

<b>Total Asset Recovery Servs., LLC v MetLife, Inc.</b>
2019 NY Slip Op 30841(U)
March 29, 2019
Supreme Court, New York County
Docket Number: 115336/10
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 48

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TOTAL ASSET RECOVERY SERVICES, LLC, on  
behalf of the State of New York,

Plaintiff/Relator,

- against -

Index No. 115336/10

Mot. Seq. Nos. 001, 002,  
003, 004, 005, and 009

METLIFE, INC., and its subsidiaries and affiliates, METROPOLITAN LIFE INSURANCE COMPANY, BRIGHTHOUSE FINANCIAL, INC., and its subsidiaries and affiliates, PRUDENTIAL FINANCIAL INC., and its subsidiaries and affiliates, THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, PRUDENTIAL INSURANCE AGENCY, LLC, AXA FINANCIAL, INC., d/b/a AXA GROUP INC., and its subsidiaries and affiliates, AXA EQUITABLE FINANCIAL SERVICES, LLC, AXA EQUITABLE LIFE INSURANCE COMPANY, GENWORTH FINANCIAL, INC., and its subsidiaries and affiliates, GENWORTH LIFE INSURANCE COMPANY OF NEW YORK, THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA, and its subsidiaries and affiliates, THE GUARDIAN INSURANCE & ANNUITY COMPANY, INC., MANUFACTURERS LIFE INSURANCE COMPANY, d/b/a MANULIFE FINANCIAL, and its subsidiaries and affiliates, JOHN HANCOCK LIFE INSURANCE COMPANY (U.S.A), JOHN HANCOCK LIFE INSURANCE COMPANY OF NEW YORK, JOHN HANCOCK LIFE & HEALTH INSURANCE COMPANY, MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, d/b/a MASSMUTUAL FINANCIAL GROUP, d/b/a MASSMUTUAL, and its subsidiaries and affiliates, NEW YORK LIFE INSURANCE COMPANY, and its subsidiaries and affiliates, NEW YORK LIFE INSURANCE AND ANNUITY CORPORATION, d/b/a NEW YORK LIFE, TEACHERS INSURANCE AND ANNUITY ASSOCIATION OF AMERICA, d/b/a TEACHERS INSURANCE AND ANNUITY ASSOCIATION-COLLEGE RETIREMENT EQUITIES FUND (TIAA-CREF), and its subsidiaries and affiliates, TIAA-CREF LIFE INSURANCE COMPANY, and JOHN DOES 23-1000,

Defendants.

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**HON. ANDREA MASLEY, J.S.C.:**

Motions designated Sequence Numbers 001, 002, 003, 004, 005, and 009 are consolidated for disposition.

In motion sequence number 001, defendants Prudential Financial, Inc., The Prudential Insurance Company of America, The Prudential Insurance Agency, LLC (collectively, "Prudential"); AXA Financial, Inc., AXA Equitable Financial Services, LLC, AXA Equitable Life Insurance Company (collectively, "AXA"); John Hancock Life Insurance Company (U.S.A.), John Hancock Life Insurance Company of New York, John Hancock Life and Health Insurance Company (collectively, "John Hancock"); The Guardian Life Insurance Company of New York, The Guardian Insurance and Annuity Company, Inc. (collectively, "Guardian"); Massachusetts Mutual Life Insurance Company ("MassMutual"); and Teachers Insurance and Annuity Association of America and TIAA-CREF Life Insurance Company (collectively, "TIAA") move, pursuant to CPLR 3211(a)(5) and (7), to dismiss the causes of action against them in the second amended complaint.

In motion sequence number 002, defendants Genworth Financial, Inc., and its subsidiaries and affiliates and Genworth Life Insurance Company of New York (collectively, "Genworth") move, pursuant to CPLR 3211(a)(2), (5) and (7), to dismiss the claims against them in the second amended complaint.

