

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

<b>KATHLEEN SCHAFFER</b>	*	<b>CIVIL ACTION NO.: 06-8262</b>
<b>Wife of/and GORDON SCHAFFER</b>	*	
	*	
<b>Versus</b>	*	<b>SECTION: "K"</b>
	*	
<b>STATE FARM FIRE &amp; CASUALTY</b>	*	<b>MAG. JUDGE: "2"</b>
<b>COMPANY</b>	*	

\*\*\*\*\*

**CONSOLIDATED MEMORANDUM IN OPPOSITION TO MOTION TO STRIKE**

NOW INTO COURT, come KATHLEEN and GORDON SCHAFFER, in their individual capacity and also on behalf of all those persons or entities similarly situated, and who respectfully submit the instant Consolidated Memorandum in Opposition to Motion to Strike in response to Defendants State Farm Fire and Casualty and Xactware, Inc. Motions to Strike.

Plaintiffs initially note that, pursuant to Local Rule 23.1(B), they filed a Preliminary Motion for Class Certification which is set for hearing before this Court on December 26, 2007. The resolution of class certification issues should be resolved at that time and not before.

Nonetheless, the Petition and the Preliminary Motion for Class Certification adequately allege a basis for maintaining class allegations. The very method Defendants employed in undervaluing class members' claims demonstrates that class certification is ideal. On the corporate level, Defendants uniformly undervalued price lists. Defendants colluded to undervalue each class member's claim equally. Defendants calculated a below market price for

every insured who made a claim with it for damages. For example, every insured in the metropolitan New Orleans area who needed to have sheet rock replaced was undervalued the exact same amount because Xactimate applied the same unit price. This case is not about whether an adjuster failed to take the proper measurements for the square feet of damaged sheet rock. This case is about the unit price Defendants ascribed to the unit price of the sheet rock. The very fact that Defendants were able to achieve this uniformity is the very fact that begs for certification.

## **I. INTRODUCTION.**

This is a case about State Farm's uniform, corporate-wide practice of undervaluing Louisiana insured's property damage after Hurricane Katrina and Xactware's active and intentional collusion. State Farm required its adjusters to use the computer program Xactimate to compute the replacement value of damaged property for as much as 60% below the actual market place value.

Xactimate is an estimating computer program used to determine the value to replace damaged property. Defendant Xactware, Inc., designed the program. The Xacimate program is a computer program where the dimensions of the damaged property (e.g., sheet rock) are inputted into the program and a value is assigned to it, typically by square feet or linear feet.

The Xactware program itself is not at issue in this case but the price lists used to value the damage is at issue. Xactware contends to have divided the state of Louisiana into separate territories and issued pricelists for each of those areas, purportedly reflective of the market rate. Xactimate has approximately 10,000 line items in the price lists, ranging from sheet rock to roofing, painting to flooring.

However, Xactware created more than one version of the price lists. Xactware created price lists for Xactimate to be sold publically to contractors or estimators or anyone who wanted to purchase the program. Yet, Xactware created another version of the price lists for State Farm and other insurers that was far below not just the market price, but also far below its own publically offered price lists. Xactware intentionally colluded with State Farm and other insurers to create this alternate price lists to drive down the value of the claims of Louisiana insureds after Katrina.

State Farm and Xactware's misconduct was uniform to the entire putative class. They created and manufactured price lists uniform to the entire state of Louisiana. They were able to uniformly apply the program to every property damage claim. The very nature of pricelists makes this case ideal for class certification. Moreover, State Farm and Xactware's collusion was performed at such a high corporate level that it applies equally to all putative class members. A finding of liability against them would apply equally to each member of the putative class. Damages are easily computable on a class wide basis. By using the same Xactimate program but replacing the price lists with true market value, the class members' damage calculation becomes a matter of simple subtraction.

## **II. BACKGROUND.**

Putative class representatives Kathleen and Gordon Schafer are both Louisiana residents who insured their property located at 3128 State Street Drive, New Orleans, Louisiana with State Farm. They sustained damage to their property as a result of Hurricane Katrina on August 29, 2005. In accordance with the policy provisions, they presented their claim to the Defendant

State Farm for compensation for the damage and/or loss to their property caused by the hurricane.

State Farm and/or others acting on their behalf inspected the properties and allegedly adjusted the claims for damages or losses to the property caused by the hurricane. This process constituted full proof of loss under Louisiana law.

State Farm and/or others acting on its behalf inspected the property and calculated/adjusted the monetary value of the damage or loss to immovable property by using a computer program called Xactimate.

Xactimate is an estimating software program designed for adjusting/estimating damaged property replacement cost (to which a depreciation amount is applied if actual cash value is the proper amount to be paid under the contract).

