From: Dennis J. Wall <DJW@dennisjwall.com>
Sent: Thursday, May 23, 2013 2:26 PM
To: #LPI Input
Cc: 'Dennis J. Wall'
Subject: Input re "Lender Placed Insurance, Terms and Conditions" FHFA FR Doc. 2013-07338 Filed 3-28-13, 78 F.R. 19263-64.
Attachments: Force Placed Insurance.Ins Lit Rptr.052213.pdf

Re: FHFA FR Doc. 2013-07338 Filed 3-28-13.
78 F.R. 19263-64.
"Lender Placed Insurance, Terms and Conditions".
ACTION: Notice; input accepted.

To the Federal Housing Finance Agency through its Office of Housing and Regulatory Policy:

In response to your captioned Notice, I am providing this input regarding force-placed or lender-placed insurance in cases involving the administration of loans guaranteed by Fannie Mae and Freddie Mac. In particular, you have requested input concerning "practices where there are concerns regarding conflicts between parties to the insurance agreement". These concerns regarding conflicts include "certain sales commissions" and "certain reinsurance activities".

1. The focus of my comments in response to your request for input.

My comments address practices where there are concerns regarding conflicts between parties to the loan agreement. It is crucial that lenders are ordinarily not parties to the insurance agreement in lender-placed insurance situations. The "practices where there are concerns regarding conflicts between parties" in the reported cases and in the FHFA experience related in the subject Notice alike, originate in large part with lenders.

2. The Uniform/standard Loan Agreement language used by Freddie Mac is the originating source of conflict.

I have researched the Uniform Instruments for Mortgages and to illustrate my comments, I have settled on citing to Form 3010 used by Freddie Mac in Florida, and to Form 3033 used in New York.[i] They are of course similar because they are intended to be 'uniform'. It is my understanding that these Uniform Instruments/Mortgages are also used by Fannie Mae. They contain these provisions which are similar in wording and largely identical in substance, and which are the originating source of conflicts between parties to the loan agreement/mortgage. In part here pertinent, Form 3010 provides in its paragraph 5:

5. Property Insurance.... This insurance shall be

maintained in the amounts (including deductible levels) and for the periods that Lender requires.
* * *
If Borrower fails to maintain any of the coverages described above, Lender may obtain insurance coverage, at Lender's option and Borrower's expense.[ii]

Likewise, Form 3033 provides in pertinent part in its own Paragraph 5, as follows:

5. Borrower's Obligation to Maintain Hazard Insurance or Property Insurance.... The insurance will be in the amounts (including, but not limited to, deductible levels) and for the periods of time required by Lender.
* * *
If I fail to maintain any of the insurance coverages described above, Lender may obtain insurance coverage, at Lender's option and my expense.[iii]

Both Forms contain similar Paragraphs 9, as well, and these too figure in the conflicts between parties to the loan agreement concerning lender-placed or force-placed insurance. Form 3010 contains the following language in pertinent part:

9. Protection of Lender's Interest in the Property and Rights Under 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 ...
* * *
Any amounts disbursed by Lender under this Section 9 shall become additional debt of Borrower secured by this Security Instrument.[iv]

Paragraph 9 of Form 3033 provides the same things in these words which are pertinent here:

9. Lender's Right to Protect Its Rights in The Property.... then Lender may do and pay for whatever is reasonable and appropriate to protect Lender's interest in the Property and Lender's rights under this Security Instrument.
* * *
I will pay to Lender any amounts, with interest, which Lender spends under this Section 9.[v]

Taken together, this is the language and these are the provisions of the loan agreement which are at the heart of the conflict in the decided case law in which borrowers sue lenders and mortgage servicers as a result of the lenders' and mortgage servicers' conduct in connection with lender-placed, force-placed insurance.

3. Lenders' and mortgage servicers' arguments in the reported case law involving the conduct of lenders and servicers with respect to lender-placed insurance under

mortgages on real property.

Defendants in litigation involving conflicts over the placement of insurance on borrowers by lenders or on behalf of lenders, to pay premiums and associated expenses such as commission costs and reinsurance charges, make several arguments. They argue for example that "the amounts" in Paragraph 5, quoted above, means any amounts that a lender may require of a borrower.

Regarding Paragraph 9, also quoted above, these Defendants argue that "whatever is reasonable or appropriate" means virtually anything they may do pursuant to that provision, that "Lender's interest in the Property" and "Lender's rights under this Security Instrument" mean ROI or return on investment, and finally that "any amounts" means exactly that, any amounts.

These arguments are misleading in their simplicity.

4. "Security interest" vs. return on investment.

If the purpose of the Freddie Mac-Fannie Mae self-described Uniform Security Instruments is to protect a lender's security interest, i.e., a lender's contract right to be paid the balance of the loan which is secured by the real property in question -- then it may be necessary for the FHFA as Conservator of these two GSEs to convey this position:

Mortgages supporting loans guaranteed by Fannie Mae and Freddie Mac exist to secure the lender's contract right to be repaid the balance of the loan which the lender made in reliance on the fact that a particular parcel of real property was used as collateral to secure the repayment.

And was not given by any borrower to insure any lender would make a profit otherwise.

In order to clearly convey this position, it may be necessary for the FHFA to clarify the language in Paragraph 5, above, concerning features and amounts of the insurance "that Lender requires". The FHFA may need to announce that this means insurance in an amount necessary to protect the lender's security interest in the loan being repaid. This may further involve the FHFA's clarification of the provisions in Paragraphs 5 and 9 together, concerning the amounts of insurance being equal to or less than the remaining balance of the loan.

I have researched the United States Code and the Code of Federal Regulations for similar language chosen by Congress and by various administrative bodies in similar situations. I would respectfully like to submit the following proposed language for your consideration, based on the results of that research, which I believe may help to clarify the protection of a lender's contract right to be

repaid the balance of a mortgage loan which was guaranteed by Fannie Mae or Freddie Mac:

References if any in Freddie Mac Uniform Security Instruments/Single-Family Mortgages to maintaining insurance in the amounts (including, but not limited to, deductible levels) and for the periods of time required by Lender, mean maintaining insurance in an amount at least equal to the outstanding balance of the mortgage or the maximum amount of insurance available for the property, whichever is less.

References if any in Freddie Mac Uniform Security Instruments/Single-Family Mortgages authorizing a Lender to obtain insurance coverage, at the Lender's option and at the Borrower's expense, likewise mean an amount at least equal to the outstanding balance of the mortgage or the maximum amount of insurance available for the property, whichever is less.[vi]

To further clearly convey FHFA's meaning concerning the appropriate amount of insurance which the parties to the loan agreement may be required or authorized to obtain, at the expense of the Borrower in all such cases, the FHFA may also need to expressly prohibit the Lender's purchase and forced placement of insurance at "replacement cost" levels beyond the amount of the remaining loan balance:

"Replacement coverage" references, if any, in Freddie Mac Uniform Security Instruments/Single-Family Mortgages, by which the Borrower would purportedly maintain a sufficient amount of insurance to cover the full replacement value of their collateralized properties, is not required by federal law and does not supersede contractual obligations between a mortgagor-Borrower and a mortgagee-Lender.[vii]

Finally, I respectfully request the FHFA to consider a requirement in the same or similar following language in order to clearly convey FHFA's intent concerning the premium rates at which lender-placed insurance is authorized:

The premium rate at which the force-placed insurance is charged to the borrower shall not be equal to or less than that applicable, if any, in actual and current use by a majority of insurers for the same coverage on a similar risk.[viii]

5. "Certain Sales Commissions".

The Notice contains language which is clear and serves the stated purpose. My input and comment is to implement it as soon as you can.

6. "Certain Reinsurance Activities".

As alternatives to the language in the Notice which goes to resolving this concern, I respectfully ask the FHFA to consider the following.

First, if the FHFA determines that it is desirable to allow the placement of reinsurance with reinsurers affiliated in some way with the Lender in a given situation:

OPTION 1 (providing for an exception):

Sellers and servicers shall not pay any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind[ix] toward reinsurance associated with an insurance provider ceding premiums to a reinsurer that is owned by, affiliated with or controlled by the sellers or servicer, with the following exception:

Except at such premiums and expenses as are equal to or less than the total premiums and expenses charged at the prevailing rate in the locality for reinsurance on similar insurance products.

Second, in all cases:

OPTION 2 (disclosure):

The ceding insurer shall disclose each and every fee paid by the ceding insurer in connection with reinsurance, which the ceding insurer paid directly to the lender or to the seller or to the servicer, as the case may be, and to the reinsurer.[x]

Third, limitations on force-placed/lender-placed insurance charges:

OPTION 3: Limitations on force-placed insurance charges:[xi]

(1) All charges, apart from charges subject to State regulation as the business of insurance, related to force-placed insurance imposed on the borrower by or through the servicer shall be bona fide and reasonable.