In motion sequence number 003, defendants Metropolitan Life Insurance Company and MetLife, Inc., and its subsidiaries and

affiliates (collectively, "MetLife") and New York Life Insurance Company, and its subsidiaries and affiliates, and New York Life Insurance and Annuity Corporation, d/b/a New York Life (collectively, "NY Life") move, pursuant to CPLR 3211(a)(7), to dismiss the claims against them in the second amended complaint.

In motion sequence number 004, defendant Brighthouse Financial, Inc. ("Brighthouse") moves, pursuant to CPLR 301, 302, 3211(a)(7) and (8), to dismiss the claims against it in the second amended complaint.

In motion sequence number 005, defendant The Manufacturers Life Insurance Company, d/b/a ManuLife Financial, and its subsidiaries and affiliates ("ManuLife") moves, pursuant to CPLR 3211(a)(5), (7), and (8) to dismiss the causes of action against it in the second amended complaint.

In motion sequence number 009, the State of New York (the "State") moves for leave to file a Statement of Interest in Opposition to defendants, motions to dismiss.

#### **BACKGROUND**

Plaintiff/Relator, Total Asset Recovery Services, LLC ("TARS"), is a limited liability investigative company that locates lost or unrecoverable funds on behalf of owners and creditors. Defendants are insurance and financial services companies.

TARS brings this action, on behalf of itself and the State

of New York, under the *qui tam* provisions of the New York False Claims Act, State Finance Law §§ 187 *et seq.* (the "NYFCA"), seeking to recover damages from defendants for their alleged failure to report and escheat to New York alleged abandoned funds held by them under mature life insurance policies. TARS states that (1) New York Abandoned Property Law §700 *et seq.* (The "APL") imposes a duty on defendants to report and escheat to New York any funds held by them that are deemed abandoned by virtue of the funds remaining unclaimed for three years by the person entitled to them upon maturity, and (2) that defendants violated their duty by failing to report and escheat certain abandoned funds. TARS also claims that defendants filed fraudulent Form 10-K annual reports pursuant to §13 of the Securities Exchange Act of 1934 by omitting unclaimed funds in their required reporting to New York, with the aim of concealing and avoiding their obligation to escheat the unclaimed funds to New York. TARS further asserts that it uncovered defendants' fraudulent conduct while researching unclaimed funds held by various state treasurers across the United States on behalf of individual clients.

TARS filed an original Complaint (Complaint), under seal pursuant to State Finance Law §190(2)(b), in December 2010, and amended the Complaint in October 2011 (Amended Complaint) and November 2017 (Second Amended Complaint). TARS also notified the

New York State Attorney General (Attorney General) of the action, but the Attorney General declined to intervene or supercede.

In May 2011, the New York State Comptroller (Comptroller) undertook an audit of Genworth "to ascertain whether the company's liability to the State under the New York Abandoned Property Law ha[d] been accurately and completely stated in the abandoned Property reports filed with the State Comptroller" (Letter, Schick Affirm, Exh 1; NYSCEF Doc. No. 19). After concluding the audit in February 2015, the Comptroller stated:

"[W]e have completed our audit of Genworth ... for compliance with Articles V & VI and Sections 1315 & 1316 of the New York State Abandoned Property Law for report years 2010 and prior, excluding equity related property (unclaimed cash dividends and underlying/un-exchanged shares) which would be covered under a separate audit. All additional abandoned property as disclosed by our examination has been reported to New York State"

(Schick aff, exhibit 2, NYSCEF Doc. No 19)).

On July 5, 2011, the State of New York Insurance Department (Insurance Department) sent letters to life insurers requesting special reports, pursuant to §308 of the Insurance Law, as part of an investigation into "allegations of unfair claims and trade practices by authorized life insurers and fraternal benefit societies (collectively, 'life insurers')" (Schick aff, exhibit 3, NYSCEF Doc. No. 19). The Insurance Department expressed concern that "life insurers may not be adopting and implementing

reasonable standards for investigating claims and locating beneficiaries with respect to death benefits under life insurance policies, annuity contracts and retained asset accounts" (*id.*).

In particular, the Insurance Department noted:

"[T]here may be instances where a death has occurred and no claim has been filed, but premiums continue to be deducted from the account value or cash value until the policy lapses. In other instances the life insurance policies, annuity contracts, or retained asset accounts may simply remain dormant after death. In these instances, a valid death benefit is either not paid or the payment is delayed"

(*id.*).

