

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

* * * * *

**INDEPENDENT ADJUSTERS' REPLY TO PLAINTIFFS' OMNIBUS OPPOSITION
MEMORANDUM TO
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 this Reply Memorandum to Plaintiffs' Omnibus Opposition Memorandum ("POOM") to Motion to Dismiss Counts II, III, and IV of the First Amended Complaint.¹ The Adjuster Defendants incorporate by reference the Motion to Dismiss Counts II, III, and IV and Memorandum of Law in Support thereof previously filed herein on their behalf.

Together with the following brief argument, the Adjuster Defendants incorporate and adopt by reference, as if fully stated herein, the Reply Memoranda filed on behalf of the Write

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

Your Own (“WYO”) Defendants² with 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.

INTRODUCTION AND EXECUTIVE SUMMARY

While approximately 50 pages in length, there are actually only six arguments that Plaintiffs advance in their Omnibus Opposition Memorandum (“POOM”) as to the Adjuster Defendants.

First, Plaintiffs contend that despite properly pleading their causes of action and providing the requisite notice of the claims being advanced, all thirty-seven defense attorneys, representing different defendants with different alleged roles and different interests in the instant litigation, misunderstood and misconstrued the import of Count II for “procurement fraud.” Plaintiffs claim that they are not asserting that the Defendants misrepresented the nature or scope of coverage being provided, but rather that Plaintiffs knew precisely what type of policies they were purchasing and, in fact, received just those policies, but that Defendants, in knowing concert, intended not to provide Plaintiffs with the benefits promised. That is, according to Plaintiffs themselves, Count II alleging “procurement fraud” alleges that the Defendants made certain promises regarding the manner in which the policies would ultimately be adjusted (i.e. in

² There are two Reply memoranda filed on behalf of the WYO Defendants: Reply Memorandum in Support of Partial Motion to Dismiss filed by Defendants Jerry Dubyak and Twelve WYO Program Insurance Companies, and Reply Memorandum in Support of Certain Write Your Own Insurance Company Defendant’s Motion to Dismiss the First Amended Complaint, and For More Definite Statement; however, for purposes of context there is some necessary duplication of those briefs.

conformance with the policies themselves) while intending all the while to breach those promises. This clarification is of enormous value, as it not only crystallizes Defendants' arguments that Count II is pre-empted by federal law, but moreover, renders Count II as nothing more than Plaintiffs' breach of contract action, which is properly asserted in Count V of the pleading.

Second, Plaintiffs contend that pre-emption is inapplicable when the Defendants are acting outside the scope of the NFIP and that these Defendants have all allegedly acted in such a fashion. Not only is Plaintiffs' claim in this regard belied by their own allegations, but the argument is also nonsensical. For Plaintiffs' argument to withstand scrutiny, this Court must assume that in every other case in which pre-emption has been applied to claims of fraud, conspiracy, tortious interference with contract, and other intentional state-law torts, the defendants were acting within the scope of the NFIP in allegedly committing these willful, tortious acts. According to Plaintiffs, unlike all of those other cases in which such conduct was apparently condoned, in this case they have alleged conduct outside the scope of the federal program and, thus, pre-emption is inapplicable.

Third, Plaintiffs contend that even if pre-emption is applicable to the governmental defendants, it is inapplicable to the Adjuster Defendants as they are not government agents and, thus, are not immune to lawsuits such as the instant litigation. Plaintiffs cite no case law, statute, or regulation in support of this argument. Moreover, to permit Plaintiffs' claims against the Adjuster Defendants to survive on this legal proposition would amount to the destruction of uniformity and consistency in application of the NFIP as intended by Congress and upheld by the majority of jurisdictions.

Fourth, Plaintiffs contend that, again, all thirty-seven defense attorneys misunderstood the well-pleaded allegations contained in Plaintiffs' complaint with regard to their reliance on the alleged promises. Plaintiffs contend that they relied upon the promises not in the purchase of the flood insurance policies, but, rather, in the actual purchasing and/or mortgaging of their homes. Whether accurate or not is a question for another day. What is important about this argument is that Plaintiffs wholly fail to address the fact that any reliance by them on alleged representations regarding the scope of coverage or the manner of claims-handling is unreasonable as a matter of law. Plaintiffs do not and cannot refute this legal principal.

Fifth, in a bizarre understanding of the law, Plaintiffs acknowledge that the non-policyholder Plaintiffs cannot recover under Count V for breach of contract, but somehow continue to assert proper standing to the claims of fraud in Counts II and III, and the claim of tortious interference with contract as stated in Count IV. If those Plaintiffs never purchased a SFIP, they could not have reasonably relied upon any misrepresentations, nor could the Defendants have interfered with their non-existent contracts.

