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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

GLORIA VANNIX-SERINA,

Plaintiff and Appellant,

v.

PACIFIC LIFE INSURANCE  
COMPANY et al.,

Defendants and Respondents.

B214458

(Los Angeles County  
Super. Ct. No. BC390613)

APPEAL from judgments of the Superior Court of Los Angeles County,  
Judith C. Chirlin, Judge. Affirmed in part and reversed in part with directions on remand.

Law Offices of James P. Wohl and James P. Wohl for Plaintiff and Appellant.

Reed Smith, Thomas A. Evans and Cheryl B. Kahn for Defendant and Respondent  
Pacific Life Insurance Company.

Anglin, Flewelling, Rasmussen, Campbell & Trytten, Robin C. Campbell, Mark T.  
Flewelling and Robert A. Bailey for Defendant and Respondent World Savings Bank,  
FSB and Wachovia Mortgage.

Glaser, Weil, Fink, Jacobs, Howard & Shapiro, Joel N. Klevens and Laura Premi  
for Defendant and Respondent Fidelity National Title Company.

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Plaintiff and appellant Gloria Vannix-Serina (plaintiff) appeals judgments of dismissal following the sustaining without leave to amend of demurrers to her complaint interposed by defendants and respondents World Savings Bank (World) and Wachovia Bank (Wachovia) (sometimes collectively referred to as World), Fidelity National Title Company (Fidelity) and Pacific Life Insurance Company (Pacific Life).

The trial court sustained defendants' demurrers on the ground that plaintiff's entire action was barred by the statute of limitations. We conclude, for reasons we shall explain, that plaintiff's claims against Fidelity and Pacific Life are time-barred, but plaintiff's claims against World are not.

In addition, we shall address World's arguments in support of its demurrer that the trial court did not reach. After reviewing these arguments, we shall hold that the trial court correctly sustained World's demurrer to plaintiff's first cause of action for fraud and intentional deceit, second cause of action for negligent misrepresentation, fourth cause of action for conversion, fifth cause of action for civil conspiracy, and seventh cause of action for breach of the implied covenant of good faith and fair dealing, but erroneously sustained World's demurrer to plaintiff's third cause of action for constructive fraud, sixth cause of action for violation of Business and Professions Code section 17200 et. seq., eighth cause of action for money had and received and ninth cause of action for elder abuse. Finally, we shall conclude that plaintiff should be granted leave to amend her first and second causes of action, but should not be granted leave to amend her fourth, fifth, and seventh causes of action.

Based on these conclusions, we affirm the judgments against Fidelity and Pacific Life but reverse in part the judgment against World.

### **FACTUAL AND PROCEDURAL BACKGROUND**

#### *1. Earlier proceedings; the claim and demand for arbitration.*

On October 31, 2003, plaintiff, represented by counsel, filed a statement of claim and demand for arbitration with the National Association of Securities Dealers (NASD). The pleading named as respondents Kenneth Mosbey and Tina H. Mosbey, individually

and dba Mosbey Financial & Insurance Services, and Pacific Life. Plaintiff alleged in relevant part:

She is a 75-year-old widow, retired from her employment as a child care provider. She was a novice investor. Her investments consisted primarily of bank certificates of deposit (CDs). She was extremely risk averse. She owned her home in Camarillo, free and clear. Her modest lifestyle allowed her to enjoy risk-free income generated by her bank CDs and Social Security.

While visiting her son and daughter-in-law in May 2000, plaintiff met John Dwight (Dwight), a mortgage broker. Dwight persuaded plaintiff to utilize the equity in her home to invest with Ken and Tina Mosbey, securities brokers who shared office space with Dwight. Plaintiff and her son expressly instructed Ken Mosbey to invest her money in the lowest risk investments, to avoid any danger of plaintiff losing her home and/or her money.

The Mosbeys, however, fraudulently convinced plaintiff to invest in unsuitable investments and failed to disclose to plaintiff the high risk nature of those investments. Plaintiff's home was mortgaged through World, with the net loan proceeds used to purchase a variable annuity through Pacific Life. Ken Mosbey was emphatic the return on the annuity would exceed the amount of the monthly mortgage interest payment she would be obligated to pay and also would provide additional income to her. In addition to the loan, plaintiff deposited \$79,000 of other monies into the Pacific Life annuity account. Plaintiff had no idea Mosbey was going to invest her money in the stock market.

Plaintiff's investments with Pacific Life, none of which were bond or fixed income funds, steadily lost value. By the time plaintiff terminated the Mosbeys' services in June 2003, the Pacific Life variable annuity had sustained losses in the net sum of \$103,773.29.

