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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon Joan A Madden PART 11

Index Number : 600944/2005

TIG INSURANCE CO

vs

WEIL GOTSHAL MANGES LLP

Sequence Number : 1

DISMISS ACTION

INDEX NO. _____

MOTION DATE 6/2/05

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with annexed Memorandum Decision and Order.

FILED

NOV 25 2005

COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: November 10, 2005

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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TIG INSURANCE COMPANY f/k/a TRANSAMERICA INSURANCE COMPANY and TIG INSURANCE COMPANY as subrogee of TIME-WARNER, INC., WARNER-CHAPPELL MUSIC LIMITED, WARNER TAMERLANE PUBLISHING CORPORATION and WB MUSIC CORPORATION,

Plaintiffs,

-against- Index No. 600944/05

WEIL, GOTSHAL & MANGES LLP and ROBERT G. SUGARMAN, ESQ.,

Defendants.

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MADDEN, J.

This action, which asserts claims for breach of fiduciary duty and intentional concealment of information, arises out of a consolidated breach of fiduciary duty action commenced by Michael Bolton (Bolton), and Mr. Bolton's Music, Inc. (Mr. Bolton's Music)[1], his personal services company, against Weil, Gotshal & Manges LLP (Weil Gotshal) and Weil Gotshal partner Robert Sugarman (Sugarman), relating to Weil Gotshal's representation of Bolton, a musician and songwriter, in connection with a copyright infringement action brought in 1992 by Three Boys Music, Inc. in the United States District Court for the District of Central California (the Three Boys Music action).

In this complaint, plaintiff TIG Insurance Company (TIG) alleges that defendants Weil Gotshal and Sugarman committed various acts or omissions that impaired TIG's ability to

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[1]In its complaint TIG does not distinguish between Bolton and Mr. Bolton's Music and instead refers to the two collectively as "Bolton."

enforce its contractual right of indemnity against Bolton contained in a publishing agreement between Bolton and TIG's insured Warner-Chappell Music Limited (Warner-Chappell). TIG brings this action not only in its own name, but also as the subrogee of it insureds, Time Warner, Inc. (Time Warner), Warner-Chappell, Warner Tamerlane Publishing Corporation (Warner Tamerlane), and WB Music Corporation (WB Music), the Time Warner subsidiaries that were Bolton's co-defendants in the Three Boys Music action.

Defendants Weil, Gotshal and Sugarman now move for an order, pursuant to CPLR 3211 (a) (1), 3211 (a) (5) and 3211 (a) (7), dismissing the complaint on the grounds that it is barred by the applicable statute of limitations, and fails to state a cause of action.

For the reasons set forth below, the motion to dismiss the complaint is granted.

BACKGROUND

TIG is a California corporation with its principal place of business in Irving, Texas (Complaint, ¶ 1). Weil Gotshal is a New York-based law firm (id., ¶ 7). Sugarman is a Weil Gotshal partner who works out of the firm's New York office (id., ¶ 8).

In their complaints in the consolidated action, Bolton and Mr. Bolton's Music allege that Weil Gotshal and Sugarman breached their fiduciary duties as a result of a conflict of interest while representing them, Warner-Chappell, Bolton's music publishing company, and Sony Music Entertainment, Inc., Bolton's record company (Sony Music), in the Three Boys Music action. The plaintiffs in the Three Boys Music action contended that Bolton's 1991 hit "Love is a Wonderful Thing," which Bolton co-authored with Andrew Goldmark (Goldmark), infringed on the copyright of a song of the same title written by the Isley Brothers in 1964. The Three Boys Music action resulted in a jury verdict against the defendants, which was upheld on

appeal.

Through an errors and omissions policy, TIG insured Time Warner and affiliated Time Warner entities, including Warner-Chappell, Warner Tamerlane and WB Music (id., ¶¶ 2-6). As previously stated, Warner-Chappell, Warner Tamerlane and WB Music were all defendants in the Three Boys Music action (id., ¶ 10).

On May 24, 1989, Bolton had entered into a Publishing Agreement with Warner-Chappell, in which Bolton warranted that his compositions would be "unencumbered and original copyright works," and that Bolton would indemnify Warner-Chappell "from and against claims, liabilities, costs, losses and damages arising out of or incurred as a direct or indirect result of [Bolton's] breach of such warranty" (id., ¶ 13).

Weil Gotshal and Sugarman were retained to represent Bolton, Sony Music, Warner-Chappell, and the other Time Warner affiliated entities in the Three Boys Music action, and TIG agreed to pay Weil Gotshal's fees "[i]n reliance on the indemnity obligations of Bolton as set forth in the [Warner-Chappell] Publishing Agreement, and because of Bolton's insistence that Sugarman be retained" (id., ¶¶ 12, 14).

The Three Boys Music action went to trial in April 1994, with Sugarman representing all of the defendants. A verdict as to liability was returned on April 24, 1994, holding all of the Three Boys Music defendants liable for subconscious copyright infringement. On December 18, 1996, a Final Judgment (the Judgment) was entered in the Three Boys Music action, ordering Sony Music to pay $4,218,838; Bolton and Mr. Bolton's Music to pay $932,924; Goldmark to pay $220,785; and Warner-Chappell, Warner-Tamerlane, and WB Music to pay $75,900. Weil Gotshal began the appeals process to the Ninth Circuit Court of Appeals. On

May 9, 2000, the Judgment was upheld by the 9th Circuit. Subsequently, Weil Gotshal and Sugarman prepared a petition for writ of certiorari to the United States Supreme Court. On January 22, 2001, the Supreme Court denied the petition for certiorari.

