9:33. Force-placed insurance: The background

Force-placed insurance is a description more likely to be used by borrowers and their attorneys than lenders to describe what lenders tend to call lender-placed insurance. In 2015, a U.S. Magistrate Judge wrote[1] that "[t]he U.S. Code" defines lender-placed insurance:

> The U.S. Code defines LPI [what the Magistrate said means "Lender-Placed Insurance"] as "hazard insurance coverage obtained by a servicer of a federally related mortgage when the borrower has failed to maintain or renew hazard insurance on such property as required of the borrower under the terms of the mortgage." 12 U.S.C. §2605(k)(2).

No, it doesn't. The cited statute is a part of the Real Estate Settlement Procedures Act ("RESPA"). RESPA defines instead "Force-Placed Insurance" for purposes of RESPA.

The reality is that the insurance placed by force by lenders is "lender force-placed insurance." By whatever name, it theoretically "occurs when a borrower fails to maintain the amount of property insurance required by a mortgage contract and the lender or servicer purchases the insurance at the borrower's expense in order to protect the lender's security interest in the property."[2]

These are the legal issues, then, in cases in which borrowers contest the placement of insurance at their expense, by lenders or the lenders' mortgage servicers:

1. Did the borrower "fail to maintain the property insurance,"[3] in any amount, at all?
2. Was the amount of property insurance, if any, maintained by the borrower in the amount "required by her or his mortgage contract"?
3. Was the insurance which was placed by the lender or by the lenders' servicer (hereinafter referred to together as the "lender," unless the context dictates a distinction), in an amount required by the mortgage "to protect the lender's interest in the property"?

Most if not all of these cases involve borrowers who either paid directly[4] in the sense of

---

1

Gomez v. Nationstar Mortg., LLC, No. 1:14-cv-1499-BAM, 2015 WL 966224 *1 n. 2 (E.D. Cal. March 4, 2015).

2

Montanez v. HSBC Mortgage Corp., 876 F. Supp. 2d 504, 507 n.1 (E.D. Pa. 2012).

3

"Property insurance" includes homeowner's insurance and flood insurance. As used in this Section, it is a short-hand description of any kind of insurance which lenders have argued in the decided case law that a borrower is required to obtain and maintain under standard mortgage provisions for the purpose of protecting the lender's security interest in the property which serves as security for the borrower to repay the loan, i.e., the mortgage amount, to the lender.

4

E.g., Ellsworth v. U.S. Bank, N.A., 908 F. Supp. 2d 1063, 1071 (N.D. Cal. 2012); Montanez v. HSBC Mortgage Corp., 876 F. Supp. 2d 504, 508 (E.D. Pa. 2012).

writing a check (presumably not paying in cash) for the force-placed, lender-placed insurance,[5] or they involve lenders who placed the insurance and added the cost to the borrower's monthly mortgage payment or escrow account.[6] Either way, the borrowers paid the insurance premiums and other costs of the placed insurance in all of these cases.

Each of these cases involves a borrower was charged for the insurance placed by the lender.

The amounts at issue make it virtually certain that without a class action vehicle to present the borrowers' claims resulting from force-placed insurance, there will be no or few lawsuits filed at least in Federal Courts in which borrowers will be allowed even to present their claims for redress, let alone have an opportunity to attempt to prove them. Typical amounts involve monthly premium payments for force-placed insurance of $276.00,[7] or a notice that the lender would add an additional $237.00 charge to the borrower's monthly mortgage payment if the borrower did not purchase insurance with limits great enough to reflect the secured property's increase in value since the time when the loan was made,[8] and $1,743.00 for six months of premiums.[9] In one case, a lender declared that the borrowers had a zero loan balance but then added $1,575.00 to their loan balance representing the amount of premium for force-placed insurance since the borrowers did not purchase insurance to protect a loan balance of zero.[10]

5

Use of both terms throughout this section will be tedious both for the reader and for the author. Accordingly, one term will be used most frequently, and it is the more descriptive term of the two, “force-placed insurance,” which of course is always placed by lenders in any case.

6

E.g., Hofstetter v. Chase Home Finance, LLC, 2010 WL 3259773 *2 (N.D. Cal. August 16, 2010); Williams v. Wells Fargo Bank N.A., 2011 WL 4901346 *2 (S.D. Fla. October 14, 2011).

7

Ellsworth v. U.S. Bank, N.A., 908 F. Supp. 2d 1063, 1071 (N.D. Cal. 2012).

8

See Kolbe v. BAC Home Loans Servicing, LP, 695 F.3d 111, 114-15 (1st Cir. 2012) (case involved New Jersey substantive law), *overruled by an equally divided First Circuit en banc*, 738 F.3d 432 (1st Cir. 2013). “Kolbe bought the additional $46,000 in flood insurance.” *Kolbe v. BAC Home Loans Servicing, LP*, 695 F.3d 111, 115 (1st Cir. 2012).

9

Williams v. Wells Fargo Bank N.A., 2011 WL 4901346 *2 (S.D. Fla. October 14, 2011) (referring to ‘putative’ class representative Plaintiff Ray Williams).

10

Hofstetter v. Chase Home Finance, LLC, 2010 WL 3259773 *2 (N.D. Cal. August 16, 2010). “The Hofstetters have refused to pay the $1,575 principal balance on their account and have only paid interest charges to prevent defendants from taking steps to collect on this ‘debt’ and affect their

In a recent development, insurance companies offering lenders force-placed insurance policies have begun facing liability exposure to homeowners/borrowers when offering insurance policies for forced placement by lenders.[11]

Settlements in lender force-placed insurance cases are on the rise, along with their attendant issues of secrecy.[12] For example, in the case of *Casey v. Citibank, N.A.*,[13] the parties settled an alleged class action over lender force-placed insurance practices. Like every other LFPI case, it never went to trial.

According to press reports,[14] the *Casey* plaintiffs would receive $110 Million in the settlement. The group of plaintiffs who would share in these settlement proceeds are the plaintiffs who "present a claim." No class action settlement in recorded history has ever had all of the plaintiffs in the class clear the first hurdle and "present a claim" on the settlement proceeds.

There were two potential groups of class action plaintiffs in *Casey*, moreover, just as there are often multiple groups or subclasses in class actions generally. The two potential subclasses in *Casey* were people who were charged with premiums for lender force-placed **hazard** insurance, and those who were charged with premiums for lender force-placed **flood** insurance.

The homeowners who were reportedly charged with LFPI hazard insurance were, in turn, charged premiums for two types of force-placed hazard insurance: one, what might be termed non-wind hazard insurance, and the other, "stand-alone" wind hazard insurance. The amount reportedly charged in force-placed insurance premiums to the "non-wind hazard" group was $758 Million in premiums. Citi allegedly received 15% in so-called "commissions." By the author's own calculation,[15] Citi's "commissions" alone totaled $113,700,000.00.

---

credit rating," they alleged in their complaint. Hofstetter v. Chase Home Finance, LLC, 2010 WL 3259773 *2 (N.D. Cal. August 16, 2010).

11

See Wilson v. Everbank, N.A., _ F. Supp. 3d _, 2015 WL 265648 *26 (S.D. Fla. January 6, 2015); Dennis J. Wall, "Property Insurance / Forced Placed Insurance," 37 Ins. Lit. Rptr. 37 (February 19, 2015).

12

See §9:28, "Settlement of first-party bad faith claims: Confidentiality (protected) or concealment (void)," *supra.*

13

Casey v. Citibank, N.A. (N.D.N.Y. Case No. 5:12-00820-DNH-DEP). The settlement agreement in this case, discussed in the text following, was filed by the Clerk in this case on February 5, 2014 as Docket No. 144-4.

14

E.g., Reuters, "Moneynews/ Citi Settles Property Insurance Suit For $110 Million" (posted online on February 6, 2014).

15

These figures are the author's. After making these calculations, the author found that these same figures are recited in the *Casey* settlement agreement. These figures have not however been found

The parties agreed in their settlement agreement in *Casey*--which, to say again, is representative of settlement agreements in LFPI cases--to request that the Court approve Citi paying 12.5% of the force-placed premiums. Again by the author's own calculation,[16] that figure is $94,750,000.00.

The difference between what Citi allegedly received as "commissions" for lender force-placed insurance in the *Casey* class action, on the one hand, and the amount which Citi reportedly will pay back on the same amount at the rate of 12.5%, is $18,950,000.00. To say again, Citi's "commissions" alone allegedly totaled $113,700,000.00 in the *Casey* class action.

As for future LFPI commissions, Citi agreed to a moratorium of six years on taking "commissions" for force-placed **hazard** insurance following Court approval of the *Casey* settlement. Citi did not agree to terminate any of its LFPI practices.

The parties' settlement agreement in Casey recited that the "stand-alone" wind hazard sub-group of people in the overall group which was charged with force-placed hazard insurance premiums, totaled $21 Million for the stand-alone wind hazard group. This sub-group of the hazard subclass was to receive 8% of the $21 Million, or $1.68 Million according to the settlement agreement.[17]

At the outset, it was noted that there was a second potential subclass of *Casey* class action plaintiffs, consisting of people who were charged for force-placed **flood** insurance. The total premiums for force-placed flood insurance in the Casey class action was allegedly $173,000,000.00. Although Citi did not apparently collect commissions for force-placed flood insurance, Citi agreed to pay 8% of that figure on top of its payment to the hazard insurance subclass. By the author's calculation,[18] that figure is $13,840,000.00.

Taking the reported maximum payments by Citi at face value as they have been reported, the difference between what Citi allegedly took in as "commissions" from the non-wind subgroup of the hazard subclass ($113,700,000.00), and the maximum amount ($110,270,000.00) that Citi would allegedly pay out if every one of the plaintiffs in both subclasses 'presented a claim' on the class action settlement (which would be a historical first), is $3,430,000.00.

---

reported in the press, whether business press or popular press. They have been reported by the author on February 11, 2014 on Insurance Claims and Issues Law Blog, at http://insuranceclaimsbadfaith.typepad.com/insurance_claims_ badfaith/2014/02/making-money-out-of-lender-force-placed-insurance.html.

16

These figures have not been found in the reported press. To say again, the author found them in the settlement agreement after my own calculations, and the two sets of figures match.