The Insurance Department merged with the New York State Banking Department to form the New York State Department of Financial Services (DFS), effective October 3, 2011 (McKinney's Cons Laws of NY, Ch 18-a, Financial Services Law §102).

In a press release, dated April 23, 2012, the Governor of New York announced that a DFS "investigation into how insurance companies tracked life insurance policy holders has resulted in 32,715 payments to consumers nationwide totaling \$262.2 million, including 7,525 payments totaling \$95.9 million to New Yorkers" (Schick aff, exhibit 4, NYSCEF Doc. No. 19). The press release further states:

"The DFS investigation found that many insurance companies regularly received a list of recent deaths from the Social Security Administration but were not mandated to use,

and therefore, were not using that list to determine if a policy holder had died. That means if a family member did not know there was a life insurance policy or simply forgot to file a claim to the insurance company, that policy went unpaid. As a result, tens of thousands of families did not receive their life insurance benefits.

Meanwhile, the investigation found that insurance companies often used the list of recent deaths to verify the status of people getting annuity checks, and, when a death was verified, the insurance company stopped the annuity payment . . . .

'In the wake of the investigation, New York will now mandate that insurance companies actively search the list of recent deaths so money will be paid to beneficiaries instead of being trapped in limbo and a new website will help families search for lost or forgotten policies''

(*id.*). The New York Insurance Law was amended to incorporate the requirements of the press release (see Insurance Law §3240).

The Second Amended Complaint alleges a single count for violation of NYFCA (NYSCEF Doc. No. 26). TARS alleges that from April 1, 1986, to September 10, 2017, defendants knowingly "made, used, or caused to be made or used false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money to the Comptroller," in violation of §189(1)(g) of NYFCA (*id.*).

TARS claims that defendants breached a duty under the APL to report and escheat abandoned property to New York. TARS also claims that between 1992 and 2000, MetLife, Prudential, and AXA decided to demutualize and return to policyholders all the

profits they had accumulated as mutual life insurer; that defendants mailed policyholders the cash, stock, or policy credits to which they were entitled; and that in many instances, the cash, stock, or policy credits were undeliverable, and were returned to defendants.

TARS further claims that, while researching unclaimed funds held by various state treasurers on behalf of individual clients, it detected a pattern of questionable activity concerning the escheatment of life insurance proceeds for deceased individuals. TARS asserts that while using publicly available information and its proprietary "Unique Name Identifier Algorithm" ("UNI"), it determined that for all of the individuals who passed away between January 1, 1982, and December 31, 2006, the New York Unclaimed Funds database did not indicate that the deceased individuals' life insurance proceeds were escheated to New York at any point up through 2010.

TARS asserts that defendants knew or should have known that the policy holders were deceased; that defendants were obligated to escheat the value of the unclaimed life insurance policies to New York; that defendants were required to report the escheatments; and that from April 1, 1986, to April 1, 2010, defendants failed to escheat approximately \$4,835,952,000 to New York and report the escheatment.

TARS further asserts that an analysis of defendants' data

revealed that defendants "either intentionally, recklessly, or with deliberate ignorance of the truth" maintained their records in a way that ensured that tens of thousands of policies were never deemed escheatable under New York Law. Thus, TARS insists that defendants either had actual knowledge that the abandoned property reports in their annual holder reports filed with the Comptroller did not identify all abandoned property escheatable to the State, or recklessly disregarded the truth or falsity of the information in their holder reports.

On September 26, 2017, the State notified TARS that it was declining to intervene or supercede in this action. Thus, on December 1, 2017, this Court (Masley, J.) so ordered a stipulation by the parties, which provides that "[a]ll previously filed documents in the Court's file in this action shall remain under seal and not be made public, except for the Complaint, the Amended Complaint, Second Amended Complaint, the State's Notice [of] Election to Decline [Intervention], and [said] order ... (collectively, the 'Previously-Unsealed Documents')" (NYSCEF Doc. No. 2). In May 2018, the Court so ordered a second stipulation, which provided for the unsealing of all future filings in this action based on the State's declination to intervene (NYSCEF Doc. No. 3).

