

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION**

TONI HOLLINGER, et al.,

Plaintiffs,

v.

**HOME STATE COUNTY MUTUAL
INSURANCE COMPANY, et al.,**

Defendants.

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CIVIL ACTION NO. 5:09-CV-118

O R D E R

Before the Court are the following motions to dismiss:

- Defendants Odyssey America Reinsurance Corporation's and Transatlantic Reinsurance Company's Joint Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) and 12(b)(1) (Dkt. No. 76)
- Defendant Consumers County Mutual Insurance Company's Motion to Dismiss for Lack of Subject Matter Jurisdiction (Dkt. No. 77)
- Motion to Dismiss of American International Insurance Company and Illinois National Insurance Company (Dkt. No. 78)
- Defendant Home State County Mutual Insurance Company's Motion to Dismiss Based on the "Home State" and "Local Controversy" Exceptions to CAFA Diversity Jurisdiction (Dkt. No. 80)
- Motion to Dismiss by Mendota Insurance Company Under Fed. R. Civ. P. 12(b)(6) and 12(b)(1) (Dkt. No. 81)
- Motion to Dismiss for Lack of Subject Matter Jurisdiction and Motion to Dismiss for Failure to State a Claim by Dorinco Re-Insurance Company, Imperial Fire and Casualty Company, Integon National Insurance Company, Middle States Insurance Company, Inc., National General Insurance Company, Titan Indemnity Company, and Young America Insurance Company (Dkt. No. 82)
- Defendant Old American County Mutual Fire Insurance Company's Motion to

Dismiss Based on the “Home State” and “Local Controversy” Exceptions to CAFA Diversity Jurisdiction (Dkt. No. 83)

- Motion to Dismiss of General Insurance Company of America (Dkt. No. 84)
- Motion to Dismiss for Lack of Subject Matter Jurisdiction and Motion to Dismiss for Failure to State a Claim by ACCC Insurance Company f/k/a American Century Casualty Company, Affirmative Insurance Company, American Hallmark Insurance Company of Texas, Direct General Insurance Company, Dorinco Re-Insurance Company, First Acceptance Insurance Company, Inc., Middle States Insurance Company, Inc., and United Automobile Insurance Company (Dkt. No. 85)
- Motion to Dismiss for Lack of Subject Matter Jurisdiction and Motion to Dismiss for Failure to State a Claim by Standard Fire Insurance Company (Dkt. No. 87)
- Defendants Southern County Mutual Insurance Company and Republic Underwriters Insurance Company’s Motion to Dismiss for Lack of Subject Matter Jurisdiction (Dkt. No. 91)

Also before the Court is Plaintiffs’ Omnibus Response to Defendants’ Motions to Dismiss (Dkt. No. 123), Defendants’ various replies (Dkt. Nos. 128, 129, 130, 131, 133, 134, & 136) and Plaintiffs’ omnibus sur-reply (Dkt. No. 139). The Court held a hearing on July 1, 2010. *See* 7/1/2010 Minute Entry, Dkt. No. 150. Having considered the briefing, oral arguments of counsel, and all relevant papers and pleadings, the Court finds that Defendants’ motions should be GRANTED IN PART and DENIED IN PART.

I. BACKGROUND

This is a putative class action alleging insurance discrimination in the “non-standard insurance market,” which serves “lower income individuals and those with less than ideal driving records.” Dkt. No. 123 at 2; *see also* First Amended Class-Action Complaint, Dkt. No. 65 at ¶¶ 1, 37, & 38. Plaintiff alleges that various “County Mutuals” have “violated the anti-discrimination provisions of Section 544.052 of the Texas Insurance Code, by charging certain

consumers higher policy fees on their automobile insurance than they charged other consumers, when those consumers were of the same class and hazard.” Dkt. No. 65 at ¶ 1. The County Mutuals are: Home State County Mutual Insurance Company (“Home State Mutual” or “Home State”), Old American County Mutual Fire Insurance Company (“Old American Mutual” or “Old American”), Consumers County Mutual Insurance Company (“Consumers Mutual” or “Consumers”) and Southern County Mutual Insurance Company (“Southern Mutual”). *Id.* at 1-2 & n.1. Plaintiff also alleges that the Reinsurers, which Plaintiff defines as the Defendants other than the County Mutuals, have “participated in and permitted such violations of the Insurance Code.” *Id.* at ¶ 1 and n.2. Plaintiff asserts diversity subject matter jurisdiction pursuant to the Class Action Fairness Act (“CAFA”), 28 U.S.C. § 1332(d)(2).