(2) "Bona fide and reasonable" charges related to force-placed insurance imposed on the borrower, by or through any person, lender, mortgagee, or servicer, shall only be such charges as:

(a). Are verified by the person, lender, mortgagee, or servicer imposing charges on the borrower for force-placed insurance, that a diligent effort has been made to procure insurance without incurring any such charges. Such person(s) must verify that a diligent effort has been made by swearing or affirming, under oath, a properly documented statement of diligent effort.[xii]

"Diligent effort" means seeking coverage without such charges from and having been rejected by at least three [3] other reinsurers writing this type of coverage and documenting these rejections[xiii];

(b) Are supported in advance by at least three [3] affidavits or declarations under oath from different persons who shall be familiar with similar such charges prevailing in the County in which the collateralized property is located, certifying that such charges are bona fide and reasonable;

(c). Do not include commissions paid by any such person to agents or brokers in connection with the forced placement of insurance; and

(d) Do not include any payment of premiums or payment of any other things of value to any reinsurance company which is a subsidiary, division, subdivision, or profit center of any such person, lender, mortgagee, or servicer, or is affiliated whatsoever with any such person, lender, mortgagee, or servicer.

Thank you for your consideration of these matters. I am providing this invited input to the Federal Housing Finance Agency on my own behalf. Although I am a lawyer, I represent no-one but myself and my own views in this matter.

Respectfully,
Dennis J. Wall, Esquire
Dennis J. Wall
Florida Bar No. 253081
DJW/jm

Attachment:
Dennis J. Wall, "Force-placed, Lender-placed Insurance Class Actions: Is the Lender Placement of Insurance Authorized by Law, Or Simply Beyond the Reach of the Courts?" 35 Insurance Litigation Reporter 221 (May 22, 2013).

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[i] Form 3010 for Florida is available on the Freddie Mac website at http://www.freddiemac.com/uniform/doc/3010-FloridaMortgage.doc, and Form 3033 for New York is available at http://www.freddiemac.com/uniform/doc/3033-NewYorkMortgage.doc.

[ii] Form 3010, p. 6/16.

[iii] Form 3033, pp. 7-8/19.

[iv] Form 3010, p. 8/16.

[v] Form 3033, p. 10/19.

[vi] See National Flood Insurance Act Regulation 24 C.F.R. § 203.16a; National Bank Act Regulations 12 C.F.R. §§ 22.3, 22.7, the latter entitled, "Forced placement of flood insurance".

[vii] Casey v. Citibank, N.A., 2013 WL 11901 *6 (N.D.N.Y. January 2, 2013)(so holding with respect to National Flood Insurance Act Regulations recommending that Borrowers purchase replacement cost insurance).

[viii] Similar provisions are found in most State Surplus Lines Laws, for example. The language in the text is drawn from Fla. Stat. § 626.916(1)(b), which is a part of Florida's Surplus Lines Law.

[ix] See 41 U.S.C. § 8701(2), definition of "Kickback". Also see Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2607.

[x] See RESPA, 12 U.S.C. § 2603(c).

[xi] The title and first sentence are taken from RESPA, 12 U.S.C. § 2605(m).

[xii] These requirements are imposed under most Surplus Lines Laws before insurance may be placed with non-admitted carriers. The language in the text is taken from Florida's Surplus Lines Law, in particular Fla. Stat. § 626.916(1)(a).

[xiii] See Fla. Stat. § 626.914(4), "Diligent effort".

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by Dennis J. Wall, Esquire

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Force-placed, Lender-placed Insurance Class Actions: Is The Lender Placement Of Insurance Authorized By Law, Or Simply Beyond The Reach Of The Courts?

by
Dennis J. Wall, Esquire[1]

Dennis Wall is an Expert Witness, Consultant, and Counsel. For thirty-five (35) years, his expertise and knowledge in Insurance Coverage and Bad Faith have led attorneys and companies across the United States to retain his assistance in many kinds of Insurance matters.

Elected to the American Law Institute, he has been selected by his peers as a Florida Super Lawyer in "Insurance Coverage," and he has been elected to the "Florida Legal Elite" and the "Best of the Bar".

Dennis Wall is the author of the leading book on Bad Faith, "Litigation and Prevention of Insurer Bad Faith," Third Edition, published in Two Volumes by West Publishing. This Book is the product of three decades of research and analysis. Originally published by Shepard's/McGraw-Hill before Thomson Reuters West acquired "Litigation and Prevention of Insurer Bad Faith," Dennis Wall has examined over 4,725 cases and statutes and other legal authorities as of the 2013 Supplement, which is in process. Both the bound volume and the current Supplement are published in Print and Online.

Dennis Wall is also the Co-Author of "CAT Claims: Insurance Coverage for Natural and Man-Made Disasters" (Thomson/West, with annual Supplements). A frequent presenter on Insurance topics, Mr. Wall has been authorized by the Florida Office of Insurance Regulation to make Adjuster Licensing Ethics Credits available by the Florida Office of Insurance Regulation (Florida Department of Insurance).

Mr. Wall is the author of two acclaimed web logs on Insurance: "Insurance Claims and Issues Web Log," which is ranked Number One by the American Bar Association, visited more often by more users than any other Insurance Law Web Log: http://www.abajournal.com/blawg/insurance_claims_and_issues/. He is also the author of the influential "Insurance Claims and Bad Faith Web Log," which is visted the second-most number of times by users than any other Insurance Law Web Log except Mr. Wall's Insurance Claims and Issues Web Log, and which is also available on the American Bar Association web site: http://www.abajournal.com/blawg/insurance_claims_bad_faith_law_blog/.

I. A Brief Discussion of The Background and the Federal Class Action Issues Presented by Claims Resulting from Force-placed Insurance

Force-placed insurance is a description more likely to be used by borrowers and their attorneys. Lenders and their attorneys describe the same thing as lender-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?

1. Portions of this article in different form are pending New Sections 9:33, 9:34, and 9:35 to be published later this year in the 2013 Supplement of "Litigation and Prevention of Insurer Bad Faith" (Thomson Reuters 2013). The complete article materials, similar but not the same, are published here with permission of the Author, Dennis J. Wall.

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 article, 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.

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"?

There are many decisions by Federal District Courts, some decisions by Federal Circuit Courts of Appeal, and none found from State Courts, in which these issues are addressed in the context of what the Courts uniformly call "putative class actions". However, few State Court actions have been located in which any of these issues have been presented, and ***no State Court class action cases have been found involving these issues.***

It bears repeating that that leaves Federal cases involving putative class actions and Rule 12(b)(6) motions to dismiss, almost exclusively. The benefit of Rule 12(b)(6) cases is that the Courts involved were presented with every conceivable basis for a claim or for a reason to dismiss for failure to state a claim upon which relief can be granted. The most commonly argued reasons for a claim or for dismissal of a claim in this context, will all be discussed here.

Every one of these cases involves borrowers who either paid directly[4] in the sense of 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.

None of these cases involves a borrower who did not pay 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]

4. *E.g., Ellsworth v. U.S. Bank, N.A.,* 2012 WL 6176905 *2 (N.D. Cal. December 11, 2012); *Montanez v. HSBC Mortgage Corp.,* 876 F. Supp. 2d 504, 508 (E.D. Pa. 2012).

5. Use of both terms throughout this article 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., Lass v. Bank of Am., N.A.,* 695 F.3d 129, 132-33 (1st Cir. 2012)(case involved Massachusetts substantive law); *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.,* 2012 WL 6176905 *2-*3 (N.D. Cal. December 11, 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). "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 credit rating," they alleged in their complaint. *Hofstetter v. Chase Home Finance, LLC,* 2010 WL 3259773 *2 (N.D. Cal. August 16, 2010).

II. The Substantive Issues of Force-placed Insurance: Success or Failure in Stating Claims

A. The prevailing Federal standard for failure to state a claim upon which relief can be granted under Rule 12(b)

As was noted previously, the great majority of cases which have been located in which claims have been alleged as a result of force-placed insurance have been resolved under Federal Rule of Civil Procedure 12(b)(6) for alleged failure to state claims upon which relief can be granted.

Rule 12(b)(6) motions to dismiss are resolved using a two-pronged approach: First, the trial Court must disregard "legal conclusions" and "naked assertions" alleged in the complaint, and second, the Court must examine the claims alleged in the complaint for "facial plausibility".[11] "Facial plausibility" involves the "nub" of the complaint, meaning allegations of *fact* that are well-pleaded, and not merely speculative.[12]

Further, the allegations of fact pleaded in the putative class action plaintiffs' complaint are often consulted by the District Courts on Rule 12(b)(6) motions as a challenge to the plaintiffs' *standing* to state claims on behalf of an entire class.[13]

B. The allegations of fact pled in the force-placed insurance cases

1. *The Contract Documents.* 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.`[14]

Paragraph 9 of the standard Fannie Mae/Freddie Mac mortgage contract, or equivalent mortgage

11. *E.g., Montanez v. HSBC Mortgage Corp.,* 876 F. Supp. 2d 504, 510(E.D. Pa. 2012); *Williams v. Wells Fargo Bank, N.A.,* 2011 WL 4901346 *3 (S.D. Fla. October 14, 2011); *see, e.g., Lane v. Wells Fargo Bank N.A.,* 2013 WL 269133 *3 (N.D. Cal. January 24, 2013).

