

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

KATHLEEN AND GORDON SCHAFFER,	*	CIVIL ACTION
	*	
Plaintiffs,	*	NO. 06-8262
	*	
VERSUS	*	SECTION "K"(2)
	*	
STATE FARM FIRE AND CASUALTY	*	JUDGE DUVAL
COMPANY AND XACTWARE, INC.,	*	
	*	MAGISTRATE WILKINSON
Defendants.	*	
*****		

**MEMORANDUM IN SUPPORT OF STATE FARM'S MOTION  
TO DISMISS AND TO STRIKE CLASS ALLEGATIONS**

State Farm Fire and Casualty Company submits this memorandum in support of its motion to dismiss Plaintiffs' Amended Complaint (the "Complaint") pursuant to Rule 12(b)(6). Plaintiffs' Complaint fails to state a claim upon which relief may be granted as to their various claims for horizontal price fixing, breach of contract, negligence, violations of Louisiana insurance law, and fraud. Moreover, the matters of which they complain could never appropriately be resolved through class litigation under Rule 23. Therefore, if the Court does not dismiss all counts of the Complaint, the Court should strike Plaintiffs' class allegations with prejudice pursuant to Rule 23(d)(4).

## I. BACKGROUND

Plaintiffs, Kathleen and Gordon Schafer, initiated this litigation by filing a petition for damages in State court on August 22, 2006. They alleged that their home was damaged during Hurricane Katrina, but when they made a claim under their homeowners insurance policy, State Farm failed to pay them the amount owed. Plaintiffs accused State Farm of misrepresenting the terms of their policy and failing timely to pay their claim, and demanded recovery of damages, penalties, and attorneys' fees.

State Farm removed the case to this Court on October 16, 2006 and filed an answer denying Plaintiffs' allegations on January 8, 2007. On February 22, 2007, Plaintiffs moved for leave to file an amended pleading, which the Court granted.

Plaintiffs have now filed their new Complaint, and through that pleading, they have attempted to transform and inflate their action from a simple contract dispute into a proposed statewide class action alleging "horizontal price fixing" and fraud, among other things. And while they still complain that State Farm failed to pay them what they were owed under their homeowners insurance policy, that contention is based on entirely *different* supposed mishandling of their insurance claim than they alleged in their first petition. Now, Plaintiffs contend that State Farm purchased faulty market data from Xactware – a new defendant here – and then underpaid Plaintiffs' insurance claim.

While Plaintiffs have come up with a new theory for their case, they have not offered the requisite factual allegations to support it, under both notice pleading and Rule 9(b) standards. Their Complaint is utterly silent as to such basic information as when Plaintiffs presented their claim to State Farm, what communications they had with State Farm about their claim, what damage their home sustained, what repairs were needed, whether they ever saw or

questioned any damage estimates prepared by State Farm, whether they ever obtained an estimate from a contractor that demanded higher prices than State Farm had estimated, what they believe they were owed under their policy, the amount by which State Farm supposedly underpaid their claim, *or* even the specific homeowners insurance policy provision that State Farm allegedly breached. Plaintiffs' allegations cannot support even their individual claims, let alone the conclusorily averred claims of horizontal price fixing and fraud.

As for Plaintiffs' class allegations, they seek to represent a class consisting of "all named insureds who received payment for damage to property located in the State of Louisiana, under the terms of homeowner's policies with State Farm, utilizing any Xactimate price since August 29, 2005 until the date of certification." Compl. ¶ 30. Yet it is apparent even from Plaintiffs' skeletal pleading that the claims they seek to assert on behalf of that proposed class could never meet the prerequisites of Rule 23. No proposed class member's claim for underpayment of insurance benefits could possibly be resolved absent an individualized review to determine such essential information as (i) the damage to his or her home; (ii) the home repairs needed; (iii) whether payments made by State Farm were sufficient to repair the home; (iv) whether any repair estimates provided by State Farm included "below market" line items; (v) whether payment to the homeowner was based in whole or in part on such "below market" line items, rather than payment of costs actually incurred; (vi) the communications between State Farm and the proposed class member regarding their homeowners insurance claim; (vii) reliance by the claimant; (viii) the timeliness of State Farm's payments; and (ix) whether delays or errors were arbitrary, capricious, or without reasonable cause. Thus, regardless of this Court's resolution of State Farm's request for dismissal, Plaintiffs' class allegations should be stricken with prejudice.

## **II. LAW AND ARGUMENT**

### **A. Count I Must Be Dismissed for Failure to State a Claim of Price Fixing.**

In Count I of their Complaint, Plaintiffs purport to assert a claim that they label as "horizontal price fixing." This claim must fail because the Plaintiffs do not identify the statutes upon which they base this count, and they have not sufficiently pled facts that would sustain a claim. If their claim is based on federal antitrust law, State Farm's conduct is exempt under the McCarran-Ferguson Act. If they rely on the Louisiana Unfair Trade Practices Act, there is no private cause of action. And if they intended to invoke Louisiana's antitrust statute, the Complaint fails to state a claim on at least three grounds: Plaintiffs have failed to identify even one insurer with which State Farm supposedly has conspired; they have alleged no facts that, if proven, would support an inference of a horizontal agreement among insurers to do anything (much less fix prices); and they have alleged no conduct that would constitute either *per se* illegal "price fixing" or a violation of the "Rule of Reason."

