

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WALTER B. GILMOUR, et al.           :  
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BARRY O. BOHMUELLER, et al.       :

CIVIL ACTION  
NO. 04-2535

**MEMORANDUM**

**Padova, J.**

**January 27, 2005**

Presently before the Court in this action are Motions to Dismiss the Amended Complaint filed by Defendants Barry O. Bohmueller ("Bohmueller"), Stephen A. Strobe ("Strobe"), The Patriot Group, Inc. ("Patriot"), American Investors Life Insurance Company ("AILIC"), and Oxford Life Insurance Company ("Oxford"), (Doc. Nos. 25, 26, 29, 31, 33 and 37). For the reasons that follow, the Motions are granted in part and denied in part.

**I. BACKGROUND**

This action is brought by Walter B. Gilmour, Sr. and Suzanne Gilmour, husband and wife, who allege a total of fifteen counts against six individual and corporate Defendants for their participation in a fraudulent scheme involving investments in living trusts and annuities. The Gilmours seek injunctive relief and damages for fraudulent and negligent misrepresentation, professional negligence, civil conspiracy, breach of contract, breach of fiduciary duty, violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, *et. seq.*, violations federal and state securities laws, violations of state

consumer protection laws, tortious interference with contractual relations and prospective economic advantage, and unjust enrichment.

The Gilmours allege the following facts in the Complaint and Amended Complaint (collectively the "Amended Complaint")<sup>1</sup>. Defendants operate a "fraudulent Living Trust and Annuities Scheme" in which they target elderly persons who own their own homes and have a certain income. (Am. Compl. ¶ 2.) Defendants use non-attorney sales representatives to sell inappropriate revocable living trusts and annuities to those individuals by making false, deceptive and misleading statements and representations. (Id. ¶¶ 2, 38.) Strobe, who is an employee of Patriot, also acts as an agent for Bohmueller, an attorney, and ALLIC, Oxford and New Life Corporation of America ("New Life") (collectively the "Annuity Companies"), who market and sell annuities. (Id. ¶¶ 15-16, 28, 34.) As agent for Bohmueller, Strobe promotes, markets, and sells living trusts to elderly investors. (Id. ¶ 8.) As agent for the Annuity Companies, Strobe markets and sells annuities to those same consumers. (Id. ¶ 34.) Both Bohmueller and the Annuity Companies use non-attorneys such as Strobe to advise consumers regarding estate planning, exaggerate the benefits of living trusts over wills; induce consumers to purchase and sign legal documents;

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<sup>1</sup> The Amended Complaint in this action added a claim for violation of the RICO statute to the allegations of the Complaint.

review provisions of legal documents with consumers; engage in the unauthorized practice of the law; hold themselves out as attorneys with Bohmuellers' law office; and mislead consumers to believe they are qualified to provide legal advice. (Id. ¶ 41.)

The Amended Complaint alleges that Defendants defrauded the Gilmours of their retirement income through the sale of annuities and use of living trusts. The Gilmours, who are residents of Pennsylvania, accumulated approximately \$2.8 million in savings over the years. (Id. ¶ 67.) They invested their savings in a portfolio comprised primarily of tax exempt bonds and blue chip stocks, and lived off of the interest from these investments. (Id. ¶ 68.) On March 22, 2001, however, Strobe knocked on the Gilmour's door intending to persuade them to liquidate their securities and invest the \$2.8 million in a Bohmueller revocable living trust and annuities issued by the Annuity Companies. (Id. ¶¶ 70, 72, 81.)

In order to induce the Gilmours to purchase a Bohmueller living trust, Strobe misrepresented the advantages of living trusts over wills and probate. (Id. ¶ 73.) Among other things, Strobe falsely claimed that living trusts avoid probate, save taxes, save attorneys fees, assure privacy after death, permit quicker distribution of assets, avoid court challenges, or are required to avoid guardianship. (Id. ¶ 74.) At the same time, in order to induce the Gilmours to purchase annuities from the Annuity Companies, Strobe falsely claimed that those annuities and future

annuity payments would be inheritance tax free, that there would be no capital gains on the sales of any securities to fund certain annuity purchases, that in order to create three annuities which the Gilmours desired they would also have to create a fourth annuity, and that this fourth annuity would be inheritance tax free. (Id. ¶ 75.)

The Gilmours believed Strobe's false representations. (Id. ¶ 76.) After Strobe had completed his sales pitch, the Gilmours gave him a check for \$1,895.00 made out to the Bohmueller Law Offices to purchase a Bohmueller living trust. (Id. ¶ 77.) Strobe also induced the Gilmours to transfer \$858,000 of their savings to New Life for a charitable gift annuity. (Id. at ¶ 80.) A short time later, Strobe met with the Gilmours again and this time persuaded them to reinvest the approximately \$2 million remaining in life savings in AILIC and Oxford annuities. (Id. at ¶¶ 102-103.)

The annuities the Gilmours received from the Annuity Companies in return for their investments were less valuable than the assets the Gilmours had transferred to them. (Id. at ¶¶ 109, 112.) As a result, the Defendants received higher commissions and other benefits from the Gilmours than they would otherwise have received for the asset transfers and sales of the deferred annuities. (Id.) As a further result of Defendants' conduct, Plaintiffs were induced to transfer their life savings of \$2.8 million into the investments recommended by Strobe and were damaged by adverse income and tax

consequences of those transfers, as well as accounting, estate planning and legal fees and costs they incurred as a result of the transfers. (Id. ¶¶ 112-113.)

## II. LEGAL STANDARD

The Moving Defendants seek the dismissal of all Counts of the Amended Complaint with the exception of Count VII pursuant to Federal Rules of Civil Procedure 12(b)(6) and 9(b) or for a more definite statement pursuant to Rules 8(a)(2) and 12(e)<sup>2</sup>. When determining a Motion to Dismiss pursuant to Rule 12(b)(6), the court may look only to the facts alleged in the complaint and its attachments. Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994). The court must accept as true all well pleaded facts in the complaint and view them in the light most favorable to the plaintiff. See Jenkins v. McKeithen, 395 U.S. 411, 421 (1969); Holder v. City of Allentown, 987 F.2d 188, 194 (3d Cir. 1993). A Rule 12(b)(6) motion will be granted when a Plaintiff cannot prove any set of facts, consistent with the complaint, which would entitle him or her to relief. Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988).

Rule 9(b) requires that "[i]n all averments of fraud or

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<sup>2</sup> Count VII of the Amended Complaint asserts a claim for professional negligence against Bohmueller only. Bohmueller has not moved to dismiss Count VII, and none of the other Moving Defendants separately address Count VII in their Motions to Dismiss. Accordingly, the Court concludes that none of the Moving Defendants seek dismissal of Count VII.

mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b). This rule "requires plaintiffs to plead with particularity the circumstances of the alleged fraud in order to place the defendants on notice of the precise misconduct with which they are charged, and to safeguard defendants against spurious charges of immoral and fraudulent behavior." Seville Indus. Mach. Corp. v. Southmost Corp., 742 F.2d 786, 791 (3d Cir. 1984). There is no formula for pleading fraud with particularity: "[a]llegations of 'date, place, or time' fulfill these functions, but nothing in the rule requires them. Plaintiffs are free to use alternative means of injecting precision and some measure of substantiation into their allegations of fraud." Id.

A. Fraudulent and Negligent Misrepresentation: Counts I & II

AILIC and Oxford seek the dismissal of Counts I and II of the Amended Complaint which allege causes of action based on fraudulent and negligent misrepresentation for statements made by Strope on behalf of the other Defendants. Moving Defendants argue that the Amended Complaint does not aver the purportedly fraudulent statements made by them or on their behalf with the particularity required by Rule 9(b).

