UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

STATE OF LOUISIANA,	*	**CIVIL NO.: 07-9409**
EX REL, JAMES D. "BUDDY" CALDWELL	*	
	*	**SECTION: "A" (5)**
Versus	*	
	*	
ALLSTATE INSURANCE COMPANY,	*	
LAFAYETTE INSURANCE COMPANY,	*	
XACTWARE, INC.,	*	
MARSHALL & SWIFT/BOECKH, LLC,	*	
INSURANCE SERVICES OFFICE, INC.,	*	
STATE FARM FIRE AND CASUALTY COMPANY,	*	
USAA CASUALTY INSURANCE COMPANY,	*	**JUDGE JAY C. ZAINEY**
FARMERS INSURANCE EXCHANGE,	*	
STANDARD FIRE INSURANCE COMPANY,	*	**MAGISTRATE CHASEZ**
MCKINSEY & COMPANY	*	

* *

RELPY MEMORANDUM IN SUPPORT OF MOTION TO SEVER

NOW INTO COURT, comes The State of Louisiana through its Attorney General, James D. "Buddy" Caldwell, who respectfully submits this reply to Defendants' memorandum in opposition to the State's Motion to Sever.

First, the Attorney General points out to this court defendants' continued use of the *ad hominem* attack fallacy to obscure their lack of a substantive basis for legal argument. The Attorney General proposes what the 5th Circuit ordered, that this Honorable Court decide on the best course of action and is suggesting severing the claim for injunctive relief because 1) that allows more options for this Court in deciding how to proceed, and 2) that is what the Fifth Circuit suggested.[1] The Attorney General of Louisiana has, and continues to believe, the

[1] *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 430 (5th Cir. 2008).

appropriate forum for proceeding in this litigation is state court.[2] What should now be transparent is the Defendants' lack of substance which relies on the legal fallacy of *ad hominem* attack.

Second, the Defendants gloss over the most important aspect of this case's present procedural status; it is a "mass action."[3] On appeal, the U.S. Fifth Circuit Court of Appeals ruled the State's action was a "mass action" under CAFA.[4] The term "mass action" means any civil action in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, **except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount**.[5] Because this case was originally brought in state court, this ruling creates two parallel suits, one in state court (claims under $75,000) and one in federal court (claims over $75,000).[6] Supplemental jurisdiction is unavailable.[7] When these facts are

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[2]This belief is not based on forum shopping; it is because the Louisiana Attorney General is not an ordinary litigant; but rather, is an elected member of the constitutional executive branch of a dual sovereign, who does not choose forums, but rather, acts for the "state as a plaintiff suing defendants over whom it has regulatory authority in state court under its own *state laws.*" *In re Katrina Canal Litigation Breaches*, 524 F.3d 700, 711 (5th Cir. 2008) (Italics in original).

[3] This difference distinguishes this case from the *Road Home* case presently before Judge Duval. *Id.*

[4] *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d at 430.

[5] 28 U.S.C.A. § 1332(d)(11)(B)(i) (Emphasis added).

[6] This Court could also abstain from exercising jurisdiction over the federal action under the abstention doctrine set forth in *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976).

[7] "Section 1367 does not apply where "expressly provided otherwise by Federal statute[.]" 28 U.S.C. § 1367(a); *Lowery v. Alabama Power Co.*, 483 F.3d 1184, 1206 FN51 (11th Cir. 2007).

considered, the defendants' arguments fail. Moreover, defendants have failed to prove the existence of any claim in excess of the jurisdictional amount in controversy necessary to maintain federal jurisdiction under CAFA. Accordingly, the fact this case has been found to be a "mass action" under CAFA is critical to the analysis of how to procedurally proceed.

The defendants complain the State's proposal is "claim splitting," an attempt to "prosecute [its case] by piecemeal," and contrary to judicial economy. Yet, "a federal court cannot adjudicate the rights of parties who are not parties before it, and they will be brought in if possible and if they will not destroy diversity; if diversity will be thereby destroyed, the court will inquire if there is any relief it could properly give without them, and if there is, it will give it without prejudice to rights of absent parties." *Tardan v. California Oil Co.*, 323 F.2d 717, 722 (5th Cir. 1963). The defendants ask this Court to adjudicate the rights of parties not before it by ruling on their motions to dismiss. To adjudicate the motions to dismiss without "prosecuting piecemeal," this Court would have to join parties that would defeat diversity. Thus, the State has proposed a means (as suggested by the Fifth Circuit) for this Court to grant relief without prejudice to the rights of the policyholders.[8]

Defendants argue severing the injunctive relief claim would deprive them of a "federal" jury trial. The case cited by defendants, *Beacon Theatres*, can be distinguished because the same party sought injunctive relief that would act as *res judicata* on the equitable claims (of a properly

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In the same footnote is a discussion on the defendant's failure to show any claim was more than $75,000; a defect that is present in this case as well. The Court could remand until the defendants measure a claim that is over $75,000; such measure could be used to figure out what other claims should be removed as well.

[8] The State's proposal also removes the danger of proceeding without subject matter jurisdiction.

joined party).[9] The Fifth Circuit has already held the claim for damages is not the State's, however, the State can seek injunctive relief. The policyholders have not been properly joined and it is their potential damage claims that can proceed before a jury. Thus, severing the State's claim for injunctive relief will not unconstitutionally deprive the defendants of a jury trial on another party's damage claim (if brought in the future).

CONCLUSION

In the interest of efficiently moving this suit forward, the Attorney General moves to sever the remedy of injunctive relief from those claims removable under CAFA. Because the real parties in interest for the remedy of treble damages must be joined for just adjudication and that joinder is infeasible, the State respectfully suggests severing the claims and proceeding with the State's action is the most efficient resolution. Accordingly, the State respectfully prays the Court grants its motion to sever.

Respectfully Submitted:

_____/s/ Jane Johnson_____
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[9] *Beacon Theatres v. Westover*, 359 U.S. 500 (1959). Defendants' claim that the State has not proposed dropping the damages claim because paragraph 119 was not amended. However, an assertion the defendants conduct caused injury to the citizens of this state does not equate to seeking a damages claim; it does equate to standing to bring an injunctive relief claim.

And

_____/s/ J. Alex Watkins_____
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CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2008, I electronically filed the foregoing with the Clerk of court by using the CM/ECF system which will send a notice of electronic filing to the following: **Judy Y. Barrasso, Stephen H. Kupperman, Susan Muller Rogge, Howard Bruce Kaplan, David M. McDonald, Mark Aaron Cunningham, Kathleen Ann Harrison, Ronald J. Sholes, Mark Raymond Beebe, Wayne J. Lee, James C. Gulotta, Jr., Justin Paul Lemaire, Michael Q. Walshe, Jr., Amelia Williams Koch, Alexander McVoy McIntyre, Jr., Steven F. Griffith, Jr., Charles S. McCowan, Jr., Bradley C. Myers, Louis Victor Gregoire, Jr., Harry Rosenberg, James Alcee Brown, George Denegre, Jr., Kenneth Todd Wallace;**

I hereby further certify the above and foregoing has been served upon all counsel of record listed below by placing same in the United States Mail, postage pre-paid, this 12th day of November, 2008.

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