Finally, despite having to "correct" all defense counsels' understanding regarding the claim being asserted in Count II for procurement fraud and their misunderstanding regarding the nature of Plaintiffs' reliance to support the fraud claims, Plaintiffs contend that dismissal under FRCP 9(b) is unwarranted as the pleading is properly pled and gives the requisite notice of the claims being advanced. Plaintiffs' own Opposition undercuts this argument. What's more, Plaintiffs completely fail to refute the legal proposition that with regard to claims of fraud and conspiracy, Plaintiffs' allegations must be precise and specific as to each Defendant. Plaintiffs' regurgitation of the generalized and non-specific allegations contained in its pleading does not further its compliance with these requirements to any extent.

ARGUMENT

A. *Procurement Fraud*

Plaintiffs disregard and fail to address the bulk of Defendants' legal arguments presented in support of the dismissal of Count II on the premise that Defendants have a "fundamental misunderstanding" of the procurement fraud cause of action. (POOM at 10 and 18) Plaintiffs assert that they are not claiming that they were promised coverage beyond that which the SFIP provides. (POOM at 18) In fact, Plaintiffs contend that in the marketing of the policies, they were told that they would receive exactly the benefits that they claim the SFIP actually provides. *Id.* According to the POOM, the fraud occurred when Defendants represented that Plaintiffs would receive the benefits to which they were entitled, knowing full well that when a claim was actually handled, these promises would be breached. *Id.* at 19.

In the first place, Plaintiffs' clarification serves to amply support the very legal premises set forth in the Motions to Dismiss, which Plaintiffs ignore. That is, Plaintiffs have clarified that at the core of Count II (Procurement Fraud) is the contention that Defendants intended to breach the contracts in the **claims-handling process**. As Plaintiffs make clear, Count II is not premised on the notion that the Defendants misrepresented the scope or nature of the policies when they were marketed or purchased. *Id.* at 19 and 21. The claim, rather, is that the amount of the benefits that they would be paid after a loss was suffered, was misrepresented. *Id.* This is nothing short of a claim of fraud in the claims-handling of the policies, which is expressly pre-empted: when benefits were paid, i.e. when the losses were adjusted, Plaintiffs were allegedly paid less than they had been promised and less than they believe they were entitled to receive. *See*, Adjuster Defendant Memorandum of Law in Support of Motion to Dismiss at 5-7.

Moreover, Plaintiffs' clarification further makes it clear that Count II is the equivalent of a conspiracy to breach contract claim. Plaintiffs claim that Defendants issued contracts with the intention of acting in concert to breach those contracts. (POOM at 18-21) As set forth in the Adjuster Defendants' Memorandum of Law in Support of their Motion to Dismiss at pages 8-9, Maryland does not recognize a cause of action based upon concert of action. *Id.* at 8 and cases cited therein. Second, courts applying Maryland law have expressly held that a breach of contract claim cannot be transformed into a tortious interference claim merely by alleging that others conspired with the contracting party to breach the contract. *Id.* at 9 and cases cited therein. Likewise, Plaintiffs should not be permitted to circumvent these established legal principals by alleging that Defendants represented that they would perform under the contracts, while conspiring to breach the same. Under Plaintiffs' theory, every breach of contract claim could be twisted into a fraud claim on the premise that the breaching party's implied representation that he would perform under the contract becomes a misrepresentation when the contract was ultimately breached.

B. Application of Established Pre-Emption Law

1. Conduct Allegedly "Outside the Scope of the NFIP"

Plaintiffs first contend that neither Counts II nor III of their complaint is pre-empted as they contend that all of the Defendants, from the very top tier of FEMA and its Director to the lowest tiers of the Independent Adjusters and the Third-Party Administrators, were acting outside the scope of the NFIP and that preemption is inapplicable to such claims. (POOM at 26) In support of this argument, Plaintiffs rely on three cases: *Davis v. Travelers Property & Casualty Co.*, 96 F.Supp.2d 995 (N.D. CA 2000); *Spence v. Omaha Indemnity Ins. Co.*, 996 F.2d 793 (5th Cir. 1993); and *Bleecker v. Standard Fire Ins. Co.*, 130 F.Supp.2d 726 (E.D.N.C. 2000).

