Memorandum

Quarles & Brady LLP

December 15, 2015

From: Faye B. Feinstein

Re: **Decision and Order Issued by Wisconsin State Court Regarding Motion to Partially Dismiss First Amended Complaint (Baetis and Brown Litigation)**

The Wisconsin state court presiding over the litigation involving the Baetis and Brown sub-funds has rendered a decision on a motion, brought by certain insurance company defendants, to dismiss certain of the claims made against those defendants. The court's decision allows us to continue to prosecute some of the claims.

The full decision is attached to this memorandum. If you have questions about this matter, please contact David Melnick (davidmelnick@melnickmelnick.com) or Stephanie Melnick (smelnick@melnickmelnick.com) at their respective e-mail addresses or at 262-241-8900.

STATE OF WISCONSIN CIRCUIT COURT BRANCH III OUTAGAMIE COUNTY

WML GRYPHON FUND LLC,
WML WATCH STONE PARTNERS, L.P.,
WML PANTERA PARTNERS, L.P.,
WML PALISADE PARTNERS, L.P.,
JOHN LESCHKE and JULIE LESCHKE,
Plaintiffs,

Case No. 12 CV 1704

v.

WOOD, HAT & SILVER, LLC,
JOSEPH M. AARON,
RIEK & ASSOCIATES, LLC,
THOMAS R. RIEK, ANDY A. CASTRO,
ROBERT FIND, BYRON A. FRISCH,
IAN R. FRISCH, MICHAEL BEAU GAYNOR,
GABRIEL GIORDANO, JOHN G. HUNTER,
PHILIP R. KAPLAN, JEFFREY B. KELLER,
SANFORD H. ROBBINS, EREZ ROTEM,
AMERICAN BUSINESS & PROFESSIONAL
PROGRAM, INC., AXA EQUITABLE LIFE
INSURANCE COMPANY, THE LINCOLN
NATIONAL LIFE INSURANCE COMPANY,
PHL VARIABLE INSURANCE COMPANY,
PHOENIX LIFE INSURANCE COMPANY,
PRINCIPAL LIFE INSURANCE COMPANY,
SUN LIFE ASSURANCE COMPANY OF
CANADA, TRANSAMERICA LIFE
INSURANCE COMPANY, THE UNITED
STATES LIFE INSURANCE COMPANY
IN THE CITY OF NEW YORK,
Defendants,

THE BAETIS FUND, L.P., THE BROWN
INVESTMENT FUND, L.P., and THE TIPPET
FUND, L.P.,
Nominal Defendants.

DECISION AND ORDER ON MOTIONS TO PARTIALLY DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

The Court's April 25, 2014 Decision held that plaintiffs' fraud claims against the insurers were not pled with sufficient specificity and granted plaintiffs leave to amend the Complaint to satisfy the requirements of Wis. Stat. § 802.03(2). On October 30, 2014, plaintiffs filed their First Amended Complaint (FAC), which for the first time raised an antitrust claim against the insurers, AXA Equitable Life Insurance Company, The Lincoln National Life Insurance Company, PHL Variable Insurance Company/Phoenix Life Insurance Company, Principal Life Insurance Company, Sun Life Assurance Company, and Transamerica Life Insurance Company.

Each of the insurers subsequently filed a Motion to Partially Dismiss the Amended Complaint on the grounds that plaintiffs' antitrust claim is untimely and unauthorized because they did not seek leave of the Court to file it and fail to allege the required elements of an antitrust claim. The insurers argue that the fraud claims should also be dismissed on the grounds that plaintiffs fail to allege an actionable misrepresentation or nondisclosure and that the claims are subject to dismissal under the economic loss doctrine.

I.

A. Fraud Claims

Plaintiffs allege that the insurers "engaged in a scheme to defraud policyholders…by representing that its policies were valid, in force, and valuable, while concealing its true intent to refuse to honor those policies." Plaintiffs contend that the "scheme" was the insurers' anti-NRPF stance and refusal to pay death benefits when claims arose by investigating and litigating policies. They allege that the insurers issued policies to multiple insureds with no intention to honor them because the insurers knew

the policies were NRPF-funded. Therefore, the contractual representations in the life insurance policies were false and induced Baetis and Brown to fund the policies with NRPF.

To state a claim for fraud, a plaintiff must allege: 1) a representation of material fact; 2) the representation's falsity; 3) intent to deceive (or reckless disregard for truth or falsity); 4) intent to defraud or to induce action; and 5) justifiable reliance by the deceived party. *Kaloti Enterprises, Inc. v. Kellogg Sales Company*, 283 Wis. 2d 555, 569, 699 N.W.2d 205 (2005).

The insurers argue that the fraud claims should be dismissed because plaintiffs fail to satisfy the requirement to plead their fraud claim with a heightened level of particularity. Wis. Stat. § 802.03(2). Wisconsin law requires plaintiffs to plead "the who, what, when, where, and how" of the alleged fraud. *Friends of Kenwood v. Green*, 239 Wis. 2d 78, 87, 619 N.W.2d 271 (Ct. App. 2000). In *John Doe 1 v. Archdiocese of Milwaukee*, 303 Wis. 2d 34, 61-62, 734 N.W.2d 827 (2007), the supreme court stated that "allegations of fraud must specify the particular individuals involved, where and when misrepresentations occurred, and to whom misrepresentations were made."

The insurers contend that plaintiffs ignore the specificity requirements for fraud claims and rely heavily on general allegations concerning all of the insurers. The purported representations identified in the FAC consist of references to policy language in the schedule and summary pages of the insurance policies for which Baetis and Brown made premium loans, as well as various notices and statements sent to policyholders over the course of the policy period. Plaintiffs allege those representations were made "to the policyholder" each time the insurer issued a policy, but fail to specifically allege which

individuals made the representations, precisely when they were made, or to whom they were made.

Exhibits G through L, attached to the FAC, provide information regarding the alleged misrepresentations for each of the policies issued by the insurers, including columns labeled "Insured," "Date," "Made by," "Made to," and "Documents/Representations." With regard to who made the representations, each of the exhibits names the insurance company itself, or in two instances, refers to "Agent." The "Made by" column refers to a footnote which provides the names of various officers of the insurers. The "Documents/Representations" column indicates the life insurance policy itself constitutes the representation. In some instances, an "In-Force Basic Illustration," "Premium Notice," or "Lapse Notice" is cited.

The FAC asserts that all of the alleged misrepresentations were made through documents sent to "policyholders." The insurers argue that plaintiffs wrongly define the term "policyholder" to include "Baetis and Brown as collateral assignees" as well as the actual applicants for the insurance policies. They point out that at the time of issuance, an irrevocable life insurance trust, a limited liability company, or the individual policyholder owned the policy, not Baetis and Brown or plaintiffs. Therefore, the insurers argue that any representation in the insurance policies was not made to plaintiffs or Baetis and Brown. Even if plaintiffs relied upon documents sent after policy issuance, plaintiffs fail to allege that plaintiffs or Baetis and Brown ever received those documents.

Plaintiffs also allege that the insurers "failed to specifically notify premium lenders, specifically Baetis and Brown, that death claims…for policies funded with NRPF would be rejected." (FAC ¶ 943). The insurers argue that nondisclosure is not

actionable as a misrepresentation unless there is a duty to disclose. *Tietsworth v. Harley-Davidson, Inc.*, 270 Wis. 2d 146, 156, 677 N.W.2d 233 (2004). Plaintiffs allege, with no supporting authority, that the insurers had a duty to disclose that the NRPF-funded policies would not be honored. The insurers point out that they entered into insurance contracts with the policyholders, not with plaintiffs and not with Baetis or Brown. They further note that plaintiffs do not specifically allege that, at the time of issuance, the insurers were aware of Baetis' and Brown's financing of the policies. The insurers assert that absent some contractual obligation to the contrary, an insurer owes no duty to a collateral assignee. *Sorenson v. National Life Insurance Company*, 56 Wis. 2d 92, 98-99, 201 N.W.2d 510 (1972) (finding that insurer was not obligated to provide collateral assignee with premium notices or lapse notices). They argue that plaintiffs have not alleged any nondisclosure, or duty to disclose, with the requisite particularity.

The insurers contend that the FAC allegations establish they did not have knowledge the policies involved NRPF at the time of issuance. Plaintiffs allege that the insurers "issued the life insurance policies at issue before Baetis and Brown approved the NRPF loans." (FAC ¶ 949). While plaintiffs allege the insurers knew the "hallmarks" of NRPF and ignored "red flags," the insurers argue this allegation is not enough to overcome the explicit allegation that NRPF was not in place prior to issuance. They contend that any attempt to allege knowledge is undermined by the allegations showing the insurers had multiple policies and procedures in place to prevent NRPF-funded policies from being issued. The insurers argue that the allegations of their knowledge are not plausible and cannot sustain plaintiffs' claim.

