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The Suit Limitation Defense in California: Ten Years After *Prudential-LMI*

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Most property insurance policies include a suit limitation provision that requires the insured to commence suit against the insurer within a certain period of time, usually one or two years, after the date of loss.[1] Ten years ago, the California Supreme Court was faced with the question of when the suit limitation period in a homeowners' policy begins to run in a continuous and progressive property loss case. In *Prudential-LMI Insurance Co. v. Superior Court*,[2] the court held that the suit limitation period begins to run at that point in time when appreciable damage occurs and is or should be known to the insured, such that a reasonable insured would be aware that its notification duty under the policy was triggered.[3] The court then held that the suit limitation period is tolled from the time the insured gives notice of the loss to the insurer until the insurer formally denies liability.[4]

The *Prudential-LMI* court's holding became the widely accepted rule applicable to all type of losses, whether progressive or not, and to both homeowners' and commercial property insurance policies.[5] The decision

1. *See generally* Harold H. Reader & Herbert P. Polk, *The One-Year Suit Limitation in Fire Insurance Policies: Challenges and Counterpunches, 19* The Forum 24 (1983).
2. Prudential-LMI Insurance Co. v. Superior Court, 798 P.2d 1230 (Cal. 1990).
3. *Id.* at 1232.
4. *Id.*
5. *See, e.g.*, Imperial Resource Recovery Assoc., L.P. v. Allendale Mut. Ins. Co., 878 F. Supp. 434, 435 (N.D.N.Y. 1995) (builder's risk policy); Forman v. Chicago Title Ins. Co., 38 Cal. Rptr. 2d 790,

After this article went to press, the California Legislature enacted a statute that revived certain time-barred claims for damages arising out of the 1994 Northridge earthquake. California Code of Civil Procedure section 340.9 revives for a one-year period time-barred Northridge earthquake claims where the policyholder has notified its insurer or insurer's representative of potential Northridge earthquake damage prior to January 1, 2000. To be timely, these actions must be commenced within one year of the statute's effective date—January 1, 2001. The statute does not apply to any claim that has been litigated to finality before the statute's effective date or to any written compromised settlement that has been made between an insurer and its insured where the insured was represented by a California-admitted attorney at the time of the settlement and who signed the agreement.

left many issues unresolved, however, and during the next ten years, the suit limitation defense was a frequently litigated issue, with much of the legal landscape carved in cases arising out of the 1994 Northridge earthquake.

After ten years, the suit limitation provision is now back before the Supreme Court for the first time since *Prudential-LMI*. In *Vu v. Prudential Property & Casualty Insurance Co.*,[6] the court will consider one still unresolved issue—whether an insurer has waived or is estopped to assert the suit limitation defense when an insured did not timely commence suit because it relied on the insurer's representation that the loss was either not covered by the policy or was less than the policy deductible.

THE SUIT LIMITATION PROVISION

Almost all property insurance policies include a suit limitation provision.[7] Typically, the suit limitation period is either one or two years, which is less than the statute of limitations applicable to actions for breach

792-794 (Cal. Ct. App. 1995) (title policy); Central Nat'l Ins. Co. v. Superior Court, 3 Cal. Rptr. 2d 622, 625-626 (Cal. Ct. App. 1992) (named peril policy); San Jose Crane & Rigging, Inc. v. Lexington Ins. Co., 278 Cal. Rptr. 301, 304 (Cal. Ct. App. 1991) (commercial property policy). In *San Jose Crane*, the court found "no reason why the rules announced in *Prudential-LMI* should not apply with equal force" to commercial all risk insurance policies. *San Jose Crane*, 278 Cal. Rptr. at 304. The court reasoned that a first-party policy insured property damage regardless of whether the property was residential or commercial. The court also reasoned that the insured's expectations and duties were the same under homeowner's and commercial all risk policies. *Id.*

6. Vu v. Prudential Property & Casualty Insurance Co., 172 F.3d 725 (9th Cir. 1999).

7. *See generally* Reader & Polk, *supra* note 1, at 24. The ISO homeowner policy forms, for example, contain a one-year suit limitation provision, which runs from the "date of loss":

of contract.[8] Some suit limitation provisions run from the "date of loss."[9] Others, like the standard fire policy, run from the "inception of the loss": "No suit or action under this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all requirements of this policy shall have been complied with, and unless commenced within twelve months next after inception of the loss."[10]

While the California courts have long recognized the validity of a suit limitation provision,[11] the courts demonstrated a reluctance to strictly apply the suit limitation provision without adopting any specified rule of law. For example, the Supreme Court in *Bollinger v. National Fire Insurance Co. of Hartford, Conn.*,[12] a 1944 decision, recognized that the suit limitation period may be "extended or tolled" in certain instances.[13] There, the insured timely filed suit against his insurer, but the action was later dismissed on the grounds of prematurity. By the time the insured could refile suit, however, the suit limitation period had expired.[14] Citing principles of equity and justice, the *Bollinger* court refused to apply the suit limitation bar to the refiled action, instead finding that the suit limitation period was extended or tolled.[15]

More recently, the court in *Zurn Engineers v. Eagle Star Insurance*

No action can be brought unless the policy provisions have been complied with and the action is started within one year after the date of loss.

E.g., ISO HO-2 (HO 00 02 04 91). The ISO Standard Commercial Property Policy has a two-year suit limitation period, which begins to run on the date "the direct physical loss or damage occurred":

No one may bring a legal action against us under this policy unless: . . .

b. The action is brought within 2 years after the date on which the direct physical loss or damage occurred.

ISO Standard Property Policy (CP 00 99 06 95); ISO Commercial Property Conditions (CP 00 90 07 88).

8. In California, for example, the statute of limitations for breach of contract is four years. *See* Cal. Civ. Proc. Code § 337 (West 1982).

9. *See supra* note 7.

10. Cal. Ins. Code § 2071 (West 1993). The standard one-year suit limitation was first adopted by the California Legislature in 1909 as part of the "California Standard Form Fire Insurance Policy." *See id.* The standard fire policy was first enacted into a statute in New York in 1887 and is often referred to as the New York Standard Fire Insurance Policy. *Prudential-LMI*, 798 P.2d at 1235. The vast majority of jurisdictions have adopted the New York Standard Fire Insurance Policy. *See generally* J. H. Tigges, Annotation, *Time Period for Bringing Action on Standard Form Fire Insurance Policy Provided for by Statute, as Running from Time of Fire (When Loss Occurs) or from Time Loss Is Payable*, 95 A.L.R.2d 1023 (1964). *See also Prudential-LMI*, at 1235. In 1975, New York amended its statutory fire policy to increase the suit limitation period from one year to two years. *See* N.Y. Ins. Law § 3404(e) (McKinney 1985). Several other states also have enacted a two-year suit limitation period. *See* Me. Rev. Stat. Ann. tit. 24-A, § 3002 (West 2000); Mass. Gen. Laws Ann. ch. 175, § 99 (West Supp. 2000); Minn. Stat. Ann. § 65A.01(3) (West Supp. 1999); Or. Rev. Stat. § 742.240 (1995); Va. Code Ann. § 38.2-2105 (Michie 1999).

11. *See, e.g.*, C & H Foods Co. v. Hartford Ins. Co., 211 Cal. Rptr. 765, 769 (Cal. Ct. App. 1984); Fageol T. & C. Co. v. Pacific Indem. Co., 117 P.2d 669, 672 (Cal. 1941).

12. Bollinger v. National Fire Insurance Co. of Hartford, Conn., 154 P.2d 399 (Cal. 1944).

13. *Id.* at 406.

14. *Id.* at 401.

15. *Id.* at 406.

Co.,[16] found that the suit limitation period did not begin to run until the insured had a reasonable opportunity to comply with policy conditions relating to notice and the filing of a proof of loss.[17] There, Zurn had delayed notifying its insurer of a loss because it believed a third-party, rather than an non-excluded cause under the policy, was responsible for the loss.[18] Hence, Zurn believed that it could not file a proof of loss because it was asserting a claim against a third party that was inconsistent with its insurance coverage. The court reasoned that a technical forfeiture imposed by a strict interpretation of the suit limitation provision was unjust under these circumstances. Rather, the court ruled that the suit limitation period began to run when it was no longer necessary for Zurn to assert inconsistent positions concerning the cause of the loss.[19]

Outside of California, courts had developed three divergent interpretations of suit limitation provisions. Some courts strictly interpreted the suit limitation provision, holding that the limitations period begins to run on the date of loss.[20] Some of these courts applied the doctrines of waiver and estoppel to militate the hardship that may result from a literal interpretation of the suit limitation provision.[21] Other courts applied a more liberal interpretation, holding that the suit limitation period begins to run upon accrual of the insured's cause of action against the insurer—usually the date coverage is denied.[22] Still other courts, most notably the New Jersey Supreme Court in *Peloso v. Hartford Fire Insurance Co.*,[23] recognized the principle of equitable tolling. In *Peloso*, the court held that the suit limitation period was tolled from the time the insured gives notice of the loss to the insurer until the insurer formally denies liability.[24]

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16. Zurn Engineers v. Eagle Star Insurance Co., 132 Cal. Rptr. 206 (Cal. Ct. App. 1976).
17. *Id.* at 210-211.
18. *Id.* at 208-209.
19. *Id.* at 211.
20. In the majority of jurisdictions, the suit limitation period runs from the date of loss. *See, e.g.*, Zuckerman v. Transamerica Ins. Co., 650 P.2d 441, 447-448 (Ariz. 1982); Closser v. Penn Mut. Fire Ins. Co., 457 A.2d 1081, 1083 (Del. 1983); Gremillion v. Travelers Indem. Co., 240 So. 2d 727, 731 (La. 1970); Proc v. Home Ins. Co., 217 N.E.2d 136, 138 (1966); General State Auth. v. Planet Ins. Co., 346 A.2d 265, 267 (Pa. 1975); Bell v. Quaker City Fire & Marine Ins. Co., 370 P.2d 219, 222 (Or. 1962).
21. *See, e.g.*, Closser v. Penn Mut. Fire Ins. Co., 457 A.2d 1081, 1087-1088 (Del. 1983); Proc v. Home Ins. Co., 217 N.E.2d 136, 139 (N.Y. 1966). *See generally* Reader & Polk, *supra* note 1, at 37-47.
22. *See, e.g.*, Fireman's Fund Ins. Co. v. Sand Lake Lounge, Inc., 514 P.2d 223, 227 (Alaska 1973).
23. Peloso v. Hartford Fire Insurance Co., 267 A.2d 498 (N.J. 1970).
24. *Id.* at 501. The *Peloso* court reasoned that there was an incongruity in the standard fire policy suit limitation provision and the policy's proof of loss and payment provisions. *Id.* at 501. The proof of loss requirement states:

> [W]ithin sixty days after the loss, unless such time is extended in writing by this Company, the insured shall render to this Company a proof of loss.