#### **1. Plaintiffs' Claim Cannot Proceed Under Federal Law.**

Plaintiffs' Complaint alleges, without specificity, that State Farm engaged in "price fixing." To the extent Plaintiffs intended to assert that claim under Section 1 of the Sherman Act, 15 U.S.C. § 1, the claim would be barred by the McCarran-Ferguson Act, 15 U.S.C. § 1012-13. While the Sherman Act prohibits contracts, combinations, or conspiracies that unreasonably restrain trade, McCarran-Ferguson precludes application of the Sherman Act to conduct that constitutes the business of insurance and is regulated by State law. Here, Louisiana has enacted laws comprehensively regulating the business of insurance, and insurers'

claim handling activities clearly fall within the "business of insurance." *See* La. R.S. 22:1211, *et seq.*<sup>1</sup>

**2. Plaintiffs Cannot Assert a Claim Under the Louisiana Unfair Trade Practices and Consumer Protection Law.**

Anti-competitive conduct, including horizontal price fixing, is also prohibited under Louisiana's Unfair Trade Practices and Consumer Protection Law (the "LUTPA"). *See* La. R.S. 51:1405 ("Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful"). If Plaintiffs intended to base their claim in Count I on *this* statute, however, their claim is barred yet again.

Section 1406 of the LUTPA expressly states that the statute "*shall not apply to . . . transactions subject to the jurisdiction of*" the Louisiana Insurance Commissioner. *See* La. R.S. 51:1406(1) (emphasis added). As this Court has recognized, Section 1406 bars claims by consumers that purport to attack conduct falling within the scope of the Insurance Commissioner's authority. *See Moore v. State Farm Mut. Auto Ins. Co.*, 439 F. Supp. 2d 615, 619 (E.D. La. 2006) (where plaintiff's allegations essentially amounted to an unfair trade practice claim against an insurer under the LUTPA, claim was due to be dismissed because the challenged conduct fell within the Insurance Commissioner's purview).<sup>2</sup> Here, the complained-

---

<sup>1</sup> *See also Lawyer's Realty Corp. v. Peninsular Title Ins. Co.*, 428 F. Supp. 1288, 1292 (E.D. La. 1977) (federal antitrust conspiracy claim barred by the McCarran-Ferguson Act in light of Louisiana's regulation of the business of insurance); *Gilchrist v. State Farm Mut. Auto. Ins. Co.*, 390 F.3d 1327, 1330-34 (11th Cir. 2004) (performance of insurers' contractual duties constitutes the "business of insurance" for purposes of the McCarran Act).

<sup>2</sup> *See also S. Gen. Agency, Inc. v. Safeway Ins. Co. of La.*, 769 So. 2d 606, 608 (La. App. 3d Cir. 2000) (same); *Alarcon v. Aetna Cas. & Sur. Co.*, 538 So. 2d 696, 699-700 (La. App. 5th Cir. 1989) (dismissing LUTPA claim of unfair competition based on insurer's alleged failure to pay homeowners insurance benefits because the insurer's alleged conduct fell within the Louisiana insurance commissioner's authority). In *Lamarque v. Massachusetts Indem. Life Ins. Co.*, 794 F.2d 197, 198 (5th Cir. 1986), the court held that plaintiffs could pursue an

of conduct is plainly within the jurisdiction of Louisiana's insurance commissioner. *See, e.g.*, La. R.S. 22:1211, *et seq.*<sup>3</sup>

**3. Plaintiffs Have Not Alleged Facts Sufficient to State a Section 122 Conspiracy Claim.**

In addition to the LUTPA, price fixing is also prohibited by Section 122 of Louisiana's Trade and Commerce Code, which makes illegal "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce" within the State. La. R.S. 55:122. If Plaintiffs seek to bring their "horizontal price fixing" claim pursuant to this statute, however, it must be dismissed because of their failure to allege sufficient facts to support such a claim.

**a. The Pleading Standard.**

While the "notice pleading" standard generally applies to state antitrust claims brought in federal court, "conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." *Aucoin v. Kennedy*, 355 F. Supp. 2d 830, 836 (E.D. La. 2004) (quoting *Fernandez-Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 284 (5th Cir. 1993)). Thus, the courts repeatedly have recognized that a plaintiff asserting an antitrust claim "must allege 'sufficient facts to support a cause of action under the antitrust laws.'" *See, e.g., In re Pabst Licensing, GMBH Patent Litig.*, 2000 WL 11456725 at \*3 (E.D. La. 2000) (quoting *TV Communications Network, Inc. v. Turner Network Television, Inc.*, 964 F.2d 1022,

---

unfair trade practice claim against an insurer despite the exemption set forth in Section 1406 of the LUTPA. Since then, however, *Lamarque* has repeatedly been criticized and rejected in Louisiana state appellate decisions. *See Travelers Indem. Co. v. Powell Ins. Co.*, 1996 WL 578030 at \*4-5 (E.D. La. 1996) (citing extensive cases).

<sup>3</sup> Louisiana jurisprudence recognizes that only the Louisiana Insurance Commissioner has standing to assert claims under the Unfair Trade Practices sections of the Insurance Code, La. R.S. 22:1214. *Riley v. Transamerica Ins. Group Premier Ins. Co.*, 923 F. Supp. 882, 888 (E.D. La. 1996); *Klein v. Am. Life & Cas. Co.*, 858 So. 2d 527, 533 (La. App. 1st Cir. 2003).

1024 (10th Cir. 1992), *cert. denied*, 506 U.S. 999 (1992)).<sup>4</sup> As one court explained when dismissing an inadequately pleaded antitrust claim:

[T]he price of entry, even to discovery, is for the plaintiff to allege a *factual* predicate concrete enough to warrant further proceedings, which may be costly and burdensome. Conclusory allegations in a complaint, if they stand alone, are a danger sign that the plaintiff is engaged in a fishing expedition.

*DM Research, Inc. v. College of Am. Pathologists*, 170 F.3d 53, 55 (1st Cir. 1999) (emphasis original).

