

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Southern Division

THOMAS L. MOFFETT, II, ET AL

*

Plaintiffs,

* Civil Action No. 8:05-CV-01547-AW

v.

*

COMPUTER SCIENCES CORPORATION,
ET AL

*

*

Defendants

* * * * *

**MEMORANDUM IN SUPPORT OF INDEPENDENT ADJUSTERS’
MOTION TO DISMISS COUNTS II, III, AND IV OF THE
FIRST AMENDED COMPLAINT**

Defendants, Bellmon Adjusters, Inc., CNC Resource, Insurance Claims & Catastrophe Services, Inc., Jackson Adjustment Company, Inc., Pilot Catastrophe Services, Inc., Simsol Insurance Services, Inc., Colonial Claims, John Postava and Doug Branham (hereinafter collectively referred to as “the Adjuster Defendants”), by and through the undersigned counsel, hereby submit their Memorandum of Law in Support of the Motion to Dismiss Counts II, III, and IV of the First Amended Complaint.¹

Together with the following brief argument, the Adjuster Defendants incorporate and adopt by reference, as if fully stated herein, the Memoranda of Law in support of the Motions to Dismiss filed on behalf of the Write Your Own (“WYO”) Defendants² with

¹ Counts I and V of Plaintiffs’ First Amended Complaint are not asserted against the Adjuster Defendants.

² There are two memoranda filed on behalf of the WYO Defendants: Memorandum in Support of Certain Write Your Own Insurance Company Defendants’ Motion to Dismiss First Amended Complaint and For More Definite Statement and Memorandum in Support of Partial Motion to Dismiss Filed by Defendants

the exception of those portions relating to Count I and Count V of Plaintiffs' First Amended Complaint as neither cause of action is asserted against the Adjuster Defendants and insofar as they are not inconsistent with the positions of the Adjuster Defendants as contained in this brief. Moreover, if any of the Plaintiffs' claims are dismissed as a result of any legal argument raised by a Co-Defendant, the Adjuster Defendants hereby adopt that argument to the extent that it can be applied to the Adjuster Defendants.

Executive Summary

In the First Amended Complaint, Plaintiffs assert claims against the Adjuster Defendants in Count II for procurement fraud and civil conspiracy, Count III for adjustment fraud and civil conspiracy, and in Count IV for interference with contract. As a matter of law, and as set forth herein and in the Memoranda of Law submitted on behalf of the WYO Defendants, none of these causes of action state viable claims against any of the Adjuster Defendants because:

- I. The purported state law claims pleaded in the Second, Third, and Fourth Causes of Action for "Procurement Fraud," "Adjustment Fraud" and "Interference with Contract" as asserted against the Adjuster Defendants are disputes arising from the handling of claims under the SFIP, and are therefore pre-empted by federal law;
- II. Even if the claims are not pre-empted by federal law, the purported state law claims pleaded in the Second Cause of Action for "Procurement Fraud" are barred, as a matter of law, because plaintiffs have failed to plead fraud with the requisite particularity, and because either plaintiffs could not have reasonably relied upon the alleged misrepresentations concerning the

Jerry Dubyak and Twelve WYO Program Insurance Companies, however, for purposes of context there is some necessary duplication of those briefs.

SFIP's scope, and/or because, to the extent this cause of action constitutes a promissory fraud claim, it is barred by Maryland law;

- III. Even in the absence of federal pre-emption, the Third Cause of Action fails to state a viable claim as it fails to plead fraud with particularity and because Plaintiffs could not have reasonably relied upon the alleged misrepresentations;
- IV. Even in the absence of federal pre-emption, the Fourth Cause of Action fails to state a viable claim as the Adjuster Defendants, as a matter of law, as common law agents could not have interfered with contracts entered into by their principals, nor conspired with their principals; and
- V. Plaintiffs who are not "insureds" under the SFIP lack standing to pursue any of the claims asserted against these Adjuster Defendants.

BACKGROUND³

Although pleaded in five causes of action⁴, plaintiffs' claims as to the Adjuster Defendants are all based on the handling and alleged underpayment of their SFIP claims. This is logical because independent adjusters do not become involved until after a policy is purchased **and** a loss sustained.

