

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

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UNITED STATES OF AMERICA,	:	
<i>EX REL.</i> BRANCH CONSULTANTS, L.L.C.,	:	Case No.: 06-cv-4091 (SSV)
	:	
Plaintiff,	:	Sect.: R
	:	
v.	:	Oral Argument Requested
	:	
ALLSTATE INS. CO., et al.,	:	
	:	
Defendants.	:	
	:	
-----X		

THE STANDARD FIRE INSURANCE COMPANY’S MOTION TO SEVER

Defendant The Standard Fire Insurance Company (“Standard Fire,” erroneously sued herein as St. Paul Travelers Cos.), by and through its undersigned attorneys, hereby moves this Honorable Court for an Order severing the claims against Standard Fire from the claims against the other seven remaining defendants pursuant to Rules 20 and 21 of the Federal Rules of Civil Procedure.¹ As set forth in its accompanying memorandum, Standard Fire has been improperly joined with the other defendants because no right to relief is or can be asserted against Standard Fire jointly or severally, and the claims against Standard Fire do not arise from the same transactions or occurrences as the claims against the other defendants. Furthermore, severance is appropriate to promote judicial economy and convenience and to avoid prejudice to Standard Fire.

Accordingly, for the reasons set forth in detail in its accompanying memorandum, Standard Fire prays that the Court enter an order severing the claims against it

¹ These are: Liberty Mutual Fire Insurance Company, Fidelity National Insurance Company, Fidelity National Property and Casualty Insurance Company, American National Property & Casualty Company, American Reliable Insurance Company of Scottsdale, Simsol Insurance Services, Inc., and Colonial Claims Corporation.

from the claims against the other seven remaining defendants pursuant to Rules 20 and 21 of the Federal Rules of Civil Procedure.

Dated: January 8, 2010

Respectfully submitted,

PHELPS DUNBAR LLP

/s/ Harry Rosenberg

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**Attorneys for The Standard Fire Insurance
Company (*named as St. Paul Travelers Cos.*)**

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has this date been served upon all parties to this suit through counsel by filing into the Court's electronic filing system and, for non-participants, by placing same in the United States mail, postage prepaid and properly addressed on this 8th of January, 2010.

/s/ Harry Rosenberg

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

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<i>EX REL.</i> BRANCH CONSULTANTS, L.L.C.,	:	Case No.: 06-cv-4091 (SSV)
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	:	
ALLSTATE INS. CO., et al.,	:	
	:	
Defendants.	:	
	:	
	-X	

**MEMORANDUM IN SUPPORT OF
THE STANDARD FIRE INSURANCE COMPANY’S MOTION TO SEVER**

Defendant The Standard Fire Insurance Company (“Standard Fire”)
(erroneously sued herein as St. Paul Travelers Cos.), by and through its undersigned attorneys, respectfully submits this memorandum of law in support of its motion to sever claims against Standard Fire concerning three properties allegedly damaged during Hurricane Katrina from the claims against the other seven remaining defendants concerning twenty-four other properties that have nothing to do with Standard Fire.

PRELIMINARY STATEMENT

Plaintiff Branch Consultants initiated this False Claims Act (“FCA”) lawsuit on behalf of the United States on the premise that it is the “original source” of information about false claims submitted to the Government by each of the defendants. According to Branch, it inspected certain properties following Hurricane Katrina and, on nearly all of those properties, defendants “maxed out or nearly maxed out the insured’s flood policy limits (underwritten by [the National Flood Insurance Program]), irrespective of the actual damage conceivably attributed to flood.” First Amended Complaint (“FAC” or “Complaint”) ¶ 20.

The alleged motive for this fraud was to shift payments due the property owner under a homeowners insurance policy backed by the insurer to a flood insurance policy backed by the Government. There is *no* allegation of a conspiracy of defendants and there is no joint and several liability among defendants for the allegations in the complaint. The Government has declined to intervene in this case.

The Complaint lumps together allegedly false flood damage claims made by numerous defendants in connection with properties in different locations that allegedly had varying levels of flood damage as a result of Hurricane Katrina. The Complaint lists three properties that allegedly were serviced by Standard Fire. *Id.* ¶ 31. The Complaint also lists twenty-four other properties that were allegedly adjusted and/or serviced by the seven other defendants¹ and have nothing to do with Standard Fire. *Id.* ¶¶ 23, 27, 28, 29, 30, 33. Pending before the Court are motions to add two additional defendants, seven third-party defendants and allegations concerning twenty additional properties, none of which have anything to do with Standard Fire. *See* Docket Nos. 247, 280.

