UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

KATHLEEN SCHAFER	**:**	**CIVIL ACTION NO. 06-8262**
Wife of/and GORDON SCHAFER	**:**	
	:	**SECTION "K" (2)**
Versus	**:**	
	:	**JUDGE DUVAL**
STATE FARM FIRE & CASUALTY	**:**	
COMPANY	**:**	**MAGISTRATE WILKINSON**

MEMORANDUM IN SUPPORT OF XACTWARE'S MOTION TO
DISMISS AND TO STRIKE CLASS ALLEGATIONS

Defendant, Xactware, Inc. ("Xactware"), moves to dismiss the Amended Complaint or, alternatively, to strike the class allegations based on the arguments and authorities in the Motion to Dismiss and to Strike Class Allegations filed by State Farm Fire & Casualty Company ("State Farm"). Xactware also wishes to bring certain additional arguments and authorities to the attention of the Court. Most of these arguments pertain specifically to Xactware which does nothing more than license pricing data and software used to estimate construction costs.

SUMMARY OF ARGUMENT

Plaintiffs generally contend that Xactware should be liable for damages because State Farm allegedly used stale and below market pricing data supplied by Xactware to estimate their property damage claim. Yet, in the Amended Complaint, Plaintiffs describe a process for adjusting claims where State Farm used the raw pricing data from Xactware to adjust claims as it

would use any other tool of the trade. State Farm could accept, reject, or modify the pricing data as it saw fit or supplement the data using other resources. Xactware never dealt with Plaintiffs, visited their home, or played any role in how State Farm adjusted their claim. Also conspicuously absent from the Amended Complaint is any allegation which would support the inference that Xactware conspired to defraud Plaintiffs or acted in furtherance of any alleged conspiracy. In fact, once the conclusory allegations are stripped away, the Amended Complaint describes nothing more than an ordinary commercial relationship between Xactware and State Farm and a difference of opinion between State Farm and Plaintiffs about the fair market value of the labor and materials necessary to perfect repairs. These allegations fall far short of suggesting the existence or breach of any contractual or delictual duty owed by Xactware.

Plaintiffs also cannot establish Article III standing to pursue individual, let alone class action, claims. Although they allege damages generally, Plaintiffs do not allege facts to suggest that they were forced to repair their property at a cost greater than the amount offered or paid by State Farm or that they could not find contractors to perform repairs in accordance with the State Farm estimate. They merely contend that the amount paid or offered by State Farm was below "market price" and unreasonable under the terms of their agreement with State Farm. They also have not alleged facts to support the inference that they have met the preconditions for the replacement cost coverage they seek under the State Farm policy. If Plaintiffs have not suffered an injury-in-fact and have no claim to assert under the State Farm policy, they do not have standing to maintain their claims against Xactware or State Farm under any theory.

Under these circumstances, the Amended Complaint cannot withstand scrutiny under Fed. R. Civ. Pro. 12(b)(6). Moreover, as Plaintiffs are represented by capable counsel and have had ample opportunity to amend their pleadings, no further amendments should be allowed. If a

factual basis existed for the claims, those facts would have been alleged already, making any further amendments futile. For these reasons, and as more fully explained below, the Amended Complaint should be dismissed pursuant to Rule 12(b)(6) without leave to amend.

FACTUAL BACKGROUND

Plaintiffs do not allege that they had any dealings with Xactware or that they received the raw pricing data supplied by Xactware. Instead, Plaintiffs generally claim that adjusters hired by State Farm inspect properties and adjust property claims using Xactware software to assist them in that process. *Id.* ¶¶ 11-15. The adjusters measured the dimensions of each room, selected the construction materials to adjust, and determined whether to use Xactware prices, State Farm prices, or some other form of pricing. *Id.* ¶¶ 14-17. According to the Amended Complaint, State Farm claim examiners monitored the adjustments and either approved or rejected them. *Id.* ¶¶ 17, 21-22. Although Plaintiffs allege that State Farm used Xactware software to identify estimates which departed from State Farm pricing, Plaintiffs do not allege that Xactware participated in the processing of property damage claims by offering direction or instruction to State Farm.

