

“WRL Freedom Premier III” variable annuity (“Annuity”), which WRL had sold to defendant DK, LLC. In the Annuity contract WRL, in consideration of payment of annual fees of approximately 3 percent of the principal amount, agreed to place premium payments made to WRL by DK, LLC in mutual fund accounts as directed by DK, LLC, and to redeem to DK, LLC its invested funds in various amounts depending on the circumstances of DK, LLC’s redemption request.

In addition to DK, LLC, as owner of the Annuity, WRL sued the individuals and their corporate entities that were involved in selling the Annuity to DK, LLC. Five of the original complaint’s 10 counts targeted DK, LLC: Count I sought rescission, based on fraud and lack of insurable interest; Count II sought a declaratory judgment that the Annuity is void *ab initio*, or that it has been properly voided and rescinded, based on lack of insurable interest and fraud; Count III sought damages based on fraud; Count VII sought damages for civil liability for the crime of insurance fraud; and Count VIII sought damages for civil conspiracy. These counts are founded ultimately on just two legal theories: 1) that the Annuity is an insurance policy and therefore subject to the common and statutory law regarding insurance; and 2), that the Annuity’s incontestability clause is not enforceable.

In its Opinion and Order entered in this and the consolidated cases June 2, 2010, *Western Reserve Life Assurance Co. v. Conreal, LLC*, 715 F. Supp. 2d 270 (D.R.I, 2010) (“Order”), this Court disposed of these two theories, holding that the Annuity is not an insurance policy, and that its incontestability clause was valid and effective. Thus, the Court dismissed claims against DK, LLC based on lack of insurable interest and for civil liability for insurance fraud because the Annuity is not insurance. Further, the Court dismissed the counts based on fraud and civil conspiracy, based on the Annuity’s incontestability clause. The Order disposed of all counts

against DK, LLC, and dismissed the complaint as to it. WRL has not sought reconsideration of those rulings.

WRL has now filed a third amended complaint, which includes an additional legal theory not present in the initial complaint, and therefore not addressed in the Order. WRL has incorporated the new theory, fraud in the factum, in several of the counts against DK, LLC, while reiterating, essentially verbatim, the claims as set forth in the initial complaint. Thus, six of the third amended complaint's 13 counts now assert claims against DK, LLC: Count I seeks rescission, based on fraud in the inducement¹, lack of insurable interest, and fraud in the factum; Count II seeks a declaratory judgment that the Annuity is void *ab initio*, or that it has been properly voided and rescinded, based on fraud in the inducement and fraud in the factum; Count III seeks damages based on fraud in the inducement; Count IV seeks damages based on fraud in the factum; Count VIII seeks damages for civil liability for the crime of insurance fraud; and Count IX seeks damages for civil conspiracy.

STATEMENT OF FACTS

WRL is a business organization that sells a range of financial investment products to the public nationally. Third amended complaint ("TAC"), ¶¶ 20, 21. On August 29, 2008, DK, LLC submitted to WRL an application for purchase of a "WRL Freedom Premier III" variable annuity (on an application form prepared by WRL) ("Application"). TAC, ¶ 28. The Application identified Jason Viveiros as the annuitant, and DK, LLC as the owner and beneficiary. *Id.*, ¶¶ 28, 30. The Application was signed and submitted on behalf of DK, LLC; it also carried the signature of Mr. Viveiros, as annuitant. DK, LLC submitted an initial premium payment of \$250,000 with the Application. *Id.*, ¶ 33.

¹ The third amended complaint replaces the term "fraud" as used in the initial complaint with "fraud in the inducement," to distinguish the earlier fraud claim from the new claims based on fraud in the factum.

Mr. Viveiros is terminally ill with cancer. *Id.*, ¶ 24. Mr. Viveiros had no relationship with DK, LLC at the time that the Application was signed and submitted to WRL. *Id.*, ¶ 32. Mr. Viveiros testified by affidavit that at the time that he signed the Application he had no knowledge that he was entering into an annuity contract, and that he had not been informed how an annuity contract worked or what his role in it would be. Exh. C to Complaint. He further testified that he was compensated for allowing his name to be used in the Application as the annuitant. *Id.*

The Application did not include any information regarding the lack of relationship between Mr. Viveiros and DK, LLC, Mr. Viveiros's health condition, or any compensation arrangements for Mr. Viveiros. TAC, ¶¶ 44, 45, 47. WRL's application form makes no inquiry regarding any of those topics. Exh. 1 to Exh. C To Complaint.