On June 8, 2018, TARS filed Notices of Voluntary Discontinuance with respect to defendants Brighthouse (NYSCEF

Doc. No. 73) and Manulife (NYSCEF Doc. No. 75).

Defendants filed multiple motions seeking to dismiss the Second Amended Complaint on various grounds, including the NYFCA's and failure to state a cause of action. The State filed a motion for leave to submit a Statement of Interest in opposition to defendants' motions to dismiss.

### DISCUSSION

#### The APL

Under the APL, "any moneys held or owing by any life insurance corporation due to beneficiaries or other persons entitled thereto under policies on the lives of persons who have died ... which moneys shall have remained unclaimed by the person or persons entitled thereto for three years ..." shall be deemed abandoned property (McKinney's Abandoned Property Law §700[1][c]). "On or before the first day of April in each year, every life insurance corporation shall make a verified written report to the state comptroller, which shall contain a true and accurate statement ... of all abandoned property ... held and owing by it" (McKinney's Abandoned Property Law §701[1]). Life insurance companies are required to escheat unclaimed life insurance benefits to the State (see McKinney's Abandoned Property Law §703). The expressed policy of the State under the APL is "to utilize escheated lands and unclaimed property for the benefit of all the people of the state" (McKinney's Abandoned

Property Law §102).

**The NYFCA**

The NYFCA was enacted as part of a federal incentive to limit Medicaid fraud (see *State ex rel. Seiden v Utica First Ins. Co.*, 96 AD3d 67, 71 [1<sup>st</sup> Dept 2012]). However, it is not restricted to Medicaid fraud, and may be applied to any sort of looting of the public purse (*id.*). The typical false claim involves the State paying out money because of a false claim (*id.*). A "reverse false claim" occurs when someone uses a false record to avoid an obligation to pay the government (*id.*).

The NYFCA applies to a defendant who "knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the state or local government" (State Finance Law §189[1][g]; *People v Sprint Nextel Corp.*, 26 NY3d 98, 106 [2015]). The statute provides that the defendant acts "knowingly" when the defendant has "actual knowledge" of the falsity of a record or statement, or "acts in deliberate ignorance" or "reckless disregard" of its truth or falsity (State Finance Law §188[3][a]; *People v Sprint Nextel Corp.*, *supra* at 106-107). A finding of liability may result in "a civil penalty of not less than six thousand dollars and not more than twelve thousand dollars, plus three times the amount of damages, including consequential

damages, which the state or local government sustains because of the act of that [defendant]" (State Finance Law §189[1][g]).

#### Qui Tam Civil Action

A plaintiff/relator may bring a *qui tam* civil action, for violation of §189 of the NYFCA, on behalf of the plaintiff/relator and the people of the State of New York (State Finance Law §190[2]). The plaintiff/relator is a party to the *qui tam* action and is awarded a percentage of the proceeds or settlement if the action is successful.

The plaintiff/relator must serve the State with a copy of the complaint and written disclosure of substantially all material evidence and information in accordance with CPLR 307(1) (see State Finance Law §190[b]). Upon receipt of the complaint and the material evidence and information, the State may decline involvement, or may elect to supercede or intervene in the action (*id.*). The State must notify the court of the intention to intervene in the action (State Finance Law §190[c][ii]).

#### Motion for Leave to File Statement of Interest

As stated, the State declined to intervene or supercede in this *qui tam* action. However, the State seeks leave to file a Statement of Interest, asserting that it is the real party in interest under the NYFCA.

The NYFCA follows the federal False Claims Act, 31 US §3729

*et seq.* (*State ex rel. Seiden v Utica First Ins. Co., supra*).

Therefore, it is appropriate to look toward federal law when interpreting the New York act (*id.*).