12. *E.g., Cannon v. Wells Fargo Bank N.A.,* 2013 WL 132450 *3 (N.D. Cal. January 9, 2013); *see, e.g., Cannon v. Wells Fargo Banks, N.A.,* 2013 WL 764964 *8 (D.D.C. March 1, 2013); *Abels v. JPMorgan Chase Bank, N.A.,* 678 F. Supp. 2d 1273, 1276 (S.D. Fla. 2009).

13. *E.g., Lane v. Wells Fargo Bank N.A.,* 2013 WL 269133 *4 (N.D. Cal. January 24, 2013); *Montanez v. HSBC Mortgage Corp.,* 876 F. Supp. 2d 504, 512(E.D. Pa. 2012).

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.[15]

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.[16]

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 to 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 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

14. Section 5 of the typical mortgage contract found in these cases, is quoted from the case of *Ellsworth v. U.S. Bank, N.A.,* 2012 WL 6176905 *1 (N.D. Cal. December 11, 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 "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* 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).

15. Paragraph 9 is quoted verbatim in the text from, again, the quotation-rich excellent opinion in *Ellsworth v. U.S. Bank, N.A.,* 2012 WL 6176905 *2 (N.D. Cal. December 11, 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), *Kolbe v. BAC Home Loans Servicing, LP,* 695 F.3d 111, 114, 116-17 (1st Cir. 2012)(Federal Housing Administration ["FHA"] mortgage contract paragraph 4), 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).

16. *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); *Cannon v. Wells Fargo Bank N.A.,* 2013 WL 132450 *2 (N.D. Cal. January 9, 2013)(case involved substantive law of Florida).

"kickbacks".[17]

Alternatively, the borrowers-plaintiffs allege that the lenders force the placement of insurance with their subsidiary insurance corporations.[18] 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.[19]

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 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."[20] 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.[21] "The question, of course, is not what amount of flood [or other] insurance a lender reasonably could require, but what this particular HUD [or any] mortgage provision in fact permits the lender to demand."[22]

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.[23]

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

17. *E.g., Cannon v. Wells Fargo Bank N.A.,* 2013 WL 132450 *2 (N.D. Cal. January 9, 2013); *Ellsworth v. U.S. Bank, N.A.,* 2012 WL 6176905 *1, *2, *3, *15 (N.D. Cal. December 11, 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.]

18. *E.g., Lass v. Bank of America, N.A.,* 695 F.3d 129, 139-40 & 139 n.19 (1st Cir. 2012); *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. 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.

19. *E.g., Lass v. Bank of America, N.A.,* 695 F.3d 129, 138-39 & 39 n.19 (1st Cir. 2012); *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). This is not the same thing as saying merely that the lenders and insurance companies have increased the financial burden faced by borrowers, an argument which has not fared very well in the Courts. However, without proof that increased cost has been the result, in April, 2013 a Federal agency settled with four mortgage insurance companies over charges that the companies chose to incur a charge -- which was apparently added to the borrowers' costs—for "captive reinsurance" offered at higher prices than the reinsurance market would ordinarily bear for comparable reinsurance, allegedly because the reinsurance they chose was offered through a "captive" company affiliated with the given lender, i.e., that the mortgage insurance companies were paying kickbacks to lenders in exchange for customers. *See, e.g.,* Press Release, "The CFPB Takes Action Against Mortgage Insurers to End Kickbacks to Lenders" (Consumer Financial Protection Bureau, April 4, 2013); Jim Puzzanghera, "Regulators Probing Alleged Mortgage Insurance Kickback Scheme" (Los Angeles Times Online at www.latimes.com, posted April 4, 2013).

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

security include the idea that the Courts protect security interests in order to secure the repayment of loans. "'Security interest' means an interest in personal property or fixtures which secures payment or performance of an obligation."[24] This is the clear understanding of the term to date, both in the law and among the population at large.[25] 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.*[26]:

21. *E.g., Lass v. Bank of America, N.A.,* 695 F.3d 129, 135-36 (1st Cir. 2012) (case involved Massachusetts substantive law); *Kolbe v. BAC Home Loans Servicing, LP,* 695 F.3d 111, 120 (1st Cir. 2012)(observing in case involving New Jersey substantive law: "We acknowledge that lenders may have good reason to require replacement coverage. Nonetheless, ... Congress in the NFIA [National Flood Insurance Act] appears to have incorporated the assumption that, at times, a more limited amount of flood insurance may be reasonable and appropriate."); *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.]

22. *Kolbe v. BAC Home Loans Servicing, LP,* 695 F.3d 111, 121 (1st Cir. 2012) (case involved New Jersey substantive law).

23. The most recent exposition of this view came in the case of *Cannon v. Wells Fargo Bank N.A.,* 2013 WL 132450 (N.D. Cal. January 9, 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.,* 2013 WL 132450 *12 (N.D. Cal. January 9, 2013).

The Alabama Supreme Court's decision in *Custer v. Homeside Lending, Inc.,* 858 So. 2d 233 (Ala. 2003) is often cited as being 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 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.

24. U.C.C. § 1-201(37).

25. *See, e.g.,* Black's Law Dictionary 1217 (Special Deluxe 5th ed. 1979)("A form of interest in property which provides that the property may be sold on default in order to satisfy the obligation for which the security interest is given.... The term 'security interest' means any interest in property acquired by contract for the purpose of securing payment or performance of an obligation or indemnifying against loss or liability."); 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.

26. *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.,* 2013 WL 132450 *12 (N.D. Cal. January 9, 2013).

> 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.
>
> ...
>
> 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.[27]

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

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

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.[28]

C. The Most Frequently Alleged Claims and Causes of Action in the force-placed insurance cases.

*1. **Breach of Contract.*** The most frequently alleged claim or cause of action in the force-placed insurance cases is breach of contract.[29] 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.[30]

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 Wells Fargo for their property *was over and above the replacement cost value*."[31]

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.[32] In the putative class action cases discussed here, involving claims resulting from the forced placement of insurance in the

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28. *E.g., Lass v. Bank of America, N.A.,* 695 F.3d 129, 138-39 & 139 n.19 (1st Cir. 2012)(case involved Massachusetts substantive law); *Cannon v. Wells Fargo Bank, N.A.,* 2013 WL 132450 *3 (N.D. Cal. January 9, 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 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.]

29. *E.g., Lass v. Bank of America, N.A.,* 695 F.3d 129, 135, 137 (1st Cir. 2012)(Massachusetts law); *Kolbe v. BAC Home Loans Servicing, LP,* 695 F.3d 111, 121-22 (1st Cir. 2012)(New Jersey law). 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 in this article, 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.,* 2012 WL 6176905 *16 (N.D. Cal. December 11, 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).

30. *Cannon v. Wells Fargo Bank N.A.,* 2013 WL 132450 *22 (N.D. Cal. January 9, 2013). *See McKenzie v. Wells Fargo Home Mort., Inc.,* 2012 WL 5372120 *20 n.12 (N.D. Cal. October 30, 2012; Spero, USMJ).

31. *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.]

mortgage context, the implied covenant of good faith and fair dealing is the covenant implied in *all* contracts.[33]

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.[34]

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,[35] Courts readily hold that such allegations state a claim of breach of the implied covenant upon which relief can be granted.[36]

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

32. As to the many features of Insurance Bad Faith generally, see DENNIS J. WALL, LITIGATION AND PREVENTION OF INSURER BAD FAITH (THIRD EDITION WEST PUBLISHING CO., 2013 SUPPLEMENT IN PROCESS). 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).

33. In one of the more recent decisions on this issue at this writing, a District Judge in the U.S. District Court for the Southern District of Florida has entered an Opinion and Order Denying a Motion to Dismiss in a Force-Placed Insurance Putative Class Action: *Martorella v. Deutsche Bank National Trust Co.,* 2013 WL 1137514 (S.D. Fla. March 18, 2013).

