENIAL OF AN INSURANCE CLAIM TO BE TIMELY, THE INSURED MUST HAVE FILED SUIT WITHIN THE TIME PRESCRIBED BY BOTH THE STATUTORY AND CONTRACTUAL LIMITATIONS PERIODS.

However, the fact that a contractual limitation period may validly shorten the time to initiate an action “on a policy” does not mean that a contractual provision fixing a limitation period different from the time fixed by a statute of limitations supersedes any applicable statutes of limitations, or otherwise relieves the insured from complying with them. Courts have repeatedly held that, under California law, actions involving insurance contracts must satisfy all applicable contractual and statutory limitations, and insurers may still assert statutory limitations even when they have waived any right to assert contractual limitations.⁵ See, e.g., *Chuck, supra*, 455 F.3d at 1032; *Wetzel, supra*, 222 F.3d at 650; *Heighley, supra*, 257 F. Supp. 2d at 1241 1258.

Even where the policy contains an enforceable contractual limitation period that is mandated by California Insurance Code section 10350.11, the insured is not relieved of the obligation of complying with statutory limitation periods. Section 10350.11 is not a statute of limitations. *Wetzel, supra*, 222 F.3d at 648; *Heighley, supra*, 257 F. Supp. 2d at 1258. It simply creates an additional contractual period with which insureds must also comply in order to recover for an action on the policy. *Wetzel, supra*, 222 F.3d at 648; *Heighley, supra*, 257 F. Supp. 2d at 1258. Thus, where the contractual provision is more restrictive than the statute of limitations, the insured must still comply with *both* of them. *Heighley, supra*, 257 F. Supp. 2d at 1258;

ACTIONS INVOLVING INSURANCE CONTRACTS MUST SATISFY ALL APPLICABLE CONTRACTUAL AND STATUTORY LIMITATIONS, AND INSURERS MAY STILL ASSERT STATUTORY LIMITATIONS EVEN WHEN THEY HAVE WAIVED ANY RIGHT TO ASSERT CONTRACTUAL LIMITATIONS

⁵ Other jurisdictions likewise hold that where an insurer waives a contractual limitation period, the statutes of limitation still apply to any subsequent action arising from the denial of an insurance claim. See, *Cange v. Stotler & Co.*, 913 F.2d 1204, 1210 (7th Cir. 1990); *Scheetz v. IMT Ins. Co. (Mut.)*, 324 N.W.2d 302, 305 (1982); Appleman, *Insurance Law and Practice*, §11637.

see, Wetzel, supra, 222 F.3d at 650. Conversely, compliance with a contractual limitation period “will not save a claim . . . where the statute of limitations has already expired.” *Heighley, supra*, 257 F. Supp. 2d at 1258; see, Appleman, *Insurance Law and Practice* (2007 Supp.), §11601.

The Central District of California resolved this issue in *Heighley v. J.C. Penney Life Ins. Co.*, 257 F. Supp. 2d 1241 (C.D. Cal. 2003). In that case, the plaintiff filed suit against the defendant insurers on August 7, 2001 alleging, among other things, a cause of action for bad faith arising from the denial of benefits under an accidental death and dismemberment policy on August 18, 1998. At that time, the defendant insurer sent a letter to the plaintiff denying benefits on the ground that the insured did not die as a result of a covered injury. *Id.* at 1248. The defendants contended that the plaintiff’s bad faith claim was time-barred under California Code of Civil Procedure section 339. The plaintiff asserted that his cause of action was timely filed under the policy’s contractual limitation for filing a claim and “taking actions on the policy,” which required claimants to file a proof of loss “as soon as possible,” and thereafter file a legal action “to recover on the policy” within three years. *Id.* at 1256.

The Court held that the plaintiff’s bad faith claim was barred by the applicable two-year statute of limitations. *Id.* at 1257. The Court rejected the plaintiff’s argument that his bad faith claim was timely filed under the policy’s contractual limitation period, concluding that, under *Wetzel, supra*, 222 F.3d 643, the plaintiff had to prove that his bad faith claim was timely under *both* the contractual limitation period and Code of Civil Procedure section 339. *Heighley, supra*, 257 F. Supp. 2d at 1258.