The **Second Cause of Action**, purportedly one for "procurement fraud," alleges that all Defendants owed a duty to plaintiffs "to refrain from falsely representing...the nature and extent of benefits that would be paid to them in the event of a flood loss...." (1st Am. Comp., ¶72.) Plaintiffs allege that at the time the alleged misrepresentation was made, *each* defendant knew that the benefits paid would not be sufficient to return their property to its pre-flood condition because of "the systematic low-balling, high pressure tactics...employed to deprive the SFIP-purchasing Plaintiffs of benefits" during

³ To avoid duplication, the Adjuster Defendants incorporate and adopt the factual summary provided by the Federal Emergency Management Agency ("FEMA") in its Memorandum of Law in support of Motion to Dismiss.

⁴ As noted above, Counts I and V of Plaintiffs' First Amended Complaint are not asserted against the Adjuster Defendants.

adjustment of claims under the SFIP. (*Id.*, ¶74.) Plaintiffs do not allege, nor can they allege, that these Adjuster Defendants participated in or were involved, in any fashion, in the marketing or procurement of the subject policies. Rather, Plaintiffs attempt to lump the Adjuster Defendants into the claim for “procurement fraud” by alleging that *all* Defendants, including the Adjuster Defendants, knew that the manner in which the policies were being marketed was contrary to the manner in which claims would ultimately be adjusted. (*Id.* at para. 73, 74)

The **Third Cause of Action** alleges that the Adjuster Defendants owed plaintiffs a duty “to refrain from employing low-balling tactics by misrepresenting the nature and extent of the Plaintiffs’ SFIP coverage and to refrain from employing high-pressure tactics by misrepresenting the consequences to the Plaintiffs if they refused to accept the low-ball offers.” (1st Am. Compl. ¶79.) Plaintiffs allege that in breach of this “duty,” the Adjuster Defendants falsely represented to plaintiffs “that SFIP benefits to which they were entitled were far less than that which...would be in an amount sufficient to return their property to its pre-flood condition, up to the policy limits.” (*Id.*, ¶80.)

The **Fourth Cause of Action** alleges that “at all times pertinent to the adjustment of the insured Plaintiffs’ flood loss claims, Defendants owed a duty...to refrain from interfering with the contractual relations between [plaintiffs] and the WYOs....” (Am. Compl. ¶86.) Plaintiffs allege that “[d]efendants, acting outside the scope of their authority, interfered with this contractual relationship,” damaging plaintiffs. (*Id.*, ¶87.)

ARGUMENT

The following is provided in supplementation to those legal arguments set forth in the Memoranda of Law submitted on behalf of the WYO Defendants, which the Adjuster Defendants adopt, with the exception of those arguments relating to Counts I and V of Plaintiffs' First Amended Complaint, which are not asserted against the Adjuster Defendants.⁵

A. Counts II, III, and IV are Preempted

In addition to those arguments set forth by the WYO Defendants regarding preemption of Counts III and IV of the Plaintiffs' First Amended Complaint, **as asserted against the Adjuster Defendants**, Count II is likewise preempted.

Effective December 31, 2000, FEMA revised Article IX of the SFIP to expressly provide that “[t]his policy and *all disputes arising from the handling of any claim under the policy* are governed exclusively by the flood insurance regulations issued by FEMA, the National Flood Insurance Act of 1968, as amended...and Federal common law.” (Emphasis supplied.) At the same time, FEMA also revised Article VII(R) to make clear

⁵ Plaintiffs allege that FEMA and CSC, through Defendants Buzzelli and Shortley, assembled a task force of adjusters to review Isabel flood loss claims that had previously been processed, and that the task force was composed “largely of the same group of adjusters and adjusting firms” that had initially processed these claims. (Am. Compl. at 58) Plaintiffs go on to allege that these unidentified task force adjusters and adjusting firms discouraged some unnamed flood victims from requesting a review of their claims or failed to correct shortfalls in those initially processed claims which were reviewed. *Id.* In addition to not identifying which adjusters and adjusting companies committed the alleged acts, the Amended Complaint does not assert or direct any of its causes of action against the task force adjusters and adjusting companies. This is understandable since the alleged task force conduct was committed when the adjusters and adjusting firms were acting on behalf of FEMA and/or CSC, and any claims relating to such conduct are barred by the doctrine of sovereign immunity. *See*, the discussion of sovereign

that the requirement that suit be filed in federal court to recover money under the SFIP “applies to any claim that you may have under this policy and *to any dispute that you may have arising out of the handling of any claim under the policy.*” (Emphasis supplied.) These revisions were made in order “to clarify the policy language pertaining to jurisdiction, venue and the applicable law *to emphasize that matters pertaining to the [SFIP], including issues relating to and arising out of claims handling...are governed exclusively by Federal law.*” 65 Fed. Reg. 34,824, 34,827 (May 31, 2000) (emphasis supplied); *see also Battle v. Seibels Bruce Ins. Co.*, 288 F.3d 596, 608, n. 18 (4th Cir. 2002) (recognizing FEMA’s stated purpose in revising the SFIP).