Plaintiffs seek to impute knowledge of the insurance agents to the insurers. They allege that, to secure NRPF for the insurance policies, the insureds, with the help of agents and producers, executed documents: 1) to create a trust that owned the life insurance policy at issue; 2) to establish the financing for the policy; and 3) to collaterally assign the policy to Baetis and Brown. The insurers point out that these documents were executed by the policyholders without any involvement or knowledge of the insurers. In fact, the insurance applications submitted to the insurers by the insurance agents denied the existence of premium financing transactions and any intent to sell the policy.

Plaintiffs argue that because the insurance agents submitted insurance applications with knowledge of the existence of NRPF, which was misrepresented in the applications, the insurance agents' knowledge should be imputed to the insurers. The insurers point out that an insurer is only bound by the acts of its agent that are within the scope of the agent's apparent authority. Wis. Stat. § 628.40. If the agent and the insured act in collusion to deceive or defraud the insurer, knowledge of any material fact is not imputed to the insurer. Wis. Stat. § 631.09(4). Such misrepresentation exceeds the scope of the agent's authority. Thus, the insurers argue that because the agents provided false information to them, nothing the agents did or said in facilitating the NRPF transactions can be imputed to the insurers.

The insurers assert that plaintiffs have not plausibly alleged a misrepresentation of a present fact, citing *Lundin v. Shimanski*, 124 Wis. 2d 175, 192, 368 N.W.2d 676 (1985) (Fraudulent representations "must relate to present or pre-existing facts."). Since plaintiffs assert that the contractual provisions in the policies represented to the policyholder that the insurer would honor the policy, the insurers maintain that at the time

of issuance, "honoring" the insurance policies would necessarily take place in the future. They argue that the alleged representation relates to a future event, not a present or pre-existing fact. Further, the insurers contend that plaintiffs cannot allege that the insurers had the specific intent not to honor the policies at the time of issuance.

The insurers point out that the NRPF was not in place at the time the policies were issued and that the insurance agents had full knowledge of the premium financing, misrepresented its existence to the insurers, and sought to obscure certain facts that would have indicated NRPF, e.g., by inflating applicants' income and assets. (FAC ¶ 226-29). Therefore, the insurers assert that plaintiffs cannot plausibly argue that the insurers had a then-existing knowledge that the relevant policies were subject to premium financing, nor can they argue the insurers had the specific intent to later investigate, litigate, and deny death benefits.

Because plaintiffs fail to identify any representation extraneous to the insurance policies at issue, the insurers assert that the fraud claims are barred by the economic loss doctrine. The economic loss doctrine "operates generally to preclude contracting parties from pursuing tort recovery for purely economic or commercial losses associated with the contract relationship." *Tietsworth v. Harley-Davidson, Inc.*, 270 Wis. 2d 146, 162, 677 N.W.2d 233 (2004). It precludes recovery in tort for economic losses resulting from the failure of a product to live up to a contracting party's expectations. *Id.* The economic loss doctrine bars a fraud claim which pertains to the character and quality of the goods that are the subject matter of the contract. *Id.* at 167.

In *Kaloti Enterprises, Inc. v. Kellogg Sales Company*, 283 Wis. 2d 555, 585, 699 N.W.2d 205 (2005), the supreme court adopted a narrow fraud in the inducement

exception to the economic loss doctrine, holding that a fraud in the inducement claim is not barred where the fraud is extraneous to, rather than interwoven with, the contract. The insurers argue that plaintiffs assert fraud claims on the basis of economic loss arising from policyholders' contractual relationships with the insurers. Plaintiffs allege that representations made in the policies regarding the insurers' intention to honor the policies and pay death benefits were false.

The insurers assert that these representations are all "associated with the contractual relationship" and relate to the "character and quality" of the insurance policy. They contend that the fraud in the inducement claim does not meet the narrow exception because the validity of the insurance policy, which is the ultimate purpose of providing the insurance contract, is clearly interwoven with the insurance policy. Representations that involve performance of the contract do not fit the narrow exception for fraud in the inducement. *Id*. Therefore, insurers argue that the fraud and fraud in the inducement claims are barred by the economic loss doctrine.

Further, the insurers argue that plaintiffs make implausible allegations in support of their fraud claims. The claims require the Court to accept the notion that six different insurers issued seventy-eight separate policies to different insureds without the intention to honor any of them. The insurers argue that there are no facts pled to suggest that this is a reasonable inference to be drawn from the FAC.

The insurers point out that NRPF was not in place at the time the relevant policies were issued. Plaintiffs allege that the insurance agents fraudulently hid the existence of NRPF from the insurers at the time of issuance. Thus, the insurers contend these

allegations render it implausible that the insurers knew they were issuing policies involving NRPF.

Plaintiffs admit that each of the insurers had denounced NRPF in early 2006. They allege that the insurers made changes to their underwriting policies to identify NRPF and engaged in efforts to require insurance agents to take more responsibility in identifying NRPF. Yet, the fraud claims allege that, by denouncing NRPF and adopting new policies and requirements, the insurers were "merely feign[ing] ignorance of STOLI/NRPF and set[ting] up agents and insureds to take the fall for continuing to issue STOLI/NRPF policies." (FAC ¶ 500). Because plaintiffs allege that the insurers renounced NRPF and took active steps to prevent its issuance, the insurers maintain that the fraud claims are wholly implausible and should be dismissed.

Plaintiffs' Opposition

In response, plaintiffs argue that their fraud claims are alleged with ample particularity because they identified the insurers' fraudulent scheme and provided concrete examples identifying the "who, what, when, where, and how" of the misrepresentations. *Friends of Kenwood v. Green*, 239 Wis.2d 78, 87, 619 N.W.2d 271 (Ct. App. 2000). The fraud particularity pleading requirement "affords notice to a defendant for the purposes of a response." *Id*.

Plaintiffs contend that when the alleged fraudulent scheme involves numerous transactions over a period of years, plaintiffs must only plead "a general fraudulent scheme, identifying the individual defendants and their roles within the scheme, pleading specific representative examples that answer all five of the 'newspaper questions'…" *Goldberg v. Rush University Medical Center*, 929 F.Supp.2d 807, 822 (N.D. Ill. 2013).

The *Goldberg* court recognized that it would be impossible to provide all the details of the fraudulent scheme that allegedly occurred over a nine-year period. *Id*. at 819.

Plaintiffs argue that their Amended Complaint addresses the Court's particularity concerns by separately detailing the misrepresentations made by each insurer, identifying the insurers' roles in the fraudulent scheme, and pleading specific examples answering all of the newspaper questions. They assert that they pled the "who" – each insurer; "what" – language from the policies and various documents sent to policyholders and the collateral assignees; "when" – the dates the documents containing the misrepresentations were sent to policyholders and collateral assignees; "where" – each document containing a misrepresentation, the mailing address to which the document was sent, and the individual to whom it was sent; and "how" – documents were mailed to policyholders and collateral assignees.

Plaintiffs point out that throughout the FAC, they pled that the insurers: a) announced that they would no longer accept NRPF by early 2006; b) knew the characteristics of NRPF/STOLI by early 2006; 3) changed their underwriting in order to detect STOLI/NRPF; and d) issued worthless paper policies from 2006-2008 even though the applications contained red flags for NRPF/STOLI. They further note that they repeatedly allege that the insurers never issued plaintiffs valuable and enforceable insurance because the insurers never intended to honor the policies. Rather, the insurers intended to contest the policies' validity before the expiration of the contestability period or after a death benefit claim was submitted so that the insurers could earn millions in premiums without ever paying death benefits.

Plaintiffs argue that they provide concrete examples of the parties involved, the relevant time frames, and the manner in which the fraud was committed. They contend that they afforded the insurers ample notice of the details surrounding the misrepresentations that they allege constitute fraud. Plaintiffs further argue that, as in *Goldberg*, they identified the individual defendants and their roles in the scheme and pled specific representative examples that answer all five of the "newspaper questions." *Goldberg*, 929 F.Supp.2d at 822. Thus, plaintiffs argue that, contrary to the insurers' arguments, the insurers have been afforded more than adequate notice of the bases of plaintiffs' claims.