The claim and demand for arbitration raised the following issues: negligence; unsuitability of investment; misrepresentation and fraud; failure of respondents to supervise her accounts; failure of respondents to supervise its registered representatives;

breach of fiduciary duties; violation of federal securities laws; violation of state securities laws; violation of NASD Rules of Fair Practice; breach of contract and breach of the implied covenant of good faith and fair dealing; loss of investment opportunity; elder abuse; and unfair or deceptive practices against senior citizens.<sup>1</sup>

2. *The instant lawsuit.*

After commencing this action on May 9, 2008, plaintiff filed the operative first amended complaint (complaint) on July 31, 2008. The named defendants included Wachovia as successor in interest to World, as well as Fidelity and Pacific Life. Plaintiff alleged:

In May 2000, she was introduced to John Dwight, who represented himself as an expert investment advisor and mortgage broker. At the time, plaintiff was 72 years old and her sole asset of any consequence was her Camarillo home, which was essentially debt free. Plaintiff had little in savings and lived on her Social Security payments.

Defendants each participated in a scheme to defraud plaintiff into obtaining a \$168,750 loan from World that she could not pay back, and then diverting the loan proceeds to risky investments with Pacific Life. Plaintiff obtained the loan by executing a deed of trust on her home. The loan proceeds went to Fidelity, which provided escrow services. Fidelity participated in the scheme by mailing the loan check to Dwight despite plaintiff's directions to the contrary. Dwight in turn forwarded the loan check to Ken and Tina Mosbey,<sup>2</sup> who invested the proceeds with Pacific Life. Fidelity sent the loan check to Dwight "in order to facilitate the passing of the funds through the Mosbeys" to Pacific Life. Pacific Life's wrongdoing consisted of accepting the proceeds from the loan "without regard to the suitability" of the investment.

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<sup>1</sup> Plaintiff settled with the Mosbeys.

<sup>2</sup> Although Ken and Tina Mosbey allegedly played a role in the transactions that defrauded plaintiff, they were not named as defendants in the complaint.

World's wrongdoing related primarily to Dwight's falsification of plaintiff's loan documents. Dwight placed false information regarding plaintiff's income, expenses and assets on the loan documents in order to fraudulently qualify plaintiff for the loan. World knew or should have known that plaintiff did not personally complete the loan application, that the loan application contained false financial information, and that Dwight's brokerage business was involved in making predatory loans to elderly persons like plaintiff. Further, World coordinated a long-term pre-payment penalty on the original loan balance to match the two percent commission it had paid Dwight, without disclosing the facts to plaintiff.

Plaintiff became aware of World's involvement in the scheme through two sources of information. First, on or about May 9, 2005, plaintiff received for the first time copies of the loan documents. Second, on or after May 9, 2005, Dwight testified under oath in another case regarding World's involvement.<sup>3</sup> From Dwight's testimony, plaintiff discovered that other actions against Dwight were pending by similarly situated persons. Plaintiff became aware that in one such action Dwight admitted falsifying loan applications, and that he did so with World's "advice, consent and participation."

Based on these allegations, the complaint pled causes of action against World, Pacific Life and Fidelity for fraud and intentional deceit, negligent misrepresentation, constructive fraud, conversion, civil conspiracy, unfair business practices (Bus. & Prof., § 17200), breach of the implied covenant of good faith and fair dealing, money had and received, and financial abuse of elderly person.

### 3. *Demurrers.*

World, Fidelity and Pacific Life all demurred on various grounds, including the statute of limitations. Defendants argued each of the causes of action pled by plaintiff has a statute of limitations of three years, except for breach of the implied covenant of good faith and fair dealing, which has a statute of limitations of four years (Code Civ.

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<sup>3</sup> In her opening brief, plaintiff claimed that this testimony occurred in a deposition in another case, *Dickson v. Dwight* (Super. Ct. San Diego County, No. GIC814732).

Proc., § 337), and all the alleged causes of action accrued well over four years before the inception of the action. Defendants requested judicial notice of the October 31, 2003 claim and demand for arbitration. Defendants contended the arbitration demand established that by October 31, 2003 at the latest, plaintiff was aware of her alleged injuries. Therefore, defendants contended, this action, which was not filed until May 9, 2008, was time-barred.

4. *Trial court's ruling.*

After hearing arguments of counsel, the trial court sustained the demurrers of World, Fidelity and Pacific Life without leave to amend, stating "I think [plaintiff] was on notice at the time she filed the N.A.S.D. complaint."

Following the entry of judgments of dismissal, plaintiff appealed.