II. LEGAL PRINCIPLES

“In examining a [Federal Rule of Civil Procedure (“Rule”)] 12(b)(1) motion, the Court is empowered to consider matters of fact which may be in dispute.” *DDB Techs., LLC v. MLB Advanced Media, LP*, 465 F. Supp. 2d 657, 661 (W.D. Tex. 2006).

A motion to dismiss for want of subject matter jurisdiction can take the form of a facial attack on the complaint, requiring the court merely to assess whether the plaintiff has alleged a sufficient basis of subject matter jurisdiction, taking all allegations in the complaint as true. . . . A factual attack on the subject matter jurisdiction of the court, however, challenges the facts on which jurisdiction depends[,] and matters outside of the pleadings, such as affidavits and testimony, are considered.

Oaxaca v. Roscoe, 641 F.2d 386, 391 (5th Cir. 1981) (citations omitted). The parties in the above-captioned case dispute the facts underlying subject matter jurisdiction, and the Court should address these disputes as necessary to evaluation its jurisdiction:

If a defendant makes a “factual attack” upon the court’s subject matter

jurisdiction over the lawsuit, the defendant submits affidavits, testimony, or other evidentiary materials. In the latter case a plaintiff is also required to submit facts through some evidentiary method and has the burden of proving by a preponderance of the evidence that the trial court does have subject matter jurisdiction.

Paterson v. Weinberger, 644 F.2d 521, 523 (5th Cir. 1981). Although the party asserting federal subject matter jurisdiction has the initial burden under the CAFA, the party seeking to apply an exception to CAFA jurisdiction bears the burden of showing that the exception applies. *See Preston v. Tenet Healthsystem Mem'l Med. Ctr., Inc.*, 485 F.3d 804, 813 (5th Cir. 2007).

Section 544.052 of the Texas Insurance Code (“Section 544.052”) prohibits unfair discrimination:

A person may not in any manner engage in unfair discrimination or permit unfair discrimination between individuals of the same class and of essentially the same hazard, including unfair discrimination in:

- (1) the amount of premium, policy fees, or rates charged for a policy or contract of insurance;
- (2) the benefits payable under a policy or contract of insurance; or
- (3) any of the terms or conditions of a policy or contract of insurance.

Section 544.051 of the Texas Insurance Code (“Section 544.051”) provides:

This subchapter applies to any individual, corporation, association, partnership, or other legal entity engaged in the business of insurance, including:

- (1) a fraternal benefit society;
- (2) a county mutual insurance company;
- (3) a Lloyd’s plan;
- (4) a reciprocal or interinsurance exchange;
- (5) a farm mutual insurance company; and

(6) an agent, broker, adjuster, or life and health insurance counselor.

III. DISCUSSION

Defendants argue that the CAFA bars jurisdiction due to lack of amount in controversy, the “local controversy” exception, and the “home state” exception. Defendants also assert lack of standing, as well as the “no-direct-action” statute and the “filed rate/tariff” doctrine. Plaintiffs respond that minimum diversity and the requisite amount in controversy of \$5 million have been met. Plaintiffs also argue that Defendants have not met their burden on the CAFA exceptions and that the no-direct-action statute and filed rate doctrine are inapplicable.

A. “Home State” and “Local Controversy” Exceptions to CAFA Diversity Jurisdiction

Old American moves to dismiss pursuant to Rule 12(b)(1) based on the “home state” and “local controversy” abstention provisions of the CAFA. Dkt. No. 83. Several other Defendants join in Old American’s motion or make similar arguments. Dkt. No. 77 at 14-21; Dkt. No. 78 at 5; Dkt. No. 80; Dkt. No. 82; Dkt. No. 85; Dkt. No. 91.

