

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND, SOUTHERN DIVISION**

Thomas L. MOFFETT, II, et al.	:	
Plaintiffs:	:	
	:	
	:	
v.	:	Civil Action No.
	:	PJM05CV1547
	:	
	:	
Computer Sciences Corp., et al	:	
Defendants	:	

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**PLAINTIFFS' SUPPLEMENTAL OPPOSITION TO REPLY MEMORANDUM  
FILED BY TWELVE WYO DEFENDANTS AND DEFENDANT DUBYAK WITH  
RESPECT TO THEIR PARTIAL MOTION TO DISMISS**

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Now come the Plaintiffs, by their counsel, and file Plaintiffs' Supplemental Omnibus Opposition Memorandum to Motions to Dismiss and for More Definite Statement, as follows:

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**PLAINTIFFS’ SUPPLEMENTAL OPPOSITION TO REPLY MEMORANDUM  
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RESPECT TO THEIR PARTIAL MOTION TO DISMISS**

---

Now come the Plaintiffs, by their counsel, and file Plaintiffs’ Supplemental Opposition to Reply Memorandum Filed by Twelve WYO Defendants and Defendant Dubyak with respect to their Partial Motion to Dismiss, as follows:

**INTRODUCTION**

On Friday, April 7, 2006 and Monday, April 10, 2006, the Defendants filed their memoranda in reply to Plaintiffs’ Omnibus Opposition Memorandum (the “POOM”). As was the case with original motions, the “prime brief” in reply (hereinafter “the Prime Reply” was that of the twelve WYOs and Mr. Dubyak, with the other Defendants adopting the arguments contained therein.<sup>1</sup>

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<sup>1</sup> The other Defendants then made additional arguments in their respective reply memoranda.

Many of the points raised in the replies appear to be recasts of those advanced in support of the original motions, while others are defense characterizations of Plaintiffs' positions. The Federal Rules of Civil Procedure, and the members of the Court, ordinarily do not allow for supplemental opposition memoranda to address such recast arguments or characterizations, but do permit a response at oral argument, if such is scheduled. On the other hand, when new cases or new arguments, or both, are presented in a reply, (as have been presented in the Prime Reply), the Court may exercise its discretion (as it has done in this case) to permit a brief supplemental opposition memorandum.

In those cases where the Court schedules oral argument on the motions (as it has in this case), the parties are ordinarily permitted to comment on the recasting of arguments and the opposing advocate's characterization of a party's position, as well as on new cases and arguments raised by the opposition raised in the opposition's last filed brief, whether or not addressed in a supplemental opposition.

Because the Prime Reply presents both new cases and new arguments which have been adopted by all Defendants, Plaintiffs here present a brief commentary on them. At oral argument, Plaintiffs plan to expand on this brief commentary, as well as to comment on other recasts and characterizations in the assorted Defendants' reply memoranda, at the April 24-25 oral argument sessions.

### **TEXT OF SUPPLEMENTAL OPPOSITION**

#### **A. Defendants' Comments on Six Cases Cited by Plaintiffs**

Defendants now advance the argument that six of the cases upon which Plaintiffs rely are no longer good law, citing decisions handed down since those cases were decided. As was the case with the Defendants' citation of three cases for the proposition

that promissory fraud does not exist when the three cases held to the contrary (See POOM, pp.21-24), the Defendants repeatedly cite law for propositions not contained in the decisions they cite. As will be seen below, the cases cited by the Defendants do not detract in the slightest from the “good law” status of the six cases discussed, as they apply to the facts of the cases as alleged in the instant Complaint.

Following are Defendants’ positions as to these six cases, followed in each instance by Plaintiffs’ brief commentary:

1. *Spence v. Omaha Indemnity Insurance Co.*, 996 F.2d 793 (5th Cir.1993)

This decision confirms the unavailability of the preemption defense (POOM, pp. 28-29).