Xactimate is used by the insurance claims adjuster entering in the damaged immovable property component parts (e.g. drywall or siding) and the size of the damaged property (e.g. square feet or linear feet) and the program applies a pre-determined price for that damaged item and calculates that "line item's" replacement cost. The "line item" prices purportedly include labor, materials and other necessary items for each repair (e.g. nails, caulk, etc.).

Claims adjusters are pressured by State Farm to accept the pricing database prices in the estimates, and any supplemental, they write. If the claims adjuster does not use the database price, they risk their submission being flagged by the insurance carrier's claim examiner and "kicked back" or rejected, thus, delaying the adjuster's payment.

Xactware, the corporation which produces the Xactimate program, issues over 460 regional pricing databases, purportedly containing current pricing information for approximately

10,000 "line items," quarterly (15th day of the beginning month of the quarter (January, April, July, October).

Xactware purportedly determines the line item prices by surveying area contractors, surveying material costs from the area's major suppliers, and/or by receiving settled claim amounts. Although presented by State Farm as an independent company, Xactware closely works with many insurance companies, including State Farm.

Xactware's wholly owned subsidiary Xactnet is a network which acts as the conduit for State Farm to assign claims to adjusters (through the Xactimate program), and for those adjusters to, in turn, submit estimates back to Defendant State Farm for final approval.

Xactnet automatically audits the submissions by the claims adjusters and "flags" any line item price changes before transmitting the submitted adjustment to State Farm. State Farm has a special "profile" designed into the Xactimate program which can be loaded by the claims adjusters when working with that particular insurance company.

State Farm receives its own pricing database prices which are different from the Xactimate standard prices, although all are below market price.

A few examples are:

<u>ITEM</u>	<u>Xactimate price (State Farm price) (HBAGNO)<sup>1</sup></u>		
R&R Furnace vent rain cap and storm collar, 5"	\$35.29	\$34.09	\$40-55.00
R&R Siding vinyl	\$2.95/SF	\$2.46/SF	\$3-\$4.25/SF
R&R Batt insulation - 4"- R13	\$0.98/SF	\$0.85/SF	\$1.15-\$1.30/SF

---

<sup>1</sup> HBAGNO- Home Builders Association of Greater New Orleans.

The line item prices used by the Defendants are, upon information and belief, consistently below the lowest market price. State Farm applied these price lists to all property damage calculations of Louisiana insureds after Katrina.

**III. THE CLASS SATISFIES ALL OF THE REQUIREMENTS FOR RULE 23(B)(3).**

The putative class satisfies all of the Rule 23(a) prerequisites and the Rule 23(b)(3) class requirements. The putative class, at this time, is defined as follows:

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.

The class definition is objectively defined. The elements of the class are as follows: (1) State Farm insured with a homeowner's policy; (2) who owned property in Louisiana; and (3) received monies from an adjustment based upon the Xactimate program. The identity of the putative class can be determined from State Farm's own records. There is no merits based inquiry in determining who is a member of the class.

**A. All of the Prerequisites to Class Certification are met.**

Here, the Rule 23(a) prerequisites to a class action are satisfied. The class is too numerous for joinder to be practical. The claims of each class member are common to the others. The claims of each class member are typical to the others since a finding of liability will apply to all. The class representatives and their counsel are adequate.

**1. Numerosity.**

Members of a proposed class must be so numerous that it is impracticable to join them all individually. Pederson v. Louisiana State Univ., 213 F.3d 858, 868 (5<sup>th</sup> Cir. 2000). As long as the court can draw reasonable inferences from the facts before it as to the approximate size of the class and the infeasibility of joinder, the numerosity requirement is satisfied. Mullen, 186 F.3d at 624-25.

Here, the numerosity requirement cannot seriously be disputed as State Farm is the single largest home owners insurer in Louisiana. After Katrina, State Farm used the Xactimate program to adjust and pay tens of thousands of claims. This is sufficient. Mullen, 186 F.3d at 624 (finding that a class of between 100 and 150 satisfies the numerosity prerequisite).

## **2. Commonality.**

Rule 23(a)(2) requires that class claims share a common question of law or fact. The threshold for satisfying the commonality prerequisite is “not high.” Jenkins v. Raymark Indus., 782 F.2d 468, 472 (5<sup>th</sup> Cir. 1986). The rule does not require that all questions of law and fact be common to the class, but only that at least one question of law or fact be present, and that such questions of law or fact are shared by the members of the prospective class. Id. A common question is defined as “one which when answered as to one class member, is answered as to all.” Shaw v. Toshiba AM Info. Sys. Inc., 91 F. Supp. 2d 942, 954 (E.D. Tex. 2000). The element is satisfied whenever “there is at least one issue, the resolution of which will affect all or a significant number of the putative class members.” Mullen, 186 F.3d at 625 (quoting Lightbourn v. County of El Paso, 118 F.3d 421, 426 (5<sup>th</sup> Cir. 1997)). The alleged existence and operation of an intentional, company-wide corporate level policy and practice of unlawfully instituting a computer program to undervalue property claims presents precisely the sort of interrelated

factual and legal issues that satisfies the commonality requirement. Shipes v. Trinity Industries, 987 F.2d 311, 316 (5<sup>th</sup> Cir. 1993) (finding commonality where the plaintiff's allegations stemmed from similar discriminatory practices utilized by two of the defendant's plants).