Title 28 U.S.C. § 1332(d)(2) accords subject matter jurisdiction for certain cases with at least minimal diversity of citizenship:

(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs, and is a class action in which—

(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

(1) “Local Controversy” Exception

Section 1332(d)(4) provides exceptions to the jurisdiction afforded by Section 1332(d)(2). One exception now at issue is contained in Section 1332(d)(4)(A), the so-called “local controversy” exception:

(4) A district court shall decline to exercise jurisdiction under paragraph (2)--

(A) (i) over a class action in which--

(I) greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed;

(II) at least 1 defendant is a defendant--

(aa) from whom significant relief is sought by members of the plaintiff class;

(bb) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and

(cc) who is a citizen of the State in which the action was originally filed; and

(III) principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and

(ii) during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons

Old American acknowledges that “[a]s the party seeking an exception to a jurisdictional statute, Defendants have the burden of proving by a preponderance of the evidence that the

exception is met.” Dkt. No. 83 at 6. Old American submits that “[a]pproximately 99.99% of the automobile insurance policies written by Old American insured an automobile located in a Texas zip code.” *Id.* at 4 & 9. Old American also notes that Plaintiffs limit their proposed class to “persons who purchased an automobile insurance policy *in Texas*,” so Old American argues that presumably the policyholders are domiciled in Texas. *Id.* at 8-9 (citing *Joseph v. Unitrin, Inc.*, No. 1:08-CV-77, 2008 WL 3822938 (E.D. Tex. Aug. 12, 2008) (Crone, J.)). Moreover, Old American submits that county mutual insurance companies are only permitted to issue insurance policies in Texas, that Plaintiffs allege they suffered harm caused by Old American, that Plaintiffs seek recovery from Old American, and that “during the 3-year period preceding the filing of this class action, no other class action was filed asserting the same or similar factual allegations against Old American or its reinsurer defendants.” *Id.* at 9-10. Old American concludes that the “local controversy” exception is satisfied and that Plaintiffs’ claims should therefore be dismissed. *Id.* at 11.

In response, Plaintiffs emphasize that Defendants bear the burden of proof on abstention. Dkt. No. 123 at 6-7. Plaintiffs argue that Defendants’ evidence of the locale of insured vehicles does not prove that any policyholders were citizens of Texas at the time suit was filed in August 2009 and, moreover, does not prove they were ever citizens of Texas. *Id.* at 8-9. Plaintiffs submit “[i]t is equally possible that more than 33% of those policyholders have moved out of state since August 2007.” *Id.* at 9. Plaintiffs further argue that Defendants fail to put forth any evidence of U.S. citizenship, which is required for citizenship in a state for purposes of diversity jurisdiction. *Id.* at 9-10.

Old American replies that “the evidence, when viewed with common sense and logic,

dictates that more than two-thirds of people insure their vehicles where they live, more than two-thirds of the policyholders who purchased their insurance in Texas ‘stuck’ in Texas, and more than two-thirds of Texas policyholders are citizens of the United States.” Dkt. No. 129 at 3-4. Old American submits that “Plaintiffs have not countered [Old American’s] affidavit with any probative evidence to the contrary.” *Id.* at 5. Pursuant to Federal Rule of Evidence 201, Old American requests that the Court take “judicial notice” that “Texas is a ‘Sticky’ State” and that during the relevant time period, only about 5.2% of all Texas residents moved out of Texas. *Id.* at 6-7 (citing Appx. 2). Old American also requests “judicial notice” that only about 11% of the residents of Texas are not citizens of the United States. *Id.* at 7 (citing Appx. 3).

In sur-reply, Plaintiffs argue that Old American still fails to “provide[] the required proof that the class members had *U.S. citizenship or permanent residence.*” Dkt. No. 139 at 1. Plaintiffs also argue that the general statistics about which Old American asks the Court to take judicial notice are insufficient because they are not specific to the members of Plaintiffs’ proposed classes. *Id.* at 2. Plaintiffs argue that “given the nature of the coverage – which includes high risk and low-income drivers – it is likely that a relatively high percentage of the policyholders are illegal aliens.” *Id.* at 3.