### **CONTENTIONS**

Plaintiff contends: the complaint is not barred by the statute of limitations; her relationship with defendants was confidential and fiduciary in nature, so as to toll the statute of limitations; defendants fraudulently concealed information which would have led her to discover her potential cause of action; the complaint sufficiently alleges the time and manner of discovery; she sufficiently alleged an inability to have made an earlier discovery despite reasonable diligence; plaintiff's current claims against defendants accrued independently of the NASD claims against the Mosbeys and Pacific Life; claims based on two independent legal theories can accrue at different times; and resolution of the statute of limitations is a question for the trier of fact.

World contends: the complaint is barred by the statute of limitations; plaintiff's causes of action are preempted by federal law relating to banks; and even assuming plaintiff's causes of action are not time-barred or preempted, the complaint fails to state sufficient facts to constitute a cause of action against World. Pacific Life and Fidelity contend, inter alia, that plaintiff's action against them is barred by the statute of limitations.

## DISCUSSION

### 1. *Standard of appellate review.*

On review of a demurrer, in addition to the allegations of the complaint, we may consider other relevant matters which are properly the subject of judicial notice and we may treat such matters as having been pleaded. We therefore treat the 2003 claim and demand for arbitration as having been pled in its entirety. (*City of Hawthorne ex rel. Wohlner v. H&C Disposal Co.* (2003) 109 Cal.App.4th 1668, 1678; *Coopers & Lybrand v. Superior Court* (1989) 212 Cal.App.3d 524, 538; *Marina Tenants Assn. v. Deauville Marina Development Co.* (1986) 181 Cal.App.3d 122, 128, 132.)

In determining whether a plaintiff has properly stated a claim for relief, “our standard of review is clear: ‘ “We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.” [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.]’ ” (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.) Our review is de novo. (*Ibid.*)

“When a demurrer is sustained without leave to amend, this court decides whether a reasonable possibility exists that amendment may cure the defect; if it can we reverse, but if not we affirm. The plaintiff bears the burden of proving there is a reasonable possibility of amendment. [Citation.] The plaintiff may make this showing for the first time on appeal.” (*Rakestraw v. California Physicians’ Service* (2000) 81 Cal.App.4th 39, 43 (*Rakestraw*)).

“To satisfy that burden on appeal, a plaintiff ‘must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading.’ [Citation.] The assertion of an abstract right to amend does not satisfy this burden.” (*Rakestraw, supra*, 81 Cal.App.4th at p. 43.) The plaintiff must clearly and specifically state “the legal basis for amendment, i.e., the elements of the cause of action,” as well as the “factual allegations that sufficiently state all required elements of that cause of action.” (*Ibid.*)

2. *Plaintiff's claims against Pacific Life and Fidelity are time-barred, but her claims against World are not.*

a. *The statute of limitations.*

The statute of limitations generally begins to accrue when the wrongful act occurs. (*Norgart v. Uphohn Co.* (1999) 21 Cal.4th 383, 397.) However, under the discovery rule, the statute of limitations accrues when the plaintiff has a suspicion of wrongdoing. (*Id.* at pp. 397-398; *Clark v. Baxter Healthcare Corp.* (2000) 83 Cal.App.4th 1048, 1055 (*Clark*.) At that point, the plaintiff is placed on inquiry notice, requiring the plaintiff to use reasonable diligence to discover the defendant's tortious conduct. (*Deveny v. Entropin, Inc.* (2006) 139 Cal.App.4th 408, 428.) Whether the plaintiff has a suspicion of wrongdoing is an issue that is determined by the jury or the trial judge acting as the trier of fact. (*Clark*, at pp. 1052, 1060 [holding that summary judgment was erroneously granted because there was a triable issue of fact as to whether plaintiff was put on inquiry notice of defendant's wrongdoing]; *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 810 (*Fox*) ["Resolution of the statute of limitations issue is normally a question of fact"].)

"A general demurrer based on the statute of limitations is only permissible where the dates alleged in the complaint show that the action is barred by the statute of limitations. [Citation.] The running of the statute must appear 'clearly and affirmatively' from the dates alleged. It is not sufficient that the complaint *might* be barred. [Citation.]" (*Roman v. County of Los Angeles* (2000) 85 Cal.App.4th 316, 324 (*Roman*.) All reasonable inferences from the complaint are drawn in favor of the plaintiff. (*Mosby v. Liberty Mutual Ins. Co.* (2003) 110 Cal.App.4th 995, 999; *Edwards v. Centex Real Estate Corp.* (1997) 53 Cal.App.4th 15, 28). "If the dates establishing the running of the statute of limitations do not clearly appear in the complaint, there is no ground for general demurrer. The proper remedy 'is to ascertain the factual basis for the contention through discovery and, if necessary, file a motion for summary judgment . . . .'" (*Roman*, at pp. 324-325.)



b. *Plaintiff's claims against World are not time-barred because the limitations period was stayed by the discovery rule.*

Plaintiff contends that under the discovery rule her action against World is not barred by the three-year statute of limitations because she filed her initial complaint within three years of discovering World's tortious conduct on May 9, 2005. We agree.