On January 31, 2001, Bolton retained separate counsel and definitively took the position that he was an additional insured under the contract of insurance issued by TIG to the Time Warner entities. Bolton's position led to the commencement of three lawsuits. On June 25, 2001, TIG and Warner-Chappell brought an English action seeking to recover damages and interest from Bolton for the defense and indemnity of Time Warner and Sony Music, or alternatively, specific performance of the indemnity agreement. In a separate Connecticut action, TIG sought to recover that portion of the Judgment attributed to Sony, and in an action brought in California by Bolton against TIG, Bolton sought a ruling that TIG owed coverage to Bolton. In March 2004, the three lawsuits culminated in a global settlement between Bolton and TIG.

On March 27, 2004, at TIG's request, TIG, Weil Gotshal and Sugarman entered into a tolling agreement with respect to the statute of limitations on any claims TIG and its insureds had against defendants. The parties renewed the tolling agreement periodically through February 15, 2005, when Weil Gotshal terminated the agreement. Under the terms of the tolling agreement, the statute of limitations period would begin to run anew thirty days from termination, in this case, March 17, 2005.

TIG filed this action on March 16, 2005. TIG's allegations in the complaint focus on the indemnification obligations running from Bolton to Warner-Chappell. The complaint alleges that Weil Gotshal and Sugarman suffered from a conflict of interest because they agreed to represent Bolton, the Time Warner entities and Sony Music in the Three Boys Music action

without obtaining their informed written consent to their joint representation and a waiver of any potential conflicts of interest (id., ¶¶ 16-20). TIG contends that "[a]lthough the defendants in the Three Boys Music action were united in their position that there was no infringement of the Isley Brothers' song, they had sharply different economic interests in the outcome of the litigation" (id., ¶ 16). More specifically, TIG contends that, because Bolton signed a written agreement with Warner-Chappell containing an indemnity provision, and because "Sony claimed entitlement to defense and indemnity directly from Warner based on implied indemnity" (id., ¶¶ 13, 15), Weil Gotshal's "approach was misleading and concealed the negative consequences of the joint representation of Bolton, as indemnitor, on the one hand, and Warner and Sony, as indemnitees on the other" (id., ¶ 21).

TIG also alleges, on information and belief, that Weil Gotshal "failed to accurately convey settlement opportunities to Bolton, even though Bolton instructed defendants to try to settle the case very early in the litigation (id., ¶ 26).

In addition, TIG alleges that Weil Gotshal and Sugarman engaged in a series of misrepresentations and omissions that caused it direct harm. The complaint alleges that Weil Gotshal and Sugarman "falsely represented to TIG that Bolton was unwilling to settle the Three Boys Music action and that he was willing to take the risk of an adverse judgment, even if that meant he would ultimately be responsible for the entire judgment due to his indemnity obligations to Warner and Sony" (id., ¶ 22). The complaint further alleges that had Weil Gotshal properly advised TIG to consult separate counsel," then "TIG would have been advised to get an express, written agreement from Bolton that he was willing to indemnify Warner and Sony" (id., ¶ 24). The complaint also alleges that "[i]f Bolton refused, TIG would have known that Bolton

disputed his indemnity obligations and could have pursued other options" or, "[a]t a minimum, TIG would not have continued to gratuitously pay for Bolton's defense" (id., ¶ 24). TIG alleges that, as a result of Weil Gotshal's conduct, it "did not take additional steps to attempt to settle the litigation" (id., ¶ 28) and, thereafter, "paid $6,673,043.51 to satisfy the portions of the judgment, including post-judgment interest and costs, rendered against Warner, Sony and Bolton"[2] (id., ¶ 34).

TIG also alleges that the terms of a settlement agreement with Goldmark prevented it "from recovering the full amount of the eventual judgment from Bolton" (id., ¶ 31) and that Weil Gotshal "did not advise TIG to seek independent counsel on behalf of Warner and Sony prior to signing the Goldmark agreement" (id., ¶ 32).

Based on these allegations, TIG asserts two causes of action. In its first cause of action, TIG alleges that defendants' "breach of their fiduciary duties and negligence was a substantial contributing cause of economic injury to TIG" (id., ¶ 44). In its second cause of action, TIG asserts that defendants "failed to provide Warner and Sony, and TIG with their undivided loyalty" (id., ¶ 49), and "abused their position of trust and confidence and acted with gross indifference to the welfare of Warner, Sony and TIG" (id., ¶ 50). TIG seeks $15,000,000 in compensatory damages, and $15,000,000 in punitive damages.