In pertinent part, the District Judge recognized the settled rule in Florida, as in most if not all other jurisdictions in the United States, that "[a] covenant of good faith and fair dealing is implied in every contract." *Martorella v. Deutsche Bank National Trust Co.,* 2013 WL 1137514 *5 (S.D. Fla. March 18, 2013). Here, the Mortgagor-Plaintiff specifically alleged that the "Defendants breached the [standard form] mortgage agreement and the covenant of good faith and fair dealing implied therein". *Martorella v. Deutsche Bank National Trust Co.,* 2013 WL 1137514 *3 (S.D. Fla. March 18, 2013). In Florida, again as in most U.S. jurisdictions, where a contracting party is vested with discretion by the contract, "the implied duty of good faith and fair dealing attaches as a gap-filling default." The implied covenant "fills the gaps" by imposing on the contracting party which is vested with discretion, a legally enforceable duty "to act in a commercially reasonable manner that satisfies the reasonable expectations of the parties." *Martorella v. Deutsche Bank National Trust Co.,* 2013 WL 1137514 *6 (S.D. Fla. March 18, 2013). Breach of the implied duty of good faith and fair dealing is enforceable at law in damages, and the Court held that such is the case here:

> Here, the force-placed insurance clause granted Defendants discretion in determining whether to purchase force-placed insurance after a policy had lapsed, and under what terms. Plaintiff's allegations that Defendants failed to observe reasonable limits in exercising their discretion to force-placing policies at grossly excessive premiums in exchange for kickbacks from the insurance carriers fully states a claim for breach of the covenant of good faith and fair dealing.

Martorella v. Deutsche Bank National Trust Co., 2013 WL 1137514 *6 (S.D. Fla. March 18, 2013).

Parenthetically, the Court held that the Defendants' attempt to have class action allegations 'dismissed' was inappropriate for resolution in a case where the class was not yet certified and the Plaintiffs have not even filed a Motion to Certify the Class. The Court declined to determine class certification "at this time." *Martorella v. Deutsche Bank National Trust Co.,* 2013 WL 1137514 *8 (S.D. Fla. March 18, 2013).

34. *See generally* WALL, LITIGATION AND PREVENTION OF INSURER BAD FAITH, *supra* note 32.

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

are routinely denied whenever a motion to dismiss a breach of contract claim would be denied.[37]

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.[38]

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."[39]

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.[40] 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.[41] 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 existence of an express contract between others as a defense to the plaintiff's unjust enrichment claim against the mortgage servicer.[42] 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

36. *E.g., Cannon v. Wells Fargo Bank, N.A.,* 2013 WL 764964 *12 (D.D.C. March 1, 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); *see, e.g., Lass v. Bank of America, N.A.,* 695 F.3d 129, 138 (1st Cir. 2012)(Massachusetts law); *Kolbe v. BAC Home Loans Servicing, LP,* 695 F.3d 111, 123 (1st Cir. 2012)(New Jersey law).

37. *E.g., Ellsworth v. U.S. Bank, N.A.,* 2012 WL 6176905 * 15, *18 (N.D. Cal. December 11, 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.").

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

39. *Kolbe v. BAC Home Loans Servicing, LP,* 695 F.3d 111, 123-24 (1st Cir. 2012)(applying New Jersey substantive law).

40. *E.g., Cannon v. Wells Fargo Bank, N.A.,* 2013 WL 764964 *13 (D.D.C. March 1, 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.").

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

42. *Cannon v. Wells Fargo Bank N.A.,* 2013 WL 132450 *23 (N.D. Cal. January 9, 2013).

insurance provision.[43]

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.[44]

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 plaintiff upon the defendant 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".[45]

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."[46] As in most cases, "whether a benefit was actually conferred is a factual question that cannot be resolved on a motion to dismiss."[47]

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.[48]

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."[49]

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."[50]

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*.[51]

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43. *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.

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

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

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

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

48. *Ellsworth v. U.S. Bank, N.A.,* 2012 WL 6176905 *19 (N.D. Cal. December 11, 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).

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

50. *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).

51. *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).

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.[52]

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"[53] and "substantive unconscionability,"[54] 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[55] and Florida law,[56] 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 not be determined short of trial or summary judgment,[57] 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."[58]

A conversion claim in a first-party case did not survive a Rule 12(b)(6) motion in the District of Columbia, however.[59]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."[60] 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."[61]

7. State Unfair/Unlawful/Fraudulent/Deceptive Practices Acts. A number of States have enacted statutes which reach commercial conduct which is variously

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

53. "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).

54. "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).

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

56. *Cannon v. Wells Fargo Bank N.A.,* 2013 WL 132450 *24 (N.D. Cal. January 9, 2013).

57. *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).

58. *Cannon v. Wells Fargo Bank N.A.,* 2013 WL 132450 *24 (N.D. Cal. January 9, 2013).

59. *Cannon v. Wells Fargo Bank, N.A.,* 2013 WL 764964 *19 (D.D.C. March 1, 2013).

60. *Cannon v. Wells Fargo Bank, N.A.,* 2013 WL 764964 *19 (D.D.C. March 1, 2013).

61. *Cannon v. Wells Fargo Bank, N.A.,* 2013 WL 764964 *19 (D.D.C. March 1, 2013).

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,[62] 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.[63]

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."[64] 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.[65] The Court accordingly held that the New Jersey plaintiff's complaint stated a claim for relief from an "an 'unlawful practice' under the CFA" and denied the defendant's motion to dismiss on that ground.[66]

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. Stat. Ann. §§ 201-1 *et seq.*"[67] 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.[68]

"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."[69]

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.[70] Applying what appear to be the same standards as are applied in Federal Courts to Rule 12(b)(6) motions to dismiss,[71] the Illinois Appellate Court reversed the trial court's order dismissing the complaint and remanded.[72] Addressing the plaintiff's Consumer

62. *Ellsworth v. U.S. Bank, N.A.,* 2012 WL 6176905 *19-*20 (N.D. Cal. December 12, 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.").

63. 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).

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

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

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

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

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

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

70. *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).

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,"[73] the defendant's "intention" that she rely on the act or practice,[74] and "it is undisputed that the occurrence of the alleged deception occurred during a course of conduct involving trade or commerce."[75] 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."[76] 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.[77]

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.[78]

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.[79]

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)".[80] 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)."[81] The Court ultimately denied the

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

72. 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, ¶25 at 687, 366 Ill. Dec. 586, ¶25 at 594 (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.

73. *Burress-Taylor v. American Sec. Ins. Co.,* 2012 Ill. App. (1st) 110554, 980 N.E.2d 679, ¶32 at 688-89, 366 Ill. Dec. 586, ¶32 at 595-96 (1st DCA, 5th Div., 2012).

74. *Burress-Taylor v. American Sec. Ins. Co.,* 2012 Ill. App. (1st) 110554, 980 N.E.2d 679, ¶33 at 689, 366 Ill. Dec. 586, ¶33 at 596 (1st DCA, 5th Div., 2012).

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

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

77. RESPA § 2602(3), 12 U.S.C. § 2602(3).

78. *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.,* 2013 WL 132450 *17-*18 (N.D. Cal. January 9, 2013); *McNeary-Calloway v. JP Morgan Chase Bank, N.A.,* 863 F. Supp. 2d 928, 952 (N.D. Cal. 2012)(Spero, USMJ). The status of the case law in April, 2013, however, did not prevent the Federal Consumer Financial Protection Bureau and four mortgage insurance companies from settling claims of improper "kickbacks" paid by the insurance companies to lenders who allegedly imposed the charges regardless of a prohibition against kickbacks in RESPA. *See, e.g.,* Press Release, "The CFPB Takes Action Against Mortgage Insurers to End Kickbacks to Lenders" (Consumer Financial Protection Bureau, April 4, 2013); Jim Puzzanghera, "Regulators Probing Alleged Mortgage Insurance Kickback Scheme" (Los Angeles Times Online at www.latimes.com, posted April 4, 2013).

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

80. *Cannon v. Wells Fargo Bank N.A.,* 2013 WL 132450 *15 (N.D. Cal. January 9, 2013).

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.[82]

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.

D. The Defenses raised in Rule 12(b)(6) motions in Federal putative class action cases of claims arising from force-placed insurance

There are three overall groups of defenses falling under this heading. 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)."[83] 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."[84] This includes real estate lending.[85] However, by Federal regulation, even conflicting State laws are 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.[86]

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.[87]

"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.[88]

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 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.[89]

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.[90]

In summary, preemption arguments based on the

81. *Cannon v. Wells Fargo Bank N.A.,* 2013 WL 132450 *15 (N.D. Cal. January 9, 2013).

82. *Cannon v. Wells Fargo Bank N.A.,* 2013 WL 132450 *17 (N.D. Cal. January 9, 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).

83. *Ellsworth v. U.S. Bank, N.A.,* 2012 WL 6176905 *8 (N.D. Cal. December 11, 2012)(Beeler, USMJ).

84. 12 U.S.C. § 24.

85. 12 U.S.C. § 371.

86. 12 C.F.R. § 34.4.

87. *Ellsworth v. U.S. Bank, N.A.,* 2012 WL 6176905 *9-*11 (N.D. Cal. December 11, 2012)(Beeler, USMJ).

88. *Ellsworth v. U.S. Bank, N.A.,* 2012 WL 6176905 *12 (N.D. Cal. December 11, 2012)(Beeler, USMJ).

89. 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.,* 2013 WL 132450 *20-*21 (N.D. Cal. January 9, 2013).