Plaintiffs here charge both Defendants with just such a company-wide corporate level policy and practice of using a computer program to uniformly undervalue property damage claims in Louisiana after Katrina. The numerous common factual and legal issues raised by the Complaint include:

- (1) Whether Defendants calculated and compiled price lists for the Louisiana regions which were well below the fair market repair/restoration cost for damaged immovable property;
- (2) whether Defendants failed to timely update the price databases to keep up with the increase in the fair market repair/restoration cost for damaged immovable property after Hurricanes Katrina and Rita;
- (3) whether Defendants failed to exercise the requisite degree of care in ensuring that its employees, who were charged with the responsibility of administering the price databases, were properly trained and supervised to do so;
- (4) whether Defendants failing to ensure improper input from biased sources did not invalidate the accuracy of the price databases;
- (5) whether the defendants committed the tortious acts of horizontal price fixing that resulted in harm to the Plaintiffs/Insureds and class members;

- (6) 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;
- (7) 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 those damages;
- (8) whether Defendants caused the Plaintiffs/Insureds and class members to suffer damage;
- (9) whether there exists an agreement, conspiracy and/or combination to fix prices between Defendant State Farm and other competing insurance companies and/or Xactware;
- (10) whether Xactware was negligent in its production, creation, supervision and/or maintenance of its pricing databases;
- (11) whether Defendant State Farm was negligent in accepting and/or using Xactimate price lists;
- (12) the amount of damages that are owed to the Plaintiffs/Insureds and class members by Xactware;
- (13) the amount of damages that are owed to the Plaintiffs/Insureds and class members by State Farm; and
- (14) other common issues of law or fact may be articulated during the course of this litigation.

The central factual and legal issues raised in this lawsuit focus on the alleged conduct of Defendants' corporate management rather than questions concerning individual policyholders. This alleged misconduct adversely affected all Louisiana State Farm insureds. Here, there is no question that establishing Defendants' pattern or practice of undervaluing property damage, by itself, would benefit the entire Class. See Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 362 (1977).

### **3. Typicality.**

The test for typicality is not demanding. Mullen, 186 F.3d at 625. Typicality is satisfied when the named plaintiffs' claims for relief arise from the same common nucleus of operative facts as the claims of absent class members. 1 H. Newberg, Newberg on Class Actions § 3.13 at 3-71 (3d ed. 1992) (“[A] plaintiff’s claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his claims are based on the same legal theory.”).

Typicality does not require the claims of the class members be identical. Rather, a claim by a representative plaintiff is “typical” if it is one which members of the proposed class should reasonably expect to be raised. Mullen, 186 F.3d at 625. A strong similarity of legal theories will, accordingly, satisfy the typicality requirement, despite factual differences between the representative plaintiffs and the class members. Forbush, 994 F.2d at 1106.

Here, the typicality requirement is readily satisfied. The Plaintiffs in these cases are Louisiana policyholders victimized in the same way by the Defendants' creation and implementation of the price lists. The proposed representatives and Class Members' claims all arise from the same course of conduct by Defendants, namely, their uniform policy of requiring

the use of Xactimate to undervalue the property damage claims. Each putative class member makes the same legal argument that Defendants engaged in a pattern and practice of illegal pricing during the Class Period. See Lightbourn, 118 F.3d at 426. Plaintiffs' claims are, therefore, typical of the claims of the Class as a whole. See Shipes, 987 F.2d at 316.

#### **4. Adequacy of Representation.**

To establish adequacy of representation under Rule 23(a), Plaintiffs must show that (1) proposed Plaintiffs' counsel is competent to handle the case and (2) there are no disabling conflicts of interests among the Class Members and Plaintiffs. Payne v. Travenol Laboratories, Inc., 673 F.2d 798, 810 (5<sup>th</sup> Cir. 1982). Both requirements are met here.

First, Plaintiffs' Counsel have regularly engaged in major complex litigation, and have extensive experience in class action litigation which is similar in size, scope and complexity to the present case.

Second, there are no disabling conflicts between Plaintiffs and the proposed Class they seek to represent which would undermine adequate representation. As Louisiana owners of Defendants' policies, Plaintiffs and the Class Members share the same interest in determining whether the Defendants undervalued their property damage claim caused by Katrina. Their claims and remedies being sought are essentially identical.