World argues that plaintiff was put on inquiry notice of World's wrongful conduct no later than October 31, 2003. It bases this conclusion in part on a statement made by plaintiff in its NASD arbitration demand dated October 31, 2003: "With JOHN DWIGHT'S prodding, Claimant [plaintiff] 'apparently' executed loan documents and escrow closed in the last week of May 2000. Although the escrow did close as stated, Claimant is not altogether certain that she knowingly executed the related documents."

This statement was part of the background section of plaintiff's NASD arbitration demand. The gravamen of the arbitration demand was that Ken and Tina Mosbey, who are not parties to this action, fraudulently convinced plaintiff to invest in unsuitable investments and failed to disclose to plaintiff the high risk nature of those investments. The arbitration demand did *not* allege that Dwight, World or anyone else fraudulently executed plaintiff's loan documents and does not hint of plaintiff's current claim that World participated in a scheme to fraudulently place false information on plaintiff's loan application or that World gave a kickback to Dwight. The statement appears to be a gratuitous remark wholly unnecessary to the causes of action asserted in the arbitration demand.

Moreover, viewing the facts in a light most favorable to plaintiff, as we must, plaintiff only stated that she did not know whether she signed the loan documents.<sup>4</sup> She may have stated this in an abundance of caution because she did not have a copy of

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<sup>4</sup> At most, the statement in plaintiff's NASD arbitration demand was ambiguous. We cannot give conclusive effect to an ambiguous statement in an arbitration demand. (See *Kirby v. Albert D. Seeno Construction Co.* (1992) 11 Cal.App.4th 1059, 1066 [rejecting a party's request in a motion for summary judgment "to give conclusive effect to an ambiguous statement in an unverified complaint and to ignore the explanation of the statement contained in deposition testimony taken under oath"].)

them.<sup>5</sup> Merely because plaintiff was uncertain whether she signed the loan documents does not mean that, as a matter of law, she should have suspected in 2003 that World committed fraud in connection with the execution of those documents. It is an even greater leap to infer that plaintiff should have reasonably suspected that World, a federally chartered savings association, was part of a scheme to fraudulently place false information in her loan application. At the pleadings stage such an inference in World's favor is not permitted.

World argues that the complaint does not set forth facts adequately explaining why plaintiff did not request loan documents from World earlier. However, in paragraph 15 of the complaint, plaintiff alleged: "From approximately July 2000, PLAINTIFF made numerous attempts to obtain information regarding her loan, the investments and related financial transactions. PLAINTIFF made many verbal requests *to the defendants* for information." (Italics added.) "Defendants" includes World.

Furthermore, we cannot review plaintiff's attempts to obtain the loan documents with the benefit of hindsight. In 2000, plaintiff was attempting to gather information regarding *the Mosbeys' and Dwight's wrongdoing in connection with the unsuitable investments* they made for plaintiff. At that time, there was no reason for plaintiff to suspect that *World* was involved in *a scheme to place false information on her loan application*.

This case is similar to *Fox*. In *Fox*, the plaintiff sued for personal injuries she sustained during an operation. Plaintiff's initial investigation only disclosed one kind of wrongdoing, namely medical malpractice. Later, after further investigation, the plaintiff discovered wrongful conduct of a wholly different sort, namely the distribution of a defective surgical stapler. (*Fox, supra*, 35 Cal.4th at p. 804.) Our Supreme Court held

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<sup>5</sup> As it turns out, after plaintiff received the loan documents, she did not allege in the complaint that defendants committed fraud related the execution of those documents—i.e. she did not allege that someone fraudulently signed the documents on her behalf. Rather, she alleged that she signed, but did not fill out, a loan application to World, and thereafter defendants placed false information on the loan application.

that the plaintiff should have been granted leave to amend her complaint to allege causes of action against the manufacturer of the stapler. (*Id.* at p. 811.)

In reaching its decision, the Supreme Court stated: “It is . . . consistent with our prior applications of the discovery rule to delay accrual of a products liability cause of action even when a related medical malpractice claim has already accrued, unless the plaintiff has reason to suspect that his or her injury resulted from a defective product. More broadly stated, if a plaintiff’s reasonable and diligent investigation discloses only one kind of wrongdoing when the injury was actually caused by tortious conduct of a wholly different sort, the discovery rule postpones accrual of the statute of limitations on the newly discovered claim.” (*Fox, supra*, 35 Cal.4th at p. 813.)