In addition, plaintiffs contend that their fraud claims are pled with sufficient particularity to withstand a motion to dismiss because they are not required to plead facts they cannot access prior to discovery. They argue that specificity pleading requirements should not be construed "to create a Catch-22 situation in which a complaint is dismissed because of the plaintiff's inability to obtain essential information without pretrial discovery…that she could not conduct before filing the complaint." *Emery v. American General Finance, Inc.*, 134 F.3d 1321, 1323 (7th Cir. 1998). Plaintiffs further point out that the particularity requirement is not intended to "act as a rigid bar to filing a charge of fraud for individuals with less than perfect knowledge." *Goldberg*, 929 F.Supp.2d at 818. They argue that the heightened pleading requirements should be relaxed "when the details of the fraud are exclusively within the defendant's knowledge." *Vega v. Contract Cleaning Maintenance, Inc.*, No. 03 C 9130, 2004 WL 2358274, at *10 (N.D. Ill. Oct. 18, 2004).

In *Vega*, the plaintiffs alleged that the defendant "made the misrepresentations through agents whose names are not known to the plaintiffs," and were made "at or about the time the defendants hired the plaintiffs and at other times through their employment." The court relaxed the heightened pleading requirements and found the complaint sufficient because the details of the fraud were exclusively within the defendant's knowledge. "In instances where a defendant is more likely to have information regarding names of agents who had contact with a plaintiff and dates of communications with plaintiff, courts will typically not dismiss a plaintiff's claim for fraud for lack of particularity when the plaintiff can obtain these details through discovery." *Id*.

Plaintiffs argue they allege details of the insurers' misrepresentations with sufficient particularity because a) they have been unable to conduct discovery related to their fraud claims, and b) the insurers are more likely to have detailed information regarding the transactions. They point out that the insurers have been reluctant to provide discovery with regard to the fraud claims. Plaintiffs further note that they alleged a scheme in which the insurers engaged in continual fraudulent conduct over the course of at least five years and concealed it from plaintiffs. The alleged scheme relied on plaintiffs' ignorance of the fraud so that Baetis and Brown continued to fund premiums on policies that the insurers intended to force to lapse or surrender before a death claim was paid.

Plaintiffs argue they have plausibly pled claims for fraud because plausibility is a pleading standard, not a probability requirement, i.e., have plaintiffs alleged "enough fact to raise a reasonable expectation that discovery will reveal evidence…" *Twombly*, 550 U.S. at 556. A claim is implausible when it is not supported by factual allegations that

address the elements of the claim. *Kuryakyn Holdings, Inc. v. Just in Time Distribution Co.*, 693 F.Supp.2d 897, 903 (W.D. Wis. 2010). (contract and unjust enrichment claims were plausible even if unlikely or illogical).

In response to the insurers' argument regarding the implausibility of plaintiffs' allegations that the insurers issued policies they did not intend to honor and knew the policies were NRPF/STOLI, the plaintiffs assert they specifically pled, for each insurer, in-depth facts demonstrating their intentions not to honor NRPF/STOLI policies and the insurers' awareness of NRPF/STOLI policies' "red flags." They specifically alleged that the insurers identified NRPF/STOLI policies' red flags, changed their underwriting to screen out those policies; issued the policies in record numbers; waited until the policies approached incontestability or a death claim surfaced to investigate, deny, and litigate so as to force policyholders to lapse or surrender their policies; all while misrepresenting that the policies were in force and had value.

In addition, plaintiffs point out that particularity is not required to plead intent. Wis. Stat. § 802.03(2) ("Malice, intent, knowledge, and other condition of mind of a person may be averred generally"). They further note that even though they are not required to plead specific facts demonstrating the insurers did not intend to honor the policies, they have done so. Plaintiffs assert that their allegations are not rendered implausible simply because the insurers believe them to be "fantastical," offer different explanations for their conduct, or reach a different conclusion. They contend that they have alleged sufficient facts to support a plausible claim.

Plaintiffs argue that their fraud claims are not barred by the economic loss doctrine because they are not seeking recovery for fraud relating to the character and

quality of the goods. *Kaloti Enterprises, Inc. v. Kellogg Sales Company*, 283 Wis.2d 555, 585-86, 699 N.W.2d 205 (2005). They contend that insurers' misrepresentations are extrinsic to, not interwoven with, the contractual relationship between the insurers and the policyholders because: a) the policies were not contracts, but rather worthless paper; b) the insurers made misrepresentations to plaintiffs before the contracts were formed; and c) the insurers' misrepresentations were extraneous to, and not interwoven with, the policies.

The economic loss doctrine bars a commercial purchaser of a product from recovering solely economic losses associated with a contractual relationship. *Id*. at 578-79. A fraud in the inducement claim is not barred by the economic loss doctrine when the fraud is extraneous to, rather than interwoven with, the contract. *Id*. at 585. In response to the insurers' argument that the fraud claims are barred because the alleged misrepresentations were contained in the policy documents, plaintiffs contend that "the insurance policies were never actually contracts – instead they were worthless paper disguised as valuable insurance policies." (Plaintiffs' Brief in Opposition to Insurers' Motion to Dismiss the First Amended Complaint, pp. 30-31).

They further argue that the misrepresentations were made prior to the establishment of the contractual relationship because insurance policies are not effective until the initial premium is paid. Thus, plaintiffs argue that the misrepresentations in the policies themselves were made before contract formation because the insurers issued the policies before Baetis and Brown loaned money to policyholders and paid the initial premiums. They contend that because the insurers transmitted the policies before Baetis and Brown paid contract-forming initial premiums, the insurers' misrepresentations

occurred pre-contract. In addition, plaintiffs argue that the representations that the policies were "in force" and had value did not relate to the quality or character of the policies but instead related to issues not expressly dealt with in the insurance contracts, i.e., the insurers intended to force Baetis and Brown to lapse or surrender the policies and retain premiums paid.

In response to the insurers' argument that the representations were made to the policyholders, not to plaintiffs or Baetis and Brown, plaintiffs contend that the misrepresentations were made to Baetis and Brown as collateral assignees of the policies. They assert that a defendant is liable to a third party when making a representation on which the defendant knew or should have known a third party would reasonably rely. *Rendler v. Markos*, 154 Wis. 2d 420, 429, 453 N.W.2d 202 (Ct. App. 1990) (A complaint pleading intentional misrepresentation must allege that the defendant misrepresented a fact to the plaintiff or to a third person with intent that it would be communicated to or influence the plaintiff).

Plaintiffs claim the insurers had "reason to expect" than any misrepresentations made to the policyholders would be communicated to and influence Baetis and Brown as premium finance lenders, since plaintiffs allege the insurers knew the policies were NRPF and that this financing arrangement required collateral assignment of the policy to a lender. Plaintiffs pled that the insurers had actual notice of the collateral assignments and that Baetis and Brown, through WHS, wired premium payments directly to the insurers' bank accounts. (FAC ¶¶ 176, 413). They further pled that the insurers' agents' knowledge that the policies were financed is imputed to the insurers. (FAC ¶ 230).

Plaintiffs also argue that the misrepresentations are not merely acts of accepting future obligations under the insurance contracts, but instead are misrepresentations of presently existing conditions, i.e., that the policies were valid, valuable, and enforceable. *Hartwig v. Bitter*, 29 Wis. 2d 653, 659, 139 N.W.2d 644 (1966) (Defendant's representation to conduct his business in a lawful and proper fashion was a misrepresentation of a present fact. The allegation of intent not to perform in the future sufficiently states that the promise was made with present intent to the contrary). Plaintiffs argue that because the insurers intended to force Baetis and Brown to lapse or surrender the policies as incontestability approached, their representations regarding the policies' status and value involved presently existing conditions. *Lundin v. Shimanski*, 124 Wis. 2d 175, 192, 368 N.W.2d 676 (1985).

Plaintiffs contend that the insurers owed Baetis and Brown, as collateral assignees of the policies, a duty to disclose that the policies were worthless paper because: a) insurers owe insureds a duty of good faith and fair dealing; and b) parties to business transactions have duties to disclose material facts. *Roehl Transport, Inc. v. Liberty Mutual Insurance Company*, 325 Wis. 2d 56, 89-90, 784 N.W.2d 542 (2010); *Kaloti*, 283 Wis. 2d at 573-74. In response to the insurers' argument that they owed no duties to plaintiffs, the plaintiffs contend that this argument only applies to fraud claims of misleading omissions, not affirmative misrepresentations. They point out that the elements of a claim for affirmative misrepresentation do not include duty. *Kaloti*, 283 Wis. 2d at 569. Plaintiffs pled that the insurers made affirmative misrepresentations and misleading omissions. They further note that Baetis and Brown, as collateral assignees, were parties to the business transaction and were therefore entitled to disclosure of

material facts from the insurers. *Kaloti*, 283 Wis. 2d at 573-74. Thus, plaintiffs argue that their affirmative misrepresentation claims stand regardless of whether the insurers owed any duties.

