UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CERTAIN UNDERWRITERS AT LLOYD'S and ZURICH SPECIALTIES LONDON LTD,

Plaintiffs,

and

ILLINOIS UNION INSURANCE COMPANY,

Intervenor Plaintiff,

against

MILBERG LLP, MELVYN I. WEISS, individually, DAVID J. BERSHAD, individually, WILLIAM S. LERACH, individually, and STEVEN G. SCHULMAN, individually,

Defendants.

08 Civ. 7522 (LAP)

MEMORANDUM AND ORDER

LORETTA A. PRESKA, Chief United States District Judge:

Plaintiff insurers instituted this action against Milberg LLP (the "firm" or "Milberg") and certain of its former partners (the "Individual Defendants") seeking rescission of the firm's liability insurance and other equitable and declaratory relief. Defendants now move to dismiss on the ground that the insurers have failed to comply with the applicable statute of limitations. For the reasons below, the motion is granted in part and denied in part.

I. THE PARTIES

Plaintiffs are underwriters of professional liability insurance ("the London Insurers") organized under the laws of England and Wales and having their principal places of business in London.[1] Intervenor Plaintiff is the Illinois Union Insurance Company ("Illinois Union"), incorporated under Illinois law and having its principal place of business in Chicago.

Defendants consist of a law firm and four individuals. Milberg is a limited liability partnership organized under New York law and having its principal place of business in New York. The Individual Defendants are Melvyn I. Weiss of New York, David J. Bershad of New Jersey, William S. Lerach of California, and Steven G. Schulman of New York, all former partners of Milberg.

II. BACKGROUND

The Complaint and Intervenor Complaint allege the following salient facts. Milberg is a law firm that, at all relevant times, specialized "in serving as plaintiff's counsel in class actions and shareholder derivative actions brought in courts throughout the United States." (Compl. ¶ 15.) From approximately 1979 through 2005, Milberg and some of its partners, including the Individual Defendants, operated a

[1] Specifically, the London Insurers include Novae Corporate Underwriting Limited and SOC Corporate Member No. 1 Limited.

fraudulent litigation scheme involving the payment of "kickbacks to named plaintiffs in [c]lass [a]ctions in which the [f]irm served as counsel." (Compl. ¶ 26a.) The present action is part of the fallout from this scheme.

On November 16, 1998, while the kickback scheme was proceeding, Milberg applied to purchase two professional liability insurance policies from the London Insurers (the "London Policies")[2] (Compl. ¶ 21) and one such policy from Illinois Union (the "First Excess Policy") (Intervenor Compl. ¶ 5). All three policies, as well as their applications, are essentially identical. (Intervenor Compl. ¶¶ 21-22.) In the applications for the policies, Mr. Bershad, on behalf of Milberg, declared that no attorney at the firm was aware of "any circumstances . . . which may result in a claim being made against" the firm. (Compl. ¶¶ 17-18; Intervenor Compl. ¶¶ 16-17.) Because the kickback scheme was underway when this statement was made, Plaintiffs and Intervenor Plaintiff allege that this statement was actually fraudulent, i.e., both false and made with knowledge that it was false. (Compl. ¶ 34-36; Intervenor Compl. ¶¶ 39-41.) Plaintiffs and Intervenor Plaintiff further allege that, on the basis of this statement, they were induced to issue the London Policies and the First

[2] The Complaint refers to these policies, numbers UP011988 and UP012204, as the "Contracts." (Compl. ¶ 1.)

Excess Policy. (Compl. ¶ 36; Intervenor Compl. ¶ 41.) Both the London Policies and the First Excess Policy became effective on January 31, 2001 and expired on January 31, 2004. (Compl. ¶ 1; Intervenor Compl. ¶ 5.)

In January 2002, Milberg became the subject of a prosecutorial investigation and was subpoenaed to testify before grand juries in California and Pennsylvania. (Compl. ¶ 22.) Milberg notified both the London Insurers and Illinois Union of the investigation. (Compl. ¶ 22; Intervenor Compl. ¶ 27.) Milberg requested that the London Insurers, as the primary insurers, fund the firm's defense. (Compl. ¶ 22.) The parties apparently disputed whether the investigation fell within the coverage of the London Policies. (Id.) They resolved the issue by entering into a new agreement (the "Interim Funding Agreement") to fund the firm's defense "under agreed terms and without prejudice." (Id.)

The firm, Mr. Bershad, and Mr. Schulman were indicted for their roles in the kickback scheme on May 18, 2006. (Compl. ¶ 23.) They notified the London Insurers of the indictment shortly thereafter, and on July 14, 2006, the London Insurers acknowledged they had received the indictment. (Id.) The London Insurers denied "there was any obligation to defend or indemnify the allegations in the indictmen[t]" and "also reserved all rights to assert legal defenses as ascertained by

later developments." (Id.) Defendants "publicly denied all charges and said they would prove them wrong in court." (Id.)