To establish a cause of action for fraudulent misrepresentation under Pennsylvania law, a plaintiff must plead:

- (1) a representation;
- (2) which is material to the transaction at hand;
- (3) made falsely,

with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance.

Manning v. Temple Univ., No. Civ. A. 03-4012, 2004 WL 3019230, at \*10 (E.D. Pa. Dec. 30, 2004) (citing Gibbs v. Ernst, 647 A.2d 882, 889 (Pa. 1994)). To successfully establish a cause of action for negligent misrepresentation under Pennsylvania law, a plaintiff must plead: "(1) a misrepresentation of material fact; (2) made under circumstances in which the misrepresenter ought to have known its falsity; (3) with an intent to induce another to act on it; and; (4) which results in an injury to the party acting in justifiable reliance on the misrepresentation." Bortz v. Noon, 729 A.2d 555, 561 (Pa. 1999) (citing Gibbs, 647 A.2d at 890)). Allegations of fraud must meet the heightened pleading standard of Federal Rule of Civil Procedure 9(b). Bristol Tp. v. Independence Blue Cross, No. Civ. A. 01-4323, 2001 WL 1231708, at \*5 (E.D. Pa. Oct. 11, 2001) (citing Seville Indus., 742 F.2d at 791.) However, in applying Rule 9(b) pleading requirements, "courts should be 'sensitive' to the fact that application of the Rule prior to discovery 'may permit sophisticated defrauders to successfully conceal the details of their fraud.'" Shapiro v. UJB Fin. Corp., 964 F.2d 272, 284 (3d Cir. 1992) (citing Christidis v. First Pa. Mortgage Trust, 717 F.2d 96, 99 (3d Cir. 1983)).

Pennsylvania has adopted the Restatement (Second) of Agency

regarding the liability of a principal for the tortious misrepresentations of his agents. Bolus v. United Penn Bank, 525 A.2d 1215, 1223 (Pa. Super. Ct. 1987). Under the Restatement (Second) of Agency, "[a] principal is subject to liability for loss caused to another by the other's reliance upon a tortious representation of a servant or other agent if the representation is: (a) authorized; (b) apparently authorized; or (c) within the power of the agent to make for the principal." Restatement (Second) Agency § 257 (1958).

The Amended Complaint alleges fraudulent and negligent misrepresentation claims against AILIC and Oxford for statements made by their agent, Strobe, when he promoted, marketed and sold annuities to Plaintiffs on their behalf. (Am. Compl. ¶¶ 1, 117, 118.) Among other things, the Amended Complaint states that the representations made by Strobe on behalf of Moving Defendants were false for the following reasons:

- (a) the estate plan of the Gilmours prior to [D]efendants' involvement was not inadequate;
- (b) the estate plan and investments in the "tax free" or "tax deductible" or "tax deferred" annuities of [New Life] and AILIC devised and recommended by [D]efendants for the Gilmours was not better than their existing estate plan, and was not in the Gilmours' best interests, and did not result in tax savings and benefits which the [D]efendants represented to the Gilmours, and did not result in the Gilmours being able to pass those assets, let alone pass



those assets with significant tax savings and benefits, to their beneficiaries upon the deaths of the Gilmours;

- (c) the annuities and investments [D]efendants sold to the Gilmours were not as represented, and the living trust created by [D]efendants for the Gilmours do not result in the tax savings and benefits to the Gilmours or the shielding or reduction of [P]laintiffs' assets from further taxation;
- (d) The Gilmours did not need to give any money away to New Life or to purchase any New Life annuities in order to create or effectuate the other trusts they desired as part of their estate plan;
- (e) the annuities that the Gilmours were induced to purchase from New Life, AILIC, and Oxford were not inheritance tax free and income tax free, as Strobe had represented; . . . .
- (g) The Gilmours did not have the right to rescind the investment whenever they wanted, let alone during three days as required by Pennsylvania's consumer protection laws; and
- (h) the living trust created for the Gilmours, and the "tax free" or "tax deductible" or "tax deferred" annuities which [D]efendants induced the Gilmours to purchase, were not tailored to the needs of the Gilmours and do not shield their income and assets from further taxes, but to the contrary, the trust agreements were "canned" or form documents, and the estate plan left the Gilmours in much worse shape than they would have been in had the Gilmours never engaged in business with any of the [D]efendants.

(Id. ¶ 118.) The Amended Complaint further alleges that these

representations "were known by [D]efendants to be false, or were made recklessly and in disregard of their truth or falsity, and were made by [D]efendants to induce [P]laintiffs to trust [D]efendants and to turn over their assets and estate to [D]efendants, in order that [D]efendants could reap substantial fees . . . ." (Id. ¶ 119.) In addition, the Amended Complaint alleges that Plaintiffs justifiably relied on these misrepresentations, acted upon them to their detriment, and lost their entire \$2.8 million in life savings. (Id. ¶¶ 120-122.)

The Amended Complaint states that Strobe was at all relevant times "acting in concert with or for and/or as an actual or apparent sales agent or representative or 'emissary' or 'Charitable Advisor' for [D]efendants . . . AILIC . . . and Oxford." (Id. ¶ 82.) In addition, the Amended Complaint alleges that Strobe "was acting in the course and scope of his agency, and with authority from [D]efendants . . . ." (Id. ¶ 105.) The Amended Complaint thus states a cause of action against AILIC and Oxford for the fraudulent and negligent misrepresentations made on their behalf by Strobe with the particularity required by Rule 9(b). See Bolus, 525 A.2d at 1223.

Plaintiffs also contend that their claim for fraudulent and negligent misrepresentation involves allegations that Defendants committed fraud when, after notification by a consumer agency that a fraudulent living trusts scheme existed, they continued to issue

annuities in connection with that scheme. (10/28/04 NT at 56.) The Amended Complaint, however, contains no facts which would establish that Defendants were involved in some larger fraudulent living trusts scheme, much less that Defendants knowingly or negligently misrepresented a material fact in connection with that larger scheme with the intent of inducing Plaintiffs to rely on it. See Bortz, 729 A.2d at 560. Accordingly, AILIC and Oxford's Motions to Dismiss Count I of the Amended Complaint are granted with respect to any claim for fraud based on their notification by a consumer agency that a larger living-trust scheme existed. AILIC's and Oxford's Motions to Dismiss Counts I and II of the Amended Complaint are denied in all other respects.

C. Civil RICO: Count III

The Moving Defendants seek the dismissal of Count III of the Amended Complaint which alleges a cause of action for civil RICO violations pursuant to 18 U.S.C. § 1962(c).<sup>3</sup> The Moving Defendants argue that the Amended Complaint fails to state a valid RICO claim because it does not allege a pattern of racketeering activities and instances of mail and wire fraud with the specificity required

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<sup>3</sup> Section 1962(c) states as follows: "[i]t shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." 18 U.S.C. § 1962(c).

by Rule 9(b).<sup>4</sup>

In order to state a claim pursuant to Section 1962(c) a plaintiff must allege the following:

(1) the existence of an enterprise affecting interstate commerce; (2) that the defendant was employed by or associated with the enterprise; (3) that the defendant participated, either directly or indirectly, in the conduct or the affairs of the enterprise; and (4) that he or she participated through a pattern of racketeering activity that must include the allegation of at least two racketeering acts.