The County Mutuals have presented evidence that more than 99% of the automobiles they insure are located in Texas. Ward Decl., Dkt. No. 83-1 at ¶ 7 (Old American); McClellan Decl., Dkt. No. 80-1 at ¶ 7 (Home State); Dobbie Decl., Dkt. No. 77-1 at ¶ 18 (Consumers); Fulton Decl., Dkt. No. 91-1 at ¶ 7 (Southern Mutual). The County Mutuals have also presented evidence that only about 5.2% of all Texas residents moved out of Texas during the relevant time period and that only about 11% of Texas residents are not United States citizens. Dkt. No. 129 at

Appxs. 2 & 3. Although the County Mutuals' statistics about Texas residents are not specific to the policyholders, these statistics are nonetheless probative, particularly in the absence of any contrary showing by Plaintiffs. *Cf. Caruso v. Allstate Ins. Co.*, 469 F. Supp. 2d 364, 368 (E.D. La. 2007) ("Although there well may be proposed classes where detailed proof of the two-thirds citizenship requirement is required, the Court finds that common sense should prevail in this closed-end class involving people who, as noted, hold an asset that is a measure of domicile, their home."); *see also Coury v. Prot*, 85 F.3d 244, 251 (5th Cir. 1996) (noting that factors for determining domicile include "places where the litigant . . . owns real and personal property").

Rather than submit contrary evidence, Plaintiffs present only attorney argument in their attempt to rebut the County Mutuals' showing. Admittedly, attributes of a policyholder like mailing address or even residence are not dispositive of domicile, particularly for many college students and soldiers that do not intend to remain indefinitely. *In re Sprint Nextel Corp.*, 593 F.3d 669, 673-74 (7th Cir. 2010). The *Sprint Nextel* court declined to find the "greater than two-thirds" requirement satisfied based on common sense "guesswork," even "sensible guesswork," and suggested that surveys of a representative sample of the proposed class might be sufficient evidence. *Id.* at 674 & 675-76. The Court of Appeals for the Fifth Circuit has also noted that "[a] party's residence in a state alone does not establish domicile." *Preston v. Tenet Healthsystem Mem'l Med. Ctr., Inc.*, 485 F.3d 793, 798 (5th Cir. 2007).

Preston, however, involved the "forced mass relocation" of putative class members out of New Orleans due to Hurricane Katrina nearly one year before the filing of suit. *Id.* at 799; *see also Preston*, 485 F.3d 804, 817 (discussing scope of evacuation and discussing affidavits of potential class members expressing intent to return to New Orleans). The *Preston* court also

declined to rely on “census data” as “too general,” but here again the court noted the uncertainties arising out of Hurricane Katrina. 485 F.3d 793, 802. On balance, *Sprint Nextel* is not binding authority, *Preston* is distinguishable from the above-captioned case, and *Caruso* and *Joseph* are persuasive district-court-level authorities in this Court’s circuit. *Caruso*, 469 F. Supp. 2d 364; *Joseph*, 2008 WL 3822938; cf. *Andirudh v. CitiMortgage, Inc.*, 598 F. Supp. 2d 448, 452-53 (S.D.N.Y. 2009) (finding “home state” exception satisfied upon unrebutted affidavit that 96.7% of the relevant loan activity was in New York).

The Court therefore rejects Plaintiff’s hypothesizing about whether the policyholders have moved or are largely not United States citizens. 5A Charles A. Wright, et al., Federal Practice and Procedure § 1350 & n.49 (“argumentative (as opposed to reasonable) inferences favorable to the pleader will not be drawn . . .”). The County Mutuals have put forth persuasive statistical evidence showing by a preponderance of the evidence—*i.e.*, that it is more likely than not—that greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of Texas and of the United States. *See Preston*, 485 F.3d 793, 797 (“[T]he party moving for remand [pursuant to CAFA exceptions to federal jurisdiction] must prove the statutory citizenship requirement by a preponderance of the evidence”).

The County Mutuals have also shown by a preponderance of the evidence that at least one defendant is a defendant from whom significant relief is sought by members of the plaintiff class, whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class, and who is a citizen of Texas. In particular, all putative class members, by definition, have claims against the County Mutuals, and as the entities that issued the insurance policies at issue, the County Mutuals have a significant role in the alleged discrimination. *See Joseph*, 2008 WL

3822938, at *9. The County Mutuals are all citizens of Texas. Dkt. No. 65 at ¶¶ 8-11. Plaintiffs do not appear to refute these element.