In 2007 and 2008, Defendants pleaded guilty to charges based on their respective roles in the scheme. (Compl. ¶¶ 24, 27.) The firm itself pleaded guilty on June 16, 2008 — the last of the five Defendants to do so. (Compl. ¶ 24.) The London Insurers filed their Complaint on August 26, 2008, alleging three causes of action: rescission, "[r]eimbursement/[u]njust enrichment," and an interpleader claim that would be necessary only if they prevail on their rescission claim. (See Compl.) Illinois Union intervened on November 25, 2008, alleging seven causes of action: the same three as the London Insurers, along with four claims for a declaratory judgment construing certain provisions in the First Excess Policy. (See Intervenor Compl.) Defendants now move to dismiss both the Complaint and the Intervenor Complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to bring this action within the time period established by the applicable statute of limitations. The Individual Defendants move to dismiss on the alternate ground that the Complaint and the Intervenor Complaint fail to state claims against them.

III. DISCUSSION

A. Legal Standard, Subject Matter Jurisdiction, and Choice of Law

On a motion to dismiss, the Court "must accept all allegations in the complaint as true and draw all inferences in the non-moving party's favor." LaFaro v. New York Cardiothoracic Group, 570 F.3d 471, 475 (2d Cir. 2009). The Court will grant the motion if the complaint does not allege sufficient facts to suggest that the plaintiff's claim to relief is plausible. Id. at 476. That standard is met where the plaintiff's claim is barred by the applicable statute of limitations. See Cantor Fitzgerald v. Lutnick, 313 F.3d 704, 706-07 (2d Cir. 2002). Here, the Court has jurisdiction pursuant to 28 U.S.C. § 1332 (2006) because the parties are diverse and the amount in controversy exceeds $75,000. The parties do not dispute that the law of New York, the forum state, governs the Court's analysis. (See Mem. Supp. Def.'s Mot. Dismiss 4 n.5; Mem. Opp'n Def.'s Mot. Dismiss 12.) See generally Plitman v. Leibowitz, 990 F. Supp. 336, 337 (S.D.N.Y. 1998) (Sotomayor, J.) (following Bank of New York v. Amoco Oil Co., 35 F.3d 643, 650 (2d Cir. 1994) and applying New York law to a statute-of-limitations dispute between diverse parties).

B. Analysis

The London Insurers assert three main arguments against the application of the statute of limitations: first, that Defendants are equitably estopped from invoking the statute of limitations (Mem. Opp'n Def.'s Mot. Dismiss 2); second, that no limitations period applies to their rescission claim (id.); and third, that even if a limitations period does apply, it did not begin to run until Milberg pleaded guilty in June 2008 (id. at 1-2). None of these contentions is persuasive.

1. Defendants are not equitably estopped from invoking the statute of limitations.

The London Insurers first assert that Milberg is estopped from invoking the statute of limitations because the London Insurers delayed bringing a timely action in reliance on Milberg's representations that the firm was not guilty of the litigation scheme. (Mem. Opp'n Def.'s Mot. Dismiss 18-19.) "The doctrine of equitable estoppel is an extraordinary remedy." Garcia v. Peterson, 820 N.Y.S.2d 901, 901 (2d Dep't 2006). It "applies where it would be unjust to allow a defendant to assert a statute of limitations defense." Zumpano v. Quinn, 849 N.E.2d 926, 929 (N.Y. 2006). To succeed on an estoppel argument, plaintiff must demonstrate that plaintiff "was induced by fraud, misrepresentations or deception to refrain from filing a timely

action," id. (quoting Simcuski v. Saeli, 377 N.E.2d 713, 716 (N.Y. 1978)), and that it "reasonabl[y] reli[ed] on the defendant's misrepresentations," id. "Significantly, the defendant's 'mere denial of wrongdoing . . . is not sufficient to create an estoppel' because the defendant 'is not legally oblig[ated] to make a public confession, or to alert people who may have claims against it to get the benefit of the statute of limitations.'" Robare v. Fortune Brands, Inc., 833 N.Y.S.2d 753, 755 (3d Dep't 2007) (quoting Ponterio v. Kaye, 808 N.Y.S.2d 439, 442 (3d Dep't 2006)).

Here, the London Insurers argue that they delayed filing suit on the basis of "the firm's emphatic denial . . . of wrongdoing," "repeated public statements . . . that [the firm] had done nothing wrong," and the firm's "extraordinary sweep of deceit and corruption." (Mem. Opp'n Def.'s Mot. Dismiss 19.) These are all mere denials of wrongdoing; as such, they are insufficient to justify estoppel. See Robare, 833 N.Y.S.2d at 755.