WRL issued Annuity Policy Number 09-01N6041113 with a policy date of September 9, 2008 ("Annuity") to DK, LLC as owner. *Id.*, ¶ 37. WRL issued the Annuity based on the Application, and in reliance on the information contained therein. *Id.* Although the Application did not inquire regarding the matters, WRL alleges that it considered information concerning the relationship between the annuitant and DK, LLC, the annuitant's physical health condition, and any compensation to the annuitant to be material to its decision to issue the Annuity. TAC, ¶¶ 44, 45, 47. WRL alleges that it would not have issued the Annuity if it had been aware that there was no relationship between Viveiros and DK, LLC, of Mr. Viveiros's health condition, or of Mr. Viveiros's compensation. *Id.*

Following issuance of the Annuity, DK, LLC made a further premium payment of \$750,000. TAC, ¶ 38.

On September 24, 2009, WRL notified DK, LLC (and Mr. Viveiros) that it intended to rescind the Annuity based on its contention that DK, LLC lacked an insurable interest in Mr. Viveiros. TAC¶ 42.

LEGAL STANDARD

In reviewing a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), the Court must “accept the well-pleaded facts as true, viewing all factual allegations in the light most favorable to the plaintiff.” *Rederford v. U.S. Airways, Inc.*, 589 F.3d 30, 35 (1st. Cir. 2009). Under Fed. R. Civ. P. 8, the complaint “must contain sufficient factual matter ... ‘to state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009), quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). “[T]o survive a Rule 12(b)(6) motion ... a complaint must contain factual allegations that ‘raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true....’” *Perez-Acevedo v. Rivero-Cubano*, 520 F.3d 26, 29 (1st. Cir. 2008), quoting *Twombly, supra*.

Further, because some of the counts of the third amended complaint are grounded in fraud, the complaint must meet the heightened pleadings requirements of Fed. R. Civ. P. 9(b). A complaint alleging fraud must “specify the who, what, where, and when of the allegedly false or fraudulent representation.” *Alternative System Concepts, Inc. v. Synopsis, Inc.*, 374 F.3d 23, 29 (1st Cir. 2004). Rule 9(b) also requires that the complaint “‘identif[y] the basis for inferring scienter,’ which refers to the culpable mental state of knowingly or intentionally committing fraud.” *Western Reserve Life Assurance Co. v. Conreal, LLC, supra*, 715 F. Supp. 2d at 276, quoting *North American Catholic Education Programming Fund v. Cardinale*, 567 F.3d 8 (1st. Cir. 2009).

ARGUMENT

1. ALL CLAIMS BASED ON FRAUD IN THE INDUCEMENT AND LACK OF INSURABLE INTEREST MUST BE DISMISSED.

Counts I and II of the third amended complaint, to the extent that they are based on lack of insurable interest and fraud in the inducement, and Counts III, VIII, and IX, are premised on WRL's legal arguments that the Annuity is a policy of insurance, and that the Annuity's incontestability provision is not enforceable against it. These legal arguments were rejected in the Order, *Western Reserve v. Conreal*, *supra*, 715 F. Supp. 2d at 279, 280, resulting in dismissal of all counts in the initial complaint against DK, LLC. *Id.*, at 281. The law of the case doctrine compels the dismissal of the third amended complaint to the extent that they repeat claims dismissed in the Order. *Naser Jewellers, Inc. v. City of Concord*, 538 F.3d 17, 20 (1st Cir. 2008) (“when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case,” quoting *Arizona v. California*, 460 U.S. 605 (1983)).

2. THE THIRD AMENDED COMPLAINT FAILS TO STATE A CLAIM FOR FRAUD IN THE FACTUM.

The only claims in the third amended complaint against DK, LLC that were not disposed of by the Order are Counts I and II, to the extent that they are based on fraud in the factum, and Count IV, which is based solely on fraud in the factum. Therefore, the third amended complaint can survive dismissal as to DK, LLC only if its allegations are sufficient under Rules 8, 9(b), and 12 to set forth a claim for fraud in the factum.

The sole factual allegations in the third amended complaint on which the claim for fraud in the factum relies are that the defendant Raymour Radhakrishnan

convinced [annuitant] Viveiros to sign an application for a WRL Annuity by paying him a total of \$7,000. Radakhrishnan did not explain to Viveiros, and Viveiros had no knowledge, that he would be entering into an annuity contract,

how the WRL annuity worked, or what Viveiros's involvement in the annuity would be.

TAC ¶ 26. Further, WRL alleges that

All defendants except Viveiros committed fraud in the factum by concealing the existence, nature, and essential terms of the annuity from Viveiros in order to get him to sign the application under which he purportedly agreed to serve as annuitant.

TAC ¶ 51. These allegations, accepted as true, do not support a claim based on fraud in the factum.