Plaintiffs also allege that "Xactware knew or should have known that State Farm was using its price lists to issue damage estimates to its insureds with a representation that Xactware was [an] impartial, third party company" and that Xactware "owed a duty to the Plaintiffs not to allow [Xactware] to be used by State Farm and other insurance companies as an unbiased, impartial company." *Id.* ¶ 50-51. Yet nothing in the Amended Complaint suggests that the pricing data collected by Xactware is manipulated or manufactured. Plaintiffs allege that: 1) Xactware publishes "over 460 regional pricing databases" on a quarterly basis (*Id.* ¶ 18); 2) Each database consists of "current pricing information for 10,000 'line items.'" (*Id.*); 3) Xactware "determines the line item prices by surveying area contractors, surveying materials costs from

the area's major supplier, and/or by receiving settled claim amount." *Id.* ¶ 19. Moreover, the only factual allegation directed at Xactware's independence appears in Paragraph 20 where Plaintiffs allege that "Although presented by Defendant State Farm as an independent company, Xactware closely works with many insurance companies, including State Farm." *Id.* ¶ 20. Common sense suggests that a vendor would work closely with its customers. As such, the only inference to be drawn from this allegation is that of a routine commercial relationship.

LAW AND ARGUMENT

A plaintiff may not rely on conclusory allegations and unwarranted deductions of fact to defeat a motion to dismiss under Rule 12(b)(6). *Tuchman v. DSC Communications Corp.*, 14 F.3d 1061, 1067 (5th Cir.1994) (accepting as true, for the purposes of a Rule 12(b)(6) dismissal, well-pleaded factual allegations, but rejecting "conclusory allegations or unwarranted deductions of fact"); *Associated Builders, Inc. v. Alabama Power Co.*, 505 F.2d 97, 100 (5th Cir.1974). Nor may he rely on legal conclusions cast in the form of factual allegations. *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir.2000) ("In order to avoid dismissal for failure to state a claim, however, a plaintiff must plead specific facts, not mere conclusory allegations."). Rather, a plaintiff must demonstrate a right to relief based on the well-pleaded factual allegations which appear in the complaint. *Crowe v. Henry*, 43 F.3d 198, 203 (5th Cir.1995).

A. Plaintiffs Cannot Prevail On Their Contract Claims Against Xactware.

Plaintiffs characterize Counts 2 and 5 of the Amended Complaint as breach of contract claims. Although Count 2 refers specifically to State Farm, Count 5 refers generally to "defendants" and, therefore, is presumably directed at Xactware. Whatever Plaintiffs may have intended, they do not allege an underlying agreement between themselves and Xactware. Nor do they allege that they were third party beneficiaries to any agreements between Xactware and

State Farm. In the absence of an allegation suggesting the existence of an agreement between Plaintiffs and Xactware, the breach of contract claims fail as to Xactware.

B. Plaintiffs Cannot Prevail On Their Negligence Claim Against Xactware.

In order to state a viable negligence claim, Plaintiffs must show that Xactware owed Plaintiffs a duty with respect to the data Xactware supplied to State Farm. A legal duty to supply correct information exists when there is privity of contract or a fiduciary relationship between the parties and when a tortfeasor communicates the misinformation *directly* to the user and the user relied on it. *Jumonville v. Federal Home Loan Mortgage Corp.*, 2005 WL 1431505 (E.D. La. June 10, 2005) (Duval, J.). The Louisiana Supreme Court also has recognized 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 report was supplied." *Barrie v. V.P. Exterminators, Inc.*, 625 So.2d 1007, 1015 (La. 1993). Thus, in *Barrie*, the Louisiana Supreme Court held that a termite inspection company owed a duty to a homebuyer where the defendant knew that its termite inspection report would be relied upon by the prospective homebuyer who was the intended user of the report. *Id.*

