

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA**

<b>KATHLEEN SCHAFER</b>	:	<b>CIVIL ACTION NO. 06-8262</b>
<b>Wife of/and GORDON SCHAFER</b>	:	
	:	<b>SECTION “K” (2)</b>
<b>Versus</b>	:	
	:	<b>JUDGE DUVAL</b>
<b>STATE FARM FIRE &amp; CASUALTY</b>	:	
<b>COMPANY</b>	:	<b>MAGISTRATE WILKINSON</b>

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**REPLY MEMORANDUM IN SUPPORT OF XACTWARE’S MOTION  
TO DISMISS AND TO STRIKE CLASS ALLEGATIONS**

The opposition memoranda filed by Plaintiffs demonstrate why the claims against Xactware, Inc. (“Xactware”) are fatally flawed and must be dismissed. Instead of confronting the arguments and authorities raised by Xactware, Plaintiffs continue to rely on hyperbole and deflection. In the case of their negligence claim, Plaintiffs argue that the Louisiana Products Liability Act applies even though the Amended Complaint never mentions the Act or alleges facts to support a products liability claim. Likewise, with respect to their fraud and horizontal price fixing claims, Plaintiffs remain unable explain how their allegations suggest a plausible conspiracy. These flaws, together with the many other deficiencies discussed below and in the other moving papers filed by Xactware and State Farm, require that Plaintiffs’ claims be dismissed.

**A. Plaintiffs Admit They Have No Breach of Contract Claim Against Xactware.**

In its motion, Xactware sought dismissal of the breach of contract claims alleged in Counts 2 and 5 of the Amended Complaint to the extent they pertained to Xactware. In their opposition memorandum, Plaintiffs contend that they “have not, and do not, allege a breach of contract claim against Xactware.” Opp. Mem. at 19 n. 79. However, Count 5 is specifically directed to “defendants” generally and, therefore, applies to Xactware by its terms. Given their concession, however, Plaintiffs presumably do not oppose dismissing Count 5 as to Xactware.

**B. Plaintiffs Cannot Prevail On A Products Liability Act Theory of Liability.**

In *Barrie v. V.P. Exterminators, Inc.*, 625 So.2d 1007, 1015 (La. 1993), the Louisiana Supreme Court held that a duty may exist when someone knows that its information will be shared with, and relied upon, by a plaintiff who was part of “a limited group for whose benefit and guidance” the information was supplied. *See also* Restatement (Second) of Torts § 552(1) cmt. (h) (1977). Plaintiffs do not dispute that Xactware had no way of knowing whether its pricing data would be shared with, or relied on by, Plaintiffs or as to how State Farm (or any other insurers) would use that information to adjust individual claims. They also do not argue that they were part of a “limited group for whose benefit and guidance” the pricing data was supplied.

Rather, in their opposition brief, Plaintiffs claimed that Xactware owed them a duty under the Louisiana Products Liability Act (“LPLA”), La. Rev. Stat. 9:2800.52 *et seq.* Yet the Amended Complaint makes no mention of the LPLA and contains none of the allegations one would ordinarily expect to see in a products liability case. *Stahl v. Novartis Pharmaceuticals Corp.*, 283 F.3d 254, 261 (5<sup>th</sup> Cir. 2002). The Amended Complaint does not identify a defective

“product.” Nor do Plaintiffs allege facts to support liability under the LPLA based on a defect in design or construction, inadequate warnings, or nonconformity with express warranties.<sup>1</sup>

The absence of these allegations is not surprising. The LPLA has no application to the facts of this case. The term “‘products liability’ means liability in tort of a manufacturer for personal injury and property damage caused by his product.” John Kennedy, A Primer on the Louisiana Products Liability Act, 49 La. L. Rev. (1989).<sup>2</sup> Here, Plaintiffs are not complaining that the price lists damaged their person or property. They are claiming that State Farm should have paid them more money for repair costs and materials based on the terms of their insurance policy. Seeking to recover damages based on the sufficiency of performance under a contract is very different than claiming that a product caused damage to your person or property.<sup>3</sup>

In short, Plaintiffs cannot defeat a Rule 12(b)(6) motion by raising theories of liability which have never been asserted. Further, any effort to amend the negligence claim to assert facts sufficient to support the existence of a duty under *Barrie* would be doomed to failure. Unlike the