Shearin v. E.F. Hutton Group, Inc., 885 F.2d 1162, 1165 (3d Cir. 1989) (citations omitted). Where the alleged racketeering activities consist of fraud, a plaintiff must also meet the particularity pleading requirements of Rule 9. Rose v. Bartle, 871 F.2d 331 (3d Cir. 1989). To meet this standard, the complaint must "specify the nature of the predicate acts to a degree that will allow the defendants to comprehend the specific acts to which they are required to answer." Id.

The elements of the predicate act of mail fraud, in violation of 18 U.S.C. § 1341, are: "(1) the existence of a scheme to

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<sup>4</sup> Moving Defendants also argue that the RICO claim should be dismissed pursuant to 18 U.S.C. § 1964(c), which provides that "no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962." 18 U.S.C. § 1964(c). It is the Court's understanding that Defendants have withdrawn such arguments in response to Plaintiffs' voluntary dismissal of their claims for violations of state and federal securities law claims. See infra, at 19.

defraud; (2) the participation by the defendant in the particular scheme charged with the specific intent to defraud; and (3) the use of the United States mails in furtherance of the fraudulent scheme." United States v. Hannigan, 27 F.3d 890, 892 (3d Cir. 1994) (footnote omitted) (citing United States v. Burks, 867 F.2d 795, 797 (3d Cir. 1989)). The wire fraud statute, 18 U.S.C. § 1343, is virtually identical to the mail fraud statute, except that it concerns "communications transmitted by wire." United States v. Frey, 42 F.3d 795, 797 (3d Cir. 1994); see also 18 U.S.C. §§ 1341, 1343. Accordingly, "'the cases construing the mail fraud statute are applicable to the wire fraud statute as well.'" Id., 42 F.3d at 797 n.2 (quoting United States v. Tarnpol, 561 F.2d 466, 475 (3d Cir. 1977)). The mail and wire fraud scheme "need not be fraudulent on its face but must involve some sort of fraudulent misrepresentations or omissions reasonably calculated to deceive persons of ordinary prudence and comprehension. Proof of specific intent is required . . . which may be found from a material misstatement of fact made with reckless disregard for the truth." United States v. Coyle, 63 F.3d 1239, 1243 (3d Cir. 1995) (citations omitted). Use of the mails and wires does not have to be an essential part of the fraudulent scheme. Rather, "it is sufficient if the mailings are incident to an essential part of the scheme or a step in [the] plot." Id. at 1244 (citation omitted). It is also not necessary that the mailings and usage of the wires

themselves be fraudulent: "[t]he mailings themselves need not contain any misrepresentations: 'innocent mailings - ones that contain no false information - may supply the mailing element.'" Philadelphia Reserve Supply Co. v. Norwalk & Assoc., Inc., 864 F.Supp. 1456, 1470 (E.D. Pa. 1994) (quoting Schmuck v. United States, 489 U.S. 705 (1989)). Moreover, liability for mail and wire fraud does not require personal use or prior knowledge of the mailing or wire content:

[T]he defendants need not have been the actual individuals who used the mails and wires, nor need they have known of the specific communications; it is sufficient under the mail and wire fraud statutes that the use of the mails and wires by others occurred in the ordinary course of business related to the fraudulent scheme, or was foreseeable as part of the furtherance of the fraudulent scheme.

Id. at 1471 (citing United States v. Bentz, 21 F.3d 37, 40-41 (3d Cir. 1994)).

The Moving Defendants claim that the Amended Complaint fails to allege specific predicate acts of mail and wire fraud with the specificity required by Rule 9(b). The Moving Defendants further argue that the Amended Complaint does not allege a pattern of racketeering activities, and does not identify any use of the mails or wires by the Defendants. The Amended Complaint states:

The mail and wire communications by which each [D]efendant perpetuated [the] scheme included, but were not limited to, those identified with particularity as aforesaid in the Complaint, and in particular:

- a. letters from [D]efendants to the [P]laintiffs;
- b. letters from [D]efendants to [P]laintiffs' tax advisers and accountants;
- c. mailings from defendants to other defendants;
- d. interstate telephone communications among [D]efendants; and
- e. interstate telephone communications between [D]efendants and [P]laintiffs.

. . . Defendant's acts constitute a pattern of racketeering activity because they were related in purpose . . . and have continued unabated since their first communications with the [P]laintiffs.

(Am. Compl. ¶¶ 251, 252, emphasis in original.) The Court finds that the Amended Complaint does not plead with particularity the date, place or time of the alleged misrepresentations. See McHale, 2002 WL at \*3. Nor has the Amended Complaint, by some other means, injected the necessary "precision and some measure of substantiation into their allegations of fraud." Id. The Amended Complaint merely states that certain types of mail and wire communications were made by "Defendants," and does not in any way identify those communications, their dates, senders, or recipients. Similarly, the Amended Complaint fails to identify the content of the mail and wire communications. See Rolo v. City Investing Co. Liquidating Trust, 155 F.3d at 658 (3d Cir. 1998) (RICO allegations should contain "precise content of each particular mailing").

These deficiencies are not cured by the general statement that the "mail and wire communications by which each [D]efendant perpetuated [the] scheme included . . . those identified with particularity as aforesaid in the [Amended] Complaint." (Am. Compl. ¶ 251.) The Amended Complaint further fails to allege how those communications relate to the alleged RICO violations. Plaintiffs allegations are, therefore, too vague to satisfy the RICO pleading requirements. See Allen Neurosurgical Assocs., Inc. v. Lehigh Valley Health Network, Civ. A. No. 99-4653, 2001 WL 41143, at \*3 (E.D. Pa. Jan. 18, 2001) (RICO claims dismissed for failure to plead date, place, or time of alleged misrepresentations, defendant who made each misrepresentation, and contents of misrepresentations). Accordingly, the Moving Defendants' Motions to Dismiss Count III of the Amended Complaint are granted.<sup>5</sup>

D. Civil Conspiracy: Count IV

AILIC and Oxford also seek the dismissal of Count IV of the Amended Complaint which alleges a cause of action for civil conspiracy. They argue that the Amended Complaint fails to state essential elements for a valid claim for civil conspiracy because it does not set forth with the required particularity the allegedly false statements made by Defendants in furtherance of the conspiracy. In order to state a claim for conspiracy under

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<sup>5</sup> Plaintiffs may, however, file a second amended complaint correcting the deficiencies of their RICO claim.



Pennsylvania law, a plaintiff must allege: "(1) a combination of two or more persons acting with a common purpose to do an unlawful act or to do a lawful act by unlawful means or for an unlawful purpose; (2) an overt act done in pursuance of the common purpose; and (3) actual legal damage." McKeeman v. Corestates Bank, N.A., 751 A.2d 655, 660 (Pa. Super. Ct. 2000) (citations omitted). To satisfy this pleading standard:

[a] complaint alleging civil conspiracy must allege facts showing the existence of all the elements, and if the plaintiff is unable to allege facts that are direct evidence of the combination and its intent, [plaintiff] must allege facts that, if proved, will support an inference of the combination and its intent.

Brown v. Blaine, 833 A.2d 1166, 1173 n.16 (Pa. Commw. Ct. 2003) (citing Baker v. Rangos, 324 A.2d 498, 506 (Pa. Super. Ct. 1974)).

The Amended Complaint alleges that the Defendants conspired with each other to deprive Plaintiffs of their life savings through fraudulent misrepresentations. (Am. Compl. ¶ 135.) As discussed, *supra*, the Amended Complaint satisfies Rule 9(b) pleading standards with regard to Plaintiffs' fraudulent and negligent misrepresentation claims. Accordingly, the inquiry must focus on whether the Amended Complaint states all remaining elements necessary to state a valid claim for civil conspiracy.