In a case of first impression, the Northern District of California likewise rejected the plaintiff's argument that the defendant insurers were estopped from asserting the statutes of limitations applicable to her claims because they allegedly failed to advise her of the policy's contractual limitations period. In *Monaco v. Liberty Life Assur. Co.*, 2008 U.S. Dist. LEXIS 30934 (N.D. Cal., Apr. 15, 2008), the plaintiff filed suit on October 4, 2006, alleging, among other things, two causes of for breach of contract and breach of the implied covenant of good faith and fair dealing against defendants Liberty Life Assurance Company of Boston ("Liberty Life") and Liberty Mutual Insurance Company, based on Liberty Life's denial of her claim for disability benefits under a group disability income policy issued by Liberty Life to the University of California. The defendants moved for partial summary judgment as to those two causes of action, arguing that they were time-barred under California Code of Civil Procedure §§ 337(1) and 339(1) in that the plaintiff filed suit more than four years after her contract and tort causes of action accrued on December 15, 2000, when Liberty Life denied her disability claim. Notwithstanding that the defendants maintained that her claims were time-barred under the applicable statutes of limitation, not under the insurance contract, the plaintiff opposed the defendants' motion, arguing that her causes of action were subject to the three-year limitation period set forth in the policy, not sections 337(1) and 339(1).⁶ The plaintiff argued that

ABSENT EVIDENCE THAT THE INSURED AND THE INSURER ENTERED INTO A WRITTEN AGREEMENT EXTENDING HIS OR HER TIME TO FILE SUIT, OR THAT THE INSURER MISLED THE INSURED AS TO HIS OR HER TIME TO DO SO, THERE IS NO BASIS IN LAW OR EQUITY FOR TOLLING THE INSURED'S TIME TO SUE, OR FINDING THAT THE INSURER IS ESTOPPED FROM ASSERTING THAT HIS OR HER CLAIMS ARE TIME-BARRERD

the policy's three-year contractual limitation period superseded these statutes of limitations, because the contractual limitation period was mandated by California Insurance Code § 10350.11. However, the plaintiff argued that she was not bound by the contractual limitations period, and the defendants were estopped from asserting her claims were time-barred under any contractual *or* statutory limitation period, because the defendants had failed to advise her of the policy's *contractual* limitation, as she maintained they were required to disclose to her under Title 10 of the California Code of Regulations, §§ 2695.4 and 2695.7(f). The court granted the defendants'

motion, holding the plaintiff's causes of action were time-barred under the applicable statutes of limitation. *Id.* at * 7.

In doing so, the court rejected the plaintiff's argument that "she may ignore the statutory statutes of limitation applicable to her action for an indefinite period, simply because defendants did not advise her of the policy's contractual limitation period." *Id.* at * 7. The court observed that, "under California law, actions involving insurance contracts must satisfy all applicable contractual and statutory limitations, and that insurers may still assert statutory limitations even if they have waived the right to assert contractual limitations. [Citations omitted.]" *Id.* at * 7-8. The court held that the contractual limitation period did not supersede the statutory limitation period, stating:

While failing to advise of a plan's terms and conditions (including a contractual limitations period) might prevent a contractual limitations period from running, it will not prevent a

⁶ Pursuant to California Insurance Code § 10350.11, the policy provided in relevant part that "[a] claimant or the claimant's authorized representative cannot start any legal action: 1. until 60 days after proof of claim has been given; or 2. more than three years after the time proof of claim is required."

statutory limitations period from running. [Citations omitted.]

. . . . The fact that a policy contains a contractual limitations period does not mean that the statutes of limitations fall by the wayside. [Citations omitted.]