Standard Fire Policy, lines 97-99 (reprinted in 1 Insuring Real Property, Appendix 2-A Stephen A. Cozen, ed., 1999). The payment clause provides:

THE *PRUDENTIAL-LMI* DECISION

Against this backdrop, the California Supreme Court decided *Prudential-LMI Insurance Co. v. Superior Court.*[25] The case involved a claim by the Lundbergs, who owned an apartment building that Prudential insured between October 27, 1977, and October 27, 1980. Prudential's policy was an all risk policy which included the standard fire policy's one-year suit limitation provision.[26] In November 1985, the Lundbergs discovered extensive cracking in the building's foundation and floor slab, apparently caused by progressive soil subsidence. In December 1985, they notified Prudential.[27] Prudential denied the claim under the policy's earth movement exclusion.[28] After the Lundbergs sued, Prudential moved for summary judgment, arguing that there was no evidence that any loss occurred during its policy period and that the suit was barred by the policy's one-year suit limitation provision.[29] The trial court denied Prudential's motion, but the court of appeal reversed.[30] The Supreme Court then granted review.

The Supreme Court first addressed the question of when the suit limitation period begins to run in continuous and progressive loss cases.[31] In effect, the court adopted a delayed discovery rule. It concluded that the suit limitation period begins to run "when appreciable damage occurs and is or should be known to the insured, such that a reasonable insured would

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> The amount of loss for which this Company may be liable shall be payable sixty days after proof of loss, as herein provided, is received by this Company.

Id. at lines 150-153. The *Peloso* court said that the effect of the proof of loss and payment provisions was to afford the insurer immunity from suit for sixty days after the insured filed a proof of loss. *Peloso*, at 501. Noting this incongruity, the court stated that the "central idea of the limitation provision was that an insured have 12 months to commence suit." *Id.* at 501-502. The court then found that the "fair resolution of the statutory incongruity is to allow the period of limitation to run from the date of the casualty but to toll it from the time an insured gives notice until liability is formally declined." *Id.* at 501.

25. Prudential-LMI Insurance Co. v. Superior Court, 798 P.2d 1230 (Cal. 1990).

26. *Id.* at 1233.

27. *Id.*

28. *Id.* at 1234.

29. *Id.*

30. *Id.* The trial court found that there were triable issues of fact as to whether the earth movement exclusion applied, whether damage occurred during Prudential's policy period, and when the cracking first manifested. *Id.* In reversing, the court of appeal adopted a "delayed discovery" rule—the one-year suit limitation period begins to run when damage to property is sufficient to put a reasonable person on notice of the possibility of a property loss. *Id.* But after adopting the delayed discovery rule, the court of appeal held that the insured was too late in filing suit because the insured failed to sue within one year after "a reasonable person" would have been placed on notice of property damage. *Id.*

31. *Id.* at 1232. The court began its analysis with a discussion of the history of the suit limitations period, noting that it had been part of the statutory standard fire policy in California since 1909. *Id.* at 1235. The court noted that because the suit limitation provision is statutorily endorsed, it is deemed consistent with public policy, and—unlike ambiguous policy language—it is not construed against the insurer. *Id.* at 1236.

be aware that his notification duty under the policy has been triggered."[32] But the court observed that the insured must be diligent in the face of discovered facts to take advantage of the delayed discovery rule. Specifically, the more substantial or unusual the nature of the damaged discovered—"the greater its deviation from what a reasonable person would consider normal wear and tear"—the greater the insured's duty to notify the insurer of the loss.[33]

Next, the court followed the New Jersey Supreme Court's lead in *Peloso v. Hartford Fire Insurance Co.*,[34] and held that the suit limitation period was equitably tolled from the time the insured gives notice of the loss to the insurer until the insurer formally denies the claim in writing.[35] Here, the court noted that the purpose behind the shortened limitations period was to relieve insurers of the burden imposed by defending old and stale claims.[36] Against this interest, the court balanced the harsh consequences of forfeiture with a strict application of the limitation period while the claim was pending. The court recognized that the one-year limitation left little or no time to investigate complex claims. Reasoning that it would be anomalous to bar an insured's suit against an insurer where the one-year limitations period ran while the claim was being investigated, the court adopted the equitable tolling doctrine.[37] In addition to these suit limitation issues, the court addressed one other issue—the allocation of coverage among successive insurers in progressive loss cases.[38] Emphasizing the

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32. *Id.* at 1238. The court noted that courts have not uniformly agreed when the suit limitations period begins to run in cases involving property damage not discovered until years after it actually occurs. *Id.* at 1236-1238. While some courts have strictly construed "inception of the loss" in cases involving a discrete event, the *Prudential* court noted that California courts had been more lenient in interpreting the suit limitation in property cases not involving fire. *Id.* at 1236 (citing Zurn Eng'rs v. Eagle Star Ins. Co., 132 Cal. Rptr. 206 (Cal. Ct. App. 1976)). The court also observed that several first-party cases had defined the term "inception of the loss" to mean that point in time when appreciable damage occurs so that a reasonable person would be on notice of a potentially insured loss. *Id.* at 1237 (citing Lawrence v. Western Mut. Ins. Co., 251 Cal. Rptr. 319 (Cal. Ct. App. 1988) and Abari v. State Farm Fire & Cas. Co., 252 Cal. Rptr. 565 (Cal. Ct. App. 1988)).

33. *Prudential-LMI*, 798 P.2d at 1238.

34. Peloso v. Hartford Fire Insurance Co., 267 A.2d 498 (N.J. 1970).

35. *Prudential-LMI*, 798 P.2d at 1232. In addition to California, two other states have adopted *Peloso's* equitable tolling doctrine. *See* Ford Motor Co. v. Lumbermens Mut. Cas. Co., 319 N.W.2d 320, 325 (Mich. 1982); Clark v. Truck Ins. Exch., 598 P.2d 628, 629 (Nev. 1979). Illinois has adopted virtually the same rule by statute, but the tolling period begins with the filing of the proof of loss rather than the notice of the claim. *See* Ill. Ann. Stat. ch. 215, para. 5/143.1 (Smith-Hurd 1993). *Id.* Several other jurisdictions toll the suit limitation provision from the date of loss until the date of denial. *See, e.g.,* Fireman's Fund Ins. Co. v. Sand Lake Lounge, 514 P.2d 223, 227 (Alaska 1973); Looney v. Georgia Farm Bureau Mut. Ins. Co., 233 S.E.2d 248, 248-249 (Ga. Ct. App. 1977); Das v. State Farm Fire & Cas. Co., 713 S.W.2d 318, 322 (Tenn. Ct. App. 1986). Three jurisdictions have specifically rejected the equitable tolling doctrine. *See, e.g.,* Closser v. Penn Mut. Fire Ins. Co., 457 A.2d 1081, 1085 (Del. 1983); Scheetz v. IMT Ins. Co., 324 N.W.2d 302, 305 (Iowa 1982); Proc v. Home Ins. Co., 217 N.E.2d 136, 139 (N.Y. 1966).

36. *Prudential-LMI*, 798 P.2d at 1236.

37. *Id.* at 1232.

38. Before *Prudential-LMI*, several courts had addressed similar issues. In Snapp v. State Farm

important distinctions between first-party and third-party coverage,[39] the court adopted the manifestation rule, holding that where there is a continuous and progressive loss over several policy periods, the carrier on the risk at the time of manifestation is solely responsible for the loss.[40] The court also held that "manifestation" has the same meaning as "inception of the loss."[41] Thus, the date of manifestation is the same as the date the suit limitation period begins to run.[42]

Thus, under *Prudential-LMI*, the suit limitation period begins to run when appreciable damage occurs and is tolled from the time the insured gives notice of the loss to the insurer until the insurer formally denies liability. While the *Prudential-LMI* decision involved the application of a suit limitation provision in a homeowner's policy to a case involving a continuous and progressive loss, the court's holdings are now the accepted rules applicable to suit limitation provisions in all types of claims and all types of policies.[43]

STARTING THE SUIT LIMITATION PERIOD

The Requirement of Appreciable Damage

Where there is a discrete event, such as a fire or explosion, it is easy to determine when the suit limitation period begins to run—it begins on

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Fire & Casualty Co., 24 Cal. Rptr. 44 (Cal. Ct. App. 1962), the court held that an insurer was responsible for damage that manifested during its policy period but which continued after the policy expired. The court reasoned that "[o]nce the contingent event insured against has occurred during the policy period covered, the liability of the carrier becomes *contractual* rather than *potential* only, and the sole issue remaining is the extent of its obligation, and it is immaterial that this may not be fully ascertained at the end of the policy period." *Id.* at 46 (italics in original). In California Union Insurance Co. v. Landmark Insurance Co., 193 Cal. Rptr. 461 (Cal. Ct. App. 1983), the court held that in a "one occurrence" case "involving continuous, progressive and deteriorating damage, the carrier in whose policy period the damage first becomes apparent remains on the risk until the damage is finally and totally complete." *Id.* at 462-463. The court also found the subsequent carrier jointly and severally liable. *Id.* Finally, in Home Insurance Co. v. Landmark Insurance Co., 253 Cal. Rptr. 277 (Cal. Ct. App. 1988), the court adopted a manifestation rule to determine "which of two first-party insurers is liable for the loss from continuing property damage manifested during successive policy periods." *Id.* at 278, 280.

39. The California Supreme Court also emphasized the important distinctions between first-party and third-party coverage in Garvey v. State Farm Fire & Casualty Co., 770 P.2d 704, 709 (Cal. 1989).

40. *Prudential-LMI*, 798 P.2d at 1246. Under this rule, the insurer on the risk at the time of manifestation is liable for all loss, whether discovered or undiscovered. *See, e.g.*, Larkspur Isle Condo. Owners' Ass'n, Inc. v. Farmers Ins. Group, 37 Cal. Rptr. 2d 3, 5 (Cal. Ct. App. 1994) (noting that "the insurer on the loss at the time of appreciable damage is responsible for the entire loss, not only that portion discovered during the policy period."). Thus, there can be no coverage if the loss manifested *before* the insurer's policy incepted. *See, e.g., Larkspur Isle*, 37 Cal. Rptr. 2d at 5. Nor can there be coverage if the loss manifested *after* the insurer's policy expired. *See, e.g.*, Stanton Road Assocs. v. Pacific Employers Ins. Co., 43 Cal. Rptr. 2d 1 (Cal. Ct. App. 1995); *Prudential-LMI*, 798 P.2d at 1247.

41. *Prudential-LMI*, 798 P.2d at 1247.

42. *Id.*

43. *See supra* note 5.

the date of that event.[44] But it is not as easy to determine when the suit limitation provision begins in cases where the loss is continuous and progressive. In these cases, the trigger of coverage will depend on whether there was "appreciable" damage.