Defendants’ position: The Fifth Circuit has twice repudiated *Spence*, and it is therefore not good law.<sup>2</sup>

Plaintiffs’ comments: Defendants’ position is demonstrably incorrect. The Prime Reply actually characterizes not two, but four Fifth Circuit cases as repudiating *Spence*.<sup>3</sup> They are: *Gowland v. Aetna*, 143 F.3<sup>rd</sup> 951 (5<sup>th</sup> Cir. 1998), *Richmond Printing, LLC v. Director, FEMA*, 2003 WL 21697457, (5<sup>th</sup>. Cir.), *Wright v. Allstate*, 415 F3<sup>rd</sup> 384 ( 5<sup>th</sup> Cir. 2005) and *Gallup v. OPAC*, 434 F.3<sup>rd</sup> 341 (5<sup>th</sup> Cir. 2005). An examination of these four cases demonstrates an absence of any basis for reliance upon them by Defendants. *Gowland* was a proof of loss adequacy case, an issue not even brought before the Court by the Prime Brief. What’s more, *Spence* is not even mentioned in the opinion. *Richmond Printing, LLC v. Director, FEMA*, 2003 WL 21697457 (5<sup>th</sup>. Cir. 2003), not only did not repudiate *Spence*; it reconfirmed *Spence*. The court held that fraud in both

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<sup>2</sup> Prime Reply, p.2

<sup>3</sup> At Prime Reply, p.25, they state that there are three such cases, but cite four.

procurement and adjustment were not preempted.<sup>4</sup> *Wright v. Allstate*, 415 F.3d 384 (2005) and *Gallup v. OPAC*, 434 F.3d 341 (5<sup>th</sup> Cir. 2005), indeed did reach a different conclusion than that reached in *Spence* and *Richmond Printing*, but only with respect to state causes of action pertaining to claims-handling brought against the WYO that provided flood loss coverage for the insured. In the instant case, there are no state causes of action pertaining to the claims-handling brought against the WYOs. (The third cause of action, adjustment fraud, names no WYOs. Thus, *Wright* and *Gallup* have no application to the case at bar. With respect to the factual setting of the case at bar, *Spence* continues not only to be good law, but law which, when applied to this factual setting, is law which is not in dispute.

2. *Bleecker v. Standard Fire Ins. Co.*, 130 F.Supp.2d 726 (E.D.N.C. 2000)

This decision also confirms the unavailability of the preemption defense (POOM, pp. 29-32).

Defendants' position: The author of the *Bleecker* decision has subsequently repudiated it.<sup>5</sup>

Plaintiffs' comments: Defendants' position is demonstrably incorrect. In *Langston Park, LLC v. First Community Insurance Company, et al*, (U.S.D.C., E.D.N.C. 2002) (Attachment D to the Prime Reply), Judge Howard stated that, if he were confronted with *Bleecker* for the first time in 2002, he might decide it differently. There are four points worth noting about this comment. First, it is clearly *dicta*. Second, his

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<sup>4</sup> Defendants continue to cling to the irrelevant "impossibility of success" decisions (e.g., *Heckler*, *Merrill O'Kane*, attached to the Prime Reply as Attachment A, and *Morrison v. State Farm*, attached to the Prime Reply as Attachment B ) which deal with misrepresentations as to the scope of coverage, rather than, as here, correct representations as to the scope of coverage coupled with a then-existing intent not to comply with that scope.

<sup>5</sup> Prime Reply, p.2

observation was what he might do, not what he would do. Third, he wasn't being confronted with it for the first time in 2002. Fourth, and most importantly, like *Wright* and *Gallup*, *Langston Park* pertained to state claims-handling causes of action brought against the WYO that provided flood loss coverage for the insured. In the instant case, as stated, there are no state causes of action pertaining to claims-handling brought against the WYOs. Thus, like *Wright* and *Gallup*, *Langston Park* has no application to the case at bar. With respect to the factual setting of the case at bar, *Bleecker* continues not only to be good law, but law which, when applied to the factual setting in the instant case, is law which is not in dispute.