Furthermore, the London Insurers have not shown reasonable reliance on Defendants' protestations of innocence. On January 11, 2002, less than one year after having obtained the London Policies, Milberg informed the London Insurers of the government investigation and the contents of the subpoenas. (See Przygoda

Decl. Ex. J at 1, Ex. K at 2.)[3] In May 2002, in a letter to the London Insurers, Milberg explicitly detailed the nature of the investigation and noted in particular the "widely available" newspaper reports discussing it. (Przygoda Decl. Ex. K at 2.) Specifically, Milberg told Plaintiffs that the news articles indicated that "the government [wa]s investigating allegations that the [f]irm had improper financial arrangements with plaintiffs in a number of securities class actions." (Id.) But the London Insurers do not claim they inquired into whether these reported allegations were true. And they do not claim they inquired into whether these alleged incidents occurred during or before the time when Milberg was applying for the London Policies. Rather, the London Insurers claim only that they "relied on [Milberg's] false representations to . . . defer [bringing this] action pending the outcome [of the investigation.]" (Id.) Mere reliance, however, does not warrant estoppel.

Plaintiffs' reliance on Milberg's representations of innocence also would have had to be reasonable in order for them to obtain estoppel. See, e.g., Zumpano, 849 N.E.2d at 929. Yet

[3] On a motion to dismiss, the Court may consider all documents attached to or incorporated by reference into the complaint, documents Plaintiff possessed or knew of when bringing suit, and matters of which judicial notice may be taken. Chambers v. Time Warner, Inc., 282 F. 3d 147, 153 (2d Cir. 2002). Pursuant to this principle, the Court, throughout this Memorandum, considers certain exhibits attached to the parties' submissions.

Defendants' communications, described above, reveal that Plaintiffs had good cause to doubt Defendants' representations about their innocence. In short, the Complaint provides no basis from which the Court can infer that any such reliance would have been reasonable.

Insofar as Plaintiffs contend that their deferral of this action "pending the outcome [of the investigation]" merits equitable estoppel (id.), their theory has no basis in fact or law. Plaintiffs do not argue that the parties agreed to toll the statute of limitations.[4] The Interim Funding Agreement contains no such tolling provision. (See Przygoda Decl. Ex. L.)[5] Rather, Plaintiffs have merely made the unilateral decision to defer their action to a later date. Plaintiffs' conduct is thus precisely what statutes of limitations are meant to restrict.

The London Insurers' cited cases are simply inapposite. Simcuski involves an estoppel argument based on an alleged fraudulent concealment of medical malpractice. 377 N.E.2d at

---

[4] In one instance, the London Insurers make the passing suggestion that "the liability insurance relationship was based on addressing allegations of wrongdoing and deferring disputes between the parties until those allegations are [sic] defended and resolved." (Mem. Opp'n Def.'s Mot. Dismiss 11.) Even if this conclusory assertion constitutes an argument that the parties agreed to toll the statute of limitations, there is no basis in the Complaint from which the Court can infer that Defendants assented to any such tolling.

[5] The Court considers this document as incorporated by reference into the Complaint. See supra at 9 n.3; (Compl. ¶ 22).

716 ("The quality of the relationship between physician and patient, with confidence normally reposed by the patient in the physician and the unquestioning reliance which such relationship may be expected to engender in the patient, make application of the doctrine [of equitable estoppel] peculiarly appropriate in such cases."). Kaufman v. Cohen, 760 N.Y.S.2d 157 (1st Dep't 2003), in which that plaintiff's equitable estoppel argument was rejected, involves an alleged fraudulent concealment of the misappropriation of a business opportunity by one partner in a partnership against the other partners. Id. at 162-63.

This case, however, involves a contractual relationship between an insurer and an insured, both of whom are sophisticated parties dealing at arm's length. The London Insurers were not lulled into believing Milberg's claims of innocence the same way that a patient may be lulled into believing a doctor's prognosis. And Plaintiffs do not contend that their contractual relationship with Milberg involved a fiduciary relationship such as that in a partnership, in which reliance on a party's representations might be more justifiable. Therefore, the London Insurers have failed to demonstrate that Defendants should be estopped from invoking the statute of limitations.

2. The statute of limitations for claims based on fraud bars the London Insurers' rescission claim.

Second, the London Insurers contend that no statute of limitations applies to a declaratory-judgment action seeking rescission of a contract that was allegedly void at its inception and, alternatively, that New York law tolls the running of the statute of limitations on insurance-related fraud claims. (See Mem. Opp'n Def.'s Mot. Dismiss 12-14.) Neither argument is convincing.

