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SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

----------x H.P.S. MANAGEMENT COMPANY, Inc., and HENRY GRUBEL, Plaintiffs, -against- ST. PAUL SURPLUS LINES INSURANCE COMPANY; SEABURY & SMITH, Inc., MARSH & McLENNAN COMPANIES, Inc.; MARSH AFFINITY GROUP SERVICES; WILTON REASSURANCE LIFE COMPANY OF NEW YORK; THE TRAVELERS COMPANIES, Inc.; BABCHIK & YOUNG, LLP; JACK BABCHIK, individually, and as a principal of BABCHIK & YOUNG LLP, Defendants. ----------x	TRIAL/IAS PART: 20 NASSAU COUNTY Index No: 019847-10 Motion Seq. Nos.: 4, 5, 6 & 7 Submission Date: 3/24/11

The following papers having been read on these motions:

Notice of Motion, Affirmation in Support and Exhibits.....x
Memorandum of Law in Support.....x
Affidavit in Opposition.....x
Memorandum of Law in Opposition.....x
Reply Affirmation.....x
Notice of Motion, Affirmation in Support and Exhibits.....x
Memorandum of Law in Support.....x
Affidavit in Opposition and Exhibits.....x
Affirmation in Further Support and Exhibits.....x
Notice of Motion.....x
Affirmation in Support and Exhibits.....x
Memorandum of Law in Support.....x
Affidavit in Opposition.....x
Memorandum of Law in Opposition.....x
Reply Affirmation in Further Support.....x
Notice of Motion, Affirmation in Support and Exhibits.....x
Memorandum of Law in Support.....x

Affidavit in Opposition.....x
Memorandum of Law in Opposition.....x
Reply Affirmation in Further Support and Exhibits.....x

This matter is before the Court for decision on 1) the motion filed by Defendants St. Paul Surplus Lines Insurance Company ("St. Paul") and The Travelers Companies, Inc. ("Travelers") on February 28, 2011, 2) the motion filed by Defendants Seabury & Smith, Inc. ("Seabury"), Marsh & McLennan Companies, Inc. ("Marsh & Mac") and Marsh Affinity Group Services ("Marsh Affinity") on March 1, 2011, 3) the motion filed by Defendant Wilton Reassurance Life Company of New York ("Wilton") on March 2, 2011, and 4) the motion filed by Defendants Babchik & Young, LLP and Jack Babchik, individually, and as a principal of Babchik & Young, LLP on March 4, 2011, all of which were submitted on March 24, 2011. For the reasons set forth below, the Court 1) grants the motion by Defendants St. Paul and Travelers to the extent that the Court a) dismisses the request in the first cause of action for retroactive reinstatement of the insurance policy at issue and grants leave to replead this application; and b) dismisses the second, third, fourteenth and fifteenth causes of action against these Defendants, as well as all claims for attorney's fees, and denies leave to replead these causes of action; 2) grants the motion by Defendants Seabury, Marsh & Mac and Marsh Affinity to the extent that the Court dismisses the first and eleventh causes of action against these Defendants and denies leave to replead these claims; 3) grants the motion by Wilton to the extent that the Court a) dismisses the eighth, twelfth and thirteenth causes of action against Wilton; b) denies leave to replead the eighth and thirteenth causes of action; and c) grants leave to replead the twelfth cause of action; and 4) grants the motion by Defendants Babchik & Young, LLP and Jack Babchik, individually, and as a principal of Babchik & Young, LLP to the extent that the Court a) dismisses the fourth and fifth causes of action against these Defendants; and b) grants leave to replead the fifth cause of action to the extent that Plaintiffs can allege that the damages were directly caused by these Defendants. If Plaintiffs elect to replead, they shall file and serve their second amended complaint within twenty (20) days after the date of this Order.

A. Relief Sought

Defendants St. Paul and Travelers move for an Order, pursuant to CPLR §§ 3013 and 3211(a), dismissing the Amended Complaint as against them.

Defendants Seabury, Marsh & Mac and Marsh Affinity move for an order, pursuant to

CPLR § 3211(a)(7), dismissing the Amended Complaint as against them.