Likewise, in this case, plaintiff’s initial investigation only disclosed one kind of wrongdoing, namely securities fraud related to unsuitable investments. Subsequently, plaintiff’s investigation revealed wrongdoing of a wholly different sort, namely the falsification of loan documents. Accordingly, in this case, as in *Fox*, the discovery rule postponed the accrual of the statute of limitations on plaintiff’s newly discovered claims against World.

In sum, at the demurrer stage, if we make all reasonable inferences in plaintiff’s favor, as we must, plaintiff was not as a matter of law placed on inquiry notice as of October 31, 2003. We thus hold that World’s demurrer should not have been sustained based on the statute of limitations.

*c. As against Pacific Life, plaintiff’s complaint alleges the same wrongdoing as was alleged in the 2003 claim and demand for arbitration.*

Unlike the other defendants herein, Pacific Life was also named in the 2003 arbitration demand. As against Pacific Life, the complaint reiterated the wrongdoing which was raised earlier in the arbitration demand. The gravamen of the 2003 arbitration demand, as against Pacific Life, was that the variable annuity was an unsuitable investment for plaintiff, and that plaintiff was never told of the full costs, expenses, risks and speculative nature of the securities in which her money was invested. Said misconduct was realleged herein, in the complaint against Pacific Life.

Although plaintiff alleges she did not discover her cause of action until May 2005, when she obtained a copy of her loan documents from World, a comparison of the 2003 arbitration demand and the operative complaint herein disclose plaintiff was actually aware of her claims against Pacific Life at the time she sought arbitration against Pacific Life in 2003. Plaintiff's claims against Pacific Life are thus time-barred.

d. *As against Fidelity, plaintiff was aware of its alleged wrongdoing as early as May 2000.*

With respect to Fidelity, the operative complaint alleges the following misconduct: Plaintiff's son instructed Fidelity to mail the loan proceeds check to his home, yet Fidelity sent the check to Dwight's office. This "facilitate[d] the passing of the funds through the Mosbeys to [Pacific Life]." However, plaintiff's obtaining a copy of the loan documents from World in May 2005 has nothing to do with her awareness of the misdelivery of the loan proceeds. Plaintiff was aware of the alleged misdelivery of the check as of the close of escrow in May 2000, when the loan proceeds were disbursed. Accordingly, plaintiff's action against Fidelity is barred by the statute of limitations.

e. *Plaintiff did not meet her burden of showing there is a reasonable possibility of amendment against Pacific Life and Fidelity.*

With respect to the causes of action against Pacific Life and Fidelity, plaintiff did not meet her burden of showing that there is a reasonable possibility of amendment because she did not explain how she would cure the defects in the complaint. The trial court thus correctly sustained these defendants' demurrers without leave to amend.

3. *Plaintiff's claims against World are not preempted.*

World contends that even if plaintiff's causes of action were not barred by the statute of limitations, the trial court correctly sustained World's demurrer because plaintiff's causes of action are preempted by the Home Owners' Loan Act of 1933 (12 U.S.C. § 1461 et seq.) (HOLA). We disagree.

State tort and contract laws are not preempted by HOLA "to the extent that they only incidentally affect the lending operations" of a federally chartered savings association. (12 C.F.R. § 560.2, subd. (c).) Common law fraud claims and claims based

on state unfair business practices statutes only incidentally affect lending operations and thus are not preempted. (*Fenning v. Glenfed, Inc.* (1995) 40 Cal.App.4th 1285, 1298-1299 (*Fenning*); accord *McKell v. Washington Mutual, Inc.* (2006) 142 Cal.App.4th 1457, 1487; *Gibson v. World Savings & Loan Assn.* (2002) 103 Cal.App.4th 1291, 1299-1300.)

In *Fenning*, the court addressed the issue of whether the plaintiff's suit for fraud and unfair and deceptive business practices against a federally chartered savings association (the Bank) was preempted under HOLA. The court stated: "[A]ctions for fraud are governed almost exclusively by state law, and do not raise issues of great federal interest. [Citation.] There is no reason to suppose that Congress intended to preempt common law tort claims, effectively granting savings associations immunity from such state law claims, and a number of courts have so held. [Citations.] And the Bank's argument that, by permitting fraud and unfair trade practices suits, the state is regulating the Bank's conduct, is off the mark. Plaintiff's ability to sue the Bank for fraud does not interfere with what the Bank may do, that is, how it may conduct its operations; it simply insists that the Bank cannot misrepresent how it operates, or employ fraudulent methods in its operations. Put another way, the state cannot dictate to the Bank how it can or cannot operate, but it can insist that, however the Bank chooses to operate, it do so free from fraud and other deceptive business practices." (*Fenning, supra*, 40 Cal.App.4th at pp. 1298-1299, fn. omitted.)