A claim for rescission based on actual fraud is governed by the statute of limitations for claims based on fraud. See Abbate v. Abbate, 441 N.Y.S.2d 506, 516 (2d Dep't 1981). Under N.Y. C.P.L.R. 213(8), the applicable limitations period is "six years from the commission of the fraud or two years from the time the plaintiff discovered, or could with reasonable diligence have discovered, the fraud, whichever is later." Quadrozzi Concrete Corp. v. Mastroianni, 392 N.Y.S.2d 687, 688 (2d Dep't 1977); Hoffman v. Cannone, 614 N.Y.S.2d 799, 800 (3d Dep't 1994); see Abbate, 441 N.Y.S.2d at 516, 517 (expressly following Quadrozzi). When the plaintiff alleges fraud in the inducement to purchase an insurance policy, the six-year limitations period begins to run on the date the policy is purchased. See Goldberg v. Mfrs. Life Ins. Co., 672 N.Y.S.2d 39, 43 (1st Dep't 1998) (calculating the six-year limitations

period for plaintiff's fraud claim from the date plaintiff purchased the insurance policy); Ply*Gem of Laurel, Inc. v. Lee, 456 N.Y.S.2d 382, 383 (1st Dep't 1982) ("A cause of action for fraud in the inducement of a contract (and therefore the commencement of the running of the [s]tatute of [l]imitations) accrues at the time of the execution of the contract.") (citations omitted); N. Am. Van Lines, Inc. v. Am. Int'l Cos., No. 600826/04, 2006 WL 908653, at *8 (N.Y. Sup. Ct. Apr. 10, 2006), aff'd, 832 N.Y.S.2d 530 (1st Dep't 2007) ("A fraud claim alleging fraud in the inducement of the purchase of an insurance policy accrues on the date that the policy was purchased."); cf. Plitman, 990 F. Supp. at 337 (calculating, under New York law, the six-year limitations period for plaintiff's fraud claim from the date plaintiff purchased securities).

In this case, the London Insurers' rescission claim is subject to the six-year statute of limitations for fraud because the Complaint alleges actual fraud in the inducement. (See Compl. ¶¶ 34-36.) The London Insurers' reliance on Riverside Syndicate, Inc. v. Munroe, 882 N.E.2d 875, 878 (N.Y. 2008) for the proposition that a statute of limitations "does not make an agreement that was void at its inception valid by the mere passage of time" is misplaced. (See Mem. Opp'n Def.'s Mot. Dismiss 12.) Riverside Syndicate involved an illegal contract between a landlord and tenants to lease a rent-stabilized

apartment at a rent far in excess of the apartment's legal maximum rent. 882 N.E.2d at 876. After a series of disputes with the tenants, the landlord sued for a declaration that the contract was void. Id. at 877. The landlord was awarded judgment on appeal, and the New York Court of Appeals affirmed despite the tenant's contention that declaratory relief was barred by the statute of limitations. Id.

Riverside Syndicate is wholly inapplicable here for two reasons. First, in that case, the subject matter of the contract was illegal. See id. Because statutory law expressly rendered such contracts void, the contract at issue could never have been enforced, regardless of whether the statute of limitations had run. Id. at 877-78.

By contrast, a contract to buy insurance, such as the one in this case, does not involve any illegal subject matter. Plaintiffs' claim concerns not an illegal agreement but rather an illegal act by one of the parties during contract formation. (See Compl. ¶¶ 34-36.) The London Insurers miss the distinction between a contract that is void from its inception, like the one in Riverside Syndicate, and a contract that is voidable for fraud, like the one at issue in this case. Compare Restatement (Second) of Contracts §§ 163, 178-79 (1981) (discussing when contracts may be void at their inception) with § 164 (discussing when contracts may be voidable because of a party's

misrepresentation). That the London Insurers mistakenly characterize the contract as "void ab initio" (e.g., Mem. Opp'n Def.'s Mot. Dismiss 11), rather than as voidable, is of no moment.

Second, the case cited by the Riverside Syndicate court for the proposition that the statute of limitations cannot render a void contract enforceable, see supra at 13-14, expressly distinguishes between contracts that are voidable because of fraud in the inducement and contracts that are void at their inception. See Pacchiana v. Pacchiana, 462 N.Y.S.2d 256, 257-58 (2d Dep't 1983). The plaintiff in Pacchiana sued to void an antenuptial agreement, but the New York Supreme Court dismissed on the ground that the applicable statute of limitations had run. Id. at 257. On appeal, the Appellate Division wrote that if the plaintiff's claim were construed as alleging fraud in the inducement, the claim would have been "untimely since the action was not commenced within six years after commission of the fraud or within two years after its discovery." Id. at 257-58. Yet the Appellate Division reversed because plaintiff alleged that the contract failed to meet all the technical requirements of validity. Id. at 258. If contract formation had never been completed, a suit for a declaration that a contract was never enforceable would not have been subject to a statute-of-limitations defense. Id.