The *Prudential-LMI* court did not define "appreciable." Some courts have looked to the dictionary definition of that term. For example, one court relied on Black's Dictionary when it defined "appreciable" to mean: "Capable of being perceived or recognized by the senses. Perceptible but not a synonym of substantial."[45] The Webster's dictionary definition is similar.[46] Thus, applying the plain meaning of the word "appreciable," the suit limitation period begins to run when the loss is perceptible to the insured.

Earthquake losses, a common phenomenon in California, present a unique problem.[47] Some courts have held that an earthquake is a discrete and, generally, catastrophic event, so the suit limitation period begins to run on the date of the earthquake.[48] Other courts have recognized that an insured's knowledge of appreciable damage from an earthquake does not always occur on the date of the earthquake.[49] Sometimes damage will be immediately apparent, and sometimes it will not. Earthquake damage may be hidden behind walls, ceilings, or carpeting and may not be immediately perceptible. Thus, an insured's knowledge of appreciable damage from an earthquake may not always arise on the date of the earthquake.

As the case *Hill v. Allstate Insurance Co.*,[50] illustrates, if the insured is aware of some earthquake damage, the suit limitation period begins to run at that time. In this case, a residence owned by Hill was damaged by the January 17, 1994, Northridge earthquake. At the time, Hill was living

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44. *See, e.g.*, Prieto v. State Farm Fire & Cas. Co., 275 Cal. Rptr. 362 (Cal. Ct. App. 1990) (fire).

45. Hill v. Allstate Ins. Co., 962 F. Supp. 1244, 1247 (C.D. Cal. 1997) (quoting Black's Law Dictionary 101 (6th ed. 1990)).

46. Webster's Third New International Dictionary 105 (1993) (defining "appreciable" to mean "Capable of being perceived and recognized.").

47. The Northridge earthquake created a substantial amount of litigation on the suit limitation issue. *See, e.g.*, Vu v. Prudential Property & Cas. Ins. Co., 172 F.3d 725 (9th Cir. 1999) (certifying question of application of estoppel to suit limitation to California Supreme Court); Borgelt v. Allstate Ins. Co., No. 98-55004, 1999 WL 89126 (9th Cir. 1999) (insured's suit for Northridge earthquake damages found to be time-barred); Ward v. Allstate Ins. Co., 964 F. Supp. 307 (C.D. Cal. 1997) (issues of fact as to whether insureds acted reasonably in not discovering Northridge earthquake damages until three years after the earthquake precluded summary judgment based on one-year suit limitation provision); Sullivan v. Allstate Ins. Co., 964 F. Supp. 1407 (C.D. Cal. 1997) (insured's suit for Northridge earthquake damages found to be time-barred); Isaacson v. Allstate Ins. Co., No. CV 97-1391 ER (SHX), 1997 WL 813001 (C.D. Cal. 1997) (same); Poole v. State Farm Ins. Cos., No. CV 95-708DT(AJWX), 1996 WL 895220 (C.D. Cal. 1996) (same); Spray, Gould & Bowers v. Associated Int'l Ins. Co., 84 Cal. Rptr. 2d 552 (Cal. Ct. App. 1999) (insurer estopped from relying on suit limitation where it did not advise insured of time remaining to sue as required by California regulation).

48. *See, e.g.*, Hill v. Allstate Ins. Co., 962 F. Supp. 1244, 1247-1248 (C.D. Cal. 1997).

49. *See, e.g.*, Ward v. Allstate Ins. Co., 964 F. Supp. 307, 311-312 (C.D. Cal. 1997).

50. Hill v. Allstate Insurance Co., 962 F. Supp. 1244, 1247 (C.D. Cal. 1997).

out of state, and tenants occupied the residence.[51] Shortly after the earthquake, the tenants told Hill that the water heater fell over and that there were big cracks, but there were "no major big problems."[52] Around the same time, Hill's son visited the property and learned that there was a problem with the back door and that a block wall had shaken loose.[53] Nonetheless, Hill did not report the damage to his insurer, Allstate. In late 1995, Hill entered the house after the tenants vacated and noticed a substantial number of cracks in the interior and exterior walls and in the foundation slab.[54] On January 2, 1996, Hill notified Allstate of the claim, which Allstate denied based on the policy's one-year suit limitation provision.[55] The court found that the claim was time barred, reasoning that there was no dispute that Hill knew there were at least some damages caused by the earthquake immediately thereafter, and he failed to file suit within one year of that date.[56]

Of course, under *Prudential-LMI*, an insured must also be diligent in the face of discovered facts to take advantage of the delayed discovery rule.[57] This means that an insured cannot ignore minor damage, but rather must consider whether the damage is something other than "wear and tear." If so, the insured must notify its insurer. As *Hill* illustrates, the insured's status as an absentee landlord does not excuse a lack of diligence.[58] In *Hill*, for example, the court also found that the insured did not exercise diligence in discovering the damage because he did not ask his tenants for access to the interior of the property.[59] Finally, when apprecia-

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51. *Id.* at 1245.
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.* at 1247 ("Since this damage was noticed, it was, by literal definition, appreciable.").
57. *Id.*
58. *See, e.g.*, Hill v. Allstate Ins. Co. 962 F. Supp. 1244, 1247 (C.D. Cal. 1997) (noting that Hill's "absence from the immediate Southern California area at the time of the earthquake does not excuse his lack of diligence."); Abari v. State Farm Fire & Cas. Co. 252 Cal. Rptr. 565, 567 (Cal. Ct. App. 1988) ("a cause of action under the discovery rule accrues when the plaintiff discovers or *should have discovered* all facts essential to the cause of action. Abari's status as an absentee landlord . . . does not toll accrual.").
59. The court reasoned:

> The Plaintiff obviously was aware of the earthquake of January 17, 1994. Moreover, it was common knowledge that the earthquake was particularly large in magnitude and destruction. In spite of the fact that the Plaintiff's tenants informed him of some damage to the residence, the Plaintiff failed to enter the home and inspect it. The Plaintiff did not require that the tenants themselves walk through the house and document the damage, settling instead for their report that there were no big cracks or big problems. The Plaintiff's son went to the property, observed damage that he believed was caused by the earthquake and yet failed to ask the tenants for access to the interior of the home. This is simply not diligent behavior.

Id. at 1248.

ble damage occurs is often a question of fact.[60] Where the evidence supports only one conclusion, however, the court may determine the date of manifestation as a matter of law.[61]

Knowledge of Policy Coverage

One recurring issue is whether the suit limitation period begins to run when the insured does not know there is coverage under the policy, either because the insured is unaware of the policy's scope of coverage or because the insured believes the loss is less than the policy deductible. On this issue, the courts have ruled that the suit limitation period begins to run even if the insured does not know there is coverage under the policy or that the loss will exceed the policy deductible.

This issue first arose in *Lawrence v. Western Mutual Insurance Co.*,[62] a case which predates *Prudential-LMI*. There, the insured sought coverage in 1985 for damage to his home caused by earth subsidence. Lawrence received a soils report in 1983 which revealed defects in the property dating back to 1975.[63] Western Mutual denied the claim based on its policy's one-year suit limitation period. Once in suit, Lawrence tried to avoid the suit limitation bar by arguing that the "inception of the loss" was when the "insured knew or should have known that a loss has occurred which is covered by his insurance policy."[64] The appellate court rejected Lawrence's argument, reasoning that if the insured's argument were accepted, it would in effect nullify the suit limitation provision because the insured could simply allege ignorance of the policy's coverage.[65]

Since *Prudential-LMI*, other courts have reached the same conclusion. In *Larkspur Isle Condominium Owners' Association, Inc. v. Farmers Insurance Group*,[66] for example, the insured homeowners' association

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60. *Prudential-LMI*, 798 P.2d at 1247 ("the date of manifestation and hence the date of inception of the loss will, in many cases, be an issue of fact for the jury to decide.").

61. *See, e.g.*, Sullivan v. Allstate Ins. Co., 964 F. Supp. 1407, 1412 (C.D. Cal. 1997); Hill v. Allstate Ins. Co., 962 F. Supp. 1244, 1247 (C.D. Cal. 1997); Stanton Road Assocs. v. Pacific Employers Ins. Co., 43 Cal. Rptr. 2d 1, 6 (Cal. Ct. App. 1995).

62. Lawrence v. Western Mutual Insurance Co., 251 Cal. Rptr. 319 (1988).

63. *Id.* at 320.

64. *Id.* at 322.

65. The court reasoned:

> If the argument advanced by Lawrence were accepted, the practical effect would be to nullify the contractual one-year commencement of suit provisions. "Any plaintiff could simply allege ignorance of his or her legal rights against a particular defendant. This is not difficult. Most people do not know the legal answers to questions arising from certain circumstances." Accordingly, any specialized knowledge Lawrence needed to interpret the factual cause of the damage to his house was provided by the report he received in December of 1983, and the commencement of suit provision was not tolled beyond that date.

Id. at 323 (quoting in part McGee v. Weinberg, 159 Cal. Rptr. 86, 90 (Cal. Ct. App. 1979)).

66. Larkspur Isle Condominium Owners' Association, Inc. v. Farmers Insurance Group, 37 Cal. Rptr. 2d 3 (Cal. Ct. App. 1994).

sought coverage for the cost to remove asbestos-containing material, which was damaged by rainwater leakage.[67] Larkspur argued that the suit limitation provision did not begin to run until coverage under its policy became apparent.[68] The appellate court rejected the insured's claim reasoning that "[t]he occurrence of 'appreciable damage' does not depend upon discovery that the damage constitutes a covered loss under a particular policy."[69]

Similarly, the suit limitation period begins to run on the date of appreciable damage even if the insured believes that the loss will not exceed the policy deductible.[70] The case *Sullivan v. Allstate Insurance Co.*,[71] is illustrative. There, the Sullivans' home was damaged in the January 17, 1994, Northridge earthquake.[72] Even though the Sullivans knew that they sustained earthquake damages, they did not notify their insurer, Allstate, until February 21, 1995—more than one year later.[73] The Sullivans argued that the suit limitation period began to run not when the loss occurred, but when "they realized it exceeded their deductible."[74] The court rejected this argument, finding that the one-year suit limitation began to run when there was "appreciable damage" and not when the Sullivans thought the loss would exceed the policy deductible.[75]

As *Lawrence*, *Larkspur*, and *Sullivan* illustrate, the suit limitation period will begin to run on the date of discovery of appreciable damage and not the date the insured realizes the loss may be covered under a particular insurance policy. As the court in *Lawrence* pointed out, if the contrary argument were accepted, the practical effect would be to nullify the suit provision because any insured could simply allege ignorance of its insurance coverage. A limited exception to this rule has been recognized

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67. *Id.* at 4.
68. *Id.* at 6.
69. *Id.*
70. *But see* San Jose Crane & Rigging, Inc. v. Lexington Ins. Co., 278 Cal. Rptr. 301, 303 (Cal. Ct. App. 1991) (stating that damage that was under the deductible was "therefore not an insured loss.").
71. Sullivan v. Allstate Insurance Co., 964 F. Supp. 1407 (C.D. Cal. 1997).
72. *Id.* at 1410.
73. *Id.* at 1409-1410.
74. *Id.* at 1412.
75. The court reasoned:

> Plaintiffs' implication here that the limitations period did not begin to run until they realized they might have a covered loss (which they define as a loss that exceeds the Policy's deductible) is untenable. Plaintiffs appear to contend that because they only had to report a "covered loss," they could not have suffered "appreciable damage" within the meaning of *Prudential-LMI* to start the running of the limitations period until they knew their losses were "covered," i.e., that they had suffered a loss which exceeded their deductible. There is no support for such a position. Indeed, all authority is to the contrary.
>
> California law is clear that contractual suit limitation periods begin to run on the date of cognizable damage even if the insured subjectively believes that its policy provides no coverage for the damage. . . .