DISCUSSION

Defendants contend that TIG's complaint must be dismissed because the applicable statute of limitations has expired. Specifically, defendants contend that, although TIG

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[2]In September 1996, a special master issued findings with regard to damages and determined that the verdict equated $4,218,838 against Sony, $75,900 against the Time Warner entities, $932,924 against Bolton and $220,785 against Goldmark.

has brought this action not only in its own name, but also as the subrogee of Time Warner, its insured, and the Time Warner subsidiaries that were Bolton's co-defendants in the Three Boys Music action, TIG is the real party in interest, as the complaint alleges harm only to TIG itself. Thus, defendants argue, TIG's claims are barred by the statutes of limitations of Texas, TIG's principal place of business, and New York, both of which are applicable by operation of New York's borrowing statute.

Conversely, TIG asserts that it has both a direct cause of action against defendants, and a subrogation action on behalf of its insured. Specifically, TIG contends, citing Allianz Underwriters Ins. Co. v Landmark Ins. Co. (13 AD3d 172 [1st Dept 2004]), that it has a direct cause of action against defendants as counsel for its insureds, because its relationship with Weil Gotshal was so "near privity" as to allow direct relief against its insureds' counsel for malpractice. TIG further contends that, as subrogee of its insureds, it has a subrogation claim on behalf of its insureds against defendants for their intentional and negligent conduct.

TIG also contends that, in a subrogation action, the statute of limitations is a defense belonging to the subrogors here, the Time Warner defendants, and that therefore, Weil Gotshal's available defenses against TIG as an insurer are dictated by the statute of limitations as applied to its insureds. TIG contends that the applicable residences where the economic injury occurred are either London, Warner-Chappell's principle place of business, or New York, where Time Warner, Warner Tamerlane and WB Music maintain their principle places of business. Thus, TIG argues, based upon the borrowing statute, the applicable statutes of limitations are England and New York. TIG further argues that its action is timely under both of these statutes of limitations.

Although TIG seeks to recover against Weil Gotshal and Sugarman through both a direct claim based on "near privity" (TIG Mem, at 10-11), and through a claim in subrogation based on a purported loss to its insureds (id. at 11-12), New York law precludes TIG from proceeding simultaneously through both a "direct malpractice action" against Weil Gotshal and Sugarman and a subrogration action on behalf of the Time Warner insureds to the extent these claims are duplicative and seek the same damages. In Harleysville Worcester Ins. Co. v Hurwitz (2005 WL 774166 [SD NY 2005]), the District Court dismissed a plaintiff insurer's claim for subrogation as duplicative of the insurer's direct claim for legal malpractice where the claims arose "from the same conduct – defendants' alleged acts of negligence – and involve[d] no distinct damages" (id. at *5). Thus, to the extent TIG's direct claims are duplicative of the subrogation claims purported to be asserted on behalf of its insured and seek the same damages, the claims asserted on behalf of the insureds must be dismissed.

Here, in many instances, the complaint fails to delineate any distinction between claims asserted on behalf of TIG and those grounded in subrogation. Many of the allegations point to a conclusion that the essence of the complaint is a direct claim by TIG, as the complaint almost exclusively alleges harm to TIG directly, not harm to its insureds. For example, TIG specifically alleges that: (1) Weil Gotshal "falsely represented to TIG that Bolton was unwilling to settle the Three Boys Music action" (Complaint, ¶ 22); (2) Weil Gotshal knew that "TIG was relying on" it to accurately convey Bolton's position in the litigation, and that "TIG believed that its best interests were adequately protected by virtue of Bolton's indemnity obligations to Warner and Sony" (id., ¶ 23); (3) Weil Gotshal should have "properly advised TIG to consult separate counsel" in relation to Bolton's indemnity obligations, so that "TIG would have known that

Bolton disputed" those obligations (id., ¶ 24); (4) in reliance on Weil Gotshal's misrepresentations, "TIG did not take additional steps to settle" the Three Boys Music action (id., ¶ 28); (5) because of Weil Gotshal's actions in relation to the Goldmark settlement agreement, "TIG was prevented from recovering the full amount of the eventual judgment from Bolton" (id., ¶ 31); (6) Weil Gotshal should have "advise[d] TIG to seek independent counsel" in relation to the Goldmark settlement agreement (id., ¶¶ 32, 33); (7) "TIG paid Bolton's share of the judgment," based on its reasonable expectation of being reimbursed by Bolton (id., ¶ 35) and (8) "TIG reasonably relied, to its detriment," on Weil Gotshal's representations about Bolton's indemnity obligations (id., ¶ 36).

Furthermore, many of alleged damages resulting from defendants' wrongful conduct appear to have been incurred directly by TIG and not its insured. Thus, the complaint seeks to recover "legal fees and costs, plus interest expanded in the prosecution of the Three Boys Music Action and defense of actions arising out of the dispute over coverage and indemnity between TIG and Bolton." (id., ¶ 45).

On the other hand, to the extent the complaint alleges that TIG paid the judgment, plus post-judgment interest and costs on behalf of its insureds, it can be read to assert a subrogation claim.

With respect to both the direct and subrogation claims asserted by TIG, the applicable statute of limitations must be analyzed in accordance with New York's borrowing statute. Under New York's borrowing statute, when, as here, the plaintiff is not a New York resident, "[a]n action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where

the cause of action accrued" (CPLR 202). "[A] cause of action accrues at the time and in the place of the injury," and "[w]hen an alleged injury is purely economic, the place of injury usually is where the plaintiff resides and sustains the economic impact of the loss" (Global Fin. Corp. v Triarc Corp., 93 NY2d 525, 529 [1999]). For purposes of the borrowing statute, a corporation is deemed to experience an economic injury at its principal place of business, or where it "more acutely" sustains the economic impact of loss (id. at 530).