Here, the gravamen of the London Insurers' complaint is that the London Policies are voidable for fraud, not that no contract between the parties was formed, so they cannot escape the time limitations the law imposes on such claims. Their rescission claim is therefore subject to New York's six-year statute of limitations for claims based on fraud.

The London Insurers' alternative argument that New York law tolls the running of the statutory clock on insurance-based claims is equally unconvincing. Plaintiffs assert that New York "looks to the insurer to defend under reservation [of any potential rights against the insured] . . . pending resolution of the underlying allegations." (Mem. Opp'n Def.'s Mot. Dismiss 14.) Plaintiffs' suggested regime purportedly avoids "early and potentially wasteful conflict between insurer and insured" in which the insurer is at once funding the insured's defense against the underlying allegations and simultaneously seeking to rescind the insured's policy based on those same underlying allegations. (Id.) It follows from their view that Plaintiffs' statutory clock would not have begun to run until Defendants pleaded guilty in 2008.

Plaintiffs, however, offer no authority holding that an insurer's defense of its insured is inconsistent with its investigating the validity of its contractual duty to defend. In the context of their tolling argument, Plaintiffs' cited

cases support three propositions, all of which are irrelevant: first, that law firms may be indicted for the crimes of their partners committed on behalf of the firm, see, e.g., People v. Lessoff & Berger, 608 N.Y.S.2d 54, 54-55 (N.Y. Sup. Ct. 1994); second, that a liability insurer must defend its insured against a lawsuit when the insurer has contractually assumed such a duty and the claims against the insured "d[o] not fall solely and entirely within the policy exclusions," see Morrissey v. Gov't Employees Ins. Co., 605 N.Y.S.2d 55, 55 (1st Dep't 1993); and third, that an insurer need not disclaim coverage of a particular incident until the insured actually files a claim with the insurer because a premature disclaimer could result in needless conflict between the parties, see Sirignano v. Chicago Ins. Co., 192 F. Supp. 2d 199, 206 (S.D.N.Y. 2002).

None of Plaintiffs' cases even remotely suggests that an insurer's duty to defend gives it a special exemption from statutes of limitations governing its own rescission claims against its insureds. Lessoff & Berger is inapposite because the question of whether a law firm may be indicted is not in dispute. Morrissey is inapposite because the London Insurers are seeking not a determination of their coverage obligations under the policy but to nullify the policy entirely. And Sirignano is inapposite because all the events giving rise to the Insurers' rescission claim have already occurred, so any

conflict between the London Insurers and Milberg would not be premature.

Indeed, the Appellate Division recently explained that an insurer is not required to await conclusion of state administrative proceedings against the insured before taking acts to safeguard its own interests. See Wood v. Nationwide Mut. Ins. Co., 845 N.Y.S.2d 641 (4th Dep't 2007)). In Wood, the an insurer's disclaimer of coverage was invalidated as untimely because the insurer defended the insured for two years without having investigated whether coverage could in fact be disclaimed. Id. at 642-43. In that case, rather than awaiting a determination by the Workers' Compensation Board that the incident was not of the kind covered by its policy, the insurer should have conducted its own investigation as soon as "the insurer first learn[ed] of the grounds for . . . denial of coverage." Id. Similarly in this case, Plaintiffs will not be allowed to make an untimely rescission of the London Policies. Rather than awaiting the results of the government's prosecution of Milberg, the London Insurers should have conducted their own inquiry into whether Milberg might have committed fraud in obtaining the London Policies. As in Wood, there is no indication that the London Insurers, upon learning of the government's investigation of Milberg, took any action to determine whether the London Policies were still valid.

Finally, the London Insurers do not assert that any agreement between the parties provided them with new rights to rescind the London Policies. Therefore, the six-year limitations period on their rescission claim began running on the date the London Policies took effect, January 31, 2001. (See Compl. ¶ 1.) That period ended on January 31, 2007, well before the London Insurers filed the present action.