The Amended Complaint asserts that the Defendants conspired and acted in concert on their intent to defraud Plaintiffs of their life savings. (Id. ¶ 136.) The Amended Complaint also alleges

that the fraudulent misrepresentations made by Strobe on behalf of himself and all other Defendants were overt acts made in furtherance of the conspiracy, as was the Moving Defendants' illegal agreement to set up the living trust arrangement and reinvest Plaintiffs' savings in annuities. (Id. ¶ 137, 140, 142.) The Amended Complaint further states that Defendants intended, through their conspiracy, to "reap substantial commissions, fees and other benefits from the creation of the living trusts for [Plaintiffs], and from the sales or transfers of [Plaintiffs'] assets, and [Plaintiffs'] purchases of 'tax-free' or 'tax deductible' or 'tax deferred' annuities." (Id. ¶ 92.) The Amended Complaint also alleges that:

one or more of the Annuity Company Defendants and one or more of the Attorney Defendants and one or more of the Sales Agents shared in the commissions or other payments paid by [Plaintiffs] in connection with the living trusts, and/or from commissions or other payments which ... the other Annuity Company Defendants paid to the non-attorney defendants.

(Id. ¶ 97.) The Amended Complaint also asserts that, as a result of Defendants' conspiratorial scheme, Plaintiffs suffered damages in the amount of \$2.8 million, the live savings they were induced to transfer to Defendants, as well as adverse tax consequences and professional fees incurred as a result of Defendants' fraudulent scheme. (Id. ¶¶ 143-44.) While the Amended Complaint does not identify a specific date, time or place where a conspiratorial

meeting was held by Defendants, these allegations, if proved, would suffice to establish a claim of civil conspiracy. See McKeeman, 751 A.2d at 660. Accordingly, AILIC's and Oxford's Motions to Dismiss Count IV of the Amended Complaint are denied.

E. Violations of Securities Laws: Counts V & VI

Counts V and VI of the Amended Complaint allege causes of action for violations of federal and state securities laws. Plaintiffs voluntarily withdrew these counts against all Defendants at the Hearing held on October 28, 2004. (See 10/28/04 N.T. at 29). Accordingly, by agreement of the parties, Counts V and VI of the Amended Complaint are dismissed.

F. Breach of Contract: Count VIII

AILIC, Oxford, Strobe and Patriot seek the dismissal of Count VIII of the Amended Complaint which alleges a cause of action for breach of contract. They argue that the Amended Complaint fails to adequately allege the existence of a contract between themselves Plaintiffs. Under Pennsylvania law, a claim for breach of contract must allege the following three elements: "(1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract, and (3) resultant damages." Omicron Systems, Inc. v. Weiner, 860 A.2d 554, 564 (Pa. Super. Ct. 2004) (citation omitted). An enforceable contract exists where the parties reached a mutual agreement, exchanged consideration, and set forth the terms of their bargain with sufficient clarity. See

Biddle v. Johnsonbaugh, 664 A.2d 159, 163 (Pa. Super. Ct. 1995)

(citation omitted).

The Amended Complaint alleges that:

Plaintiffs entered into an agreement with [D]efendants whereby [D]efendants were specifically instructed by [P]laintiffs to provide estate planning to [P]laintiffs that would result in (1) tax and estate benefits to [Plaintiffs]; and (2) inheritance tax free and income tax free investments to [Plaintiffs] . . . and (3) a living trust that would enable the [Plaintiffs'] assets to avoid probate after their death . . . Defendants breached their agreement with [P]laintiffs by failing to deliver the contracted upon services . . . As a direct and proximate result of [D]efendants' breaches of contract . . . [P]laintiffs have sustained damages in the amount of \$2.8 million.

(Am. Compl. ¶¶ 193-196.) The Amended Complaint fails to state the specific identity of the party or parties who entered into the contract, or contracts, with Plaintiffs. The Amended Complaint further fails to state the consideration for any such contract and the essential terms of any such agreement. For example, while the Amended Complaint broadly outlines some of the Defendants' responsibilities, there is no information which would suggest Plaintiffs' duties under the agreement. The allegations contained in the Amended Complaint are, therefore, insufficient to establish a cause of action for breach of contract against any of the Defendants. Accordingly, Defendants AILIC, Oxford, Strobe and Patriot's Motions to Dismiss Count VIII of the Amended Complaint are granted.

G. Breach of Fiduciary Duty: Count IX

AILIC and Oxford also seek the dismissal of Count IX of the Amended Complaint which alleges a cause of action for breach of fiduciary duty. They argue that the Amended Complaint fails to state a claim for breach of fiduciary duty because there is no factual basis from which to infer that they owed a fiduciary duty to Plaintiffs. Under Pennsylvania law, fiduciary relationships exist "where by virtue of the respective strength and weakness of the parties, one has a power to take advantage of or exercise undue influence over the other." eToll, Inc. v. Elias/Savion Advertising, Inc., 811 A.2d 10, 22 (Pa. Super. Ct. 2002). Accordingly, "the critical question is whether the relationship goes **beyond** mere reliance on superior skill, and into a relationship characterized by 'overmastering influence' on the one side or 'weakness, dependence, or trust, justifiably reposed' on the other side." Id. at 23 (emphasis in original) (citing Basile v. H & R Block, 777 A.2d 95, 101 (Pa. Super. Ct. 2001)). A fiduciary duty may attach "'whenever one occupies toward another such a position of advisor or counsellor as reasonably to inspire confidence that he will act in good faith for the other's interest.'" Basile, 777 A.2d at 102 (quoting Brooks v. Conston, 51 A.2d 684, 688 (Pa. 1947)). Indeed, "those who purport to give advice in business may engender confidential relations if others, by virtue of their own weakness or inability, the advisor's

pretense or expertise, or a combination of both, invest such a level of trust that they seek no other counsel." Basile, 777 A.2d at 102 (citations omitted). In Pennsylvania, a claim for breach of fiduciary duty must allege that: "(1) the defendant acted negligently or intentionally failed to act in good faith and solely for the benefit of plaintiff in all matters for which he or she was employed; (2) the plaintiff suffered injury; and (3) the agent's failure to act solely for the plaintiff's benefit was a real factor in bringing about plaintiff's injuries." Schmidt, Long & Assoc. v. Aetna U.S. Healthcare, Inc., Civ. A. No. 00-3683, 2001 WL 856946, at \*9 (E.D. Pa. July 26, 2001) (citation omitted).

Here, the Amended Complaint states that:

Defendants owed a duty, imposed by common law, to [Plaintiffs] to represent them and their interests in a fair and honest manner, and to invest their finances in conservative, low-risk investments that would be tax-free and safe, and that would maximize the tax and estate savings and benefits to the [P]laintiffs . . . Defendants breached the fiduciary duties which they owed to [P]laintiffs.

(Am. Compl. ¶¶ 199, 200.) The Amended Complaint further alleges that Strobe, acting on behalf of AILIC and Oxford, held himself out as an expert on tax and estate planning. (Id. ¶¶ 117) As a result of Strobe's representations, Plaintiffs posed justifiable trust in him and in AILIC and Oxford. (Id. ¶ 103); see Basile, 777 A.2d at 101-02. The Amended Complaint asserts that AILIC and Oxford breached their fiduciary duty when they, through their agent

Strope, knowingly or recklessly misrepresented the benefits and drawbacks of living trusts annuities. (Am. Compl. ¶ 118, 119.) The Amended Complaint alleges that Defendants made these false representations:

to induce [P]laintiffs to trust [D]efendants and to turn over their assets and estate to [D]efendants, in order that [D]efendants could reap substantial fees from the sales and liquidation of [P]laintiffs' assets, and the purchase of the 'tax free' or 'tax deductible' or 'tax deferred' annuities . . . and the creation of the living trusts.