Defendant Wilton moves for an Order, pursuant to CPLR §§ 3013 and 3211(a)(7), dismissing the eighth, ninth, twelfth and thirteenth causes of action in the Amended Complaint as against it.

Defendants B&Y move for an Order, pursuant to CPLR § 3211, dismissing the Amended Complaint, including the fourth and fifth causes of action, as against them.

B. The Parties' History

The Amended Complaint ("Complaint") describes the nature of this action as follows:

> These actions sounding in breach of contract, legal malpractice, fraud and other related torts all arose out of Plaintiffs' annuity sales activities and the bad faith administration of Plaintiffs' Insurance Agents Errors and Omissions insurance policy. The willful actions of the Defendants to silence Plaintiffs were a cause of the essential demise of Plaintiffs' once thriving annuity sales business. Plaintiffs seek a declaratory judgment as to coverage, with issuance of a current Errors and Omissions Policy together with money damages against Defendants in an amount to be proven at trial, but believed to be in excess of $50 million in compensatory damages, plus if allowed, punitive damages, costs, interest, and attorney fees.

Compl. at p. 1

Plaintiffs H.P.S. Management Company, Inc. ("HPS") and Henry Grubel ("Grubel"), the sole shareholder and officer of HPS, are licensed by the New York State Insurance Department ("NYSID") to sell Life Insurance and Annuities. Grubel is also an attorney licensed to practice law in New York.

The Complaint provides the following background of this action:

From on or before 1990 until 2000, Plaintiffs had sold approximately 1,000 annuities for Royal Life Insurance Co. of N.Y. ("Royal"). In 2000, North American Life Co. of N.Y. ("NANY") purchased RLNY and assumed its obligations. NANY refused to permit Plaintiffs to service their annuity accounts, and assigned Plaintiffs' customers to other agents. In or about 2004, NANY went into "RUN-OFF" (Compl. at ¶ 17), which means that the company no longer underwrites new business, but continues to handle and pay claims. On or about December 30, 2004, Best [1] downgraded the financial strength rating of NANY from A to A-, in part because NANY was going into RUN-OFF.

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[1] The Court surmises that Plaintiffs' reference to "Best" is a reference to A.M. Best, the credit rating agency.

In or about 2004, Wilton Re Holdings Ltd. ("Wilton Ltd.") and its subsidiary Wilton Re U.S. Holdings, Inc. ("Wilton Inc.") were formed ("Wilton Re Start-Ups"). MMC Capital, Inc. via Trident III, LP, a subsidiary of Marsh & Mac, was one of the largest investors in the Wilton Re Start-Ups. In 2005, Marsh & Mac entered into a settlement agreement with New York State in connection with Marsh & Mac's alleged acceptance of payoffs from insurance companies in exchange for steering business to them, submission of false quotes and conflicts of interest.

In January of 2006, Standard & Poor's ("S&P") downgraded NANY's financial strength from "AA" to "BBB." In June of 2006, Wilton Ltd. acquired NANY from its owner, Sammons Enterprises, Inc. Citigroup provided financial advice to NANY in connection with this acquisition. Citigroup and Travelers were co-defendants in an action in the Eastern District of New York ("Federal Action") in which Grubel represented the plaintiff. During the Federal Action, it was revealed that Travelers unlawfully paid sales commissions to an unlicensed entity.

