

Ordered Not Published Previously published at: 214 Cal.App.3d 227(Cal. Rules of Court, Rules 976, 977, 979)
(Cite as: 262 Cal.Rptr. 595)

No. A043009.

Court of Appeal, First District, Division 3, California.

Sept. 25, 1989.

Rehearing Denied Oct. 25, 1989.

Review Denied Dec. 14, 1989. [\[FN*\]](#)

Len DAVIS et al., Plaintiffs and Appellants,

v.

STATE FARM INSURANCE COMPANY et al.,

Defendants and Respondents.

LUDWIG'S LIQUOR AND SMOKE SHOP et al.,

Plaintiffs and Appellants,

v.

AETNA INSURANCE COMPANY et al.,

Defendants and Respondents.

Gary STOUTENBURGH et al., Plaintiffs and

Appellants,

v.

STATE FARM FIRE AND CASUALTY
COMPANY et al., Defendants and Respondents.

John PRUSCH et al., Plaintiffs and Appellants,

v.

STATE FARM INSURANCE et al., Defendants and
Respondents.

Lee Noble McEACHERN, Jr. et al., Plaintiffs and

Appellants,

v.

STATE FARM INSURANCE COMPANY et al.,
Defendants and Respondents.

Rosemary GARTZKE, Plaintiff and Appellant,

v.

STATE FARM INSURANCE COMPANIES et al.,
Defendants and Respondents.

Richard RODECK, Plaintiff and Appellant,

v.

STATE FARM GENERAL INSURANCE
COMPANY et al., Defendants and Respondents.

Curtis PROAPS et al., Plaintiffs and Appellants,

v.

STATE FARM FIRE AND CASUALTY
COMPANY et al., Defendants and Respondents.

CARL MOSHER'S SHOES, INC. et al., Plaintiffs

and Appellants,

v.

GREAT AMERICAN INSURANCE COMPANIES
et al., Defendants and Respondents.

Joseph M. GONZALEZ et al., Plaintiffs and

Appellants,

v.

STATE FARM INSURANCE et al., Defendants and
Respondents.

RAPHAEL FLOOR COVERING & APPLIANCE,
INC. et al., Plaintiffs and Appellants,

v.

AETNA INSURANCE COMPANY et al.,

Defendants and Respondents.

[FN*](#) In denying review, the Supreme Court ordered that the opinion be not officially published.

Insureds sued their insurers for, inter alia, breach of contract, unfair claims settlement practices, and misrepresentation arising out of insurers' denial of coverage under their all risks policies for flood or earth movement damage to their properties. The Superior Court, Marin County, Henry J. Broderick and Richard H. Breiner, JJ., sustained the insurers' demurrers and insureds appealed. The Court of Appeal, White, P.J., held that allegations that insurers failed to disclose that coverage was possible where third-party negligence is a concurrent proximate cause of damages and with intent to deceive their insurers falsely asserted that there was no coverage available were, if true, sufficient to toll the applicable statutes of limitation.

Reversed.

Strankman, J., dissented and filed opinion.

***596** Lehmann Law Offices, Harry V. Lehmann, Novato, for plaintiffs and appellants.

Thorton, Taylor & Downs, Clarke B. Holland, C. Scott Penner, San Francisco, for defendants and respondents.

WHITE, Presiding Judge.

In this consolidated action plaintiff insureds appeal from a judgment in favor of defendant insurers based on the sustaining of defendants' demurrer to plaintiffs' amended complaints. [\[FN1\]](#) We hold that there is a triable issue of material fact as to ***597** whether defendants are estopped from raising the statute of limitations as a defense and reverse the judgment accordingly.

[FN1.](#) Twelve actions were consolidated for

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the purposes of ruling on the demurrer, for judgment and for appeal. One plaintiff, Katherine Broussard, has subsequently abandoned her appeal.