Id. at * 8-9. Moreover, the court held that the defendants were not estopped from asserting the applicable statutes of limitations under Section 2695.7(f) or Section 2695.4. In reaching this conclusion, the court explained that, “Section 2695.7(f) requires insurers to provide written notice to unrepresented claimants of any statute of limitations or other time period requirement on which the insurer *may rely to deny an insurance claim* -- not to defeat a subsequent lawsuit arising from the denial of the claim.” *Id.* at * 8-9 (emphasis added). Likewise, the court explained that Section 2695.4 only “applies to time limits within the policy.” *Id.* at * 8-9. Although the court agreed that, if an insurer failed to disclose all material provisions *in the policy* that may apply to a claim made by the claimant, then the insurer may be estopped from relying on that provision in denying the insured’s claim for benefits, “[w]hether or not defendants disclosed all the material provisions to plaintiff is irrelevant for purposes of determining whether this action is barred by the statutes of limitations contained in the California Code of Civil Procedure.” *Id.* at * 9-10.

This conclusion finds further support where the policy at issue not only contains a contractual limitation period, but also states that the governing jurisdiction is California and subject to “the law” of this State, or words to that effect. In that instance, the policy’s contractual limitation period will not govern causes of action to the exclusion of California’s statutes of limitations. Although insurance contracts have special

**IN INCORPORATING THE
 “LAWS” OF CALIFORNIA WITHOUT
 QUALIFICATION, A POLICY
 NECESSARILY INCORPORATES
 ALL OF CALIFORNIA’S STATUTES
 OF LIMITATIONS, WITHOUT
 EXCEPTION.**

attributes, they are nevertheless contracts to which ordinary rules of contract interpretation apply. *Perez-Encinas, supra*, 468 F. Supp. 2d at 1133; *see, Bank of the West v. Superior Court*, 2 Cal. 4th 1254, 1264 (1992). The first rule is that the interpretation of an insurance contract must give effect to the “mutual intention” of the parties. *E.M.M.I., Inc. v. Zurich American Ins. Co.*, 32 Cal. 4th 465, 470 (2004). Such intent is to be inferred wherever possible solely from the written provisions of the contract. *Id.*; Cal. Civ. Code, § 1639. Both the insured and the insurer are bound by the clear language of the policy. *Chase, supra*, 42 Cal. App. 4th at 1155. A court reviewing the policy must review the language of the entire contract in order to ascertain its plain meaning or the meaning a layperson would ordinarily attach to it. *Waller v. Truck Ins. Exch., Inc.*, 11 Cal.4th 1, 18 (1995); *Reserve Ins. Co. v. Pisciotto*, 30 Cal. 3d 800, 807, 180 Cal. Rptr. 628, 640 P.2d 764 (1982); Cal. Civ. Code § 1638; *see, Perez-Encinas, supra*, 468 F. Supp. 2d at 1133. In searching for the plain meaning of an insurance contract, the Court may not ignore the policy’s choice of law provision in favor of its contractual limitation provision. Rather, language in the contract must be interpreted as a whole, and the “clear and explicit” meaning of both 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” (Cal. Civ. Code, § 1644), controls judicial interpretation. *E.M.M.I., supra*, 32 Cal. 4th at 470; *Bank of the West, supra*, 2 Cal. 4th at 1265.; *Perez-Encinas, supra*, 468 F. Supp. 2d at 1133.

West, supra, 2 Cal. 4th at 1265.; *Perez-Encinas, supra*, 468 F. Supp. 2d at 1133.

In common usage, the term “law” refers to both legislative and court made law, as well as to administrative rules, regulations and ordinances.

Hambrecht & Quist Venture Partners v. Am. Medical Internat., 38 Cal. App. 4th 1532, 1540 (1995). “Both the technical and popular meanings of ‘laws’ refer to a jurisdiction’s statutory law, of which the statutes of limitations are a part.” *Id.* Thus, California courts have recognized that the word “law” in a contract’s choice of law provision includes a state’s statutes of limitations. *Id.*; *ABF Capital Corp. v. Berglass*, 130 Cal. App. 4th 825, 836 (2005).