(POOM at 26-32). As set forth in the Reply Memoranda filed on behalf of the WYO Insurance Companies, none of these cases remains good law today. (Twelve WYO Reply at 2; Certain WYO Reply at 6-11)

Moreover, Plaintiffs themselves have acknowledged that the Administrator has determined that the actions of the Defendants were not “outside the scope” of the NFIP. (Compl. at para. 33) Indeed, the very premise of Plaintiffs’ claims contradicts the arguments that they are now presenting to this Court. In order to attempt to avoid preemption, Plaintiffs contend that all of the Defendants acted outside the scope of the NFIP, i.e. entirely independent of the NFIP. On the other hand, Plaintiffs assert that in conjunction with their purchase of SFIP’s and the claims-handling of their SFIP’s after Isabel, that the Defendants, through their concerted action, failed to pay them the benefits to which they had previously been promised and to which they were entitled. That is, Plaintiffs’ claims do not exist without first establishing that they purchased SFIP’s (or at least some of them did) and then establishing that they did not receive all of the benefits to which they were entitled under the SFIP’s. Even if this Court accepts all of Plaintiffs’ allegations as true at this stage of the proceedings, it cannot escape the fact that Plaintiffs’ claims do not exist but for the SFIP’s. Thus, Plaintiffs’ argument that the claims are not pre-empted because they allege conduct that falls outside the scope of the NFIP is disingenuous at best. *See also*, Reply Memoranda of Twelve WYO’s at 7-8.

2. Pre-Emption Applicable Only to Government Defendants

Second, Plaintiffs contend that even if Count III was pre-empted, that pre-emption only applies to “the federal government, any federal government employee, any entity under contract with the federal government or any employee under contract with the federal government.” (POOM at 41) As Plaintiffs now contend that Count III for adjustment fraud is only asserted

against those Defendants who are neither a contractor nor employee with the federal government, they claim that pre-emption is inapplicable. *Id.* Plaintiffs make this legal proclamation without the support of any case law, statute, or regulation. *Id.*

Putting aside the fact that the express preemption language found in the FEMA regulations makes absolutely no mention of being limited only to those claims asserted against government defendants, Plaintiffs' argument has been explicitly rejected by at least two courts. *See, Chatmar v. Bankers Ins. Co.*, 2005 WL 588511 (N.D. Cal. Feb. 11, 2005); and *Morrison v. State Farm*, (N.D. Tex. Feb. 1, 2006) No. 1: 04-CV-244-C (Attachment B to Reply Memoranda of Twelve WYO's).

Moreover, numerous courts have held that "all" state-law based tort and extra-contractual claims based upon claim disputes are preempted. *See*, Memorandum in Support of Motion to Dismissed filed on behalf of Twelve WYO's at 32-35 and Attachment A thereto. The principals relied upon by these courts would be entirely undermined if state-law claims regarding the adjustment of SFIP claims could be pursued against independent adjusters in state court actions, while the same claims against entities or individuals employed by or under contract with the federal government were preempted. This would lead to inconsistent results and destroy the uniformity in the application of the SFIP's, which is a principal goal of the NFIP.

C. Reasonable Reliance

In further support of their argument that the fraud claims should not be dismissed, Plaintiffs again feel the need to clarify or correct Defendants' understanding of their claims. Plaintiffs assert in their POOM that they did not detrimentally rely on the alleged misrepresentations of Defendants in the purchase of the SFIP's, but rather in the purchase or

mortgaging of their homes. (POOM at 10-11, 24-25) Plaintiffs make this argument in the context of attempting to establish that “but for” causation is well-pled in the Complaint. *Id.*

Whether Plaintiffs actually decided to purchase their homes and/or mortgage their properties only after Defendants represented the benefits to which they would be entitled under the SFIP is another question for another day. Plaintiffs’ argument in this regard, however, misses the mark. Plaintiffs continue to fail to be able to establish that any reliance on these alleged misrepresentations was not unreasonable as a matter of law. Plaintiffs wholly ignore this argument in their POOM while attempting to focus this Court’s attention on the nature of their reliance. Whether Plaintiffs purchased the policies, purchased their homes, or mortgaged their homes in reliance on the alleged misrepresentations is irrelevant. What is relevant and material is the fact that as a matter of law, any reliance by Plaintiffs on alleged representations made by any of the Defendants regarding the benefits that they would be paid under the SFIP’s is unreasonable as a matter of law. *See*, Memorandum of Law in Support of Motion to Dismiss filed by Certain Write Your Own Insurance Company Defendants at 19-23.

D. Non-Policyholder Plaintiffs

In an unusual application of Maryland law, Plaintiffs acknowledge that the non-policyholder Plaintiffs are not entitled to recover under Count V for breach of contract, but assert that they are entitled to recover under Counts II, III, and IV of their Complaint. (POOM at 49-50) The only basis for Plaintiffs’ argument is that an intentional tortfeasor may be liable for all foreseeable consequences of his conduct. *Id.* Under this principal, Plaintiffs apparently believe that Defendants may be liable in fraud and tortious interference of contract to anyone living in the subject homes regardless of whether the remaining elements of the cause of action can be satisfied. *Id.* at 50.