17

These are the figures recited in the settlement agreement in Casey, Docket No. 144-4 filed 02/05/14, in p 25 on p. 11. The author has double-checked these figures and they check out.

18

By this time, the reader's awareness is likely heightened as to the kind and quality of information that is, and that is not, reported in the business and popular press about such settlement arrangements.

There is no indication of how much money, if any, Citi received in premiums for reinsurance paid to any Citi subsidiaries or affiliates, or how if at all Citi obtained any monies at all in the forced placement of insurance on any of the *Casey* plaintiffs, separate and apart from "commissions" for force-placed non-wind hazard insurance. The settlement agreement in particular does not recite any other amounts.

In any event, based on historical experience, the payout in the *Casey* class action settlement is very likely, if not certain, to include these payments as a small percentage of a mix with "credits" to the lender for things which do not involve the payment of cash, such as reductions in mortgage principal.

To say again, these figures represent taking the amounts and percentages recited in the parties' *Casey* settlement agreement at face value. Further, and perhaps the most significant thing about the settlement in *Casey* and in other, similar settlements in LFPI class actions: The lender's legal capacity to charge "commissions" in the first place was recognized, a right which the law itself never recognized outside of such "settlement agreements."

9:34. The substantive issues of force-placed insurance: Success or failure in stating claims

1. *<u>The allegations of fact in the force-placed insurance cases frequently begin with similar or identical Contract Documents</u>.* The right of a lender to force the placement of insurance at the expense of a borrower comes from the mortgage contract between the two parties. Section 5 of the standard Fannie Mae/Freddie Mac mortgage form provides in pertinent part:

> 5. Property Insurance. Borrower shall keep the improvements now existing or hereafter erected on the Property insured against loss by fire, hazards included within the term "extended coverage," and any other hazards including, but not limited to, earthquakes and floods, for which Lender requires Insurance. This Insurance shall be maintained in the amounts (including deductible levels) and for the periods that Lender requires. What Lender requires pursuant to the preceding sentences can change during the term of the Loan. The insurance carrier providing the insurance shall be chosen by Borrower subject to Lender's right to disapprove Borrower's choice, which right shall not be exercised unreasonably.

***

> If Borrower fails to maintain any of the coverages described above, Lender may obtain insurance coverage, at Lender's option and Borrower's expense. Lender is under no obligation to purchase any particular type or amount of coverage. Therefore, such coverage shall cover Lender, but might or might not protect Borrower, Borrower's equity in the Property, or the contents of the Property, against any risk, hazard or liability and might provide greater or lesser coverage than was previously in effect. Borrower acknowledges that the cost of the insurance coverage so obtained might significantly exceed the cost of insurance that Borrower could have obtained. Any amounts disbursed by Lender under this Section 5 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.[1]

1

Section 5 of the typical mortgage contract found in these cases, is quoted from the case of Ellsworth v. U.S. Bank, N.A., 908 F. Supp. 2d 1063, 1070 (N.D. Cal. 2012). [Emphasis in original.] A sample of the same or manifestly similar provisions includes McKenzie v. Wells Fargo Home Mort., Inc., 2012 WL 5372120 *5 (N.D. Cal. October 30, 2012); Montanez v. HSBC Mortgage Corp., 876 F. Supp. 2d 504, 508 (E.D. Pa. 2012), McNeary-Calloway v. JP Morgan Chase Bank, N.A., 863 F. Supp. 2d 928, 955 (N.D. Cal. 2012), and Abels v. JPMorgan Chase Bank, N.A., 678 F. Supp. 2d 1273, 1275 (S.D. Fla. 2009). As to the standardization of Fannie Mae and Freddie Mac documents with input at the time from people who are now sometimes called

Paragraph 9 of the standard Fannie Mae/Freddie Mac mortgage contract, or equivalent mortgage contract language, ties in to the above-quoted paragraph 5 together with a provision authorizing “Loan Charges”:

> 9. **Protection of Lender's Interest in the Property and Rights Under** this Security Instrument. If (a) Borrower fails to perform the covenants and agreements contained in this Security Instrument, ... then Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument, including protecting and/or assessing the value of the Property, and securing and/or repairing the Property.

***

> Loan Charges. [The Lender] may charge Borrower fees for services performed in connection with Borrower's default, for the purpose of protecting [the Lender's] interest in the Property and rights under this Security Agreement, including, but not limited to, attorneys' fees, property inspection and valuation fees.[2]

Further, Flood Insurance Notification forms are a standard part of real estate closings when Flood Insurance is required to be obtained and maintained on the secured property. In such situations, Courts have understandably held that the Flood Insurance Notification is a part of the mortgage contract documents and must be considered together with them as a whole.[3]

Those are the pertinent provisions of the lenders' mortgage contracts with the borrowers in these cases. It remains to be seen what conduct of the lenders and their mortgage servicers allegedly has no legally protected relationship with those contract provisions in borrowers' claims against lenders and mortgage servicers as a result of the forced placement of insurance.

2. *The Three Most Commonly Alleged Clusters of Fact in Force-Placed Insurance: Kickbacks, purchasing unnecessary policies, and backdating.*

a. Kickbacks. The game is afoot, it would appear, even to one whose name is not Sherlock Holmes. Three common themes run throughout the putative class action cases in which claims are

---

“consumer advocates” in the legal literature, *see* Lass v. Bank of America, N.A., 695 F.3d 129, 137 & n.14 (1st Cir. 2012). *See also* Julia Patterson Forrester, “Symposium: A Festschrift in Honor of Dale A. Whitman/Fannie Mae/Freddie Mac Uniform Mortgage Instruments: The Forgotten Benefit to Homeowners” 72 Mo. L. Rev. 1077 (2007).

2

Paragraph 9 is quoted verbatim in the text from, again, the quotation-filled excellent opinion in Ellsworth v. U.S. Bank, N.A., 908 F. Supp. 2d 1063, 1070-71 (N.D. Cal. 2012) [emphasis in original], and the “Loan Charges” provision is reproduced exactly in substance from the same opinion although the *Ellsworth* Court did not attempt to quote the provision in full. Once again, the same or clearly similar provisions are reproduced or quoted in pertinent part in other cases involving force-placed insurance, including Lass v. Bank of America, N.A., 695 F.3d 129, 132 n.7 (1st Cir. 2012) (referring to a “Paragraph 7” containing the same operative language as that quoted in the text from Paragraph 9), and McNeary-Calloway v. JP Morgan Chase Bank, N.A., 863 F. Supp. 2d 928, 955-56 (N.D. Cal. 2012) (referring first to “the California Plaintiffs'” mortgage contract paragraph 5, and then to Plaintiff Mayko's mortgage contract paragraphs 4 and 7).

3

E.g., Lass v. Bank of America, N.A., 695 F.3d 129, 135 (1st Cir. 2012) (case involved Massachusetts substantive law); Lane v. Wells Fargo Bank N.A., 2013 WL 269133 *1, *6-*7 (N.D. Cal. January 24, 2013) (Arkansas substantive law).

alleged as a result of the forced placement of insurance. They are each part and parcel of an alleged scheme in most cases.

The first note in this theme is the allegation that the defendant lenders or that the defendant mortgage servicers which are affiliates of the plaintiffs' mortgage lenders, place insurance with insurance companies which in turn provide the lenders with “commissions,” or a percentage of the premium. Most plaintiffs expressly allege that these payments are “kickbacks.”[4]

Alternatively, the borrowers-plaintiffs allege that the lenders force the placement of insurance with their subsidiary insurance corporations.[5] Either way, the conduct complained of is the lender's alleged receipt of a payment from the insurance companies which the lender selects to provide the insurance coverage at the expense of the borrower-plaintiff.

b. Purchasing unnecessary insurance policies and coverage. This set of allegations is self-explanatory. The borrowers-plaintiffs generally allege that the defendant lenders use their contractual authorizations to force the placement of insurance when it was not needed, or in amounts that are greater than necessary to protect their interests in the secured property.[6]

This set of allegations is deceptively easy to understand. This is the central question among many issues involved in presenting and defending claims spawned by the forced placement of insurance: What amount of money is “necessary to protect the lender's interest” in the secured property?

The decided cases settle between majority and minority answers to this question. The

---

4

E.g., Ellsworth v. U.S. Bank, N.A., 908 F. Supp. 2d 1063, 1069, 1071, 1078-80 (N.D. Cal. 2012); Williams v. Wells Fargo Bank N.A., 2011 WL 4901346 *2 (S.D. Fla. October 24, 2011); *see* Lass v. Bank of America, N.A., 695 F.3d 129, 138 (1st Cir. 2012). In the case of Lane v. Wells Fargo Bank N.A., 2013 WL 169133 *2 (N.D. Cal. January 24, 2013), the plaintiffs alleged that the payments taken out of the premiums and remitted to the lenders were “‘kickbacks *or* unwarranted “commissions”’.” [Emphasis added.]

5

E.g., McNeary-Calloway v. JP Morgan Chase Bank, N.A., 863 F. Supp. 2d 928, 937-38 (N.D. Cal. 2012); Williams v. Wells Fargo Bank N.A., 2011 WL 4901346 *2 (S.D. Fla. October 24, 2011). In some cases, plaintiffs allege that the defendant lender canceled the borrower's “existing policy and force-placed coverage with another carrier.” McNeary-Calloway v. JP Morgan Chase Bank, N.A., 863 F. Supp. 2d 928, 937 (N.D. Cal. March 26, 2012).
Allegations are different from proof, of course. In the only Summary Judgment case found to date among the putative class action cases of claims resulting from force-placed insurance, the District Judge ruled that the plaintiffs failed to put proof in the record sufficient to withstand summary judgment, Webb v. Chase Manhattan Mort. Corp., 2008 WL 2230696 *20 (S.D. Ohio May 28, 2008) (“Plaintiff Webb has also alleged that Chase was paid a commission by ASIC ... however, there is no evidence to support Plaintiff's assertions. In fact, the evidence proves otherwise.”), regardless of whether the alleged kickbacks furnished the basis for legal claims, or not.