As these authorities make clear, a plaintiff asserting an antitrust conspiracy claim pursuant to Section 122 first must plead facts sufficient to demonstrate the existence of a conspiracy. *Abraham v. Richland Parish Hosp. Serv. Dist.*, 938 So. 2d 1163, 1172 (La. App. 2d Cir. 2006).<sup>5</sup> In addition, the plaintiff must identify the particular market in which competition allegedly has been unreasonably restrained and, unless the conduct alleged is "per se" illegal, must also allege facts demonstrating that an anticompetitive effect has occurred within that market. *Id.*; *see also Broyles v. Wilson*, 812 F. Supp. 641 (M.D. La. 1993) ("Market definition is essential to make out an antitrust claim"). Plaintiffs' Complaint meets none of these requirements.

**b. Plaintiffs' Allegations of "Horizontal" Conspiracy are Wholly Conclusory.**

Under the antitrust laws, a "horizontal" conspiracy is an agreement among competitors in a market. *See Mulhearn v. Rose-Neath Funeral Home, Inc.*, 512 F. Supp. 747,

---

<sup>4</sup> *See also Heart Disease Research Found'n v. General Motors Corp.*, 463 F.3d 98, 100 (2d Cir. 1972) ("a bare bones statement of conspiracy or of injury under the antitrust laws without any supporting facts permits dismissal").

<sup>5</sup> Section 122 is a "counterpart" of Section 1 of the Sherman Act and, accordingly, federal decisions interpreting Sherman Act § 1 claims provide useful guidance when interpreting and applying Section 122. *Id.*

754 (W.D. La. 1981). Here, there are no facts alleged in Plaintiffs' Complaint to support an inference that State Farm conspired with *any* competing insurer.<sup>6</sup>

**i. No Horizontal Co-Conspirator is Identified.**

To begin with, Plaintiffs do not identify even one insurer by name as an alleged "conspirator" with State Farm. State Farm's only co-defendant in this action is Xactware, but Plaintiffs recognize that Xactware is not an insurer in competition with State Farm. *See* Compl. ¶¶ 13, 18. Allegations of a horizontal conspiracy that do not name a *single allegedly conspiring competitor* of the defendant simply cannot survive on a motion to dismiss. *See Cayman Exploration Corp. v. United Gas Pipe Line Co.*, 873 F.2d 1357, 1361 (10th Cir. 1989) (dismissing antitrust claim on Rule 12(b)(6) motion where, among other things, plaintiff "did not identify the alleged conspirators" or "when or how they functioned").

**ii. Mere "Conscious Parallelism" Does Not Suggest Agreement.**

Plaintiffs' Complaint further is deficient in that their factual allegations do not suggest anything more than mere "consciously parallel conduct" among State Farm and other insurers, which is not actionable under the antitrust laws. Specifically, Plaintiffs allege that State Farm "acted conscious of other competing insurance companies' actions in using the Xactimate program," and that State Farm engaged in that parallel conduct intentionally. *See* Compl. ¶ 33. It long has been recognized, however, that mere "parallel" conduct among competitors in a marketplace – even where such parallel action is purposefully undertaken by competitors – is commonplace and wholly insufficient by itself to suggest a conspiracy. *See Theatre Enterps.*,

---

<sup>6</sup> Based on Plaintiffs' allegations, State Farm does not understand Plaintiffs to be asserting a claim based on the purely vertical agreement between State Farm and Xactware for State Farm's purchase of the Xactimate software.

*Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 541 (1954). Accordingly, the courts have required that a plaintiff relying in part on alleged conscious parallelism must *also* demonstrate one or more further "plus factors" in order prove an antitrust conspiracy claim. *See Williamson Oil Co., Inc. v. Philip Morris USA*, 346 F.3d 1287, 1322-23 (11th Cir. 2003). Here, Plaintiffs' claim must be dismissed for their failure to plead facts in support of any "plus factor." *See Cayman Exploration*, 873 F.2d at 1361 (dismissing antitrust claim as inadequately pleaded because "even conscious parallel business behavior, standing alone, is insufficient to prove conspiracy"); *Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 961 F.2d 1148, 1158-59 (5th Cir. 1992) (antitrust complaint could proceed where plaintiff alleged facts supporting more than mere conscious parallelism in support of conspiracy claim).

Plaintiffs have offered just one paragraph in their Complaint in an attempt to allege "plus factors" supporting their claim. Their allegations, however, are wholly inadequate. First, Plaintiffs have offered the bald assertion that "insurance companies have actively coordinated their actions through various organizations and associations." *See* Compl. ¶ 35. That single statement, identifies no communications among insurers, and it takes Plaintiffs nowhere. With this addition to their pleading, Plaintiffs have alleged that State Farm copied other, unnamed insurers by using Xactimate data and that State Farm did so as a result of unspecified acts of "coordination" with unidentified competitors at some unidentified point in time through unnamed organizations and associations. "There is a limit to how much a court may be called upon to divine in assessing the sufficiency of the complaint before it," and Plaintiffs have reached that limit here. *See Heart Disease Research Found'n*, 463 F.2d at 100. These are precisely the sort of vague and conclusory allegations that require dismissal. *See Broyles*, 812 F. Supp. at 655.

Likewise, Plaintiffs have not adequately alleged a "plus factor" by asserting that no insurer would use Xactimate's market data when adjusting its insureds' claims absent an agreement with competitors, due to fear that any such unilateral action would hurt the insurer's "competitiveness" *See* Compl. ¶ 35. To the contrary, Plaintiffs' factual allegations (to the extent there are any) actually *contradict* this conclusory assertion. An insurer's mere purchase of market data from a commercial source for use in the insurer's claim handling is wholly consistent with an insurer's self-interest and is not anti-competitive. *See, e.g., Quality Auto Body, Inc. v. Allstate Ins. Co.*, 660 F.2d 1195, 1204 (7th Cir. 1981) (an argument that insurers must "write estimates of repair costs so as to be within the prices sought by high-priced non-competitive shops clearly runs counter to" antitrust principles favoring competition).<sup>7</sup> Thus, the notion that State Farm's use of market data from Xactware would be contrary to its self-interest depends on Plaintiffs' characterization that the 10,000 line item prices supplied through the Xactimate software are consistently and invariably "below market." *Id.* Yet Plaintiffs themselves have undercut their "below market" characterization of Xactimate's data through their factual allegations that Xactimate's data is based on *actual market prices* gathered through extensive, regularly updated surveys of contractors and suppliers. *See* Compl. ¶¶ 18-19.