In this case, Plaintiffs do not allege privity of contract or a fiduciary relationship with Xactware. Nor do they allege that Xactware communicated with them directly or indirectly. In addition, unlike the situation in *Barrie*, Plaintiffs were not part of a "limited group for whose benefit and guidance" the raw Xactware pricing data was supplied. Xactware is a national company which collects and publishes pricing data for "over 460" regions. Plaintiffs do not, and cannot, allege that Xactware adjusts claims, instructs insurance companies in how to adjust claims, or certifies that insurance companies have adjusted claims correctly. Rather, Xactware provides raw data for its customers to use as a resource. How, if at all, Xactware customers use

the raw data supplied by Xactware to adjust the claims of Plaintiffs or any other policyholders is a matter both within their sole discretion and over which Xactware has no control.

Further, unlike the termite inspection company which prepares a report based on firsthand inspection with knowledge that the report will be presented to homebuyers as evidence of the absence of termites in a particular house, Xactware prepares no individual report. It also has no ability to monitor how its many insurer customers processing hundreds of thousands of property damage claims nationwide will use its raw pricing data or how they will adjust individual claims. As described in the Amended Complaint, State Farm adjusters "inspected the properties," identified "component parts (e.g. dry wall or siding)," and determined "the size of the damaged property (e.g. square feet or linear feet)." Amended Compl. ¶ 14. In selecting the component parts, adjusters had the option to choose from "approximately 10,000 'line items.'" *Id.* ¶ 15. These adjustments were then audited by State Farm claims examiners according to State Farm guidelines. *Id.* ¶¶ 17, 21. In short, Plaintiffs cannot reasonably claim to be part of a "limited group for whose benefit and guidance" the raw Xactware pricing data was supplied because Xactware is several times removed from Plaintiffs and the State Farm estimate.

Recognizing a duty to Plaintiffs under these circumstances would expose Xactware to unlimited tort liability without an ability to supervise or control the insurer. *See Barrie*, 625 So.2d at 1016-17 (noting that extending liability to the termite inspector did not raise the fear, recognized in other cases, of "indeterminate limits of amount, time, and class"). Not only would this exposure have no socially redeeming deterrent effect, it actually would discourage the collection and publication of pricing data to the detriment of the public. This consequence is not insignificant. In the aftermath of Katrina, the Louisiana Insurance Commissioner specifically required insurance companies and policyholders to use "pricing guidelines" published by

"nationally recognized sources, companies such as Simsol, Inc. and Xactware, Inc." as the "starting point in the dispute resolution process."32:9 La. Reg. 1583 (Sept. 2006). These policy considerations weigh heavily against extending *Barrie*. *See Fisher v. Evans*, 2004 WL 612949, at *1 (E.D. La. Mar. 25, 2004) (Duval, J.) (declining to extend liability to guest passengers for injuries sustained by third parties absent special circumstances suggesting that the passenger had the ability to cause the driver to act more prudently); *Commerce & Indus. Ins. Co. v. Grinnell Corp.*, 1999 WL 508357 (E.D. La. July 15, 1999) (declining to extend liability to trade association for publishing deficient safety standards where safety standards were "to be used as minimum guidelines that third parties may or may not choose to adopt, modify, or reject").

The absence of any duty under the facts of this case finds ample support outside Louisiana. In *First Equity Corp. v. Standard & Poor's Corp.*, 670 F.Supp 115 (S.D.N.Y. 1987), the court held that a subscription service could not be held liable for errors in the corporate records data it published when a subscriber relied on the data in purchasing corporate bonds. *Id.* at 117-18. Relying on a series of decisions holding that newspaper publishers cannot be held liable for nondefamatory negligent misstatements of news, the court reasoned that exposing the subscription service to liability would be inappropriate because "it is impossible to attain perfection in the publishing business" and the specter of unlimited liability "would have a staggering deterrent effect on the dissemination of printed material." *Id.* at 117. The only difference between the subscription service in *First Equity Corp.* and the subscription service offered by Xactware is that Xactware publishes its data in electronic form as opposed to print.