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.[91]

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.[92]

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 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.[93]

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.[94]

"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."[95] 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.[96] 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

90. *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).

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

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

93. *See, e.g., Ellsworth v. U.S. Bank, N.A.,* 2012 WL 6176905 *12 n.10 (N.D. Cal. December 11, 2012); *Morales v. Attorneys' Title Ins. Fund, Inc.,* 983 F. Supp. 1418, 1426 (S.D. Fla. 1997).

94. *Ellsworth v. U.S. Bank, N.A.,* 2012 WL 6176905 *13 (N.D. Cal. December 11, 2012)(Beeler, USMJ).

95. *Ellsworth v. U.S. Bank, N.A.,* 2012 WL 6176905 *13 (N.D. Cal. December 11, 2012)(Beeler, USMJ).

96. *Ellsworth v. U.S. Bank, N.A.,* 2012 WL 6176905 *14 (N.D. Cal. December 11, 2012)(Beeler, USMJ).

this particular insurance company and this particular rate."[97]

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.[98]

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 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.[99]

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.[100]

3. The Voluntary Payment Doctrine. 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 in this article 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.[101] "The voluntary payment doctrine is an affirmative defense that bars the recovery of money that was voluntarily paid with knowledge of the facts."[102]

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.[103]

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97. *Abels v. JPMorgan Chas 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).

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

99. *Cannon v. Wells Fargo Bank N.A.,* 2013 WL 132450 *9 (N.D. Cal. January 9, 2013).

100. 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).

101. As was noted earlier, 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.

102. *Ellsworth v. U.S. Bank, N.A.,* 2012 WL 6176905 *14 (N.D. Cal. December 11, 2012)(Beeler, USMJ).

103. *See, e.g., Kolbe v. BAC Home Loans Servicing, LP,* 695 F.3d 111, 125 (1st Cir. 2012)(applying New Jersey law); *Ellsworth v. U.S. Bank, N.A.,* 2012 WL 6176905 *14 (N.D. Cal. December 11, 2012)(Beeler, USMJ).

III. Class Action Certification of Force-placed Insurance Cases

A. Federal Rule of Civil Procedure 23, "Class Actions"

Federal Rule of Civil Procedure 23 governs class actions in Federal Courts. Rule 23 imposes six (6) requirements which must be met by plaintiffs in force-placed insurance cases:

> (a) PREREQUISITES. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
>
> (1) the class is so *numerous* that joinder of all members is impracticable;
>
> (2) there are *questions of law or fact common* to the class;
>
> (3) the claims or defenses of the representative parties are *typical* of the claims or defenses of the class; and
>
> (4) the *representative* parties will fairly and adequately protect the interests of the class.
>
> (b) TYPES OF CLASS ACTIONS. A class action may be maintained if Rule 23(a) is satisfied and if:
>
> * * *
>
> (3) the court finds that *the questions of law or fact common to class members predominate* over any questions affecting only individual members, ***and*** that a class action is *superior* to other available methods for fairly and efficiently adjudicating the controversy.[104]

This is not an article about class action procedure, except as class action procedure relates to cases which involve force-placed insurance issues. There are very few such cases, which are here supplemented with a brief foray into pertinent decisions on class action procedure which are likely to affect whether force-placed insurance cases are certified as class actions in Federal Court, or not. This brief examination brings us back to our starting point, namely, the six requirements pertinent to force-placed insurance class action cases and which are contained in the emphasized language of Rule 23, above: numerosity, "commonality," typicality, adequate representation, predominance, and superiority.

1.*"Numerosity".* Most of the handful of force-placed insurance cases in which class action certification has been sought in Federal cases, have been filed in U.S. District Courts of the Eleventh Circuit. Briefly stated, the Eleventh Circuit Court of Appeals has stated a preference for a satisfactory class size of more than 21 or perhaps more than 40 class members.[105] This broad preference has always it seems been found to be complied with in force-placed insurance cases whether or not a class action has ultimately been certified.[106]

2."Commonality."[107] This Rule 23 requirement pertains to questions of law or fact which are "common" to the putative class.[108] This requirement illustrates a split in class action cases including those involving force-placed insurance.

One focus of "commonality" is that the class members have suffered the same injury as a result of a common practice or procedure. Here the focus has been found favorable to certifying a class of force-placed insurance plaintiffs:

> The Plaintiffs argue that all members of the proposed class were injured in the same manner, namely by being charged inflated premiums for the force-placed insurance.

104. Fed. R. Civ. P. 23(a) & (b)(3). [Emphasis added.]

105. *E.g., Gordon v. Chase Home Finance, LLC,* 2013 WL 436445 *4 (M.D. Fla. February 5, 2013); In re *Checking Account Overdraft Lit.,* 281 F.R.D. 667, 672 (S.D. Fla. 2012).

106. *E.g., Gordon v. Chase Home Finance, LLC,* 2013 WL 436445 *4 (M.D. Fla. February 5, 2013); *Williams v. Wells Fargo Bank, N.A.,* 280 F.R.D. 665, 671-72 (S.D. Fla. 2012).

107. "Commonality" has generally been defined as of or relating to the people in common taken as a whole. *See* Webster's New World Collegiate Dictionary 281 (3d ed. 1996). It does not have that meaning in class action procedure, as will be seen.

108. Fed. R. Civ. P. 23(a)(2).

* * *

> The essence of this case, as alleged, is a common scheme to systematically, and without any individual consideration, force-place insurance at an excessive rate to every person whose self-placed property insurance had elapsed.

* * *

> Here, the ultimate question of liability is whether the force-placed insurance premiums were unlawfully inflated and excessive.... Any distinctions between class members with respect to theories of liability, as argued by Wells Fargo and QBE, could be adequately addressed through the use of discrete subclasses, if necessary at all.[109]

The District Judge who made this ruling stated at one and the same time in February, 2012, that he was following the United States Supreme Court decision in *Wal-Mart Stores, Inc. v. Dukes,*[110] insofar as requiring the plaintiffs to demonstrate that the class members have suffered the same injury, yet distinguishing the *Dukes* majority opinion by pointing out that the instant force-placed insurance case will provide the same answer to every plaintiff without requiring "a secondary factual inquiry" as in *Dukes.*[111]

The split in force-placed insurance cases as to whether District Courts certify class actions, can be said to be traced to whether the case requires a "secondary factual inquiry" as in *Dukes.* However, it is submitted that in 2013, the "secondary factual inquiry" is best understood as a judicial impediment to certifying class actions dependent on an early judicial determination of the *merits*, without any jury in any case, i.e., focusing not on whether the plaintiffs' case presents questions of common law or fact but whether their claim or claims will *succeed*. In other words, the only "question" worth considering in this view clearly seems to be whether the plaintiffs can *prove recoverable damages*. In an area where a small number of Courts are sometimes complicit in the efforts of parties to redefine "security interest" to mean "investment," so that the purpose of requiring Mortgage Insurance to protect a lender's "security interest" must simultaneously be restated as protecting the lender's "investment," this development is not at all surprising.

It should however be clearly identified.

This is an opportune time for a brief digression into class action procedure, in which parallel developments are also taking place recently. In the cited case of *Wal-Mart Stores, Inc. v. Dukes,*[112] Justice Scalia attracted the votes of four of the eight other Justices with this opinion which appears to impose a gloss on Rule 23 that would make Federal class certification dependent on proof of a likely successful outcome:

> Commonality requires the plaintiff to *demonstrate* that the class members "have suffered the same injury," [citation omitted]. *This does not mean merely that they have all suffered a violation of the same provision of law.... Frequently that "rigorous analysis" will entail some overlap with the merits of the plaintiffs' underlying claim. That cannot be helped.*[113]

On February 5, 2013, a District Judge in *Gordon v. Chase Home Finance, LLC,*[114] appeared to follow the *Dukes* reasoning to its logical conclusion in a force-placed insurance case. Citing *Dukes,* the District Court held that the class would not be certified in that case because the two asserted classes of plaintiffs, one consisting of 33,000 persons and the other consisting of 350,000 persons, did not sign a common contract:

109. *Williams v. Wells Fargo Bank, N.A.,* 280 F.R.D. 665, 672 (S.D. Fla. 2012).
110. *Wal-Mart Stores, Inc. v. Dukes,* 131 S. Ct. 2541 (U.S. 2011).
111. *Williams v. Wells Fargo Bank, N.A.,* 280 F.R.D. 665, 672 (S.D. Fla. 2012).
112. *Wal-Mart Stores, Inc. v. Dukes,* 131 S. Ct. 2541 (U.S. 2011).
113. *Wal-Mart Stores, Inc. v. Dukes,* 131 S. Ct. 2541, 2551 (U.S. 2011). [Emphasis added.]
114. *Gordon v. Chase Home Fin., LLC,* 2013 WL 436445 (M.D. Fla. February 5, 2013).