On or about August 15, 2006, Plaintiffs sent a letter to their annuity customers ("Plaintiffs' Letter") (Ex. A to Compl.). advising those customers of issues regarding letters they may have received from NANY. Specifically, Plaintiffs' Letter advised customers that there was a "big problem" with the NANY letter's language which stated that if the customers failed to return a signed and dated copy of the NANY letter, their annuity contract would mature and be "paid out according to the provisions stated in the contract." NANY, which was now owned by Wilton Ltd., responded via a letter dated August 28, 2006 (*id.* at Ex. B). In that letter ("NANY Letter"), NANY advised Plaintiffs, *inter alia*, that 1) Plaintiffs' Letter was inaccurate with respect to its corporate designations, and likely to confuse policyholders about the distinction between NANY and North American Company for Life and Health Insurance ("North American"), NANY's parent company; 2) several statements in Plaintiffs' Letter were "demonstrably false" and "apparently...intended to induce policyholders to replace their NANY policies regardless of their individual circumstances;" and 3) directed Plaintiffs to "immedately cease and desist any further publication or dissemination of any false or misleading information concerning NANY or North American including, but not limited to, the attached letter and the matters referenced therein." Plaintiffs sent the NANY Letter, which Plaintiffs characterize as "threatening" (Compl. at ¶ 27), to its Errors and Omissions ("E&O") Carrier, St. Paul, as required by the E&O Policy.

On or about September 20, 2006, S&P withdrew its "BBB" rating and issued an "NR"

(Not Rated) financial strength rating for NANY. The transfer of NANY by Wilton Ltd. to Wilton Inc. occurred, effective September 27, 2006. As a result, Wilton Re assumed NANY's existing obligations, which included the RLNY annuities, as successor corporation to NANY. Weiss Ratings gave Wilton Re a "D-" rating and described it as one of the twenty (20) worst annuity companies in the United States.

By letter dated November 28, 2006 to the NYSDI (Ex. C to Compl.) ("Customer Letter"), a customer of Plaintiffs requested the status of "North American Company for Life and Health Insurance, (NANY)" and said that he was "very concerned" as a result of a letter he received from Grubel advising him that he "should consider a tax-free rollover/transfer of my account balance out of NANY." The customer also advised the NYSDI that he had contacted NANY which assured him that it is still doing business in New York and he had "nothing to worry about."

By notice to HPS dated December 21, 2006 (Ex. D to Compl.), Marsh Affinity advised Plaintiffs that St. Paul would not renew Plaintiffs' policy, policy number 560JB4798 ("E&O Policy") which was scheduled to expire on January 1, 2007. St. Paul did agree to extend coverage under the E&O Policy until March 7, 2007 for an additional premium.

By letter dated February 20, 2007 ("NYSID Letter") (Ex. E to Compl.), the NYSDI advised Grubel that it had received the Customer Letter, which it characterized as a "complaint," and asked Grubel to provide the NYSID with a detailed statement of facts as to his position in the matter. The NYSID also asked Grubel 1) how many other individuals were provided with the Letter, as well as press releases and an S&P Insurer Profile, by Plaintiffs; and 2) which insurance companies Plaintiffs were considering as replacements.

Plaintiffs sent the NYSID Letter to Travelers, at the direction of St. Paul. In or about February of 2007, Travelers/St. Paul retained Defendant Babchik & Young, LLP. ("B&Y"), a law firm of which Defendant Jack Babchik ("Babchik"), an attorney, is a principal. B&Y and Babchik are referred to collectively as the B&Y Lawyers. Travelers sent to Plaintiffs a Reservation of Rights Letter ("ROR Letter") dated March 6, 2007 (Ex. F to Compl.) which reflected that the subject of the ROR Letter was the Customer and NANY. Travelers, on behalf of St. Paul, advised Plaintiff that the ROR Letter "sets forth our position as to coverage and advises you of various provisions of the Policy that may impact the scope of coverage available for this matter." The Complaint alleges that the ROR "construed Plaintiffs' claims to be a

'disciplinary proceeding', which reduced Plaintiffs' defense costs to a maximum of $10,000, from $1 million (Compl. at ¶ 38). The ROR Letter does not expressly state that Travelers construed the complaints to be a disciplinary proceeding. The ROR Letter does cite to relevant provisions in the Disciplinary Proceedings Coverage section of the policy, makes reference to the Customer's letter to the NYSID and states that St. Paul reserves its rights under the cited policy provision. On October 25, 2007, Babchik advised Plaintiffs that he would ask Travelers to assign new counsel to Plaintiffs. Plaintiffs subsequently retained new counsel at their own expense.