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<sup>1</sup> *Stahl* explains the standards for liability under these theories as follows:

To maintain a “construction or composition” defect claim under the LPLA, a plaintiff must establish that, at the time the product left the manufacturer's control, “the product deviated in a material way from the manufacturer's specifications or performance standards for the product or from otherwise identical products manufactured by the same manufacturer.” La.Rev.Stat. Ann. § 9:2800.55 (West 1997). To maintain a failure-to-warn claim, a plaintiff must demonstrate that “the product possessed a characteristic that may cause damage and the manufacturer failed to use reasonable care to provide an adequate warning of such characteristic and its danger to users and handlers of the product.” *Id.* § 9:2800.57 (West 1997). Proving a design defect or a “construction or composition” defect is not a prerequisite to establishing a failure-to-warn claim. Even if a product is not defectively designed or constructed, a manufacturer “may still have a duty to warn consumers about any characteristic of the product that unreasonably may cause damage.” *Grénier v. Med. Eng'g Corp.*, 243 F.3d 200, 205 (5th Cir.2001).

*Id.*

<sup>2</sup> John Kennedy, the author of the article, drafted the Louisiana Products Liability Act together with Professor H. Alston Johnston III. During the session in which the legislation was enacted, Kennedy worked for its passage as Special Counsel to Governor Buddy Roemer. A copy of the article is attached as Exhibit 1.

<sup>3</sup> Plaintiffs may not pursue an LPLA claim under a general negligence theory of liability. The LPLA represents an exclusive theory of liability against manufacturers for product claims. *See Stahl*, 283 F.3d at 261-62. For the same reason, in the unlikely event Plaintiffs are permitted to pursue a LPLA claim against Xactware in lieu of their negligence claim, it can easily dispense with fraud and horizontal price fixing conspiracy claims. *Id.*

strict liability provisions of the LPLA, a negligence claim based on misinformation requires evidence of reliance. Plaintiffs do not, and cannot, allege that they relied on pricing information that Xactware collected and provided to State Farm. The entire point of this lawsuit is that Plaintiffs disputed the State Farm adjustments and concomitant pricing from the outset.

**C. Plaintiffs Support Their Fraud Claim With Nothing But A Legal Conclusion.**

Plaintiffs also have fallen far short of meeting the pleading standards recently established in *Bell Atlantic Corp. v. Twombly*, \_\_\_ U.S. \_\_\_, 127 S.Ct. 1555 (2007). In *Twombly*, the Supreme Court ruled that a complaint must contain “more than labels and conclusions, and a formulaic recitation of elements of a cause of action. Factual allegations must be enough to raise a right to relief above the speculative level.” *Id.* at 1964-65 (citations omitted). Perhaps aware that this pleading standard poses serious problems for their fraud claim, Plaintiffs dedicated only a single paragraph in more than 35 pages of briefing to salvaging the claim. In that paragraph, Plaintiffs do not cite any case law to support their position or respond to the arguments and authorities appearing in the Xactware brief. Instead, they hinge their claim on Paragraphs 53 and 54 of the Amended Complaint, claiming that those allegations are enough to state a claim for fraud.<sup>4</sup> Yet Paragraphs 53 and 54 contain nothing more than a broad unsupported pronouncement of fraud.

In Paragraphs 53 and 54, Plaintiffs allege that Xactware and State Farm “intentionally colluded,” but offer no factual underpinning to support this legal conclusion. Instead, they claim

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<sup>4</sup> Paragraphs 53 and 54 of the Amended Complaint state in their entirety:

53.

At all material times, Xactware and State Farm intentionally colluded to keep down the prices of its price lists in the Xactimate system. In particular, Xactware knowingly accepted lower altered prices (as shown in paragraph 25) as well as, upon information and belief, other pricing data from State Farm for use in the Xactimate program.

54.