Id. at 1413.

in cases where there is a named peril policy. In *Central National Insurance Co. v. Superior Court*,[76] the court held that it may consider whether the insured realized the loss was of the type covered by the policy in determining when the suit limitation period begins to run.[77]

Similarly, the suit limitation period begins to run even though the insured does not know whether the quantum of damages may exceed a certain amount, thus triggering coverage under a particular policy. Hence, the fact that an insured may not know the dollar amount of the damage does not relieve it of its duty to report a potential claim under the policy. This is consistent with the fact that policies do not require an insured to first make an estimate of the dollar amount before making a claim with the insurer. Instead, a determination of whether the damage was in excess of the deductible is accomplished after notification of a potential claim. A contrary rule would effectively nullify any reporting requirement under the policy because most insureds would not be capable of estimating the dollar amount of their loss. It would mean that an insurer would never have any certainty as to the claims that might be made or the time period in which such claims could be made. This would result in an insurer's inability to set loss reserves or to maintain proper surplus with any confidence.

NO TOLLING IF THE SUIT LIMITATION PERIOD HAS ALREADY EXPIRED

Under *Prudential-LMI*, once the suit limitation period begins to run, it will continue to run until the insured gives notice of a loss, at which time the period is tolled. If the suit limitation period has already expired when the insured gives notice, there is nothing to toll. Thus, if an insured waits

76. Central National Insurance Co. v. Superior Court, 3 Cal. Rptr. 2d 622 (Cal. Ct. App. 1992).

77. *Id.* at 626. In *Central National*, the Spindts sought coverage for the settling and cracking of the foundation and walls of their house. Central National insured the Spindts under a named peril policy from September 20, 1983 to September 20, 1985. *Id.* at 623. During this time period, the Spindts noticed a change in condition of the house, including cracks, sticking doors, and uneven floors. *Id.* at 624. The Spindts had in fact noticed damage much earlier. Prior to 1975, they noticed sticking doors and uneven floors. In August 1975, they hired a contractor to repair the damage. The Spindts saw no further damage for a year and a half and believed their problems were solved. *Id.* at 623. In 1989, the Spindts received a soils report from a geotechnical consultant which concluded that the distress was caused by the intrusion of surface water—one of the specified perils in the Central National policy. *Id.* at 624. The Spindts then notified Central National of the loss. Once in suit, Central National sought summary judgment based on the one-year suit limitation provision. The Spindts argued that they did not have to give notice until "they had reason to believe that the policy provided coverage for the occurrence." *Id.* at 626. The appellate court agreed that a triable issue of fact existed concerning the reasonableness of their allegation that it was not until 1989 that they realized the damage to their home was caused by a covered peril. *Id.* The court concluded that determining when appreciable damage occurs "necessarily encompasses consideration of the type of policy in question along with other considerations." *Id.*

more than the suit limitation period year after manifestation of the loss before giving notice of a loss to its insurer, there can be no equitable tolling. The insured's claim was already time-barred at the time notice was given.[78]

This point was implicit in *Prudential-LMI*,[79] and made explicit in subsequent decisions. In *Sullivan v. Allstate Insurance Co.*,[80] for example, the Sullivans' home was damaged in the Northridge earthquake.[81] Even though the Sullivans knew that they sustained earthquake damages, they did not notify Allstate, their insurer, until more than one year later.[82] The court found that the Sullivans' claim "already was time-barred when it was submitted" because the policy had a one-year suit limitation.[83]

Similarly, the equitable tolling doctrine is inapplicable in any claim filed more than one year (or two years if that is the suit limitation period) after expiration of a policy. As the court in *Stanton Road Associates v. Pacific Employers Insurance Co.*,[84] observed, those claims also are time barred at the time notice was given. There, after Stanton discovered that its property was contaminated by an adjacent dry cleaning plant in August 1988, it sued its property insurers to recover damages caused by environmental contamination.[85] Three of the property insurers insured Stanton's property between 1983 and 1986.[86] The appellate court found that the one-year suit limitation provision barred Stanton's claim.[87] The court reasoned that coverage only could be triggered if the loss became manifest during the policy period, and the last conceivable date on which Stanton could have filed suit was one year after the policies expired, which was sometime in 1987.[88] Because Stanton did not notify the insurers of the loss until March 1989, more than one year after the policies expired, the one-year suit limitation period already had run.[89]

While the *Stanton* court's conclusion is both correct and logical, courts often miss this fundamental point. *Central National Insurance Co.*

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78. *See, e.g.*, Hill v. Allstate Ins. Co., 962 F. Supp. 1244, 1248 (C.D. Cal. 1997); Stanton Road Assocs. v. Pacific Employers Ins. Co., 43 Cal. Rptr. 2d 1, 7 (Cal. Ct. App. 1995).

79. *Prudential-LMI*, 798 P.2d at 1242 ("For example, if an insured waits 11 months after discovering the loss to make his claim, he will have only 1 month to file his action after the claim is denied before it is time-barred under section 2071.").

80. Sullivan v. Allstate Insurance Co., 964 F. Supp. 1407 (C.D. Cal. 1997).

81. *Id.* at 1410.

82. *Id.* at 1409-1410. The Sullivans gave notice on February 21, 1995. *Id.* at 1410.

83. *Id.* at 1412.

84. Stanton Road Associates v. Pacific Employers Insurance Co., 43 Cal. Rptr. 2d 1 (Cal. Ct. App. 1995).

85. *Id.* at 2.

86. *Id.* A fourth insurer insured the property from 1986 until March 1988. *Id.*

87. *Id.* at 5-6, 7.

88. *Id.* at 6.

89. *Id.* at 7.

v. Superior Court[90] is one example. There, the Spindts owned a home that Central National insured from September 20, 1983, until September 20, 1985.[91] Under *Prudential-LMI*, coverage could only be triggered if the loss became manifest during Central National's policy period, and the last conceivable date on which the Spindts could have filed suit was one year after the policies expired, which was September 20, 1986. Because the Spindts did not notify Central National of the loss until March 1989, two and one-half years after the policy expired, the one-year suit limitation period already had expired. Nevertheless, the court denied summary judgment, holding that a material issue of fact existed regarding the timeliness of the Spindts' suit against Central National.[92]

STARTING THE TOLLING PERIOD—NOTICE AS REQUIRED BY THE POLICY

In *Prudential-LMI*, the court held that the tolling starts at "the time the insured files a timely notice, pursuant to policy notice provisions."[93] Is the requirement that notice be given "pursuant to policy notice provisions" to be taken literally? For example, will the suit limitation period be tolled if the policy requires written notice and the insured only provides oral notice?

The court in *Vashistha v. Allstate Insurance Co.*,[94] held that where the policy requires written notice, an insured's oral notice of a loss to the insurer did not start the tolling period. There, the Vashisthas' owned a home and several rental properties that were damaged in the Northridge earthquake.[95] They timely notified Allstate of a claim relating to their home. While Allstate's inspector was visiting the Vashisthas' home on February 24, 1994, the Vashisthas told the inspector that their four rental properties also were damaged by the earthquake,[96] but the Vashithas did not submit a formal claim for damage to the rental properties until August 9, 1995, more than one year after the earthquake.[97] To avoid the suit limitation defense, the Vashisthas argued that their earlier oral notice to Allstate's inspector tolled the running of the one-year suit limitation

90. Central National Insurance Co. v. Superior Court, 3 Cal. Rptr. 2d 622 (Cal. Ct. App. 1992).
91. *Id.* at 623.
92. *Id.* at 626. The court held: "The Spindts raised a triable issue of material fact concerning the reasonableness of their allegation that it was not until March 13, 1989, that they realized the damage to their home was caused by a covered peril insured under their policy." *Id.*
93. *Prudential-LMI*, at 1232.
94. Vashistha v. Allstate Insurance Co., 989 F. Supp. 1029 (C.D. Cal. 1997).
95. *Id.* at 1030.
96. *Id.*
97. *Id.* at 1032.

provision.[98] The Allstate policy required written notice of a loss, however.[99] The court granted summary judgment, holding that the suit limitation period was not tolled because the Vashisthas "never provided Allstate with written notice of the loss to the rental properties as required by the policy provisions."[100]

Cases like *Vashistha* are rare because most policies do not require written notice of loss. Even where a policy requires written notice and the insured's notice is oral, courts may be reluctant to penalize an insured—by declining to toll the suit limitation provision—just because the insured's notice of the claim was given orally rather than in writing as required by the policy. This will be especially true in those cases where the insurer has acknowledged receipt of the claim and has started its investigation. More likely, a strict adherence to the notice provision will be limited to factual circumstances like *Vashistha,* where there is no clear indication that the insured is even making a claim.

ENDING THE EQUITABLE TOLLING PERIOD—THE "FORMAL" DENIAL

In *Prudential-LMI,* the Supreme Court held that the tolling period ends when "the insurer formally denies the claim in writing."[101] Other than the requirement of a written denial, and a later suggestion that the denial be "unequivocal," the court did not provide any criteria for determining

98. *Id.*

99. *Id.* at 1031.

100. *Id.* at 1032. The notice provision stated:

> IN THE EVENT OF A LOSS TO ANY PROPERTY THAT THIS INSURANCE MAY COVER, **YOU** MUST DO THE FOLLOWING THINGS:
>
> (a) PROMPTLY GIVE **US** OR **OUR** AGENT WRITTEN NOTICE.

Id. at 1031. The court also rejected the Vashisthas' argument that Allstate had "actual notice," reasoning that the Vashisthas failed to cite any authority supporting this argument. *Id.* The court also found that even if Allstate had actual notice, the tolling lasted a manner of minutes because Allstate's inspector advised them that they had no claim for damages for the rental properties. *Id.* at 1032-1033.