The only three Standard Fire-associated properties identified in the complaint are located in New Orleans. *Id.* ¶ 31. Branch alleges that flood waters entered into each of these three New Orleans properties. According to Branch, the flood waters rose to twelve inches at the 7732 Edwards Street property, to about four feet at the 7568 Horizon Drive property, and to about three and one-half feet at the 7311 Beauvoir Court property. *Id.*

¹ Six of the original fourteen defendants have been dismissed from this action. Allied American Adjusting Company was dismissed on October 2, 2007. *See* Docket No. 178. Two more defendants were dismissed from the case based on the “first-to-file” bar. *See United States ex rel. Branch Consultants LLC v. Allstate Ins. Co.*, 560 F.3d 371, 381 (5th Cir. 2009). On October 19, 2009, the Court dismissed three other defendants without prejudice. *See* Docket No. 228. The remaining eight defendants are: Liberty Mutual Fire Insurance Company, Fidelity National Insurance Company, Fidelity National Property and Casualty Insurance Company, American National Property & Casualty Company (“American National”), American Reliable Insurance Company of Scottsdale, Standard Fire, Simsol Insurance Services, Inc., and Colonial Claims Corporation.

Standard Fire allegedly paid \$148,000, \$81,000, and \$142,000, respectively, in flood damage for these properties. *Id.* Branch estimated the total flood damage for each of these properties to be about \$30,000. *Id.* Branch alleges that Standard Fire issued the homeowners and flood insurance policies on these properties and therefore had a motive to and did commit fraud.² There are no other allegations against Standard Fire in the First Amended Complaint.

The twenty-four properties allegedly insured or adjusted by other defendants are spread across three Louisiana cities (New Orleans, Chalmette, and Slidell) and eleven zip codes (70117, 70119, 70125, 70126, 70127, 70115, 70122, 70129, 70458, 70041 and 70043). *Id.* ¶¶ 23, 27, 28, 29, 30, 33. These include four New Orleans properties that (according to Branch) experienced no flooding. *Id.* ¶ 27(a)-(d). Other properties in this group experienced flooding as high as eight feet. *Id.* ¶ 23(c). Branch's estimate of the flood damage at these properties ranges from \$0 to \$79,000. *Id.* ¶¶ 23, 27, 28, 29, 30, 33. Standard Fire is not alleged to have anything whatsoever to do with these other properties or defendants.

ARGUMENT

Claims against a party may be severed if that party has been improperly joined or to avoid prejudice or serve the interests of judicial economy. *See* FED. R. CIV. P. 20-21; *Applewhite v. Reichhold Chems.*, 67 F.3d 571, 574 (5th Cir. 1995) (“Under Rules 20 and 21, the district court has the discretion to sever an action if it is misjoined or might otherwise cause delay or prejudice.”); *F.D.I.C. v. Selaiden Builders, Inc.*, 973 F.2d 1249, 1253 (5th Cir. 1992) (affirming grant of severance where claims were unrelated, did not arise at the same time and did not involve the same parties); *Frankland v. State Farm Fire & Cas. Co.*, No. 2:07-cv-1767, 2008 WL 4072819, at *3-5 (W.D. La. July 2, 2008) (severance granted where

² The evidence disclosed in discovery to this point shows that Branch's theory holds no water with respect to Standard Fire. Of the three Standard Fire properties identified in the Complaint as having been insured by Standard Fire for both flood and homeowners, Standard Fire appears to have issued the flood policies on only two and the homeowners policies on none.

defendant was misjoined). A district court has “broad discretion” to sever improperly joined parties. *Brunet v. United Gas Pipeline Co.*, 15 F.3d 500, 505 (5th Cir. 1994). In this case, the claims against Standard Fire should be severed because Standard Fire has been improperly joined, severance would serve the interests of judicial economy and convenience, and because it is necessary to avert prejudice to Standard Fire.

I. THE CLAIMS AGAINST STANDARD FIRE SHOULD BE SEVERED BECAUSE STANDARD FIRE WAS IMPROPERLY JOINED

Joinder is proper if: (1) any right to relief is asserted against the defendant jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and (2) any question of law or fact common to all defendants will arise in the action. FED. R. CIV. P. 20(a)(2); *Cresson v. State Farm Fire & Cas. Co.*, No. 06-8788, 2007 WL 1191817, at *1 (E.D. La. Apr. 19, 2007); *Porter v. Milliken & Michaels, Inc.*, No. 99-0199, 2000 WL 1059849, at *1-2 (E.D. La. Aug. 1, 2000). Neither of these requirements is satisfied as to Standard Fire here.