The allegations set forth in each of the complaints are essentially the same. On January 4 and 5, 1982, each of the plaintiffs suffered flood or earth movement damage to their insured properties. Negligence by third parties was a concurrent cause of the flooding. Pursuant to the terms of their "all risks" policies, plaintiffs contacted their carriers promptly after the damage was sustained. Despite the fact that an "all risks" policy covers flood and/or earth movement damage where the actual and concurrent proximate cause of such damage is the negligence of a third party, plaintiffs were informed by the carriers or their agents that there was no coverage due to the flood and/or earth movement exclusions in their policies. All claims were denied without investigation. It was not until November of 1985 that plaintiffs discovered that they may be entitled to coverage for losses if negligence was the proximate cause of the loss, because such coverage or potential coverage was kept secret from plaintiffs by defendants.

Based on these allegations each complaint alleges causes of action for breach of contract, "fiduciary" deceit, declaratory relief, bad faith refusal to pay benefits, unfair claims settlement practices based on [Insurance Code section 790.03](#), [FN2] misrepresentation, and infliction of emotional distress. Defendants demurred, primarily on the grounds that plaintiffs' complaints were barred by the applicable statutory and contractual limitation periods. The trial court sustained the demurrer without leave to amend and denied plaintiffs' motion for clarification and reconsideration. This appeal followed.

[FN2]. All statutory references are to the Insurance Code unless otherwise indicated.

DISCUSSION

[1][2][3] When reviewing an order sustaining a demurrer without leave to amend, this court must treat the demurrer as admitting all properly pleaded facts, but not contentions, or conclusions of fact or law. We must read the complaint as a whole and give it a reasonable interpretation. ([Blank v. Kirwan](#)

(1985) 39 Cal.3d 311, 318, 216 Cal.Rptr. 718, 703 P.2d 58.) If the complaint, liberally construed, can state a cause of action or if it is reasonably possible that the plaintiff can cure the complaint by amendment, the trial court should not sustain a demurrer without leave to amend. ([Heckendorn v. City of San Marino](#) (1986) 42 Cal.3d 481, 486, 229 Cal.Rptr. 324, 723 P.2d 64.) The burden is on the plaintiff to establish the reasonable possibility that the defect is curable. ([Blank v. Kirwan](#), *supra*, 39 Cal.3d at p. 318, 216 Cal.Rptr. 718, 703 P.2d 58.)

[4] "A complaint which shows on its face that the cause of action is barred by limitations is subject to demurrer." (5 Witkin, Cal.Procedure (3d ed. 1985) Pleading, § 912, p. 349.) Therefore, plaintiffs must allege specific acts which excuse failure to file within the statutory period.

Plaintiffs contend that defendants should be estopped from relying on the one-year limitation periods contained in their policies. This is because the insurers purportedly concealed their wrongful denial of coverage. The estoppel claim is based on the theory that the insurers have a fiduciary duty to their insureds, yet they concealed from plaintiffs the possibility that the policies covered plaintiffs' damages. Plaintiffs argue that the trial court erred in holding that "[n]o basis for estoppel is pled nor could such a contention survive the unequivocal holding of [Neff v. New York Life \[Ins. Co. \(1947\) 30 Cal.2d 165, 180 P.2d 900.\]](#)"

[5][6] An estoppel to set up the defense of the statute of limitations arises as a result of some conduct by a defendant, relied on by a plaintiff, which induces the belated filing of the action. (See 3 Witkin, Cal.Procedure (3d ed. 1985) Actions, § 523, p. 550 and cases cited therein.) "The statute of limitations may not be used to perpetrate a fraud upon otherwise diligent suitors. Thus if the defendant, by his own wrongdoing, prevents the plaintiff from instituting a suit he may not take advantage *598 of the statute of limitations. [Citation.]" ([Snyder v. Boy Scouts of America, Inc. \(1988\) 205 Cal.App.3d 1318, 1323, 253 Cal.Rptr. 156.](#)) Consequently, when a party fraudulently conceals material facts that induces a person not to prosecute a claim, the statute of limitations is tolled and the fraudulent person is estopped from pleading the statute of limitations. ([Ibid.](#))

Plaintiffs maintain that defendants, in their fiduciary capacity, concealed the fact that plaintiffs had potential claims on a third-party negligence theory.