Plaintiffs attempt to circumvent the pre-emption of their Second Cause of Action by asserting it as one of “procurement fraud,” thus, inferring that this involves only pre-claim fraud. However, with regard to the Adjuster Defendants, Plaintiffs’ attempts in this regard fail. Plaintiffs cannot and do not assert that the Adjuster Defendants marketed the policies or were otherwise involved in their sale. This is because, as Plaintiffs recognize, independent adjusters do not become involved in claims until after the policy is purchased and a loss is sustained.

Thus, Plaintiffs allege that the Adjuster Defendants, acting in concert with the co-Defendants, “knew, or [were] recklessly indifferent to the truth, that the systematic low-balling, high pressure tactics described in this Complaint would be employed to deprive the SFIP-purchasing Plaintiffs of benefit necessary to make them whole and sufficient to

immunity and cases cited in the Memorandum in Support of Defendants’ Motion to Dismiss Plaintiffs’ Amended Complaint Against the CSC Defendants at p.8-12.

return their respective residences to their pre-flood condition.” (First Am. Compl. at para. 74) That is, Plaintiffs claim that the Adjuster Defendants allegedly knew that their **claims handling** would ultimately be contrary to the manner in which the policies were being marketed by other Defendants. Thus, to prevail under Count Two, Plaintiffs must establish that the SFIPs were marketed as providing broad coverage and that their claims were in fact handled in a fashion that was not in accordance with these representations. As Independent Adjusters are not involved in the marketing or procurement of the policies, nor does Plaintiff specifically allege as such, the Second Cause of Action must be read against the Adjuster Defendants as involving the claims handling of the policies.

Therefore, as asserted against the Adjuster Defendants, the Second Cause of Action alleges “impropriety in the investigation and adjustment of their insurance claims [that] are intimately related to the disallowance of their insurance claim.” *Van Holt v. Liberty Mutual Fire Ins. Co.*, 163 F.3d 161, 167 (3rd Cir. 1998). As such, the Second Cause of Action **as alleged against the Adjuster Defendants** is expressly preempted by federal law. 44 C.F.R. Pt. 61, App. A(1) art. IX.

B. Parties Cannot Interfere With Their Own Contracts--A Rule That Cannot Be Circumvented By Conspiracy Allegations

The “interference with contract” claim asserted in the Fourth Cause of Action is legally insufficient because, as a matter of law, a party (WYO Insurers) may not interfere with its own contractual relationship and conspiracy allegations are insufficient to avoid this well-settled rule.

As to the claim of interference with contract, Maryland's courts consistently have held that a defendant cannot tortiously interfere with a contract to which the defendant is a party. *See Parks v. CAI Wireless Systems, Inc.*, 85 F. Supp. 2d 549, 556 (D. Md. 2000) (“There is no cause of action for interference with a contract when suit is brought against a party to the contract.”); *Kaser v. Financial Protection Marketing Inc.*, 376 Md. 621, 630, 831 A.2d 49, 54 (2003); *Travelers Indemnity Co. v. Merling*, 326 Md. 329, 343, 605 A.2d 83, 89-90 (1992). Nor can a plaintiff recover for contractual interference against an agent of a party to a contract.⁶ *See Lewis v. Forest Pharmaceuticals, Inc.*, 217 F. Supp. 2d 638, 660 (D. Md. 2002); *Simon v. Union Hosp.*, 15 F.Supp.2d 787 (D. Md. 1998), *Byington v. Vega Biotechnologies*, 869 F.Supp. 338 (D. Md. 1994) *Bagwell v. Penninsula Regional Med. Center*, 106 Md.App. 470 (1995). “The reasoning behind this rule is that a suit for breach of contract is the more appropriate remedy.” *Parks, supra*.