Moreover, the idea that no insurer would have a self-interest in applying Xactimate software *absent* an agreement with its competitors is further, and fatally undercut by

---

<sup>7</sup> *See also Zinser v. Rose*, 868 F.2d 938, 942 (7th Cir. 1989) (allegation that insurers entered into parallel vertical agreements with a consultant who reviewed the insurers' claims and limited their claim costs did not state a viable antitrust claim)

matters of public record that this Court may properly consider in ruling on State Farm's Motion.<sup>8</sup> It actually is entirely to be *expected* that many insurers in Louisiana will independently have chosen to purchase market data from Xactimate and use that data when adjusting claims, given the Louisiana Insurance Commissioner's enactment of Emergency Rule 22 following the disasters caused by Hurricanes Katrina and Rita. *See* Emergency Rule 22, 32 La. Register 60 (Jan. 2006). As set forth more fully below, Emergency Rule 22 set up a mediation program *specifically designed* to address disputes between homeowners insurers in Louisiana and their policyholders regarding the estimated and actual costs to repair homes damaged by the hurricanes. *See* discussion *infra* at 24. And in the Emergency Rule, the Commissioner mandated that the parties to such mediations *must* use the current construction pricing guidelines compiled by Xactware, or similar "reputable" sources, as the starting point in the mediation process. *See* La. Admin. Code tit. 37:XI, Chapter 41, Rule 22, § 4117(B), 32 La. Register at 64.

**4. Plaintiffs Have Failed To Allege an Unreasonable Restraint of Trade.**

The antitrust laws only prohibit conduct that constitutes an *unreasonable* restraint of trade. *See Kiepfer v. Beller*, 944 F.2d 1213, 1221 (5th Cir. 1991). When assessing the sufficiency of allegations as to this essential requirement of an antitrust claim, the courts have recognized a narrow category of activity that is *presumed* to have an anticompetitive effect and thus is considered "per se" illegal. *See Consol. Metal Prods. v. Am. Petro. Inst.*, 846 F.2d 284, 289-92 (5th Cir. 1988). For claims based on any other form of allegedly anticompetitive conduct, the courts apply the "rule of reason" to determine whether that supposed conduct actually produced an injury to competition in a specific market. *Id.* Here, Plaintiffs have not

---

<sup>8</sup> *See Cinel v. Connick*, 15 F.3d 1338, 1343 (5th Cir. 1994) ("In deciding a 12(b)(6) motion to dismiss, a court may permissibly refer to matters of public record. . . . Accordingly, the consideration of the consent judgment

adequately alleged facts to demonstrate either "per se" illegal price fixing *or* a violation of the rule of reason.

**a. Plaintiffs Have Not Alleged Conduct Constituting "Price Fixing."**

Regardless of the inflammatory "price fixing" label they repeatedly invoke, it is plain that Plaintiffs are *not* actually complaining of a "price fix." There are no allegations that State Farm has agreed with its competitors (or anyone else) regarding the price it will charge for the insurance policies it sells. Nor is there any allegation that State Farm has agreed with other insurers as to the actual price that it will pay for the services of contractors, for building materials, or any other commodity. Rather, the gist of the few factual allegations Plaintiffs have included in their Complaint is that State Farm has purchased market data from Xactware to calculate *estimates* of the cost to repair Louisiana homes insured under State Farm homeowners policies. *See* Compl. ¶¶ 11-15. Plaintiffs simply have not alleged facts showing that State Farm has agreed with others to fix the price of anything it allegedly is buying *or* selling.

**b. Plaintiffs Have Not Alleged an Unreasonable Restraint of Trade in an Identified Market.**

Because Plaintiffs are complaining solely of State Farm's claim adjustment practices, rather than actual price fixing, the rule of "*per se*" illegality cannot apply to their claim. *See, e.g., Quality Auto Body, Inc. v. Allstate Ins. Co.*, 660 F.2d 1195, 1204 (7th Cir. 1981) (a "per se analysis is not appropriate . . . where anticompetitive effect is far from obvious and may be non-existent"). As a result, the anticompetitive effect of a supposed conspiracy by insurers to use Xactimate market data cannot be presumed, and Plaintiffs instead must allege facts to show that an anticompetitive effect actually occurred in an identified market. *See Kiepfer*, 944 F.2d at

---

does not convert this motion into one for summary judgment.").

1221 (where "rule of reason" applied, it was incumbent on plaintiff to demonstrate that defendants' alleged antitrust conspiracy "produced some anti-competitive effect in the relevant market"); *see also Consol. Metal Prods.*, 846 F.2d at 289-90 (same). Plaintiffs' Complaint, however, is silent in this regard.

Though Plaintiffs never expressly so state, the "market" they apparently are concerned with in their antitrust claim is that for homeowners insurance in Louisiana. *See* Compl. ¶ 36. Yet Plaintiffs have not alleged facts showing an anticompetitive effect in that market, as is required to state a viable claim under Section 122. *See Abraham*, 938 So. 2d at 1172. Instead, Plaintiffs merely allege that State Farm benefited by allegedly reducing what it paid to insureds. *See* Compl. ¶ 34. Even assuming the truth of that contention for purposes of this motion, those allegations do not identify an injury to *competition*. *See* Compl. ¶ 34. With no allegations identifying which insurers supposedly participated in a conspiracy with State Farm to base replacement cost estimates on data from Xactware, and no allegation of facts showing that a resulting reduction in competition *actually occurred* among insurers for *new* business (since there plainly is no "market" for payment of claims an insurer owes under existing policies), Plaintiffs' "horizontal price fixing" claim must be dismissed.