Decision on Fraud Claims

The insurers contend that the fraud claims should be dismissed because plaintiffs fail to satisfy the requirement under Wis. Stat. § 802.03(2) to plead those claims with a heightened level of particularity, i.e., the who, what, when, where, and how of the misrepresentation. Further, they argue that the fraud claims are barred by the economic loss doctrine because the representations are not extraneous to the insurance policies.

Plaintiffs argue their fraud claims are pled with ample particularity because their allegations detail the misrepresentations made by each insurer, identify the insurers' roles in the fraudulent scheme, and plead specific examples answering all of the "newspaper questions." They assert that their fraud claims are pled with sufficient particularity on a motion to dismiss because they are not required to plead facts they cannot access prior to discovery. They contend that their fraud claims are not barred by the economic loss doctrine because the alleged misrepresentations are extrinsic to, not interwoven with, the contract, i.e., their claim does not relate to the character and quality of the goods.

Since the alleged misrepresentations are contained in the policies themselves or related notices and statements, the First Amended Complaint, Exhibits G through L, provide details for each of the policies issued by the insurers. The information in the exhibits names each insurer (who); specifies the language in the policy, notice or statement (what); the dates the policies or other documents were sent to policyholders

(when); the individual and mailing address to whom the policy or document was sent (where); and indicates that the documents were mailed to policyholders (how).

Given that the policies themselves constitute the alleged misrepresentations, plaintiffs pled their fraud claims with sufficient specificity, thus affording notice to the insurers for purposes of a response. When the alleged fraudulent scheme involves numerous transactions over a period of years, plaintiffs must only plead "a general fraudulent scheme, identifying the individual defendants and their roles within the scheme, pleading specific representative examples that answer all five of the 'newspaper questions'…" *Goldberg v. Rush University Medical Center*, 929 F.Supp.2d 807, 822 (N.D. Ill. 2013).

As plaintiffs point out, they separately detail the misrepresentations made by each insurer, identify the insurers' roles in the fraudulent scheme, and plead specific examples answering all of the newspaper questions. The FAC alleges that the insurers announced they would no longer accept NRPF by early 2006; knew the characteristics of NRPF/STOLI by early 2006; changed their underwriting guidelines to detect NRPF/STOLI; and issued worthless policies from 2006-2008 despite red flags in applications indicating NRPF/STOLI. Plaintiffs repeatedly allege that the insurers never issued valuable and enforceable insurance to plaintiffs because they never intended to honor the policies. Instead, the insurers intended to contest the policies' validity and retain significant premiums without paying death benefits.

Plaintiffs pled examples of the parties involved, the relevant time frames, and the manner in which the fraud was committed, thus affording the insurers adequate notice of the bases of their claims. Further, plaintiffs pled their claims with sufficient particularity,

as they have been unable to conduct discovery which likely would provide detailed information exclusively within the defendant insurers' knowledge. They allege "enough fact to raise a reasonable expectation that discovery will reveal evidence..." *Twombly,* 550 U.S. at 556.

However, plaintiff's fraud claims are barred by the economic loss doctrine because they seek recovery for fraud relating to the character and quality of the goods. A fraud in the inducement claim is not barred by the economic loss doctrine when the fraud is extraneous to, rather than interwoven with, the contract. Here, plaintiffs allege the misrepresentations are contained within the policy documents, i.e., the insurers intended to breach the contract provisions for payment of death claims, the very essence of a life insurance contract. Therefore, the fraud is indeed interwoven with the insurance contract, as plaintiffs seek tort recovery for a purely economic loss associated with the contract relationship. Accordingly, plaintiffs' fraud claims are dismissed.

B. Antitrust Claim

The insurers argue that the antitrust claim is untimely because plaintiffs did not seek leave to file it, as required by Wis. Stat. § 802.09(1). They point out that the FAC with the unauthorized antitrust claim was filed almost two years after the original Complaint was filed. As a result of plaintiffs' failure to comply with the statutory requirement, the insurers argue that the antitrust claim should be dismissed.

Even if plaintiffs had complied with the statute, the insurers contend that plaintiffs have not alleged conduct that substantially affected the people of Wisconsin. The Wisconsin Antitrust Act, Wis. Stat. § 133.03(1) provides in relevant part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade

or commerce is illegal." The insurers argue that there are insufficient allegations that the alleged misconduct substantially affected the people of Wisconsin.

An action under Wisconsin's antitrust act must allege that: 1) actionable conduct, such as the formation of a combination or conspiracy, occurred within this state, even if its effects are felt primarily outside Wisconsin; or 2) the conduct complained of "substantially affects" the people of Wisconsin and has impacts in this state, even if the illegal activity resulting in those impacts occurred predominantly or exclusively outside this state. *Olstad v. Microsoft Corporation*, 284 Wis. 2d 224, 263, 700 N.W.2d 139 (2005). A plaintiff must allege that the conduct complained of has impacts in Wisconsin, and not merely nationwide impacts. *Meyers v. Bayer AG, Bayer Corporation*, 303 Wis. 2d 295, 319, 735 N.W.2d 448 (2007).

The insurers point out that the *Meyers* court cited with approval the "adverse effects" standard relied on in *Emergency One, Inc. v. Waterous Co., Inc.*, 23 F.Supp.2d 959, 969-70 (E.D. Wis. 1998) which "extend[s] the jurisdictional scope of Wisconsin antitrust law to unlawful activity which has significantly and adversely affected trade and economic competition within this state." In *Emergency One*, the plaintiff, a Florida-based manufacturer of fire trucks alleged that a Wisconsin truck manufacturer and two manufacturers of fire pump hoses conspired to choke competition in the United States market for fire pumps.

The *Emergency One* court concluded that the complaint did not allege significant and adverse effects on economic competition in Wisconsin because the only significant and adverse effect alleged was to the plaintiff itself. The court found that the connection between plaintiff's injury and Wisconsin commerce was tenuous at best. The plaintiff

identified three Wisconsin dealerships that it maintained over the years, did not estimate the amount of sales at such dealerships in a certain time frame or suggest what proportion of those sales were affected by the defendants' conduct. Further, plaintiff did not indicate how many fire trucks were sold annually in Wisconsin, how many by plaintiff, or how many by plaintiff's competitors. The court noted that plaintiff did not identify a single fire truck contract in Wisconsin from which it was precluded from bidding based on the unavailability of the pumps. Therefore, the complaint did not suggest that injury to plaintiff also constituted significant injury to trade and commerce related to fire truck sales in Wisconsin.

The insurers argue that plaintiffs have not alleged actionable anticompetitive conduct that "substantially affected" the people of Wisconsin. Plaintiffs allege that "the effects of Insurer Defendants' anticompetitive conspiracy were felt in Wisconsin." (FAC ¶ 710). The insurers contend this is not an assertion that the alleged misconduct "substantially affected" the people of Wisconsin, but rather a bare conclusion requiring the Court to engage in speculation as to the extent of how the misconduct "was felt." Plaintiffs further assert that "Insurer Defendants' anticompetitive conspiracy restricted the ability of Wisconsin policyholders to sell and Wisconsin investors to buy life insurance policies on the secondary market." (FAC ¶ 710). The insurers point out that plaintiffs do not identify a single Wisconsin policyholder/seller or Wisconsin investor/buyer who was so restricted, nor have they alleged a restriction that "substantially affected" the people of Wisconsin.

Plaintiffs assert that "[f]rom 2006 to 2009, Insurer Defendants collected $828,115,996 in premiums from Wisconsin residents." (FAC ¶ 710, n.114). The insurers

contend that the amount of gross premium collected from all Wisconsin residents for all types of insurance coverage is meaningless. The allegation does not refer exclusively to life insurance policies, but even if it did, the insurers maintain plaintiffs have not alleged that the premium collected was for policies that the policyholders attempted or desired to sell on the secondary market.

The insurers compare the allegations here with those the *Meyers* court determined met the "substantially affects the people of Wisconsin" pleading standard. *Meyers*, 303 Wis.2d at 325-26. Meyers alleged that a group of pharmaceutical companies conspired to maintain monopoly prices on a best-selling prescription drug purchased by thousands of Wisconsin residents. The *Meyers* court held that this allegation met the "substantially affects" test set forth in *Olstad*, 284 Wis. 2d at 263. Here, plaintiffs allege that the effects of the insurers misconduct "were felt" in Wisconsin and that there was a restriction on unidentified and unnumbered Wisconsin policyholders/sellers and investors/buyers in the secondary market. The insurers argue this cannot be construed to meet the "substantially affects" standard.