> Upon due consideration, the Court determines that this suit is not amenable to resolution on a classwide basis. Plaintiffs fall short of satisfying the required element of *commonality* as Plaintiffs have not *demonstrated* the existence of a *common contract* signed by all members of the proposed classes.[115]

On February 27, 2013, the United States Supreme Court held that "merits determinations" of the claims asserted by a putative class are not a part of the "commonality" determination. In a 6-to-3 decision, Justice Ginsburg wrote for a majority which included Chief Justice Roberts[116] and in which Justices Scalia, Kennedy, and Thomas dissented. In its decision in that case, *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds,*[117] the Court was confronted with a theory of liability that starkly outlined the "question" inherent in the commonality requirement. In this decision, the important focus of Rule 23 on "questions" of common law or fact involved the plaintiffs' *common theory of liability*, not whether they would succeed and recover their claimed damages:

> While Connecticut Retirement certainly must prove materiality to prevail on the merits, we hold that such proof is not a prerequisite to class certification. Rule 23(b)(3) requires a showing that *questions* common to the class predominate, not that those questions will be answered, on the merits, in favor of the class. *Because materiality is judged according to an objective standard*, the materiality of Amgen's alleged misrepresentations and omissions is a question common to all members of the class Connecticut Retirement would represent. *The alleged misrepresentations and omissions, whether material or immaterial, would be so equally for all investors composing the class.* As vital, the plaintiff class's inability to prove materiality would not result in individual questions predominating. Instead, a failure of proof on the issue of materiality would end the case, given that materiality is an essential element of the class members' securities-fraud claims.[118]

The potential importance of this distinction to certification of force-placed insurance cases as class actions is obvious. The predominant theories of liability for wrongfully force-placed insurance in the decided cases, as we have seen in this article, each require a showing that *questions* common to the class will predominate in all similar claims by all members of the class, regardless of how those common questions may be decided in a given case.

In *Amgen*, the Court judicially limited *Dukes* in this regard:

> The only issue before us in this case is whether Connecticut Retirement has satisfied Rule 23(b)(3)'s requirement that "questions of law or fact common to class members predominate over any questions affecting only individual members." Although we have cautioned that a court's class-certification analysis must be "rigorous" and may "entail some overlap with the merits of the plaintiff's underlying claim," *Wal–Mart Stores, Inc. v. Dukes,* 564 U.S. __, __, 131 S.Ct. 2541, 2551, 180 L.Ed.2d 374 (2011) (internal quotation marks omitted), Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage. Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are

115. *Gordon v. Chase Home Fin., LLC,* 2013 WL 436445 *5 (M.D. Fla. February 5, 2013). [Emphasis added.]

116. This is at least the second public occasion in less than a year on which Chief Justice Roberts has voted for a position contrary to Justice Scalia's, one previous such occasion coming on June 28, 2012 in the Chief Justice's Opinion for the Court in the decision which upheld the "mandate" provision of the Affordable Care Act. *National Fed. Indep. Bus. v. Sebelius,* 567 U.S. ___, 132 S. Ct. 2566 (2012).

117. *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds,* 133 S.Ct. 1184 (U.S. 2013).

118. *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds,* 133 S.Ct. 1184, 1191 (U.S. 2013). [Emphasis added. Italics by the Court.]

satisfied.[119]

On March 27, 2013, the Court issued another class action decision. In another 5-to-4 result, Justice Scalia attracted the same four Justices from the remaining eight other Justices to vote for his opinion in *Comcast Corp. v. Behrend*[120] as he attracted to vote for his opinion in *Dukes.* In *Comcast,* the same majority as in *Dukes* restored the gloss which *Dukes* temporarily imposed on the "commonality" requirement of Rule 23, a merits inquiry. In that case, the majority held that Federal class action status would not be conferred on a class of plaintiffs in an antitrust suit who alleged that they are subscribers of the defendant's cable television services:

> Respondents' class action was improperly certified under Rule 23(b)(3). By refusing to entertain arguments against respondents' damages model that bore on the propriety of class certification, simply because those arguments would also be pertinent to the merits determination, the Court of Appeals ran afoul of our precedents requiring precisely that inquiry. And it is clear that, under the proper standard for evaluating certification, respondents' model falls far short of *establishing that damages are capable of measurement on a classwide basis*. Without presenting another methodology, respondents cannot show Rule 23(b)(3) predominance: Questions of *individual damage calculations* will inevitably overwhelm questions common to the class.[121]

The effect of this resurgent gloss on class certification decisions in force-placed insurance cases, will be discussed below in connection with a related requirement, that of "predominance".

3. ***Typicality.*** As has been discussed earlier in this article, there are a variety of claims alleged by plaintiffs in force-placed insurance cases. However, the underlying theory of liability is always the same. It has been held that this fact requires a finding that the "typicality" requirement of Rule 23 is met in such a case:

> Regardless of which claim a class member were seeking to recover under, however, the theory of liability is identical, namely that Wells Fargo and QBE colluded and charged the class member excessive and inflated insurance premiums for their force-placed insurance.[122]

4. *Adequate representation.* Satisfying this requirement will depend on the plaintiffs and their counsel in each case. However, it is worth a passing mention here that this requirement too has been found satisfied in force-placed insurance Federal class action cases even when the class ultimately was not certified.[123]

5. *Predominance in commonality.* This requirement, imposed by Rule 23(b)(3),[124] links the concept of predominance to the questions of law or fact common to the class as required by Rule 23(a)(4).[125] This was the publicly stated reason for decision

119. *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds,* 133 S.Ct. 1184, 1194-95 (U.S. 2013).

120. *Comcast Corp. v. Behrend,* 133 S. Ct. 1426 (U.S. 2013).

121. *Comcast Corp. v. Behrend,* 133 S. Ct. 1426, 1432-33 (U.S. 2013). [Emphasis added.]

122. *Williams v. Wells Fargo Bank, N.A.,* 280 F.R.D. 665, 673 (S.D. Fla. 2012).

123. *E.g., Williams v. Wells Fargo Bank, N.A.,* 280 F.R.D. 665, 673 (S.D. Fla. 2012)(case involved force-placed insurance claims; class certified). Rule 23 of course requires that "the representative *parties* will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). [Emphasis added.] In *Kunzelmann v. Wells Fargo Bank, N.A.,* 2013 WL 139913 *6 (S.D. Fla. January 10, 2013), the District Judge expressly observed that the named plaintiff in that case, "Mr. Kunzelmann[,] is represented by skilled *counsel,*" [emphasis added], despite the same Judge's further comments which are not of the same kind or stripe. *See Kunzelmann v. Wells Fargo Bank, N.A.,* 2013 WL 139913 *11 (S.D. Fla. January 10, 2013). The Federal Judge declined to make a finding on adequacy of representation by the representative parties in *Kunzelmann*, although the Court ultimately denied class action certification in that case regardless. *Kunzelmann v. Wells Fargo Bank, N.A.,* 2013 WL 139913 *6 (S.D. Fla. January 10, 2013)("Since I find that the requirements of commonality and typicality are not met and that the predominance and superiority requirements of Rule 23(b)(3) cannot be demonstrated, I decline to make a finding as to adequacy.").

124. Fed. R. Civ. P. 23(b)(3). This provision is quoted in pertinent part, *supra.*

discussed above by the 5-to-4 majority in *Comcast*, that the class action in that case was improperly certified because common questions of law or fact did not "predominate"; rather, "[q]uestions of *individual damage calculations* will inevitably overwhelm questions common to the class."[126]

The requirement of predominance in commonality is precisely the basis for decision as well in some of the available decisions denying class certification in force-placed insurance cases *depending on the classes which the plaintiffs requested to be certified.* The District Court in the case of *Gordon v. Chase Home Finance, LLC,*[127] refused to certify two classes, "one concerning force-placed insurance and one concerning excess flood insurance requirements," both requested classes to consist of "United States residents with mortgages owned or serviced by" the defendants.[128]

With respect to the plaintiffs' claims of breach of contract and asserted breach of "implied warranty of good faith and fair dealing claims" a defendant and the Court agreed that predominance was lacking because "'each borrower's claim necessarily depends on the particular language of each mortgage.'"[129] Similarly, claims for alleged breaches of fiduciary duties would also "rise or fall" depending not only on each plaintiff's relationship with the defendant but "may also change depending on the state of contracting."[130] Nor did the plaintiffs' alleged unconscionability claims predominate even when limited to Florida law, apparently, for similar reasons including "because the Court lacks a homogenous contract to evaluate for the presence of egregious terms."[131]

Class action certification was similarly denied in the case of *Kunzelmann v. Wells Fargo Bank, N.A.*[132] The plaintiff in that case requested certification of two classes. We know from a previous appearance before the same District Judge in the *Kunzelmann* case that the plaintiff's complaint contained two counts: alleged breach of an implied covenant of good faith and fair dealing, and unjust enrichment.[133] The two classes for which the plaintiff requested certification was, *one*, what again was to be a *nationwide* class of "borrowers with properties throughout the United States" and who claimed "unjust enrichment". The *second* set was to be a subclass of just "borrowers with properties in Florida" and who claimed "breach of the implied covenant of good faith and fair dealing."[134]