(Id. ¶ 119.) The Amended Complaint further asserts that Defendants' actions resulted in an estate plan and investments for Plaintiffs which were not in Plaintiffs' best interest, and that the direct and proximate cause of Defendants' actions was a loss to Plaintiffs in the amount of \$2.8 million, as well as professional fees and costs. (Id. ¶¶ 118, 122.) These allegations are sufficient to establish a claim for breach of fiduciary duty against AILIC and Oxford in connection with tax and estate planning activities. Accordingly, AILIC and Oxford's Motions to Dismiss Count IX of the Amended Complaint are denied.

H. Violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law: Count X

AILIC, Oxford and Bohmueller further seek the dismissal of Count X of the Amended Complaint which alleges a cause of action for violations of the Pennsylvania Unfair Trade Practices and Consumer Protection Law (the "UTPCPL"), 73 Pa. Stat. Ann. § 201-1,

*et. seq*, based on fraudulent misrepresentations as well as aiding and abetting in the unauthorized practice of law.<sup>6</sup> AILIC, Oxford and Bohmueller argue that the Amended Complaint fails to plead the instances of alleged fraud under the UTPCPL with the particularity required by Federal Rule of Civil Procedure 9(b). They further argue that the Amended Complaint fails to demonstrate a sufficient factual basis from which to infer that they were obligated to provide estate planning services to Plaintiffs. In addition, AILIC, Oxford and Bohmueller submit that Plaintiffs' UTPCPL claims for aiding and abetting the unauthorized practice of law must fail because Pennsylvania has not yet adopted a cause of action for aiding and abetting in the unauthorized practice of law.

The Pennsylvania Supreme Court has held that the purpose of the UTPCPL is to "place on more equal terms seller and consumer" and "to ensure the fairness of market transactions." Commonwealth by Creamer v. Monumental Properties, Inc., 329 A.2d 812, 816 (Pa. 1974). The UTPCPL is to be interpreted liberally so as to

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<sup>6</sup> Under Section 9.2 of the UTPCPL, "[a]ny person who purchases . . . goods or services primarily for personal . . . purposes and thereby suffers any ascertainable loss of money . . . as a result of the use or employment by any person of a method, act or practice declared unlawful by section 3 of this act, may bring a private action to recover actual damages." 73 Pa. Stat. Ann. § 201-9.2. Section 3 of the UTPCPL declares as unlawful unfair methods of competition, including acts or practices "causing likelihood of confusion or misunderstanding as to affiliation, connection, or association with . . . another" and "any other fraudulent or deceptive conduct which creates a likelihood of confusion or misunderstanding." 73. Pa. Stat. Ann. §§ 201-2 (iii) and (xxi), 201-3.



effectuate its purpose. Keller v. Volkswagen of America, Inc., 733 A.2d 642, 646 (Pa. Super. Ct. 1999). To establish a valid cause of action under the UTPCPL for unfair or deceptive acts or practices, a plaintiff must plead those acts or practices with the same specificity as common law fraud. Grant v. Kingswood Apts., No. Civ. A. 01-1523, 2001 WL 1876343, at \*3 (E.D.Pa. Oct 15, 2001). Accordingly, in order to assert a cause of action pursuant to the UTPCPL, a plaintiff must allege the following essential elements of fraud: "(1) material misrepresentation of a material fact; (2) scienter; (3) intention by the declarant to induce action; (4) justifiable reliance by the party defrauded upon the misrepresentation; and (5) damages to the party defrauded as a proximate result." Heller v. Shaw Indus., Civ. A. No. 95-7657, 1997 WL 535163, at \*20 (E.D. Pa. Aug. 18, 1997) (citing Prime Meats, Inc. v. Yochim, 619 A.2d 769, 773 (Pa. Super. Ct. 1993)).

The Amended Complaint asserts a cause of action pursuant to the UTPCPL against Moving Defendants with respect to the estate, asset and tax planning services provided to Plaintiffs, the sale of annuities by Oxford and AILIC, and the sale of living trusts by Bohmueller. (Am. Compl. ¶¶ 203, 204.) Plaintiffs obtained these services for the primarily personal use of increasing their retirement income. (Id. ¶¶ 74, 75.) The Amended Complaint asserts that Moving Defendants fraudulently gained access to Plaintiffs' assets and violated the UTPCPL by (1) misrepresenting their

expertise in estate and tax planning and investments, as well as their relationships with each other; (2) using false and misleading information to persuade Plaintiffs to use Bohmueller as their attorney and to utilize the services of the other Defendants; (3) "causing a likelihood of confusion or misunderstanding as to affiliation, connection, or association with each other;" and (4) engaging in "fraudulent conduct which created the likelihood of confusion or misunderstanding." (Id. ¶¶ 205-208.) The Amended Complaint also alleges that the representations made by Defendants "were known by [D]efendants to be false, or were made recklessly in disregard of their truth or falsity, and were made by [D]efendants to induce [P]laintiffs to trust them and turn their entire estate over to them." (Id. ¶ 110.) Finally, the Amended Complaint alleges that these actions induced Plaintiffs to justifiably rely on Defendants' misrepresentations, and that Plaintiffs sustained damages in the amount of \$2.8 million. (Id. ¶¶ 211-213.) These allegations are sufficient to state valid claims under the UTPCPL with respect to the estate, asset and tax planning services, the sale of annuities by AILIC and Oxford, and the sale of living trusts by Bohmueller. See Heller v. Shaw Indus., 1997 WL 535163 at \*20.

The Amended Complaint also alleges a cause of action against AILIC, Oxford and Bohmueller for aiding and abetting Strobe in the unauthorized practice of law in violation of the UTPCPL and 42 Pa.

Stat. Ann. § 2524.<sup>7</sup> (Id. ¶¶ 209-210.) Plaintiffs do not dispute that Pennsylvania has not yet adopted a cause of action for aiding and abetting liability, and that the Pennsylvania Supreme Court has not yet spoken on the issue. See Clayton v. McCullough, 670 A.2d 710, 713 (Pa. Super. Ct. 1996). "When presented with a novel issue of law, or where applicable state precedent is ambiguous, absent or incomplete, [the federal court] must determine or predict how the highest state court would rule." Rolick v. Colins Pine Co., 925 F.2d 661, 664 (3d Cir. 1991) cert. denied, 507 U.S. 973 (1993). The parties have submitted no authority to support the proposition that the Pennsylvania Supreme Court would recognize a claim for aiding and abetting the unauthorized practice of law. Accordingly, the Court cannot conclude that the Pennsylvania Supreme Court would recognize such a claim. AILIC's, Oxford's and Bohmueller's Motion to Dismiss Count X of the Amended Complaint are, therefore, granted as to the claim for aiding and abetting the unauthorized practice of law, and denied in all other respects.