This result cannot be circumvented by the simple expediency of alleging in conclusory fashion that non-parties to the contract “acted in concert” or “conspired” with the defendant to breach its own contract. First, Maryland law does not recognize a cause of action based upon concert of action. *See Christian v. Minnesota Mining & Manufacturing Co.*, 126 F. Supp. 2d 951, 959-60 (D. Md. 2001); *see also, Herlihy v. Ply-Gem Industries, Inc.*, 752 F. Supp. 1282, 1290 (D. Md. 1990); *Lee v. Baxter Healthcare*

⁶ The Adjuster Defendants refer to “agent” in the common law sense akin to master and servant and do not allege, infer, or acknowledge that the Adjuster Defendants were fiscal or fiduciary agents of the WYO's or FEMA or that they were "insurance agents" in connection with the SFIPs.

Corp., 721 F. Supp. 89, 92 (D. Md. 1989). Second, under Maryland law, “conspiracy” “is a parasite tort -- it cannot stand alone.” *Kramer v. Mayor and City Council of Baltimore*, 723 A. 2d 529, 542 (Md. App. 1999).

Courts applying Maryland law have expressly held that breach of contract claims cannot be transmogrified into tortious interference claims by simply alleging that others “conspired” with one of the contracting parties to breach the contract. *See Alexander & Alexander, Inc. v. B. Dixon Evander & Associates, Inc.*, 650 A. 2d 260, 265 fn. 8 (Md. App. 1994) (“a party to contractual relations cannot be liable for the interference tort...We do not believe that this principle can be circumvented by the ‘conspiracy’ device”); *Hale Trucks of Md., LLC v. Volvo Trucks North America, Inc.*, 224 F. Supp. 2d 1010, 1021 (D. Md. 2002) (“A civil conspiracy to breach a contract is not a viable claim”). Principal and agent, moreover, cannot conspire.⁷ *Marmott v. MD Lumber*, 807 F.2d 1180 (D. Md. 1986); *Mylan Lab. v. Akzo*, 770 F.Supp. 1053 (D. Md. 1991); *Fraidin v. Weitzman*, 93 Md.App. 168 (1992). Plaintiffs’ allegations that the Adjuster Defendants conspired to interfere with contract cannot succeed.⁸

C. Plaintiffs’ Fraud Claims Should Be Dismissed For Failure To Plead Fraud With Particularity.

Even if this Court concludes that the Second and/or Third Causes of Action are not pre-empted by federal law and survive the application of state law principals, the claim is still insufficient as a matter of law. Fed. R. Civ. P. 9(b) makes clear that “[i]n all

⁷ See footnote 6, above.

averments of fraud or mistake, the circumstances constituting the fraud or mistake shall be set forth with particularity.” Courts have repeatedly emphasized that these pleading requirements are designed to: (1) ensure that the defendants have sufficient information for the formulation of a defense by putting them on notice of the alleged fraudulent conduct; (2) protect defendants from frivolous suits; (3) eliminate fraud claims based on facts learned only after discovery; and (4) protect defendants’ reputations. *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 784 (4th. Cir. 1999) (citing *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Blue Cross Blue Shield of Georgia, Inc.*, 755 F. Supp. 1055, 1056-57 (S.D. Ga. 1990)). Accordingly, a plaintiff must plead with particularity “the time, place and contents of the false representations, as well as the identity of the person making the misrepresentation and what was obtained thereby.” *Id.* (citing 5 Wright and Miller, *Federal Practice and Procedure: Civil* § 1297 at 590 (2d ed. 1990)).

Where, as here, multiple defendants are named, the information required by Rule 9(b) must be alleged with particularity as to *each* Defendant. *See Hirschler v. GMD Investments Ltd. Partnership*, 1990 WL 263438, at *5 (E.D. Va. 1990) (“where multiple defendants are involved, the complaint must state with sufficient particularity the specific nature of each defendant’s participation in the alleged fraud”) (citing *Di Vittorio v. Equidyne Extractive Industries, Inc.*, 822 F. 2d 1242, 1247 (2d Cir. 1987)).

⁸ For this reason, Plaintiffs’ claims of conspiracy against the Adjuster Defendants in connection with the Second and Third Causes of Action also must fail.