While plaintiffs themselves or their investors have Wisconsin connections, the insurers note that the antitrust claim is asserted on behalf of Delaware hedge funds headquartered in Sonoma, California. The derivative antitrust claim is not a claim of any of the hedge funds' investors, including the Wisconsin plaintiffs. The insurers argue that even if the antitrust claim was asserted on behalf of plaintiffs themselves, injury to plaintiffs alone is insufficient to show that the people of Wisconsin were affected. *See Emergency One*, 23 F.Supp.2d at 971. They assert that financial injury to plaintiffs does not "substantially affect" the people of Wisconsin.

The insurers further argue that plaintiffs fail to allege an actual agreement to engage in the anticompetitive conduct because they do not allege sufficient facts to suggest that the insurers entered into an unlawful agreement. They point out that at the motion to dismiss stage, there must be "plausible grounds to infer an agreement." *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544, 556 (2007). The insurers contend that the allegations, which consist largely of independent commercial efforts by the insurer defendants and innocuous participation in industry groups, do not plausibly allege an agreement.

Asserting that the FAC alleges only independent commercial efforts on behalf of each of the insurer defendants, the insurers argue such a pattern of uniform business conduct, or "conscious parallelism," is not in itself prohibited. *Twombly*, 550 U.S. at 553-54. The *Twombly* court stated, at 556-57:

> …[A]n allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality. Hence, when allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.

The insurers contend the alleged anticompetitive conduct consists wholly of independent activities. With regard to the insurers' separate underwriting policies to eliminate NRPF/STOLI and efforts to require insurance agents to take more responsibility in identifying NRPF/STOLI, the insurers note that plaintiffs allege no conspiracy or agreement with respect to those underwriting policies or agent requirements except that the policies were "comparable" and the requirements were issued "simultaneously." (FAC ¶¶ 493-94). They further note that the allegations

regarding separate efforts to investigate and challenge NRPF/STOLI policies refer to those efforts as "markedly similar" and claim that the insurers were "aware" of one another's efforts.

The insurers argue that mere knowledge of a competitor's actions, even when combined with parallel conduct, is insufficient to allege an agreement. They claim, therefore, that plaintiffs' allegations regarding the insurers' parallel behavior are insufficient to show agreement. (Citing *Howard Hess Dental Laboratories Inc. v. Dentsply International, Inc.*, 602 F.3d 237, 255 (3rd Cir. 2010); *In re Travel Agent Commission Antitrust Litigation*, 583 F.3d 896, 903-05 (6th Cir. 2009)). In *Howard Hess*, the court found that the allegations did not offer the slightest inference of any degree of coordination; the *In re Travel Agent* court dismissed the restraint of trade claim that was based solely on allegations of parallel conduct and "stray statements" of agreement.

In addition, the insurers assert that plaintiffs cannot allege agreement merely because the insurers had the "opportunity to conspire" through attendance at or participation in insurance industry groups and meetings. Plaintiffs allege that membership in industry groups and attendance at industry conferences "provided Insurer Defendants with both the opportunity and incentive to conspire with their competitors." (FAC ¶ 332). The insurers argue that such allegations fail to show an agreement under the antitrust laws. *See In re Insurance Brokerage Antitrust Litigation*, 618 F.3d 300, 349 (3rd Cir. 2010) (membership in industry group and adoption of industry group's suggestions do not plausibly suggest conspiracy for purposes of restraint of trade claim).

The insurers note that the sole attempt to allege an actual agreement is a vague hearsay assertion by an individual who is unaffiliated with any party to this case.

Plaintiffs allege that the Chairman of ING U.S. Financial Services stated in February 2007 (FAC ¶ 348):

> On the universal life, big challenges. We have the top 30 life company CEOs that are on the American Council of Life Insurance Board have all agreed that we will not write STOLI which is stranger owned life insurance or investor owned life insurance…**So the big companies have all agreed to no longer write it.** Starting [sic] we made that agreement in early 2006.

The insurers assert that this edited quote is the type of "stray statement" that does not constitute the required independent allegation of actual agreement. *See, e.g., In re Travel Agent Commission Antitrust Litigation*, 583 F.3d at 905, 911 (dismissing restraint of trade claim due to lack of plausible allegations of agreement because, *inter alia*, *Twombly* rejected notion that "stray statements" of agreement could satisfy plausibility standard and alleged statement of non-conspirator did not support a "plausible inference" of agreement among alleged conspirators). They point out that the omitted portion of the press release indicates that the insurers agreed not to write STOLI "because we've gotten a lot of pushback from Congress because the whole premise of life insurance is to provide tax benefits. But if you are going to let investment banks, Wall Street firms use the tax arbitrage the Congress is saying they will take it away." (Initial Complaint ¶ 242).

The insurers argue that the full quote provides meaningful context of the alleged agreement, i.e., they chose not to write STOLI based on a recognition that Congress disfavored STOLI and that the tax benefits of life insurance were being threatened by legislative action. They contend that, at best, plaintiffs have alleged that the insurers agreed, in the face of Congressional pressure, to refrain only from issuing STOLI. The FAC claims that STOLI and NRPF are two distinct types of insurance policies. Plaintiffs allege that their damages arise from the devaluation of NRPF, not STOLI.

The insurers assert that plaintiffs' sole allegation of agreement is not plausible to show that the insurers engaged in any anticompetitive conduct. It does not suggest that the insurers collectively agreed to engage in the larger scheme alleged by plaintiffs to grow the supply of NRPF/STOLI policies and then crush the secondary market. Plaintiffs must allege facts that suggest more than a possibility of a claim because it is the substantive law that drives what facts must be pled. *Data Key Partners v. Permira Advisers LLC*, 356 Wis. 2d 665, 679-80, 849 N.W.2d 693 (2014) (citing *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544, 557-58 (2007)). "A statement of parallel conduct, even conduct consciously undertaken, needs some setting suggesting [an] agreement" and when the allegations do not raise a plausible inference of agreement, the complaint fails to state a claim. *Bell Atlantic Corporation v. Twombly*, 550 U.S. at 545-46, 557. The insurers contend that plaintiffs fail to offer sufficient factual allegations of a plausible agreement in violation of Wis. Stat. § 133.03 and therefore, the antitrust claim must be dismissed.

The insurers further argue that plaintiffs fail to allege the requisite market power. Courts use the "rule of reason" approach to determine the reasonableness of a restraint, including an examination of the purpose of the restraint, market power, and the anticompetitive effect of the restraint. *Independent Milk Producers Co-op v. Stoffel*, 102 Wis.2d 1, 8, 298 N.W.2d 102 (Ct. App. 1980). Under the rule of reason, a prima facie case requires proof that the defendant has sufficient market power to substantially restrain competition. *In re Sulfuric Acid Antitrust Litigation*, 703 F.3d 1004, 1007 (7th Cir. 2012). Plaintiffs' threshold burden involves alleging a precise market definition to demonstrate that defendants wield market power, which means that defendants can

produce anticompetitive effects. *Agnew v. National Collegiate Athletic Association*, 683 F.3d 328, 337 (7th Cir. 2012).

The insurers contend plaintiffs cannot allege that the insurers had sufficient market power in the secondary market as they have defined it. Plaintiffs identify two separate markets – the primary and secondary markets for life insurance. The FAC states that the "markets are separate, distinct, and do not compete with one another." (FAC ¶ 690). Plaintiffs allege the primary market for life insurance involves the sale of potential life insurance policies to primary market buyers who seek to obtain life insurance for financial protection, while the secondary market involves the sale of actual life insurance policies already issued by an insurance company and in force. They further allege that the relevant secondary market is limited to buyers seeking to purchase life insurance for investment purposes, i.e., professional or institutional buyers who rarely participate in the primary market. (FAC ¶¶ 691-92).

Plaintiffs allege that the relevant geographic market is the global secondary market for life insurance in which investors all over the world are able to compete to purchase life insurance policies. (FAC ¶ 695). The insurers note that there are sharp distinctions between participants in and actions taken in these different markets. They argue that plaintiffs fail to sufficiently allege that the insurers had sufficient market power in the relevant secondary market because their only alleged activities in that market relate to policy lapses and surrenders. The insurers assert that lapse or surrender of an insurance policy, and any resulting payment to which a policyholder may be contractually entitled, do not constitute competition in the secondary market. (FAC ¶¶ 368, 389, 500, 510, 574).