Plaintiffs allege that, following the Marsh notification that Plaintiffs' E&O Policy would not be renewed, Plaintiffs have been unable to obtain "affordable and appropriate" E&O insurance (Compl. at ¶ 41), except for one year, and they cannot sustain their business without such insurance. Plaintiffs also allege that they cannot afford to pay the fees incurred in retaining their new counsel.

In 2008, the NYSID fined Wilton Re for policyholder violations, and fined Travelers $50,000 for paying commissions to unlicensed entities. The Complaint alleges that Plaintiffs "fear" (Compl. at ¶ 45) that the NYSID may formally charge Plaintiffs, potentially resulting in the imposition of fines and other penalties, which Plaintiffs will have to address without the benefit of E&O insurance.

The Complaint contains fifteen (15) causes of action, which are as follows:

First Cause of Action - against St. Paul, Travelers and the Marsh Defendants (Declaratory Judgment Action for Coverage)

By letter of March 6, 2007, Travelers advised Plaintiffs that St. Paul would only provide Plaintiffs with a limited defense under the E&O Policy, refused to defend or pay the full costs of the defense of the claims against Plaintiffs and refused to indemnify Plaintiffs for all sums for which Plaintiffs may be obligated. Plaintiffs seek a Declaratory Judgment against St. Paul and Travelers for coverage under the E&O Policy to date and into the future, and for issuance of a current standard rate Insurance Agent E&O Policy.

Second Cause of Action - against St. Paul and Travelers for Breach of Contract (Insurance carriers' extra contractual damage for bad faith claim handling)

St. Paul breached its duty to process and administer Plaintiffs' claims fairly and in good faith under the E&O Policy, as demonstrated by, *e.g.*, its failure to provide Plaintiffs with a

disclaimer of coverage letter/notice and to advise Plaintiffs to engage private counsel at St Paul's or Traveler's expense, and its limitation of defense costs to $10,000. Plaintiffs seek consequential and compensatory damages, as well as counsel fees.

Third Cause of Action - against St. Paul and Travelers (Plaintiffs' insurance claim was wrongfully delayed or denied)

Travelers, instead of St. Paul, sent the ROR Letter to Plaintiffs, and St. Paul improperly failed to provide written notice of denial of coverage, to set forth the reason for their disclaimer of liability and to provide defense costs. This resulted in injury to Plaintiffs' reputation and business, for which Plaintiffs seek consequential damages, punitive damages and counsel fees.

Fourth Cause of Action - against the B&Y Lawyers and Travelers (Attorney Malpractice as aided and abetted by Travelers)

The B&Y Lawyers failed to exercise the required degree of care, skill, prudence and diligence, and acted in a way designed to protect the interests of Travelers, Wilton Re and the Marsh Defendants, rather than Plaintiffs. Their alleged malpractice injured Plaintiffs' reputation and business, for which Plaintiffs seek consequential damages, counsel fees and punitive damages.

Fifth Cause of Action - against the B&Y Lawyers and Jack Babchik (Fraud and Deceit)

The B&Y Lawyers allegedly made misrepresentations regarding potential conflicts of interest and breached their fiduciary duties to Plaintiffs, causing injury to Plaintiffs' reputation and business, for which Plaintiffs seek consequential damages, punitive damages and counsel fees.

Sixth Cause of Action - against Travelers & St. Paul (Violation of § 349 of NYS General Business Law)

Travelers and St. Paul engaged in deceptive and misleading acts or practices, including failing to advise Plaintiffs of their right to independent counsel at St. Paul or Traveler's expense, for which Plaintiffs seek compensatory damages, punitive damages and counsel fees.

Seventh Cause of Action - against Wilton as Successor Corporation to NANY (Breach of Contract)

NANY and its successor Wilton Re improperly failed to honor Plaintiffs' commission contract with RLNY for which Plaintiffs seek consequential damages, punitive damages and counsel fees.

Eighth Cause of Action - against Wilton as Successor Corporation to NANY & RLNY (Unfair Competition)

Wilton is liable for NANY and RLNY's improper conduct, including using the HPS name as plan agent without Plaintiffs' consent and without compensating Plaintiffs and falsely implying to former RLNY annuitants that Plaintiffs were still involved in servicing the annuities sold under the RLNY auspices, for which Plaintiffs seek consequential damages, punitive damages and counsel fees.