Further, the County Mutuals have shown by a preponderance of the evidence that principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in Texas. This stems from the County Mutuals' showing that they are citizens of Texas and only issue policies in Texas. Ward Decl., Dkt. No. 83-1 at ¶¶ 3-6 (Old American); McClellan Decl., Dkt. No. 80-1 at ¶¶ 3-6 (Home State); Dobbie Decl., Dkt. No. 77-1 at ¶¶ 2-6 & 16 (Consumers); Fulton Decl., Dkt. No. 91-1 at ¶¶ 3-6 (Southern Mutual). Plaintiffs do not appear to refute this element.

Finally, Old American has shown by a preponderance of the evidence that during the three-year period preceding the filing of this action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons. Ward Decl., Dkt. No. 83-1 at ¶ 8 (Old American); McClellan Decl., Dkt. No. 80-1 at ¶ 8 (Home State); Dobbie Decl., Dkt. No. 77-1 at ¶ 7 (Consumers); Fulton Decl., Dkt. No. 91-1 at ¶ 9 (Southern Mutual). Plaintiffs do not appear to refute this element.

Defendants have thus shown by a preponderance of the evidence that all elements of the "local controversy" exception are satisfied. Defendants' motions should be GRANTED as to the "local controversy" exception.

(2) "Home State" Exception

Section 1332(d)(4)(B) provides the so-called "home state" exception to Section 1332(d)(2):

(4) A district court shall decline to exercise jurisdiction under paragraph (2) [over a class

action in which]--

(B) two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed.

Old American incorporates its argument as to the local controversy exception, as set forth in Section III.A.(1), above, that more than two-thirds of the proposed class members are citizens of Texas. Dkt. No. 83 at 11. Old American argues that it, not any reinsurer, is the “primary” defendant because “[t]he reinsurers do not have any contractual relationship with the plaintiffs.” *Id.* Old American further argues that Plaintiffs’ proposed classes must be considered individually for determining jurisdiction but, even if all of Plaintiffs’ proposed classes are considered together, all four of the County Mutual Defendants are citizens of Texas. *Id.* at 12.

Plaintiffs’ response includes no separate argument on the “home state” exception, so for this exception Plaintiffs evidently rely on their argument that Defendants have failed to demonstrate that more than two-thirds of the proposed class is domiciled in Texas. *See* Dkt. No. 123 at 5-13, *esp.* at 5 (“Each of these exceptions requires proof that greater than two-thirds of all the proposed plaintiff classes in the aggregate are citizens of Texas.”). Nor do Old American’s reply or Plaintiffs’ sur-reply separately address this exception. Dkt. Nos. 129 & 139.

On balance, for the same reasons discussed in Section III.A.(1), above, the County Mutuals have shown by a preponderance of the evidence that two-thirds or more of the members of all of Plaintiffs’ proposed classes in the aggregate are citizens of Texas.

The County Mutuals have also shown that they are “primary” defendants. In particular, all putative class members, by definition, have claims against the County Mutuals, and as the entities that issued the insurance policies at issue, the County Mutuals have a primary role in the

alleged discrimination. Further, the County Mutuals have shown that they are citizens of Texas. Ward Decl., Dkt. No. 83-1 at ¶ 3 (Old American); McClellan Decl., Dkt. No. 80-1 at ¶ 3 (Home State); Dobbie Decl., Dkt. No. 77-1 at ¶¶ 2 & 5-6 (Consumers); Fulton Decl., Dkt. No. 91-1 at ¶ 3 (Southern Mutual). Plaintiffs do not appear to refute this element. *But see* Dkt. No. 123 at 18 & 19 (arguing as to no-direct-action statute that Reinsurers are the “primary offenders”).

Defendants have thus shown by a preponderance of the evidence that all elements of the “home state” exception are satisfied. Defendants’ motions should therefore be GRANTED as to the “home state” exception.

B. No Direct Action

Section 493.055 of the Texas Insurance Code (“Section 493.055”) provides: “A person does not have a right against a reinsurer that is not specifically stated in: (1) the reinsurance contract; or (2) a specific agreement between the reinsurer and the person.”