Thus, the inquiry comes down to whether the London Insurers' rescission claim is saved by the two-year discovery rule. See N.Y. C.P.L.R. 213(8). Defendants concede that the London Insurers' "fraud claims . . . might still be timely if commenced within two years from the date the fraud was discovered or through the exercise of reasonable diligence could have been discovered." (Mem. Supp. Def.'s Mot. Dismiss 5 (citing N.Y. C.P.L.R. 213(8)).) But they also contend that the London Insurers were on inquiry notice of their claims no later than July 14, 2006, the date when the London Insurers sent a letter to Defendants acknowledging receipt of the First Superseding Indictment of Defendants. (Mem. Supp. Def.'s Mot. Dismiss 7.) The London Insurers argue they could not possibly have been on notice of the alleged fraud until "the firm acknowledged in June of 2008" that it had for years operated a kickback scheme. (Mem. Opp'n Def.'s Mot. Dismiss 1.) Because the London Insurers must have been on notice of their claim no

later than two years prior to the filing of their complaint for their rescission claim to be timely, e.g., Quadrozzi, 392 N.Y.S.2d at 688, the ultimate question is whether the London Insurers knew or should have known about the alleged fraud before August 26, 2006. The London Insurers' own submissions indicate that they knew about their potential claim well before that date.

"The test as to when a plaintiff, with reasonable diligence, could have discovered an alleged fraud is an objective one." Prand Corp. v. County of Suffolk, 878 N.Y.S.2d 198, 200 (2d Dep't 2009). As New York courts have long held,

> where the circumstances are such as to suggest to a person of ordinary intelligence the probability that he has been defrauded, a duty of inquiry arises, and if he omits that inquiry when it would have developed the truth, and shuts his eyes to the facts which call for investigation, knowledge of the fraud will be imputed to him.

Higgins v. Crouse, 42 N.E. 6, 7 (N.Y. 1895). On a motion to dismiss, judgment for the defendant should be denied "unless it conclusively appears that the plaintiff had knowledge of facts which should have caused him or her to inquire and discover the alleged fraud." Hoffman, 614 N.Y.S.2d at 800.

Notice of a civil complaint, or of a government investigation, relating to the contract at issue "clearly trigger[s] a duty on the part of the plaintiff to inquire as to potential fraud" with respect to that contract. Prand, 878

N.Y.S.2d at 200; see TMG-II v. Price Waterhouse & Co., 572 N.Y.S.2d 6, 7 (1st Dep't 1991) ("They knew the IRS had questioned the legitimacy of the losses . . . . This alone creates a duty of inquiry."). Knowledge of information materially inconsistent with the alleged misrepresentations will trigger the two-year limitations period. See Rattner v. York, 571 N.Y.S.2d 762, 764-65 (2d Dep't 1991) (holding that plaintiff, who had sued for a judgment voiding a contract on the ground of fraudulent inducement, had notice of her claim when she knew the other parties were not performing the contract as they had previously indicated they would). Even media coverage in the news may be sufficient to start the statutory clock. See TMG-II, 572 N.Y.S.2d at 7 (holding that a Wall Street Journal article contributed to putting the plaintiff on notice of its claim).

Two cases are particularly useful in assessing whether Plaintiffs were on notice of Defendants' fraud prior to August 26, 2008. The first, Prand, involved "an action to rescind a contract for the sale of real property" based in part on a claim of fraudulent inducement. Id. at 199-200. The plaintiff corporation had allegedly sold the real estate to Suffolk County at a price well above market. Id. The sale was alleged to have been induced by secret dealings between the corporation's president and a Suffolk County official. Id. at 200. Further,

more than two years before the plaintiff brought its rescission suit, the New York Attorney General sued the plaintiff for its profit on the contract, alleging that the sale had been induced by fraud. Id. The Appellate Division held that "notice to the plaintiff of the Attorney General's action in 2002 clearly triggered [under the two-year discovery rule] a duty on the part of the plaintiff to inquire as to potential fraud with respect to the contract of sale." Id.

Similarly, in TMG-II the plaintiff alleged that the defendant had perpetrated an accounting fraud that had injured the plaintiff. TMG-II, 572 N.Y.S.2d at 7. In holding that the plaintiff's action was untimely under the two-year discovery rule, the Appellate Division noted that the plaintiff was on notice at two times, id., both of which are relevant to the instant action. First, the plaintiff was on notice when it "knew the IRS had questioned the legitimacy" of the defendant's tax statements. Id. Second, a front-page article in the Wall Street Journal put TMG-II on notice of its claim. Id.

Here, as in Prand and TMG-II, the London Insurers received notice that government authorities questioned the very representations allegedly central to the contracts at issue. They expressly acknowledge that in "January of 2002, the firm gave notice to the London Insurers that it had received a subpoena to testify before a grand jury in California . . . [as

well as] in Pennsylvania later in the year. . . . The firm said it was only an investigation . . . ." (Compl. ¶ 22.) Furthermore, the Court notes that the government's investigation of Milberg received widespread media coverage beginning at least in 2002.[6] Such notice that the firm was being investigated by the government imposed a duty on the London Insurers to inquire as to potential fraud in the London Policies. See Prand, 878 N.Y.S.2d at 200; TMG-II, 572 N.Y.S.2d at 7.