First, no right to relief is or can be asserted against Standard Fire jointly or severally. Branch does not allege that Standard Fire and any other defendant are *together* responsible for any particular false claim. *See, e.g., United States v. Board of Educ. of Union City*, 697 F. Supp. 167, 172 (D.N.J. 1988) (defendants in FCA action are jointly and severally liable if they “are found responsible for a particular false claim”).³ Nor does Branch allege that Standard Fire conspired with other defendants to handle any Katrina flood claims. Accordingly, Standard Fire has been misjoined and severance is proper. *See United States ex rel. Grynberg v. Alaskan Pipeline Co.*, No. Civ. 95-725(TFH), 1997 WL 33763820, at *2 (D.D.C. Mar. 27, 1997) (“[I]t is not enough for plaintiff to allege that each defendant violated

³ *See also Frankland*, 2008 WL 4072819, at *3 (no joint and several liability between insurer and adjuster defendants where insurer was not party to contract between homeowner and adjuster, and adjuster was not party to contract between the homeowner and insurer).

the False Claims Act or even that each violated the FCA in a similar manner. . . . Instead, ***plaintiff must allege that defendants somehow acted in concert.***”) (emphasis added); *United States ex rel. N. Santiam Watershed Council v. Kinross Gold USA, Inc.*, No. C 96-3673 TEH, 1998 WL 118176, at *2 (N.D. Cal. Mar. 9, 1998) (eighteen defendants in FCA action “accused of engaging in similar activities” were misjoined because alleged conduct occurred at different times and places and there was no allegation of concerted action).

Furthermore, the claims asserted against Standard Fire do not involve the same transactions or occurrences as the claims against the other defendants. Each NFIP payment for flood insurance coverage is a separate transaction to be separately considered under the FCA. The payments made with respect to the twenty-seven properties allegedly at issue occurred at different times and were made by different companies to different property owners in different locations. The transactions at issue with respect to Standard Fire are necessarily distinct from the transactions involving other defendants. *See United States ex rel. N. Santiam Watershed Council*, 1998 WL 118176, at *2 (eighteen defendants which allegedly obtained mining patents from government through fraudulent statements in patent applications were misjoined because these “allegedly unlawful acts occurred at different times and in various locations over the course of thirteen years”); *United States ex rel. Grynberg*, 1997 WL 33763820, at *2 (sixty defendants which allegedly underpaid royalties due for natural gas were misjoined because complaint “merely allege[d] that defendants committed similar actions at different times and different places, and that they submitted distinct and separate false statements on different contracts”).

Indeed, whether Branch is an “original source” with respect to allegedly false claims by Standard Fire—*i.e.*, whether the Court has subject matter jurisdiction over each allegedly false claim—must be established on a claim-by-claim basis. *See Rockwell Int’l Corp. v. United States*, 549 U.S. 457, 476 (2007) (“Section 3730(e)(4) does not permit

jurisdiction in gross just because a relator is an original source with respect to some claim.”). Thus, whether Branch is an original source for claims relating to one property involving Standard Fire is not relevant to its purported original source status for claims relating to any other property allegedly involving another defendant. To take just one example, Branch’s allegation that it is an original source of allegations that Standard Fire overstated flood damage at property where “flood waters eventually rose to approximately 4 feet inside the dwelling” is separate and distinct from the allegation that Branch is an original source of an allegation American National overstated flood damage at a property where “there was no flooding.” FAC ¶¶ 27(a), 31(b). The allegedly false claims made by Standard Fire simply do not involve the same transactions or occurrences as those made by the other defendants.⁴

Second, the claims of actual fraud against Standard Fire do not share common questions of fact or law with the claims against other defendants. Properties that Standard Fire allegedly serviced under the NFIP involve unique factual issues. Those issues include but are not limited to the structure of each property, its pre-Katrina condition, the extent of flood damage that it experienced as a result of Katrina, the nature and extent of any adjustments of the property following Katrina, and any claims submitted in connection with the property under homeowners or NFIP policies. *See, e.g., Cresson*, 2007 WL 1191817, at *2 (severing claim against one insurer relating to Hurricane Katrina losses at one property from claims against another insurer relating to other properties because claims involved “entirely different factual and legal issues,” including each property’s condition and location before storm, the value of the properties, and the extent of damage sustained). Testimony regarding the degree of flooding at one property in New Orleans at one time would not be