#### **B. THE COURT SHOULD CERTIFY THE CLASS PURSUANT TO RULE 23(B)(3) BECAUSE THE COMMONALITY OF THE CLASS PREDOMINATES OVER ANY INDIVIDUAL ISSUES.**

The class is cohesive because the defining illegal misconduct is the Defendants' uniform undervaluing of plaintiffs' property damage based on the same price lists. Defendants

themselves have demonstrated how the class is manageable and ascertainable by employing a single computer program to value the adjustment of tens of thousands of Katrina insurance claims.

A (b)(3) class should be certified if “the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.” FED. R. CIV. P. 23(b)(3).

The predominance test is met where “common issues...constitute a significant part of the individual cases.” Mullen, 186 F.3d at 626. That common issues must be shown to “predominate” does not mean that individual issues do not exist. See, e.g., Bertulli v. Indep. Ass'n of Continental Pilots, 242 F.3d 290, reh'g denied, 252 F.3d 437 (5th Cir. 2001).

**A. Common Proof for the Common Injury.**

The commonality of the putative class and the dominance of common issues over any individualized ones is best demonstrated by explaining how the proof to support one plaintiffs' claim is the same as every other class member's. This is a case involving uniform pricelists on the part of the Defendants against Louisiana who can be readily identified in Defendants' records. The case is simplified by the fact that the Plaintiffs do not seek emotional distress damages.

This case is far more manageable than any of the long line of cases in which bifurcation has been used. Under those cases, courts in the Fifth Circuit have used a bifurcated trial to establish liability in Stage I of the proceeding, and to adjudicate remaining individual issues relating to class members in Stage II.

Here, a far simpler and less complicated trial is foreseen. Once liability and the total amount of restitution due to the class has been determined, the bulk of the work would have been completed. In the course of proving the merits (that the pricelists undervalued the value of the damage), the damage calculation will also be determined.

This process is simplified because Plaintiffs are essentially making claims for equitable relief – restitution of the value of the property damage from Katrina. The absence of mental anguish claims allows for a damage calculation independent from a single class member's subjective beliefs.

Proof of liability and class-wide damages in this case presents no management difficulties. The simple fact that Defendants implemented a computer program to uniformly undervalue the putative class' property damage claims demonstrates that a similar method could be employed to determine the proper value.

Once Plaintiffs have established liability, proceedings relating to the distribution of damages are likewise manageable. This process will only require the implementation of the market value price lists for replacing the damaged property into the Xactimate program. Each class members' amount of restitution will be determined using the same program that Defendants employed to undervalue the property damage claims. This process will not be overly complex, as the amount of restitution due to the class members will have been established during the liability determination.

Moreover, if numerous members of this proposed class try their claims individually against the defendants it could result in inconsistent or varying decisions on those claims, and

may establish incompatible standards of conduct for the defendants. The results of the numerous cases may not be consistent and compatible with one another.

Trying the class members' claims on a one-by-one basis could create a risk of the Court having trials of some claims that would, as a practical matter, be dispositive of the interests of other class members who were not parties to those particular trials, and, therefore, not present to protect their interests. Having individual trials of all these claims also could substantially impair or impede the ability of the other class members to protect their interests, especially those who were required (due to scheduling or docketing conflicts) to wait months or years to have their individual claims tried. Having individual trials also tends to deplete the financial resources of the defendants in favor of those whose cases are tried first.

#### **IV. CONCLUSION.**

This Court should deny Defendants' Motions to Strike. Certification of the class rests solidly upon the class' cohesiveness and commonality. Common proof will be used to prove common facts to demonstrate the common harm.

Respectfully Submitted:

s/Soren E. Gisleson

**RUSS M. HERMAN**, La. Bar No. 6819  
**STEVE J. HERMAN**, La. Bar No. 23129  
**SOREN E. GISLESON**, La. Bar No. 26302  
**HERMAN, HERMAN, KATZ & COTLAR, LLP**  
820 O'Keefe Ave.  
New Orleans, LA 70113  
Telephone: (504) 581-4892  
Fax No. (504) 561-6024

and

---

J. ALEX WATKINS (29472)  
T. CAREY WICKER, III (13450)  
CAPITELLI & WICKER  
1100 POYDRAS STREET  
2950 ENERGY CENTRE  
NEW ORLEANS, LA 70163-2950  
TELEPHONE: (504) 582-2425  
FACSIMILE: (504) 582-2422  
JAW@Capitelliandwicker.com

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the above and foregoing has been served upon all counsel of record by electronically filing the Preliminary Motion for Class Certification, this 5th day of June, 2007.

/s/ Soren E. Gisleson

**SOREN E. GISLESON**