At all material times, Xactware and State Farm were able to perpetuate the fraud by basing its price lists, in whole or in part, on settled claim amounts submitted by State Farm and/or its agents.

that collusion can be inferred because they allege that Xactware accepted “lower altered prices” and “other pricing data from State Farm” and at least some of the pricing data was based on settled claims. However, Plaintiffs point to no provision in their policy or law which prohibited State Farm from modifying whatever pricing data it received from Xactware. They also fail to explain why pricing data based on settled claims should have been disregarded by Xactware and State Farm. Thus, the conduct alleged in Paragraphs 53 and 54 is suggestive of nothing more than ordinary commercial conduct. In any event, to maintain their claim *against Xactware*, Plaintiffs also would have to allege that Xactware at the very least knew that State Farm intentionally misled policyholders. Plaintiffs never make these allegations.

Plaintiffs allege only that “Xactware knew or should have known that State Farm was using its price lists to issue damage estimates with a representation that Xactware was [an] impartial, third party company.” Amended Compl. ¶ 50. Representing that Xactware is an impartial company is not the equivalent of alleging that State Farm had no involvement or decision-making authority in the development of the pricing data. Moreover, Plaintiffs do not allege any facts to suggest that Xactware is not an impartial, third party company. Instead, they make the innocuous assertion that Xactware “works closely with” its insurer customers. Even assuming Plaintiffs and other insured has any idea that Xactimate even existed, there is no basis for suggesting that Xactware “working closely with” insurers would be a material (or even relevant) fact. It also says nothing about whether Plaintiffs actually relied on any alleged representation relating to Xactimate, an allegation also missing in Plaintiffs’ negligent misrepresentation claim.

Consequently, the fraud claim must ultimately fail. Plaintiffs have not alleged the facts necessary to support the inference that State Farm and Xactware conspired to defraud them or anyone else. Plaintiffs also were never misled by the alleged fraud.

**D. Plaintiffs Lack Antitrust Standing to Pursue Their Price Fixing Claim.**

In the aftermath of Katrina and Rita, Plaintiffs and other insureds had by definition already selected their insurers from the competitive market. Consequently, in its motion papers, Xactware argued that the horizontal price fixing conspiracy made no economic sense because the insurance companies were not competing with respect to how the property damage claims arising from those natural disasters were handled. In their opposition memorandum, Plaintiffs responded to this argument by describing the insurance companies as competing “buyers of services” and asserting that they conspired to “lower the amount paid (through the insured) for repair services.” Opp. Mem. to Motion to Dismiss, at p. 14. However, shifting the object of the conspiracy from fixing how claims were adjusted to fixing “the amount paid for insurance services” creates an insurmountable standing problem for Plaintiffs who stood to benefit from lower repair service prices and were at best only indirectly impacted by the alleged conspiracy.

To maintain an antitrust action, a plaintiff must show that he suffered an “antitrust injury”; that is, an injury which is “of the type that the antitrust laws were intended to prevent, and that flows from that which makes defendants' acts unlawful.” *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 697 (1977). In the context of a price-fixing conspiracy among sellers, this means that competitors lack standing to challenge price fixing conspiracies that “would either leave [the competitor] in the same position as would market forces or would actually benefit respondents by raising market prices.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 584 n. 8, 106 S.Ct. 1348, 1355 n. 8 (1986). The same

principles hold true for a conspiracy among competing purchasers where the alleged conspiracy either had no impact on or benefited other purchasers of the same goods and services.

When it came to the purchasing of repair services and materials, the insurance companies and Plaintiffs had aligned interests. Lower prices meant that the insurance companies would pay less in claims, while plaintiffs would pay lower prices for uninsured repairs. Plaintiffs also stood to pay lower insurance premiums as the insurance companies paid out less in claims. Further, while Plaintiffs contend that they suffered harm because they were unable to effect repairs at the below market pricing allegedly offered by State Farm and its unidentified co-conspirators, this claim has nothing to do with the anticompetitive effects of the alleged “price fixing” conspiracy which, if anything, would lower the amounts paid to firm’s selling repair services and materials. Plaintiffs are not in the market of providing repair services and materials, and therefore had nothing more than an indirect interest in the effects, if any, of an alleged conspiracy to suppress the prices charged by sellers in that market.