**B. Plaintiffs Have Failed to State a Claim for Breach of Contract, Negligence, or Violations of Louisiana Insurance Law**

The plaintiffs have also asserted claims for breach of the insurance policy, for negligence, and for violations of Louisiana insurance law. (Counts II, III, and V). Plaintiffs' conclusory allegations, however, fail to establish viable claims as a matter of law.

**1. Plaintiffs Have Not Stated a Claim for Breach of Contract or Negligence.**

To begin with, Plaintiffs have failed to plead the facts necessary to support a breach of contract claim. To state a claim for breach of contract, a plaintiff must allege breach of a specific policy provision. *Louque v. Allstate Ins. Co.*, 314 F.3d 776, 782 (5th Cir. 2002); *Bergeron v. Pan Am. Assurance Co.*, 731 So. 2d 1037, 1045 (La. App. 4th Cir. 1999). In *Bergeron*, plaintiffs sued their life insurance company, alleging negligent misrepresentation, fraud, fraud in the inducement, and breach of contract. *Id.* at 1038. The *Bergeron* plaintiffs contended that the defendant insurer and its agents made false representations to them when selling them life insurance policies. *Id.* at 1039. The *Bergeron* court affirmed dismissal of the Petition because the plaintiffs failed to allege "any breaches of the written policy." The court explained:

The plaintiffs fail to point out any provision of the written insurance policies which have been allegedly breached. . . . [T]he unambiguous terms of the written insurance policies at question here . . . reveal that the plaintiffs have failed *to even allege* any breaches of the written policy.

*Id.* at 1045 (emphasis added).<sup>9</sup> Similarly, the Fifth Circuit in *Louque* adopted the district court's dismissal of an insured's claim for breach of contract. 314 F.3d at 782. Relying on *Bergeron*, the district court granted Allstate's Rule 12(b)(6) motion to dismiss where the insured failed to specify what provision of the insurance contract Allstate had allegedly breached. *Id.*

Here, review of the amended complaint reveals that Plaintiffs have failed to allege this critical element in a breach of contract action. Nowhere in the Complaint do Plaintiffs

---

<sup>9</sup> *Accord Balehi Marine, Inc. v. Firemen's Ins. Co.*, 460 So. 2d 16, 17 (La. App. 1st Cir. 1984) (in action on an insurance contract, plaintiff has burden of pleading and proving that his claim falls within the general policy); *Carriere v. Triangle Auto Serv.*, 340 So. 2d 665, 666 (La. App. 4th Cir. 1976) (same).

identify any provision of the policy that they contend has been breached. Under the terms of the homeowners policy issued to Plaintiffs,<sup>10</sup> State Farm agreed:

We will pay the cost to repair or replace buildings under Coverage A, subject to the following . . . until actual repair or replacement is completed, we will pay the actual cash value of the damage to the buildings, up to the policy limit, not to exceed the replacement cost of the damaged part of the buildings for equivalent construction on the same premises. . . .Any additional payment is limited to the amount you actually and necessarily spend to repair or replace the damaged buildings with equivalent construction and for equivalent use on the same premises. . . .

Policy, attached as exhibit "A", at p. 23 (Option RC). While the Complaint alleges that a State Farm estimate for three items was below the price estimates posted by the Home Builders Association of Greater New Orleans ("HBAGNO") Compl. ¶ 25, nothing in the contract requires State Farm to use HBAGNO figures to calculate either the actual cash value or replacement cost of damaged property. And nowhere in the Complaint have Plaintiffs alleged that they presented actual replacement cost amounts that were ignored by State Farm. The Court should dismiss Plaintiffs' claims for failure properly to allege facts that establish a breach of contract.

For this same reason, Plaintiffs have failed to properly allege a claim for negligence. It is fundamental under Louisiana tort law that to establish a claim for negligence, Plaintiffs must prove that State Farm breached a duty owed them. State Farm's duty to its insureds is governed by the terms of the insurance policy. Plaintiffs' failure to allege what provision of the policy State Farm supposedly breached is fatal to their negligence claim for the same reason it is fatal to their breach of contract claim. Both claims should be dismissed.

---

<sup>10</sup> Because Plaintiffs allege a breach of contract, the Court may review the contract in connection with a Rule 12(b)(6) motion. "Documents that a defendant attaches to a motion to dismiss are considered part of the pleadings if

**2. The Plaintiffs Have Not Stated a Cause of Action for Violations of La. R.S. 22:658 and 22:1220.**

Plaintiffs' claims for statutory penalties likewise must be dismissed. Plaintiffs allege that the purported actions of State Farm violated La. R.S. 22:658 and R.S. 22:1220 because State Farm failed to pay the reasonable amount due under the policy within 30 or 60 days, respectively, of receipt of the plaintiff's proof of loss and demand. Compl. ¶¶ 41-42. They also assert that State Farm violated La. R.S. 22:1220 by misrepresenting the relevant facts concerning the coverages at issue. Plaintiffs' claims for breach of Section 658 and Section 1220 must fail as a matter of law because, as shown above, they have failed to plead viable claims for a breach of their insurance policy. Sections 658 and 1220 "do not provide a cause of action against an insurer absent a valid, underlying insurance claim." *Clausen v. Fid. & Deposit Co. of Md.*, 660 So. 2d 83, 86 (La. App. 1st Cir. 1995) ("The penalties authorized by [La. Rev. Stat. Ann. § 22:658 and 1220] do not stand alone; they do not provide a cause of action against an insurer absent a valid, underlying, insurance claim"); *see also Phillips v. Patterson Ins. Co.*, 813 So. 2d 1191, 1195 (La. App. 3d Cir. 2002).