The insurers argue that plaintiffs' reliance on the allegation that 72% of the policies presented to Baetis and Brown on the secondary market were the insurers' policies is misplaced because it does not permit the inference that the insurers possessed the requisite market power. They point out that universal life policies are not unique to any particular insurer, as they are an industry-wide category of life insurance product. Investors worldwide are able to compete with one another to purchase policies on the secondary market. Baetis and Brown were two investors in a global market. Thus, the insurers argue that Baetis and Brown are not a market unto themselves and there is no basis to conclude that all investors in a global market had the same experience. They further point out that plaintiffs' allegation does not create a plausible inference of insurers' market power in the secondary market.

Insurers note that none of the alleged anticompetitive conduct occurred in the secondary market. For example, plaintiffs allege that the insurers ignored NRPF/STOLI "red flags" in issuing policies, employed lax underwriting standards, made false representations about policies, and targeted NRPF/STOLI policies at issuance for future investigation. The insurers note that all of these actions relate to the sale of potential insurance policies in the primary insurance market and therefore do not satisfy plaintiffs' burden to show the insurers exercised market power in the secondary market.

The insurers' alleged disparagement of NRPF did not erode secondary market buyer confidence. (FAC ¶ 661). The insurers point out that their alleged litigation efforts regarding NRPF/STOLI policies relate to issuance of policies lacking an insurable interest and therefore involve transactions on the primary market. They assert that plaintiffs cannot allege the requisite market power, as they have not identified a single

anticompetitive action in the secondary market. The insurers contend that all of the alleged anticompetitive conduct relates to the issuance of life insurance policies in the primary market and cannot be construed as an exercise of market power in the secondary market for purchase and sale of in-force life insurance policies.

The insurers assert that plaintiffs' § 133.03 claim is implausible on its face. Their antitrust claim alleges that the insurers acted collectively to increase the supply of NRPF, while simultaneously decreasing secondary market buyer demand. Plaintiffs allege that the secondary market rapidly expanded in 2003, and that the "robust secondary market would shatter Insurer Defendants' lapse assumptions and related profitability." (FAC ¶ 335). Plaintiffs further allege that the insurers began issuing NRPF-funded policies in 2005, two years after the expansion in the secondary market. They claim that the insurers knew all of the hallmarks of NRPF as early as 2005 or, at the latest, by March 2006.

Plaintiffs allege that the insurers acted against their own self-interest and purposely continued to grow their sales of NRPF through the end of 2007. The insurers assert that if the secondary market exploded in 2003 and the insurers knew NRPF would be harmful to their profitability as early as 2005, it is implausible that the insurers continued to grow the market through 2007. They maintain that the § 133.03 claim must fail because plaintiffs must allege "something beyond the mere possibility" of an unlawful restraint of trade. *Twombly*, 550 U.S. at 557-58.

Plaintiffs' Opposition

Plaintiffs allege that the insurers violated Wis. Stat. § 133.03 when they agreed to boycott NRPF in order to fix the ceiling for secondary market policy prices at surrender rates. They assert that a group boycott that effectuates price fixing is illegal *per se*.

Denny's Marina, Inc. v. Renfro Productions, Inc., 8 F.3d 1217, 1220 (7th Cir. 1993). They contend that the insurers' conduct subsequent to their collective NRPF ban was consistent with and in furtherance of the overarching conspiracy. Plaintiffs point out that the Wisconsin legislature intended chapter 133 to be broadly applied. Section 133.01 provides, in relevant part:

> The intent of this chapter is…to foster and encourage competition by prohibiting unfair and discriminatory business practices which destroy or hamper competition. It is the intent of the legislature that this chapter be interpreted in a manner which gives the most liberal construction to achieve the aim of competition. It is the intent of the legislature to make competition the fundamental economic policy of this state…

A conspiracy to fix prices is a *per se* violation of Wis. Stat. § 133.03(1) which requires a plaintiff to allege: 1) some form of concerted action among defendants; 2) an antitrust injury; and 3) substantial effects on the people of Wisconsin related to defendants' conduct. *See Grams v. Boss*, 97 Wis. 2d 332, 349, 294 N.W.2d 473 (1980); *Meyers v. Bayer AG, Bayer Corporation*, 303 Wis. 2d 295, 320-21, 735 N.W.2d 448 (2007). Plaintiffs allege that the insurers shared information with one another in real time and agreed with their competitors to reach an explicit agreement in 2006. The agreement was publicly acknowledged by an insurance company executive in early 2007.

Plaintiffs allege that the insurers acted in unison and continued their unified front to advance the goals of their 2006 agreement. They contend that their allegations are plausible, make economic sense, and are wholly consistent with the notice pleading standards outlined in *Date Key Partners* and *Twombly*. The *Twombly* court stated: "Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable

expectation that discovery will reveal evidence of illegal agreement." *Twombly*, 550 U.S. at 556.

Plaintiffs allege that the insurers collectively and explicitly agreed to boycott NRPF. They allege that in early January 2006, the insurers shared information with their competitors in real time by responding to a survey which asked whether they accepted premium finance business. Plaintiffs argue than an email from an insurance executive titled "Survey of Competitors" with the message "notice how all these other carriers are jumping on board" shows that the survey was an agreement among competing life insurers to jointly renounce NRPF. The FAC further alleges that the insurers made various announcements indicating their compliance with the life insurance industry's NRPF ban and equating NRPF with STOLI and life settlements.

Plaintiffs point to the statement by ING Chairman and CEO, Tom McInerney, *see supra*, in a 2007 conference call that the top 30 life insurance companies had all agreed not to write STOLI policies. (FAC ¶ 348). They assert that they have alleged detailed facts describing the insurers' explicit conspiracy to ban NRPF. Plaintiffs argue, therefore, that they properly alleged an actual agreement among the insurers. *In re Polyurethane Foam Antitrust Litigation*, 799 F.Supp.2d 777, 795 (N.D. Ohio 2011) ("In short, the plausibility pleading standard does not require a court to construct a mandatory checklist of the "who, what, where, when, and how" of an antitrust agreement for each defendant. Common sense prevails, and a complaint survives if it contains 'enough factual matter (taken as true) to suggest that an agreement was made' among the defendants. *Twombly,* 550 U.S. at 556, 127 S.Ct. 1955."

Plaintiffs contend that the insurers' subsequent actions were consistent with the conspiracy. "[B]ecause conspiracies are presumptively ongoing, a plaintiff plausibly alleges that defendants acted pursuant to a conspiracy if the plaintiff alleges both (1) a conspiratorial agreement and (2) later actions that are consistent with the conspiracy." *Watson Carpet & Floor Covering, Inc. v. Mohawk Industries, Inc.*, 648 F.3d 452, 458 (6th Cir. 2011). "Proof that the conspiracy was ongoing is unnecessary because conspiracies presumptively are ongoing until the participants achieve their objective." *Id*. at 457. When varying inferences may be drawn from a complaint's allegations, plaintiffs argue that the allegations are sufficient as long as one such inference plausibly suggests consistency with the unlawful agreement and they have alleged an express conspiratorial agreement. *In re Polyurethane Foam Antitrust Litigation*, 799 F.Supp.2d at 798 n.3

Plaintiffs allege an overt agreement which initially failed to achieve its objective. They further allege that the insurers were secondary market policy buyers through lapse and surrender. When renouncing NRPF was insufficient to render the insurers as the only buyers of secondary market policies and fix prices at surrender value or less, plaintiffs argue that the insurers increased the supply of NRPF policies and simultaneously decreased demand. They assert that this conduct is consistent with the insurers' agreement to ban NRPF because their price-fixing goal remained constant throughout.

Further, plaintiffs allege that the insurers recognized but ignored NRPF/STOLI policies and implemented but ignored their NRPF/STOLI underwriting guidelines while secretly identifying and targeting NRPF/STOLI policies for future investigation, denial,

and litigation. They contend that banning NRPF and issuing worthless NRPF are consistent methods of fixing prices for secondary market policies because neither encumbers the insurers with real liability. Plaintiffs claim that issuing worthless NRPF policies and collecting related premiums is at least as anti-competitive as banning NRPF because the insurers would not have collected premiums had their NRPF ban been effective. Thus, plaintiffs assert that they plausibly alleged that all of the insurers' conduct is part of and consistent with their conspiratorial agreement.