The Court denied certification of the *nationwide* class in that case in part because "the substantial variations in law among the fifty states" would prevent common questions from predominating. The Court denied certification of the *Florida subclass* in part because the Court interpreted Florida case law to require individualized determinations which would have the effect of preventing predominance in a class action:

> While Plaintiff argues that this may be that rare case, it seems to be a textbook example of why such a claim can not be certified. First, a claim for unjust enrichment or a claim based on a breach of the implied covenant of good faith and fair dealing requires examination of the particular circumstances of an individual case as well as the expectations of the parties to determine whether an inequity would result or whether their reasonable expectations were met.[135]

Resolution of a Rule 12(b)(6) motion to dismiss does not necessarily determine the outcome of class action certification. The same Court previously denied the

125. Fed. R. Civ. P. 23(a)(4). This provision is also quoted, *supra*.
126. *Comcast Corp. v. Behrend,* 133 S. Ct. 1426, 1433 (U.S. 2013). [Emphasis added.]
127. *Gordon v. Chase Home Fin., LLC,* 2013 WL 436445 (M.D. Fla. February 5, 2013).
128. *Gordon v. Chase Home Fin., LLC,* 2013 WL 436445 *3, *8, *11 (M.D. Fla. February 5, 2013).
129. *Gordon v. Chase Home Fin., LLC,* 2013 WL 436445 *8-*9 (M.D. Fla. February 5, 2013).
130. *Gordon v. Chase Home Fin., LLC,* 2013 WL 436445 *10 (M.D. Fla. February 5, 2013).
131. *Gordon v. Chase Home Fin., LLC,* 2013 WL 436445 *10 (M.D. Fla. February 5, 2013).
132. *Kunzelmann v. Wells Fargo Bank, N.A.,* 2013 WL 1339913 (S.D. Fla. January 10, 2013).
133. *Kunzelmann v. Wells Fargo Bank, N.A.,* 2012 WL 2003337 *5, *6 (S.D. Fla. June 4, 2012).
134. *Kunzelmann v. Wells Fargo Bank, N.A.,* 2013 WL 1339913 *2 (S.D. Fla. January 10, 2013). [Emphasis added.]
135. *Kunzelmann v. Wells Fargo Bank, N.A.,* 2013 WL 1339913 *6 (S.D. Fla. January 10, 2013).

defendants' Rule 12(b)(6) motion to dismiss in the same case.[136]

In addition, in denying class certification of force-placed insurance claimants in *Kunzelmann,* the Court took account of defenses available to the defendants. In particular, the Court held, "differences between the states in their application of the filed-rate doctrine render certification of a nationwide class improper."[137] Previously, the Court denied the defendants' Rule 12(b)(6) motion to dismiss because the filed rate doctrine did not apply:

> I find that in this case Plaintiff's claims are not barred by the filed rate doctrine because he is not challenging the rates filed by Defendants' insurers. Rather, Plaintiff challenges the manner in which Defendants select insurers, the manipulation of the force-placed insurance process, and the impermissible kickbacks that were included in the premium. (DE 37 at ¶ 21-36, 40, 53, 62, 78.) Accordingly, Plaintiff's claims are not barred by the filed rate doctrine.[138]

In holding that the filed rate doctrine did not apply to the force-placed insurance claims before the Court, the *Kunzelmann* Court was holding squarely with the mainstream of Federal Courts confronting Rule 12(b)(6) motions to dismiss in force-placed insurance cases as to the filed rate doctrine: The filed rate doctrine does not apply to such allegations. The next year, when the same Court discussed a doctrine which the Court had already held did not apply, the Court was of the view that the inapplicable doctrine would "render the class unmanageable."[139]

It is also of more than passing interest here, that Mr. Kunzelmann was unlike most of his putative class members. (Therefore, he could not meet the typicality requirement for that reason in that case.) *Mr. Kunzelmann paid the premium for the insurance placed upon him by force by his lender whereas most of the putative class members explicitly did not.*[140]

That was all in early 2013. In 2012, in contrast, a more specific, concentrated class of plaintiffs was certified in a different force-placed insurance case in the same District as the one in which the 2013 *Kunzelmann* decision was made. Although the 2013 *Kunzelmann* decision is the later of the two and although it involved an identical defendant, it never mentioned the decision. The 2012 decision in question is in the case of *Williams v. Wells Fargo Bank, N.A.*[141]

In *Williams*, a different District Judge in the same District had no problem certifying this compact class of force-placed insurance plaintiffs:

> This Court certifies the following class to proceed under the Counts remaining in the Plaintiffs' Amended Complaint:
>
> > All borrowers that had mortgages with and/or serviced by Wells Fargo Bank, on property located within the State of Florida, that were charged, and who either paid or who still owe, premiums for a force-placed insurance policy within the applicable statute of limitations through April 7, 2011 ("the Class Period"), unless (1) the lender has obtained a foreclosure judgment against the borrower; (2) the borrower has entered into a short-sale

136. The Court denied the defendants' earlier Rule 12(b)(6) motion to dismiss because the Court held that there were sufficiently pleaded facts as to the count for alleged breach of an implied covenant of good faith and fair dealing, concerning contravention of the parties' reasonable expectations, no competitive bids, and kickbacks, and Rule 8(d) allows for alternative pleading even if there was an express contract at issue which would preclude relief on the unjust enrichment claim. *Kunzelmann v. Wells Fargo Bank, N.A.,* 2012 WL 2003337 *5-*6 (S.D. Fla. June 4, 2012).

137. *Kunzelmann v. Wells Fargo Bank, N.A.,* 2013 WL 1339913 *12 (S.D. Fla. January 10, 2013).

138. *Kunzelmann v. Wells Fargo Bank, N.A.,* 2012 WL 2003337 *3 (S.D. Fla. June 4, 2012).

139. *Kunzelmann v. Wells Fargo Bank, N.A.,* 2013 WL 1339913 *6 (S.D. Fla. January 10, 2013).

140. *Kunzelmann v. Wells Fargo Bank, N.A.,* 2013 WL 1339913 *4, *9 (S.D. Fla. January 10, 2013). It is also interesting to note that the insurance in question in a previous iteration before the same District Judge was consistently called only "force-placed insurance," *Kunzelmann v. Wells Fargo Bank, N.A.,* 2012 WL 2003337 (S.D. Fla. June 4, 2012), while in the iteration under discussion it was consistently called only "lender-placed insurance".

141. *Williams v. Wells Fargo Bank, N.A.,* 280 F.R.D. 665 (S.D. Fla. 2012).

> agreement with the lender; (3) the borrower has granted a deed in lieu of foreclosure to the lender; (4) the borrower has entered into a loan modification agreement with the lender; (5) the borrower has filed a claim for damages which has been paid in full or part by the force-placed insurer; or, (6) the cost of force-placed insurance was canceled out in full.[142]

The "Counts remaining in the Plaintiffs' Amended Complaint," were alleged "claims of unjust enrichment and breach of the covenant of good faith and fair-dealing," as to which the plaintiffs limited a proposed class "to only Florida properties."[143]

With specific focus on certifying the class of *Florida unjust enrichment claimants* in this force-placed insurance case, the *Williams* Court rejected as irrelevant whether individual claimants may have been aware of the defendants' alleged injustice, in basic terms, when addressing potential reasons for denying certification:

> Wells Fargo and QBE argue that an individuated inquiry will be necessary to determine whether class members were aware that force-placed insurance would be more expensive than self-placed coverage. The Defendants are incorrect in this assertion. The Plaintiffs claim is that Wells Fargo and QBE secretly colluded to artificially and unjustly inflate the cost of the force-placed insurance. Therefore, it is not relevant whether a particular class member was aware that force-placed insurance is generally more expensive because the claim in this case is not just that the force-placed insurance was more expensive, but that the force-placed insurance was artificially and unjustly more expensive due to the illicit actions of Wells Fargo and QBE.[144]

As noted, the *Williams* Court certified a class of Florida plaintiffs pursuing claims for alleged breach of the implied covenant of good faith and fair dealing in this force-placed insurance case.[145] In contrast, the *Kunzelmann* Court in the same District refused to certify a similar class, holding that Florida law requires "a fact intensive inquiry" for claimed violations of an implied covenant of good faith and fair dealing.[146] "Like the claim for unjust enrichment," the *Kunzelmann* Court ruled when denying class certification, "the need to examine the state of mind of each borrower, including awareness, expectations, and conduct requires individualized scrutiny incompatible with class treatment."[147] While those perceived needs may or may not apply in jurisdictions outside of Florida, they do not apply in Florida actions based either on unjust enrichment, or on breach of an implied covenant of good faith and fair dealing. Those perceived needs may be justifications for denying certification of a national class, as in *Gordon* and as in *Kunzelmann,* but they do not exist in Florida classes of plaintiffs presenting those claims as in *Williams* or in other, non-force-placed insurance Federal class actions.[148]

6. Superiority. As might be expected, a national

142. *Williams v. Wells Fargo Bank, N.A.,* 280 F.R.D. 665, 675-76 (S.D. Fla. 2012). [Emphasis added.]

