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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

NINA WILLIAMSON,  
Plaintiff,  
vs.  
ALLSTATE INSURANCE COMPANY,  
a foreign insurer,  
Defendant.

No. CIV-00-2460-PHX-ROS  
**ORDER**

Pending before the Court is Defendant's Motion to Dismiss. Having considered the arguments set forth by the parties in their pleadings, the Court will grant Defendant's Motion to Dismiss, but will allow Plaintiff leave to amend Counts Two and Three of the Amended Complaint.

**Background**

On November 29, 2000, Plaintiff Nina Williamson ("Plaintiff") commenced this action against Allstate Insurance Company ("Defendant") setting forth the following three claims: (1) Count One alleging that Defendant acted in bad faith; (2) Count Two alleging that Defendant violated Arizona's Consumer Fraud Act, A. R. S. § 44-1521, et seq.; and (3) Count Three alleging that Defendant violated Arizona's Unfair Claims Practice Act,

1 A. R. S. § 20-411, et seq.<sup>1</sup> Based on this Court's diversity jurisdiction under 28 U.S.C. §  
2 1332, Defendant removed this action to this Court on December 27, 2000.<sup>2</sup>

3 Plaintiff set forth the following allegations in the Amended Complaint. Defendant  
4 is in the business of selling, marketing, and issuing insurance policies. (Amend. Comp. ¶  
5 3.) Plaintiff purchased an automobile liability policy from Defendant, identified as  
6 Allstate Policy No. 038916780. (Id. ¶ 4.) This policy provided coverage for "uninsured  
7 motorist" liability, whereby Defendant was required to reimburse Plaintiff for any injuries  
8 or damages caused by an uninsured motorist. (Id. ¶¶ 5-6.) On March 21, 1999, a vehicle  
9 operated by an uninsured motorist negligently collided with Plaintiff's vehicle, causing  
10 Plaintiff to sustain injuries and damages allegedly covered by the provisions of her policy  
11 with Defendant. (Id. ¶¶ 7-8.)

12 In Count Two of Plaintiff's Amended Complaint, she alleged that Defendant made  
13 representations about its insurance policies which provided that it would treat its  
14 customers "fairly, honestly, reasonably, promptly and courteously." (Id. ¶¶ 21-22.)  
15 Defendant intended to induce people to purchase its policies by marketing and promoting  
16 its image as "The Good Hands People." (Id. ¶ 23.) Plaintiff further alleged that while  
17 "deceptively and through false pretense promoting itself," Defendant adopted a corporate  
18 policy of "underpaying claims, forcing its insureds to litigation and denying valid claims  
19 and benefits." (Id. ¶ 24.) Plaintiff therefore alleged that Defendant violated Arizona's  
20 Consumer Fraud Act, A. R. S. § 20-1521, et seq. (Id. ¶ 25.)

21 In Count Three, Plaintiff alleged that Defendant circulated brochures and sales  
22 material, and made statements which misrepresented the benefits or advantages of its  
23 insurance policies. (Id. ¶ 28.) Defendant also published advertisements regarding its  
24 business which were false or misleading. (Id. ¶ 29.) Plaintiff therefore alleged that

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26 <sup>1</sup> On December 19, 2000, Plaintiff filed an Amended Complaint which serves as the  
27 basis for Defendant's Motion to Dismiss.

28 <sup>2</sup> The parties do not dispute that this action was properly removed to this Court.