In response to the insurers' argument that the statement by ING Chairman and CEO Tom McInerney is a "stray statement" and incomplete quote, plaintiffs contend that this detailed factual allegation is not a "stray statement," as defined in *Twombly*, 550 U.S. at 564 n.9 ("stray statement" that defendants "engaged in a 'contract, combination or conspiracy' and agreed not to compete with each other" is a legal conclusion). In addition, they point out that the insurers fail to cite any federal statute or other Congressional mandate requiring them to boycott NRPF/ STOLI. They note that Congressional pressure or threat does not confer antitrust immunity under Wisconsin or federal law. *See* Wis. Stat. § 133; 15 U.S.C. § 1.

Plaintiffs assert that on a motion to dismiss, their allegations are accepted as true and facts and inferences construed in plaintiffs' favor. Therefore, the insurers' motives relating to Congressional pressure are not an issue a court will resolve on a motion to dismiss.

In the alternative, plaintiffs assert that they allege the insurers' consciously parallel behavior and related plus factors. They contend that direct evidence of conspiracy is not required, but rather circumstantial evidence can establish an antitrust

conspiracy. *In re Text Messaging Antitrust Litigation*, 630 F.3d 622, 629 (7th Cir. 2010). An illegal agreement can be inferred from consciously parallel behavior supplemented with various "plus factors." *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Company, Inc.*, 998 F.2d 1224, 1242-43 (3rd Cir. 1993). Plus factors are "proxies for direct evidence of an agreement" that include the insurers' motives, opportunities, interrelationships, inclination to collaborate, actions against their economic interests, and pervasive parallel conduct. *In re Text Messaging Antitrust Litigation*, 630 F.3d at 629.

Plaintiffs allege that the insurers expressly agreed to ban NRPF/STOLI and modified their strategy when the ban by itself was ineffective in order to fix prices for secondary market policies at surrender rates or lower. Since they allege that the insurers acted pursuant to an explicit agreement, plaintiffs argue they need not plead facts showing consciously parallel behavior and related plus factors. *Watson Carpet & Floor Covering, Inc.*, 648 F.3d at 457. However, plaintiffs contend they pled extensive, detailed facts to describe the insurers' consciously parallel behavior and the setting surrounding it.

Plaintiffs assert that their extensive, fact-based allegations demonstrate that the insurers behavior was parallel, specifically, that the insurers shared real time information with competitors, including each other, in January 2006; all renounced NRPF between January and March 2006; equated NRPF with STOLI and life settlements in 2006; identified but intentionally ignored NRPF/STOLI policies in 2005-06; implemented equivalent sham underwriting procedures to flag NRPF/STOLI policies for future investigation, rescission, or denial in 2006; blamed their agents and policyholders for the

issuance of NRPF/STOLI policies in 2005-06; intentionally ignored their revised underwriting procedures and continued to issue NRPF/STOLI policies in 2006-07; delayed investigating and rescinding NRPF/STOLI policies until either just prior to the two-year contestability period expired or after a policyholder died and the beneficiary claimed the death benefit; and automatically litigated when policyholders or beneficiaries refused to voluntarily abandon their policies or death benefits using identical strategies and often identical legal counsel.

Plaintiffs further point out that the insurers' universal life policy sales all increased in 2006-07, all decreased in 2008-09, and all of their resist/deny rates increased in 2008-09. They assert that whether the insurers' conduct was parallel is ultimately a question of fact not considered on a motion to dismiss.

With regard to whether the insurers' behavior was consciously parallel, plaintiffs note that the insurers agreed to renounced NRPF in response to a real time survey among their competitors, including each other; acknowledged that eliminating NRPF/STOLI was an industry-wide stance; acknowledged that their NRPF/STOLI screening measures were similar to those of their competitors; decided to collectively feign ignorance of NRPF/STOLI and blame agents and insureds for the issuance of such policies; and were aware of one another's strategies to force lapses and undermine secondary market buyer confidence, which was an element in their decisions to act similarly.

As to plus factors, plaintiffs contend they pled detailed facts describing the insurers motives to fix secondary market prices at surrender rates or lower, including e.g., to realize their profit-dependent, lapse-supported pricing projections and to decrease universal life reserves. They point out that the insurers were interrelated through their

common cadre of independent agents, overlapping reinsurance agreements, their trade association, and a cryptic 501(c)(4) nonprofit corporation with a common but deliberately obscured objective. Plaintiffs also allege that the insurers exchanged information concerning whether they accepted NRPF with their competitors, including each other, in real time.

In addition, plaintiffs allege extensive opportunities to collude, including that the insurers were all ACLI members and their executives were on ACLI's Board of Directors at various times from 2006-09; attended at least 139 ACLI meetings in 2006-07, including 31 meetings at which NRPF/STOLI was discussed; attended industry conferences in 2007-08 at which NRPF/STOLI was discussed; were all members of ALIA, a secretive 501(c)(4) nonprofit corporation funded by life insurance companies; and had ample opportunities to share information and signal their competitors through a multitude of documents and announcements. Plaintiffs allege that the insurers not only had multiple opportunities to collude during meetings and conferences, but also that the stated purposes of these meetings related to the conspiracy. They further allege that the nonprofit ALIA demonstrates the insurers' willingness and ability to conspire for a common purpose.

The FAC also alleges that the insurers acted against their economic interests, pointing to the insurers' public filings in which they state that their reputations and third-party ratings are competitive factors that impact policyholders', agents', and lenders' decisions regarding which policies to purchase, which carriers to promote, and which carriers are creditworthy. Plaintiffs argue their allegations are fact specific, supported by the insurers' public filings, agent and policyholder notices and emails, earnings calls,

underwriting forms and guidelines, newsletters, policies, applications, and Annual Statements. They assert that if private plaintiffs, who do not have access to inside information, are to pursue violations of the law, the pleading standard must recognize that a complaint will usually be limited to allegations pieced together from publicly available data. *In re Plasma-Derivative Protein Therapies Antitrust Litigation*, 764 F.Supp.2d 991, 1002 n.10.

While the insurers offer alternate explanations for their actions, plaintiffs argue their allegations are not implausible at the motion to dismiss stage simply because alternate theories exist. They refer to the allegations that the insurers expressly agreed to ban NRPF; carried out that agreement; deliberately conflated NRPF with STOLI and life settlements; identified NRPF/STOLI, issued policies despite changing their applications and underwriting guidelines to exclude it; issued worthless policies with no intention to honor them, but rather investigated, denied, and litigated them; and deterred secondary market buyers from purchasing policies to retain their monopsony as the only buyers on the secondary market through lapse and surrender.

Plaintiffs further claim that their allegations make economic sense, as the conspiracy resulted in the insurers selling significantly more universal life policies, dissolving looming liability for worthless NRPF policies, and fixing secondary market prices at surrender rates or less. They contend that the conspiracy was remarkably profitable. Thus, plaintiffs argue they pled facts describing an actual conspiratorial agreement and plausible conspiracy and alleged the insurers' behavior was consciously parallel and supported by multiple plus factors.

With regard to the secondary market for life insurance, plaintiffs allege a buyer-side conspiracy. The relevant market in a buyer-side conspiracy is the market of competing buyers. Plaintiffs point out that secondary market sellers had choices to either sell their policies to investors or to surrender or lapse them to the issuing insurance company. The insurers argue that they are not secondary market purchasers because surrender rates are contractually based. However, plaintiffs assert that the issue in a buyer-side conspiracy relates to the sellers' options and whether the buyers' conspiracy constrained those options. They contend they properly defined the market as the secondary market for life insurance because both plaintiffs and the insurers participated in the secondary market as sellers and buyers respectively. They point out that courts hesitate to grant motions to dismiss for failure to plead a relevant product market because market definition is a fact-intensive inquiry.

As price fixing is *per se* illegal under Wis. Stat. § 133.03, proof of an anticompetitive effect is not required. *Grams v. Boss*, 97 Wis.2d 332, 348-49, 294 N.W.2d 473 (1980). Plaintiffs allege the conspiracy caused anticompetitive effects since the insurers will continue to pay anticompetitive prices for their policies via lapse and surrender to the detriment of consumers and their policy owners. They allege the conspiracy restrained competition by eliminating secondary market competition among buyers (investors and life insurance companies); reserving for themselves the exclusive power to buy unwanted policies through lapse and surrender; capping the ceiling on secondary market prices at surrender rates; denying policyholders economically advantageous options; and decimating the secondary market for life insurance.