Ninth Cause of Action - against Wilton (§ 349 General Business Law)

Wilton Re and NANY misappropriated the good will and good name of HPS, and conveyed the false impression that Plaintiffs were still involved with their annuities, for which Plaintiffs seek consequential damages, compensatory damages, punitive damages, counsel fees and declaratory relief directing Wilton Re to cease and desists from using the HPS name on its statement and compelling Wilton Re to advise Plaintiffs' customers that the use of the HPS name was not authorized.

Tenth Cause of Action - against St. Paul and Travelers (Confusing Language in the the E&O Policy)

The E&O Policy is confusing, contradictory and contains misleading or conflicting elements, and a reasonable interpretation of the Policy supports Plaintiffs' right to have its full defense costs paid by St. Paul. Plaintiffs were prejudiced by the contradictory language of the Policy, for which they seek consequential damages, compensatory damages, punitive damages and counsel fees.

Eleventh Cause of Action - against Marsh Affinity, Marsh and Mac, and Seabury (Insurance Broker Malpractice)

Marsh Affinity, as agent of Seabury and Marsh and Mac, failed to properly advise and counsel Plaintiffs about their claims and their coverage in the E&O Policy. This resulted in Plaintiffs' inability to obtain affordable E&O coverage, except in one year thereafter, for which Plaintiffs seek consequential and compensatory damages, punitive damages and counsel fees.

Twelfth Cause of Action - against Wilton (Intentional Interference with Prospective Economic Advantage)

Wilton Re interfered with Plaintiffs' ongoing business relationships with their annuity customers, which included the use of "dishonest, unfair and improper means" (Compl. at ¶ 220)

to prevent Plaintiffs from servicing their accounts, and earning commissions and fees. Plaintiffs seek consequential, compensatory and punitive damages, as well as counsel fees.

Thirteenth Cause of Action - against Wilton as Successor Corporation to NANY & RLNY (Sales Commissions due from Wilton Re)

Wilton Re, as successor corporation to RLNY and NANY, is liable to Plaintiffs for service fees and commissions they were prevented from earning, for which Plaintiffs seek an accounting, as well as consequential and compensatory damages, punitive damages and counsel fees.

Fourteenth Cause of Action - against St. Paul and Travelers (insurance carrier supplying defense for Plaintiffs)

St. Paul and Travelers breached their duty, under the E&O Policy, to provide full defense costs, up to the policy limit of $1 million, to Plaintiffs, as opposed to the $10,000 limited defense they provided. This breach damaged Plaintiffs' reputation and business, for which Plaintiffs seek consequential and compensatory damages, punitive damages and counsel fees.

Fifteenth Cause of Action - against St. Paul and Travelers (Fraud and Deceit)

Travelers and St. Paul misrepresented to Plaintiffs that its coverage under the E&O Policy was limited to the amounts payable under a disciplinary proceeding, on which Plaintiffs relied to their detriment. Plaintiffs seek consequential and compensatory damages, punitive damages and counsel fees.

RULING OF THE COURT

A. Standards of Dismissal

A motion interposed pursuant to CPLR § 3211 (a)(7), which seeks to dismiss a complaint for failure to state a cause of action, must be denied if the factual allegations contained in the complaint constitute a cause of action cognizable at law. *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268 (1977); *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144 (2002). When entertaining such an application, the Court must liberally construe the pleading. In so doing, the Court must accept the facts alleged as true and accord to the plaintiff every favorable inference which may be drawn therefrom. *Leon v. Martinez*, 84 N.Y.2d 83 (1994). On such a motion, however, the Court will not presume as true bare legal conclusions and factual claims which are flatly contradicted by the evidence. *Palazzolo v. Herrick, Feinstein*, 298 A.D.2d 372 (2d Dept.

2002).