6

E.g., Lane v. Wells Fargo Bank N.A., 2013 WL 269133 *1 (N.D. Cal. January 24, 2013); Hofstetter v. Chase Home Finance, LLC, 2010 WL 3259773 * 3 (N.D. Cal. August 16, 2010).

majority view is the settled view. District Courts holding this view are of the opinion that "[t]he purpose of a force-placement clause is to protect the lender's interest in the property securing the mortgage loan."[7] The lender's interest in the property securing the mortgage loan is nothing more than what the contract documents protect, i.e., the amount remaining on the balance of the loan extended to the borrower including accumulated interest and authorized charges.[8] The question, of course, is not what amount of insurance a lender reasonably could require, but what a particular mortgage provision in fact permits the lender to demand.

The minority view appears to be more recent. It holds that the lender's interest in the secured property can *increase* as the value of the secured property increases. Magistrate Judges and District Judges following this view have found no actionable conduct, therefore, in a lender forcing the placement of insurance in an amount that reflects the "replacement value" of the secured property.[9]

7

Montanez v. HSBC Mortgage Corp., 876 F. Supp. 2d 504, 513 (E.D. Pa. 2012).

8

See, e.g., McNeary-Calloway v. JP Morgan Chase Bank, N.A., 863 F. Supp. 2d 928, 935, 955-56 (N.D. Cal. 2012) (Spero, USMJ; California plaintiffs and New Jersey plaintiff stated claims for breach of contract, with allegations that in part the defendants JPMorgan Chase and Chase Bank breached their mortgage contracts by force-placing "duplicative" insurance); Hofstetter v. Chase Home Finance, LLC, 2010 WL 3259773 *10 (N.D. Cal. August 16, 2010) ("Since plaintiff owed the bank nothing and could not draw any funds on the line (and would have had to file and prevail on a written appeal with the bank to have her credit limit reinstated), the bank faced *zero risk* that it would incur uninsured losses under the loan due to flooding ... . The bank nevertheless purchased a $175,000 flood insurance policy through an affiliate--likely earning a commission in the process--and billed plaintiff for the trouble. This maneuver was *not* required under the NFIA [National Flood Insurance Act].") [Emphasis by the Court.]

9

An exposition of this view came in the case of Cannon v. Wells Fargo Bank N.A., 917 F. Supp. 2d 1025 (N.D. Cal. 2013). The District Judge in that case relied on two opinions in previously decided cases--one by U.S. Magistrate Judge Spero in California, and one by appellate judge Boudin dissenting in a case from Massachusetts--to hold that a lender was authorized by standard mortgage contract provisions to force the placement of insurance with policy limits at replacement value, not merely with the policy limits necessary to pay off the loan. "The Court agrees with Judge Spero and Judge Boudin that a lender's interest is not limited to the outstanding principal." Cannon v. Wells Fargo Bank N.A., 917 F. Supp. 2d 1025, 1041 (N.D. Cal. 2013).
The Alabama Supreme Court's decision in Custer v. Homeside Lending, Inc., 858 So. 2d 233 (Ala. 2003) is often cited as in accord with this minority view. However, the Alabama Supreme Court actually split its votes. For all that appears from the reported decision, four Alabama Supreme Court Justices decided this putative class action case in which, again, the issue of class action certification was not reached. Three Justices voted to affirm the dismissal of mortgagors'-borrowers' alleged breach of contract cause of action on the ground that as to the flood insurance at issue, the mortgagee could require that the flood insurance policy limits be obtained by the borrower in excess of the remaining mortgage loan balance; one Justice concurred in part in

The rationale behind the minority view is not so much a rationale as received doctrine replacing traditional legal concepts of a "security interest" in the secured property. The established legal concepts of security include the idea that the Courts protect security interests in order to secure the repayment of loans. This is the clear understanding of the term to date, both in the law and among the population at large.[10] Current lenders may wish to have the Courts enforce a different understanding. However, the long-established majority view of a security interest is that the Courts protect security interests in order to secure the repayment of loans.

In contrast, the minority doctrine or contrary view has it that instead it is in the lender's best interest for the loan *not* to be repaid; the longer the loan is outstanding and unpaid, the more money the lender can make with its investment, and the property exists for the purpose of providing the lender with a return on its investment paid for by the borrower in addition to the loan amount, plus interest for which the lender and borrower contracted. This position was advanced and quoted at great length in a fairly recent decision, for which we are indebted to the U.S. Magistrate Judge who took the time to quote this lengthy passage from Wells Fargo's Reply in Support of Defendants' Motion to Dismiss in the case of *McKenzie v. Wells Fargo Home Mortgage, Inc.*:[11]

> In *McNeary-Calloway [v. JP Morgan Chase Bank, N.A.,* 863 F. Supp. 2d 928 (N.D. Cal. 2012], the Court did not explore the outer limits of the lender's discretion to set the type and amount of required hazard insurance, and it need not do so in this case, either--even assuming that New Mexico and Texas law impose the same implied limitation on the lender's discretion as California and New Jersey law do.
>
> Outer limits need not be explored here because wherever the outer bounds are, replacement cost coverage falls well within them ... .
>
> Furthermore, even apart from the agencies' recommendation, it is reasonable for a lender to require replacement cost value flood insurance. As FEMA explains, any lower coverage "may be insufficient to cover the cost of repairing the building"--thus, leaving the borrower homeless if a flood destroys the dwelling.

---

the rationale but wrote to expressly leave open "the question whether the NFIA [National Flood Insurance Act] affirmatively authorizes a mortgage lender to force-place flood insurance in an amount greater than the lender's exposure in a mortgage," *id.* at 249, while also concurring in the result; and the five (5) remaining Alabama Supreme Court Justices on the Court at the time, do not make an appearance in the decision with a record of their votes nor any opinions in dissent.
So far, at least, Courts have not addressed the corollary issue of what amount of insurance lenders can force-place if the value of the collateral ***decreases***.

10

See, e.g., Merriam Webster Dictionary Online, definition of "security interest," found at http://www.merriam-webster.com/dictionary/security %20interest; "security interest" definition, Webster's Ninth New Collegiate Dictionary p. 1062 (1987); Wikipedia Encyclopedia definition of "security interest," at www.wikipedia.org. According to both Merriam Webster Dictionary Online and Webster's Ninth New Collegiate Dictionary, the term first came into use in 1951 with this understanding.

11

McKenzie v. Wells Fargo Home Mort., Inc., 2012 WL 5372120 *11-*12 (Spero, USMJ, October 30, 2012) (quoting Wells Fargo's Reply in Support of Defendants' Motion to Dismiss). [Emphasis added.] Authorship of the quoted passage has mistakenly been attributed to the U.S. Magistrate Judge instead of to the Wells Fargo Memorandum. Cannon v. Wells Fargo Bank N.A., 917 F. Supp. 2d 1025, 1041 (N.D. Cal. 2013).

> ...
> Also, a lender's economic interest in a performing loan extends beyond immediate repayment of the principal balance--as would occur if a flood destroys the home and insurance benefits are only sufficient to repay the loan. *A lender wants a performing loan or asset, not immediate repayment.* A performing loan pays the lender interest at the rate set in the promissory note. *That interest rate may well exceed the rate the lender can obtain if the loan is repaid* and the lender must make a new loan at current interest rates. *A lender also incurs loan origination costs to make a new loan replacing the repaid loan*. There is a lost opportunity cost as well. Absent the prepayment, the new loan might have been funded with the lender's other capital, giving the lender two, not just one, performing loans. For all these reasons, many loan agreements contain prepayment penalty clauses to discourage borrowers from repaying their loans early.
> ...
> Because replacement cost value flood insurance is a *reasonable economic choice* from both the borrower's and the lender's point of view, it cannot be an abuse of the lender's broad, if not unlimited, discretion to choose insurance in that amount.

The U.S. Magistrate Judge to whom these remarks were addressed, agreed with Wells Fargo's argument that this is a legally recognized basis for allowing lenders to require borrowers to pay the higher premiums of replacement-cost force-placed insurance:

> Plaintiffs argue that Defendants breached the covenant by force-placing insurance in excess of the lender's interest and the mortgage contract's terms, and by engaging in the kickback scheme with the insurer. *As noted above*, Plaintiffs' argument that insurance covering the replacement cost value exceeds the lender's interest in the property is unavailing; *such coverage benefits the lender because it better insures that the loan continues as a performing asset.* Additionally, because the Court has already found that the contract afforded Defendants discretion to set the amount of coverage above the minimum, Defendants' exercise of that discretion does not necessarily constitute bad faith or contravene the reasonable expectations of the parties.[12]

c. Forcing the placement of backdated insurance policies. The final set of factual allegations is that the defendant lenders obtained insurance coverage including for a time when there were no insurance claims. Since that time had already safely passed, allegedly without any claims or occurrences ever likely to involve the policy, the borrowers pursuing this set of allegations predicate their claims upon the purchase of insurance which the lenders were not authorized to purchase at the expense of the borrowers-plaintiffs.[13]

12

McKenzie v. Wells Fargo Home Mort., Inc., 2012 WL 5372120 *20 (N.D. Cal. October 30, 2012; Spero, USMJ). [Emphasis added.]

13

E.g., Cannon v. Wells Fargo Bank, N.A., 917 F. Supp. 2d 1025, 1044-46 (N.D. Cal. 2013); McNeary-Calloway v. JP Morgan Chase Bank, N.A., 863 F. Supp. 2d 928, 935, 935-37 (N.D. Cal. 2012) (Spero, USMJ; “The policy was backdated, despite the fact that there was no damage to the property or claims arising out of the property for the lapse period.”).

In Lane v. Wells Fargo Bank N.A., 2013 WL 269133 *9, *10, *11 (N.D. Cal. January 24, 2013), a District Judge in California held that backdating allegations were “not, however, sufficiently alleged” in order to state a claim for breach of contract, or a claim for breach of the implied covenant of good faith and fair dealing, or a claim for breach of fiduciary duties under Arkansas law.

It is crucial to the success of stating a claim upon which relief can be granted under such allegations, that the plaintiffs allege and when necessary, prove, that as stated in the text, that the lapse period already safely passed, allegedly without any claims or occurrences ever likely to

9:35. Force-placed insurance: The most frequently alleged claims and causes of action, including alleged bad faith

1. Breach of Contract. The most frequently alleged claim or cause of action in the force-placed insurance cases is breach of contract.[1] Most Federal Courts in most cases have denied Rule 12(b)(6) motions to dismiss for failure to state a breach of contract claim upon which relief could be granted. Nonetheless, since these breach of contract claims were alleged for the first time, the Courts have mostly resolved several problems inherent in the claim for alleged breach of contract in these cases.