1 Defendant committed unfair insurance practices in violation of A. R. S. § 20-411, et seq.  
2 (Id. ¶ 30.)

3 On February 23, 2001, Defendant filed a Motion to Dismiss Counts Two and  
4 Three of Plaintiff's Amended Complaint.

### 5 Discussion

#### 6 **I. Legal Standard For Motion to Dismiss**

7 In determining whether a complaint states a claim, all allegations of material fact  
8 are taken as true and construed in the light most favorable to the non-moving party.  
9 Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9<sup>th</sup> Cir. 1996). "A complaint should  
10 not be dismissed unless a plaintiff can prove no set of facts in support of his claim which  
11 would entitle him to relief." Id. (citing Parks Sch. of Bus., Inc. v. Symington, 51 F.3d  
12 1480, 1484 (9<sup>th</sup> Cir. 1995)). "In determining the propriety of a Rule 12(b)(6) dismissal, a  
13 court may not look beyond the complaint to a plaintiff's moving papers, such as  
14 memorandum in opposition to a defendant's motion to dismiss." Schneider v. Cal. Dep't  
15 of Corr., 151 F.3d 1194, 1197 (9<sup>th</sup> Cir. 1998) (citing Harrell v. United States, 13 F.3d  
16 232,236 (7<sup>th</sup> Cir. 1993)).

#### 17 **II. Defendant's Motion to Dismiss Counts Two and Three of Plaintiff's Amended 18 Complaint**

19 Defendant argues that both Counts Two and Three of Plaintiff's Amended  
20 Complaint should be dismissed because they fail to allege fraud with particularity in  
21 compliance with Fed. R. Civ. P. 9(b), which provides that "[i]n all averments of fraud or  
22 mistake the circumstances constituting fraud or mistake shall be stated with particularity."  
23 Fed. R. Civ. P. 9(b); see also Moore v. Kayport Package Express, Inc., 885 F.2d 531, 540  
24 (9<sup>th</sup> Cir. 1989).

1           **A. Whether Plaintiff Must Comply with the Pleading Requirements of Fed. R.**  
2           **Civ. P. 9(b)<sup>3</sup>**

3           Plaintiff argues that Fed. R. Civ. P. 9(b)'s particularity requirement does not apply  
4 to its claims. Plaintiff asserts that "[b]ecause Fed. R. Civ. P. 9(b) is a special pleading  
5 requirement and contrary to the general approach of simplified pleading adopted by the  
6 Federal Rules, its scope of application should be construed narrowly and [does] not  
7 extend to other legal theories or defenses." (Resp. at 7.) Plaintiff supports this position  
8 by setting forth two arguments. First, Plaintiff argues that because "the elements of  
9 common law fraud differ from the elements of statutory fraud, it is illogical to assume  
10 that the heightened pleading standard automatically applies." (*Id.*) Second, Plaintiff  
11 asserts that "simply because Plaintiff's claims regarding unfair advertising practices arise  
12 under the 'fraud' statute, it does not follow that the heightened pleading standard  
13 applies." (*Id.*)

14           Both of Plaintiff's arguments fail. The plain language of Rule 9(b) requires a  
15 plaintiff to plead "all" averments of fraud with particularity. Although Plaintiff argues  
16 that this particularity requirement does not apply to her statutory claims, Plaintiff has  
17 failed to offer any Ninth Circuit authority limiting Rule 9(b)'s broad language. The Ninth  
18 Circuit has addressed this issue, when it applied Rule 9(b) to federal statutory security  
19 fraud claims, and stated, "we are not free to override the clear language of Rule 9(b),  
20 which refers unequivocally to 'fraud', and makes no distinction between common law  
21 fraud and modern statutory causes of action based on fraud." *In re GlenFed Sec. Litig.*,  
22 42 F.3d 1541, 1545 n.3 (9<sup>th</sup> Cir. 1994) (citation omitted).

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24           <sup>3</sup> Because this case is in federal court, the manner in which Plaintiff must allege her  
25 fraud claims is governed by the Federal Rules of Civil Procedure. See *Taylor v. United*  
26 *States*, 821 F.2d 1428, 1432 (9<sup>th</sup> Cir. 1987) (stating that although state substantive law  
27 governed the plaintiff's claims under the Federal Tort Claims Acts, the Federal Rules of Civil  
28 Procedure determined the manner and time in which defenses could be raised and when  
waiver occurred), cert. denied, 485 U.S. 922 (1988).