**C. Plaintiffs Fail to Plead Facts Necessary to Support a Fraud Claim.**

When fraud is alleged, as here, a plaintiff faces heightened pleading requirement. When a plaintiff alleges fraud, Federal Rule of Civil Procedure 9(b) requires the plaintiff to state with particularity the circumstances constituting fraud or mistake. The Fifth Circuit mandates that plaintiffs who aver fraud identify "the particulars of time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he

---

they are referred to in the Plaintiff's complaint and are central to her claim." *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498-99 (5th Cir. 2000).

obtained thereby." *Shushany v. Allwaste, Inc.*, 992 F.2d 517, 521 (5th Cir. 1993) (quoting *Tel-Phonic Servs., Inc. v. TBS Int'l, Inc.*, 975 F.2d 1134, 1139 (5th Cir. 1992)).

Plaintiffs have failed to meet Rule 9(b)'s requirements. As discussed above, Plaintiffs' own allegations contradict their sweeping assertion that all 10,000 line items of data that Xactware periodically provides to State Farm for its use in claim handling activities are categorically "below-market." But even aside from that, Plaintiffs have not alleged even one communication with State Farm regarding their coverages or their claim. They have not alleged any communication between themselves and State Farm regarding the amount they claim was due under their policy, or regarding State Farm's estimate of the cost to repair any damage to their home. Nor have Plaintiffs identified any estimate State Farm actually prepared for their claim, when it was prepared, or what it contained. And the Complaint likewise is silent as to how Plaintiffs supposedly relied on any estimate (or any other statement by State Farm) to their detriment. Accordingly, Plaintiffs' fraud allegations are fatally deficient as a matter of law.

**D. The Court Should Strike the Class Allegations With Prejudice Because Plaintiffs Cannot Satisfy Rule 23.**

Even if the Court determines that Plaintiffs have stated a cause of action as to one or more of their claims, the Court should strike Plaintiffs' class allegations. A party who wishes to bring a class action must establish that all four requirements of Rule 23(a) and at least one part of Rule 23(b) are met. *Pederson v. La. State Univ.*, 213 F.3d 858, 866 n. 7 (5th Cir. 2000). Plaintiffs bear the burden of proving that the proposed class should be certified. *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 156 (1982); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 740 (5th Cir. 1996). When a complaint fails to set forth the minimum facts required to establish the existence of the class action criteria, the court may dismiss or strike the class allegations – even at the

pleading stage. *See, e.g., Gen. Tel. Co.*, 457 U.S. at 160 ("Sometimes the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff's claim. . . .").<sup>11</sup>

**1. The Class Allegations Should Be Stricken Because Individual Issues Would Predominate Over Any Class-wide Issues.**

The proposed class must meet all Rule 23 criteria to merit certification. *Gen. Tel. Co.*, 457 U.S. at 156. Under Rule 23(b)(3), class certification cannot be granted absent a showing that common questions of law or fact will predominate over questions affecting only individual class members. Fed. R. Civ. Proc. 23(b)(3). The predominance requirement of Rule 23(b)(3) is "demanding" and tests whether the proposed class is "sufficiently cohesive to warrant adjudication by representation." *Ungar v. Amedisys Inc.*, 401 F.3d 316, 320 (5th Cir. 2005). Where a class would result in a series of individual trials, the requirement cannot be satisfied. *Maldonado v. Oschner*, 237 F.R.D. 145, 152 (E.D. La. 2006).

Here, it is obvious that Plaintiffs cannot demonstrate that questions common to the class will predominate over individual issues. Plaintiffs' proposed class includes all State Farm insureds who owned property in Louisiana and who received estimates of damage that contained an Xactimate price. Plaintiffs' core allegation on behalf of this proposed class is that State Farm used artificially low pricing guidelines compiled by Xactware to estimate and pay

---

<sup>11</sup> *See also Jones v. Nat'l Sec. Fire & Cas. Co.*, 2006 WL 3228409 at \*4 (W.D. La. Nov. 3, 2006) (plaintiffs' failed attempt to propose a class that was defined and clearly ascertainable thereby supporting defendant's motion to dismiss class prior to the commencement of discovery); *Lumpkin v. E.I. Du Pont De Nemours & Co.*, 161 F.R.D. 480, 481-82 (M.D. Ga. 1995) (denying certification of a class based on plaintiff's pleadings, without requiring the defendant to respond to class discovery); *Hedgepeth v. Blue Cross & Blue Shield of Miss.*, 2006 WL 141624 (N.D. Miss. Jan. 18, 2006) (noting that Fifth Circuit has upheld the power of district courts to dismiss class allegations prior to any extensive class related discovery taking place); *Stubbs v. McDonald's Corp.*, 224 F.R.D. 668, 674 (D.

line item replacement costs that were "consistently below the lowest market price."<sup>12</sup> To determine whether and to what degree a particular estimate included a "below market" line item, however, the Court would have to consider the line items in estimates for each house individually, which would vary over time given the allegation that Xactimate updates its information on a quarterly basis.<sup>13</sup> Each claim would then have to be reviewed independently to determine what was actually paid and whether any adjustments were made based on interaction with the policyholder (such as their submission of competing estimates or other information). Plaintiffs' intentional misrepresentation/fraud claims would raise still other individualized issues of reliance, and force the Court to evaluate each class member's different interactions with different representatives of State Farm at different periods of time.<sup>14</sup>

Plaintiffs' own descriptions of the common questions of law and fact illustrate that individualized issues will predominate. Plaintiffs aver that the following questions of law and fact that are common to all and support class certification: "whether Defendant State Farm breached their contracts with their policyholders, and if so, are the policyholders entitled to recover under the provisions of Louisiana Revised Statutes 22:1220 and/or 658"; "whether damages are owed to the Plaintiffs/Insureds and class members by the defendants for the damages and losses they suffered as a result of the failure of Defendant State Farm to provide the market price payment(s) pursuant to the subject policies, and, if so, the nature and amount of

---

Kan. 2004) (recognizing that federal courts use motions to strike to test the viability of a class at the earliest pleading stage of the litigation).