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Therefore, we must first examine whether defendants were fiduciaries for plaintiffs.

The nature of the relationship between the insurer and the insured is still unresolved in California. In *Seaman's Direct Buying Service, Inc. v. Standard Oil Co.* (1984) 36 Cal.3d 752, 206 Cal.Rptr. 354, 686 P.2d 1158, our Supreme Court stated that "[i]n holding that a tort action is available for breach of the covenant [of good faith and fair dealing] in an insurance contract, we have emphasized the 'special relationship' between insurer and insured, characterized by ... fiduciary responsibility." (*Id.*, at p. 768, 206 Cal.Rptr. 354, 686 P.2d 1158.) Based on this statement, the court in *Gibson v. Government Employees Ins. Co.* (1984) 162 Cal.App.3d 441, 208 Cal.Rptr. 511; acknowledged that the precise issue had not been decided, but assumed that the relationship between an insurer and its insured is a fiduciary one. (*Id.*, at p. 446, 208 Cal.Rptr. 511.) Subsequent support for the *Gibson* assumption is found in *Frommoethelydo v. Fire Ins. Exchange* (1986) 42 Cal.3d 208, 215, 228 Cal.Rptr. 160, 721 P.2d 41, wherein the high court stated: "In addition an insurer holds itself out as a fiduciary. With the public trust must go private responsibility consonant with the trust, including qualities of decency and humanity inherent in the responsibilities of a fiduciary." Given this trend in California law we, like the *Gibson* court, assume that the insurer owes certain fiduciary duties to its insured.

[7] "Cases in which the defendant stands in a fiduciary relationship to the plaintiff are frequently treated as if they involved fraudulent concealment of the cause of action by the defendant. The theory is that although the defendant makes no active misrepresentation, this element 'is supplied by an affirmative obligation to make full disclosure, and the non-disclosure itself is "fraud." ' [Citations.]" *Amen v. Merced County Title Co.* (1962) 58 Cal.2d 528, 534, 25 Cal.Rptr. 65, 375 P.2d 33. Pleading the existence of a fiduciary relationship obviates the necessity of pleading fraud. (*Ibid.*)

[8][9] One of the fiduciary duties that an insurer owes its insured is to disclose relevant matters arising from their relationship. (*Spindle v. Chubb/Pacific Indemnity Group* (1979) 89 Cal.App.3d 706, 712, 152 Cal.Rptr. 776.) In their second cause of action, plaintiffs not only alleged defendants failed to disclose that coverage was possible where negligence is the concurrent proximate cause of damages, but with intent to deceive plaintiffs, they falsely asserted that there was absolutely no coverage available.

Such allegations, if true, are sufficient to toll the applicable statutes of limitation.

[10] Even if our assumption that defendants owed a fiduciary duty to their insureds is incorrect, plaintiffs have alleged sufficient facts for intentional concealment. Intentional concealment of a material fact is an alternative form of fraud equivalent to direct affirmative misrepresentation. (*Civ.Code*, § § 1572, subd. 3, 1709, 1710, subd. 3; *Stevens v. Superior Court* (1986) 180 Cal.App.3d 605, 608, 225 Cal.Rptr. 624; 5 Witkin, Summary of Cal.Law (9th ed. 1988) Torts, § 702, pp. 804-805.) Proof of such allegations would equally toll the limitation periods.

Neff v. New York Life Ins. Co., *supra*, 30 Cal.2d 165, 180 P.2d 900, may easily be distinguished from the present action. In *Neff*, the complaint alleged that an insured became totally disabled and requested disability payments from his insurance company. When the company denied coverage on the grounds that Neff was not permanently prevented from pursuing some gainful occupation for life, Neff made no further claim on the policy. After Neff's death, *599 the administrator of his estate brought action to recover the 10-year accrual of disability payments to which Neff was allegedly entitled. The complaint alleged that proof of Neff's permanent disability could not be provided within the insured's lifetime and, consequently, the denial of the claim for disability payments was fraudulent. Our Supreme Court held the action was barred by the statute of limitations, reasoning that "[i]t is a matter of common knowledge that there are often differences of opinion concerning liability under insurance policies and no mere denial of liability, even though it be alleged to have been made through fraud or mistake, should be held sufficient, without more, to deprive the insurer of its privilege of having the disputed liability litigated within the period prescribed by the statute of limitations." (*Id.*, at pp. 172-173, 180 P.2d 900.)