101. *Prudential-LMI,* 798 P.2d at 1232. The *Prudential-LMI* court followed the New Jersey Supreme Court's decision in Peloso v. Hartford Fire Insurance Co., 267 A.2d 498 (N.J. 1970). In *Peloso,* the court held that the tolling period ends when "liability is formally declined." *Id.* at 501. The *Peloso* court did not explain what it meant by "formally declined," but it apparently equated "formal" with "written." Indeed, in *Peloso,* Hartford sent a written denial, after orally denying the claim twice. *Id.* at 500. The court found that the tolling ended when the insureds "were notified in writing that liability was denied." *Id.* at 502. When the supreme courts of Michigan and Nevada adopted the *Peloso* equitable tolling doctrine, they did not include any requirement that a denial be in writing. *See* Ford Motor Co. v. Lumbermens Mut. Cas. Co., 319 N.W.2d 320, 325 (Mich. 1982); Clark v. Truck Ins. Exch., 598 P.2d 628, 629 (Nev. 1979). In those jurisdictions, an oral denial may be sufficient to end the tolling period. *See, e.g.,* Bourke v. North River Ins. Co., 324 N.W.2d 52, 56 (Mich. Ct. App. 1982) ("Noting that "a verbal rejection of a claim following a conference between the claimant and the company president or ranking officers might well constitute a formal denial.")

what constitutes a "formal" denial.[102] This seemingly straightforward test has given rise to several interesting issues.

For example, many insurers include a statement in their denial letters expressing their willingness to consider additional information from the insured. In *Doty v. State Farm Fire & Casualty*,[103] the court considered whether the inclusion of this type of statement rendered the denial "equivocal" and thus, insufficient to end the tolling period. There, State Farm denied the Dotys' settlement-related claim in an August 26, 1986, letter.[104] The denial letter stated "if you have additional information as to the cause or causes of your loss or damage, which you feel would bring this loss or damage within the conditions of the policy, please advise us in writing, and we will give these concerns our immediate attention."[105] Thereafter, the Dotys received an additional expert opinion regarding the cause of the damage to their house, which they submitted to State Farm on June 24, 1987. By letter dated June 30, 1987, State Farm "reaffirmed" the denial of coverage.[106] The Dotys commenced suit on July 31, 1987, which would have been time-barred if the August 26 letter ended the tolling period.[107]

The Dotys argued that State Farm's August 26 letter was not a "formal" denial because it was not "unequivocal."[108] The district court granted State Farm's summary judgment motion, and the Ninth Circuit affirmed.[109] The appellate court held that the August 26 letter was a formal denial despite the fact that the letter indicated State Farm's willingness to consider additional information: "Nothing in [the *Prudential-LMI]* opinion

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102. *Prudential-LMI*, 798 P.2d at 1242. In *Prudential*, the insurer first sent a letter proposing that coverage be denied based on the earth movement exclusion unless the insureds had any additional information favoring coverage. Thereafter, the insureds sought counsel, and Prudential requested examinations under oath. The court noted that it was not until September 1987, when Prudential sent its "formal" denial, "that plaintiffs' claim was denied unequivocally." *Id.*

103. Doty v. State Farm Fire & Casualty, No. 91-16381, 1993 WL 12499 (9th Cir. 1993). In the Ninth Circuit, unpublished opinions are not precedential and should not be cited except when relevant under the doctrines of law of the case, *res judicata*, or collateral estoppel. *See* Ninth Circuit Local Rule 36-3.

104. *Doty* at *1. The Dotys discovered settlement-related damage to their home on March 25, 1986. *Id.* Thirty-one days later, on April 25, 1986, the Dotys gave notice to State Farm, their homeowner's insurer. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at *2. Because 31 days had elapsed before the Dotys gave notice of the claim, the Dotys had just less than 11 months to commence suit if the tolling period ended with the August 26 letter. *See id.* at *1. State Farm argued that under the California Supreme Court's decision in *Prudential LMI*, the one-year suit limitation period began to run on March 25, 1986, the date the damage was discovered. After running for 31 days, the one-year limitation was tolled from April 25, 1986 (when notice of the loss was given) until August 26, 1986 (when the claim was denied). Thus, the Dotys had 334 days thereafter to file suit. The Dotys' suit, however, was filed 339 days later, on July 31, 1987. *See id.* at *2.

108. *Id.*

109. *Id.* at *1.

suggests that the penultimate sentence of the August 26 letter rendered it 'equivocal' or anything less than a formal denial in writing. State Farm's otherwise clear denial of coverage was not rendered less so because it indicated that the Dotys could submit new information."[110]

In *Imperial Resource Recovery Associates, L.P. v. Allendale Mutual Insurance Co.*,[111] a federal district court in New York, applying California law, considered whether the failure to include words like "denial" or "disclaimer" meant that the denial was not "formal" enough to end the tolling period. There, three fires occurring on June 13, July 13, and July 28, 1990, destroyed organic fuel during the construction of the insured's power plant.[112] Imperial notified Allendale, its builder's risk insurer, of the losses on August 8, 1990.[113] On November 5, 1990, Allendale's adjuster wrote to Imperial, stating that "this policy cannot respond to the loss of straw that was damaged in the above referenced fires."[114] Imperial commenced suit on March 5, 1992, nearly eighteen months after Allendale's November 5, 1990, letter.[115] Allendale moved for summary judgment on the grounds of the one-year suit limitation provision, arguing that the tolling period ended with its November 5, 1990, letter.[116] Imperial, on the other hand, argued that the November 5 letter was not a "formal" denial because it did not mention "denial" or "disclaimer."[117] The court granted Allendale's motion, holding that "it is clear from the record that the November 5 letter constituted an unequivocal, written denial of plaintiffs' claims."[118] The court rejected the insureds' argument that the November 5 letter was not a formal denial because it did not mention the words "denial" or "disclaimer," finding "no authority for such a requirement."[119]

An interesting issue arises when the insurer pays a claim rather than denies it. Does payment of a claim without a written denial end the tolling period? In *Aliberti v. Allstate Insurance Co.*,[120] the appellate court answered that question in the negative. There, Aliberti's apartment building

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110. *Id.* at *3.

111. Imperial Resource Recovery Associates, L.P. v. Allendale Mutual Insurance Co., 878 F. Supp. 434 (N.D.N.Y. 1995).

112. *Id.* at 435.

113. *Id.*

114. *Id.* at 436.

115. *Id.*

116. *Id.*

117. *Id.* at 437.

118. *Id.* at 438.

119. *Id.* The court also cited the fact that both parties treated the November 5 letter as a denial of all claims. *Id.* Allendale's adjuster testified that the November 5 letter was Allendale's denial, and that Allendale closed its file after the letter was sent. *Id.* Similarly, Imperial Resource's risk manager testified that the November 5 letter was a denial. *Id.* He also wrote an internal memorandum in which he stated that, "On November 9, 1990, Allendale denied any liability under the All Risk Builder's Risk policy for the above claims." *Id.*

120. Aliberti v. Allstate Insurance Co., 87 Cal. Rptr. 2d 645 (Cal. Ct. App. 1999).

was destroyed by fire on November 2, 1993. Aliberti reported the loss to Allstate, his insurer, the next day.[121] Eight days after the fire, Allstate issued a check to Aliberti for $317,000—the policy limit. Aliberti claimed that Allstate underinsured the apartment building and that the policy's limit was not enough to rebuild.[122] Allstate continued to adjust the Aliberti's claim for lost rental income under a different coverage of the policy, and it made its final payment on the lost rental claim on September 7, 1994.[123] Allstate never gave written notice that it was denying any claim by Aliberti.[124]

On November 1, 1995, Aliberti sued Allstate for fraud, negligent misrepresentation, negligence, and breach of fiduciary duty, essentially claiming that Allstate improperly valued the building and that Aliberti relied on Allstate's advice in selecting the coverage limit.[125] Allstate asserted that Aliberti's claim was barred by the policy's one-year suit limitation period. The appellate court reversed summary judgment in favor of Allstate, holding that an insurer must deny a claim in writing to end the tolling period.[126] The court said it chose "to take the Supreme Court at its word" when it held that the limitation period is tolled until "the time the insurer formally denies the claim in writing."[127] Because Allstate never formally and unequivocally denied Aliberti's claim in writing, the suit limitation period remained equitably tolled.[128]

Several conclusions can be drawn from these cases. First, a written denial is needed to end the tolling period. Payment of a claim without a denial will not end the tolling period, which means that an insurer could be sued years after a loss has been paid.[129] Thus, if an insurer wants

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121. *Id.* at 647.

122. *Id.* Aliberti's daughter, who was dealing with Allstate while Aliberti was in Hawaii, actually sent the check back to Allstate. *Id.* Allstate reissued the check on December 15, 1993, which bore the notation "UNDISPUTED AMOUNT, POLICY LIMITS, ON APARTMENT STRUCTURE FIRE ON OR ABOUT 11/2/93." *Id.* Aliberti also claimed that Allstate owed an additional ten percent under an inflation-protection policy. Even though the clause did not apply, Allstate issued another check for $31,700 on December 23, 1993. *Id.*

123. *Id.*

124. *Id.* at 648.

125. *Id.*

126. *Id.* at 653.

127. *Id.* (quoting in part *Prudential-LMI*, 798 P.2d at 1232).

128. *Id.* The court reasoned that the facts of the case illustrated why this rule promotes the policy reasons behind the equitable tolling rule. First, Aliberti claimed that although the policy limits were being paid, Allstate breached its duty by providing inadequate coverage. Allstate's statements that it would not pay more than the policy limits, "begged the question which Aliberti raised." *Id.* Second, Allstate's "conduct was subject to differing interpretations." *Id.* Finally, while Aliberti may have known his claim was denied, "the need to resolve such evidentiary conflicts is entirely eliminated by requiring the insurer to deny a claim clearly and unequivocally in writing." *Id.* The court stated that "[d]oing so places little or no burden on the insurer, which obtains in return the certainty of knowing that the equitably tolled period has ended." *Id.*

129. Such an action, however, may be barred by the four-year contract statute of limitations. Indeed, there is authority for the proposition that an insured's action accrues under an insurance

protection of the suit limitation provision, it must deny the claim in writing, even where it has made a payment. Second, a denial need not contain the words "denial" or "disclaimer" as long as it is otherwise clear that the insurer is rejecting the insured's claim. While the absence of the words "denied" or "declined" is not fatal, it should be clear from the letter that the insurer is rejecting the insured's claim. Third, a written denial is still "formal" even though the denial letter indicates that the insurer will consider additional information from the insured. Thus, an insurer will not suffer an unintended extension of the suit limitation period by asking the insured to forward any additional information it would like the insurer to consider.