As to TIG's direct claims, TIG maintains its principal place of business in Texas (Complaint, ¶ 1). Because Texas is the place where the claims accrued (Global Fin. Corp. v Triarc Corp., 93 NY2d 525, supra), CPLR 202 provides the rule for determining the statute of limitations applicable to plaintiffs' claims. As a result, TIG's direct claims are time-barred if they are shown to be untimely under the law of either Texas or New York (Antone v General Motors Corp., 64 NY2d 20 [1984]; Ackerman v Price Waterhouse, 252 AD2d 179 [1st Dept 1998]). TIG bears the burden of proving that the applicable statute of limitations has been tolled (Easton v Sankel, 268 AD2d 861 [3d Dept], affd sub nom Brothers v Florence, 95 NY2d 290 [2000]; Nailor v Oberoi, 237 AD2d 898 [4th Dept 1997]).

TIG argues, citing Allstate Ins. Co. v Stein (1 NY3d 416 [2004]), that the statute of limitations that can be asserted on behalf of its insureds applies not only to its subrogation action, but also to its direct action (TIG Mem, at 13). Thus, TIG argues, the applicable statute of limitations is not Texas, but New York and England, the principal places of business of its insureds – the Time Warner entities. Allstate, however, does not support TIG's argument, as that case exclusively involved claims brought by an insurer as subrogee, and did not involve a direct claim. Moreover, the Court of Appeals has stated that the "critical factor" for statute of

limitations purposes is "the residency of the person in whose favor the cause of action accrued" (U.S. Fid. & Guar. Co. v E.W. Smith, 46 NY2d 498, 504 [1979]). To the extent the complaint seeks damages incurred directly by TIG, and the cause of action accrued in its favor, TIG may proceed only its in own name against Weil Gotshal and Sugarman, and not in favor of its insureds. And as TIG maintains its principal place of business in Texas, the Texas and New York statutes of limitations control by operation of New York's borrowing statute.

As set forth below, defendants' motion to dismiss is granted with respect to TIG's direct claims, as TIG's complaint is clearly barred by the both the Texas and New York statutes of limitations.

Texas has a two-year statute of limitations for legal malpractice claims (see Tex Civ Prac & Rem Code § 16.003 [a] [Vernon 2004]; Apex Towing Co. v Tolin, 41 SW3d 118 [Tex 2001]). This two-year statute of limitations applies to any claim arising out of an attorney's breach, such as legal malpractice, breach of fiduciary duty, or some similar cause of action (see Kimleco Petroleum, Inc. v Morrison & Shelton, 91 SW3d 921 [Tex App 2002]). The cause of action accrues either "when the client sustains a legal injury or ... when the client discovers or should have discovered the facts establishing the elements of a cause of action [the discovery rule]" (Hughes v Mahaney & Higgins, 821 SW2d 154, 156 [Tex 1991]).

For tolling purposes, the Supreme Court of Texas applies a "bright-line" rule: when an attorney is alleged to have committed malpractice in a prior action, the statute of limitations "is tolled until all appeals on the underlying claim are exhausted" (id. at 157; accord Apex Towing Co. v Tolin, 41 SW3d at 119 ["When an attorney commits malpractice in the prosecution or defense of a claim that results in litigation, the statute of limitations on a

malpractice claim against that attorney is tolled until all appeals on the underlying claim are exhausted"]). Controlling Texas law thus dictates that any direct claims asserted by TIG expired no later than January 22, 2003, two years after the U.S. Supreme Court denied certiorari in the underlying Three Boys Music action, and long before TIG and Weil Gotshal entered into the March 27, 2004 tolling agreement. As a result, this action, which was filed on March 16, 2005, is clearly untimely.

Although TIG argues that the discovery rule delayed accrual of its claims until late 2003, when it discovered that Bolton had alleged that Sugarman failed to convey settlement offers, the discovery rule does not save its action. Under the discovery rule, "the statute of limitations for legal malpractice actions does not begin to run until the claimant discovers or should have discovered through the exercise of reasonable care and diligence the facts establishing the elements of a cause of action" (Willis v Maverick, 760 SW2d 642, 643 [Tex 1988]; accord Murphy v Mullin, Hoard and Brown, LLP, 168 SW3d 288 [Tex App 2005]). Here, as indicated below, it is clear that TIG should have discovered the elements of its cause of action no later than January 31, 2001, the date on which Bolton's lawyers sent a letter to TIG confirming that Bolton expressly disclaimed all liability for payment of the judgment, and denied any obligation to indemnify TIG.