B. Leave to Replead

Following the amendment of CLR § 3211(e) in 2005, the standard to be applied on a motion for leave to replead is now consistent with the standard governing motions for leave to amend pursuant to CLR § 3025. *Janssen v. Inc. Village of Rockville Centre*, 59 A.D.3d 15, 26-27 (2d Dept. 2005). Accordingly, like motions to amend, leave to replead should be freely granted absent prejudice or surprise to the opposing party, unless the proposed amendment is devoid of merit or palpably insufficient. *Id.* at 27, citing, *inter alia*, *Smith-Hoy v. AMC Prop. Evaluations, Inc.*, 52 A.D.3d 809 (2d Dept. 2008).

C. Relevant Causes of Action

The second cause of action entitled "extra contractual damages for bad faith claim handling" appears to allege a separate tort for the alleged bad faith refusal to comply with the parties' insurance contract. No such cause of action exists. *Paterra v. Nationwide Mut. Fire Ins. Co.*, 38 A.D.3d 511 (2d Dept. 2007); *Johnson v. Allstate Ins. Co.*, 33 A.D.3d 665 (2d Dept. 2006). Furthermore, a claim for breach of the implied covenant of good faith would be duplicative of the first cause of action. *See Grazioli v. Encompass Ins. Co.*, 40 A.D.3d 696 (2d Dept. 2007); *Paterra, supra.* Accordingly, the Court dismisses the second cause of action and denies leave to replead.

A cause of action for fraud does not lie where the only fraud alleged relates to a breach of contract. *Hylan Elec. Contracting, Inc. v. MasTec North America, Inc.*, 74 A.D.3d 1148 (2d Dept. 2010); *Stangel v. Chen,* 74 A.D.3d 1050 (2d Dept. 2010).

Insurance brokers and agents in New York are not within the ambit of CPLR § 214(6), which addresses the statute of limitations for malpractice actions other than medical, dental or podiatric malpractice. *Chase Scientific Research, Inc. v. N.A. Group, Inc.*, 96 N.Y.2d 20, 30 (2001). A malpractice claim against an insurance agent or broker is not viable, *Santiago v. 1370 Broadway Associates, LP,* 96 N.Y.2d 765 (2001), but a plaintiff may seek to hold a defendant broker liable under a theory of negligence or breach of contract, *Bruckmann, Rosser, Sherrill & Co., LP v. Marsh USA, Inc.*, 65 A.D.3d 865, 866 (1st Dept. 2009). Where the alleged negligence involves failure to procure adequate insurance coverage at the outset, the three-year statute of limitations period runs from the date that the inadequate policy was procured. *Atlantic Balloon*

& Novelty Corp v. American Motorists Ins. Co., 62 A.D.3d 920 (2d Dept. 2009); *Mauro v. Niemann Agency, Inc.*, 303 A.D.2d 468 (2d Dept. 2003).

In an action for legal malpractice, the plaintiff must allege that the attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession, and that the attorney's breach of this duty proximately caused plaintiff to sustain actual or ascertainable damages. *Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer*, 8 N.Y.3d 438, 442 (2007), quoting *McCoy v. Feinman*, 99 N.Y.2d 295, 301-302 (2002) (internal quotation marks and citation omitted). To establish causation, the plaintiff must show that he would have prevailed in the underlying action, or would not have incurred any damages, but for the attorney's negligence. *Id.* Selection of one among several reasonable courses of action does not constitute malpractice. *Rosner v. Paley*, 65 N.Y.2d 736, 738 (1985). Where a plaintiff fails to plead specific factual allegations demonstrating that, but for the defendant 's alleged negligence, there would have been a more favorable outcome in the underlying proceedings, dismissal of the claim for legal malpractice is appropriate. *Ferdinand v. Crecca & Blair,* 5 A.D.3d 538 (2d Dept. 2004), *app. den.* 3 N.Y.3d 609 (2004).

