

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

AMY FISHELL and JUSTIN FISHELL,

No. 2:23-cv-00027-DJC-DB

Plaintiffs,

v.

NATIONWIDE MUTUAL INS. CO. and
AMCO INS. CO.,

Defendants.

ORDER

17 As recounted in the Court's Order granting a motion to dismiss the First
18 Amended Complaint in this case (ECF No. 26), Plaintiffs Amy and Justin Fishell
19 ("Plaintiffs") were unfortunate victims of the Paradise, California Camp Fire in 2018.
20 Plaintiffs had to relocate after their home was destroyed by the fire and incurred
21 additional expenses resulting from additional travel for which they claim
22 reimbursement by their insurance provider, Defendant AMCO Insurance Company, a
23 subsidiary of Defendant Nationwide Mutual Insurance Company ("Defendants").
24 Plaintiffs claim they were reimbursed improperly under the Internal Revenue Service
25 ("IRS") standard mileage rate for medical and moving expenses, which they allege
26 constitutes a breach of the covenant of good faith and fair dealing, and a violation of
27 the California Unfair Competition Law ("UCL"). They also seek declaratory relief.

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1 Plaintiffs seek to bring claims on their own behalf and on behalf of a not yet certified
2 class of similarly situated individuals.

3 Defendants now move the Court to dismiss Plaintiffs' Second Amended
4 Complaint ("SAC") (ECF No. 28), arguing that Nationwide is not a proper defendant,
5 that the claims are time barred, and that Plaintiffs have failed to allege plausible
6 claims. Because Plaintiffs have failed to establish that their claims are timely, the
7 claims must be dismissed as time-barred. Accordingly, the Motion to Dismiss ("Mot.
8 or the Motion") (ECF No. 32) is GRANTED.

9 **I. Procedural History**

10 Plaintiffs filed their initial Complaint on January 6, 2023. (Compl. (ECF No 1).)
11 Plaintiffs subsequently amended their Complaint to name AMCO Insurance Company
12 as a Defendant. (First Am. Compl. (ECF No. 14).) The First Amended Complaint was
13 dismissed for being time-barred and for failure to state claims. (Order (ECF No. 26) at
14 7-8.) Plaintiffs were granted leave to amend their Complaint to allege facts which
15 would support tolling, or to allege claims that are not time-barred. (*Id.*) Plaintiffs
16 thereafter filed the operative Second Amended Complaint. (SAC.)

17 Defendants filed a Motion to Dismiss the Second Amended Complaint on
18 September 13, 2023. (Mot.) Plaintiffs opposed the motion, (Opp'n (ECF No. 33)), and
19 Defendants have filed a reply (Reply (ECF No. 34)). The Court heard oral argument on
20 the Motion on October 26, 2023, with J. Paul Gignac and Claire Mitchell appearing for
21 Plaintiffs, and Mark Hanover appearing for Defendants.

22 **II. Legal Standard for Motion to Dismiss**

23 A party may move to dismiss for "failure to state a claim upon which relief can
24 be granted." Fed. R. Civ. P. 12(b)(6). The motion may be granted if the complaint
25 lacks a "cognizable legal theory" or if its factual allegations do not support a
26 cognizable legal theory. *Godecke v. Kinetic Concepts, Inc.*, 937 F.3d 1201, 1208 (9th
27 Cir. 2019) (quoting *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988)).
28 The Court assumes all factual allegations are true and construes "them in the light

1 most favorable to the nonmoving party." *Steinle v. City and Cnty. of San Francisco*,
2 919 F.3d 1154, 1160 (9th Cir. 2019) (quoting *Parks Sch. of Bus., Inc. v. Symington*, 51
3 F.3d 1480, 1484 (9th Cir. 1995)). If the complaint's allegations do not "plausibly give
4 rise to an entitlement to relief," the motion must be granted. *Ashcroft v. Iqbal*, 556
5 U.S. 662, 679 (2009).