3. *Davis v. Travelers Property & Cas. Co.*, 96 F.Supp.2d 995 (N.D.CA 2000)

This decision also confirms the unavailability of the preemption defense (POOM, pp. 26-28).

Defendants' position: Deemed unpersuasive and otherwise criticized in five other cases.<sup>6</sup>

Plaintiffs' comments: Defendants' position is demonstrably incorrect. The five cases are: *Novikov v. Allstate Inc. Co.*, Not Reported in F.Supp.2d, 2001 WL 880852, E.D.Cal.,2001; *Pecarovich v. Allstate Ins. Co.*, 272 F.Supp.2d 981, C.D.Cal.,2003; *Eaker v. State Farm Fire and Cas. Ins. Co.*, 216 F.Supp.2d 606 S.D.Miss.,2001, *Scherz v. South Carolina Ins. Co.*, 112 F.Supp.2d 1000 C.D.Cal.,2000; and *Neill v. State Farm Fire and Cas. Co.*, 159 F.Supp.2d 770 E.D.Pa.,2000. All five of these cases are claims-handling cases.<sup>7</sup> They are not Bivens cases, not procurement fraud cases, not tortious interference with contract cases. *Flick v. Liberty Mut. Fire Ins. Co*, 205 F.3d 386 (9<sup>th</sup> Cir. 2000), *cert*

<sup>6</sup> At Prime Reply, p.2, defendants state that there are seven such cases. But at Prime Brief, p. 24, only five, cases are addressed in support of Defendants' position.

<sup>7</sup> At Prime Reply

*denied*, 21 S.Ct. 305 (2000), on which *Novikov* relies, is also a claims handling case. It held that a claims-handling claim against a WYO is a claim against the U.S., (by virtue of the contractual relationship between them) and is thus preempted [except of course the breach of contract claim]. The case at bar has no fraud in the tortious claims-handling cause of action against the WYOs (Count 3). That cause of action is brought only against those who are neither employees of the U.S., nor contractors with the U.S., nor employees of contractors with the U.S. Claims against this group therefore cannot by any indicator be considered claims against the U.S.<sup>8</sup> Thus, with respect to the factual setting of the case at bar, like *Spence* and *Bleecker, Davis* continues not only to be good law, but law which, when applied to the factual setting in the instant case, is law which is not in dispute.

4. *Deverant v. Selective Ins. Co., Inc.*, 2003 WL 21282184 (E.D.PA)

This decision confirms the unavailability of the preemption defense, particularly as to the fraud in the procurement count (POOM, pp. 33-34).

Defendants' position: Irrelevant because the same judge disposed of the same claim later in the case, on another theory Defendants raise here.<sup>9</sup>

Plaintiffs' comments: Defendants' position is demonstrably incorrect. The later opinion citation is *Deverant v. Selective Ins. Co., Inc.*, 2004 WL 1171333 (E.D.PA). The "other theory" is the "impossibility of success" theory in which the policyholder may not reasonably rely on a misrepresentation of the scope of coverage. Once again, the Defendants continue to cling to the irrelevant "impossibility of success" decisions which

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<sup>8</sup> In the Defendants' replies, the Defendants argue that there is no authority supporting absence of preemption of Plaintiffs' state-based claims against those not in privity with the U.S., or employed by someone in such privity. In doing so, they ignore this obvious corollary to the *Flick* decision.

<sup>9</sup> Prime Reply, p.2

deal with misrepresentations as to the scope of coverage, rather than, as here, correct representations as to the scope of coverage coupled with a then-existing intent not to comply with that scope. The 2004 *Deverant* opinion simply is not relevant to the facts alleged in the instant case. The 2003 *Deverant* opinion not only remains as good law, but unlike *Deverant* 2004, is applicable to the facts pleaded in the case at bar.