Only a party to a contract can breach it, or be the object of a breach of contract claim. It has been held that a mortgage servicer was not a party to the mortgage contract, and accordingly its motion to dismiss the breach of contract claim was granted.[2]

Illustrating the difference between the majority and minority views concerning whether a lender can force the placement of insurance at levels above the amount of the loan balance, a District Judge in another case recited that "[t]his order finds that Wells Fargo did not breach its contract with plaintiffs simply by requiring flood insurance above the minimum amount required by federal law. *Plaintiffs have not alleged* that the $58,000 of insurance required and purchased by

---

involve the policy. In Webb v. Chase Manhattan Mortgage Corp., 2008 WL 2230696 (S.D. Ohio May 28, 2008), backdating was alleged but the District Court held in the course of granting the lender's motion for summary judgment that the backdating allegations were refuted on the record in that case: "The Court finds that Chase did not improperly backdate the ASIC replacement policy as alleged by Plaintiff Webb. Chase had to ensure that the property was continuously covered in the event that a loss had occurred during the lapse in insurance coverage *because no inspection of the property was done.*" Webb v. Chase Manhattan Mortgage Corp., 2008 WL 2230696 *19 (S.D. Ohio May 28, 2008). [Emphasis added.]

1

It is important to point out that the breach of contract claims alleged in the force-placed insurance cases are based on the same contract documents, quoted earlier and at length upon which the defendant lenders based their claims of authority to force the placement of insurance in the first place. "This language provides a basis for the claim that Defendants may force-place insurance only to the extent such insurance 'is necessary' to protect the property's value and Defendants' rights in the property." McNeary-Calloway v. JP Morgan Chase Bank, N.A., 863 F. Supp. 2d 928, 956 (N.D. Cal. 2012) (Spero, USMJ). *Accord*, Ellsworth v. U.S. Bank, N.A., 908 F.Supp.2d 1063, 1085 (N.D. Cal. 2012) (Beeler, USMJ). One District Judge has pointed out that there will be a different result, and no breach of contract or misrepresentation either for that matter, if the mortgage contract documents expressly allow a lender's "affiliated insurance agent" to "collect a commission from the [force-placed] insurer." Schilke v. Wachovia Mort., FSB, 820 F. Supp. 2d 825, 832-33 (N.D. Ill. 2011) aff'd sub nom. Cohen v. American Security Ins. Co., 735 F.3d 601 (7th Cir. 2013).

2

Cannon v. Wells Fargo Bank N.A., 917 F. Supp. 2d 1025, 1052 (N.D. Cal. 2013). *See* McKenzie v. Wells Fargo Home Mort., Inc., 2012 WL 5372120 *20 n.12 (N.D. Cal. October 30, 2012; Spero, USMJ).

Wells Fargo for their property *was over and above the replacement cost value*."[3]

2. Breach of the Implied Covenant of Good Faith and Fair Dealing. Claims based upon alleged breach of the implied covenant of good faith and fair dealing withstand most Rule 12(b(6) motions to dismiss in force-placed insurance cases. In most if not all of these cases, the implied covenant at issue is not necessarily the same thing as the implied covenant of good faith and fair dealing that gives rise to the duties of good faith and fair dealing involved in cases of alleged *insurer* bad faith.[4] In the putative class action cases discussed here, involving claims resulting from the forced placement of insurance in the mortgage context, the implied covenant of good faith and fair dealing is the covenant implied in *all* contracts.

Unlike the law of insurer bad faith, for example, the implied covenant of good faith and fair dealing in the context under discussion is often subject to the argument that there cannot be a cause of action for breach of an implied covenant if there is an express contract between the parties; in such a situation, the express contract ordinarily governs the rights and duties of the contracting parties. This is an argument that is seemingly never raised in cases of alleged insurance bad faith, and for good reason: Insurers' duties of good faith and fair dealing are implied because their policies have been deemed by the Courts to be legally insufficient to provide redress to injured policyholders and third parties allegedly harmed by the 'bad faith' conduct and unfair dealing of the insurance companies handling and negotiating the settlement of claims.

In contrast, this argument is routinely raised in other cases in which express contracts exist. Courts have found that this is not an insurmountable obstacle to alleging breach of the implied covenant in these force-placed insurance cases, however. Where the alleged scheme of a lender "contravenes" the purpose of an express contractual provision and the plaintiffs' "reasonable expectations" of how that lender would act pursuant to the provision authorizing the lender to force the placement of insurance,[5] Courts readily hold that such allegations state a claim of breach of the

---

3

Lane v. Wells Fargo Bank N.A., 2013 WL 269133 *9 (N.D. Cal. January 24, 2013) (holding that lender's security interest included replacement cost value). [Emphasis added.]

4

In this regard, a passing mention is given here to the 2-to-1 decision on rehearing in the case of Alvarado v. Lexington Ins. Co., 389 S.W.3d 544 (Tex. Ct. App., Houston [1st Dist.] 2012). In that case, the sole defendant was a force-placed insurance company. The insurance policy was issued to the mortgagee-lender, which was not a party to the case. Two Texas Appellate Court Justices joined in an opinion to hold that the force-placed insurance company had not established as a matter of law applied to the record, that the plaintiff-mortgagor-borrower was *not* a legally cognizable third-party beneficiary capable of enforcing the policy. The third Justice continued to dissent on rehearing, as in the original decision. Thereafter, the parties settled and requested not only that the appeal be dismissed accordingly, but that the opinion on rehearing be withdrawn. In apparent unanimity in what was styled a "Supplemental Memorandum Opinion," the Texas Court of Appeals panel agreed to vacate the appellate judgment and to dismiss the appeal, but declined to withdraw the rehearing opinion. Alvarado v. Lexington Ins. Co., 2012 WL 6213457 (Tex. Ct. App., Houston (1st Dist.) December 13, 2012).

5

Montanez v. HSBC Mortgage Corp., 876 F. Supp. 2d 504, 514-15(E.D. Pa. 2012).

implied covenant upon which relief can be granted.[6]

In many cases, moreover, the plaintiffs even allege their breach of implied covenant claims as breach of contract claims, or the Courts involved treat these claims as breach of contract claims. Either way, Rule 12(b)(6) motions to dismiss implied covenant claims are routinely denied whenever a motion to dismiss a breach of contract claim would be denied.[7]

In most if not all of these cases, the Courts involved hold that all three sets of the clusters of fact analyzed earlier in this article, ordinarily furnish the basis for a claim of breach of the implied covenant. In some cases, the District Court may parse the allegations in a particular case, holding for example that a Rule 12(b)(6) motion would be denied as to "kickback" allegations giving rise to an alleged claim of breach of the implied covenant in a given case, but that "backdating" allegations would not give rise to a sustainable claim sufficient to defeat a Rule 12(b)(6) motion.[8]

Moreover, where the law of the forum state appears to require allegation and proof of an improper motive in order to allege and prove bad faith in breach of the implied covenant, it has been held that "allegations plausibly support such a contention of improper motivation" where the plaintiff alleges that the lender demanded insurance in excess of the plaintiff-borrower's obligations under the contract, that the lender did so in bad faith, and that the lender or its "related entities" would profit from that plan. In such a case, "[t]hese allegations, in effect, amount to a claim that the Bank's motivation for demanding additional ... insurance coverage was to increase corporate profits by funneling new coverage to its own affiliates."[9]

6

See Cannon v. Wells Fargo Bank, N.A., 926 F. Supp. 2d 152, 169 (D.D.C. 2013); Williams v. Wells Fargo Bank N.A., 2011 WL 4901346 *4 (S.D. Fla. October 14, 2011); Abels v. JPMorgan Chase Bank, N.A., 678 F. Supp. 2d 1273, 1278-79 (S.D. Fla. 2009).

7

E.g., Ellsworth v. U.S. Bank, N.A., 908 F. Supp. 2d 1063, 1086-87 (N.D. Cal. 2012) (Beeler, USMJ); McNeary-Calloway v. JP Morgan Chase Bank, N.A., 863 F. Supp. 2d 928, 954-55 (N.D. Cal. 2012) (Spero, USMJ, exercising jurisdiction by consent; holding under both California and New Jersey law that the separate plaintiffs alleged sufficient claims both for breach of contract and for breach of the implied covenant of good faith and fair dealing, noting that in California "[a] breach of contract may be established on the basis of either an express provision of the contract or on the implied covenant of good faith and fair dealing," and noting a similar rule prevails in New Jersey); Webb v. Chase Manhattan Mort. Corp., 2008 WL 2230696 *16 n.8 (S.D. Ohio May 28, 2008) ("Under Ohio law, there is no tort cause of action for breach of the covenant of good faith that is separate from a breach of contract claim. Therefore, if a breach of duty of good faith and fair dealing is asserted as part of a contract claim, it must be alleged as part of that contract count; it cannot stand alone.").

8

Lane v. Wells Fargo Bank N.A., 2013 WL 269133 *10 (N.D. Cal. January 24, 2013) (applying Arkansas law).

3. Unjust enrichment. There are at least two splits of authority on whether unjust enrichment claims are claims upon which relief can be granted in the force-placed insurance context.