<sup>12</sup> See Compl. ¶¶ 12-19, 24-26. Significantly, the Department of Insurance disagrees and has identified Xactimate as an approved source of price guidelines to be used as the starting point in any mediation.

<sup>13</sup> See *id.* ¶ 18.

those damages;" "whether Defendants caused the Plaintiffs/Insureds and class members to suffer damages"; and "the amount of damages that are owed to the Plaintiffs/Insureds and class members by State Farm." Compl. pp. 8-9. Plaintiffs cannot demonstrate how these questions can be answered without looking at the claims of each individual putative class member. Neither membership in the class, liability, nor quantum of damages can be determined without a claim by claim evaluation. For example, sections 658 and 1220 require an insurer to tender the undisputed portion of a claim within 30 or 60 days, respectively, of the insured submitting "satisfactory proofs of loss." For each claim, then, the Court will have to determine the time period applicable to the statutory delays, whether State Farm actually received a "satisfactory proof of loss," and the amount that was reasonably undisputedly owed. Further, a determination of whether an insurance company's conduct was arbitrary, capricious or without probable cause pursuant to section 658 or 1220 depends upon the information known to the insurer at the time, and that determination requires a "case-by-case analysis," making such determinations inappropriate for class treatment. *See Defraites v. State Farm Mut. Auto. Ins. Co.*, 864 So. 2d 254, 263 (La. App. 5th Cir. 2004).

In *Aguilar v. Allstate Fire and Casualty Insurance Co.*, 2007 WL 734809 (E.D. La. Mar. 6, 2007), Judge Feldman considered the same issue before the Court now. The *Aguilar* plaintiffs alleged that Allstate employed below market unit pricing on its damage estimates. Judge Feldman determined that it would be impossible for the *Aguilar* plaintiffs to meet Rule 23(b)(3)'s predominance requirement. He stated:

---

<sup>14</sup> Courts have consistently held that claims for fraud are generally unsuitable for class certification. *See, e.g., Bradberry v. John Hancock Mut. Life Ins. Co.*, 222 F.R.D. 569, 572. (W.D. Tenn. 2004).

While Allstate's general internal policies for adjusting claims may arguably be one common issue of fact, demonstrating a wrongful pattern and practice of failing to adjust claims will require an intensive review of the individual facts of each class member's damage claim, including the nature and extent of damage, the timing and adjustment of each class member's claim, how much each class member was paid for his claim and for what damage, and whether that amount was sufficient and timely. On the face of the pleading, it is clear that those individualized and highly personal issues pertaining to each class member patently overwhelm any arguably common issues, rendering the claims inappropriate for class treatment.

*Aguilar*, 2007 WL 734809, at \*3. Thus, the court dismissed the *Aguilar* class allegations.

In *Guice v. State Farm Fire & Cas. Co.*, 2006 WL 2359474 (S.D. Miss. Aug. 14, 2006), the plaintiff asked the court to rule that homeowners coverage exists for every Katrina-related total loss of a home ("slab case") caused by any combination of wind and flood. In refusing to certify the class, the court held:

[T]he questions of law and fact common to the members of the plaintiff class do not predominate over the questions affecting individual members of the plaintiff class. . . . This Court's insurance docket can be described as a variety package with respect to such factors as the number of lawyers involved, the theories of recovery being pursued, or the geographical location of the loss.

*Id.* at \*5 (internal citations omitted). The plaintiff in *Guice* recently asked the court to reconsider its class certification ruling. The court reaffirmed its ruling that class treatment was inappropriate because individual factors predominated over issues that could be class-wide:

The proof available in any particular "slab case" will vary greatly from the evidence in other "slab cases." Location along the coast, proximity to the shore line, the quality of construction, and the way the claims were handled are only four of the many possible variations that may exist. . . . State Farm has a right to offer any evidence it wishes to support its view of the relevant facts, and this right is part of the most fundamental requirements of due process.

*Guice v. State Farm Fire & Cas. Co.*, 2007 WL 912120, at \*2 (S.D. Miss. Mar. 22, 2007).

As in the *Aguilar* and *Guice* cases, it is clear from Plaintiffs' pleadings that individual issues predominate. The proof necessary to attempt to prove liability against State Farm will be different for every insured and will require "intensive review of the individual facts of each class member's damage claim." *Aguilar*, 2007 WL 734809, at \*3. Furthermore, State Farm has the right to submit proof and offer any applicable defenses to each class member's claim. Class treatment is simply not proper based upon the allegations in the Complaint.

Other Katrina-related cases also support striking Plaintiffs' class allegations because individual issues would predominate. *See Spiers v. Liberty Mut. Fire Ins. Co.*, No. 06-4493, R. Doc. 11 (E.D. La. Nov. 21, 2006) (granting insurer's motion to strike class allegations in Katrina insurance lawsuit alleging that insurer had engaged in a "corporate scheme and pattern and practice of bad faith and improper claims handling," and asserting causes of action for breach of contract, breach of implied duties of good faith, and breach of fiduciary duty because individual questions pertaining to each class member overwhelmed any arguably common issues); *Comer v. Nationwide Mut. Ins. Co.*, 2006 WL 1066645 at \*2-3 (S.D. Miss. Feb. 23, 2006) (denying motion for leave to file amended complaint seeking class action against insurers by homeowners seeking coverage Hurricane Katrina damage because no two property owners would have suffered the same loss and each individual claim would require particular evidence to establish the cause and extent of loss).<sup>15</sup>

---

<sup>15</sup> *See also Maldonado*, 237 F.R.D. at 153 (E.D. La. 2006) ("Where, after adjudication of the classwide issues, plaintiffs still must introduce a great deal of individualized proof or argue a number of individualized legal points to establish most or all of the elements of their individual claims, such claims are not suitable for class certification under Rule 23(b)(3)") (citations omitted); *Young v. Ray Brandt Dodge, Inc.*, 176 F.R.D. 230, 234 (E.D. La. 1997) (class certification inappropriate because "[e]ach plaintiff clearly has a specific set of circumstances surrounding his or her purchase of the insurance at issue"); *In re Masonite Corp. Hardboard Siding Prods. Liab. Litig.*, 170 F.R.D.