5. *Houck v. State Farm*, 194 F.Supp.2d 452 (D.C.S.C. 2002)

This decision also confirms the unavailability of the preemption defense, particularly as to the fraud in the procurement count (POOM, pp. 34-35).

Defendants' position: Cast into doubt by another opinion by the same judge in another case thirty days later.<sup>10</sup>

Plaintiffs' comments: Defendants' position is demonstrably incorrect. The decision entered thirty days later is *Southpointe Villas Homeowners Assn. v. Scottish Ins. Agency, Inc.*, 213 F. Supp. 2d 586 (D.S.Car. 2002). Once again, Defendants turn for support of their untenable position to a case which has nothing to do with the facts alleged in the instant case. The Plaintiff in *Southpointe Villas* was seeking return of overcharged premiums under the flood insurance contract, a factual setting which simply has no application to the case at bar. *Houck* continues as good law.

6. *Jamal v. Travelers Lloyds of Texas Ins. Co.*, 129 F.Supp.2d 1024 (S.D.Tex. 2001)

This decision confirms the right to recover pre-judgment interest (delay damages) in an NFIP setting (POOM, p. 9, fn. 6).

Defendants' position: Based on *Gallup* and *West v. Harris*, 573 F.2d 873, (5<sup>th</sup> Cir. 1978), a case which related to Part A of the NFIA, not Part B, prejudgment interest is not recoverable.

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<sup>10</sup> Prime Reply, pp.2-3.

Plaintiffs' comments: Defendants' position is demonstrably incorrect. Still again, Defendants rely on a case which doesn't decide the issue the way Defendants say it does, or even address the issue. *Gallup* does not even mention delay damages or prejudgment interest, much less hold that such are not available. *West* determined that a prevailing plaintiff may recover prejudgment interest in a case under the NFIA. *Id.*, at 883-884. The *West* court noted that in analogous situations in which the amount of liability is "based upon the readily ascertainable value of damages to property rather than personal injury ... it has been held that the better practice is to allow prejudgment interest as an element of compensation in the absence of strong equities to the contrary." *Id.* at 883 (citing *Eazor Express, Inc. v. International Bhd. of Teamsters*, 520 F.2d 951, 973 (3d Cir.1975), *cert. denied*, 424 U.S. 935, 96 S.Ct. 1149, 47 L.Ed.2d 342 (1976); *Aetna Cas. & Sur. Co. v. United States*, 365 F.2d 997, 1006-07 (8th Cir.1966)). Under the NFIA, "the amount [of damages] is based upon the readily ascertainable value of services and property." *Id.* Accordingly, the court found that "[f]air compensation to the plaintiff for his loss covered by the insurance policy issued by the defendant can only be achieved by including the award of prejudgment interest as a mandatory element of damages." *Id.*, at 883. Therefore, Jamal was entitled to an award of prejudgment interest if he was successful on his remaining claim under federal law. The rationale in *West* and *Jamal* applied independently of whether recovery was under Part A or B. In fact, there is no mention of Part A or B in the rationale supporting payment of prejudgment interest in either case. Finally, *In Re Estate of Lee*, 812 F.2d 253 (5th Cir. 1987) simply declined to extend the *West* affirmation of the right to recover prejudgment interest from the WYO to FEMA, a decision which did not disturb the basic ruling in *West* permitting the recovery of

prejudgment interest from the WYOs, a ruling confirmed long after *Estate of Lee*, in *Jamal*. *Jamal* and *West* continue to be good law.