I. Tortious Interference with Contractual Relations: Count XI

All Moving Defendants have moved to dismiss Count XI of the Amended Complaint which alleges a cause of action for tortious interference with contractual relations. Moving Defendants argue

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<sup>7</sup> Under 42 Pa. Stat. Ann. § 2524 it is unlawful for any person to "hold[] himself out to the public as being entitled to practice law . . . without being an attorney at law." 42 Pa. Stat. Ann. § 2524.

that the Amended Complaint does not allege that they wrongfully prevented a third party from performing a contract with Plaintiffs, and thus fails to state essential elements of a claim for tortious interference with contractual relations. Pennsylvania has adopted the cause of action for intentional interference with contractual relations as defined in the Restatement (Second) of Torts § 766:

One who intentionally and improperly interferes with the performance of a contract . . . between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

Restatement (Second) of Torts § 766 (1979); see also Adler, Barish, Daniels, Levin and Creskoff v. Epstein, 393 A.2d 1175, 1183 (Pa. 1978); Daniel Adams Assoc., Inc. v. Rimbach Publ'g, Inc., 519 A.2d 997, 1000 (Pa. Super. Ct. 1987). Accordingly, the elements of a cause of action for interference with contractual relations are:

(1) the existence of a contractual . . . relation between the complainant and the third party; (2) purposeful action on the part of the defendant, specifically intended to harm the existing relation . . .; (3) the absence of privilege or justification on the part of the defendant; and (4) the occasioning of actual legal damage as a result of the defendant's conduct.

Strickland v. Univ. of Scranton, 700 A.2d 979, 985 (Pa. Super. Ct. 1997) (citations omitted).

The Amended Complaint states that "Defendants tortiously interfered with [P]laintiffs' contractual relations with third

parties, including without limitation, with the contractual relations existing by virtue of [P]laintiffs' purchase of securities comprising their existing investment portfolios." (Am. Compl. ¶ 217). The Amended Complaint, however, alleges no facts which would support an inference that any specific third party was prevented from performing its contractual obligations owed to Plaintiffs as a result of Defendants' conduct. Accordingly, Moving Defendants' Motions to Dismiss Count XI of the Amended Complaint are granted.

J. Tortious Interference with Prospective Economic Advantage: Count XII

Moving Defendants also seek the dismissal of Count XII of the Amended Complaint which alleges a cause of action for tortious interference with prospective economic advantage. They argue that the Amended Complaint does not identify any prospective contracts or business relationships that Plaintiffs were prevented from entering into, and thus fails to state essential elements for a valid claim for tortious interference with prospective contractual relations. Under Pennsylvania law, to state a claim for tortious interference with prospective economic advantage a plaintiff must allege:

- (1) the existence of a potential contractual relation between itself and a third party;
- (2) purposeful action on the part of the defendant, specifically intended to prevent the prospective relation from occurring;
- (3) the absence of a privilege or justification on the part of the defendant;
- (4) the occasioning

of actual legal damage as a result of the defendant's conduct; and (5) a reasonable likelihood that the relationship would have occurred but for the interference of the defendant.

SmithKline Beecham Corp. v. Apotex Corp., Civ. A. No. 99-4304, 2004 WL 2222388, at \*14 (E.D. Pa. Sept. 29, 2004) (citing Brokerage Concepts, Inc. v. U.S. Healthcare, Inc., 140 F.3d 494, 530 (3d Cir. 1998)). A prospective contract is "something less than a contractual right, something more than a mere hope; it exists if there is a reasonable probability that a contract will arise from the parties' current dealings." Alvord-Polk, 37 F.3d 996, 1015 (3d Cir. 1994). Conclusory speculation that plaintiffs might have entered into a business or contractual relationship with unspecified third parties is insufficient to state a claim for tortious interference. Alvord-Polk, 37 F.3d at 1015.

The Amended Complaint states that "Defendants tortiously interfered with [P]laintiffs' prospective economic advantage, including without limitation, with the prospective economic advantage by reason of [P]laintiffs' purchase of securities comprising their pre-existing investment portfolios, and the earnings therefrom, and [Plaintiff's] ability to use their assets as they saw fit." (Am. Compl. ¶ 223). The Amended Complaint, however, contains no facts which would support an inference that specific prospective contracts existed into which either third parties or Plaintiffs were prevented from entering. Moreover, the

Amended Complaint does not allege that Moving Defendants acted purposefully to harm Plaintiffs and prevent a prospective relation from occurring, or that Moving Defendants were not privileged or justified in their actions. See Gordon, 489 A.2d at 1370. The Amended Complaint's bald assertion that Defendants interfered with Plaintiffs' prospective economic advantage is insufficient to state a claim under Pennsylvania law. See Alvord-Polk, 37 F.3d at 1015. Accordingly, Moving Defendants' Motions to Dismiss Count XII of the Amended Complaint are granted.

K. Unjust Enrichment/*Quantum Meruit* and Accounting: Counts XIII, XIV

AILIC and Oxford have also moved to dismiss Counts XII and XIV of the Amended Complaint which allege causes of action for unjust enrichment/*quantum meruit* and for an accounting. They argue that the Amended Complaint fails to plead how the Defendants were unjustly enriched. AILIC further argues that, because the annuities are an express contract, the purchase of these annuities cannot form the basis of a *quantum meruit* recovery.

In order to plead a claim for unjust enrichment/*quantum meruit* under Pennsylvania law a complaint must allege the following:

benefits conferred on defendant by plaintiff,  
appreciation of such benefits by defendant,  
and acceptance and retention of such benefits  
under such circumstances that it would be  
inequitable for defendant to retain the  
benefit without payment of value . . . .  
Where unjust enrichment is found, the law  
implies a contract . . . which requires that  
the defendant pay to plaintiff the value of

the benefit conferred. In short, the defendant makes restitution to the plaintiff in *quantum meruit*.

Schenck v. K.E. David, Ltd., 666 A.2d 327, 328-29 (Pa. Super. Ct. 1995). However, "where an express contract governs the relationship of the parties, a party's recovery is limited to the measure provided by the express contract; and where the contract fixes the value of the services involved, there can be no recovery under a *quantum meruit* theory." Constar, Inc. v. Nat'l Distribution Centers, Inc., 101 F. Supp. 2d 319, 324 (E.D. Pa. 2000) (citing Hershey Foods Corp v. Ralph Chapek, Inc., 828 F.2d 989, 999 (3d Cir. 1987)) (internal quotations omitted).

Here, the Amended Complaint alleges that "Defendants were unjustly enriched by [P]laintiffs in the amount of \$2.8 million. . . . Also, or in the alternative, [P]laintiffs are entitled to a *quantum meruit* recovery against [D]efendants in the amount of \$2.8 million." (Am. Compl. ¶¶ 229, 230.) The Amended Complaint further alleges that Plaintiffs transferred \$2.8 million to Defendants as a result of the fraudulent misrepresentations made by Strobe on behalf of himself and all other Defendants. (Id. ¶¶ 81, 92.) The Amended Complaint, further states that Plaintiffs were damaged in the amount of \$2.8 million in addition to professional fees and costs incurred by Plaintiffs in pursuing this action to recover their assets (Id. ¶¶ 112, 114.) The Amended Complaint does not allege the existence of a written



agreement or express contract which governs the relationship between Plaintiffs and Moving Defendants or fixes the value of the services involved. However, the Amended Complaint relies on the purchase of annuities from AILIC and Oxford. AILIC has submitted a copy of the two annuity policies issued to the Gilmours together with its Motion to Dismiss. While a court must accept the well-pleaded allegations of the complaint as true and may not rely on matters outside the complaint in deciding a motion to dismiss, the court may consider documents explicitly relied on in the complaint in its analysis. See GSC Partners CDO Fund v. Washington, 368 F.3d 228, 236 (3d Cir. 2004). Accordingly, the Court can take into account the annuity policy Plaintiffs and AILIC entered into in ruling on AILIC's Motion to Dismiss. This policy is an express contract which governs the relationship between the parties, and thus prevents Plaintiffs from being able to recover against AILIC on a *quantum meruit* theory. Oxford, on the other hand, did not provide the Court with documentation of an annuity policy which governs the relationship between Plaintiffs and Oxford. In the absence of such policy, the Court can not conclude that such policy in fact existed, much less that it governed the relationship between the parties or fixed the value of the services involved. Under these circumstances and the facts as pled in the Amended Complaint, it would be inequitable to allow Defendants to retain the money given to them by Plaintiffs. See

Schenck, 666 A.2d at 328. Accordingly, AILIC's Motion to Dismiss Count XIII is granted, while Oxford's Motions to Dismiss Count XIII is denied.