**2. A Class Action Is Not Superior To Other Available Methods For Resolving This Dispute.**

Plaintiffs' class allegations are further due to be stricken because their proposed class litigation cannot satisfy Rule 23(b)(3)'s superiority requirement. Rule 23(b)(3) provides a non-exhaustive list of factors the Court should consider, including:

(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the difficulties likely to be encountered in the management of a class action.

Consideration of these factors demonstrates that a class action is not a superior form of adjudication. This Court is certainly aware that hundreds of cases are already pending in the Eastern District as well as in Louisiana State courts regarding the adjustment of Hurricane Katrina insurance claims. This demonstrates that members of the putative class have demonstrated a strong interest in "individually controlling the prosecution" of their cases. Further, due to the sheer volume of cases and the individualized inquiry each case requires, this Court would face enormous difficulty if the litigation were further concentrated in this forum and the Court were required to manage it.<sup>16</sup> It is far superior to allow these claims to proceed in their respective forums.

Further, in addition to the factors listed in Rule 23(b)(3), this Court may also consider such factors as the availability of alternative remedies, including relief through

---

417, 425-26 (E.D. La. 1997) (denying class certification where individual questions of law and fact overwhelmed common questions and mini-trials on causation would be necessary).

<sup>16</sup> The en banc Court of the Eastern District recently determined that the mass joinder of individual claims is a single suit is improper, and that such cases must be severed into individual suits, with each suit addressing a single property. *In re Katrina Canal Breaches Consol. Litig.*, No. 05-4182, R. Doc. 3573 at 1-2 (E.D. La. Mar. 27, 2007).

administrative proceedings when evaluating the superiority requirement. *Ostrof v. State Farm Mut. Auto. Ins. Co.*, 200 F.R.D. 521, 532 (D. Md. 2002). Here, the State of Louisiana has established an ADR program for the speedy and cost-efficient handling of disputes regarding the amount an insurer may owe as a result of damage to an insured's home. There can be no question that the claims Plaintiffs intend to assert in their proposed class action are precisely the variety of claims that the ADR program was designed to address.<sup>17</sup> And significantly, under this procedure, the parties to a mediation are *specifically required* to use the current construction pricing guidelines compiled by Xactware, Inc. ("Xactware") or a similar "reputable" source as the starting point in the ADR process. See La. Admin Code tit. 37:XI, Chapter 41, Rule 22, § 4117(B), 32 La. Register at 64. As demonstrated by the successful handling of thousands of claims from Hurricanes Katrina and Rita, the Louisiana Commissioner of Insurance's ADR program is a superior method for resolving any claims that proposed class members may have as to State Farm.<sup>18</sup> By contrast, a class action would create intractable problems of management that would overwhelm this Court. It would be redundant and is unnecessary for the Court to engage in this exercise. The Court should strike Plaintiffs' class allegations.

---

<sup>17</sup> The Commissioner has observed that many of the claims that remain to be resolved arise out of "disputes regarding costs of labor and materials needed to effectuate repairs," including "disparities between the estimates of insurers and repair contractors." 32 La. Register at 61. Indeed, the ADR program includes "a procedure to determine a construction pricing guideline to be used in mediation proceedings to determine reasonable payments for repair and replacement costs arising from damage caused by hurricanes Katrina and Rita." *Id.*

<sup>18</sup> See, e.g., *Ostrof*, 200 F.R.D. at 532 (denying class certification because alternative remedies were available to plaintiffs through Maryland Insurance Administration); *Kamm v. Calif. City Dev. Co.*, 509 F.2d 205, 211 (9th Cir. 1975) (when considering the superiority requirement, court should "determine whether any administrative methods of settling the dispute exist" (quoting Wright and Miller, Fed. Prac. and Proc. § 1779 (1973 Supp. at 17)); *accord Chin v. Chrysler Corp.*, 182 F.R.D. 448, 464-65 (D.N.J. 1998); *Thornton v. State Farm Mut. Auto Ins. Co., Inc.*, 2006 WL 3359482, at \*2-5 (N.D. Ohio Nov. 17, 2006).

### **III. CONCLUSION**

The Complaint fails to state a claim for horizontal price fixing, breach of contract, negligence, violations of Louisiana insurance law, or fraud. The Court should dismiss the Complaint. Further, the amended complaint fails to offer any claim that could meet prerequisites for class certification. Individualized issues would predominate over class-wide issues, and a class action would not be superior to other forms of adjudication. Therefore, if the Court does not dismiss the Complaint in its entirety, the Court should strike the Plaintiffs' class allegations.

Respectfully submitted,

/s/ J. Dalton Courson

Wayne J. Lee, 7916, T.A.

Mary L. Dumestre, 18873

Michael Q. Walshe, Jr., 23968

J. Dalton Courson, 28542

of

STONE PIGMAN WALTHER WITTMANN L.L.C.

546 Carondelet Street

New Orleans, LA 70130

Telephone: (504) 581-3200

Facsimile: (504) 581-3361

Email: wlee@stonepigman.com

mdumestre@stonepigman.com

mwalshe@stonepigman.com

dcourson@stonepigman.com

*Attorneys for Defendant State Farm Fire  
and Casualty Company*

### **C E R T I F I C A T E**

I hereby certify that a copy of the above and foregoing Memorandum In Support of State Motion to Dismiss and to Strike Class Allegations has been served upon all counsel of record by the CM/ECF electronic filing system, this 16th day of April, 2007.

/s/ J. Dalton Courson