1 Further, Counts Two and Three are founded on allegations that Defendant violated  
2 Arizona statutory law because of its false and deceptive representations about its  
3 insurance policies. (See Amend. Compl. ¶¶ 21-32.) Thus, the Court agrees with  
4 Defendant that because Counts Two and Three rely on classic allegations of fraud and  
5 misrepresentation, they are subject to Rule 9(b)'s specificity requirement. See Black's  
6 Law Dictionary (7<sup>th</sup> ed. 1999) (defining "fraud" as a "knowing misrepresentation of the  
7 truth or concealment of a material fact to induce another to act to his or her detriment.");  
8 Bly-Magee v. Cal., 236 F.3d 1014, 1018 (9<sup>th</sup> Cir. 2001) ("[C]omplaints brought under the  
9 [federal False Claims Act, 31 U.S.C. § 3729(a),] must fulfill the requirements of Rule  
10 9(b)--defendants accused of defrauding the federal government have the same protections  
11 as defendants sued for fraud in other contexts."); Sparks v. Republic Nat'l Life Ins. Co.,  
12 647 P.2d 1127, 1139 (Ariz.) ("A.R.S. § 20-443 . . . deals with unfair practices and frauds  
13 in the transaction of the insurance business."), cert. denied, 459 U.S. 1070 (1982).

14 **B. Whether Plaintiff has Plead Fraud in Compliance with Fed. R. Civ. P. 9(b)**

15 The particularity requirement of Rule 9(b) requires claims for fraud "to be pled  
16 with sufficient specificity to allow a defendant an opportunity to defend against the claim,  
17 rather than simply deny they have done anything wrong." Foster v. Allstate Ins. Co., No.  
18 93-0960-BMT, 1995 WL 396646, at \*2 (S.D. Cal. Oct. 7, 1993) (citing Semegen v.  
19 Weidner, 780 F.2d 727, 731 (9<sup>th</sup> Cir. 1985)). Pursuant to Fed. R. Civ. P. 9(b), "in order  
20 for a complaint to allege fraud with the requisite particularity, 'a plaintiff must set forth  
21 more than the neutral facts necessary to identify the transaction. The plaintiff must set  
22 forth what is false or misleading about a statement, and why it is false. In other words,  
23 the plaintiff must set forth an explanation as to why the statement or omission complained

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1 of was false or misleading.”<sup>4</sup> Yourish v. Cal. Amplifier, 191 F.3d 983, 993 (quoting In  
2 re GlenFed, 42 F.3d at 1548).

3 The Court agrees with Defendant that Plaintiff has failed to allege fraud with  
4 particularity in Counts Two and Three. In Count Two, Plaintiff has failed to set forth the  
5 content of any false representation giving rise to Plaintiff’s claim, other than that  
6 Defendant promoted itself as “The Good Hands People.” (See Amend. Compl. ¶¶ 21-23.)  
7 See also Moore, 885 F.2d at 541. Plaintiff has also failed to allege with particularity what  
8 representations were false and why they were false. Yourish, 191 F.3d at 993. Count  
9 Three is even more unspecific. While Plaintiff alleges that Defendant circulated  
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12 <sup>4</sup> The parties dispute what elements of fraud Plaintiff must plead, pursuant to  
13 Arizona substantive law, to withstand Defendant’s Motion to Dismiss. (See Mot. Dismiss  
14 at 3-5; Resp. at 5-7.) Plaintiff argues that she is not required to plead “the nine elements” of  
15 common law fraud under Arizona law, because “the elements of common law fraud are  
16 separate from statutory fraud.” (Resp. at 5.) The Court acknowledges that the “elements of  
17 a claim for relief under the Consumer Fraud Act are not necessarily identical to the elements  
18 of a common law fraud action. A violation of the Act is more easily shown.” See Peery v.  
19 Hansen, 585 P.2d 574, 577 (Ariz. Ct. App. 1978); Murry v. Western Mortgage Co., 604 P.2d  
20 651, 654 (Ariz. Ct. App. 1980) (“[T]he elements of a claim for relief [under the Consumer  
21 Fraud Act] are not necessarily identical to those of a common law fraud action.”) (citing  
22 Peery, 585 P.2d at 577).