One line of authority travels with a literal, precise interpretation of the equitable rule that unjust enrichment is not an actionable claim where there is a valid and enforceable express contract, such as a mortgage contract.[10] Other Courts hold in force-placed insurance cases that where the defendant contends that it is a mortgage servicer and not a lender, it is effectively asserting that the mortgage contract is invalid and so the plaintiff has a claim against it for unjust enrichment even though there is an express mortgage contract in existence.[11] It has also been held that a mortgage servicer is simply not a party to the mortgage contract and so it may not raise the

---

9

Kolbe v. BAC Home Loans Servicing, LP, 695 F.3d 111, 123-24 (1st Cir. 2012) (applying New Jersey substantive law), *overruled by an equally divided First Circuit en banc*, 738 F.3d 432 (1st Cir. 2013). To make a very long and confusing judicial story short, in the *Kolbe* case a District Judge dismissed claims alleged by one Kolbe under ***New Jersey law*** that he incurred damages as a result of lender force-placed insurance. The original panel of the First Circuit reversed, for reasons similar to those in the above-cited *Lass* case, which the same panel decided under ***Massachusetts law*** on the same day: Lass v. Bank of America, 695 F.3d 129 (1st Cir. 2012).
Unlike the analysis of the original panel of First Circuit appellate judges, however, the three judges who divided the First Circuit en banc looked away from the law of the forum state, New Jersey, toward the national economy and national policy. In the view of these three judges, national concerns simply trumped the individual concerns raised as a result of Mr. Kolbe's mortgage. Kolbe v. BAC Home Loans Servicing, LP d/b/a Bank of America, 695 F.3d 111 (1st Cir. 2012), *overruled by an equally divided First Circuit en banc*, 738 F.3d 432 (1st Cir. 2013).
The designation of "an equally divided" Court in the second visitation of *Kolbe* may also be confusing. Here, it means that the en banc First Circuit mustered a roll of six (6) Judges. That number is less than the number of justices on most state supreme courts, of course. Three (3) of the First Circuit Judges voted to affirm the District Judge, and three (3) voted to affirm the original panel decision and thus to reverse the District Judge's order dismissing Mr. Kolbe's claims. The District Judge provided a fourth vote, if you will, and so the order of dismissal was reinstated in this case.

10

E.g., Cannon v. Wells Fargo Bank, N.A., 926 F. Supp. 2d 152, 170 (D.D.C. 2013); Montanez v. HSBC Mortgage Corp., 876 F. Supp. 2d 504, 516 (E.D. Pa. 2012) (holding that Pennsylvania "Courts typically allow a plaintiff to plead both a breach-of-contract claim and an unjust-enrichment claim only where there is some dispute as to whether a valid, enforceable written contract exists ... . Because there is no dispute that the mortgage contract in this case was valid and enforceable, plaintiffs may not assert an unjust-enrichment claim premised on the absence of a contract. Thus, plaintiffs' unjust-enrichment claim against HSBC Mortgage is dismissed.").

11

Williams v. Wells Fargo Bank N.A., 2011 WL 4901346 *6 (S.D. Fla. October 14, 2011).

existence of an express contract between others as a defense to the plaintiff's unjust enrichment claim against the mortgage servicer.[12] Finally, it has been held that standard mortgage contract documents do not expressly address “commissions” or “kickbacks” specifically, “or, more generally, the Bank's entitlement to profit from its forced placement of insurance.” In such a case, an unjust enrichment claim has thus been held to potentially exist at the pleading stage alongside the express contract which does not address the lender's profit-making authority, if any, under the force-placed insurance provision.[13]

A second area of dispute in lender-forced-insurance cases is over the equitable requirement that in order to recover a remedy for unjust enrichment, the plaintiff must allege that she or he conferred a direct benefit on the defendant. This allegation is often difficult to allege in force-placed insurance cases. Absent an allegation that the plaintiff conferred a direct benefit on the defendant, there is ordinarily no tenable claim for unjust enrichment.[14]

One Court has held that a benefit passing from the plaintiff to the defendant through a third party, is a direct benefit conferred by the defendant upon the plaintiff sufficient to comply with this requirement of stating an unjust enrichment claim. Thus, where the plaintiff borrowers alleged that “Wells Fargo Bank received kickbacks and/or commissions which were taken directly from the insurance premiums paid by Plaintiffs,” the plaintiffs adequately alleged that they directly conferred a benefit upon the Defendant Wells Fargo Bank, “even if there was no direct ***contact*** between Wells Fargo Bank and Plaintiffs.”[15]

An alternative view of similar allegations, by a different District Judge in the same District Court, was expressed in a holding based on the plaintiffs' argument “that, pursuant to the terms of the mortgage, any unpaid insurance premiums are added to the outstanding balance of the mortgage, thereby accruing interest for Defendants. The Court agrees with Plaintiffs.”[16] As in most cases, “whether a benefit was actually conferred is a factual question that cannot be resolved

---

12

Cannon v. Wells Fargo Bank N.A., 917 F. Supp. 2d 1025, 1053 (N.D. Cal. 2013).

13

See Lass v. Bank of America, N.A., 695 F.3d 129, 140-41 (1st Cir. 2012) (so holding in case presenting Massachusetts substantive law). Under these circumstances, the holding is properly analyzed as a holding that the express contract exists but it is effectively invalid and unenforceable with respect to profit-making under the force-placed insurance provision of the mortgage contract documents.

14

Montanez v. HSBC Mortgage Corp., 876 F. Supp. 2d 504, 517 (E.D. Pa. 2012).

15

Williams v. Wells Fargo Bank N.A., 2011 WL 4901346 *5 (S.D. Fla. October 14, 2011). [Emphasis added.]

16

Abels v. JPMorgan Chase Bank, N.A., 678 F. Supp. 2d 1273, 1279 (S.D. Fla. 2009).

on a motion to dismiss."[17]

Further, a pair of United States Magistrate Judges in the Northern District of California have held that similar "unjust enrichment" claims are effectively claims for "restitution" and the claims therefore survived motions to dismiss in those cases.[18]

4. Breach of Fiduciary Duties. This claim does not appear to be alleged frequently in force-placed insurance cases. When it is alleged and when it is attacked by a motion to dismiss for failure to state a claim, an alleged breach of fiduciary duties claim tends to rise and fall with other claims based on the same common nucleus of operative facts, so to speak.

A claim in which a plaintiff borrower alleged that her lender "had a fiduciary duty in connection with managing her escrow account," which duty was breached when the lender allegedly charged her for "excessive" insurance "and related commissions ... in an act of self-dealing," stated a claim sufficient to withstand a Rule 12(b)(6) motion to dismiss. "Our discussions of the other claims inevitably lead to the conclusion that the dismissal of the fiduciary duty claim also was premature."[19]

In contrast, the plaintiffs in another case failed to state a claim for alleged breach of fiduciary duties under Arkansas law, for two reasons, one legal and the other factual. The legal reason for decision was that the Court in that case was not provided with any authority "that the mere maintenance of an escrow account for the payment of routine fees and expenses creates a fiduciary duty and gives rise to a relationship that is 'more than a debtor-creditor relationship' under Arkansas law."[20]

Moreover, in any event, the plaintiffs in that case did not allege a universally required fact element of a fiduciary relationship in that case: They *did not allege* a relationship of trust.[21]

17

Abels v. JPMorgan Chase Bank, N.A., 678 F. Supp. 2d 1273, 1279 (S.D. Fla. 2009).

18

Ellsworth v. U.S. Bank, N.A., 908 F. Supp. 2d 1063, 1087-88 (N.D. Cal. 2012) (Beeler, U.S.M.J.); McNeary-Calloway v. JP Morgan Chase Bank, N.A., 863 F. Supp. 2d 928, 963-64 (N.D. Cal. 2012).

19

Lass v. Bank of America, N.A., 695 F.3d 129, 141 (1st Cir. 2012).

20

Lane v. Wells Fargo Bank, N.A., 2013 WL 269133 *11 (N.D. Cal. January 24, 2013). *Accord as to* Texas law: McKenzie v. Wells Fargo Home Mort., Inc., 2012 WL 5372120 *22 (N.D. Cal. October 30, 2012; Spero, USMJ).

21

Lane v. Wells Fargo Bank, N.A., 2013 WL 269133 *11 (N.D. Cal. January 24, 2013). *Accord as to* New Mexico law: McKenzie v. Wells Fargo Home Mort., Inc., 2012 WL 5372120 *23 (N.D. Cal. October 30, 2012; Spero, USMJ). *Accord as to California law:* Meyer v. One West Bank, F.S.B., _ F. Supp. 3d _, 2015 WL 1222402 *4 (C.D. Cal. March 18, 2015) (observing that "courts have

5. Unconscionability. Courts have doubts about whether the remaining ‘equitable’ claim, so to speak, in the force-placed insurance cluster of cases is really a claim at all. Even if it is a claim or cause of action, one Court has pointed out in a particular case that it could not grant money damages because in that case the plaintiff borrowers were asking for a “refund” of all “hidden profits or other financial benefits.” Therefore the Court in that case granted a motion to dismiss the plaintiffs' “unconscionability” claim in a case involving Florida substantive law.[22]

However, in another case involving Florida substantive law, the defendant's motion to dismiss the plaintiffs' unconscionability claim was denied under similar allegations. A different Federal Judge held in a case filed in the same District Court that Florida law recognizes an unconscionability claim where the plaintiffs demonstrate both “procedural” and “substantive” unconscionability. Since the plaintiffs in that case established both “procedural unconscionability”[23] and “substantive unconscionability,”[24] the defendant's motion to dismiss was denied.

6. Conversion. This is the last of the torts, so to speak, the last of the common law causes of action or equitable claims which are most frequently alleged in putative class action force-placed insurance cases. It has survived Rule 12(b)(6) motions to date which have been filed in a pair of Northern District of California cases decided in January, 2013, in which the Courts applied Arkansas law[25] and Florida law,[26] respectively, and with the same result. In both cases, the tort of conversion was viewed by two different District Judges as being outside of the contract, in one case because the plaintiffs' “kickback” allegations raised claims involving fact issues which could

---

regularly held that, under California law, a borrower-lender relationship does not create a fiduciary duty.”).

22

Williams v. Wells Fargo Bank N.A., 2011 WL 4901346 *4 (S.D. Fla. October 14, 2011).

23

“Procedural unconscionability is satisfied here because of the disparity in bargaining power between Plaintiffs and Defendant.” Abels v. JPMorgan Chase Bank, N.A., 678 F. Supp. 2d 1273, 1279 (S.D. Fla. 2009).

24

“Regarding substantive unconscionability, Plaintiffs have alleged sufficient facts showing that, had they known the full extent of Defendant's permissible conduct under the contract, no reasonable person would have agreed to it. Whether or not a reasonable person would have actually agreed to it is a factual question that cannot be decided on a motion to dismiss.” Abels v. JPMorgan Chase Bank, N.A., 678 F. Supp. 2d 1273, 1279-80 (S.D. Fla. 2009).