One additional issue merits some mention. In California, state insurance regulations require that an insurer's denial must meet specific requirements. A denial must (1) be in writing, (2) provide the insured with a statement of the factual basis for the denial as obtained through the investigation of the claim, (3) reference the specific policy provision upon which the denial is based, (4) provide an explanation of the application of the policy provision to the facts of the claim, and (5) include a notice to the insured that, if the insured believes that the claim has been wrongfully denied, the insured may have the matter reviewed by the California Department of Insurance.[130] While no California court has yet to consider

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contract on the date of loss or, at the latest, the date the loss was discovered. *See* Love v. Fire Ins. Exch., 271 Cal. Rptr. 246, 249 (Cal. Ct. App. 1990); Federal Ins. Co. v. The Irvine Co., No. 95-56785, 1997 WL 367825, at *1 (9th Cir. 1997) (applying California law). That is because a "cause of action accrues when a suit may be maintained thereon. . . ." Dillon v. Board of Pension Comm'rs, 116 P.2d 37, 39 (Cal. 1941). An insured can sue its insurer immediately upon occurrence of the loss insured against by the policy because "[a]n insurance company's contractual obligation to provide for the proceeds under [an insurance] policy becomes operative immediately whenever the contingencies insured against in the policy occur." Ash v. Safeco Ins. Co., 652 F. Supp. 148, 151 (C.D. Cal. 1986), *vacated on other grounds*, 117 F.R.D. 433 (1987). *See also* Pfeiffer v. General Ins. Co., 185 F. Supp. 605, 608 (N.D. Cal. 1960) ("when the contingency arises, then the liability of the insurer becomes a contractual obligation"); Snapp v. State Farm Fire & Cas. Co., 832, 24 Cal. Rptr. 44, 46 (Cal. Ct. App. 1962) ("once the contingent event insured against has occurred during the period covered, the liability of the carrier becomes *contractual* rather than *potential* . . . ").

130. Cal. Code Regs. tit. 10, ch. 5, § 2695.7(b)(1), (b)(3) (2000). The pertinent portions of section 2695.7 subdivision (b) reads:

> (1) Where an insurer denies or rejects a first party claim in whole or in part, it shall do so in writing and shall provide to the claimant a statement of the factual basis for such rejection or denial which is then within the insurer's knowledge or available to the insurer through investigation when it rejected or denied the claim. Where an insurer's denial of a first party claim, in whole or in part, is based on a specific policy provision, condition or exclusion, the written denial shall include reference thereto and provide an explanation of the application of the provision, condition or exclusion to the facts of the claim. . . .
>
> (3) Written notification pursuant to this subsection also shall include a notification that if the claimant believes the claim has been wrongfully denied or rejected, he or she may have the matter reviewed by the California Department of Insurance, and shall provide the address and telephone number of the unit of the Department which reviews complaints regarding claims practices.

Id.

whether a denial which fails to comply with these requirements is sufficiently "formal" to end the tolling period, the court in *Spray, Gould & Bowers v. Associated International Insurance Co.*,[131] recently held that an insurer could be estopped from asserting the suit limitation defense where it did not advise the insured of the remaining time to sue as required by the same insurance regulations. Thus, insureds should comply with these regulations to avoid any estoppel of the suit limitation defense.

NO TOLLING DURING AN INSURER'S POST-DENIAL RECONSIDERATION

Not all claims end with single written denial of coverage. Indeed, in some cases the insurer may, after first denying coverage, reconsider its denial. Some insurers may, after reconsidering their denial of coverage, reaffirm their denial in a second (or third or fourth) "final" denial of liability. In these cases, questions arise as to when the tolling period ends, with the first denial or the final denial, and whether the time during which the insurer reconsidered the claim is equitably tolled.[132]

In *Singh v. Allstate Insurance Co.*,[133] the court of appeal held that the tolling of the suit limitation period ends with the *first* formal denial and that there is no tolling during the time the insurer reconsiders the claim.[134] There, the Singhs' vacant rental property was damaged by fire set by vandals on April 27, 1994.[135] Allstate denied the Singhs' claim on November 9, 1994, on the grounds that the property had been vacant for thirty

131. 84 Cal. Rptr. 2d 552 (Cal. Ct. App. 1999).

132. This issue arises with surprising frequency in jurisdictions following the equitable tolling rule. *See supra* note 134.

133. 73 Cal. Rptr. 2d 546 (Cal. Ct. App. 1998).

134. Most courts outside of California have taken the same approach. *See, e.g.*, International School Servs., Inc. v. Northwestern Needle Ins. Co., 710 F. Supp. 86, 89 n.5 (S.D.N.Y. 1989) (finding that under New Jersey law the equitable tolling period ended with the first denial and subsequent communications "did not extend the tolling period."); Dittler Bros., Inc. v. Allendale Mut. Ins. Co., 509 F. Supp. 514, 516-517 (N.D. Ga. 1981) (holding that insurer's willingness to meet with insured and consider insured's new evidence and its subsequent denials did not extend the tolling period.); Das v. State Farm Fire & Cas. Co., 713 S.W.2d 318 (Tenn Ct. App. 1986) (holding that the discussions and exchange of letters between State Farm and the insured did not extend the tolling period to the "final" denial).

Two reported cases outside of California have extended the tolling period beyond the first denial of coverage. *See, e.g.*, Walker v. American Bankers Ins. Group., 836 P.2d 59, 63 (Nev. 1992); Tell v. Cambridge Mut. Fire Ins. Co., 375 A.2d 315, 319 (N.J. Super. Ct.1977). In *Walker*, the insurer agreed to reopen its file and continued to negotiate with the insured until the suit limitation period expired. *Walker*, 836 P.2d at 63. In *Singh*, the California Court of Appeal distinguished *Walker* factually and observed that "the actions of the insurer in *Walker* resulted in what should more properly be characterized as a waiver or estoppel." *Singh*, 73 Cal. Rptr. 2d at 551 n.1.

135. *Id.* at 548. Shortly before the fire, the Singhs submitted two separate vandalism claims, which Allstate paid. *Id.*

days in violation of a policy condition.[136] On February 21, 1995, the Singhs requested reconsideration.[137] On March 22, 1995, Allstate again denied the claim.[138]

The Singhs sued Allstate on December 5, 1995.[139] The Singhs' suit was timely only if the one-year suit limitation period also was tolled during Allstate's thirty-day reconsideration of the claim.[140] The appellate court found that suit limitation period was not tolled during Allstate's reconsideration of the claim, so the Singhs' claim was time barred.[141] The court reasoned that the policies behind the equitable tolling doctrine have been fulfilled once a claim has been made, investigated, and denied.[142] The court said that the insurer's right to notice, and its ability to investigate have been preserved, while the insured has been provided with the grounds for denial before being required to sue the insurer.[143]

The same finding is implicit in *Imperial Resource Recovery Associates, L.P. v. Allendale Mutual Insurance Co.*[144] There, Allendale denied the claim, and in response to requests for reconsideration, Allendale reaffirmed its denial three times.[145] The last denial followed a meeting between the parties' representatives.[146] Imperial argued that the subsequent negotiations between the parties tolled the suit limitation to the "final" denial.[147] The court found, however, that the tolling period ended with the first denial, reasoning that the "subsequent discussions and reviews of the denial by defendants, all at the request of plaintiffs, did not serve to retroactively nullify the effect of [the denial] letter."[148]

The decisions in *Singh* and *Imperial Resource* are sound. Indeed, nothing in *Prudential-LMI* suggests that anything can retroactively nullify the effect of a formal denial. Furthermore, a contrary approach adds

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136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. The fire occurred on April 27, 1994, and the Singhs notified Allstate of the claim the following day. *Id.* Allstate first denied the claim on November 9, 1994, so the Singhs would have had until November 8, 1995 (one year minus one day) to file suit. If the suit limitation period was also tolled during the time Allstate reconsidered the claim (February 21, 1995–March 22, 1995), the Singhs would have had an additional 30 days (until December 8, 1999) to file suit, and, thus, its suit filed on December 5, 1995 would have been timely. *See id.* at 549.
141. *Id.* at 550-551.
142. *Id.* at 550.
143. *Id.* The court concluded that "the justifications for equitable tolling are absent, once the carrier has initially denied the claim. The policies supporting the shortened limitation period are then fully applicable, and no reason for further tolling exists." *Id.* at 551.
144. 878 F. Supp. 434 (N.D.N.Y. 1995).
145. *Id.* at 436.
146. *Id.* Imperial Resource argued that the purpose of the May 14-15, 1991, meeting was to settle the matter, but the meeting concluded without Allendale announcing a final decision. *Id.* at 436.
147. *Id.* at 437.
148. *Id.* at 438.

uncertainty to a doctrine that was designed to eliminate uncertainty. The approach taken by the courts in *Singh*, and *Imperial Resource*, which ends the tolling period with the first formal denial, regardless of subsequent discussions and regardless of who initiates them, is consistent with the underlying rationale for adoption of the equitable tolling doctrine. In adopting the equitable tolling doctrine, the *Prudential-LMI* court said that the intent of the one-year suit limitation provision was to give the insured a full year in which to bring suit.[149] To ensure the insured had a full year to commence suit, the running of the suit limitation period was tolled from the date of notice until the date of formal denial.[150] To allow the tolling period to be extended beyond the first formal denial would in effect give the insured more than a full year to commence suit. Thus, extending the tolling period beyond the first formal denial would be inconsistent with the policy reasons for recognition of the equitable tolling doctrine. Once there has been a formal denial, insureds must act to protect their rights by commencing suit against the insurer within the suit limitation period.[151]

Finally, fairness favors the approach taken by the courts in *Singh* and *Imperial Resource*. Insurers in California owe a duty of good faith and fair dealing to their insureds and may be found liable in tort for breaching this duty.[152] Among an insurer's duties is the duty to adequately investigate an insured's claim.[153] At least one court has suggested that an insurer's failure to reconsider its denial of coverage could constitute bad faith.[154] Thus, if the tolling did not end with the first formal denial, the insurer would be

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149. *See Prudential-LMI*, 798 P.2d at 1241.

150. *See id.*

151. As one court stated: "An unequivocal denial of a claim is the very conduct which should induce an insured to file suit rather than dissuade it from doing so." Village of Lake in the Hills v. Illinois Emcasco Ins. Co., 506 N.E.2d 681, 684 (Ill. Ct. App.), *appeal denied*, 515 N.E.2d 128 (Ill. 1987).

152. *See, e.g.*, Gruenberg v. Aetna Ins. Co., 510 P.2d 1032, 1040 (Cal. 1973).

153. *See, e.g.*, Egan v. Mutual of Omaha Ins. Co., 620 P.2d 141, 145-46 (Cal. 1979), *cert. denied*, 445 U.S. 912 (1980).