6 A complaint need contain only a "short and plain statement of the claim
7 showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), not "detailed
8 factual allegations," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). But this rule
9 demands more than unadorned accusations; "sufficient factual matter" must make the
10 claim at least plausible. *Iqbal*, 556 U.S. at 678. In the same vein, conclusory or
11 formulaic recitations of elements do not alone suffice. *Id.* (citing *Twombly*, 550 U.S. at
12 555). This evaluation of plausibility is a context-specific task drawing on "judicial
13 experience and common sense." *Id.* at 679.

14 **III. Discussion**

15 Defendants argue that Plaintiffs have exceeded the time limit to bring suit
16 under the contract, which is one year from the date of loss, and that the claims are
17 therefore time-barred. Plaintiffs counter that the claims are not "on the policy" and
18 therefore not subject to this one-year contractual limitation. They further allege that
19 application of the one-year contractual limitation period would be inequitable and
20 unfair because many of the contested payments were made over one year from the
21 date of loss.

22 **A. Applicability of the Contractual Limitations Period**

23 Ordinarily, a contractual limitation on the time to bring suit would be
24 controlling. See *Gaylord v. Nationwide Mut. Ins. Co.*, 776 F. Supp. 2d 1101, 1113 (E.D.
25 Cal. 2011) ("[A] covenant shortening the period of limitations is a valid provision of an
26 insurance contract."); *Jang v. State Farm Fire & Cas. Co.*, 80 Cal. App. 4th 1291, 1296
27 (2000), as modified (June 8, 2000) ("The one-year statutory limitations period on
28 insurance actions has 'long been recognized as valid in California.'" (internal quotation

1 omitted) (quoting *Prudential-LMI Com. Insurance v. Superior Court* 51 Cal.3d 674, 682
2 (1990))). However, when the claims are not on the policy, they are not subject to the
3 contractual limitation period, and are instead controlled by the statutory limitation
4 period. *Id.* at 1296.

5 "The phrase 'on the policy' is broadly construed to include those claims that are
6 generally 'grounded in a failure to pay benefits that are due under the policy.'" *Brafman v. Nationwide Mut. Ins. Co.*, No. 2:11-CV-01627-MCE, 2011 WL 5299280, at
7 *3 (E.D. Cal. Nov. 2, 2011) (quoting *Campanelli v. Allstate Life Ins. Co.*, 322 F.3d 1086,
8 1093 (9th Cir. 2003)). Whether a claim is on the policy is determined by the nature of
9 the damages sought, not by the legal basis for the claim. A plaintiff cannot bypass the
10 contractual limitations period by construing their claims as based in tort or "bad faith"
11 conduct rather than contractual terms. *Abari v. State Farm Fire & Cas. Co.*, 205 Cal.
12 App. 3d 530, 536 (1988); *Velasquez v. Truck Ins. Exch.*, 1 Cal. App. 4th 712, 722
13 (1991). "Regardless of whether the insured elects to file a complaint alleging solely
14 tort claims . . . an action seeking damages recoverable under the policy for a risk
15 insured under the policy is merely a 'transparent attempt to recover on the policy.'" *Jang*, 80 Cal. App. 4th at 1301, as modified (June 8, 2000) (quoting *Abari*, 205 Cal.
16 App. 3d at 536). A claim is considered off the policy if it has "nothing to do with the
17 initial claim under the policy." *Velasquez*, 1 Cal. App. 4th at 720.

18 *Murphy v. Allstate* provides an example of a claim that is off the policy. 83 Cal.
19 App. 3d 38, 46 (1978). The case "sets forth a narrow exemption for actions in which
20 the insured seeks damages that are not recoverable under the policy, stemming from
21 conduct by the insurer which results in the uncovered damages." *Jang*, 80 Cal. App.
22 4th at 1302. In *Murphy*, the plaintiff sued for damage to their home which resulted
23 from the "untimely, unworkmanlike and unsatisfactory restoration and repair work" by
24 the contractors hired by the insurance company, and for damages resulting from an
25 interpleader action instituted by the insurance company. *Murphy*, 83 Cal. App. 3d at
26 49. In holding that the claims were not on the policy, the court emphasized that the
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1 "the damages claimed were not caused by any risk insured against under the policy
2 and were not recoverable under the policy." *Id.* at 49.