25

Lane v. Wells Fargo Bank N.A., 2013 WL 269133 *11 (N.D. Cal. January 24, 2013).

26

Cannon v. Wells Fargo Bank N.A., 917 F. Supp. 2d 1025, 1053-54 (N.D. Cal. 2013).

not be determined short of trial or summary judgment,[27] and in the other case for two reasons, first because the conversion claim was alleged against a mortgage servicer which was not a party to the mortgage contract, and second because "the tort by Wells Fargo is independent of the breach of contract as the contract does not on its face address kickbacks or backdating."[28]

A conversion claim in a first-party case did not survive a Rule 12(b)(6) motion in the District of Columbia, however.[29] The District Judge gave one, or perhaps two, reasons for its ruling dismissing the conversion claim alleged in that case. First, "[t]he Plaintiff does not allege that the Defendants exercised unlawful control over her personal property, nor does she articulate a right to any specific identifiable fund of money. The Plaintiff fails to state a claim for conversion."[30] Later in the same opinion, the Court summarized all its holdings, and in particular with respect to the Court's holding with respect to dismissal of the alleged conversion claim in that case, the Court stated that "[a] claim for conversion is unavailable because the Plaintiff's allegations concern only the payment of money."[31]

7. State Unfair/Unlawful/Fraudulent/Deceptive Practices Acts. A number of States have enacted statutes which reach commercial conduct which is variously labeled in the statutes as unfair, unlawful, fraudulent or deceptive.

To date, claims have been permitted to stand in putative class actions in Federal Courts involving force-placed insurance, under *California Business and Professional Code §17200*,[32]

27

Lane v. Wells Fargo Bank N.A., 2013 WL 269133 *11 (N.D. Cal. January 24, 2013). The same plaintiffs failed, however, to adequately plead a conversion claim based on a mere conclusory allegation of "*improper* *backdating* of insurance procured for plaintiffs' property" [emphasis added], and failed to plead any claim based on such an allegation, the Court held in that case. "Plaintiffs have not, however, sufficiently alleged that Wells Fargo engaged in improper backdating of insurance procured for plaintiffs' property." Lane v. Wells Fargo Bank N.A., 2013 WL 269133 *11 (N.D. Cal. January 24, 2013).

28

Cannon v. Wells Fargo Bank N.A., 917 F. Supp. 2d 1025, 1054 (N.D. Cal. 2013).

29

Cannon v. Wells Fargo Bank, N.A., 926 F. Supp. 2d 152, 176 (D.D.C. 2013).

30

Cannon v. Wells Fargo Bank, N.A., 926 F. Supp. 2d 152, 176 (D.D.C. 2013).

31

Cannon v. Wells Fargo Bank, N.A., 926 F. Supp. 2d 152, 178 (D.D.C. 2013).

32

Ellsworth v. U.S. Bank, N.A., 908 F. Supp. 2d 1063, 1088-89 (N.D. Cal. 2012) (Beeler, USMJ, denying motion to dismiss Section 17200 or Unfair Competition Law claim as to both "kickback" and "backdating" allegations, holding in part that "[t]he court follows the weight of authority in district court cases that denied motions to dismiss claims supported by similar allegations in force-placed insurance cases.").

although not every such case will or may involve "fraudulent" conduct as opposed to, say, statutorily "unfair" practices since allegedly unfair practices under the California statute do not require allegations of reliance on the defendants' alleged fraud and misrepresentation, which would be difficult if not impossible to allege or prove in the ordinary force-placed insurance case.[33]

__The New Jersey Consumer Fraud Act__ was successfully invoked by a New Jersey plaintiff in a Federal putative class action in California. According to the California Court, the New Jersey Consumer Fraud Act, "N.J.S.A. 56:8-1, et seq., provides a private cause of action to consumers who are victimized by fraudulent practices in the marketplace."[34] It was held in that case that the New Jersey law's requirements of "ascertainable loss" and "causal relationship" were met by the complaint in that case, and that the "'particularity requirements' " of Federal Rule of Civil Procedure 9(b) were met by the plaintiff's allegations of fraud.[35] The Court accordingly held that the New Jersey plaintiff's complaint stated a claim for relief from "an 'unlawful practice' under the CFA" and denied the defendant's motion to dismiss on that ground.[36]

An example of when other rules of law factor into analyzing whether a statutory claim has been alleged, is provided by a Federal putative class action complaint which invoked the *__Pennsylvania "Unfair Trade Practices and Consumer Protection Law__* ('UTPCPL'), 73 Pa. Cons.

33

It was so held in McNeary-Calloway v. JP Morgan Chase Bank, N.A., 863 F. Supp. 2d 928, 959, 961-62 (N.D. Cal. 2012) (Spero, USMJ), and in Hofstetter v. Chase Home Finance, LLC, 2010 WL 3259773 *14-*15 (N.D. Cal. August 16, 2010). Both Courts addressed claims alleged under California's Unfair Competition Law, Cal. Bus. & Prof. Code §17200. Parenthetically, the defendants in the *McNeary-Calloway* case argued "that Plaintiffs could have avoided the alleged unfair conduct." The Court responded that this argument "ignores Plaintiffs' factual allegations." One plaintiff alleged that she faced financial difficulties following the death of her husband. Another plaintiff alleged that she faced financial hardship after a serious illness. Other plaintiffs alleged that their insurance coverage lapsed because of a computer error, an error for which they were not responsible. "The Court cannot say, as a matter of law, that Plaintiffs could reasonably have avoided Defendants' alleged unfair practice." McNeary-Calloway v. JP Morgan Chase Bank, N.A., 863 F. Supp. 2d 928, 962 (N.D. Cal. 2012).

34

McNeary- Calloway v. JP Morgan Chase Bank, N.A., 863 F. Supp. 2d 928, 962 (N.D. Cal. 2012) (Spero, USMJ).

35

McNeary-Calloway v. JP Morgan Chase Bank, N.A., 863 F. Supp. 2d 928, 962-63 (N.D. Cal. 2012) (Spero, USMJ).

36

McNeary-Calloway v. JP Morgan Chase Bank, N.A., 863 F. Supp. 2d 928, 963 (N.D. Cal. 2012) (Spero, USMJ).

Stat. Ann. §§201-1 et seq."[37] The defendants in that case argued for dismissal of this statutory claim on the basis of Pennsylvania's economic loss doctrine," which appears to be fairly typical of the "economic loss doctrine" applied in other jurisdictions. Where the plaintiff's only alleged injury is "economic loss," i.e., loss which is not either "physical injury" or "damage to tangible property," then no cause of action can be maintained in tort or negligence or under the UTPCPL for it.[38]

"In this case," said the Court, "plaintiffs have suffered purely economic loss. Plaintiffs do not allege any injury to themselves or to their tangible property ... . Accordingly, the economic loss doctrine bars plaintiffs' claim under the UTPCPL against HSBC Mortgage."[39]

In one State Court decision found raising this issue in a similar context, a single plaintiff appealed the dismissal of her putative class action complaint involving force-placed insurance after a fire loss.[40] Applying what appear to be the same standards as are applied in Federal Courts to Rule 12(b)(6) motions to dismiss,[41] the Illinois Appellate Court reversed the trial court's order dismissing the complaint and remanded.[42] Addressing the plaintiff's Consumer Fraud Act claim under 815 ILCS 505/1 et seq., the Illinois Appellate Court held in part here pertinent that the plaintiff adequately alleged a cause of action under the Consumer Fraud Act because she alleged facts supporting her claim of "a deceptive act or practice,"[43] the defendant's "intention" that she

37

Montanez v. HSBC Mortgage Corp., 876 F. Supp. 2d 504, 507 (E.D. Pa. 2012). [Emphasis added.]

38

Montanez v. HSBC Mortgage Corp., 876 F. Supp. 2d 504, 518 (E.D. Pa. 2012).

39

Montanez v. HSBC Mortgage Corp., 876 F. Supp. 2d 504, 518-19 (E.D. Pa. 2012).

40

Burress-Taylor v. American Sec. Ins. Co., 2012 Ill. App. (1st) 110554, 980 N.E.2d 679, 366 Ill. Dec. 586 (1st DCA, 5th Div., 2012).

41

See Burress-Taylor v. American Sec. Ins. Co., 2012 Ill. App. (1st) 110554, 980 N.E.2d 679, 684 p 13, 688 p 30, 366 Ill. Dec. 586, 591 p 13, 595 p 30 (1st DCA, 5th Div., 2012).

42

The plaintiff in this case alleged causes of action for breach of contract, declaratory judgment, and consumer fraud under an Illinois statute. The trial court dismissed the contract and declaratory judgment causes of action based on the statutes of limitation. The appellate court reversed this ruling. Burress-Taylor v. American Sec. Ins. Co., 2012 Ill. App. (1st) 110554, 980 N.E.2d 679, 687 p 25, 366 Ill. Dec. 586, 594 p 25 (1st DCA, 5th Div., 2012). The Illinois courts' disposition of the plaintiffs' breach of contract and declaratory judgment claims is otherwise outside the focus of this article.

43

Burress-Taylor v. American Sec. Ins. Co., 2012 Ill. App. (1st) 110554, 980 N.E.2d 679, 688-89 p rely on the act or practice,[44] and "it is undisputed that the occurrence of the alleged deception occurred during a course of conduct involving trade or commerce."[45] Once again, however, the issue of certifying the case as a class action was not yet presented to the Courts.

8. The Federal Real Estate Settlement Procedures Act ("RESPA"). The Federal Real Estate Settlement Procedures Act contains an express prohibition against giving or taking kickbacks or any "thing of value pursuant to any agreement or understanding ... that business incident to or part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person."[46] The tagline is "real estate settlement service," a term of art defined in RESPA as any service "provided in connection with a real estate settlement," in part here pertinent.[47]

Lenders force the placement of insurance *after* a real estate settlement, at least as alleged in putative class action cases confronting motions to dismiss to date. For that reason, Rule 12(b)(6) motions have been granted in such cases as to claims alleged under RESPA.[48]

Where the defendant lender is also shown by record proof to have complied with RESPA without a genuine issue of material fact, such as where the alleging plaintiffs did not establish actual damages on the case record, summary judgment has been granted for the defendant on a RESPA claim in putative class action force-placed insurance cases.[49]

32, 366 Ill. Dec. 586, 595-96 p 32 (1st DCA, 5th Div., 2012).