We preliminarily note that *Neff* was written more than 40 years ago at a time when there were few restrictions on insurance carriers. More than a decade later, the Legislature enacted [section 790.03](#), listing unfair and deceptive practices in the insurance industry. (See Stats. 1959, c. 1737, p. 4188, § 1.) In 1972, the Legislature added subdivision (h) to [section 790.03](#), which currently lists 15 specific unfair and deceptive practices by insurance companies. (See Stats. 1972, c. 725, p. 1314, § 1; Stats. 1975, c. 790, p. 1812, § 1.) Finally, as previously noted, California courts have imposed fiduciary duties on insurance companies subsequent

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to the Neff decision.

Notwithstanding the evolvement of the law, there is a significant difference between the nature of the loss in Neff and that involved in the case at bench. Neff's insurer attempted to avoid payment based upon a simple denial of the fact of disability, the rebuttal of which is within the knowledge of the average insured. In contrast, the question of coverage in this case depends on a complex question of law and fact. When courts of law struggle "to enunciate principles that determine whether coverage exists when excluded and covered perils interact to cause a loss" (Garvey v. State Farm Fire & Casualty Co. (1989) 48 Cal.3d 395, 401, 257 Cal.Rptr. 292, 770 P.2d 704), it seems unreasonable to require lay insureds to fathom the terms of "all risks" policies. Such policyholders should be able to rely on the representations by insurance carriers as to whether their damages are in any way covered under their policies.

Moreover, at the time of Neff, insurance carriers were not bound by rules for settlement practices. Here, defendants allegedly committed unfair settlement practices. First, in violation of section 790.03, subdivision (h)(3), defendants allegedly failed to investigate plaintiffs' claims. Without such investigation there was no way for them to determine the existence of third-party liability. Nor was there any factual basis upon which they could attempt a good faith settlement of the claims. (§ 790.03, subd. (h)(5).) Under the alleged facts, it similarly was impossible to provide a reasonable explanation of the basis relied on in the insurance policy, in relation to the facts or applicable law, for the denial of plaintiffs' claims. (§ 790.03, subd. (h)(13).) Defendants' alleged unfair claims practices coupled with their failure to disclose potential coverage and/or misrepresentation that no coverage existed makes this a stronger complaint than that in Neff.

In conclusion, we hold that plaintiffs have alleged or can allege by way of amendment sufficient facts, which, if proven, could estop defendants from raising the defense of the statute of limitations. Accordingly, defendants' demurrer was improperly sustained without leave to amend.

The judgment is reversed. Costs of appeal are awarded to plaintiffs.

MERRILL, J., concurs.

STRANKMAN, Associate Justice.

I dissent. The majority's misplaced reliance on the doctrine of estoppel under the facts alleged here to avoid the bar of the one-year limitations period is inconsistent with controlling precedent in Neff v. New York Life Ins. Co. (1947) 30 Cal.2d 165, 172-173, 180 P.2d 900, in which the California Supreme Court stated: "It is a matter of common knowledge that there are often *600 differences of opinion concerning liability under insurance policies and no mere denial of liability, *even though it be alleged to have been made through fraud or mistake*, should be held sufficient, without more, to deprive the insurer of its privilege of having the disputed liability litigated within the period prescribed by the statute of limitations." (Emphasis added.)

The majority, in holding that the facts as alleged establish the insurer's estoppel to rely on the one-year limitations period, reason as follows: that defendant insurer stood in a fiduciary relationship with plaintiff insureds, and, accordingly, had a duty to disclose that where third-party negligence was a proximate cause, an otherwise excluded loss was a covered loss (under Ins.Code, § 530); and the insurer's denial of coverage without disclosure amounted to fraudulent concealment of a cause of action giving rise to estoppel to assert the bar of the limitations period.

