

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

KATHLEEN SCHAFER, ET AL	*	CIVIL ACTION NO. 06-8262
	*	
Versus	*	SECTION: "K" (2)
	*	
	*	JUDGE DUVAL
	*	
STATE FARM FIRE & CASUALTY, ET AL	*	MAGISTRATE JUDGE WILKINSON
	*	
* * * * *	*	

SECOND AMENDED COMPLAINT

NOW COME Plaintiffs, Kathleen and Gordon Schafer, who, in accordance with the Court's ORDER AND REASONS dated August 22, 2007, and RULE 15 of the Federal Rules of Civil Procedure, respectfully supplement and amend their AMENDED COMPLAINT as follows:

I.

Plaintiffs respectfully supplement and amend the allegations relating to the liability of Xactware contained in Paragraphs 30 - 59 of the Amended Complaint, by adding the following:

"59-A.

Plaintiffs respectfully submit that Defendant Xactware is liable to Plaintiffs for intentionally understating what it knew to be the average and/or reasonable and/or otherwise appropriate construction and/or replacement costs for goods and services,

with the knowledge and/or foreseeable expectation that State Farm (and other insurance companies) would rely upon those numbers in the making of unconditional actual cash value or other payments to Plaintiffs. Such conduct on Xactware's part was intentionally designed to maximize Xactware's profits and revenue, while causing injury to Plaintiffs.¹

59-B.

In addition, and in the alternative, Plaintiffs respectfully submit that Defendant Xactware is solidarily liable to Plaintiffs and the Proposed Class for conspiring with State Farm (and the other insurance companies) to intentionally violate the terms and provisions of their insurance policy contracts with Plaintiffs, the Louisiana Anti-Monopoly Statutes, (La. R.S. 51:121, *et seq.*),² and/or the Louisiana Insurance Code, (La. R.S. 22:658, 22:1214 and/or 22:1220), in accordance with LOUISIANA CIVIL CODE ARTICLE 2324(A).

59-C

In the alternative, Defendant Xactware is liable to Plaintiffs for the economic damages suffered by Plaintiffs whose unconditional payments were less than what they should have been, due to the defective design of the Xactimate software. Such software, (a product manufactured and sold by Defendant Xactware), Plaintiffs respectfully allege, presented an unreasonable danger of economic injury, as there existed an alternative feasible design that was capable of preventing the plaintiffs' damage, (*i.e.* a functionally equivalent software program providing fair, reasonable, average and otherwise appropriate, rather than devalued and deflated, construction and/or replacement costs). Such alternative design was available to Xactware without any increased burdens, in terms of either technological feasibility or cost. Xactware is therefore alternatively liable to Plaintiffs and the Proposed Class under

¹Plaintiffs do not seek to certify for class treatment any claims for fraud against State Farm; nor do Plaintiffs seek to certify claims against Xactware as a solidary obligor for conspiring to commit fraud with State Farm (or any other insurer).

²Plaintiffs are mindful of the dismissal of Plaintiff's horizontal price-fixing claims. Plaintiffs respectfully note, however, that the Court's August 22, 2007 ORDER AND REASONS is not a Final Judgment under RULE 54, and respectfully preserve such claims in the event that Plaintiffs seek and are granted leave to further amend with additional evidence of or other bases for liability under LA. REV. STAT. 22:1214(4) and/or 51:121, *et seq.*

the Louisiana Products Liability Act, (La. R.S. 9:2800.53(5) and 9:2800.56).”

II.

Plaintiffs amend the proposed Class Definition contained within Paragraph 30 of the AMENDED COMPLAINT to the following:

“All Louisiana residents who were named insureds with State Farm and who received a one-time unconditional payment for the actual cash or other value of damage to property located in the State of Louisiana, under the terms of homeowner’s policies with State Farm, utilizing any Xactimate pricing, from August 29, 2005 thru [the date of certification].”

III.

Plaintiffs supplement and amend the Class Allegations contained within Paragraphs 29 - 31 of the AMENDED COMPLAINT, by adding the following:

“31-A.

Plaintiffs, in this class action, seek to recover the difference between the unconditional actual cash value or other payments from State Farm to Plaintiffs and the actual cash value or other unconditional payment that Plaintiffs would have and should have received.

31-B.

Plaintiffs are not seeking to certify ‘bad faith’ or other claims regarding the timeliness of Defendant’s payment or adjustment, nor coverage issues (*e.g.* whether damages were caused by water or wind). Plaintiffs, rather, contend that State Farm’s payment of deflated and devalued Xactware-based prices violated La. R.S. 22:658 and 22:1220 (and/or the policy and/or other legal duties) as a failure to pay the reasonable *amount* due within 30 or 60 days of receipt of what State Farm admittedly deemed to be satisfactory or other required proof of loss and/or demand.

31-C.

Excluded from the Proposed Class, moreover, are policyholders who made a supplemental claim with or filed a lawsuit against State Farm (either directly or through an architect or contractor or other service provider or supplier) to amend, supplement, increase or otherwise revise the 'actual cash value' or other unconditional payment with 'replacement' or other costs.

31-D.

Plaintiffs do *not* seek to certify fraud or misrepresentation claims against State Farm. *Nor* do plaintiffs seek to certify claims against Xactware as a co-conspirator to commit fraud with State Farm (or any other insurance company).

31-E.

Plaintiffs only seek to certify fraud claims against Xactware to the extent that Xactware knew and intended that State Farm (and other insurers) would rely upon the devalued and deflated numbers for unconditional actual cash value or other payments. Plaintiffs respectfully submit that, as to this cause of action, individual questions of 'reliance' or causation are not relevant, as the only conduct at issue is the common classwide 'reliance' and conduct of State Farm. Plaintiffs, as to these payments, did not 'rely' on either Xactware or State Farm's 'representations'; they merely received payments which were less than what they should have been."

WHEREFORE Plaintiffs respectfully request that this Second Amended Complaint be deemed good and sufficient, and that, after due proceedings be had, this case be certified as a class action under Rule 23 of the Federal Rules of Civil Procedure, and that, after further proceedings be had, there be judgment herein in favor of Plaintiffs and the Proposed Class, and against Defendants, State Farm Fire & Casualty Company and Xactware Inc., jointly, severally and *in solido*, for all damages reasonable in the premises, together with penalties, the costs of these proceedings, legal

interest, reasonable attorneys' fees, and all other general or equitable relief to which Plaintiffs and/or the Proposed Class may be entitled.

This 4th day of September, 2007.

Respectfully Submitted,

/s/ Stephen J. Herman

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COUNSEL FOR PLAINTIFFS.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the above and foregoing Second Amended Complaint has been served, *via* E-MAIL, upon Defense Counsel, and will be filed electronically with the Clerk of Court of the United States District Court for the Eastern District of Louisiana by using the CM/ECF system thereby serving notice on all counsel this 4th day of September, 2007.

/s/ Stephen J. Herman