3 Plaintiffs assert two distinct bases for their causes of action, which the court will
4 assess separately. First, Plaintiffs claim that Defendant failed to satisfactorily
5 reimburse them for the additional car insurance premium and depreciation expenses
6 they incurred as a result of the loss. (SAC ¶¶ 63, 72.) These additional expenses are a
7 direct result of their displacement due to the loss of use of their home, which is a risk
8 insured against under the policy. (*Id.* ¶¶ 18, 21, 37.) Such increased costs are clearly
9 recoverable under the policy which reimburses for "any necessary increase in living
10 expenses incurred" as a result of a loss under the policy. (*Id.* ¶¶ 4-5, 18-19.) Further,
11 "[t]he fact that an insured seeks damages in addition to those covered by the policy
12 will not render the cause of action 'off the policy,'" meaning that Plaintiffs' claims for
13 attorneys' fees and exemplary and punitive damages does not change this analysis.
14 *Campanelli*, 322 F.3d at 1096 (citing *Velasquez*, 1 Cal. App. 4th at 722).

15 Plaintiff attempts to argue under *Frazier v. Metro Life Ins. Co.*, that any claim
16 which "arose after the insurer paid on the policy but not to the satisfaction of the
17 beneficiary of the policy" is a claim not on the policy. See *Lawrence v. W. Mut. Ins. Co.*,
18 204 Cal. App. 3d 565, 575 (1988) (summarizing *Frazier v. Metro. Life Ins. Co.*, 169 Cal.
19 App. 3d 90, 103-04 (1985)). However, the plaintiff in *Frazier* was not claiming that the
20 payments themselves were unsatisfactory or made in bad faith. Rather, in *Frazier*, the
21 insurance company had paid benefits for the death of the plaintiff's husband, but
22 continued to investigate whether the death was an accident, which would have
23 entitled the plaintiff to double indemnity payments. *Frazier*, 169 Cal. App. 3d at 95-
24 97. It was not until the insurance company's investigation concluded and it denied the
25 double indemnity payments that the plaintiff's cause of action arose. *Id.* at 103-04.
26 Starting the clock at the time of denial, the court found the action was brought within
27 the contractual limitation period. *Id.*

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1 Later California Appellate Courts, including the same court which had decided
2 *Frazier*, have clarified that *Frazier* presents a tolling doctrine, wherein the limitations
3 period on a bad faith claim does not begin to run until an “ultimate act of bad faith”
4 occurs, not necessarily an example of a claim off the policy. See *Jang*, 80 Cal. App.
5 4th 1301-02 (summarizing cases and finding that *Frazier* only has continuing viability
6 as it pertains to equitable tolling); see also *Lawrence*, 204 Cal. App. 3d at 575 (noting
7 that it was the “subsequent event [which] occurred after the initial policy coverage was
8 triggered which was the basis for the cause of action”); *Velasquez*, 1 Cal. App. 4th at
9 720 (“[I]t was not until the insurer denied her double indemnity claim that the
10 beneficiary could ascertain whether she had a cause of action for bad faith. Thus, the
11 action did not accrue until such denial.” (internal citations omitted)); *Prieto v. State*
12 *Farm Fire & Cas. Co.*, 225 Cal. App. 3d 1188, 1194-95, (1990), *reh'g denied and*
13 *opinion modified* (Dec. 28, 1990).