**B. *Reeder v. Nationwide Mut. Fire Ins. Co.*,--F.Supp.2d --, 2006 WL 618814, (D.Md.)**

On March 13, 2006, this Court held:

Defendants also contend that FEMA "legislatively preempted" any potential claims of misrepresentation by promulgating the following regulation: The standard flood insurance policy is authorized only under terms and conditions established by Federal statute, the program's regulations, the Administrator's interpretations and the express terms of the policy itself. Accordingly, *representations regarding the extent and scope of coverage which are not consistent with the National Flood Insurance Act of 1968, as amended, or the Program's regulations, are void*, and the duly licensed property or casualty agent acts for the insured and does not act as agent for the Federal Government, the Federal Emergency Management Agency, or the servicing agent. 44 C.F.R. § 61.5(e) (emphasis added). This argument has also been considered and rejected by at least two courts. *See Houck*, 194 F .Supp.2d at 462 ("However, this regulations does not have the effect of immunizing agents from liability for fraudulent statements concerning the scope of coverage, but instead it protects federal funds by making clear that such unauthorized actions cannot operate to waive a provision of the SFIP.") (citing *Kennedy v. CNA Ins. Co.*, 969 F.Supp. 931, 935 n. 6 (D.N.J.1997)); *see also Spence*, 996 F.2d at 797 ("FEMA regulations disclaiming any agency relationship with WYO companies, as well as the terms of the FEMA-WYO agreement, more indicate intent to leave these insurers responsible for their own tortious conduct... We decline to accept a reading of that provision immunizing WYO companies from liability for the tortious conduct of their agents."). Accordingly, Defendants' motion to dismiss Plaintiffs' Complaint based on constructive knowledge of federal statues and 44 C.F.R. § 61.5(e) is DENIED.

*Id.*, at p. 11. Thus, this Court has confirmed the decisions in *Houck* and *Spence*. Coupling this ruling with the inapplicability of the "impossibility of success" argument to the case at bar, the Court now has before it both a set of facts alleged which goes far beyond that alleged in prior federal cases, and a Maryland federal District Court decision recognizing, as do *Spence*, *Bleecker*, *Davis*, *Deverant* and *Houck*, recognizing the unavailability of the preemption defense to facts analogous to the case at bar.

In an apparent effort to diminish the import of the *Reeder* case, Defendants cite two additional recent cases from other courts: *O’Kane v. Hartford* (Att. A to the Prime Reply) and *Morrison v. State Farm* (Att. B to the Prime Reply). *O’Kane* held that fraud in the procurement was not preempted, but reasonable reliance was impossible because the allegation was that the scope of coverage was misrepresented. Again, reasonable reliance on representations regarding the scope of coverage is not an issue in the instant case, where it is alleged that the representation to the prospective insured was that the insured would be paid the amount to which he was entitled under the scope of coverage in the SFIP, when the intent at that time was not to do so. Defendants represent that, in *Morrison* (a claims handling case against the insuring WYO and two of its adjusters), claims against the adjusters were dismissed because they were preempted.<sup>11</sup> This representation is patently incorrect. The claims of fraudulent misrepresentation of the scope of the coverage, at the time of procurement, were dismissed based on the impossibility of proving “reasonable reliance”, a rationale which, as stated, has no application to the case at bar. The dismissal of the contract count against the adjusters was based on lack of privity.<sup>12</sup>

C. **The Twenty-Eight Cases listed in Attachment A to the Prime Brief**

Attachment A of the WYO Prime Brief lists twenty-eight (28) NFIP cases as ones in which “the plaintiff’s state law based extra-contractual claims arising out of claims handling were dismissed as preempted”.

However, in each of these cases, the defendant as to whom the preemption defense was allowed was the federal government, a federal government employee, or an

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<sup>11</sup> Prime Reply, p.6

<sup>12</sup> The contract count in the case at bar is brought against the contracting party only. In no instance are adjusters sued for breach of contract.

entity under contract with the federal government. In none of the cases was preemption applied to claims-handling under the SFIP by a defendant who was neither the federal government, a federal government employee, an entity under contract with the federal government nor an employee of an entity under contract with the federal government.