In light of the finding in Section III.A, above, that the Court lacks subject matter jurisdiction, the Court does not reach the Reinsurers’ reliance on the no-direct-action statute, which the Reinsurers assert on the merits pursuant to Federal Rule of Civil Procedure 12(b)(6). As to any Defendant that has not specifically moved to dismiss based on lack of subject matter jurisdiction, the Court finds lack of subject matter jurisdiction in accordance with Section III.A., above. The Reinsurers’ motions should therefore be DENIED WITHOUT PREJUDICE as to the no-direct-action statute.

C. “Filed Tariff” or “Filed Rate” Doctrine

The Reinsurers argue that the Texas Department of Insurance (the “Department”) has exclusive jurisdiction over the reasonableness of insurance rates. Dkt. No. 76 at 7-11 (discussing

Korte v. Allstate Ins. Co., 48 F. Supp. 2d 647 (E.D. Tex. 1999)); *see also* Dkt. No. 81; Dkt. No. 84. Defendants submit that the relevant policy fees have been filed with the Department. *Id.* at 10 (citing Dkt. No. 65 at ¶ 37). Defendants conclude that the “filed rate” doctrine, which is a species of the “filed tariff” doctrine, bars judicial review of the rates. *Id.* at 11.

In light of the finding in Section III.A, above, that the Court lacks subject matter jurisdiction, the Court does not reach the Reinsurers’ reliance on the filed rate doctrine, which the Reinsurers assert on the merits pursuant to Federal Rule of Civil Procedure 12(b)(6). As to any Defendant that has not specifically moved to dismiss based on lack of subject matter jurisdiction, the Court finds lack of subject matter jurisdiction in accordance with Section III.A., above. The Reinsurers’ motions should therefore be DENIED WITHOUT PREJUDICE as to the filed rate doctrine.

D. Standing

The Reinsurers argue that Plaintiffs “fail to establish *any* link between *any* Reinsurer and *any* Plaintiff’s alleged injury.” Dkt. No. 76 at 11; *see also* Dkt. No. 84; Dkt. No. 85. Odyssey also submits that its name “appears only in the style of the case and in a paragraph alleging that it has been served.” *Id.* at 12.

Plaintiffs respond that they have adequately alleged a “link” by alleging, for example:

By virtue of their experiences in the non-standard automobile market and, for many, their affiliations with MGAs [(managing general agents)] (in the case of Defendant Republic, also by virtue of its affiliation with Southern Mutual), the Re-Insurer Defendants are aware that their participation in these programs is essential, aware that without their participation there would be no programs, and are otherwise aware of how the non-standard automobile insurance market and the MGAs operate in Texas. The Re-Insurer Defendants are aware that the different MGAs and the County Mutual Insurance Company Defendants are engaging in the price-discriminatory practices set forth in this complaint, but nevertheless they

permit these practices to continue. They permit these practices to continue by both agreeing to issue policies of re-insurance, policies of re-insurance without which these practices would have to be discontinued, and in some instances by requiring that certain policy fees be charged by the County Mutual Insurance Defendants as a condition for their participation in a particular MGA's non-standard automobile insurance program.

Dkt. No. 123 at 25-26; Dkt. No. 65 at ¶ 74.

The Reinsurers reply that Plaintiffs' "but for" test for standing is unsupported and overbroad. *Id.* at 5. In sur-reply, Plaintiffs submit that their pleading "identifies the association of certain of the accused Reinsurers with specific County Mutuals and Plaintiffs," but "[n]othing in the Amended Complaint indicates that this is intended to be an *exclusive* rather than *illustrative* list." Dkt. No. 139 at 10.

On balance, Plaintiffs have adequately alleged harm caused by the Reinsurers being aware of discriminatory practices and permitting and facilitating them. Dkt. No. 65 at ¶ 74. The Reinsurers' motions should therefore be DENIED as to standing.