The documentary evidence reveals that, since in or about May 1994, Bolton, through his personal attorneys, consistently rejected TIG's repeated requests that he reimburse it for the costs of defense, and confirm that he would indemnify Warner-Chappell and Sony for the amount of any adverse judgment (see Suppl Aff. of Michael S. Feldberg, Exhs P, Q, R and S). In early 2000, during the time TIG and Bolton were negotiating a possible settlement, an April 18,

2000 draft settlement agreement contained the following recital:

> The Insurer [TIG] has claimed that Bolton may be liable to reimburse the Insurer for such defense costs. *Bolton has denied that claim.*

Feldberg Suppl Aff., Exh T (emphasis added). As previously indicated, Bolton ultimately confirmed that position on January 31, 2001, when he expressly disclaimed to TIG all liability for payment of the judgment (see January 31, 2001 Letter from P. LiCalsi and R. Zuckerman, in which Bolton's personal attorneys, RubinBaum LLP, wrote to TIG's outside counsel, and stated that TIG was not entitled to seek indemnity from Bolton because, they claimed, he was an "additional insured" under the Warner-Chappell policy [4/12/05 Feldberg Aff., Exh D]).

Therefore, the documentary evidence conclusively establishes that, by no later than January 31, 2001, TIG knew that Sugarman had allegedly misrepresented that Bolton was willing to indemnify his corporate co-defendants in the event of an adverse verdict. Indeed, TIG has indicated, in a prior judicial admission in the English action, that it had knew of the inter-defendant conflicts on January 31, 2001 (see Amended Reply and Defence to Counterclaim dated as May 16, 2003, at 19, ¶ 5 [d]-[e] ["the Defendants (i.e. Bolton and Mr. Bolton's Music, Inc.) only gave notice of a claim for an indemnity on 31st January 2001"]. As TIG stated in its pleading to the English court, had Bolton made that claim earlier, TIG would "not have allowed [Bolton] to select counsel to run the defence in the Three Boys litigation and [would have] settled the Three Boys Music litigation" (id. at ¶ 5 [e]). Under New York law, a judicial admission in a prior action that refutes an essential element of a plaintiff's claim constitutes "documentary evidence" within the meaning of CPLR 3211 (a) (1) that warrants dismissal of the claim (see Morgenthow & Latham v Bank of New York Co., Inc., 305 AD2d 74 [1st Dept], lv denied 100 NY2d 512 [2003]).

Although TIG contends that this denial did not objectively place it on notice of Weil Gotshal's alleged breaches and negligence (TIG Mem at 3), TIG's causes of action are clearly premised on the allegation that Weil Gotshal misrepresented Bolton's willingness to indemnify his corporate co-defendants for any loss (see Complaint, ¶ 22 ["Defendants falsely represented to TIG that Bolton was unwilling to settle the Three Boys Music action and that he was willing to take the risk of an adverse judgment, even if that meant he would ultimately be responsible for the entire judgment due to his indemnity obligations to Warner and Sony"; id., ¶¶ 23-24 [TIG "was relying on [Weil Gotshal's] communications and representations concerning Bolton's position ... [and] believed that its best interests were adequately protected by virtue of Bolton's indemnity obligations," and if Weil Gotshal "had properly advised TIG to consult separate counsel," TIG would have secured from Bolton written confirmation of his indemnity obligations]).

Accordingly, if TIG's causes of action are premised on the allegation that Weil Gotshal misrepresented Bolton's willingness to indemnify his corporate co-defendants for any loss, TIG, at the latest, must have discovered the facts giving rise to its causes of action when Bolton rejected TIG's efforts to enforce his indemnity obligations. It is thus clear that by January 31, 2001, TIG knew the essential facts "establishing the elements of a cause of action" (Willis v Maverick, 760 SW2d at 643). As such, its claims are clearly time-barred.

TIG also contends that it learned for the first time, in 2003, of Bolton's claim that Weil Gotshal and Sugarman never informed him about his settlement options. However, neither TIG's familiarity with Bolton's claims, nor its subjective knowledge, is relevant to the application of the discovery rule (see Smith v Flinn, 968 SW2d 12, 14 [Tex App 1998] [holding, in legal

malpractice case, that the statute of limitations begins to run when "the plaintiff discovered, or using reasonable diligence, should have discovered the essential facts of his cause of action"). As TIG's knowledge of Bolton's claim cannot be said to be an essential fact, and as TIG was objectively aware of the "essential facts" for its causes of action against Weil Gotshal no later than January 31, 2001 – including misrepresentations of Bolton's willingness to indemnify Warner-Chappell and Sony – its alleged subsequent discovery of additional facts related to those causes of action is inconsequential.

TIG's claim is also untimely under the New York statute of limitations. New York has a three-year statute of limitations for legal malpractice (CPLR 214 [6]). Under New York law, a malpractice claim accrues "when all the facts necessary to the cause of action have occurred and an injured party can obtain relief in court" (Ackerman v Price Waterhouse, 84 NY2d 535, 541 [1994]). Typically, this time is measured from the day the actionable injury occurs, "even if the aggrieved party is then ignorant of the wrong or injury" (id.). "What is important is when the malpractice was committed, not when the client discovered it" (Shumsky v Eisenstein, 96 NY2d 164, 166 [2001], quoting Glamm v Allen, 57 NY2d 87, 95 [1982]).

The running of the statute of limitations for legal malpractice is tolled until the conclusion of the attorney's continuing representation of the client (Greene v Greene, 56 NY2d 86 [1982]). TIG has the burden of demonstrating that the continuous representation doctrine applies so as to toll the running of the statute of limitations, or to raise an issue of fact as to whether such doctrine applies (see CLP Leasing Co., LP v Nessen, 12 AD3d 226 [1st Dept 2004].