The essence of an unfair competition claim under New York law is that the defendant misappropriated the fruit of plaintiff's labors and expenditures by obtaining access to plaintiff's business idea either through fraud or deception, or an abuse of a fiduciary or confidential relationship. *Telecom International v. AT&T*, 280 F.3d 175, 197 (2d Cir. 2001), citing *Katz Dochrermann & Epstein, Inc. v. Home Box Office*, [citations omitted], (S.D.N.Y. March 31, 1999). A cause of action based on unfair competition may be predicated on the alleged bad faith misappropriation of a commercial advantage belonging to another by exploitation of proprietary information or trade secrets. *Out of the Box Promotions, LLC v. Koschitzki*, 55 A.D.3d 575, 578 (2d Dept. 2008), citing *Beverage Mktg. USA, Inc. v. South Beach Beverage Co., Inc.*, 20 A.D.3d 439, 440 (2d Dept. 2005), quoting *Eagle Comtronics v. Pico Prods.*, 256 A.D.2d 1202, 1203 (4th Dept. 1998).

To state a cause of action alleging tortious interference with prospective contractual relations, the plaintiff must allege that the defendant engaged in culpable conduct which interfered with a prospective contractual relationship between the plaintiff and a third party. *Adler v. 20/20 Companies*, 919 N.Y.S.2d 585, 587 (2d Dept. 2011). As a general rule, such culpable conduct must amount to a crime or independent tort, and may include wrongful means,

defined as physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure. By contrast, mere knowing persuasion is not sufficient. *Id.*, quoting *Guard-Life Corp. v. Parker Hardware Mfg. Corp.*, 50 N.Y.2d 183, 191 (1980).

The elements of a claim for breach of fiduciary duty are: 1) existence of a fiduciary relationship, 2) misconduct, and 3) damages directly caused by the wrongdoer's misconduct. *Fitzpatrick House III, LLC v. Neighborhood Youth & Family Services*, 55 A.D.3d 664 (2d Dept. 2008); *Kurtzman v. Bergstol*, 40 A.D.3d 588, 590 (2d Dept. 2007).

D. Insurer's Obligations to Insured

If an insurance company was obligated to defend a plaintiff in the underlying action, and provide the plaintiff with independent counsel of its own choosing due to a conflict of interest, the insurance company is required to advise the plaintiff of that right. *Elacqua v. Physicians' Reciprocal Insurers*, 21 A.D.3d 702, 707 (3d Dept. 2005), *app. dism.*, 6 N.Y.3d 844 (2006). A failure to inform a plaintiff of that right may state a cause of action pursuant to General Business Law § 349. *See Wilner v. Allstate Ins. Co.*, 71 A.D.3d 155 (2d Dept. 2010) (refusal to reach timely decision on coverage); *Elacqua v. Physicians' Reciprocal Insurers*, 52 A.D.3d 886 (3d Dept. 2008) (failure to inform plaintiff of right to independent counsel at defendant's expense).

E. Attorney's Fees

An insured may not recover expenses incurred in bringing an affirmative action against an insurer to settle rights under a policy. *Kantrowitz v. Allstate Indem. Co.*, 48 A.D.3d 753 (2d Dept. 2008); *Grazioli, supra.*

F. Application of these Principles to the Instant Action

I. Motion by St. Paul and Travelers

The first cause of action for a declaratory judgment alleges a cause of action to the extent that it alleges a claim under the Policy as to the applicability of the "Disciplinary Proceedings Coverage," on which Defendants rely in offering only limited coverage to Plaintiffs. Plaintiffs, however, have failed to allege any legal basis for a claim of retroactive reinstatement and, therefore, the Court dismisses the first cause of action to the extent that it seeks such relief. The Court grants leave to replead this claim to the extent that Plaintiffs are able to allege a legal basis for such relief.

The Court dismisses the second cause of action, in light of the fact that no separate tort exists for the alleged bad faith refusal to comply with an insurance contract. Moreover, a claim

for breach of the implied covenant of good faith would be duplicative of the first cause of action and, therefore, the Court denies leave to replead this cause of action.

The third cause of action, which relies in part on the claim that St. Paul allowed Travelers to send the ROR Letter to Plaintiffs and never sent its own denial of coverage, is contradicted by the ROR Letter in which Travelers states that it is acting on behalf of St. Paul. Accordingly, the Court dismisses the third cause of action and denies leave to replead.