"An estoppel to set up the defense of the statute of limitations arises as a result of some conduct by the defendant, relied on by the plaintiff, which induces the belated filing of the action." (3 Witkin, Cal.Procedure (3d ed. 1985) Actions, § 523, p. 550.) California decisions in which the defendant's conduct, either actual or alleged, has been found to give rise to estoppel, roughly fall into three categories. The first category is where the defendant induces the plaintiff to delay in bringing suit, e.g., by promises of performance; promises of settlement; promises concerning other pending litigation which induce the plaintiff not to sue; or representations to the plaintiff that by relying on him or her and following his or her advice the plaintiff will suffer no loss. (See 3 Witkin, Actions, *op. cit. supra*, § § 524-528, pp. 551-555.)

The second category involves fraudulent concealment by the defendant of the defendant's identity. (See 3 Witkin, Actions, *op. cit. supra*, § 529, pp. 556-558.)

The third category, generally, and somewhat imprecisely labeled "Fraudulent Concealment of

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Cause of Action," is where the defendant fraudulently conceals from the plaintiff material facts upon which the existence of the cause of action depends, in which case the limitations period does not begin to run until discovery of those facts. (See *Kimball v. Pacific Gas & Elec. Co.* (1934) 220 Cal. 203, 215, 30 P.2d 39; 3 Witkin, Actions, op. cit. supra, § 530, p. 559.) One court stated this rule as follows: "[I]t would seem to be clear that the conduct of the defendants need not be shown to be directed specifically against the bringing of an action, but that if it was aimed against the acquisition of the requisite knowledge which would naturally lead to such a result, it comes within the condemnation of the rule." (*Bowman v. McPheeters* (1947) 77 Cal.App.2d 795, 804, 176 P.2d 745.)

Neither the first nor second categories of cases above described are applicable to the instant case. The facts upon which plaintiffs rely in claiming estoppel do not involve any conduct on the part of the insurer which induced them to forego initiating litigation after asserting a claim for coverage under the policy. For example, the insurer did not send the insured a detailed summary of the policy which omitted the one-year commencement of suit provision (cf. *Elliano v. Assurance Co. of America* (1970) 3 Cal.App.3d 446, 450-452, 83 Cal.Rptr. 509.) or equivocate as to denial of coverage.

The third category is pertinent to the majority's holding here that the facts as alleged show defendant insurer fraudulently concealed a valid basis for a claim for coverage. Fraudulent concealment of material facts giving rise to a cause of action includes nondisclosure of material facts by a fiduciary or some other person standing in a confidential relationship with the plaintiff, in breach of a duty of disclosure. (See *Pashley v. Pacific Elec. Ry. Co.* (1944) 25 Cal.2d 226, 153 P.2d 325; *Kimball v. Pacific Gas & Elec. Co.*, supra, 220 Cal. 203, 30 P.2d 39; 3 Witkin, Actions, op. cit. supra, § 533, pp. 561-562.)

The majority finds that under a developing, though not yet explicitly clear, trend in California case law, an insurer stands in a fiduciary relationship with the insured, at least for certain purposes, which imposes a *601 duty of full disclosure concerning coverage. They further hold that the defendant insurer's failure to disclose to the plaintiffs a valid basis for claiming coverage for flood damage--third party negligence--constituted a fraudulent concealment of a cause of action by a fiduciary.

I disagree. The facts as alleged here do not show

concealment or nondisclosure by the insurer of any of the material facts, as opposed to pertinent law, giving rise to a claim for coverage. The insurer did not conceal, and indeed had no information concerning the nature or possible causes of the flooding or resulting damage. Nor did the insurer take any action to prevent plaintiffs from learning of the cause of the flooding, e.g., it did not discourage plaintiffs from having a contractor investigate the site of the flooding. The insurer did not conceal any of the terms of the policy or the fact of its unequivocal denial of coverage under the policy.