TIG argues that Weil Gotshal's representation of the plaintiffs in the Three Boys Music action extended well into 2002, and that thus, the doctrine of continuous representation tolled the

statute of limitations until at least March 27, 2004, when it entered into the tolling agreement with defendants. However, the doctrine of continuous representation does not apply here. The complaint does not allege that Weil Gotshal represented TIG in the Three Boys Music action. Moreover, a thorough review of relevant case law reveals no case in which a New York court has extended the doctrine of continuous representation to negligence claims brought by a non-client against an attorney on the basis of "near privity."

Thus, New York's statute of limitations began to run, at the very latest, on January 31, 2001, after the Supreme Court denied the petition for certiorari and Bolton's personal attorneys wrote to TIG to expressly repudiate his indemnity obligations, because, at this point, all the facts necessary to the cause of action had occurred, and TIG could clearly obtain relief in court (see Ackerman v Price Waterhouse, 84 NY2d 535, supra). As a result, New York's three-year statute of limitations expired prior to March 27, 2004, when Weil Gotshal and TIG entered into their tolling agreement.

Accordingly, defendants' motion to dismiss on the ground that the applicable statute of limitations has expired is granted with respect to TIG's direct claims for damages.

The next issue is whether the claims asserted by TIG on behalf of its insured are timely. At the outset, the court notes that while TIG purports to assert claims for malpractice on behalf of the various Time-Warner entities, including Warner-Chappell, Warner Tamerlane and WB Music, TIG can only allege harm on behalf of Warner-Chappell and not the other Time-Warner insureds, since the gravamen of the complaint is that Warner-Chappell was harmed based on Bolton's repudiation of his agreement to indemnify contained in Bolton's Music Publishing Agreement with Warner-Chappell.

To the extent the complaint alleges subrogation claims on behalf of Warner-Chappell, the defendants' statute of limitations defense against TIG is controlled by the statute of limitations that would apply to Warner-Chappell. Allstate Ins. Co. v Stein 1 NY3d at 421). Warner-Chappell is a foreign corporation with its principal place of business in London, England. Thus, under New York's borrowing statute, the issue of whether the subrogation claims would be time-barred must be analyzed under English law. See CPLR 4511(b). Moreover, the construction of a foreign law is a legal matter which is appropriate for resolution on a motion for summary judgment. Harris S.A. De C.V. v. Grupo Sistemas Integrales De Telecomunicacion S.A De C.V., 279 AD2d 263 (1st Dept 2001)(no hearing was necessary regarding interpretation of Mexican law where the record contained, inter alia, judicial decisions and affidavits from parties' experts interpreting the relevant law).

The parties agree that limitations period for this action seeking to recovery for professional negligence and breach of fiduciary duty is found in Sections 2 and 14A of the English Limitation Act. Section 2 provides that "[a]n action founded in tort shall not be brought after the expiration of six years from the date on which the cause of action accrued." Section 14A, subsection 4, provides a "[s]pecial time limit for negligence actions where facts relevant to the action are not known at the date of accrual." It provides that such negligence actions must be brought either "within six years from the date on which the cause of action accrued" or "three years from the starting date" which is defined under subsection 5, as "the earliest date on which the plaintiff or any person in whom the cause of action was vested before him first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring

such action.[3]"

Defendants argue that this action is untimely if either measured six years from the accrual of the cause of action or three years from plaintiff's obtaining the knowledge required to bring the action and a right to bring such an action. In support of their position, defendants submit the affidavit of Sidney Albert Myers, a partner in the London Office of the defendant's law firm. With respect to the six-year period, defendants argue that under English law, a cause of action for professional negligence is deemed to have accrued when plaintiff suffers damages, which include any contingent loss or liability as a result of defendant's negligent act or omission. Applying this rule to the facts of this case, defendants assert that an English court would hold that this action accrued either in 1992, when TIG retained Weil Gotshal despite the conflict of interest or at the very latest in May 1994, when Warner-Chappell became contingently liable for a portion of the adverse liability verdict and the documentary evidence in the form of letters between lawyers for TIG and Bolton's personal lawyers indicates that Bolton began to resist his alleged indemnity obligations. (See, Supp. Feldberg Aff., Exhs. P,Q, R, & S). In either case, defendants argue, TIG's complaint, filed on March 16, 2005 and subject to the tolling agreement effective March 27, 2004, is time barred.

In opposition, TIG submits the affidavit of Julian Matin Flux, an English lawyer specializing in commercial law. Mr. Flux agrees with defendants that a cause of action under

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[3]Subsection 6 provides that the knowledge required under subsection 5 "means knowledge both (a) of the material facts about the damage in respect to which damages are claimed, and (b) of the other facts relevant to the current action mentioned in subsection(8)." The other facts mentioned in subsection 8 provides, are "(a) that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence; (b) the identity of the defendant, and (c) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person....."

English law accrues when a plaintiff suffers actual damage and that actual damage includes "liability which may arise on a contingency" (Flux Aff. ¶ 5). However, Mr. Flux asserts, based on dicta in Hatton v. Chafes, [2003] P.N.L.R. 24 (Eng. C.A.) (Id. ¶ 10), that a cause of action accrues when "it was more likely than not, on a balance of probabilities, that the relevant contingency would occur."