⁴ Of course, merely because Branch’s allegations of fraud all relate to Hurricane Katrina does not mean that there is a common issue. Hurricane Katrina “alone cannot serve as a common transaction or occurrence because the effects of the hurricane were unevenly felt.” *Rohr v. Metro. Ins. & Cas. Co.*, No. 06-10511, 2007 WL 163037, at *3 (E.D. La. Jan. 17, 2007).

relevant to the degree of flooding at a property in another city at another time. *See United States ex rel. N. Santiam Watershed Council*, 1998 WL 118176, at *2 (where FCA defendants' allegedly unlawful acts occurred at different times and locations, "the determination of facts and the scope of testimony with respect to one defendant would have little relevance to issues raised by another defendant"); *McFarland v. State Farm Fire & Cas. Co.*, No. 1:06CV466-LTS-RHW, 2006 WL 2577852, at *1 (S.D. Miss. Sept. 6, 2006) (factors relevant to severance include "whether different witnesses and documentary proof are required for separate claims"), *aff'd*, 2006 WL 3071988 (S.D. Miss. Oct. 25, 2006). These fact issues will differ from property to property and, therefore, from defendant to defendant. Simply because Hurricane Katrina caused the property damage in question is not sufficient to satisfy the transaction or occurrence requirement in Rule 20(a). *See Sucherman v. Metro. Prop. & Cas. Ins. Co.*, Nos. 06-8765, 05-6456, 2007 WL 1484067, at *1 (E.D. La. May 21, 2007) (Vance, J.) (citing cases).

Determining whether any claims relating to the three alleged Standard Fire properties were false (including any relevant discovery and/or fact investigation concerning these three properties) will not be relevant to determining whether any claims submitted by other defendants with respect to other properties were false. Severance is appropriate given the unique factual issues presented by the three Standard Fire properties. *See Ducree v. Liberty Mut. Ins. Co.*, No. 06-8286, 2007 WL 781968, at *2 (E.D. La. Mar. 12, 2007) (severing claims because properties were located in three different areas of Orleans Parish, were separately insured and suffered varying degrees of damage); *Rohr*, 2007 WL 163037, at *1 (granting severance where plaintiffs' properties were not of equal value and condition, did not suffer identical property damage, and were in different parts of St. Bernard Parish). *See also McFarland*, 2006 WL 2577852, at *1 (severing claims regarding hundreds of properties arising out of Hurricane Katrina damage because "each property owner . . . is uniquely

situated” in that “[t]he nature and extent of the property damage the owners sustain from the common cause, Hurricane Katrina, will vary greatly in its particulars, depending on the location and condition of the property before the storm struck and depending also on what combination of forces caused the damage”) (internal quotation marks omitted).

In sum, Standard Fire was misjoined. Severance is therefore appropriate.

II. SEVERANCE OF CLAIMS AGAINST STANDARD FIRE IS ALSO APPROPRIATE BECAUSE IT WILL PROMOTE JUDICIAL ECONOMY AND CONVENIENCE AND BECAUSE IT IS NECESSARY TO AVOID PREJUDICE TO STANDARD FIRE

Severance is also appropriate when it is (1) in furtherance of convenience, (2) necessary to avoid prejudice, or (3) conducive to judicial economy. *See Applewhite*, 67 F.3d at 574. All of these factors weigh in favor of severing the claims against Standard Fire here. *See also McFarland*, 2006 WL 2577852, at *1 (factors relevant to severance include “whether different witnesses and documentary proof are required for separate claims”).

First, severance will promote judicial economy and convenience. The operative Complaint involves eight defendants and twenty-seven properties allegedly damaged in Hurricane Katrina spread across three cities and eleven zipcodes. Pending before the Court is a motion to expand the litigation to ten parties and forty-five properties. The burden on Standard Fire in participating in such an expansive suit and on the Court of managing these claims all together in a single lawsuit is unnecessary and wasteful. *See In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, 214 F.R.D. 152, 157 (S.D.N.Y. 2003) (severing claims in stock fraud case furthered judicial economy because discovery burdens and associated expenses would operate expansively absent severance); *In re CFS-Related Sec. Fraud Litig.*, 213 F.R.D. 435, 438 (N.D. Okla. 2003) (severing claims in securities fraud action because severance would permit greater ease in handling of motions and court could more easily handle service issues); *Rohr*, 2007 WL 163037, at *3 (finding severance

appropriate given “the burden imposed on [Defendant] in defending multiple claims, with different factual scenarios, in one trial”).