AILIC and Oxford further seek the dismissal of Count XIV of the Amended Complaint which alleges a cause of action for an accounting. They argue that the Amended Complaint does not state sufficient facts to support a claim that they were obligated to provide legal, tax or estate planning services to Plaintiffs, and that an accounting would, therefore, be inappropriate. Plaintiffs seek an accounting from Defendants:

- (a) Itemizing and describing in detail each and every security and other asset turned over by [P]laintiffs to [D]efendants; and
- (b) Itemizing and detailing the liquidation of each such assets, including date sold or disposed, manner of disposition, transferee, amount received (both gross and net of any commissions paid or earned);
- (c) Itemizing and detailing each and every payment earned or received by each [D]efendant . . . in connection with (i) the liquidation of \$2.8 million of [P]laintiffs' existing investment portfolios, and (ii) the purchase of [Defendants'] "tax free" annuities; and (iii) the establishment of the living trust.

(Am. Compl. ¶ 232.) Pennsylvania Rule of Civil Procedure 1021 permits parties to seek relief "of several different types, including an accounting." Pa.R.Civ.P. 1021(a). Accordingly, AILIC and Oxford's Motions to Dismiss Count XIV are denied.

L. Professional Negligence: Count XV

AILIC and Oxford further seek the dismissal of Count XV of the Amended Complaint which alleges a cause of action for professional negligence against all Defendants. They argue that the Amended Complaint contains no factual basis from which to infer that they had contracted to provide Plaintiffs with professional services. Under Pennsylvania law, clients may bring tort actions against professionals for their failure to provide the client with professional services consistent with those expected by the profession. Gorski v. Smith, 812 A.2d 683, 693-94 (Pa. Super. Ct. 2002). Professional negligence actions, however, can be maintained only against persons licensed in Pennsylvania or another state as: (1) health care providers as defined in 40 P.S. § 1303.503; (2) accountants; (3) architects; (4) chiropractors; (5) dentists; (6) engineers or land surveyors; (7) nurses; (8) optometrists; (9) pharmacists; (10) physical therapists; (11) psychologists; (12) veterinarians; or (13) attorneys. Pa.R.Civ.P. 1042.1.

Here, the Amended Complaint alleges that moving Defendants are not registered to do business in Pennsylvania, and use sales representatives such as Strobe to market and sell annuities. (Am. Compl. ¶¶ 8, 12, 37.) The Amended Complaint further alleges that Moving Defendants:

undertook to provide estate and asset and tax planning advice to [P]laintiffs . . . As

professionals providing estate and asset and tax planning advice for [P]laintiffs, the [D]efendants owed a common law duty to [P]laintiffs to provide such professional advice to [P]laintiffs with the necessary skill, confidence, prudence and diligence, as other similarly situated estate and asset planning professionals in the community.

(Am. Compl. ¶¶ 234, 235.)

The Amended Complaint does not allege that any of the Defendants except for Bohmueller are licensed professionals. Under Pennsylvania law, however, professional negligence actions can be maintained only against defendants who are licensed professionals as defined in Pennsylvania Rule 1042.1. See Pa. R. Civ. P. 1042.1. Accordingly, AILIC and Oxford's Motions to Dismiss Count XV are granted.

M. Motion for a More Definite Statement

AILIC and Oxford have asked the Court to dismiss the Amended Complaint for its failure to plead short, concise statements in accordance with Federal Rule of Civil Procedure 8(a)(2) or, in the alternative, that Plaintiffs be required to file a second amended complaint pursuant to Federal Rule of Civil Procedure 12(e). Plaintiffs argue that Defendants are attempting to impose inconsistent pleading standards on them, by seeking dismissal of the Amended Complaint for too much detail on the one hand, and lack of specificity on the other. However, it is well-established that it is not necessary to violate Rule 8 in order to comply with Rule 9(b). See In re Wesinghouse Securities Litig., 90 F.3d 696, 703

(3d Cir. 1996) (“[i]t is well settled that the particularity demands of pleading fraud under Rule 9(b) in no way negate the commands of Rule 8.”) (citations omitted). Accordingly, the requirements of Rule 8 apply even where Rule 9(b) commands that circumstances be pled with particularity. Id. (citing to James W. Moore, et. al, Moore’s Federal Practice ¶ 8.13, at 8-58 (2d ed. 1995)).

Courts should dismiss pleadings for failure to comply with Rule 8 only if the pleading is “so confused, ambiguous, vague or otherwise unintelligible that its true substance, if any, is well disguised.” Martin v. Warrington, Civ. A. No. 01-1178, 2002 WL 341000, at \*3 (E.D. Pa. Mar. 4, 2002) (citing Simmons v. Abruzzo, 49 F.3d 83, 89 (2d Cir. 1995)). While courts can strike pleadings that are “laden with unnecessary factual narrative,” courts frequently decline to dismiss complaints despite plain violations of Rule 8(a)(2). Martin, 2002 WL 341000, at \*3. Accordingly, the Court denies ALLIC’s and Oxford’s Motions to Dismiss the Amended Complaint for violations of Rule 8(a)(2). However, should Plaintiffs decide to file a Second Amended Complaint, they must comply with Rule 8(a)(2).

Under Rule 12(e), a party may move for a more definite statement if the pleading is so “vague or ambiguous that the opposing party cannot respond, even with a simple denial, in good faith without prejudice to itself.” Sun Co., 939 F.Supp. at 368

(citing 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1376 (1990)). "The class of pleadings that are appropriate subjects for a motion under Rule 12(e) is quite small . . ." Id. The Court finds that the Amended Complaint as a whole is not so vague, ambiguous, or unintelligible that Defendants cannot discern the essence of the claims made. Accordingly, AILIC's and Oxford's Motions for a More Definite Statement pursuant to Rule 12(e) are denied.

### **III. CONCLUSION**

For the foregoing reasons, the Moving Defendants' Motions to Dismiss are granted in part and denied in part. AILIC and Oxford's Motions to Dismiss for failure to comply with Federal Rule of Civil Procedure 8(a)(2) are denied. AILIC and Oxford's Motions to Dismiss are granted as to Count I with respect to any claim for fraud based on their notification by a consumer agency that a larger living-trust scheme existed, and denied in all other respects. In addition, AILIC Motion to Dismiss is denied with respect to Counts II, IV, IX, X (except with respect to the claims that they aided and abetted in the unauthorized practice of the law) and XIII, and granted with respect Counts III, VIII, XI, XII, XIV and XV. Oxford's Motion to Dismiss is denied with respect to Counts II, IV, IX, X (except with respect to the claims that they aided and abetted in the unauthorized practice of the law), XIII and XIV, and granted with respect Counts III, VIII, XI, XII and XV.

BohmueLLer's Motion to Dismiss is granted with respect to Counts III, XI and XII, as well as with respect to the claim made in Count X that he aided and abetted the unauthorized practice of law. BohmueLLer's Motion to Dismiss is denied in all other respects. Strobe and Patriot's Motions to Dismiss Counts III, VIII, XI and XII are granted. By agreement of the parties and by Order of the Court, Counts V and VI of the Amended Complaint are dismissed.<sup>8</sup>

An appropriate Order follows.