23 Because Plaintiff has admitted that she asserts Count Three pursuant to A.R.S. § 20-  
24 443, Plaintiff must plead with particularity the statutory elements found in this provision.  
25 See Haisch v. Allstate Ins. Co., 5 P.3d 940, 944-45 (Ariz. Ct. App. 2000) (“A  
26 misrepresentation in violation of A.R.S. § 20-443 is one that concerns the ‘terms’ of a policy,  
27 its ‘benefits’ or ‘advantages, or its ‘true nature.’”). It is unclear which elements Plaintiff  
28 must plead in Count Two, because Plaintiff has failed to set forth the explicit provision or  
provisions under which she has brought this claim, though apparently because of her  
mistaken belief that her claims need not be plead under Fed. R. Civ. P. 9(b). Plaintiff has  
stated that she “identifies the complete Consumer Fraud Act as establishing the basis for  
liability and not the individual provisions of the Act.” (Resp. at 6.) In order to allow  
Defendant the opportunity to defend against this claim and to plead such claim with  
sufficient particularity, Plaintiff must elaborate on which provision or provisions of the  
Consumer Fraud Act serve as the basis for Count Two. Foster, 1995 WL 396646 at \*2; see  
also Parks, 591 P.2d at 1008 (providing the elements for a cause of action brought pursuant  
to A.R.S. § 44-1522).

1 brochures and sales material, and made statements which misrepresented the benefits or  
2 advantages of its insurance policies, Plaintiff has failed to identify the content of any  
3 alleged misrepresentation. (Amend. Compl. ¶ 28.) See also Moore, 885 F.2d at 541.  
4 Accordingly, Plaintiff has also failed to allege with particularity why such statements or  
5 representations were false. Yourish, 191 F.3d at 993.

6 Although Plaintiff argues, in a conclusory fashion, that the facts pled in her  
7 Amended Complaint meet the particularity requirements of Rule 9(b), Plaintiff has failed  
8 to apply Rule 9(b) to the facts she alleged. (See Resp. at 8-10.) The Court is concerned  
9 with Plaintiff's failure to do so. It appears, however, that Plaintiff concedes that Counts  
10 Two and Three have not been plead with sufficient particularity pursuant to Fed. R. Civ.  
11 P. 9(b). In her Response, Plaintiff merely argues that because Defendant removed this  
12 action to this Court after she filed her Amended Complaint in state court, "the case law  
13 requiring special pleadings for fraud cases in federal court would be unjustly applied to a  
14 claim initiated in state court[.]"<sup>5</sup> (Resp. at 10; see also id. at 2 ("Assuming arguendo that  
15 Rule 9(b) applies to claims asserted by plaintiff, the appropriate remedy is not to Dismiss  
16 the two counts, but rather, to grant leave to amend the Complaint to bring it into  
17 compliance with Rule 9(b)."))).

18 Plaintiff has failed to rebut Defendant's convincing argument that Counts Two and  
19 Three of the Amended Complaint do not meet the particularity requirements of Rule 9(b).  
20 Thus, the Court will grant Defendant's Motion to Dismiss Counts Two and Three for  
21 failure to plead fraud with particularity.

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25 <sup>5</sup> The Court questions the credibility of Plaintiff's position in light of the Arizona  
26 Court of Appeals' broad statement that "[a]llegations of fraud must be plead with  
27 particularity." Parks v. Macro-Dynamics, Inc., 591 P.2d 1005, 1008 (Ariz. Ct. App. 1979)  
28 (applying Ariz. R. Civ. P. 9(b), which is identical to Fed. R. Civ. P. 9(b), to both statutory  
and common law fraud claims).

1           **C. Leave to Amend**

2           Plaintiff requests leave to amend her Amended Complaint, so that she may plead  
3 Counts Two and Three with sufficient particularity under Rule 9(b). (Resp. at 10.)