Under federal law, the plaintiff in a *qui tam* action invokes the standing of the government resulting from the fraud injury (see *U.S. ex rel. Kreindler & Kreindler v United Tech. Corp.*, 985 F2d 1148, 1154 [2d Cir 1993]). However, the government remains the real party in interest in the action (*id.*).

Furthermore, "while it is the general rule that nonparties may not participate in [FCA] litigation, the government is in a peculiar posture in a declined FCA case" (*U.S. ex rel. McCready v Columbia/HCA Healthcare Corp.*, 251 F Supp 2d 114, 119 [D DC 2003]). The plaintiff is suing in the name of the government and the government "will receive the majority of any recovery in the suit" (*id.*). "Poor litigation practices by [the plaintiff] could harm [the government] by raising a res judicata bar to a later action by the government or otherwise prejudicing its interest" (*id.*).

Here, the State limits the scope of its Statement of Interest to items relevant to preserving its interests, and does not involve the factual issues raised in this declined case. In particular, the Statement of Interest challenges defendants' position that abandoned property report audits by the Comptroller

are administrative actions requiring dismissal under State Finance Law §190(9)(a)(i). The Statement of Interest "assists the Court in acting in the broader context of [NYFCA] jurisprudence, and does not seek to participate directly in the suit by discussing the merits of Relator's complaint" (see *id.* at 120). Thus, the motion for leave to file the Statement of Interest is granted.

### **Motions to Dismiss**

As stated, defendants seek to dismiss the Second Amended Complaint on various grounds. It is well established that on a motion to dismiss, pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (see CPLR 3026; *Leon v Martinez*, 84 NY2d 83, 87 [1994]). The court must accept the facts alleged in the complaint as true, accord the plaintiff the benefit of every favorable inference, and determine whether the facts as alleged fit within any legally cognizable legal theory (*Leon v Martinez, supra*). The court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint, and "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*id.*, quoting *Guggenheimer v Ginsburg*, 43 NY2d 268 [1977]).

### **NYFCA's Administrative Action Bar**

Defendants argue that TARS's claims are barred under State

Finance Law §190(9)(a), which states, in part, that “[t]he court shall dismiss a qui tam action under this article if: (i) it is based on allegations or transactions which are the subject of a pending civil action or an administrative action in which the state or local government is already a party . . . .” Defendants essentially assert that an audit of their life insurance escheatment practices initiated by the Comptroller in May 2011, and the letters from the Insurance Department requesting special reports, constitute “administrative action in which the state or local government is already a party” within the meaning of State Finance Law §190(9)(a), which present a bar to this *qui tam* action under NYFCA.

Research reveals no case law specifically addressing State Finance Law §190(9)(a). Thus, the court must determine what qualifies as “administrative action in which the state or local government is already a party” within the meaning of §190(9)(a), a matter of statutory construction.

In matters concerning statutory interpretation, the court’s primary consideration is to discern and give effect to the Legislature’s intention (*Rodriguez v City of New York*, 31 NY3d 312, 317 [2018]). The Court must turn first to the plain language of the statute as the best evidence of legislative intent (*Malta Town Ctr. I, Ltd. v Town of Malta Bd. of Assessment Review*, 3 NY3d 563, 568 [2004]). It is well settled that “where

the statutory language is clear and unambiguous, the court should construe it so as to give effect to the plain meaning of the words used" (*Patrolmen's Benevolent Assn. of City of N.Y. v City of New York*, 41 NY2d 205, 208 [1976]).

State Finance Law §190(9)(a) directs that a court must dismiss a *qui tam* action if it is based on allegations or transactions which are the subject of, among other things, "a civil action" or "an administrative action in which the state or local government is already a party . . . ." The statute does not define the term "administrative action." In the absence of a statutory definition, the court will "construe words of ordinary import with their usual and commonly understood meaning, and in that connection have regarded dictionary definitions as useful guideposts in determining the meaning of a word or phrase" (*Yaniveth R. Ex rel. Ramona S. v LTD Realty Co.*, 27 NY3d 186, 192 [2016]).