We agree with the analysis of *Fenning*. Plaintiff's state-law causes of action against World are not preempted by HOLA. Because we find no merit to World's statute of limitations and preemption arguments, we reverse the judgment with respect to World.

4. *World's arguments relating to particular causes of action.*

In addition to its statute of limitations and preemption arguments, World contends that each of plaintiff's causes of action were deficiently pled for various reasons. Although the trial court did not reach these arguments, World asserted them below.

a. *Intentional fraud and deceit and negligent misrepresentation.*

The first cause of action is for fraud and intentional deceit and the second cause of action is for negligent misrepresentation. Both of these causes of action are forms of deceit and must be pled with specificity. (5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, §§ 709, 711, 727, pp. 124-127, 143 (Witkin).) Further, an essential element of both causes of action is that the plaintiff detrimentally relied on the defendant's misrepresentation. (*Id.*, § 710, p. 125.)

World argues that the complaint fails to set forth sufficiently specific facts to state these causes of action. We agree. In particular, the complaint does not specify the affirmative false statements that were allegedly made to plaintiff and the person who made them.<sup>6</sup> Instead, the complaint alleges that “defendants” made false statements regarding plaintiff’s qualification for and suitability of World’s loan, and “facts concerning fees, costs, and expenses, details regarding the effect of variable interest rates and early termination penalties . . . .” In order to state a cause of action for intentional or negligent misrepresentation, the complaint must, at a minimum, state (1) the name of the party who allegedly made the false statement and (2) the words, either verbatim or paraphrased, that were stated.

Although the allegations in the complaint are not sufficiently specific, there is a reasonable possibility that plaintiff can amend her complaint to satisfy the pleading requirements for fraud and deceit. Accordingly, we hold that the trial court correctly sustained the demurrer to the first and second causes of action, but should have granted plaintiff leave to amend.

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<sup>6</sup> The complaint does state that Dwight made false statements on plaintiff’s loan applications regarding plaintiff’s income, expenses, and assets. However, it also alleges that plaintiff did not become aware of these false statements until years *after* she obtained the loan from World. Accordingly, plaintiff could not have detrimentally relied on these false statements, and these statements cannot be the basis of intentional misrepresentation and negligent misrepresentation causes of action against World.

b. *Constructive Fraud*

The third cause of action is for constructive fraud. Plaintiff alleges that the defendants had a fiduciary relationship with her, that they intentionally failed to disclose or concealed material facts from her, that they did so with the intention of deceiving and defrauding her, and that as a result, plaintiff sustained damages by incurring debt (the loan) and the loss of her savings.

World's principal argument regarding this cause of action is that as a bank, World did not have a fiduciary relationship with plaintiff and, accordingly, did not have a duty to disclose any material facts to her. We agree that constructive fraud depends on the existence of a fiduciary relationship of some kind (5 Witkin, *supra*, § 717, p. 133), and that in general a bank does not have a fiduciary relationship with its loan customers. (*Price v. Wells Fargo Bank* (1989) 213 Cal.App.3d 465, 476.) However, in this case, plaintiff's constructive fraud cause of action is not based merely on her direct relationship with World; it is based on her relationship with Dwight. As we will explain, the complaint alleges facts showing that Dwight had a fiduciary relationship with plaintiff, that Dwight failed to disclose material facts to plaintiff, that plaintiff sustained damages as a result of that failure, and that World was in a civil conspiracy with Dwight to defraud plaintiff.

“ ‘ “The essence of a fiduciary or confidential relationship is that the parties do not deal on equal terms, because the person in whom trust and confidence is reposed and who accepts that trust and confidence is in a superior position to exert unique influence over the dependent party.” ’ [Citation.] Fiduciary obligations ‘generally come into play when one party’s vulnerability is so substantial as to give rise to equitable concerns underlying the protection afforded by the law governing fiduciaries.’ [Citation.] While it is impossible to identify a single set of factors giving rise to a fiduciary relationship [citation], some reasons generally used to demonstrate that a party to such a relationship is vulnerable include advanced age, youth, lack of education, ill health, and mental weakness.” (*Brown v. Wells Fargo Bank, N.A.* (2008) 168 Cal.App.4th 938, 960.)