14 Moreover, other courts have found that claims which allege dissatisfaction with
15 the amount paid out on a policy are claims under the policy. In *Banga v. Americprise*
16 *Auto & Home Insurance Company* the plaintiff brought claims asserting that the
17 amount paid by the insurer based on its adjuster’s estimate was insufficient to cover
18 the repairs. No. 2:18-CV-01072-MCE-AC, 2021 WL 5303914, at *1-*2 (E.D. Cal. Nov.
19 15, 2021), *report and recommendation adopted*, No. 2:18-CV-01072-MCE-AC, 2022
20 WL 525646 (E.D. Cal. Feb. 22, 2022). The plaintiff in *Banga* also asserted that the
21 insurance company had engaged in an unfair business practice and bad faith conduct
22 when estimating the amount of the loss incurred. *Id.* at *5. The court nevertheless
23 found that the claims were on the policy because the damages were grounded in a
24 failure to pay benefits that were due under the policy. *Id.* at *6-*7. Similarly, in *Jang*,
25 the plaintiff brought a cross complaint alleging that the amount paid to the property
26 owners was less than they were entitled to. *Jang*, 80 Cal. App. 4th at 1293-95, 1301-
27 02. The *Jang* court also held that the claim was on the policy because it was based on
28 “the failure to receive benefits the plaintiff believes are owing under the policy.” *Id.* at

1 1304. Accordingly, Plaintiffs' claims that they were insufficiently reimbursed are
2 fundamentally claims for benefits which are recoverable under the policy, meaning
3 they are subject to the one-year contractual limitations period. As the date of loss was
4 on November 8, 2018, this suit filed on January 6, 2023 is untimely for the claims as
5 they relate to unsatisfactory reimbursement.

6 The second basis for Plaintiffs' causes of action is that Defendants failed to
7 disclose what the reimbursement rate would be, and that they used a non-industry
8 standard rate. As Plaintiffs argued during the hearing, this cause of action does not
9 necessarily arise from the policy because the duty to disclose the rate arose before the
10 contract was formed and is independent of whether Plaintiffs suffered a loss on the
11 policy. But even if the Court were to accept this theory, the claims would still be time
12 barred under the respective statutory limitation periods.

13 The statutes of limitation on these claims begins to run when "the injured party
14 discovers or should have discovered the facts supporting liability." *Davies v. Krasna*,
15 14 Cal. 3d 502, 512 (1975); see also *Gutierrez v. Mofid*, 39 Cal. 3d 892, 897 (1985)
16 (applying to breach of covenant of good faith and fair dealing claims "the uniform
17 California rule [] that a limitations period . . . begins to run no later than the time the
18 plaintiff learns, or should have learned, the facts essential to his claim."); *Aryeh v.
19 Canon Bus. Sols., Inc.*, 55 Cal. 4th 1185, 1195-96 (2013) (applying the same to UCL
20 claims which allege a deceptive practice). Plaintiffs knew or should have known that
21 Defendant failed to disclose the rate – and suffered appreciable harm as a result of
22 that failure to disclose – when they received the first check which was calculated using
23 the non-standard mileage rate. The additional checks Plaintiffs received thereafter do
24 not provide any additional facts essential to show that Defendant failed to disclose the
25 non-standard mileage rate. This is not a case where a "wrongful course of conduct
26 became apparent only through the accumulation of a series of harms." *Aryeh*, 55 Cal.
27 4th 1198 (comparing a harassment claim where the component acts may not be
28 individually actionable until, taken together, they establish a pattern of harassment,

1 with a claim where the defendant commits a discrete fraudulent act); see *Gutierrez*, 39
2 Cal. at 898 (“It is irrelevant that the plaintiff is ignorant of his legal remedy or the legal
3 theories underlying his cause of action.”) Instead, the additional checks instead only
4 serve as proof of additional damages.¹

5 After receipt of this first check, Plaintiffs would have had two years to bring the
6 breach of the covenant of good faith and fair dealing claims, see *Hovsepian v. GEICO*
7 *Gen. Ins. Co.*, 616 F. Supp. 3d 1057, 1068 (E.D. Cal. 2022) (citing *Archdale v. Am.*
8 *Internat. Specialty Lines Ins. Co.*, 154 Cal. App. 4th 449, 467 n. 19 (2007)), and four
9 years to bring the UCL claims, Cal. Bus. & Prof. Code § 17208. As the check was
10 issued in 2018, Plaintiff’s suit filed on January 6, 2023 is untimely for both claims.