The decision in *Hughes v. Tobacco Institute*, 278 F.3d 472 (5<sup>th</sup> Cir. 2002) is instructive. There, a consumer plaintiff brought an antitrust claim against tobacco manufacturers alleging that they had raised the prices of cigarette by coordinating tobacco research on the safety of tobacco and other products such as the “safer cigarette.” *Id.* at 422. The district court dismissed the complaint on standing grounds finding that “allowing consumers who purchased goods from distributors who could bring their own suits would result in two sets of plaintiffs recovering from the defendant for the same acts.” *Id.* at 422-23. The Fifth Circuit affirmed.

The result in this case should be the same as *Hughes*. The plaintiff policyholders were not the targets of the alleged conspiracy but only intermediaries. Any competitive harm flowing from the alleged conspiracy to lower service prices would have been suffered by the service

providers. As such, the service providers are better situated to challenge the alleged conspiracy, particularly when the policyholders stood to benefit from lower repair service prices.

**E. Plaintiffs Cannot Meet the Plausibility Standard in *Twombly*.**

In *Twombly*, the Court held that stating an antitrust conspiracy claim “requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made.” In discussing this requirement, the Court noted that the alleged agreement must be “plausible” and that something more than mere parallel behavior is needed. 127 S.Ct. at 1965-66. The plaintiff must allege facts which suggest something more than “the natural, unilateral reaction of each” competitor. *Id.*; *see id.* at 1966 (“Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality. Hence, when allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.”).

Plaintiffs point to Paragraphs 53 and 54 as the allegations which they claim support maintaining an action against Xactware for horizontal price fixing. However, if the allegations in Paragraphs 53 and 54 are insufficient to support a conspiracy of fraud, they are equally unable to support the notion that Xactware conspired with a host of unnamed insurance companies to fix prices. *Twombly* teaches that the word “colluded” is simply no substitute for facts.

*Twombly* also stands in the way of the overarching claim that the insurance companies conspired to fix repair prices. While Plaintiffs allege an agreement among insurance companies, this allegation amounts to nothing more than the same type of legal conclusion dismissed in *Twombly* as insufficient. Plaintiffs argue that their “plus factor” allegations overcome this deficiency, but a close look at these allegations reveals that they suggest nothing at all about

whether insurance companies were operating in an environment where price fixing represented an attractive, or even plausible, option. *Lum v. Bank of America*, 361 F.3d 217, 229-230 (3d Cir. 2004) (“The law is settled that proof of consciously parallel business behavior is circumstantial evidence from which an agreement, tacit or express, can be inferred but that such evidence, without more, is insufficient unless the circumstances under which it occurred make the inference of rational independent choice less attractive than that of concerted action.”).

For example, Plaintiffs make the extraordinary claim that the “structure of the market as described in the Amended Complaint” supports their conspiracy claim. Yet the Amended Complaint does not identify a market let alone describe how the undefined market is structured. What Plaintiffs appear to be speaking to when they claim that the market structure is conducive to conspiracy is their allegation that “insurance companies actively coordinated their actions through various organizations and associations.” Amended Compl. ¶ 35. However, the prevalence of associations and conventions in an industry does not say anything at all about whether the market is concentrated, the extent of entry barriers, existence of potential competitors and other alternative sources of supply, cross elasticity of demand, or any other market structure issues. In the absence of this kind of information, Plaintiffs cannot reasonably claim that their “market structure” allegations are suggestive of a plausible conspiracy.

Further, trade associations are generally viewed as pro-competitive. Consequently, when Plaintiffs claim that they could list a “myriad of property insurer associations and organization[s] which regularly hold meetings and conventions,” they are suggesting nothing more than that they can allege commercial behavior one would expect to see in any industry. Opp. Mem. to Motion to Dismiss at 13. *See Twombly*, 127 S.Ct. at 1971 n. 12 (rejecting suggestion that allegations of mere membership in trade associations are sufficient to suggest an antitrust conspiracy). Indeed,

federal law exempts most insurer collaborations from antitrust scrutiny because of the particular need for legitimate coordination among insurers. 15 U.S.C. § 1011-1015.