4           In exercising the Court's discretion to allow leave to amend a complaint, the Court  
5 must be guided by the command of Fed. Civ. R. P. 15(a), which provides that "leave shall  
6 be freely given when justice so requires." Allen v. City of Beverly Hills, 911 F.2d 367,  
7 373 (9<sup>th</sup> Cir. 1990) (citing Fed. R. Civ. P. 15(a)). The Court should examine five factors  
8 when assessing whether to allow leave to amend: (1) bad faith, (2) undue delay, (3)  
9 prejudice to the opposing party, (4) futility of amendment, and (5) whether the plaintiff  
10 has previously amended the complaint. Id.

11           When dismissing for failure to state a claim, the Court should grant leave to amend  
12 even if no express request to amend the pleading was made, unless the Court determines  
13 that the pleading could not possibly be cured by the allegations of other facts. Doe v.  
14 United States, 58 F.3d 494, 497 (9<sup>th</sup> Cir. 1995); see also Bonin v. Calderon, 59 F.3d 815,  
15 845 (9<sup>th</sup> Cir. 1995) ("Futility of amendment can, by itself, justify the denial of a motion  
16 for leave to amend."), cert. denied, 516 U.S. 1142 (1996); Shermoen v. United States, 982  
17 F.2d 1312, 1319 (9<sup>th</sup> Cir. 1992) ("[A] district court does not err in denying leave to  
18 amend where the amendment would be futile.") (quoting DeSoto v. Yellow Freight Sys.,  
19 Inc., 957 F.2d 655, 658 (9<sup>th</sup> Cir. 1992)), cert. denied, 509 U.S. 903 (1993).

20           Although Plaintiff has previously amended her Complaint, she has not previously  
21 requested leave of this Court to do so. Nothing in the record indicates Plaintiff's bad  
22 faith or shows that allowing Plaintiff leave to amend will cause undue delay or will  
23 prejudice Defendant. (See Reply at 8.) Defendant's only objection to Plaintiff's request  
24 to amend her Amended Complaint is that such amendment will be futile, because "[t]he  
25 procedural deficiencies of Plaintiff's complaint are compelling evidence of more  
26 important underlying substantive deficiencies." (Id.) Defendant also argues that Plaintiff  
27 "failed to plead Counts II and III with sufficient particularity because she cannot do so."

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1 (Id.) Defendant's argument is mere speculation and Defendant has failed to offer any  
2 legal authority stating that because Plaintiff has failed to plead fraud with particularity,  
3 any amendment would be futile.

4 The Court finds that Plaintiff may cure the particularity defects in her Amended  
5 Complaint by setting forth allegations of other facts aimed at establishing both of her  
6 fraud-based claims. Doe, 58 F.3d at 497. The Court will therefore allow Plaintiff one  
7 additional time to amend Counts Two and Three to set forth allegations in compliance  
8 with Fed. R. Civ. P. 9(b) and this Order.

9 **III. Defendant's Motion to Dismiss Pursuant to the Unfair Claims Practice Act**

10 Defendant argues that Count Three, which alleges that Defendant violated  
11 unspecified provisions of the Unfair Claims Practices Act, should be dismissed because  
12 A. R. S. § 20-461(D) "bars any private right of action arising out of violations of the  
13 insurance practices covered by that particular section[.]" (Mot. Dismiss at 2.)

14 A.R.S. § 20-461 makes it illegal for an insurance company to misrepresent  
15 "pertinent facts or insurance policy provisions" as a general business practice. A.R.S. §  
16 20-461(A)(1). In support of its Motion, Defendant cites A. R. S. § 20-461(D), which  
17 provides: "Nothing contained in this section is intended to provide any private right or  
18 cause of action to or on behalf of any insured or uninsured resident or non-resident of this  
19 state. It is, however, the specific intent of this section to provide solely an administrative  
20 remedy to the director for any violation of this section or rule related thereto." A. R. S. §  
21 20-461(D).