Likewise, Section 552 of Restatement (Second) of Torts teaches that liability for an allegedly negligent statement should extend "only to those persons for whose benefit and guidance it is supplied." Restatement (Second) of Torts § 552(1) cmt. (h) (1977). Here, as

explained above, Plaintiffs do not allege that Xactware supplied pricing data for their benefit or guidance or that Xactware represented anything at all regarding State Farm's adjustment of claims. Consequently, extending a duty to Xactware under these facts would represent a substantial departure from the general principles of tort law applicable in other jurisdictions.

Even if Plaintiffs could establish a duty on the part of Xactware, they cannot demonstrate that they justifiably relied on the allegedly inaccurate pricing data supplied by Xactware or that they suffered anything but speculative harm. Plaintiffs never allege that they relied on data supplied by Xactware and have asserted claims in this lawsuit for the very reason that they refused to accept the State Farm estimates as an accurate adjustment of their claim. Further, while Plaintiffs allege that State Farm took advantage of Xactware software, they also allege that the pricing data used by State Farm belonged to State Farm. *See* Amended Compl. ¶¶ 23 ("State Farm has a special profile designed into the Xactimate program which can be loaded by the claims adjusters when working with that particular company."); ¶ 24 ("State Farm receives its own pricing database prices which are slightly different from the Xactimate standard prices, although all are below market."). Consequently, under their own theory, any errors in the pricing data compiled and published by Xactware would be of no consequence to Plaintiffs.

Finally, even if Xactware pricing had been used, Plaintiffs do not allege any facts to suggest that they were forced to repair their properties at a cost greater than the amounts offered or paid by State Farm under their insurance policies or that they could not find contractors to perform repairs in accordance with the State Farm estimates. They merely contend that the amounts paid or offered by State Farm were below "market price" and unreasonable under the terms of their agreements with State Farm. These allegations are insufficient to establish that

Plaintiffs were harmed by the pricing data. Thus, in addition to being unable to establish a duty on the part of Xactware, Plaintiffs cannot show damages or reasonable reliance.

C. Plaintiffs Cannot Prevail On Their Fraud Claim Against Xactware.

The fraud claim suffers from the same infirmities as the negligent misrepresentation claim. Xactware licenses software. It does not offer insurance, adjust property damage claims, or certify that adjustments are fair or accurate, and Xactware owed no duty to Plaintiffs to advise them that State Farm used its own pricing data to adjust claims. Plaintiffs also have alleged no facts to support injury in fact. Nonetheless, Plaintiffs claim that Xactware should be held liable for fraud because it permitted State Farm to operate its estimating software with "lower altered prices" and "other pricing data" supplied by State Farm. Stated differently, Plaintiffs contend that Xactware should be liable for facilitating the alleged understatement of their claims.

Louisiana law does not recognize a distinct cause of action for aiding and abetting. *Guidry v. Bank of LaPlace*, 661 So.2d 1052, 1057 (La.App. 4 Cir. 1995). Rather, in order to establish tort liability, Plaintiffs must allege facts to support the conclusion that Xactware knowingly joined in a conspiracy with State Farm to defraud Plaintiffs. *Id.* To establish a conspiracy based on facilitation, the "assistance or encouragement must be of such quality and character that a jury would be permitted to infer from it an underlying agreement and act that is the essence of the conspiracy." *Chrysler Credit Corp. v. Whitney Nat'l Bank*, 51 F.3d 553, 557 (5th Cir.1995). The Amended Complaint falls far short of meeting this standard.

Here, the only allegations which mention conspiracy speak generally of parallel conduct and coordination among insurance companies and make no reference to Xactware. Amended Compl. ¶¶ 32-36. The Amended Complaint also is conspicuously silent on where or when the alleged agreement between State Farm and Xactware to defraud the policyholders was negotiated

and on how or when Xactware communicated its assent to the alleged conspiracy. Plaintiffs have not placed Xactware or any of its employees at any meetings, forums, or events where a conspiracy to defraud was discussed. Plaintiffs do not even bother to allege the time period during which the alleged conspiracy existed. Moreover, the only conduct attributed to Xactware is that it "worked closely" with State Farm and that it permitted State Farm to use its own pricing data. These allegations suggest nothing more than a vendor working with its customers, hardly a suspicious fact.