While Mr. Flux concedes that the language he relies on "was not necessary to the judgment [in Hatton]" he argues that this concept should be applied "given the commercial realities of the present case." (Id. ¶ 10). Specifically, Mr. Flux states that:

> At one level, there was always risk (irrespective of the negligence of the defendants) that Mr. Bolton would not honour his indemnity obligations, for example if he became bankrupt. The English Court would thus be looking to identify a degree of risk of the contingency occurring, which was caused by the negligence of the defendants and which went beyond the level of commercial risk of the contingency occurring irrespective of negligence. In principle, it would seem that the degree of risk attributable to negligence would be that, as a consequence of the negligence, the contingency was more likely than not to occur.

(Id. ¶ 11).

Applying this reasoning, Mr. Flux concludes that the cause of action would not have accrued until it could be shown that "it would be more likely than not, on the balance of probabilities, that the relevant contingency would occur (i.e. that an adverse verdict would be reached and Bolton would deny his indemnity obligations)," and that would have been no sooner than January 31, 2001, the date that Bolton denied his indemnity obligations in his attorney's letter. (Id. ¶ 12).

Contrary to Mr. Flux's analysis, and the dicta in Hatton, the English case law, decided

both before and after Hatton, holds that a claim for economic loss occasioned by the negligence of a solicitor accrues when the client entered into the transaction which gave rise to the risk and not the later date when the actual loss was suffered by the client. See Daniels v. Thompson, [2004] P.N.L.R. 33, at ¶ 24 (Eng. C.A.); see Forster v. Outred, [1982] 1 W.L.R. 86 (Eng. C.A.)(finding that a claim for negligence was untimely as it accrued when the client signed a mortgage deed in reliance on negligence advice of defendant solicitor as that was the date that plaintiff entered into an agreement which subjected her to liability, and not at a later date when demand for payment was made on the mortgage); Melton v. Walker & Stranger, [1981] 125 S.J. 861 (Eng. Ch.)(holding that a negligence claim was time-barred when it accrued on the date that the defendant solicitor inadequately drafted a contract and not when the plaintiff was assessed taxes as a result of the inadequate contract).

Furthermore, the factual circumstances of Hatton, are inapposite to those in this case and therefore its holding is not controlling. In Hatton, the claimant sued his former solicitors for their alleged dilatoriness in prosecuting an action against his accountant which resulted in his claims against the accountant being struck out (i.e. dismissed) for want of prosecution. In determining whether the claim against the solicitors was time-barred, the court found that the cause of action did not accrue on the date that the claims were struck but, at the latest, when there was no arguable defense to an application to strike the complaint for want of prosecution. Hatton, ¶ 53. The court concluded that using that accrual date (i.e. the date on which there was no arguable defense to an application to strike the complaint for want of prosecution) the claim was time-barred. Thus, the court did not have to determine the issue of whether the limitations period on the malpractice claim would have accrued on an earlier date, including the date when it was more

probable than not that the claim would be struck out, or an earlier date, when there was a real (as opposed to a minimal or fanciful) risk of the claim being struck out. Id. ¶ 17 Notably, the court in Hatton acknowledged that its analysis was based on the particular factual circumstances before it regarding when a clamant alleges that his claims were struck out due to negligence of his solicitors in the form of delay. Id., ¶ 13.

In contrast to Hatton, here, plaintiffs' claims are not based on allegations that defendants engaged in dilatory conduct. Instead, the gravamen of the complaint is that defendants breached their fiduciary duties by jointly representing the defendants in the Three Boys Action and failing to disclose certain conflicts of interest inherent in that representation. In addition, it is alleged that the underlying conflict of interest led to further wrongdoing, including misrepresentations regarding Bolton's settlement position and his willingness to indemnify Warner-Chappell and Sony.

McCarroll v. Statham Gill Davis, [2003] P.N.L.R. 25 (Eng. C.A.), like this action, involved allegations that an attorney failed to provide adequate legal advice as the result of a conflict of interest arising out joint representation. In McCarroll, the court considered when a negligence cause of action accrued against the defendant solicitors in connection with a recording contract signed by a rock band, including the claimant, who was then the band's drummer. The claimant in McCarroll alleged that since defendants had been acting for all members of the band in negotiating the terms of the recording contract, they had become subject to a conflict of interest among the band's members, and had failed to advise claimant to seek independent advice, and that as a result he entered into a commercially disadvantageous contract which resulted in his expulsion from the band. The court dismissed the complaint as time-barred,

finding that claimant suffered a measurable loss at the time that the recording contract was executed, and rejected claimant's argument that the harm occurred when he suffered actual loss due to his expulsion from the band.

Notably absence from the analysis in McCarroll or other cases addressing when a plaintiff suffers damages for the purpose of assessing when a cause of action accrues is any discussion of the balance of probabilities, that the relevant contingency would occur. Instead, the English courts have focused on when the claimant became subject to a risk of loss, which tends to be the date on which the negligent act is committed. Daniels [2004] P.N.L.R. 25, at ¶ 24 (a negligence cause of action accrues upon "the risk.... that a contingency would occur which would cause actual loss to the claimant ") ; see Forster v. Outred, [1982] 1 W.L.R. 86 (Eng. C.A.)(finding that a claim accrued on the date plaintiff was caused to enter into an agreement which subjected her to liability beyond her control which may mature into a financial loss); Melton v. Walker & Stranger, [1981] 125 S.J. 861(holding that "the normal rule is that actual damage is suffered in a negligence action at the date when the negligent act is committed").