154. Othman v. Globe Indem. Co., 759 F.2d 1458 (9th Cir. 1985). Othman's supermarket was destroyed by fire, and all evidence indicated that arson was the cause of the fire. Globe Indemnity denied coverage on the grounds that Othman failed to answer certain questions in his examination under oath and failed to produce certain documents, most of which related to the circumstances of the fire and Othman's financial condition. *Id.* at 1461. Othman thereafter got a new lawyer, who offered to produce the requested documents. After initially indicating that it would consider the additional documents and information, Globe would not revoke its denial because it believed Othman's claim was barred by the policy's one-year suit limitation period. *Id.* at 1466. Othman then sued for bad faith. The trial court directed a verdict in favor of Globe. The Ninth Circuit reversed, finding that "[a]n unreasonable failure to make any efforts toward a settlement is sufficient to constitute breach of the implied covenant of good faith." *Id.* at 1467. The court said there were sufficient evidence from which a jury could conclude that Globe acted in bad faith based on Globe's post-denial conduct. *Id.*

In California, insurance regulations now prohibit an insurer from negotiating with an insured up to the time the statute of limitations is to expire. The insurer must give written notice that the time period is expiring within sixty days of the date the time period expires. *See* Cal. Code Regs. tit. 10, ch. 5, § 2695.7 (f) (2000).

placed in the proverbial "Catch-22." On the one hand, if the insurer reconsiders its denial of coverage or renews discussions with the insured, it could extend the suit limitation period. On the other hand, if the insurer declines to reconsider its denial, it faces potential bad faith liability. Thus, to avoid penalizing the insurer, the tolling period properly ends with the first formal denial of coverage.[155]

THE NEW ATTACK ON THE SUIT LIMITATION DEFENSE—WAIVER AND ESTOPPEL

When the *Prudential-LMI* court adopted the equitable tolling rule, it reasoned that it was "more easily applied than the concepts of waiver and estoppel in the many different fact patterns that may arise."[156] While the court rejected the waiver and estoppel theories in favor of equitable tolling doctrine, those theories have reemerged as a means to avoid a suit limitation bar.

The Elements of Waiver and Estoppel

In the insurance context, the terms "waiver" and "estoppel" are sometimes used interchangeably.[157] "Waiver" and "estoppel," however, are actually two distinct legal theories. "Waiver" is the intentional relinquishment of a known right after knowledge of the facts.[158] To establish an implied waiver there must be conduct so inconsistent with the intent to enforce the limitations period as to induce a reasonable belief that it had been relinquished.[159] In other words, the insurer, by its conduct, must induce the insured to delay bringing an action. In contrast, "estoppel" requires proof of four elements: (1) the party to be estopped must know

155. The rule ending the tolling period with the first formal denial also encourages settlements. If the tolling of the suit limitation did not end after the first denial, insurers may be reluctant to reconsider their denial of coverage. Thus, to extend the tolling of the suit limitation period beyond the first formal denial could frustrate attempts by insurers and insureds to resolve coverage disputes.

156. *Prudential-LMI,* 798 P.2d at 1242.

157. *See, e.g.,* Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2d 1551, 1560 (9th Cir. 1991); Waller v. Truck Ins. Exch., 900 P.2d 619, 637 (Cal. 1995).

158. *See, e.g.,* Waller v. Truck Ins. Exch., 900 P.2d 619, 636 (Cal. 1995). An insurer, of course, can expressly waive policy provisions which would otherwise defeat coverage. *See, e.g.,* Miller v. Elite Ins. Co., 161 Cal. Rptr. 322, 330 (Cal. Ct. App. 1980).

159. *See, e.g.,* Insurance Co. of the W. v. Haralambos Beverage Co., 241 Cal. Rptr. 427, 433 (Cal. Ct. App. 1987). *See also* Enfantino v. United States Fire Ins. Co., 3 P.2d 331, 332 (Cal. 1931) (insurer waived policy condition requiring insured to file a proof of loss by denying coverage); Elliano v. Assurance Co. of Am., 83 Cal. Rptr. 509, 511 (Cal. Ct. App. 1970) (insurer waived formal proof of loss by failing to object to insured's delay in submitting proof of loss); Maier Brewing Co. v. Pacific Nat'l Fire Ins. Co., 33 Cal. Rptr. 67, 72-73 (Cal. Ct. App. 1963) (insurer waived requirement that insured file a proof of loss by denying claim); Comunale v. Traders & Gen. Ins. Co., 253 P.2d 495, 499 (Cal. Ct. App. 1953) (insurer waived the insured's failure to submit a written notice of loss by denying claim).

the facts; (2) it must intend that its conduct be acted upon or must so act that the party asserting the estoppel had the right to believe that it was so intended; (3) the party asserting the estoppel must be ignorant of the true facts; and (4) it must rely upon the conduct to his injury.[160]

As a preliminary matter, for waiver or estoppel to be successful, the insurer's conduct must occur before the suit limitation period expires. Indeed, conduct occurring after the suit limitation period expires cannot, as a matter of law, amount to an implied waiver or estoppel.[161] The case *Aceves v. Allstate Insurance Co.*,[162] is illustrative. There, the Aceves bought a house in 1978. In 1981, they discovered a sizeable crack and notified the builder, but they did not notify Allstate at that time.[163] In 1985, the structural damage worsened, and the Aceves sued the builder. They also notified Allstate.[164] Allstate's adjusters twice confirmed coverage and never raised the one-year suit limitation issue.[165] In 1990, five years later, Allstate denied the claim based on the one-year suit limitation provision.[166] The Aceves then sued. Allstate moved for summary judgment based on the one-year suit limitation defense. In response, the Aceves argued that Allstate waived the right to rely on the defense by its conduct from 1985 to 1989, particularly when it confirmed coverage in 1987 and 1988 without mentioning the suit limitation defense.[167] The court found that Allstate could not have waived the suit limitation defense because the alleged conduct implying waiver occurred after the suit limitation period had run.[168]

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160. *See, e.g.*, Insurance Co. of the W. v. Haralambos Beverage Co., 241 Cal. Rptr. 427, 433 (Cal. Ct. App. 1987).

161. *See, e.g.*, Vashistha v. Allstate Ins. Co., 989 F. Supp. 1029, 1033 (C.D. Cal. 1997); Singh v. Allstate Ins. Co., 73 Cal. Rptr. 2d 546, 551 n.1 (Cal. Ct. App. 1998); Alta Cal. Reg'l Center v. Fremont Indem. Co., 30 Cal. Rptr. 2d 841, 848 (Cal. Ct. App. 1994); Prudential-LMI Commercial Ins. Co. v. Superior Court, 798 P.2d 1230, 1240 n.5 (Cal. 1990). *See also* Becker v. State Farm Fire & Cas. Co., 664 F. Supp. 460, 461-462 (N.D. Cal. 1987).

162. 68 F.3d 1160 (9th Cir. 1995).

163. *Id.* at 1162.

164. *Id.*

165. *Id.*

166. *Id.* During the interim, Allstate received coverage opinions from outside counsel that the suit limitation period barred coverage and that Allstate had not waived the defense. *Id.*

167. *Id.* at 1163.

168. *Id.* The court reasoned:

> Waiver provides insurers with an incentive to investigate claims diligently. The doctrine prevents insurers from denying claims for one reason, then coming forward with several other reasons after the insured defeats the first . . .
>
> However, insurers need no incentive to investigate thoroughly exclusions like the suit limitation here. The facts of such an exclusion need no investigation—they are evident from the policy, the coverage claim, and the claim's date. Thus, as a matter of law, Allstate could not have waived the one-year suit limitation.

Id. at 1163-1164.

Failure to Comply with Insurance Regulation Requiring Notice of Time Left to Sue

A California insurance regulation requires insurers to advise claimants of any applicable time limits in the policy.[169] In *Spray, Gould & Bowers v. Associated International Insurance Co.*,[170] the court considered whether an insurer could be estopped from asserting the suit limitation defense where it did not comply with this regulation. There, the Spray, Gould law firm discovered that it suffered damage caused by the Northridge earthquake. Ten months later, the firm made a claim to Associated, its property insurer.[171] Almost five months later, Associated denied the claim. The law firm then sued seventeen months later.[172] Associated asserted that the claim was barred by the policy's one-year suit limitation provision.[173] The law firm argued that Associated's failure to disclose the time limit that applies to filing an action as required by the insurance regulation estopped it from relying on the suit limitation defense.[174]

The court of appeal agreed with Spray, Gould's estoppel theory.[175] To find the requisite affirmative conduct to establish estoppel, the court cited cases holding that an estoppel may arise where there is a duty to speak.[176] The court then found that the insurance regulation imposed just such a duty: "The regulation imposes on insurers an unmistakable duty to advise its claimant insureds of applicable claim time limits. The regulation directly targets the situation presented by this appeal."[177]

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169. In 1993, the California Insurance Commissioner adopted the Fair Claims Settlement Practices Regulations. As adopted, Section 2695.4(a) of those regulations stated:

> 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.

Cal. Code Reg. tit. 10, ch. 5, subch. 7.5 § 2695.4(a) (2000). This regulation has since been amended, but the amendment was not substantive. *See id.*

170. 84 Cal. Rptr. 2d 552 (Cal. Ct. App. 1999).

171. *Id.* at 554. Spray, Gould discovered the loss on January 18, 1994—one day after the Northridge earthquake. It did not notify Associated of the loss until November 21, 1994. *Id.*

172. *Id.* Spray, Gould filed suit on September 16, 1996—17 months after Asssociated's denial. *Id.*

173. Associated argued that about 10 months of the one-year suit limitation period elapsed between January 18, 1994 (when Spray, Gould discovered the loss) and November 21, 1994 (the date of claim). It further argued that the suit limitation period was tolled until April 18, 1995 (the date of denial). Thus, according to Associated, the filing of the action an additional 17 months later on September 16, 1996, was untimely because there was a net elapsed period of about 27 months. *Id.*

174. *Id.*

175. The court held that "AIIC's violation of section 2695.4(a) of the Fair Claims Settlement Practices Regulations (requiring the insurer to 'disclose to' a claimant insured all policy 'time limits . . . that may apply to the claim') may provide the basis of an estoppel against the insurer's assertion of a contract limitations defense." *Id.* at 555.

176. *Id.* at 556-557.

177. *Id.* at 557. The court considered and rejected several of Associated's arguments. First, it rejected the argument that an estoppel was inappropriate because the regulations themselves limit the available sanctions to administrative action against the insurer's license or monetary penalties. *Id.* at 557-558. The court reasoned that the mere existence of a stated regulatory penalty does not necessarily

The court's holding in *Spray, Gould* is not as broad as it intially seems. An estoppel will apply only if the insured failed to timely file suit because the insurer did not advise it of the suit limitation period and the time remaining to sue. If the insured had actual notice of suit limitation provision, which is often the case, then there can be no estoppel because the insurer's conduct did not cause the insured to file an untimely lawsuit. In any event, insurers should notify their insured of the time remaining to sue or risk an estoppel.

Reliance on Affirmative Representations Made by the Insurer

Waiver and estoppel frequently have been invoked in cases where the insured relied on the insurer's affirmative representations. For example, an insured may argue that it did not timely commence suit because it relied on the insurer's representation that the loss was either not covered by the policy or was less than the policy deductible.