In *Jones v. National Security Fire & Casualty Co.*, 2006 WL 3228409 (W.D. La. Nov. 3, 2006), the court confronted a complaint with fraud allegations similar to the fraud allegations in this case though they were directed only at the insurance company and not its software vendor. Specifically, Jones alleged that an insurance company used estimating software and stale pricing to understate the true value of his losses. *Id.* at *2-3. Although finding a factual basis for a breach of contract claim against the insurance company, the court ruled that "having a different position as to what is the fair value does not rise to the level of fraud." *Id.* at *3.

In *Guidry*, the Fourth Circuit found no evidence of a conspiracy to defraud or negligence where a bank provided assurances to the plaintiff about the banking history of one of its customers who later turned out to be operating a ponzi scheme. 661 So.2d at 1058-59. The plaintiff complained that the bank should have done more to discover, prevent, and disclose the scheme based on a high number of overdrafts. The court rejected this argument holding that the bank had no duty to "disclose information about its customers . . . to a non-customer" and that it should not be "potentially liable for the fraudulent activities of their customers." *Id.*

Finally, in *Wilson v. Mobil Oil Corp.*, 940 F. Supp. 944 (E.D. La. 1996), Judge Vance dismissed a fraud claim against Mobil Oil in a case where the plaintiff franchisees alleged that

Mobil Oil facilitated the fraud of a franchisor by failing to disclose the terms of its supply agreement with the franchisor. *Id.* at 955. The court ruled that "absent a duty to disclose, silence with respect to the details of a business transaction does not constitute fraud." *Id.*

The result in this case should be the same as in *Jones*, *Guidry*, and *Wilson*. Xactware has no ability to detect, control, or investigate how its customers conduct their business. Further, the only agreement between Xactware and State Farm alleged in the Amended Complaint is an ordinary commercial relationship where Xactware sold raw data for State Farm to use as a resource.

D. Plaintiffs Cannot Prevail On Their "Horizontal Price Fixing" Claim

The horizontal price fixing conspiracy claim likewise fails as to Xactware. Xactware is not engaged in the business of insurance and, therefore, does not compete with State Farm or other insurance companies. Any agreements between Xactware and its customers, therefore, would be vertical in nature. A "horizontal price fixing" claim makes no sense as to Xactware.

Even if a horizontal arrangement was possible, Plaintiffs do not allege facts that would support an inference Xactware joined or participated in an agreement to fix prices. According to the Amended Complaint, State Farm used pricing data different than Xactware pricing. Amended Compl. ¶¶ 23-24. The Amended Complaint also concedes that Xactware pricing is not the product of an agreement, but rather is determined "by surveying area contractors, surveying materials costs from the area's major supplier, and/or by receiving settled claim amount." *Id.* ¶ 9. The horizontal price fixing conspiracy allegations also suffer from the same flaws as the conspiracy to defraud allegations discussed above. None of the allegations answer the who, what, where, when, or why questions of the price fixing conspiracy claim or explain how the

relationship between State Farm and Xactware can be characterized as anything other than an ordinary vendor/customer arrangement.

The vagueness of the "horizontal price fixing" claim does not stop with the failure to support the conspiracy claim with facts. The "horizontal price fixing" claim also makes no economic sense. Insurance companies compete in the sale of insurance products not in the adjustment of claims. When the Amended Complaint alleges that insurance companies fixed the "prices" used in adjusting claims, they clearly are not talking about the price at which insurance is sold. Hence, even if facts had been alleged to suggest the existence of an agreement among the insurance companies with respect to data relevant to the adjustment of property damage claims, the agreement would not be a "horizontal price fixing" agreement.[1] *See Texaco, Inc. v. Dagher*, 547 U.S. 1, 126 S.Ct. 1276, 1279 (2006) (defining a "horizontal price fixing agreement" as requiring at least two participants who "compete with one another in the relevant market").