Despite these requirements, in both the Second and Third Causes of Action, all 182 Plaintiffs, allegedly representing 77 separate households and flood insurance policies issued by 17 different WYO carriers and FEMA, claim fraud against 56 Defendants (all Defendants but FEMA) with respect to the procurement and adjusting of each of these 77 policies. (Am. Comp. ¶¶ 72-78 & Rev. Att. A.) Plaintiffs do not even mention by name, however, most of the Defendants after the “Parties” section of the First Amended Complaint; much less plead the specific information required under Rule 9(b). For example with regard to Count II:

- Rather than alleging the identity of the persons alleged to have made the claimed misrepresentations, Plaintiffs make the sweeping allegation that the purported statements were made (apparently to each Plaintiff purchasing an SFIP) by “each of the Defendants or their agents, servants and employees, or by one or more of the Defendants or their agents, servants and employees conspiring or acting in concert with each Defendant” (Am. Comp. ¶ 73.) There is no identification of which Defendants, which agents, which servants, or which employees purportedly made statements to which Plaintiffs.
- Plaintiffs make no attempt to plead the time of the alleged misrepresentations, other than to suggest that they took place at “times pertinent to the procurement” of the policies. Given that there are 77 separate policies at issue, which were undoubtedly purchased at many different times, this allegation provides no meaningful notice to Defendants.
- There is no allegation at all as to the alleged place of the misrepresentations.
- Plaintiffs also fail to plead the specific misrepresentation each Defendant is alleged to have made, instead alleging a single misrepresentation as to all of the Defendants, notwithstanding the fact that 77 separate policies issued by 17 different WYO carriers and FEMA are at issue. (Am. Comp. ¶ 73.)

Similarly, with regard to Count III:

- Rather than alleging the identity of persons alleged to have made the claimed misrepresentations, Plaintiffs make sweeping statements such as stating that certain defendants misrepresented “the consequences to the Plaintiffs if they refused to accept the low-ball offers.”
- Plaintiffs make no attempt to allege which defendant made a representation to a particular Plaintiff.
- Plaintiffs make no attempt to plead the time of the alleged misrepresentation or exactly what was said.
- There is no allegation as to the place of the misrepresentation.
- There is no allegation as to how the Plaintiffs contend that they relied upon the alleged misrepresentation.

Plaintiffs’ attempt to mass-plead their fraud claim in this fashion does not meet the requirements or purposes of Rule 9(b). The court in *Hirschler* dismissed fraud claims where the claims were similarly pled “against ‘defendants’ in a vague, conclusory fashion,” where the connection of each defendant to each specific alleged misrepresentation was “missing,” and where the complaint failed to allege the role of each defendant in the alleged fraudulent scheme. 1990 WL 263438, at *6. The court observed that “[g]uilt by association is not sufficient to meet the strict requirements of Rule 9(b).” *Id.* Plaintiffs’ fraud claims here should likewise be dismissed for failure to comply with Rule 9(b).

Plaintiffs’ failure to plead fraud with particularity is not excused by their inclusion of conspiracy allegations. To the contrary, claims of conspiracy to commit fraud not only must satisfy the particularity requirements of Rule 9(b), but also must include allegations as to the agreement (including its time and place), the identity of the co-conspirators, and

what each defendant allegedly did to carry the conspiracy into effect. *Hill v. Brush Engineered Materials, Inc.*, 2005 WL 1983653, at *8-9 (D. Md. 2005).

CONCLUSION

For the reasons set forth above and the arguments set forth in the Memoranda of Law submitted on behalf of the WYO Defendants, the Adjuster Defendants respectfully request that this Honorable Court dismiss Counts II, III, and IV of Plaintiffs' Complaint with prejudice and grant all other relief appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 31st day of October 2005, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system and served the same via the Court's electronic system to: Jennifer Caitlin Argabright; Scott Nathan Auby; Peter F. Axelrad; Jamie M. Bennett; Pamela Anne Bresnhan; Holly Drumheller Butler; Natalie Paige Drinkard; W. Neil Eggleston; Arthur F. Fergenson; Martin H. Freeman; Monte Fried; William G. Gandy; William J. Hickey; Mary Legare Hughes; Patricia McHugh Lambert; Frank D. Lawrence, III; Jennifer S. Lubinski; Donald W. Marcari; Jay I. Morstein; Gerald J. Nielsen; Kirk Robert Ruthenberg; Steven B. Schwartzman; Elizabeth T. Simon; James D. Skeen; Steuart H. Thomsen; and Bradish J. Waring; and served the same by first-class mail postage prepaid to: Tyler B. Raimo, 3170 Fairview Park Dr., Falls Church, Virginia 22042.

_____/s/_____
Stacey A. Moffet