22 In the Response, Plaintiff concedes that A. R. S. § 20-461(D) bars any private right  
23 of action she may have under this provision.<sup>6</sup> ( Resp. at 3.) Plaintiff, however, argues  
24 that a review of her Amended Complaint "demonstrate[s] that [her] claims are largely  
25 premised upon the false advertising provisions of the Act contained in [A. R. S.] § 20-

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27 <sup>6</sup> Accordingly, the Court will grant Defendant's Motion to Dismiss with regard to  
28 all allegations in Count Three which relate to A. R. S. § 20-461. (See Reply at 7.)

1 443.<sup>7</sup> (Id.) Plaintiff asserts that under A. R. S. § 20-443, the Supreme Court of Arizona  
2 expressly authorized private causes of action. (Resp. Mot. Dismiss at 2.) Plaintiff cites  
3 Sparks v. Republic Nat'l Life Ins. Co., 647 P.2d 1127 (Ariz. 1982), in support of her  
4 position. In Sparks, the Supreme Court of Arizona stated: "The considerations which  
5 lead us to conclude that a private cause of action exists under the Consumer Fraud Act are  
6 also present in the context of the Arizona Insurance Code. A.R.S. § 20-443 is found  
7 under Chapter 2, Article 6, which deals with unfair practices and frauds in the transaction  
8 of the insurance business." Id. at 1139; see also Haisch, 5 P.3d at 944 ("A private right of  
9 action exists for damages caused by a violation of section 20-443.") (citing Sparks, 647  
10 P.2d at 1138-39).

11 Defendant concedes that Arizona allows private causes of action under § 20-443.  
12 (Mot. Dismiss at 2; Reply at 6.) Defendant, however, argues that Plaintiff's "all-  
13 encompassing pleading style" insufficiently alleged her claim pursuant to Fed. R. Civ. P.  
14 8, and that it was required to "guess what section Plaintiff asserts it violated." (Reply at  
15 7.) Defendant further argues that "Plaintiff's failure to specify the particular statutory  
16 provision or provisions [Defendant] allegedly violated is, in itself, a sufficient reason to  
17 dismiss Count [Three]." (Id.) Because the Court has found that Plaintiff must plead the  
18 allegations in Count Three with particularity pursuant to Fed. R. Civ. P. 9(b), the Court  
19 need not address whether this claim was sufficiently plead under Fed. R. Civ. P. 8.  
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24 <sup>7</sup> A. R. S. § 20-443 provides: "A person shall not make, issue or circulate, or cause  
25 to be made, issued or circulated, any estimate, illustration, circular, sales material or  
26 statement: 1. Misrepresenting the terms of any policy issued or to be issued or the benefits  
27 or advantages promised or the dividends or share of the surplus to be received." A. R. S.  
28 §20-443 (emphasis added).

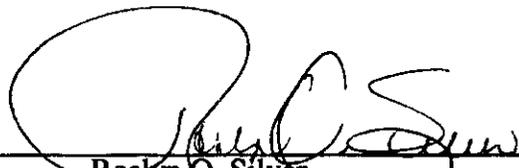
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Accordingly,

**IT IS ORDERED** that Defendant' Motion to Dismiss [Doc. # 12.] is granted with leave to amend Counts Two and Three of Plaintiff's Amended Complaint. All allegations in Count Three which relate to A. R. S. § 20-461 are dismissed with prejudice.

**IT IS FURTHER ORDERED** that the Court grants Plaintiff leave to amend if she can in good faith amend Counts Two and Three of her Amended Complaint to comply with Fed. R. Civ. P. 9(b) and the provisions of this Order. Plaintiff must file a sufficiently plead Second Amended Complaint with the Court within fifteen (15) days from the date of this Order. If Plaintiff fails to comply with this Order, the Court will dismiss Counts Two and Three with prejudice. See *Ferdik v. Bonzelet*, 963 F.2d 1258, 1260 (9<sup>th</sup> Cir. 1992), cert. denied, 506 U.S. 915 (1992).

DATED this 17 day of August, 2001.

  
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Roslyn O. Silver,  
United States District Judge