E. Amount in Controversy as to Consumers County Mutual

Defendant Consumers County Mutual Insurance Company argues that Plaintiffs fail to meet the \$5 million amount-in-controversy requirement of the CAFA. Consumers also asserts the "local controversy" and "home state" provisions, which are addressed in Section III.A., above, as to all Defendants. Defendant Standard Fire Insurance Company, one of Consumers' reinsurers, joined in Consumers' motion (Dkt. No. 87), but Standard Fire has since been dismissed from the above-captioned case. 4/8/2010 Order, Dkt. No. 125.

Consumers argues that because Plaintiffs' various claims do not arise out of the same transaction, occurrence, or series of transactions or occurrences, each putative class' claims

against each putative defendant must be examined individually. Dkt. No. 77 at 6-7. Consumers thus argues that Plaintiffs' claims against Consumers and its reinsurers cannot be aggregated with Plaintiffs' claims against other of the County Mutuals and their reinsurers. In support, Consumers argues that the "CAFA altered traditional diversity jurisdiction to permit aggregation of multiple *plaintiffs'* claims to meet the jurisdictional minimum, but did not alter the judicially established prohibition forbidding aggregation of claims against multiple *defendants* absent joint and several liability." *Id.* at 11.

Consumers submits evidence that "[a]ll individuals who purchased nonstandard private passenger automobile insurance policies in Texas from Consumers during the two years prior to institution of this lawsuit were charged policy fees totaling in the aggregate less than \$4 million." Dkt. No. 77 at 7-8 (citing Dobbie Decl., Dkt. No. 77-1 at ¶ 15 & Ex. 2). Because the only monetary relief Plaintiffs seek is restitution (Dkt. No. 65 at ¶ 89), Consumers concludes that Plaintiffs cannot meet the \$5 million amount-in-controversy requirement. *Id.* at 8.

Plaintiff responds that Texas Insurance Code § 544.052 permits up to \$25,000 of civil penalties per claimant, which Plaintiff submits puts the amount in controversy against Consumers far in excess of \$5 million. Dkt. No. 123 at 28. Plaintiff also argues that the CAFA does not require that "each Plaintiff sub-class should be treated separately; and it would defeat the policy of the [CAFA] to interpret it this way." *Id.*

Consumers replies that Plaintiffs' complaint makes no mention of Section 544.052 or any punitive or additional damages or penalties. Dkt. No. 136 at 2-3. Consumers also argues that even if Plaintiffs have adequately alleged civil penalties, it would be too speculative to include maximum statutory penalties in the amount-in-controversy calculation. *Id.* at 8. Consumers

emphasizes that Plaintiffs have the burden of showing jurisdiction and have not done so. *Id.* at 3-4. Finally, Consumers notes that Plaintiffs' complaint seeks certification of four separate classes, not "sub-classes" as Plaintiffs suggest. *Id.* at 10.

Plaintiffs' sur-reply does not address Consumers' motion. *See* Dkt. No. 139.

"The general rule with respect to the aggregation of the claims of a plaintiff against two or more defendants is that where a suit is brought against several defendants asserting claims against each of them which are separate and distinct, the test of jurisdiction is the amount of each claim, and not their aggregate." *Jewell v. Grain Dealers Mut. Ins. Co.*, 290 F.2d 11, 13 (5th Cir. 1961) (citation and internal quotation marks omitted); *see also Pilgrim's Pride Corp. v. Frisco Food Servs., Inc.*, No. 2:06-CV-512, 2007 WL 508365, at *2 (E.D. Tex. Feb. 13, 2007) (in context of traditional diversity jurisdiction, noting that "[i]n general, claims against multiple defendants can only be aggregated for the purpose of meeting the jurisdictional requirement if the defendants are jointly liable to the plaintiff.") (citing *Jewell*). Plaintiffs have not established that these traditional diversity principles do not apply to the CAFA, so the Court applies them.

Consumers has set forth un rebutted evidence that the restitution sought by Plaintiffs as to Consumers is less than \$5 million. *See* Dobbie Decl., Dkt. No. 77-1 at ¶ 15 & Ex. 2. Plaintiffs have not shown that Consumers is jointly and severally liable for Plaintiffs' claims against the other Defendant County Mutuals or that Plaintiffs' claims against them are not separate and distinct.