Fraud in the factum occurs when there is a “misrepresentation as to the nature of a writing that a person signs with neither knowledge nor reasonable opportunity to obtain knowledge of its character or essential terms.” *R.I. Depositors Economic Protection Corp. v. Duguay*, 715 A.2d 1278, 1280 (R.I. 1998) (quoting *Black's Law Dictionary* 661 (6th ed. 1990)). The essence of a defense of fraud in the factum is that a contract never came into being, because there was never a manifestation of mutual assent. *See* 17A Am. Jur. 2d Contracts §217 (“If a misrepresentation as to the character or essential terms of a proposed contract induces conduct that appears to be a manifestation of assent by one who neither knows nor has reasonable opportunity to know of the character or essential terms of the proposed contract, his conduct is not effective as a manifestation of assent”).

In the limited circumstances in which the defense of fraud in the factum is available, the contracting party signing a document in total ignorance of its contents cannot be held to have assented to its terms. The application of fraud in the factum is to relieve a party of his obligations under a contract that is found to be affected by fraud in the factum. *See, Dante State Bank v. Calenda*, 56 R.I. 68, 183 A. 873 (1936) (on which the court relied in its definition of fraud in the factum in *R.I. Depositors Economic Protection Corp. v. Duguay, supra*) (“if a party

to a written instrument has signed it because he believed it to be a different kind of an instrument, it *cannot be enforced against him* by one who knew that it was signed by reason of such mistake, even though he had no part in causing it”) (emphasis supplied) *Id.*, 56 R.I. at 75, 183 A. at 877.

The third amended complaint misses the fraud in the factum target in several respects. The essential elements of the claim are that the alleged victim was induced by a misrepresentation into execution of a contract to which he is a party. The first infirmity in WRL’s claim of fraud in the factum is that the alleged victim of the fraud, Mr. Viveiros, is not a party to any contract. Fraud in the factum, if proved, would relieve Mr. Viveiros from having contractual obligations imposed against *him*. Mr. Viveiros is not a party to the Annuity. He has no obligation under the Annuity from which he could be relieved. No person seeks to impose any obligations on Mr. Viveiros. Even if fraud in the factum were adequately pled as to Mr. Viveiros’s signature on the Application, neither that document nor the Annuity constituted a contract to which he was a party. Mr. Viveiros’s alleged ignorance of the terms of an annuity contract to which he is not a party is immaterial to the validity of the contract or to the obligations of the actual parties to that contract.

Further, WRL’s allegation that Mr. Viveiros was convinced to sign the document in ignorance of its terms is insufficient to state a claim for fraud in the factum even if the Annuity were a contract to which Mr. Viveiros was a party. The essence of a claim of fraud, whether in inducement or in factum, is misrepresentation. Fraud in the factum is the rare exception to the rule that a person who signs a contract in ignorance of its contents is nevertheless bound by the instrument. *See Shappy v. Downcity Capital Partners, Ltd.* 973 A.2d 40 (2009). The exception is premised on proof that the contracting party’s ignorance of the document was induced by

misrepresentation as to its content or meaning. The third amended complaint fails to make that allegation. WRL alleges that Mr. Radhakrishnan failed to explain the annuity contract to Mr. Viveiros. This is not an allegation of misrepresentation, particularly in the absence of supporting allegations that, for example, Mr. Viveiros informed Mr. Radhakrishnan of his ignorance of the document, and requested an explanation. WRL also alleges that defendants “concealed” information from Mr. Viveiros, but fails to allege the facts that would give rise to a duty in any defendant to inform him regarding the annuity contract. *Cf. Guilbeault v. R. J. Reynolds Tobacco Co., Inc.* 84 F. Supp. 2d 263, 269 (D.R.I. 2000) (fraud by concealment will arise only when there is a duty to disclose).

Given that the notion of fraud in the factum has been gestating at WRL at least since February 1, 2010, when it filed its memorandum in opposition to the defendants’ first motion to dismiss, these failures and omissions in the third amended complaint cannot be passed off as an accident. The inadequacy of the complaint to state a claim for fraud in the factum must be deemed to be the result of the inadequacy of the underlying facts to support such a claim. It should therefore be dismissed.

CONCLUSION

The only change in the third amended complaint, vis a vis DK, LLC, from the one that this Court previously dismissed, is the addition of the legal theory of fraud in the factum as a basis for relief against DK, LLC. For the reasons set forth above, the allegations on which claims based on this theory rely fail by a long shot to state a cause of action for fraud in the factum. The third amended complaint therefore must be dismissed as to DK, LLC.

Respectfully submitted,
DK, LLC

By its attorneys,

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CERTIFICATE OF SERVICE

I certify that the within document was electronically filed with the clerk of the court on April 4, 2011, and that it is available for viewing and downloading from the Court's ECF system. Service by electronic means has been effectuated on all counsel of record.

/s/ R. Daniel Prentiss