For example, by misjoining Standard Fire with the seven other defendants, Branch has profoundly and unnecessarily increased the cost of discovery to Standard Fire. The length of depositions of witnesses will likely be orders of magnitude longer as the scope of depositions will relate to the nature and amount of damage to at least *twenty-seven* different properties—not just the three that allegedly concern Standard Fire.⁵ And Branch has already sought discovery well beyond the properties identified in the First Amended Complaint, seeking information on *every* Hurricane Katrina flood claim. Although Standard Fire disputes Branch’s entitlement to such discovery, if Branch were permitted to embark on such discovery, the corresponding depositions could be completely unmanageable in length. Moreover, Standard Fire will have to bear the cost of participation in depositions of *all* of the other parties, which would be completely unnecessary but for Branch’s misjoinder of Standard Fire.⁶ Finally, certain defendants have sought to expand the scope of this litigation by joining as third-party defendants the property owners to whom they paid flood losses. This, too, may increase the cost and burden of this litigation on Standard Fire.

Second, severance is necessary to avoid prejudice to Standard Fire. In a jury trial of this action, aggregating the large number of claims (and the individualized proof necessary to support each claim) into one lawsuit could confuse the jury and will significantly prolong Standard Fire’s trial. *See, e.g., Klimaski v. Parexel Intern.*, No. Civ.A. 05-298, 2005

⁵ This assumes that the seven-hour deposition rule would not apply in this case. Of course, if the rule were to apply, Standard Fire could be significantly prejudiced by such limitation.

⁶ While the testimony of the fact witnesses of other defendants should not, in theory, impact Standard Fire, Standard Fire cannot anticipate what questions Branch will ask such witnesses and thus would plan to attend such depositions in an abundance of caution.

WL 857350, at *5 (E.D. Pa. Apr. 4, 2005) (finding severance was necessary to prevent prejudice to defendants because (i) allowing claims to proceed in single action would deflect jury's attention from merits of each claim, (ii) evidence admissible for one party's claim may not be admissible for other claims, and (iii) it would be extremely difficult for jury to consider each party's claim independently of others); *Rohr*, 2007 WL 163037, at *2 (in determining whether severance is appropriate, "[a] court may also consider whether jury confusion would result from the volume of evidence if the plaintiffs were joined"). Severance of the claims against Standard Fire would permit jurors to focus on the claims relating to the three Standard Fire properties at issue and the individualized proof necessary to support these claims. It would prevent the prejudice inherent in claims of fraud asserted against other defendants.

CONCLUSION

For the reasons set forth above, Standard Fire prays that the Court grant its motion and enter an order severing plaintiff's claims against Standard Fire pursuant to Rules 20 and 21 of the Federal Rules of Civil Procedure.

Dated: January 8, 2010

Respectfully submitted,

PHELPS DUNBAR LLP

/s/ Harry Rosenberg

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**Attorneys for The Standard Fire Insurance
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has this date been served upon all parties to this suit through counsel by filing into the Court's electronic filing system and, for non-participants, by placing same in the United States mail, postage prepaid and properly addressed on this 8th of January, 2010.

/s/ Harry Rosenberg

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**REQUEST FOR ORAL ARGUMENT ON THE STANDARD FIRE
INSURANCE COMPANY'S MOTION TO SEVER**

In accordance with Local Rule 78.1E, Defendant The Standard Fire Insurance Company (erroneously sued herein as St. Paul Travelers Co.), by and through its undersigned attorneys, hereby requests that the Court hear oral argument on its Motion to Sever.

Dated: January 8, 2010

Respectfully submitted,

PHELPS DUNBAR LLP

/s/ Harry Rosenberg

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v. :
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ALLSTATE INS. CO., et al., :
:
Defendants. :
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NOTICE OF HEARING

PLEASE TAKE NOTICE that Defendant The Standard Fire Insurance Company (erroneously sued herein as St. Paul Travelers Cos.), will bring its Motion to Sever for hearing before the Honorable Sarah S. Vance at the United States District Court for the Eastern District of Louisiana, 500 Poydras Street, Room C-279, New Orleans, LA 71030, on **Wednesday, February 3, 2010, at 10:00 a.m.**

Dated: January 8, 2010

Respectfully submitted,

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/s/ Harry Rosenberg

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/s/ Harry Rosenberg_____