Plaintiffs also argue that Paragraph 34 suggests that insurance companies had a motive to conspire when they allege that State Farm “increased [its] profits” by using Xactware pricing data. However, the natural reaction of any insurance company to a disaster like Hurricane Katrina would be to adjust claims rationally using whatever commercially reasonable market data might be available to that insurance company. In fact, the Insurance Commissioner of Louisiana recommended that insurers utilize pricing data collected by third parties. Thus, any motive to use Xactware data did not depend on an insurance company’s participation in the alleged conspiracy. If the insurance companies were just as likely to use Xactware on their own as they would have been in a conspiracy, their motive to use Xactware does not add credence to the conspiracy allegation. *In re Tableware*, \_\_\_ F. Supp. \_\_\_, 2007 WL 781963, at \*16 (C.D. Cal. Mar. 13, 2007) (rejecting argument that a motive to terminate dealer suggested a conspiracy where defendants would have had same motive in the absence of the alleged conspiracy).

Plaintiffs try to deflect attention away from the economic reality that insurance companies had a rational motive for adjusting claims in similar ways by alleging that that it would have been contrary to the interests of the insurance companies to use Xactware pricing data unless they were engaged in a conspiracy. See Amended Compl. ¶ 35. This allegation is grounded in speculation and inconsistent with Plaintiffs’ earlier allegation that insurance companies had an incentive to reduce the amounts paid to policy holders. Further, the allegation merely mimics case law holding that a conspiracy may sometimes be inferred where defendants acted in contradiction of their own economic interests. *See, e.g., Lum*, 361 F.3d at 229-230

(listing plus factors). Thus, viewed in its most favorable light, the allegation represents nothing more than the same type of “formulaic recitation” which *Twombly* warned against.

Finally, Plaintiffs defensively argue that they do not need to name co-conspirators in order to state a plausible conspiracy claim. Although identifying co-conspirators may not be required in all instances, the absence of such allegations must be factored into the determination of whether a complaint states a plausible conspiracy claim. In this case, Plaintiffs have offered no information about the identity or number of insurance companies participating in the alleged conspiracy. They have also said nothing about the scope of the conspiracy, how alleged conspirators are able to police the conspiracy, or any other facts suggestive of a plausible conspiracy to fix prices for repair services and materials. Thus, their failure to identify conspirators is just one more piece of the missing detail necessary to state a claim.

**F. Plaintiffs Concede That Individual Issues Predominate.**

In their opposition brief, Plaintiffs responded to an Article III standing argument by stating that “Plaintiffs allege they, and many other class members, have suffered economic injury in the form of the difference between what they contracted for (Actual cash value payment of covered damaged) and what they actually received (Xactimate calculated repair costs that [are] substantially lower than the actual cash value).” Opp. Mem. to Motion to Dismiss at 19. This statement is significant because Plaintiffs do not contend that *all* class members have suffered economic injury. Rather they suggest quite the contrary by claiming that only “they, and *many other* class members, have suffered economic injury.” Under Fifth Circuit law, the admission that not all class members suffered economic injury is fatal to class certification because individual issues will predominate:

Establishing causation, or “fact of damage,” requires the plaintiff to demonstrate a causal connection between the specific antitrust violation at issue and an injury to

the business or property of the antitrust plaintiff. *Id.* This requirement is in no way lessened by reason of being raised in the context of a class action. Rather, this court has held that the issue of fact of damage “is a question unique to each particular plaintiff and one that must be proved with certainty.” *Id.* at 327. Accordingly, we have repeatedly held that where fact of damage cannot be established for every class member through proof common to the class, the need to establish antitrust liability for individual class members defeats Rule 23(b)(3) predominance

*Bell Atlantic Corp. v. AT&T*, 339 F.3d 294, 302 (5<sup>th</sup> Cir. 2003). Thus, in addition to the other compelling arguments about predominance raised by State Farm, the inability of the Plaintiffs to allege that *all* class members have suffered injury also warrants striking Plaintiffs’ class action allegations.

### **CONCLUSION**

For the reasons stated above and in the other memoranda filed by Xactware and State Farm in support of their respective motions, Xactware requests that the Court dismiss the Amended Complaint with prejudice under Fed. R. Civ. Pro. 12(b)(6).

Respectfully submitted,

*/s/ Mark A. Cunningham*

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing pleading has been served upon all counsel of record by U.S. Mail, properly addressed and postage prepaid, this 11<sup>th</sup> day of June, 2007.

*/s/ Mark A. Cunningham*

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