44

Burress-Taylor v. American Sec. Ins. Co., 2012 Ill. App. (1st) 110554, 980 N.E.2d 679, 689 p 33, 366 Ill. Dec. 586, 596 p 33 (1st DCA, 5th Div., 2012). *But see* Wilson v. Everbank, N.A., No. 14-CIV-22264, 2015 WL 1600549 *7 (S.D. Fla. April 9, 2015) (Illinois plaintiffs' Illinois Consumer Fraud Act claim dismissed by Federal Judge in Florida where "[t]he Amended Complaint does not allege that the Crosses ever received or read any lender-placed insurance communications.").

45

Burress-Taylor v. American Sec. Ins. Co., 2012 Ill. App. (1st) 110554, 980 N.E.2d 679, 689 p 34, 366 Ill. Dec. 586, 596 p 34 (1st DCA, 5th Div., 2012).

46

RESPA §2607(a)(2), 12 U.S.C. §2607(a)(2).

47

RESPA §2602(3), 12 U.S.C. §2602(3).

48

E.g., Lane v. Wells Fargo Bank, N.A., 2013 WL 269133 *15 (N.D. Cal. January 24, 2013); Cannon v. Wells Fargo Bank N.A., 917 F. Supp. 2d 1025, 1046-48 (N.D. Cal. 2013); McNeary-Calloway v. JP Morgan Chase Bank, N.A., 863 F. Supp. 2d 928, 952 (N.D. Cal. 2012) (Spero, USMJ).

49

Webb v. Chase Manhattan Mort. Corp., 2008 WL 2230696 *13 (S.D. Ohio May 28, 2008).

9. The Federal Truth-in-Lending Act. The Federal Truth-in-Lending Act is given force by its regulations. The well-known "Regulation Z," for example, is actually a collective reference to a set of regulations promulgated under the Truth-in-Lending Act or "TILA" by the Federal Reserve Board. Under 12 C.F.R. §226.18(d), for example, a lender-creditor is required to disclose a finance charge. "Finance charge" by definition "can include a premium for property insurance. *See id.* §226.4(b)(8)."[50] Observing that "it is not clear" how alleged failures to disclose concerning the forced placement of insurance "could constitute a violation of TILA," a District Court accordingly limited "its consideration of the TILA claim to whether there has been a violation of §226.18(d)."[51] The Court ultimately denied the motion to dismiss the TILA claim "to the extent it is based on a kickback or backdating theory." The Court granted the motion to dismiss the TILA claim to the extent that it was based on "'pure' excessive coverage" allegations.[52]

Rule 12(b)(6) motions have gone beyond arguments that *legally cognizable claims*, so to speak, have not been alleged on the face of the operative allegations in putative class action cases arising from the forced placement of insurance. Rule 12(b)(6) motions in such cases have included arguments for dismissal based on *defenses* allegedly appearing from the face of the complaints, usually if not always premised on the plaintiffs' allegations of *fact*, as reasons why the complaints fail to state claims upon which relief can be granted.

10. Tortious interference with a business relationship. This alleged tort has so far survived the motions to dismiss filed against it in the Southern District of Florida:

> As Plaintiff observes in response to the Green Tree Defendants' Motion, this Court has often found that a plaintiff has properly stated a claim for tortious interference with a business relationship in cases alleging wrongful force-placement of insurance.[53]

This is especially true in LFPI cases filed against mortgage servicers and force-placing insurance companies which are not also the plaintiffs' lenders:

> This case is not meaningfully different. Here, in the light most favorable to Plaintiff, the Amended Complaint alleges that Defendants Green Tree Servicing and Green Tree Insurance conspired in bad faith to improperly force-place insurance on Plaintiff's property, and that this conduct interfered with the relationship between Plaintiff and the holder of his mortgage.[54]

50

Cannon v. Wells Fargo Bank N.A., 917 F. Supp. 2d 1025, 1044-45 (N.D. Cal. 2013).

51

Cannon v. Wells Fargo Bank N.A., 917 F. Supp. 2d 1025, 1044-45 (N.D. Cal. 2013).

52

Cannon v. Wells Fargo Bank N.A., 917 F. Supp. 2d 1025, 1046 (N.D. Cal. 2013). A similar holding on similar allegations that a lender placed insurance by force "in excess of the outstanding loan balance," was reached by another District Judge in the same District, in Lane v. Wells Fargo Bank N.A., 2013 WL 269133 *14-*15 (N.D. Cal. January 24, 2013).

53

Burdick v. Bank of Am., N.A., _ F. Supp. 3d _, 2015 WL 1780982 *5 (S.D. Fla. April 14, 2015).

54

Burdick v. Bank of Am., N.A., _ F. Supp. 3d _, 2015 WL 1780982 *5 (S.D. Fla. April 14, 2015).

In an earlier decision, the Court in *Novell v. Bank of America*[55] held that plaintiff homeowners were not required "to allege a breach of the underlying mortgage agreement," because of the "murky" Florida Supreme Court precedent on whether Florida actually recognizes one or two torts in such situations: one being tortious interference with contract, and the second being tortious interference with a preexisting business relationship.[56] In particular, the plaintiffs in that case alleged that defendants Balboa Insurance Services (a subsidiary at the time of Bank of America, also a defendant) and Seattle Specialty Services, Inc. "received 'unearned commission from the various surplus lines insurers issuing force-placed flood insurance coverage.'" The Court held that these allegations stated a claim upon which relief could be granted for tortious business interference with a business relationship in that case:

> Although it was Defendant Bank of America that was in effect alleged to have force-placed insurance onto Plaintiffs, via its role as servicer, the allegations in this case extend towards all of the Defendants acting together, with knowledge of Plaintiffs' relationship, for the sole purpose of profiting via the force-place insurance. *See Hamilton [v. Suntrust Mort. Inc.],* 6 F. Supp. 3d [1312], at 1321 [(S.D. Fla. 2014)]("While SunTrust was entitled to procure insurance when Plaintiffs failed to maintain coverage their properties, nothing permitted SunTrust and the QBE Defendants to collude to force-place excessive and exorbitantly-priced insurance to maximize their profit at Plaintiffs' expense.").
>
> In another force-placed insurance case, based on slightly different allegations, the Court found that the Defendant-insurer "acted in bad faith when charging *excessive* and *unwarranted* fees and when paying/receiving *improper* commissions and kickbacks" and that by doing so the defendant interfered with the plaintiff's relationship with its loan servicer. *Williams v. Wells Fargo Bank N.A.*, No. 11-21233-CIV, 2011 WL 4368980, *12 (S.D. Fla. Sept. 19, 2011).
>
> Here, Plaintiffs allege similar conduct, but that such conduct interfered with Plaintiffs' relationship with the investor. Regardless, allegations that Defendants' agreement to force-place inflated insurance resulting in Plaintiffs' increased indebtedness, viewed in the light most favorable to Plaintiffs, adequately support a claim for direct interference.[57]

55

Novell v. Bank of Am., No. 14-CV-80672-RLR, 2014 WL 7564678 (S.D. Fla. December 3, 2014).

56

Novell v. Bank of Am., No. 14-CV-80672-RLR, 2014 WL 7564678 *5 (S.D. Fla. December 3, 2014).

57

Novell v. Bank of Am., No. 14-CV-80672-RLR, 2014 WL 7564678 *6-*7 (S.D. Fla. December 3, 2014). To similar effect is the even earlier decision in the case of Persaud v. Bank of Am., N.A., No. 14-21819-CIV, 2014 WL 4260853 *15-*16 (S.D. Fla. August 28, 2014).

11:25. Defenses in force-placed insurance cases

There are three overall groups of defenses raised in force-placed insurance cases. They include preemption, the filed rate "doctrine," and a voluntary payment "doctrine." Each will be discussed in turn.

1. Preemption. Preemption by Federal statutes of conflicting State law generally centers on the National Bank Act in these cases. It has been held that any Court must begin its analysis of this issue by considering "the conduct on which the claims are based (and not just the categories of the claims)."[1] The National Bank Act clothes federally chartered banks with immense powers including "all such incidental powers as shall be necessary to carry on the business of banking."[2] This includes real estate lending.[3] However, by Federal regulation, even conflicting State law is not preempted "to the extent they only incidentally affect the exercise of national banks' real estate lending powers," such as the law of contracts and the law of torts in a given State.[4]

Examining first the common core of operative allegations of fact, it has been held that "kickback" allegations do not challenge premium charges. A lender's alleged practice of selecting the insurance company to earn kickbacks for itself rather than selecting an insurance company "through a competitive bidding practice" does not state a State law claim which conflicts with nor is preempted by the NBA.[5]

"Backdating" allegations have been held by the same Court not to constitute a challenge to the setting of insurance premiums, either, and further that the NBA accordingly does not preempt claims based upon these fact allegations, either.[6]

Next examining the commonly alleged claims in these putative class action cases, Courts have also looked at the legal bases for the alleged claims and compared them to the legal purpose behind the NBA. Using this analysis, Courts declare that over all, State laws of a general nature which are not directed at activities of national banks are not preempted by the NBA. Such State

---

1

Ellsworth v. U.S. Bank, N.A., 908 F. Supp. 2d 1063, 1077 (N.D. Cal. 2012) (Beeler, USMJ).

2

12 U.S.C. §24.

3

12 U.S.C. §371.

4

12 C.F.R. §34.4.

5

Ellsworth v. U.S. Bank, N.A., 908 F. Supp. 2d 1063, 1078 (N.D. Cal. 2012) (Beeler, USMJ).