For this reason, absent any policy provisions to the contrary, in incorporating the “laws” of California without qualification, a policy necessarily incorporates all of California’s statutes of limitations, without exception. Accordingly, under well-settled rules of contract interpretation, for “any legal action” arising from the denial of benefits under an insurance policy to be timely, it must be filed within the controlling statutes of limitations as well as the policy’s contractual limitation.

This conclusion also accords with California law, which restricts the right of parties to waive statutes of limitations altogether or otherwise allow for litigation in perpetuity. Under Code of Civil Procedure section 360.5, parties may only waive the statute of limitations defense if the waiver is in writing and does not extend the limitations period for more than four years at a time. *Hambrecht, supra*, 38 Cal. App. 4th at 1547-1548. Absent evidence that the insured and the insurer entered into a written agreement extending his or her time to file suit, or that the insurer misled the insured as to his or her time to do so, there is no basis in law or equity for tolling the insured’s time to sue, or finding that the insurer is estopped from asserting that his or her claims are time-barred.

CONCLUSION

Equity will not resuscitate stale claims that have expired through no fault of the insurer. Although an insurer may be barred from asserting a contractual

limitation period of which the insured was not aware, it may nevertheless assert the applicable statutes of limitations to defeat an untimely lawsuit, regardless of whether it advised the insured of any contractual limitation periods pursuant to 10 CCR sections 2695.4(a) and 2695.7(f). Thus, at a minimum, any action to recover policy benefits must be filed within the time prescribed by the applicable statutes of limitations to be timely.



Robert M. Forni, Jr. is a senior associate at the firm of Ropers, Majeski, Kohn & Bentley in Redwood City, California. He specializes in the representation of insurance carriers in bad faith and coverage litigation, including liability, property, automobile and disability insurance. His practice also includes ERISA litigation, contract and tort disputes involving insurance agents and brokers, general commercial litigation, and NASD arbitrations. His expertise extends to personal and commercial lines of insurance. Comments and inquiries may be directed to him at rforni@rmkb.com.

L A W Y E R S
RMKB
R O P E R S M A J E S K I K O H N B E N T L E Y

A better legal system®

Document hosted at JDSUPRA

<http://www.jdsupra.com/post/documentviewer.aspx?fid=ae045de5-ca0d-4b8a-ba99-761cc042c0ba>

In California, the firm has long maintained a reputation as one of the state's most outstanding trial firms. The addition of a New York office in 1999 and the newest office in Boston this year has allowed RMKB to expand the wide variety of services available to our clients and has allowed the firm to represent clients on a national basis. The attorneys at RMKB have extensive experience in the areas of business litigation; catastrophic injury litigation; class actions; construction defect litigation; corporate law; directors and officers liability; employment counseling and litigation; entertainment law; environmental and toxic tort liability; fidelity and surety bonds; insurance coverage, bad faith, ERISA, fraud and regulation; intellectual property; litigation management, cost control and fee disputes; mergers and acquisitions; product liability; professional negligence; real estate; and reinsurance. The firm's appellate practice has an outstanding track record and has more than 350 published decisions.



San Francisco

201 Spear Street
Suite 1000
San Francisco, CA 94105
ph (415) 543-4800
fax (415) 972-6301

Los Angeles

515 South Flower Street
Suite 1100
Los Angeles, CA 90071
ph (213) 312-2000
fax (213) 312-2001

San Jose

50 W. San Fernando Street
Suite 1400
San Jose, CA 95113
ph (408) 287-6262
fax (408) 918-4501

Redwood City

1001 Marshall Street
Suite 300
Redwood City, CA 94063
ph (650) 364-8200
fax (650) 780-1701

New York

17 State Street
Suite 2400
New York, NY 10004
ph (212) 668-5927
fax (212) 668-5929

Boston

60 State Street
Suite 700
Boston, MA 02109
ph (617) 973-5720
fax (617) 973-5721

www.rmkb.com