The complaint sets forth sufficient facts to establish a fiduciary relationship between Dwight and plaintiff. Plaintiff alleges the following in her pleading. When she met Dwight, plaintiff was 72 years old, had little savings, and lived essentially on social security payments. Plaintiff's primary asset was her home, which she owned free and clear. She "was not a knowledgeable investor in securities and was not a person who was savvy in real estate transactions." Dwight advised plaintiff that "he was an expert investment advisor and a mortgage broker." He further advised plaintiff that he would assist her in making a greater return on her investments and introduced her to the Mosbeys, who were also expert financial and investment advisors. In light of her trust in Dwight and her lack of financial sophistication, plaintiff routinely signed documents put in front of her for signature without being informed of the content. Plaintiff also signed her loan application to World without filling in all of the blank spaces in the application, leaving that task to Dwight. In short, plaintiff was an elderly, financially unsophisticated and vulnerable person who trusted Dwight and relied on his financial expertise to help her make good financial decisions. Under these circumstances, Dwight had a fiduciary relationship with plaintiff.

"Conspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration. [Citation.] By participation in a civil conspiracy, a coconspirator effectively adopts as his or her own the torts of other coconspirators within the ambit of the conspiracy. [Citation.] In this way, a coconspirator incurs tort liability co-equal with the immediate tortfeasors." (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 510-511. (*Applied Equipment*).

The complaint alleges that Dwight and World worked together in a conspiracy or a "scheme" to defraud plaintiff. World's employee, Stager, participated in the conspiracy by processing plaintiff's loan application in an "expedited fashion," though he knew or shown have known that Dwight falsified the loan documents, and that plaintiff did not qualify for the loan.



As a fiduciary, Dwight had an obligation to inform plaintiff about the material facts concerning her loan from World, including the facts that she did not qualify for the loan and that Dwight placed false financial information on her loan application. The complaint alleges that Dwight did not disclose these material facts to plaintiff, that had plaintiff known the truth, she would not have agreed to obtain a loan from World, and that plaintiff lost money as a result. These allegations are sufficient to state a constructive fraud cause of action against Dwight. Because the complaint sufficiently alleges that World was in a conspiracy with Dwight to defraud plaintiff, it also states facts sufficient to state a cause of action for constructive fraud against World. The trial court therefore erroneously sustained World's demurrer to this cause of action.

*c. Conversion.*

The fourth cause of action is for conversion. The complaint alleges that defendants converted "moneys" from plaintiff, "including, but not limited to commissions, fees, interest and penalties" paid in connection with the loan and investments made by plaintiff. However, "[w]hen money is the subject of conversion, the plaintiff must plead that a specific identifiable sum was taken." (5 Witkin, *supra*, § 702, p. 118; accord *Vu v. California Commerce Club, Inc.* (1997) 58 Cal.App.4th 229, 235.) Because the complaint does not state a specific identifiable sum of money converted, it does not state a cause of action for conversion. Moreover, plaintiff has not asserted that she can make such an allegation. Plaintiff therefore has not met her burden of showing a reasonable possibility that this cause of action can be saved by amendment. The trial court thus correctly sustained World's demurrer to this cause of action without leave to amend.

*d. Civil conspiracy.*

The fifth cause of action is for civil conspiracy. As stated *ante*, civil conspiracy is not an independent cause of action. (*Applied Equipment, supra*, 7 Cal.4th at p. 510.) The trial court therefore correctly sustained World's demurrer to plaintiff's sixth cause of action for civil conspiracy without leave to amend.

e. *Violation of Business and Professions Code section 17200 et seq.*

The sixth cause of action is for unfair competition in violation of Business and Professions Code section 17200 et seq. Unfair competition includes “any unlawful, unfair *or* fraudulent business act or practice . . . .” (Bus. & Prof. Code, § 17200, italics added.) Here, the complaint alleges that World participated in a conspiracy with Dwight to defraud<sup>7</sup> plaintiff, and that World and Dwight engaged in the same fraudulent business practice with respect to other elderly persons. These allegations are sufficient to state a cause of action for unfair competition.<sup>8</sup> The trial court therefore erroneously sustained World’s demurrer to the sixth cause of action.

f. *Breach of the implied covenant of good faith and fair dealing.*

The seventh cause of action is for breach of the implied covenant of good faith and fair dealing. This is, in essence, a cause of action for breach of contract based on a breach of an implied term of the contract. (See *Smith v. International Brotherhood of Electrical Workers* (2003) 109 Cal.App.4th 1637, 1644-1645, fn. 3 [“A breach of the covenant of good faith and fair dealing does not give rise to a cause of action separate from a cause of action for breach of the contract containing the covenant”].)

“It has long been recognized in California every contract contains an implied covenant of good faith and fair dealing that ‘neither party will do anything which will injure the right of the other to receive the benefits of the agreement.’” [Citations.] This covenant is ‘read into contracts “in order to protect the express covenants or promises of the contract, not to protect some general public policy interest not directly tied to the

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<sup>7</sup> “The term ‘fraudulent’ as used in Business and Professions Code section 17200 requires only a showing that members of the public are likely to be deceived. [Citation.] Unlike common law fraud, a Business and Professions Code section 17200 violation can be shown even without allegations of actual deception, reasonable reliance and damage.” (*Blakemore v. Superior Court* (2005) 129 Cal.App.4th 36, 49.)