According to Black's Law Dictionary, "administrative acts" are "[t]hose acts which are necessary to be done to carry our legislative policies and purposes already declared by the legislative body or such as are devolved upon it by the organic law of its existence" (Black's Law Dictionary 43 [5<sup>th</sup> ed. 1979][citations omitted]). Furthermore, the term "action," in its usual legal sense, means:

"[A] suit brought in a court; a formal

complaint within the jurisdiction of a court of law . . . . The legal and formal demand of one's right from another person or party made and insisted on in a court of justice. An ordinary proceeding in a court of justice by which one party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense. It includes all the formal proceedings in a court of justice attendant upon the demand of a right made by one person of another in such court, including an adjudication upon the right and its enforcement or denial by the court"

(Black's Law Dictionary 26, *supra* [citations omitted]). In addition, a "party," in legal parlance, refers to "those by or against whom a legal suit is brought, whether in law or in equity, the plaintiff or defendant, whether composed of one or more individuals and whether natural or legal persons" (Black's Law Dictionary 1010, *supra*); see also *United States ex rel. Capella v United Techs. Corp.*, 1999 WL 464536 at \*7).

Guided by these definitions, it seems unlikely that the legislature intended an audit of defendants' life insurance escheatment practices initiated by the Comptroller, and a request for special reports by the Insurance Department, to constitute an "administrative action in which the state or local government is already a party" within the meaning of State Finance Law §190(9)(a)(i). The statute refers to both "a civil action" and "an administrative action." Reading "civil action" and "administrative action" together, along with the requirement that

the State is already a "party" to either of those actions, the Court can easily ascertain that the Legislature intended to bar *qui tam* actions that were already subject to formal proceedings in which the State was a party. Neither the audit of defendants' life insurance escheatment practices initiated by the Comptroller, nor the request for special reports by the Insurance Department, amounts to a formal proceeding in which the State is already a party.

The court is not persuaded by defendants' proffer of cases from Delaware and Florida, essentially holding that audits of a company's compliance with unclaimed property laws are "administrative proceedings." In those cases, the "administrative proceedings" resulted in comprehensive settlements designed to resolve all outstanding claims under the states' unclaimed property and insurance laws. That is not the case here. Furthermore, in construing its State's FCA, at least one other jurisdiction has held that an audit is neither a "civil suit" nor an "administrative civil money penalty proceeding" (see *People ex rel. Lindblom v Sears Brands, LLC*, 2018 IL App 1<sup>st</sup> 171468 [Ill App 2018]). Thus, the branch of the motions that seek to dismiss the Second Amended Complaint based on NYFCA's administrative action bar is denied.

#### **Statute of Limitations**

A civil action under the NYFCA must be commenced "no later

than ten years after the date on which the violation of this article is committed" (State Finance Law §192[1]). Under the NYFCA, an action commences when the plaintiff files a complaint (see *id.*; *Wilcox v Credit Suisse*, 2015 WL 7008109, \*2 [Sup Ct, NY County 2015]).

TARS filed the Complaint in this action on December 3, 2010, alleging claims against AXA and Metlife. As stated, TARS claims that from April 1, 1986, to April 1, 2010, defendants failed to escheat approximately \$4,835,952,000 to New York and report the escheatment. Thus, any claims against those defendants based on the failure to report or escheat prior to 2000 are barred by the statute of limitations. For the same reason, the assertions that between 1992 and 2000, MetLife, Prudential, and AXA defendants failed to report and escheat insurance proceeds resulting from demutualization are time-barred.

The Amended Complaint, filed on October 13, 2011, added defendants TIAA, John Hancock, Guardian, Genworth, MassMutual, and NY Life. Any claims for relief based on those defendants failure to report or escheat prior to October 2001 are similarly time-barred.

TARS's attempt to use §1400 of the APL to preserve its untimely claims is fruitless. Section 1400 states:

"The expiration of any period specified by law, during which an action or proceeding may be commenced or enforced to secure payment of

a claim for money or recovery of property, shall not prevent any such money or property from being deemed abandoned property, nor affect any duty to file a report required by this chapter or to pay or deliver to the state comptroller any such abandoned property; and shall not serve as a defense in any action or proceeding by or on behalf of the state comptroller to compel the filing of any report or the payment or delivery of any abandoned property required by this chapter or to enforce or collect any penalty provided by this chapter."