Over fifty years ago, the California Supreme Court in *Neff v. New York Life Insurance Co.*,[178] gave a rather dim view of waiver and estoppel in these types of cases. In *Neff*, the insurer unequivocally denied the insured's claim for disability payments.[179] Nearly sixteen years later, the insured's representative sued the insurer. To avoid the statute of limitations bar, Neff argued that the insurer, knowing there was in fact coverage, fraudulently and with the intent to deceive, represented that there was no coverage.[180] The Supreme Court held that an insurer is not estopped from invoking the statute of limitations even if its denial of the claim proved erroneous and the insured relied on it. The *Neff* court relied on three considerations: (1) the insurer advised the insured of the denial of the

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end the inquiry into whether other sanctions may apply. *Id.* at 557. The court wrote [need lead in language]: "In contrast, equitable estoppel is not a punitive notion, but rather a remedial judicial doctrine employed to insure fairness, prevent injustice, and do equity. It stems from the venerable judicial prerogative to redress unfairness in the application of otherwise inflexible legal dogma, based on sound public policy and equity." *Id.* at 558. The court noted that since the purpose of the regulation's time-limit disclosure requirement was to preserve claims for resolution on the merits: "Only if the courts, through their equitable powers, require compliance with the regulation will its purpose of claim preservation be achieved." *Id.* Second, the court rejected Associated's argument that imposing an equitable estoppel remedy would implicitly contravene the supreme court's holding in Moradi-Shalal v. Fireman's Fund Insurance Co., 758 P.2d 58 (Cal. 1986), which held that the Unfair Practices Act does not provide a private cause of action. *Id.* at 559. The court reasoned that "nothing in *Moradi-Shalal* suggests that insurer violations of the Unfair Practices Act or its enabling regulations may not have consequences short of an independent private right of action." *Id.* Third, the court rejected Associated's attempt to invoke the doctrine of constructive knowledge because of the clear terms of the policy. The court reasoned that "By its terms, section 2695.4, subdivision (a) requires the insurer to 'disclose to' a claimant insured all policy 'time limits.' This obviously implies a type of notice, communicated independent of the policy itself, which is calculated to achieve actual rather than constructive knowledge. *Id.* at 559.

178. 180 P.2d 900 (Cal. 1947).

179. *Id.* at 902.

180. *Id.*

claim; (2) the relationship between the insurer and insured was entirely arms-length, so that the insured had no reasonable basis for believing he could rely on the insurer's investigation; and (3) the insurer did not make any deceptive assurances tending to lull the insured into a sense of security and to forbear suit for the statutory period.[181] *Neff* even went so far as to say that the insurer would not be estopped from invoking the statute of limitations when it acted fraudulently in denying the claim:

> It 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.[182]

More recently, the court in *Love v. Fire Insurance Exchange*[183] relied on *Neff* in holding that an insurer was not estopped from relying on a suit limitation provision. There, Fire Insurance Exchange denied the Loves' claim for cracking damage to their home.[184] Nearly five years later, the Loves made another claim, which the insurer again denied. After the Loves sued, Fire Insurance moved for summary judgment based on the policy's one-year suit limitation provision and on the statute of limitations.[185] The Loves argued that the insurer was estopped to rely on the suit limitation and statute of limitations because it stood in a fiduciary relationship with them and fraudulently concealed the fact that the loss was covered.[186] The court, relying on *Neff*, rejected the Loves' estoppel argument. The court reasoned that as in *Neff*, the Loves knew the operative facts (*i.e.*, that their home was damaged and that third-party negligence was a cause), had a copy of the policy, which outlined their rights, and knew that the insurer denied their claim.[187]

Despite *Neff* and *Love*, however, the court in *Ward v. Allstate Insurance Co.*,[188] found that the insured's reliance on the insurer's underestimation of the damages estopped the insurer from relying on the suit limitation defense. There, the Wards made a timely claim for damages arising out of the Northridge earthquake.[189] Allstate's adjuster visited the

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181. *Id.* at 906.
182. *Id.* at 905.
183. 271 Cal. Rptr. 246 (Cal. Ct. App. 1990).
184. *Id.* at 248.
185. *Id.*
186. *Id.* at 250.
187. *Id.*
188. 964 F. Supp. 307 (C.D. Cal. 1997).
189. *Id.* at 309. The Wards submitted the claim on January 3, 1995, nearly one year after the January 17, 1994, Northridge earthquake. *Id.*

home and estimated the damages to be approximately $20,000. After applying the policy deductible, Allstate paid the Wards $7,054.17 for covered losses to the home and $4,270.29 for damage to personal property.[190] In late 1995, the Wards discovered that their home had suffered greater damage, including damage to the foundation. The Wards notified Allstate of the newly-discovered damage on January 3, 1996, but Allstate denied the claim.[191] After the Wards sued, Allstate moved for summary judgment based on the one-year suit limitation provision.[192] The Wards then argued that Allstate's adjuster represented that he was a qualified expert and that the Wards relied on his report concerning the extent of damages.[193] The court found that Allstate would be estopped from relying on the suit limitation provision if the insured reasonably and detrimentally relied on the Allstate adjuster's statements that the damage was limited to $20,000 by allowing the suit limitation period to lapse without making a further investigation.[194]

The Ninth Circuit Court of Appeals addressed a nearly identical case in *Vu v. Prudential Property & Casualty Insurance Co.*[195] As in *Ward*, Vu's home suffered damages in the Northridge earthquake. Within a few days of the earthquake, Vu notified Prudential that his home sustained damage, including cracks in the walls and ceilings.[196] Prudential's adjuster inspected Vu's home and informed him that he was entitled to $2,500 for the appurtenant structures, but that the damage to the home was below the deductible.[197] Relying on Prudential's inspection and denial of his claim, Vu took no further action until September 1995 when he notified Prudential that he discovered substantial additional earthquake damage.[198] Prudential denied the claim based on the policy's one-year suit limitation provision.[199] Vu then sued Prudential, and Prudential moved for summary judgment. Vu alleged that Prudential was estopped from relying on the suit

190. *Id.*

191. *Id.*

192. Allstate argued that the Wards made a claim on January 3, 1995, 350 days after the suit limitations period had begun to run (from the date of the earthquake). The statute was tolled, at most, from January 3, 1995 to June 6, 1996, the time at which Allstate formally informed the Wards that it would provide no further coverage for the earthquake damage. At that point, according to Allstate's calculations, the Wards had fifteen days within which to file suit. Since the Wards did not file suit until over seven months later, the suit is barred. *Id.* at 311.

193. *Id.*

194. *Id.* at 312. The court first found the suit limitation period did not begin to run on the date of the earthquake—January 17, 1994—and that the Wards essentially made a new claim with Allstate in January 1996. The suit limitation period was tolled from January 1996 to June 6, 1996, thus making the complaint filed on January 17, 1997, timely. *Id.* at 311-312.

195. 172 F.3d 725 (9th Cir. 1999).

196. *Id.* at 727.

197. *Id.* Prudential's policy provided $300,000 in coverage on the home and $30,000 for appurtenant structures subject to a 10 percent deductible. *Id.*

198. *Id.*

199. *Id.* at 727-728.

limitation provision because his failure to timely sue was a direct result of his reasonable reliance on Prudential's representation that the damage was below the policy deductible.[200] The district court granted Prudential's summary judgment motion based on the one-year suit limitation, reaching the opposite conclusion reached by the court in *Ward*.[201]

On appeal, the Ninth Circuit noted a number of conflicts in authority. First, it cited the conflict between the trial court's decision in *Vu* and the decision in *Ward*.[202] Second, the court noted that the California Supreme Court recently ordered the depublication of a court of appeal decision that relied on *Ward* and reached the same conclusion.[203] Third, the appellate court cited *Neff*, which the court thought was on point.[204] The court noted that the difficulty with *Neff, however,* was that the passage of time has undermined one of the three key assumptions—that the insurer and insured stand in an arms-length relationship.[205] The court observed that the California Supreme Court in *Egan v. Mutual of Omaha Insurance Co.*,[206] suggested that an insurer owes a quasi-fiduciary duty to insureds.[207] The court also noted that *Neff* seemed at odds with *Prudential-LMI*, in which the court indicated that the insurer's negligent or fraudulent conduct may estop the insurer from relying on the suit limitations provision.[208]

Because of conflicting decisions on the issue coupled with the *Neff* case, the Ninth Circuit certified the question to the California Supreme Court. While the *Vu* court certified the matter to the California Supreme Court, the court impliedly, if not expressly, noted its disagreement with the *Neff* decision. The court noted that if there is damage to some property, the extent of the damage may not always be discoverable by ordinary visual inspection; it may require a trained technician and the use of specialized equipment, which can be expensive.[209] The court then queried whether "a competent inspection of the damage by the trained professional [was] part of the bargained-for-benefit of the policy" and whether "the insured [was] justified in relying on the insurer's good faith and expertise, or must he incur the expense of hiring an independent expert to inspect

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200. *Id.* at 728.
201. *Id.*
202. *Id.* at 728-729.
203. *Id.* at 729. The depublished case was Nguyen v. 20th Century Insurance Co., 79 Cal. Rptr. 2d 115 (Cal. Ct. App. 1998), review denied and ordered not to be officially published. Depublished opinions have no precendential authority and may not be cited. *See* Cal. R. Ct. 977.
204. *Vu*, 172 F.3d at 729.
205. *Id.* at 730.
206. 620 P.2d 141 (Cal. 1979).
207. *Vu*, 172 F.3d at 730.
208. In *Prudential-LMI*, "an insurer that leads its insured to believe that an amicable adjustment of the claim will be made, thus delaying the insured's suit, will be estopped from asserting the limitation defense." *Prudential-LMI*, 798 P.2d at 1240.
209. *Vu*, 172 F.3d at 730-731.

the damage."[210] The court noted that under *Neff*, an insured may not rely on the insurer's investigation and must incur the additional cost of conducting an independent investigation.[211] The *Vu* court said that if this was an accurate statement of California law, it "may not accord with the reasonable expectations of many insurance policy holders in California."[212] The Ninth Circuit certified the question to the California Supreme Court so that insureds would be "on notice as to what steps they must take to protect themselves when their claims are denied (in whole or in part) by their insurer after inspection."[213]

The California Supreme Court has accepted the certified question.[214] If Supreme Court reaffirms *Neff*, insureds will not be able to invoke waiver and estoppel in cases where they allegedly relied on the insurer's affirmative representations in not timely filing suit. If the court overrules *Neff*, insureds may be able to be able to invoke waiver and estoppel in these types of cases. To prevail, however, the insured must still prove all of the elements of waiver and estoppel.

CONCLUSION

Under *Prudential-LMI*, the insured has one year from the date of loss in which to file an action against the insurer. This limitation period is tolled from the time the insured gives notice until the time the insurer formally denies the claim. While *Prudential-LMI* left many issues unresolved, most of those issues have been resolved by subsequent cases. What still remains unresolved is whether an insured can invoke the doctrines of waiver and estoppel where an insured did not timely commence suit because it relied on the insurer's representation that the loss was either not covered by the policy or was less than the policy deductible. This issue is now pending before the California Supreme Court.

210. *Id.* at 731.
211. *Id.*
212. *Id.*
213. *Id.*
214. *See* Cal. S. Ct. Minutes (July 28, 1999), Case No. S078271.