11 Because these underlying claims are untimely, Plaintiffs also cannot maintain
12 the cause of action for declaratory relief. *Maguire v. Hibernia Sav. & Loan Soc.*, 23 Cal.
13 2d 719, 734 (1944) (“[T]he period of limitations applicable to ordinary actions at law
14 and suits in equity should be applied in like manner to actions for declaratory relief.
15 Thus, if declaratory relief is sought with reference to an obligation which . . . is barred
16 by the statute, the right to declaratory relief is likewise barred.”).

17 **B. Equitable Tolling**

18 Plaintiffs argue that it would be unfair and inequitable to enforce the one-year
19 contractual limitation period against Plaintiff’s unsatisfactory reimbursement claims
20 because the limitation period would have expired before they received most of the
21 payments. (Opp’n at 10.)² However, even if the Court tolled these claims to the date
22 Plaintiffs received their final check, the suit is still untimely.

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24 ¹ The statute of limitations does not pause while a Plaintiff continues to accrue additional damages after
25 having experienced the initial appreciable legal harm. “To delay the running of the period of limitation
26 until defendant’s acts furnished plaintiff with a more certain proof of damages would contravene the
principle that victims of legal wrong should make reasonable efforts to avoid incurring further damage.”
Davies, 14 Cal. 3d at 515.

27 ² Plaintiffs have not presented any equitable tolling argument with respect to their claims that
28 Defendants failed to disclose what the reimbursement rate would be and that they used a non-industry
standard rate, and the Court fails to see how any such argument would be applicable.

1 In *Frazier* the California Supreme Court stated that a contractual limitations
2 period for unsatisfactory reimbursement claims does not begin to run until the
3 defendant “ha[s] committed an ultimate act of bad faith.” *Frazier*, 169 Cal. App. 3d at
4 103-04. It is arguable that the first inadequate check Plaintiff received which was
5 allegedly calculated in bad faith is an ultimate act of bad faith which would have
6 started the clock. But even if the Court were to find that Plaintiffs’ claims should have
7 been tolled until the *final* check was received, the claims would still be untimely.
8 Plaintiffs’ last check was issued on December 8, 2021, and Plaintiffs did not initiate this
9 suit until over one year later on January 6, 2023. Therefore, even if Plaintiffs’ claims
10 were equitably tolled to the latest date a cause of action could accrue, they are still
11 time-barred.

12 Because Plaintiffs’ claims are untimely, Plaintiffs cannot state a claim upon which
13 relief can be granted. Accordingly, Defendant’s Motion to Dismiss the Second
14 Amended Complaint is GRANTED.

15 **C. Leave to Amend**

16 Plaintiffs have already been given the opportunity to amend their Complaint to
17 “provide the necessary information to establish tolling or to sufficiently allege a timely
18 claim,” and have failed to do so – opting instead to bring forward a legal argument
19 that the contractual limitations period does not apply. At oral argument, counsel for
20 Plaintiffs conceded that Plaintiffs cannot provide any additional facts to establish that
21 their claims are timely. The Court will therefore not grant leave to amend. See *Zucco*
22 *Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 1007 (9th Cir. 2009), as amended (Feb.
23 10, 2009) (denial of leave to amend appropriate where amendment would be futile
24 because the plaintiff had no additional facts to plead).

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1 **IV. Conclusion**

2 For the above reasons, IT IS HEREBY ORDERED that Defendants' Motion to
3 Dismiss, ECF No. 32, is GRANTED, and Plaintiff's Second Amended Complaint, ECF
4 No. 28, is dismissed with prejudice.

5 The Clerk of the Court is directed to close this case.

6 IT IS SO ORDERED.

7 Dated: October 31, 2023


Hon. Daniel J. Calabretta
UNITED STATES DISTRICT JUDGE

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