Here, however, the Second Amended Complaint alleges that defendants knowing made, used, or caused to be made or used false records or statements to conceal, avoid, or decrease an obligation to pay or transmit money to the comptroller in violation of §189(1)(g) of NYFCA. As stated, the statute is governed by a 10-year statute of limitations.

Likewise, the doctrine of "continuous violation" does not render timely TARS's stale claims. Section 703 of the APL requires insurance companies to file annual reports regarding unclaimed insurance proceeds, and does not provide for "continuous performance over a period of time" (see *Beller v William Penn Life Ins. Co. of New York*, 8 AD3d 310, 314 [2d Dept 2004]).

#### **Sufficiency of the Pleadings**

Defendants argue that the Second Amended Complaint fails to allege a viable NYFCA claim. In order to state a viable claim

under the NYFCA, TARS must allege facts showing that defendants "knowingly" made, used, or caused to be made or used, "a false record or statement material to an obligation to pay or transmit money or property to the state or local government" (State Finance Law §189[1][g]; *People v Sprint Nextel Corp.*, *supra*). Furthermore, in order to recover under the NYFCA, TARS must demonstrate that the State "was owed a specific legal obligation at the time that the alleged false record or statement was made, used, or caused to be made or used" (*People ex rel. Schneiderman v Bank of New York Mellon Corp.*, 40 Misc 3d 1232[A], \*30 [Sup Ct, NY County 2013]). "[A] defendant must have had a present duty to pay money or property that was created by a statute, regulation, contract, judgment, or acknowledgment of indebtedness" (*id.*). In other words, the duty "must have been an obligation in the nature of those that gave rise to actions of debt at common law for money or things owed" (*id.*).

In order to allege a reverse false claim under the NYFCA, TARS must state facts tending to show (1) that the defendant made, used, or caused to be made or used a record or statement to conceal, avoid, or decrease an obligation to the government; (2) that the statement or record was false; (3) that the defendant knew that the statement or record was false; and (4) that the State suffered damages as a result (*State ex rel. Seiden v Utica First Ins. Co.*, 96 AD3d 67, 71-72 [1<sup>st</sup> Dept 2012]). In addition,

TARS must state a reverse false claim with particularity (*id.*).

Thus, in order to state a viable claim under the NYFCA, TARS must allege facts to establish that defendants had an obligation to report and remit specific insurance proceeds to the State, but that defendants knowingly submitted false reports omitting those insurance proceeds.

The NYFCA imposes an obligation on insurers to report and remit, among other things, insurance proceeds that "have remained unclaimed by the person or persons entitled thereto for three years." TARS bases its claim on defendants' purported failure to use the Social Security Administration's Death Master File (DMF) to locate beneficiaries of deceased insureds, and to report and escheat to the State any funds unclaimed by beneficiaries.

However, TARS does not allege facts showing that defendants had an obligation to use the DMF, for reporting and escheatment purposes, when this action was commenced. When TARS commenced this action in 2010, there was no requirement that insurance companies actively search the list of deaths.

As stated, New York did not mandate that insurance companies actively search the list of recent deaths until April 2012, when the Superintendent of Insurance promulgated a regulation requiring that insurance companies use the DMF to locate deceased insureds (see 11 NYCRR 226 [Insurance Regulation 200]). Effective June 15, 2013, the Legislature enacted legislation

requiring insurers to use the DMF to cross-check every policy and account (see Insurance Law §3240[d]). Prior to the legislation, there was no obligation on an insurer to pay until receipt of notice and proof of death of an insured (see *Connor v New York Life Ins. Co.*, 179 App Div 596, 599 [2d Dept 1917]).

Moreover, Insurance Law §3240(f)(3) expressly states that "[n]othing herein shall prevent an insurer from requiring satisfactory proof of loss, such as a death certificate, for verifying the death of an insured . . . ." TARS' assertion that death alone, not proof of death, triggers the three-year dormancy period of the escheatment requirement under section 700 of the APL lacks merit. The pleadings do not allege that any of the defendants received notice and proof of death of any insureds.