Finally, Plaintiffs' attempt to use civil penalties to increase the amount in controversy is not adequately plead and, moreover, is too speculative to support federal jurisdiction. *See Brown v. Jackson Hewitt, Inc.*, No. 1:06-cv-2632, 2007 WL 642011, at *5-6 (N.D. Ohio Feb. 27, 2007).

Consumers' motion to dismiss for lack of subject matter jurisdiction should therefore be GRANTED.

IV. CONCLUSION

Defendants Odyssey America Reinsurance Corporation's and Transatlantic Reinsurance Company's Joint Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) and 12(b)(1) (Dkt. No. 76) is hereby DENIED WITHOUT PREJUDICE.

Defendant Consumers County Mutual Insurance Company's Motion to Dismiss for Lack of Subject Matter Jurisdiction (Dkt. No. 77) is hereby GRANTED.

The Motion to Dismiss of American International Insurance Company and Illinois National Insurance Company (Dkt. No. 78) is hereby GRANTED IN PART and DENIED IN PART. Specifically, this motion is hereby GRANTED as to the local controversy exception, GRANTED as to the home state exception, and DENIED WITHOUT PREJUDICE as to the no-direct-action statute

Defendant Home State County Mutual Insurance Company's Motion to Dismiss Based on the "Home State" and "Local Controversy" Exceptions to CAFA Diversity Jurisdiction (Dkt. No. 80) is hereby GRANTED.

The Motion to Dismiss by Mendota Insurance Company Under Fed. R. Civ. P. 12(b)(6) and 12(b)(1) (Dkt. No. 81) is hereby DENIED WITHOUT PREJUDICE.

The Motion to Dismiss for Lack of Subject Matter Jurisdiction and Motion to Dismiss for Failure to State a Claim by Dorinco Re-Insurance Company, Imperial Fire and Casualty Company, Integon National Insurance Company, Middle States Insurance Company, Inc., National General Insurance Company, Titan Indemnity Company, and Young America Insurance

Company (Dkt. No. 82) is hereby GRANTED IN PART and DENIED IN PART. Specifically, this motion is hereby GRANTED as to the local controversy exception, GRANTED as to the home state exception, DENIED WITHOUT PREJUDICE as to the no-direct-action statute, and DENIED as to standing.

Defendant Old American County Mutual Fire Insurance Company's Motion to Dismiss Based on the "Home State" and "Local Controversy" Exceptions to CAFA Diversity Jurisdiction (Dkt. No. 83) is hereby GRANTED.

The Motion to Dismiss of General Insurance Company of America (Dkt. No. 84) is hereby DENIED WITHOUT PREJUDICE.

The Motion to Dismiss for Lack of Subject Matter Jurisdiction and Motion to Dismiss for Failure to State a Claim by ACCC Insurance Company f/k/a American Century Casualty Company, Affirmative Insurance Company, American Hallmark Insurance Company of Texas, Direct General Insurance Company, Dorinco Re-Insurance Company, First Acceptance Insurance Company, Inc., Middle States Insurance Company, Inc., and United Automobile Insurance Company (Dkt. No. 85) is hereby GRANTED IN PART and DENIED IN PART. Specifically, this motion is hereby GRANTED as to the local controversy exception, GRANTED as to the home state exception, DENIED WITHOUT PREJUDICE as to the no-direct-action statute, and DENIED as to standing.

The Motion to Dismiss for Lack of Subject Matter Jurisdiction and Motion to Dismiss for Failure to State a Claim by Standard Fire Insurance Company (Dkt. No. 87) is hereby DENIED AS MOOT because Standard Fire has been dismissed from the above-captioned case. *See* 4/8/2010 Order, Dkt. No. 125.

Defendants Southern County Mutual Insurance Company and Republic Underwriters Insurance Company's Motion to Dismiss for Lack of Subject Matter Jurisdiction (Dkt. No. 91) is hereby GRANTED.

Any requested relief not specifically GRANTED by this Order is hereby DENIED.

In light of the Court's finding that it lacks subject matter jurisdiction, the above-captioned case is hereby DISMISSED WITHOUT PREJUDICE as to all Defendants.

IT IS SO ORDERED.

SIGNED this 5th day of August, 2010.



DAVID FOLSOM
UNITED STATES DISTRICT JUDGE