In order to reject Plaintiffs' argument, this Court need not determine whether it was, in fact, foreseeable to the Adjuster Defendants that all persons living in the households of the policyholders may be harmed by their alleged conduct.³ Counts II and III of the complaint assert variations on claims for fraud with regard to the procurement of a contract and the adjustment of a contract. Two of the required elements to a fraud claim are that the defendant made a false representation to the plaintiff and that the plaintiff relied upon the same. *See e.g., Maryland Env't'l Trust v. Gaynor*, 370 Md. 89, 97 (2002). Plaintiffs' fraud claims arise from representations allegedly made during the procurement of the policies and during the adjustment of claims under the policies. As such, non-policyholder plaintiffs could not have been the recipients of any such representations since they neither purchased policies nor were parties to the contracts under which the losses were being adjusted. Moreover, these plaintiffs could not have reasonably relied upon representations allegedly being made to others regarding policies issued to others.

Similarly, Count IV asserts a cause of action for tortious interference with contract. It is baffling that Plaintiffs will concede that the non-policyholder plaintiffs cannot recover under a claim for breach of contract since they are not parties to any contract and yet attempt to legitimately claim that they can recover under a tortious interference with contract claim. These Plaintiffs were not party to any contracts; thus, none of the Defendants could have interfered with their non-existent contracts. *See, Fraidin v. Weitzman*, 93 Md.App. 168 (1992) (tortious

³ Interestingly, Plaintiffs do not indicate whether they contend that it was foreseeable that persons living in the homes at the time the representations were made would be harmed, or persons living in the homes at the time of the storm would be harmed, or persons living in the homes when the claims were adjusted would be harmed, or whether all three elements would be required to meet their foreseeability test.

interference with contract requires a third-party interfering with a contract between plaintiff and a third-party, i.e. being a party to the contract is an essential element to the cause of action).

E. Failure to Properly Plead with Particularity

In response to the Federal Rule of Civil Procedure 9(b) motions to dismiss, Plaintiffs contend that “a reading of the Complaint makes clear that these arguments are meritless.” (POOM at 41) This statement is made after Plaintiffs spent a good portion of the 50 page Opposition clarifying for all defense counsel their “fundamental misunderstanding” of Count II and correcting Defendants with regard to the actual detrimental reliance suffered. Certainly, if Plaintiffs’ pleading were as clearly pled, as they believed, such assistance would not have been necessary.

Moreover, Plaintiffs’ Opposition is merely a recitation of the allegations contained in the Complaint. *See*, Exhibit A to POOM. Most of these allegations are background in nature or are general allegations regarding the conduct of various tiers of defendants. *See, e.g.*, Compl. at para. 21, POOM Exhibit A at 2: “Each of the independent adjusting companies...”. However, none of these snippets, nor any portion of Plaintiffs’ Complaint, sets forth specific allegations as to what each Defendant did or represented to each Plaintiff, when such action was taken, where such action occurred, and how that particular Plaintiff was harmed by that particular Defendant’s actions.

Indeed of the fifty-one exemplar paragraphs contained in Exhibit A to the POOM, under a very generous reading of the Exhibit, only eight specifically relate to the Independent Adjuster Defendants. (Exhibit A to POOM, Complaint para. 7, 21, 22, 23, 55, 56, 76, and 80) Of those eight, only two paragraphs specifically identify information allegedly held by specific Independent Adjuster Defendants. (Exhibit A to POOM, Complaint para. 22 and 23) Those

paragraphs, however, only identify alleged information possessed by Messrs. Postava and Branham and do not allege, in any fashion, how that knowledge relates to any of these specific Plaintiffs. Moreover, the remaining six paragraphs only contain generalized allegations against all of the Independent Adjuster Defendants as to all of the Plaintiffs. While Plaintiffs contend that all of these Defendants employed “high-pressure low-balling tactics” as to all of the Defendants, such a statement cannot be accurate. That is, it is a near impossibility that all six Independent Adjuster Defendants or their employees made the same 34 identical statements or employed the same 34 identical tactics as set forth in Paragraph 56 of the Complaint, in connection with all 182 Plaintiffs. However, based upon the POOM, this is what Plaintiffs would like this Court, and the Defendants, to believe is accurate and complete pleading.

The requirement to plead claims of fraud and conspiracy with particularity as to each Plaintiff and each Defendant are not new nor novel and Plaintiffs’ repetition of the general, non-specific allegations contained in the Complaint are insufficient. *See, e.g., Hirschler v. GMD Investments Ltd. Partnership*, 1990 WL 263438, at *5 (E.D. Va. 1990); *DiVittorio v. Equidyne Extractive Industries, Inc.*, 822 F.2d 1242 (2d Cir. 1987); *Hill v. Brush Engineered Materials, Inc.*, 2005 WL 1983653, at *8-9 (D. Md. 2005).

CONCLUSION

For the reasons set forth above, the arguments set forth in the Motion to Dismiss and Memorandum of Law in Support thereof filed on behalf of the Adjuster Defendants, and 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 7TH day of April 2006, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system.

_____/s/_____
Stacey A. Moffet