143. *Williams v. Wells Fargo Bank, N.A.,* 280 F.R.D. 665, 669 (S.D. Fla. 2012). [Emphasis added.]

144. *Williams v. Wells Fargo Bank, N.A.,* 280 F.R.D. 665, 674 (S.D. Fla. 2012).

145. *See Williams v. Wells Fargo Bank, N.A.,* 280 F.R.D. 665, 669, 675-76 (S.D. Fla. 2012).

146. *Kunzelmann v. Wells Fargo Bank, N.A.,* 2013 WL 139913 *9 (S.D. Fla. January 10, 2013).

147. *Kunzelmann v. Wells Fargo Bank, N.A.,* 2013 WL 139913 *10 (S.D. Fla. January 10, 2013).

148. If it were otherwise, there could never be *any* Federal class actions in which a class is certified consisting of plaintiffs pursuing any claims for alleged violations of an implied covenant of good faith and fair dealing, yet there are. Besides the *Williams* force-placed insurance class action of Florida real property owners which is discussed at length in the text, a class and *thirteen* subclasses of plaintiffs were certified including claimants who alleged bad faith, unjust enrichment, unconscionability and various statutory claims under the laws of Connecticut, New Jersey, Pennsylvania and Vermont, against banks in connection with their overdraft fees activity, in In re *Checking Account Overdraft Lit.,* 281 F.R.D. 667 (S.D. Fla. 2012). In particular as to bad faith claims apparently including under the laws of jurisdictions in addition to Florida, the Court said: "To the contrary, breach of the duty of good faith and fair dealing may be shown by class-wide evidence of a defendant's subjective bad faith or objectively unreasonable conduct." In re *Checking Account Overdraft Lit.,* 281 F.R.D. 667, 682 (S.D. Fla. 2012).

class action of force-placed insurance plaintiffs has been found not to be superior to individual determinations of individual claims under the laws of different jurisdictions,[149] whereas a Florida class of plaintiffs with the same types of claims has been affirmatively found to be superior to individual resolutions of those claims in separate and discrete lawsuits.[150]

B. Federal Class Action Fairness Act ("CAFA").

Plaintiffs who do not wish to have their putative class actions filed in state courts treated involuntarily as Federal class actions, and defendants who do wish to have such putative class actions filed in state courts decided in Federal District Courts instead, should all be aware of the Federal "Class Action Fairness Act" or CAFA. Congress added a so-called "Class Action Fairness Act" to what previously was the statute which authorized Federal Courts to exercise original jurisdiction in cases between citizens of different States, in basic and simple terms.[151]

CAFA authorized the District Courts to assume original jurisdiction in class actions "if the class has more than 100 members, the parties are minimally diverse, and the 'matter in controversy exceeds the sum or value of $5,000,000.'"[152] To determine whether a given controversy exceeds the sum of $5,000,000.00, "'the claims of the individual class members shall be aggregated.'"[153]

No force-placed insurance case has yet been found in which CAFA issues were raised or addressed. Given the relatively small amounts at issue in force-placed insurance cases—for example, the monthly premium payments for force-placed insurance of $276.00,[154] or an additional monthly charge of $237.00,[155] or $1,743.00 for six months of premiums,[156] or $1,575.00 added to a total loan balance due,[157] which were all sums that were previously mentioned in this article—it seems likely that the classes of plaintiffs would have to include as many as half a million people or more in order to satisfy the CAFA requirement of a sum in controversy which exceeds $5,000,000.00.

Further, a recent case which did not involve force-placed insurance but did involve somewhat analogous issues is instructive. In *Cicero-Berwyn Elks Lodge No. 1510 v. Philadelphia Insurance Co.,*[158] a District Court dealt with the defendant insurance company's removal of a class action from Illinois State Court. The proposed class consists of some seven hundred (700) lodges against the former insurance company. "The complaint alleges that Philadelphia Insurance overcharged the lodges for insurance contracts that it issued to them."[159]

With regard to the in-excess-of-$5,000,000.00 jurisdictional requirement of CAFA, the Court pointed out that the only evidence before it as to the recoverable total amount of the plaintiffs' claims is what they alleged in their complaint and amended complaint, or a total of some $750,000.00. Therefore CAFA does not apply in such a case, the Court held.[160]

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149. *Gordon v. Chase Home Finance, LLC,* 2013 WL 436445 *11 (M.D. Fla. February 5, 2013).

150. *Williams v. Wells Fargo Bank, N.A.,* 280 F.R.D. 665, 675 (S.D. Fla. 2012).

151. CAFA is found in 28 U.S.C. § 1332(d)-(e).

152. *Standard Fire Ins. Co. v. Knowles,* 133 S. Ct. 1345, 1348 (U.S. 2013).

153. *Standard Fire Ins. Co. v. Knowles,* 133 S. Ct. 1345, 1348 (U.S. 2013). It was unanimously held in *Standard Fire* that the plaintiffs and the defendants cannot confer original jurisdiction on a District Court under CAFA simply by stipulating that the amount in controversy exceeds the sum of $5,000,000.00.

154. *Ellsworth v. U.S. Bank, N.A.,* 2012 WL 6176905 *2-*3 (N.D. Cal. December 11, 2012).

155. *See Kolbe v. BAC Home Loans Servicing, LP,* 695 F.3d 111, 114-15 (1st Cir. 2012)(case involved New Jersey substantive law).

156. *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).

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

158. *Cicero-Berwyn Elks Lodge No. 1510 v. Philadelphia Ins. Co.,* 2013 WL 1385675 (N.D. Ill. April 4, 2013).

159. *Cicero-Berwyn Elks Lodge No. 1510 v. Philadelphia Ins. Co.,* 2013 WL 1385675 *1 (N.D. Ill. April 4, 2013).

CONCLUSION

The continued viability of any action arising out of force-placed insurance will depend on whether mortgagees and their servicers are successful in silently altering the legally accepted understanding of "security interest". It is only for the protection of a lender's security interest that standard mortgage documents allow the forced placement of insurance necessary to protect that interest. If the understanding of such a security interest silently morphs from the interest of the lender in receiving any remaining proceeds of the loan for which the borrower gave the lender a mortgage, to an understanding that the term now instead should mean to protect the value of a bank's or other lender's investment, then there will in all likelihood be no causes of action or claims available, either, as a result of force-placed insurance.

If such causes of action and claims remain viable, however, then putative class actions involving force-placed insurance will have to meet the evolving requirements of the applicable rules of civil procedure and statutes. Most such class actions are filed now in Federal District Courts, which means that they are subject to the requirements of Federal Rule of Civil Procedure 23, possibly the Federal Class Action Fairness Act, and the pronouncements so far of possibly five Justices of the United States Supreme Court. The adjudication of Federal force-placed insurance class actions is still in its early stages.

An effort has been made to plot the likely and potential courses of that adjudication as Federal Judges face increasing numbers of force-placed insurance class action cases. If this article is of assistance to Courts and mortgagees and lenders and their counsel in resolving such issues, then it will have been worth the cost. If the amounts involved in these cases are kept near to our thoughts, then it must truly be said that whether our Courts will do justice requires attention:

> Since the damage amounts allegedly owed to each individual defendant are relatively low—especially as compared to the costs of prosecuting the types of claims in this case involving complex, multi-level business transactions between sophisticated Defendants—the economic reality is that many of the class members would never be able to prosecute their claims through individual lawsuits.[161]

160. *Cicero-Berwyn Elks Lodge No. 1510 v. Philadelphia Ins. Co.,* 2013 WL 1385675 *1 (N.D. Ill. April 4, 2013). The Court further held in that case that the amounts recoverable under the individual plaintiffs' claims cannot be aggregated for "ordinary" or non-CAFA purposes. Under that calculation, no individual plaintiff's claim meets the $75,000.00 threshold for diversity jurisdiction. *Cicero-Berwyn Elks Lodge No. 1510 v. Philadelphia Ins. Co.,* 2013 WL 1385675 *2-*4 (N.D. Ill. April 4, 2013). "The court therefore concludes that it lacks subject matter jurisdiction and must remand the case to Illinois state court." *Cicero-Berwyn Elks Lodge No. 1510 v. Philadelphia Ins. Co.,* 2013 WL 1385675 *6 (N.D. Ill. April 4, 2013).

161. *Williams v. Wells Fargo Bank, N.A.,* 280 F.R.D. 665, 675 (S.D. Fla. 2012).

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