Moreover, in none of the cases was it alleged, as is pleaded in the case at bar, that the defendant was participating in a scheme completely outside the scope of his or its authority.<sup>13</sup>

At least one of the 28 cases makes abundantly clear that the reasons for preemption simply do not apply to a defendant who is (a) someone other than the federal government, a contractor or employee with the federal government, or an employee of any such contractor, or (b) the federal government, a contractor or employee with the federal government, or an employee of any such contractor, who is acting outside the scope of his or its authority:

Even assuming that § 4081(c) applies to claims adjustment, it is plainly limited to claims against agents and brokers, as distinct from WYOs. *See* 42 U.S.C. § 4081(a) (referring to insurance companies as distinct from agents and brokers), § 4081(c) (referring only to claims against agents and brokers who sell or undertake to sell flood insurance policies under the NFIP). Wright's argument that his breach of contract suit does not implicate federal funds because FEMA may, in some cases, choose not to reimburse a WYO is similarly unavailing. FEMA regulations permit FEMA to decline to recognize as a reimbursable loss cost claims grounded in actions by the WYO which FEMA determines are "significantly outside the scope of this Agreement." 44 C.F.R. Pt. 62, App. A. Art. III(D)(4).

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<sup>13</sup> Defendants argue that FEMA, not the Court, determines whether a defendant is acting outside the scope of authority. In the absence of wrongdoing implicating FEMA officials and those in privity with FEMA, the most that can be said is that FEMA's view is entitled to "some deference". (See, e.g., *Novokov, supra*, at page 5). That deference would be subject to the extent to which the proof demonstrated the complicity of FEMA's officials in the wrongdoing. In the instant case, it is alleged that FEMA officials were complicit. In any event, the final decision as to preemption (and resolution of the issue of whether the accused conduct was outside the scope of authority perforce must be part of that decision), is to be decided in Court. (See, e.g., *Smiley v. Citibank*, 517 U.S. 735, 744 (1996) (preemption questions are decided de novo by the courts).

*Wright v. Allstate Ins. Co.*, 415 F.3d 384, 388-389 (5th Cir. 2005).

Thus, the 28 cases have no application to the case at bar.

**D. Other Incorrect Statements by Defendants**

1. Defendants assert that, in paragraph 33 of the Complaint, Plaintiffs pleaded that Defendants did not act outside the scope of FEMA's regulations, and cannot therefore be heard now to allege that Defendants acted outside their scope of authority.<sup>14</sup> Once again, Defendants make a representation to the Court diametrically opposed to the facts. Paragraph 33 of the First Amended Complaint reads in pertinent part:

At all times pertinent to the claims asserted in this action, Defendants Brown, Maurstad and Conner have been well aware that the actions in which they and the other Defendants have been engaged are outside the scope of authority permitted under, and are contrary to, the NFIP regulations.

2. Defendants assert that Plaintiffs display no respect for the concept of uniformity of decision.<sup>15</sup> To the contrary, Plaintiffs have strived to report every decision they cite accurately, and to place each of them into their factual context, to determine their applicability to the case at bar. In this fashion, it becomes clear that the body of law applicable to this case is indeed uniform. It is the Defendants who have in many instances misrepresented the holdings in cases, the facts alleged by Plaintiffs, and the content of the pleadings, in both the initial and reply memoranda supporting the motions to dismiss, a practice which does not advance the goal of obtaining the correct result in this case.

As stated in the Introduction to this Supplemental Memorandum, Plaintiffs plan to expand on this brief commentary, as well as to comment on other recasts and

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<sup>14</sup> Prime Reply, pp. 7-10.

<sup>15</sup> Prime Reply, p. 7.

characterizations in the assorted Defendants' reply memoranda, at the April 24-25 oral argument sessions.

Respectfully submitted,

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Counsel for Plaintiffs

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the forgoing Plaintiffs' Supplemental Opposition to Reply Memorandum Filed by Twelve WYO Defendants and Defendant Dubyak with respect to their Partial Motion to Dismiss was served on all counsel of record this 17<sup>th</sup> day of April, 2006, via electronic case filing

/s/ Martin H. Freeman /s/  
Martin H. Freeman