With respect to the sixth cause of action, the Court concludes that, at this early stage of the litigation, Plaintiffs have stated a cause of action pursuant to General Business Law § 349 in light of the allegations that Defendants failed to inform Plaintiffs that they had a right to select independent counsel of their choosing at Defendants' expense, and that this was a routine practice.

The tenth cause of action, based on the allegedly confusing language in the E&O Policy, states a cause of action to the extent that it alleges a claim for breach of contract based on the language in the Policy. The Court, however, dismisses Plaintiffs' request for attorney's fees in connection with this cause of action, in light of applicable case law as cited above.

The Court dismisses the fourteenth cause of action based on the Court's conclusion that it is duplicative of the claim in the first cause of action that St. Paul and Travelers were obligated to provide full defense costs to Plaintiffs. The Court denies leave to replead this cause of action.

The Court dismisses the fifteenth cause of action in light of the fact that no fraud cause of action properly lies where, as here, the only fraud alleged relates to a breach of contract. The Court denies leave to replead this cause of action.

II. Motion by Seabury and Marsh

To the extent that Plaintiffs seek declaratory relief against these Defendants in the first cause of action, there is no factual or legal basis for such relief and, accordingly, the first cause of action against Seabury or Marsh is dismissed, and leave to replead is denied.

The eleventh cause of action against these Defendants is not viable to the extent that it asserts a claim for malpractice. To the extent that it asserts a claim for negligence, the three-year statute of limitations period began to run in December of 2005, the date that the inadequate policy was procured. Moreover, the allegations that Marsh wrongfully implemented the non-renewal of E&O coverage and advised Plaintiffs that they could not find other E&O coverage for Plaintiffs relate to conduct occurring in December of 2006. Accordingly, this cause of action is

time-barred and the Court dismisses the eleventh cause of action.

III. Motion by Wilton

The Court dismisses the eighth cause of action based on the Court's conclusion that the allegations do not support a claim for unfair competition in light of the failure to allege necessary elements of competition and bad faith. The Court denies leave to replead this cause of action.

The dispute regarding the viability of the ninth cause of action for violations of General Business Law § 349 relates to the issue of whether the allegations are consumer-oriented or, rather, a private contract dispute between Plaintiffs and Wilton. On this pre-discovery record, where it is unclear which annuitants are involved and whether Wilton's conduct involves an extensive marketing scheme having a broad impact on consumers at large, *see Wilner*, 71 A.D.3d at 163-164, the Court concludes that Plaintiffs have adequately alleged this cause of action.

The Court dismisses the twelfth cause of action, which apparently alleges intentional interference with prospective economic advantage, in light of the lack of specific allegations regarding Wilton's use of dishonest or improper means. The Court grants leave to replead this cause of action.

The Court dismisses the thirteenth cause of action, purporting to allege a claim against Wilton for sales commissions due, based on the Court's conclusion that this cause of action is duplicative of the seventh cause of action for breach of contract. The Court denies leave to replead this cause of action.

IV. Motion by B&Y and Babchik

The Court dismisses the fourth and fifth causes of action in light of factors including 1) with the exception of the allegations regarding conflicts of interest, the allegations relate to courses of action or strategic choices available to B&Y and Babchik which do not support a claim for malpractice; 2) the allegations do not demonstrate that, but for the alleged negligence of these Defendants, there would have been a more favorable outcome to Plaintiffs; and 3) the fifth cause of action, while labeled a fraud claim, is more accurately a claim for breach of fiduciary duty in which Plaintiffs have not adequately alleged that their damages were directly caused by Plaintiffs' misconduct. The Court grants leave to replead the fifth cause of action, to the extent that Plaintiffs can adequately allege that these Defendants directly caused their damages.

If Plaintiffs elect to replead, they shall file and serve their second amended complaint within twenty (20) days after the date of this Order.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel of their required appearance before the Court for a Preliminary Conference on June 29, 2011 at 9:30 a.m.

ENTER

DATED: Mineola, NY
May 12, 2011

HON. TIMOTHY S. DRISCOLL
J.S.C.