Applying these principles to the instant case, the earliest it can be said that the claims against defendants accrued is on April 10, 1992, when TIG, on behalf of Warner-Chappell, first retained Weil Gotshal since it was at that point that TIG placed Warner-Chappell at risk of loss arising from Weil Gotshal's conflict of interest due to its joint representation of the defendants in the Three Boys Action. To the extent it could be argued that in April 1992, Warner-Chappell had not yet suffered a measurable loss as it still could have released itself from the unfavorable arrangement without resulting harm, the damage could not be avoided as of May 1994, after the adverse liability verdict and Bolton's initial rejection of TIG's efforts to enforce his contractual

indemnity obligations.[4] Thus, TIG's causes of action brought on behalf of Warner-Chappell accrued no later than May 1994 and are untimely, as this action was brought well after the six-year limitation period expired in May 2000.

With respect to the three-year limitations period, defendants argue that under English law, the starting date, that is the date on which TIG acquired knowledge of its potential claim against defendants is no later than January 31, 2001, when the Supreme Court denied certiorari in the Three Boys, and when Bolton expressly disclaimed all liability for payment of the judgment.

Mr. Flux counters that the January 31, 2001 letter did not put TIG on notice that the damage to them arising from Bolton's denial of his indemnity obligations was "attributable to negligent breaches of duty and/or negligent misrepresentation on the part of the defendants" (Flux Aff. ¶ 17). Flux bases his conclusions on the factual statements made in an affidavit submitted by Scot Adams ("Adams"), a claims handler who was retained by TIG to represent its interests in the Three Boys Action. Adams states that TIG did not become aware that Sugarman misrepresented Bolton's position regarding settlement in the Three Boys Action until the fall of 2003 during the course of the English action, and that prior to this time, TIG was never aware that Sugarman's joint representation would damage TIG.

Adams' statements, however, are belied by the record. Specifically, as indicated above in connection with TIG's direct claims, the documentary evidence shows that by January 31, 2001, Bolton had notified TIG that he expressly disclaimed all liability for his indemnification obligations (see January 31, 2001 Letter from P. LiCalsi and R. Zuckerman, in which Bolton's

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[4]TIG's obligation to pay damages was fixed as of May 1994, and this obligation was independent of Bolton's agreement or refusal to indemnify TIG.

personal attorneys, RubinBaum LLP, wrote to TIG's outside counsel, and stated that TIG was not entitled to seek indemnity from Bolton because, they claimed, he was an "additional insured" under the Warner-Chappell policy [4/12/05 Feldberg Aff., Exh D]). Moreover, as previously indicated, in a prior judicial admission in the English action, TIG acknowledged that it knew of the inter-defendant conflicts on January 31, 2001 (see Amended Reply and Defence to Counterclaim dated as May 16, 2003, at 19, ¶ 5 [d]-[e] ["the Defendants (i.e. Bolton and Mr. Bolton's Music, Inc.) only gave notice of a claim for an indemnity on 31st January 2001" (and) "[h]ad Defendants given notice earlier, (TIG) would (i) not have allowed the Defendants to select counsel to run the defence in the Three Boys litigation and (ii) settled the Three Boys Music litigation] [Feldberg Aff., Exh C]).

Thus, the record demonstrates that TIG knew of defendants' alleged conflict of interest based on Bolton's rejection of its indemnification obligations and Weil Gotshal's joint representation of defendants in the Three Boys Action no later than January 2001, which under 14A of the Limitation Act, was "the earliest date on which [TIG]... was vested [with]... both the knowledge required for bringing the action for damages in respect of the relevant damage and a right to bring such action." Furthermore, that TIG may have subsequently discovered other issues related to the conflict of interest including the alleged misrepresentation of Bolton's willingness to be responsible for any adverse judgment (Complaint, ¶ 22), and the alleged failure to "advise TIG to seek independent counsel on behalf of Warner and Sony prior to signing the Goldmark agreement," (Id. ¶ 32) do not serve to extend the limitations period. See McCarroll (holding that for the three year limitations period to commence, a plaintiff must acquire knowledge of the "basic set of essential facts" giving rise to the claim.)

Thus, as TIG knew the essential facts underlying its claims against defendants no later than January 31, 2001, and the tolling agreement was not entered into until more than three years later on March 27, 2004, TIG's subrogation action on behalf of Warner-Chappell is untimely under English law. Furthermore, since TIG's subrogation claims are time-barred under CPLR 202 if they are untimely under either the laws of the relevant place of residence, which is in this case England, or under New York law, the court need not examine whether the claims would be timely under New York law.

Accordingly, defendants' motion to dismiss on the ground that the applicable statute of limitations has expired is granted. In light of this determination, the court need not consider defendants' alternative motion to dismiss on the ground of failure to state a claim.

In view of the above, it is

ORDERED that the motion to dismiss is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: November 10, 2005

J.S.C.