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<sup>8</sup> In sum, the following claims survive the Motions to Dismiss:

1. The fraudulent and negligent misrepresentation claims in Counts I and II against Strobe as well as New Life, AILIC, Oxford, BohmueLLer, and Patriot for false statements made by Strobe acting as agent on their behalf.
2. The civil conspiracy claim against New Life, AILIC, Oxford, BohmueLLer, Strobe and Patriot.
3. The professional negligence claim in Count VII against BohmueLLer.
4. The breach of fiduciary duty claim in Count IX against New Life, AILIC, Oxford, BohmueLLer, Strobe and Patriot.
5. The UTPCPL claim for fraudulent misrepresentations in Count X against New Life, AILIC, Oxford, Strobe, BohmueLLer and Patriot.
6. The unjust enrichment/*quantum meruit* claim in Count XIII against New Life, Oxford, BohmueLLer, Strobe and Patriot.
7. The claim for an accounting in Count XIV against New Life AILIC, Oxford, BohmueLLer, Strobe and Patriot.
8. The claim for professional negligence in Count XV against BohmueLLer.





3. American Investors Life Insurance Company's and Oxford Life Insurance Company's Motions to Dismiss are **DENIED** as to Count IV of the Amended Complaint;
4. American Investors Life Insurance Company's, Oxford Life Insurance Company's, Barry O. Bohmueller's, Stephen A. Strobe's, and The Patriot Group, Inc.'s Motions to Dismiss are **GRANTED** as to Counts V and VI of the Amended Complaint by agreement of the parties; those Counts are hereby **DISMISSED** with prejudice;
5. American Investors Life Insurance Company's, Oxford Life Insurance Company's, Stephen A. Strobe's and The Patriot Group, Inc.'s Motions to Dismiss are **GRANTED** as to Count VIII of the Amended Complaint; Count VIII is hereby **DISMISSED** without prejudice and with leave to file a Second Amended within thirty days of the date of this Order;
6. American Investors Life Insurance Company's and Oxford Life Insurance Company's Motions to Dismiss are **DENIED** as to Count IX of the Amended Complaint;
7. American Investors Life Insurance Company's, Oxford Life Insurance Company's, and Barry O. Bohmueller's Motions to Dismiss is **GRANTED** as to the claim made in Count X of the Amended Complaint for claim for aiding and abetting the unauthorized practice of law; this claim is hereby

- DISMISSED** with prejudice; American Investors Life Insurance Company's, Oxford Life Insurance Company's, and Barry O. Bohmueller's Motions to Dismiss are **DENIED** as to Count X of the Amended Complaint in all other respects;
8. American Investors Life Insurance Company's, Oxford Life Insurance Company's, Barry O. Bohmueller's, Stephen A. Strobe's, and The Patriot Group, Inc.'s Motions to Dismiss are **GRANTED** as to Count XI of the Amended Complaint; Count XI is hereby **DISMISSED** with prejudice;
  9. American Investors Life Insurance Company's, Oxford Life Insurance Company's, Barry O. Bohmueller's, Stephen A. Strobe's, and The Patriot Group, Inc.'s Motions to Dismiss are **GRANTED** as to Count XII of the Amended Complaint; Count XII is hereby **DISMISSED** with prejudice;
  10. Oxford Life Insurance Company's Motion to Dismiss is **DENIED** as to Count XIII of the Amended Complaint;
  11. American Investors Life Insurance Company's Motion to Dismiss is **GRANTED** as to Count XIII of the Amended Complaint; Count XIII of the Amended Complaint against American Investors Life Insurance Company is hereby **DISMISSED** with prejudice;
  12. American Investors Life Insurance Company's and Oxford Life Insurance Company's Motions to Dismiss are **DENIED** as to Count XIV of the Amended Complaint;

13. American Investors Life Insurance Company's and Oxford Life Insurance Company' Motions to Dismiss are **GRANTED** as to Count XV of the Amended Complaint; Count XV is hereby **DISMISSED** with prejudice against all Defendants except for Barry O. Bohmueller; and
14. American Investors Life Insurance Company's and Oxford Life Insurance Company's Motions to Dismiss the Amended Complaint for violating Federal Rule of Civil Procedure 8(a)(2) are **DENIED**;
15. American Investors Life Insurance Company's, Oxford Life Insurance Company's, Barry O. Bohmueller's, Stephen A. Strobe's, and The Patriot Group, Inc.'s Motions for a More Definite Statement pursuant Federal Rule of Civil Procedure 12(e) are **DENIED**; and
16. **IT IS FURTHER ORDERED** that any Second Amended Complaint filed by Plaintiffs shall comply with Federal Rule of Civil Procedure 8(a)(2), which requires a short and plain statement of the claims showing that the pleader is entitled to relief.

BY THE COURT:

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John R. Padova, J.

## RICO CASE STATEMENT

1. State whether the alleged unlawful conduct is in violation of 18 U.S.C. §§ 1962(a), (b) (c), and/or (d);

2. List each defendant and state the alleged misconduct and basis of liability of each defendant;

3. List the alleged victims and state how each victim was allegedly injured:

4. Describe in detail the pattern of racketeering activity or collection of unlawful debts alleged for each RICO claim. A description of the pattern of racketeering activity shall include the following information:

a. List the alleged predicate acts and the specific statutes that were allegedly violated;

b. If the RICO claim is based on the predicate offenses of wire fraud, mail fraud or fraud in the sale of securities, the "circumstances constituting fraud or mistake shall be stated with particularity". Fed. R. Civ. P. 9(b).

c. Describe how the predicate acts form a "pattern of racketeering activity"; and

d. State whether the alleged predicate acts relate to each other as part of a common plan. If so, describe.

5. Describe in detail the alleged enterprise for each RICO claim. A description of the enterprise shall include the following

information:

a. State the names of the individuals, partnerships, corporation, associations or other legal entities that allegedly constitute the enterprise;

b. Describe the structure, purpose, function and course of conduct of the enterprise;

c. State whether any defendants are employees, officers or directors of the alleged enterprise;

d. State whether any defendants are associated with the enterprise; and

e. State whether you are alleging that the defendants are individuals or entities separate from the alleged enterprise or that the defendants are the enterprise itself, or members of the enterprise.

6. Describe the alleged relationship between the activities of the enterprise and the alleged pattern of racketeering activity. Discuss how the racketeering activity differs from the usual and daily activities of the enterprise, if at all;

7. Describe the effect of the enterprise on interstate or foreign commerce;

8. If the complaint alleges a violation of 18 U.S.C. § 1962(a), provide the following information:

a. State who received the income derived from the pattern of racketeering activity or through the collection of an unlawful debt;

b. Describe the use of investment of such income;

9. If the complaint alleges a violation of 18 U.S.C. § 1962(b), describe the acquisition or maintenance of any interest in control of the alleged enterprise;

10. If the complaint alleges a violation of 18 U.S.C. § 1962(c), provide the following information:

a. State who is employed by or associated with the enterprise; and

b. State whether the same entity is both the liable "person" and the "enterprise" under § 1962(c);

11. If the complaint alleges a violation of 18 U.S.C. § 1962(d), describe the alleged conspiracy;

12. Describe the alleged injury to business or property;

13. Describe the direct causal relationship between the alleged injury and the violation of the RICO statute.

14. Provide additional information that you feel would be helpful in processing your RICO claim.