After all, as the London Insurers allege, the firm reported the investigation to the Insurers less than one year after the Insurers issued the London Policies. (Compl. ¶¶ 1, 22.) Indeed, the London Insurers acknowledged receipt of notice of the subpoenas in a letter from their counsel dated January 25, 2002. (Przygoda Decl. Ex. J at 1.) As a May 2002 letter indicates, they were notified specifically that the subpoenas "relat[ed] to any promise to pay any person for the purpose of recommending the Firm as counsel for a named plaintiff."

---

[6] "[I]t is proper to take judicial notice of the fact that press coverage, prior lawsuits, or regulatory filings contained certain information, without regard to the truth of their contents, in deciding whether so-called 'storm warnings' were adequate to trigger inquiry notice as well as other matters." Staehr v. Hartford Fin. Servs. Corp., 547 F.3d 406, 425 (2d Cir. 2008). Here, the Court takes judicial notice of the news reports submitted by the parties, along with the fact that the Milberg investigation received a great deal of media coverage over a period of years beginning at least in 2002. These are noticed only for the limited purpose of determining that information about the investigation was publicly available and widely reported.

(Przygoda Decl. Ex. K at 2.) As discussed above, see supra at 8-9, Plaintiffs admit that the firm told them that "newspaper reports concerning the subpoenas ha[d] suggested that the government [wa]s investigating allegations that the Firm had improper financial arrangements with plaintiffs in a number of securities class actions" (Przygoda Decl. Ex. K at 2), and that the "newspaper reports [were] available through Lexis, Westlaw, [and] other widely available services, [and] could [themselves] trigger [others] to bring a claim for damages against the Firm" (id.). A government investigation of the firm is certainly inconsistent with a statement by the firm, effective just one year earlier, that none of its lawyers was "aware of any circumstances . . . which may result in a claim being made against" it. (Compl. ¶ 17.) And even if the firm had not notified the London Insurers of the investigation, the news coverage also served to put the Insurers on notice. See TMG-II, 572 N.Y.S.2d at 7. Thus, the only reasonable inference the record permits is that the London Insurers were on notice of the alleged fraud in either January 2002 or May 2002.

The law does not protect the plaintiff who turns a blind eye to such information. Indeed, as indicated above, the benefit of the discovery rule comes with a corresponding "duty of inquiry." Higgins, 42 N.E. at 7. Accordingly, if the London Insurers made no inquiry, knowledge of the fraud must be imputed

to them as of either January or May 2002. See id. Neither the Complaint nor the London Insurers' brief, together with their attached exhibits, provides any reasonable basis for the court to infer that the London Insurers undertook an inquiry into the validity of the London Policies upon learning of the government's investigation. Therefore, knowledge of the fraud in the issuance of the London Policies must be imputed to the London Insurers as of January 2002, and certainly no later than May 2002, which renders their rescission claim untimely.

That, however, is not the end of the story. The most striking example of Plaintiffs' willful ignorance of their potential rescission claim is their failure to have made any inquiry after Milberg was indicted. The foregoing analysis applies all the more forcefully after July 14, 2006, when the London Insurers acknowledged their awareness that the firm had been indicted for the same fraud for which it had been investigated for four years. The indictment expressly referenced Milberg's fraudulent activities that occurred prior to the negotiation of the London Policies. (See, e.g., McMinn

Decl. Ex. D at 20.)[7] For example, the indictment states on page 20: "Beginning in or about 1988 and continuing through at least in or about 1998 . . . MILBERG WEISS, BERSHAD, and others . . . made and caused to be made approximately $6.5 million in secret and illegal kickback payments for the benefit of [certain plaintiffs they represented]." (Id.) The indictment states on page 23:

> During the period from 1984 through 2005, MILBERG WEISS obtained more than approximately $216.1 million in attorneys' fees in the Lawsuits and litigation resolving the Lawsuits, and, together with BERSHAD, SCHULMAN, and others . . . paid and caused to be paid more than approximately $11.3 million in secret and illegal kickbacks to the Paid Plaintiffs.

(Id. at 23.) The indictment includes pages of tables containing specific, detailed information about the illegal kickback payments. (See id. at 15-23.) In sum, a prudent insurer, upon giving the indictment even a cursory review, should have known in July 2006 that it may have had a claim against Defendants for rescission of the London Policies. Yet again, nothing in the record indicates that Plaintiffs undertook any inquiry into potential fraud in the London Policies or even asked the firm about it. Therefore, even if the two-year period began to run

[7] The Court takes judicial notice of the First Superseding Indictment, a publicly filed document, for the purpose of assessing whether Plaintiffs were on notice of the accusations contained therein. Alternatively, the Court is entitled to consider the First Superseding Indictment as a document that is integral to the Complaint. See supra at 9 n.3; (Compl. ¶ 23 (referring to the First Superseding Indictment)).

as late as July 2006, the rescission claim would still be time barred because Plaintiffs did not commence this action until August 2008.[8] On the basis of all of the foregoing, the Court concludes as a matter of law that the London Insurers' rescission claim is barred by the statute of limitations.