"When horizontal price fixing causes buyers to pay more, or sellers to receive less, than the prices that would prevail in a market free of the unlawful trade restraint, antitrust injury occurs." *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 988 (9th Cir. 2000). Plaintiffs pled that they suffered antitrust injuries because they were a) unable to sell NRPF policies to secondary market buyers at any price; b) unable to recover on their NRPF loans; and c) forced to lapse the policies. While the insurers argue plaintiffs did not suffer antitrust injury because the insurers' conduct increased competition and decreased prices for secondary market buyers, plaintiffs assert that they allege a buyer-side conspiracy in which the issue is not remarkable opportunities and bargain prices for buyers, but nonexistent choices and depressed prices for sellers. Thus, plaintiffs suffered an antitrust injury as a result of the insurers' conduct because they were unable to sell and forced to lapse their secondary market policies.

A complaint is sufficient under the Wisconsin Antitrust Act if it alleges price fixing that substantially affected the people of Wisconsin and had impacts in Wisconsin. *Meyers v. Bayer AG, Bayer Corporation*, 303 Wis. 2d 295, 320, 735 N.W.2d 448 (2007). The *Meyers* court rejected a heightened pleading standard for the "substantially affects" test, holding that even "bare allegations" may be sufficient. *Id*. at 320-21. Plaintiffs argue they satisfy the *Meyers* test by alleging that prices and sale options for secondary market policies were depressed and restricted, including for Wisconsin life insurance policyholders.

Since plaintiffs allege that the insurers' boycott and continuing conspiracy depressed sale prices for secondary market insurance policies, they argue the conspiracy substantially affected Wisconsin policyholders, specifically those who paid $828,115,996

in premiums to the insurers for life insurance policies between 2006 and 2009 because their secondary market sale options and prices were fixed at lapse or surrender to the insurers. Plaintiffs assert their allegations are sufficient because "[t]he public interest and welfare of the people of Wisconsin are substantially affected if prices of a product are fixed or supplies thereof are restricted." *Id*. at 313-14.

Proof of market power is not required to prove a violation of Wis. Stat. § 133.03(1). Plaintiffs point out that direct evidence of anticompetitive effects proves market power. *Toys "R" Us, Inc. v. Federal Trade Commission*, 221 F.3d 928, 937 (7th Cir. 2000). Plaintiffs allege that insurers' conspiracy caused multiple anticompetitive effects, including price fixing of secondary market policies. They argue that even if they are required to allege market power, pleading the actual anticompetitive effects of the insurers' conduct is sufficient.

Decision on Antitrust Claim

Since plaintiffs' antitrust claim was first pled in their First Amended Complaint, the insurers argue it should be stricken because plaintiffs did not seek leave of the Court to amend. Plaintiffs have since filed a Motion for Leave to Amend, arguing that it should be granted because this case has been pending for over two years but is still at the motion to dismiss stage due to a protracted procedural history; no scheduling order has yet been entered and thus no deadline for amending pleadings has been set; and none of the insurers has claimed any prejudice resulting from the amended complaint or its antitrust claim, as discovery has been largely stymied.

Under Wis. Stat. § 802.09(1), leave to amend pleadings "shall be freely given at any stage of the action when justice so requires." As the Court finds plaintiffs' arguments

compelling, the insurers have not shown any prejudice due to the additional claim, and in the interest of hearing plaintiffs' claims in their entirety, plaintiffs' Motion for Leave to Amend is hereby granted.

Plaintiffs allege the insurers violated Wis. Stat. § 133.03 when they agreed to boycott NRPF in order to fix secondary market policy prices at surrender rates. They allege concerted action by the insurers in sharing information with one another in real time and ultimately reaching an explicit agreement in 2006, which they contend was acknowledged by an insurance company executive in early 2007. They further pled that the insurers acted in unison and continued their unified effort to advance the goals of the 2006 agreement. The FAC alleges that in early 2006 the insurers shared information with their competitors in real time by responding to a survey asking whether they accepted premium finance business. Referring to the survey, an insurance company executive noted in a conference call that "all these other carriers are jumping on board." Plaintiffs allege the executive recognized the survey as an agreement among competing life insurance carriers to jointly renounce NRPF.

Each of the insurers subsequently announced it was banning NRPF. Plaintiffs allege that the insurers' conduct subsequent to their collective ban is consistent with and in furtherance of the conspiracy. A conspiracy to fix prices is a *per se* violation of Wis. Stat. § 133.03(1) which requires a plaintiff to allege: 1) some form of concerted action among defendants; 2) an antitrust injury; and 3) substantial effects on the people of Wisconsin related to defendants' conduct. *Grams*, 97 Wis. 2d at 349; *Meyers*, 303 Wis. 2d at 320-21.

Plaintiffs allege that the insurers' behavior was consciously parallel in that they agreed to renounce NRPF in response to the survey; acknowledged that eliminating NRPF/STOLI was an industry-wide stance; acknowledged that their underwriting screening measures were similar to those of their competitors; collectively feigned ignorance of NRPF/STOLI and blamed agents and insureds for the issuance of such policies; and were aware of one another's strategies to force lapses and undermine secondary market buyer confidence. Plaintiffs alleged plus factors, including facts describing the insurers' motives to fix secondary market prices at surrender rates or lower in order to realize their profit-dependent, lapse-supported pricing projections and decrease universal life reserves.

Further, plaintiffs allege opportunities for the insurers to collude, including that they were all ACLI members; attended at least 139 ACLI meetings in 2006-07, 31 of which discussed NRPF/STOLI; attended industry conferences in 2007-08 at which NRPF/STOLI was discussed; were all members of ALIA, a secretive 501(c)(4) nonprofit corporation funded by life insurance companies; and had ample opportunities to share information through a multitude of documents and announcements.

The FAC alleges that the insurers acted against their economic interests, referring to public filings which state that their reputations and third-party ratings are competitive factors that impact decisions regarding which policies to purchase, which carriers to promote, and which carriers are creditworthy. The allegations are supported by the insurers' public filings, agent and policyholder notices and emails, earnings calls, underwriting forms and guidelines, newsletters, policies, applications, and annual statements.

Since price fixing is *per se* illegal under § 133.03, proof of an anticompetitive effect is not required. *Grams*, 97 Wis. 2d at 348-49. However, plaintiffs pled the conspiracy restrained competition by eliminating secondary market competition among buyers (investors and life insurance companies); reserving for themselves the power to buy unwanted policies through lapse and surrender; capping the ceiling on secondary market prices at surrender rates; denying policyholders advantageous options; and decimating the secondary life insurance market.

Plaintiffs pled that they suffered antitrust injuries because they were unable to sell NRPF policies to secondary market buyers at any price, were unable to recover on the NRPF loans, and forced to lapse the policies. They allege a buyer-side conspiracy in which the issue is nonexistent choices and depressed prices for sellers. Plaintiffs allege they suffered an antitrust injury as a result of the insurers' conduct because they were unable to sell and forced to lapse their secondary market policies.

With regard to whether the price fixing substantially affected the people of Wisconsin, even "bare allegations" are sufficient. *Meyers*, 303 Wis. 2d at 320-21. Plaintiffs allege that prices and sale options for secondary market policies were depressed and restricted for Wisconsin life insurance policyholders, specifically those who paid $828,115,996 in premiums for those policies between 2006 and 2009 because their secondary market sale prices and options were fixed at lapse or surrender to the insurers.

In addition, proof of market power is not required to prove a violation of

§ 133.03(1). Direct evidence of anticompetitive effects proves market power. *Toys "R" Us*, 221 F.3d at 937. Plaintiffs allege anticompetitive effects, including price fixing of secondary market policies.

To determine whether a complaint is legally sufficient, a court: 1) accepts all facts pled as true; 2) derives all reasonable inferences from those facts; and 3) construes those facts and inferences in the light most favorable to the plaintiff. A motion to dismiss is granted only if it is clear that a plaintiff cannot recover under any circumstances. *Preston v. Meriter Hospital, Inc.*, 284 Wis. 2d 264, 276, 700 N.W.2d 158 (2005). "The court is not to be concerned with whether the plaintiff can actually prove the allegations; that task is left to the trier of fact." *Keller v. Welles Department Store of Racine*, 88 Wis. 2d 24, 28, 276 N.W.2d 319 (Ct. App. 1979).

"Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading state; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Twombly*, 550 U.S. at 556. Plaintiffs' rather extensive allegations meet the plausibility requirement, i.e. there are plausible grounds to infer an agreement. Accordingly, the insurers' motion to dismiss the antitrust claim is hereby denied.

Dated at Appleton, Wisconsin this 11th day of November, 2015.

BY THE COURT:

HONORABLE MITCHELL J. METROPULOS
CIRCUIT COURT JUDGE, BRANCH III
OUTAGAMIE COUNTY