Finally, the Amended Complaint suffers from the same rank speculation about injury which infects the negligence and fraud claims. Beyond complaining about damages generally, Plaintiffs do not allege that they paid a higher then competitive price for their insurance or that they were unable to repair their property based on the State Farm estimates. They allege only that the estimates were below market and unreasonable. Plaintiffs cannot pursue a "horizontal price fixing" claim based on speculation about what the difference in cost might be between the State Farm estimate and the actual cost of repairs for repairs which have never been undertaken.

[1] As noted above, the fact that insurance companies use pricing data from Xactware and other estimating software companies is hardly surprising given that the Louisiana Insurance Commissioner has specifically instructed insurers to use raw pricing data collected by estimating software companies "as guidelines" and the "starting point in the dispute resolution process" with insureds. 32:9 La. Reg. 1583 (Sept. 2006).

E. The Court Should Strike All Class Action Allegations.

State Farm has largely addressed why the class action allegations should be dismissed. The court also should consider this additional argument—Plaintiffs have not alleged that the preconditions for replacement cost coverage under the State Farm policy have been met and, therefore, lack standing as individuals and prospective class representative to seek damages based on the alleged failure of State Farm to reimburse them on a replacement cost basis.

It is well established that a "litigant must be a member of the class which he or she seeks to represent at the time the class action is certified by the district court." *Sosna v. Iowa*, 419 U.S. 393, 403, 95 S.Ct. 553 (1975). In order to establish standing, Plaintiffs "must have suffered an 'injury in fact'-an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *United States v. Hays*, 515 U.S. 737, 742-43, 115 S.Ct. 2431 (1995) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130 (1992)). Second, Plaintiffs must demonstrate "a causal connection between the injury and the conduct complained of . . . ." *Id.* "Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.*

In this case, Plaintiffs claim that State Farm failed to estimate or pay for the cost of repairs and replacement at market rates, but do not allege that they have started, let alone completed, their repairs or that the actual cost of their repairs or replacements exceeded State Farm's estimates. As such, they have not alleged facts to support the conclusion that they have suffered an injury in fact. Further, nothing in the State Farm insurance policy obligated State Farm to reimburse Plaintiffs on a replacement cost basis up front. To the contrary, the policy specifically limited State Farm's up-front obligation to Plaintiffs to paying the actual cash value of the damage "until the actual repair or replacement is completed." *See* State Farm Policy at p.

23 (attached as Exhibit A to State Farm's Motion to Dismiss and to Strike Class Allegations). The policy further required Plaintiffs to make a claim for any additional payment and required Plaintiffs to limit the claim to "the amount you actually and necessarily spend to repair or replace the damaged buildings with equivalent construction and for equivalent use." *Id.*

The Amended Complaint contains no allegations to suggest that Plaintiffs have completed their repairs or replacements, that they have submitted a claim to State Farm for payment on a replacement cost basis, or that the claim was limited to what was actually and necessarily spent to repair or replace the damaged buildings with equivalent construction and for equivalent use. In the absence of these allegations, Plaintiffs cannot establish that they met the preconditions for replacement cost coverage under the State Farm policy and lack standing to maintain an individual, let alone, class claim for replacement cost coverage under the policy or, alternatively, under the myriad of tort theories thoroughly discussed above. *See Mills v. Foremost Ins. Co.*, 2006 WL 3313945 *1-2 (M.D. Fla. Nov. 15, 2006) (dismissing on standing grounds individual and class action claims for overhead and profit on a replacement cost basis where plaintiffs failed to allege that they met the precondition of the operative policy).

CONCLUSION

For the reasons stated above, and in the Motion to Dismiss and to Strike Class Allegations filed by State Farm, 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 21st day of May, 2007.

/s/ Mark A. Cunningham