Under somewhat similar circumstances, the California Supreme Court in *Neff v. New York Life Ins. Co.*, supra, 30 Cal.2d 165, 180 P.2d 900. found the insurer's denial of coverage commenced the running of the limitations period. There, the complaint alleged that an insured became totally disabled and made proof thereof to defendant insurer with a request for disability payments; the policy provided coverage if the insured became permanently disabled before the age of 60; the defendant fraudulently represented that he was not entitled to benefits because it did not appear that he was disabled for life, and sent a letter to the insured to that effect; that the insured, and later his widow, relied on the insurer's representations, and made no further claim. The action was brought by the son, 16 years after the alleged representations.

The court held the statute of limitations had not been tolled, and accordingly the action was untimely. The court found the insurer's letter constituted an unconditional denial of liability to the insured which gave rise to an immediate cause of action to the insured. Because at that time the insured was in possession of all the facts concerning the state of his health and of the extent of his disability, and in possession of all the terms of the policy, the doctrine of estoppel did not apply. "[Insurer's estoppel to assert the defense of the statute of limitations] would mean that no insurer could deny liability without indefinitely suspending the running of the statute of limitations until perchance the insured, or his heirs after his death, might obtain at some future time legal advice indicating the view that liability existed." (*Neff v. New York Life Ins. Co.*, supra, 30 Cal.2d at p. 172, 180 P.2d 900.) The court stated the critical factors supporting its conclusion were (1) the insurer plainly advised the insured, and later his widow, that the insured had no disability rights under the policy; (2) there was no confidential relationship between defendant and the insured or his widow which would relieve either of them from the duty to make diligent

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inquiry into the merit of defendant's position; and (3) there were no deceptive assurances by the defendant tending to lull the insured into a false sense of security and to forbear suit for the statutory period. (*Id.*, at p. 174, 180 P.2d 900.)

The majority states that *Neff* does not control here because the court there relied upon the absence of a fiduciary relationship between the insurer and insured, whereas, since *Neff*, the California Supreme Court as well as the Legislature has enunciated certain fiduciary-type obligations owing by the insurer to its insured, and that such obligations under the circumstances here include a duty of disclosure concerning the effect of third-party negligence.

I do not agree, for despite developing case law of our Supreme Court imposing upon insurers the highest degree of good faith and fair dealing with respect to their insureds, no decision of that court to date squarely holds that an insurer stands in a fiduciary relationship with its insured. As Judge Learned Hand remarked, "[I]t [is not] desirable for a lower court to embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant...." *602 (*Spector Motor Service v. Walsh* (2d Cir.1944) 139 F.2d 809, 823 (dis. opn. by Hand, J.)) Further, even if a fiduciary relationship exists for certain specific purposes, no California Supreme Court decision holds that such relationship imposes upon the insurer a duty to advise the insured of California statutory law which might pertain to a claim of loss, or of different legal theories which the insured could pursue to avoid policy exclusions. "An insurer is under no obligation to explain to the insured all possible legal theories of recovery." (*Lawrence v. Western Mutual Ins. Co.* (1988) 204 Cal.App.3d 565, 574, 251 Cal.Rptr. 319.)

I acknowledge that the terms of an insurance policy must fairly and accurately explain the covered risks (*Lawrence v. Western Mutual Ins. Co.*, *supra*, 204 Cal.App.3d at p. 574, 251 Cal.Rptr. 319), and that the instant policy did not explain that under then-existing statutory law, flood losses were covered if third-party negligence was a concurrent cause. I find no authority, however, which requires the insurer to explain in its policy the impact of California law on the scope of excluded losses, or to advise that certain statutory provisions may define or expand the scope of coverage beyond that apparent from the policy language itself. The Legislature amends and alters insurance law on an ongoing basis, and it would be impractical to require the insurer to amplify or amend

the provisions of policies already issued to reflect these ongoing statutory changes.

I would affirm the trial court's order sustaining the demurrers with prejudice and dismissing the complaints.

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