3. The London Insurers' equitable claim is without merit, and their interpleader claim is moot.

The London Insurers' Second Cause of Action for "Reimbursement/Unjust Enrichment" (Compl. ¶ 13) is predicated on a confusing, and somewhat incoherent, legal theory. Insofar as this cause of action seeks monetary relief "in connection with rescission of the [London Policies]" (Compl. ¶ 43), the action is barred by the statute of limitations as described above. To the extent the London Insurers are attempting to enforce their rights to "reimbursement of claim payments" under the written and bargained-for Interim Funding Agreement (Compl. ¶ 42), the London Insurers may not obtain such relief in equity, particularly because this agreement was negotiated after they knew that Milberg was under investigation. Finally, the London

[8] Plaintiffs also argue that Milberg Weiss LLP v. Kallas, No. 113416/07 (N.Y. Sup. Ct. May 2, 2008), rev'd, 876 N.Y.S.2d 389 (1st Dep't 2009) supports their contention that they were not on inquiry notice until 2008. (See id. at 18.) To the extent Kallas is relevant, it would mandate dismissal; however, the Court does not rely on Kallas because it has been reversed, albeit on other grounds.

Insurers' interpleader claim, also asserted "in connection with rescission" (Compl. ¶ 47) and contingent on the success of that claim, is dismissed as moot.

4. Illinois Union's first through third claims are dismissed.

Illinois Union's Intervenor Complaint includes seven Claims for Relief. The First Claim for Relief is essentially identical to the London Insurers' rescission claim. (See Intervenor Compl. ¶¶ 38-44.) Illinois Union has "join[ed] in and adopt[ed] the memoranda of law submitted by [P]laintiffs in opposition to [D]efendants' motions." (Mem. Opp'n Def.'s Joint Mot. Dismiss Rescission Claim 2.) Thus, if Illinois Union is situated similarly to the London Insurers, its rescission claim must also be dismissed.

It alleges that the First Excess Policy ran concurrently with the London Policies. (Intervenor Compl. ¶ 5.) Thus, its claim was not brought within the applicable six-year limitations period for fraud claims. Further, Illinois Union alleges that Defendants put them on notice of the government investigation in January 2002. (Intervenor Compl. ¶ 27.) Like the London Insurers, Illinois Union also appears to have ignored the extensive news coverage of the government's investigation dating back at least to 2002. See supra at 24-25. Illinois Union does

not allege it made any inquiry into potential fraud in the First Excess Policy, and the Court does not infer that it did so. Therefore, Illinois Union must be charged with knowledge of the fraud in 2002, see Higgins, 42 N.E. at 7, and its First Claim for Relief is untimely.

The Second Claim for Relief seeks "a judgment declaring that [Illinois Union] has no coverage obligation under the First Excess Policy." (Intervenor Compl. ¶ 46.) This claim is also dismissed as untimely because it arises from the same allegations of fraud as the rescission claim. The Third Claim for Relief, an interpleader claim identical to that of the London Insurers and similarly contingent upon the success of the rescission claim (see Intervenor Compl. ¶¶ 48-52), is likewise dismissed as moot.

5. Parties will advise why Illinois Union's remaining claims should not be dismissed.

Illinois Union's Fourth through Seventh Claims for Relief seek a declaratory judgment construing certain provisions in the First Excess Policy. The Court has discretion whether to entertain a suit for declaratory relief. See Wilton v. Seven Falls Co., 515 U.S. 277, 289, 290 (1995). As there is no allegation that Illinois Union has had to make any payments under the First Excess Policy or will be forced to do so

imminently, it does not now appear that granting the declaratory relief Illinois Union requests would amount to anything more than an advisory opinion. Therefore, the parties will advise the Court within 20 days why the remaining claims should not be dismissed.

III. CONCLUSION

Defendants' motion to dismiss (docket #48) is GRANTED in part and DENIED in part. The London Insurers' complaint is dismissed in its entirety. Illinois Union's First through Third Claims for Relief are also dismissed. Because these claims are untimely, the court finds it unnecessary to consider whether the Complaint and Intervenor Complaint state claims against the Individual Defendants. The remaining parties will advise the Court within 20 days why Illinois Union's remaining claims should not be dismissed.

SO ORDERED:

Dated: New York, New York
September 29, 2009

Loretta A Preska

LORETTA A. PRESKA, Chief U.S.D.J.