6

Ellsworth v. U.S. Bank, N.A., 908 F. Supp. 2d 1063, 1080-81 (N.D. Cal. 2012) (Beeler, USMJ).

laws which merely "incidentally affect the exercise of national banks insurance activities" are not preempted by the NBA. It has been so held in force-placed insurance putative Federal class action cases.[7]

Thus, it has been expressly held that claims for breach of the implied covenant of good faith, and unjust enrichment, are not preempted by the National Bank Act.[8]

In summary, preemption arguments based on the National Bank Act (and no preemption arguments have been found in these cases based on any other Federal laws) pretty uniformly fail in putative Federal class action cases of force-placed insurance claims, although such arguments are often made. One Court recently disposed of this argument as follows:

> Plaintiffs also challenge Wells Fargo's charge for commission fees that it actually received through its affiliate. That is, plaintiffs have alleged a scheme whereby Wells Fargo misrepresented the nature and purpose of supposed commission fees. Pursuant to this scheme, Wells Fargo did not perform any work in procuring an insurance policy because of the bank's exclusive purchase agreements with QBE. Wells Fargo nonetheless charged as costs to plaintiffs[,] commission fees that it then received back through its affiliate. Wells Fargo essentially paid itself for work it did not do, passing through to plaintiffs an unjustified and illusory charge. Plaintiffs' claims thus do not affect Wells Fargo's ability to set fees or prices; rather, the core of the allegations is that Wells Fargo wrongfully charged plaintiffs for work that it neither actually performed nor actually paid for.[9]

To put the same observations more concisely, perhaps:

> In other words, Plaintiffs' claim is not addressed at Wells Fargo Bank being "enriched" by Plaintiffs, but at it being "*unjustly* enriched." The claim does not seek to impose requirements on Wells Fargo Banks' conduct; it simply seeks the return of funds unjustly paid to Wells Fargo Bank pursuant to the force-placed insurance scheme. Courts have held similar claims not to be preempted by the NBA.[10]

2. Filed Rate Doctrine. The filed rate doctrine arose in the context of utilities regulation. Where a utility is required by law to charge its rates after filing for and receiving the approval of

---

7

The language quoted in the text comes from the Court's holding in Williams v. Wells Fargo Bank N.A., 2011 WL 4901346 *9 (S.D. Fla. October 14, 2011). In accord with this holding are, *e.g.*, Lane v. Wells Fargo Bank N.A., 2013 WL 269133 *12, *13 (N.D. Cal. January 24, 2013); Cannon v. Wells Fargo Bank N.A., 917 F. Supp. 2d 1025, 1050 (N.D. Cal. 2013).

8

Williams v. Wells Fargo Bank N.A., 2011 WL 4901346 *10 (S.D. Fla. October 14, 2011). In that case, as to the plaintiffs' implied covenant claim, the Court observed that "[i]ndeed, numerous courts have recognized that this type of claim is not preempted by the NBA." With respect to the plaintiffs' unjust enrichment claim in that case, the Court made a similar observation: "Courts have held similar claims not to be preempted by the NBA." Williams v. Wells Fargo Bank N.A., 2011 WL 4901346 *10 (S.D. Fla. October 14, 2011).

9

Lane v. Wells Fargo Bank N.A., 2013 WL 269133 *13 (N.D. Cal. January 24, 2013).

10

Williams v. Wells Fargo Bank N.A., 2011 WL 4901346 *10 (S.D. Fla. October 14, 2011). [Emphasis by the Court.]

a ratemaking regulatory authority, the Courts have constructed a doctrine of immunization for such utilities from suits based on allegations that the utilities rates are unreasonably high.[11]

Further, Courts have transferred this "filed rate doctrine" into the insurance arena. Where insurance companies must receive the approval of State Insurance Commissioners and their equivalents for the rates which the insurance companies are permitted to charge, many Courts apply the filed rate doctrine to hold that such insurance companies are immune from suits based on allegations that insurance rates are too high.[12]

"Thus," in a putative class action case involving force-placed insurance, the question raised by the filed rate doctrine "is whether [the plaintiff] Ellsworth's claims challenge ASIC's ratemaking authority. They do not."[13] Where the plaintiffs do not challenge the rates or the premiums paid for force-placed insurance, but instead challenge "the alleged kickbacks," it has been held that the filed rate doctrine accordingly does not apply.[14] In such a case, "Plaintiffs are not complaining that they were charged an excessive insurance rate, they are complaining that the defendant bank acted unlawfully when it chose this particular insurance company and this particular rate."[15]

Further, in the insurance context including the forced placement of insurance by a *lender*, the defendant lender cannot claim the immunity afforded by the filed rate doctrine. It has been held that the filed rate doctrine simply does not apply to a *bank* in that context.[16]

Further, the filed rate doctrine has been held not to apply to immunize a *mortgage servicer* in that context, either:

> [W]here a plaintiff is not challenging a rate as excessive, but rather the manipulation of the rate, the filed-rate doctrine does not apply. This reasoning is persuasive. For example, if insurance were available from a number of carriers at different rates--all subject to filed-rates--the filed-rate doctrine would not protect a loan servicer who chooses a carrier and a policy with a rate higher than others simply to receive a kickback not available from other carriers. A claim of manipulation could lie irrespective of the fact that the rate charged by the

---

11

See, e.g., Ellsworth v. U.S. Bank, N.A., 908 F. Supp. 2d 1063, 1081 n.10 (N.D. Cal. 2012); Morales v. Attorneys' Title Ins. Fund, Inc., 983 F. Supp. 1418, 1426 (S.D. Fla. 1997).

12

Ellsworth v. U.S. Bank, N.A., 908 F. Supp. 2d 1063, 1081-82 (N.D. Cal. 2012) (Beeler, USMJ).

13

Ellsworth v. U.S. Bank, N.A., 908 F. Supp. 2d 1063, 1082 (N.D. Cal. 2012) (Beeler, USMJ).

14

Ellsworth v. U.S. Bank, N.A., 908 F. Supp. 2d 1063, 1082 (N.D. Cal. 2012) (Beeler, USMJ).

15

Abels v. JPMorgan Chase Bank, N.A., 678 F. Supp. 2d 1273, 1277 (S.D. Fla. 2009). *Accord,* Cannon v. Wells Fargo Bank N.A., 2013 WL 132450 *9 (N.D. Cal. January 9, 2013).

16

Abels v. JPMorgan Chase Bank, N.A., 678 F. Supp. 2d 1273, 1277 (S.D. Fla. 2009).

> carrier is protected under the filed-rate doctrine.
> Accordingly, the Court rejects Wells Fargo's argument that the filed-rate doctrine is a bar to the kickback claims asserted against it.[17]

In short, in the force-placed insurance, putative class action cases decided by Federal Courts to date, the filed rate doctrine has met with a lack of success in the Courts' disposition of Rule 12(b)(6) motions, certainly and clearly with regard to the class of kickback allegations upon which the plaintiffs base their claims.[18]

<u>3. The Voluntary Payment Doctrine.</u> Some defendant lenders and mortgage servicers have raised the voluntary payment doctrine as a defense appearing from the face of the putative class action complaint, which bars any claim upon which relief can be granted. It was noted earlier that every one of the force-placed insurance, putative Federal class action cases which have been found, involves the plaintiffs-borrowers' payment of the force-placed insurance premium.[19] “The voluntary payment doctrine is an affirmative defense that bars the recovery of money that was voluntarily paid with knowledge of the facts.”[20]

The voluntary payment doctrine is not applied to cases in which payments are made involuntarily, or in which the payments are clearly made under duress, or in which the payments are coerced. The voluntary payment doctrine has not been applied in favor of defendants filing Rule 12(b)(6) motions in force-placed insurance cases, and the voluntary payment doctrine has been rejected as a ground to dismiss claims in such cases.[21]

17

Cannon v. Wells Fargo Bank N.A., 917 F. Supp. 2d 1025, 1038 (N.D. Cal. 2013).

18

In the case of Webb v. Chase Manhattan Mort. Corp., 2008 WL 2230696 (S.D. Ohio May 28, 2008), the Court was faced with a summary judgment motion, not a Rule 12(b)(6) motion. Further, the Court in that case seemed to be for applying the filed rate doctrine before it was against applying it, as they say; the Court seemed to express a view, at first, that the filed rate doctrine applied in that case but then the Court wrote that it was “unnecessary to reach such a conclusion” because of the nature of the plaintiff's arguments in that case. Webb v. Chase Manhattan Mort. Corp., 2008 WL 2230696 *21 (S.D. Ohio May 28, 2008).

19

As was noted earlier, *see* §9:34, *supra*, sometimes the plaintiffs in these cases allege that they paid the premiums directly to their lender or to the insurance company, and sometimes the plaintiffs in these cases allege that their mortgage escrow accounts are charged for the force-placed premiums.

20

Ellsworth v. U.S. Bank, N.A., 908 F. Supp. 2d 1063, 1083 (N.D. Cal. 2012) (Beeler, USMJ).

21

See, e.g., Kolbe v. BAC Home Loans Servicing, LP, 695 F.3d 111, 125 (1st Cir. 2012), *overruled by an equally divided First Circuit en banc*, 738 F.3d 432 (1st Cir. 2013) (applying New Jersey law); Ellsworth v. U.S. Bank, N.A., 908 F. Supp. 2d 1063, 1083 (N.D. Cal. 2012) (Beeler, USMJ). To make a very long and confusing judicial story short, in the *Kolbe* case a

District Judge dismissed claims alleged by one Kolbe under ***New Jersey law*** that he incurred damages as a result of lender force-placed insurance. The original panel of the First Circuit reversed, for reasons similar to those in the above-cited *Lass* case, which the same panel decided under ***Massachusetts law*** on the same day: Lass v. Bank of America, 695 F.3d 129 (1st Cir. 2012).

Unlike the analysis of the original panel of First Circuit appellate judges, however, the three judges who divided the First Circuit en banc looked away from the law of the forum state, New Jersey, toward the national economy and national policy. In the view of these three judges, national concerns simply trumped the individual concerns raised as a result of Mr. Kolbe's mortgage. Kolbe v. BAC Home Loans Servicing, LP d/b/a Bank of America, 695 F.3d 111 (1st Cir. 2012), *overruled by an equally divided First Circuit en banc*, 738 F.3d 432 (1st Cir. 2013). The designation of "an equally divided" Court in the second visitation of *Kolbe* may also be confusing. Here, it means that the en banc First Circuit mustered a roll of six (6) Judges. That number is less than the number of justices on most state supreme courts, of course. Three (3) of the First Circuit Judges voted to affirm the District Judge, and three (3) voted to affirm the original paneldecision and thus to reverse the District Judge's order dismissing Mr. Kolbe's claims. The District Judge provided a fourth vote, if you will, and so the order of dismissal was reinstated in this case.