Nor does TARS allege facts showing that defendants "knowingly" made, used, or caused to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the State. As stated, the NYFCA defines "knowingly" as having "actual knowledge," "deliberate ignorance of the truth or falsity," or "reckless disregard of the truth or falsity" of the information (State Finance Law §188[3][a]). "[A]cts occurring by mistake or as a result of mere negligence are not covered" by the NYFCA (State Finance Law §188[c][b]). The conclusory, general facts alleged in the pleadings do not show that defendants knowingly made false statements to avoid

their escheatment obligations.

The assertions regarding the adequacy of defendants' records and the use of the DMF for annuities are unavailing. The APL requires an insurance company to escheat unclaimed moneys payable to persons in the State "according to the records of the corporation" (McKinney's Abandoned Property Law §700[1]).

Furthermore, TARS fails to satisfy the particularity requirement applicable to pleadings arising under the NYFCA (see *State ex rel. Seiden v Utica First Ins. Co., supra*. A fraud claim asserted against multiple defendants must include specific and separate allegations for each defendant (see *Abdale v North Shore-Long Island Jewish Health Sys.*, 49 Misc 3d 1027, 1043 [Sup Ct, Queens County 2015]).

Here, the pleadings contain no specific allegations regarding any of the defendants, and refer generally to all defendants. Plaintiff alleges, among other things, that defendants "violated their duty to report and escheat life insurance policy proceeds" from deceased policy holders under the APL; that defendants "knew or should have known that the policy holders were deceased;" that analysis of defendants' data revealed that defendants "either intentionally, recklessly, or with deliberate ignorance of the truth maintain their records in a way that ensures that tens of thousands of policies will never be deemed escheatable under New York law;" that defendants'

"policies and procedures are inadequate to identify all policies that should have been escheated to New York;" and that defendants' "representations to New York on their annual holder reports were each materially false and misleading in that [defendants] know that they are failing to escheat policy proceeds for insureds that have been deceased beyond the three-year period or beyond the limiting age" (Second Amended Complaint, Schick aff, exhibit 8, NYSCEF Doc. No. 19).

TARS fails to (1) identify facts specifically relating to defendants and their fraudulent conduct, (2) identify the specific false reports that were submitted by defendants to the State, or (3) allege facts establishing that defendants knew that they submitted false unclaimed property reports to the State (see *State ex rel. Seiden v Utica First Ins. Co., supra*).

Contrary to TARS's assertion, State Finance Law §192(1-a) does not relieve a *qui tam* plaintiff of an obligation to plead facts with particularity. Rather, it only relieves the plaintiff of the obligation "to identify specific claims that result from an alleged course of misconduct." "Plaintiff must state a reverse false claim with particularity" (*State ex rel. Seiden v Utica First Ins. Co., supra*). Thus, the Second Amended Complaint must be dismissed.

The request for leave to further amend the pleading is denied. Although leave to amend shall be freely given upon such

terms as are just (CPLR 3025[b]), TARS has twice amended its pleading and, yet, its allegations are insufficient to state a claim for violation of the NYFCA. Any further amendment would be futile (see *Triad Intl. Corp. v Cameron Indus., Inc.*, 122 AD3d 531, 532 [1<sup>st</sup> Dept 2014]).

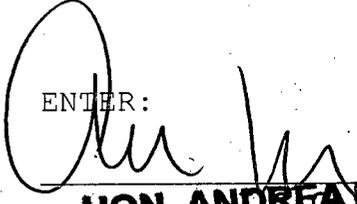
Accordingly, it is

ORDERED that the motion of the State of New York to file a statement of interest in this action is granted; and it is further

ORDERED that the motions of defendants to dismiss the second amended complaint for failure to state a cause of action is granted and the Clerk is directed to enter judgment in favor of defendants dismissing this action, together with costs and disbursements, as taxed by the Clerk upon presentation of a bill of costs.

Dated: 3/29/19

ENTER:

  
**HON. ANDREA MASLEY**