<sup>8</sup> World’s reliance on *Emery v. Visa Internat. Service Assn.* (2002) 95 Cal.App.4th 952 (*Emery*) is misplaced. There, the defendant had no relationship with the plaintiff and did not engage in a civil conspiracy with the alleged tortfeasors. *Emery* is thus distinguishable from this case.

contract's purpose." ' ' ' (Wolf v. Walt Disney Pictures & Television (2008)  
162 Cal.App.4th 1107, 1120.)

Plaintiff's breach of the implied covenant of good faith and fair dealing cause of action against World is based on the "agreements in conjunction with" the loan she received from World. However, the complaint does not specify any express benefits of these contracts she lost as a result of World's alleged bad faith conduct. To the contrary, the complaint alleges that World funded the loan to plaintiff pursuant to the agreements. The complaint therefore fails to state facts sufficient to constitute a cause of action for breach of the implied covenant of good faith and fair dealing. Further, plaintiff has not shown that there is any possibility that her pleading can be amended to state this cause of action. The trial court thus correctly sustained World's demurrer to the seventh cause of action without leave to amend.

*g. Money had and received.*

Plaintiff's eighth cause of action is for money had and received. World argues that the complaint does not allege that World received any money from plaintiff, and thus does not state a cause of action for money had and received. This is not true. In paragraph 56 of the complaint, which is incorporated into the eighth cause of action, it states that defendants received money from plaintiff, "including, but not limited to, commissions, fees, interest and penalties paid in connection with" the loan given by World. A reasonable inference can be made that as the maker of the loan, World received, at a minimum, interest payments. At the pleading stage, this inference must be made in plaintiff's favor.

Money had and received is a common count which may be based on a variety of situations, including fraud in the execution of a contract. (4 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 561, pp. 688-689.) The only essential allegations to state a common count are "(1) the statement of indebtedness in a certain sum, (2) the consideration, i.e., goods sold, work done, etc., and (3) nonpayment." (*Id.*, § 557, pp. 685-686.) Because this form of pleading common counts has been so long established, the general rules of pleading in California do not apply, and "it is settled that

they [common counts] are good against special as well as general demurrers.”  
(*Id.*, § 553, p. 681.)

The complaint sets forth the essential elements of the common count of money had and received. It alleges that plaintiff took a loan out from World, that plaintiff was defrauded into executing the loan documents, that plaintiff paid World money in connection with the loan, that World became indebted to plaintiff for money had and received, and that World has not paid any part of that debt. The trial court therefore erroneously sustained World’s demurrer to the eighth cause of action.

h. *Elder abuse.*

Plaintiff’s ninth cause of action is for elder abuse under Welfare and Institutions Code section 15600 et seq. Abuse of an elder includes financial abuse. (Wel & Inst. Code, § 15610.07.) Financial abuse occurs when a person or entity does any of the following: “(1) Takes, secretes, appropriates, or retains real or personal property of an elder or dependent adult to a wrongful use or with intent to defraud, or both. [¶] (2) Assists in taking, secreting, appropriating, or retaining real or personal property of an elder or dependent adult to a wrongful use or with intent to defraud, or both.” (Wel. & Inst. Code, § 15610.30, subd. (a).)

World argues that the complaint does not state a cause of action for elder abuse against World because it does not state World received any money from plaintiff. However, as we explained *ante*, the complaint states that World received money from plaintiff as a result of World’s participation in a civil conspiracy to defraud plaintiff. The complaint therefore states a cause of action for elder abuse against World. Accordingly, the trial court erroneously sustained World’s demurrer to plaintiff’s ninth cause of action.

## **DISPOSITION**

The judgments of dismissal in favor of Fidelity and Pacific Life are affirmed. The judgment of dismissal in favor of World is reversed with respect to plaintiff's first cause of action for fraud and intentional deceit and second cause of action for negligent misrepresentation. The trial court is directed to grant plaintiff leave to amend her first and second causes of action. The judgment of dismissal in favor of World is also reversed with respect to plaintiff's third cause of action for constructive fraud, sixth cause of action for violation of Business and Professions Code section 17200 et seq., eighth cause of action for money had and received, and ninth cause of action for elder abuse. The judgment of dismissal in favor of World is affirmed with respect to plaintiff's fourth cause of action for conversion, fifth cause of action for civil conspiracy, and seventh cause of action for breach of the implied covenant of good faith and fair dealing. The parties are to bear their own costs.

## **NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

KITCHING, J.

We concur:

KLEIN, P. J.

CROSKEY, J.