CENTER for ECONOMIC JUSTICE | FAIR ACCESS FAIR TREATMENT

Supplemental Comments of the Center for Economic Justice to the

NAIC Creditor-Placed Model Review Working Group

July 22, 2016

The Center for Economic Justice submits these supplemental comments to respond to the working group's request during the last conference call for information on litigation decisions regarding the inclusion of insurance tracking in LPI rates and to respond to the July 21, 2016 comment letter of Allied Solutions.

Court Decisions Regarding Inclusion of Insurance Tracking Expenses In LPI Rates

During the last call, industry suggested that the issue of whether insurance tracking is reasonably included in lender-placed insurance (LPI) rates had been addressed in court decisions about LPI litigation. This assertion is incorrect. First, the majority of LPI class actions in the past few years have survived insurer and lender/servicer motions to dismiss on the basis of the filed rate doctrine. Attached is a plaintiff's appeal of a district court's granting of a motion to dismiss on the basis of the filed rate doctrine. The brief identifies some two dozen actions in which the filed rate doctrine has been rejected.

Second, the filed rate doctrine defense is an argument that a borrower's challenge to the lender/servicer's LPI charges to the borrower is a challenge to rates approved by state insurance regulators. As explained below, this opinion from the 2nd Circuit Court of Appeals in *Rothstein* is based on a factually incorrect description of the LPI policy and placement and charging process.

In any event, the filed rate doctrine defense rests on the view that challenge to the amounts a lender/service charges a borrower for LPI is a challenge to the approved LPI rates. This defense and the court decisions agreeing with the filed rate doctrine argument do not address the issue of whether insurance tracking is a reasonable cost to include in LPI rates or in LPI charges by a lender/servicer to a borrower. On the other hand, the court decisions dismissing the filed rate doctrine argument have accepted the claim that LPI charges by a lender/servicer to a borrower are inflated due to kickbacks, such as the inclusion of tracking expenses in LPI charges to a borrower.

While the attached brief and the issue of whether the filed rate doctrine is implicated in the LPI class actions are interesting, they have no bearing on the activities of this working group regarding the exclusion of tracking expenses from LPI rates. Insurance regulators have the authority to exclude unreasonable expenses from LPI rates filed by insurers. Stated differently, none of the court cases involving LPI litigation direct state regulators to include or exclude tracking expenses from LPI rates. While some of the cases result in the LPI charges by a lender/servicer to a borrower excluding tracking expenses, such decisions involve the banking transaction between a lender/lender/servicer and a borrower and are not directed at insurance regulators.

The Second Circuit's Opinion in Rothstein v. Balboa

I have reviewed the United States Court of Appeals for the Second Circuit opinion in *Rothstein v. Balboa*. The Second Circuit's conclusion that the filed-rate doctrine applies to LPI is based on a factually-inaccurate description of LPI. The Second Circuit described LPI charges to borrowers as "passed through an intermediary" and, consequently, a challenge to the LPI kickbacks by borrowers is a challenge to insurance regulators' approval of LPI rates. As explained above, LPI charges are not "pass-throughs." The Court stated:

> The filed rate doctrine is not limited to transactions in which the ratepayer deals directly with the rate filer. The doctrine operates notwithstanding an intermediary that passes along the rate.
>
> The distinction between an "A-to-B" transaction and an "A-to-B-to-C" transaction is especially immaterial in the LPI context because LPI travels invariably "A-to-B-to-C."

The description of LPI premium charges by an LPI insurer to a lender/servicer and a lender/servicer's subsequent charge to a borrower for LPI is, in fact, not the A to B to C transaction explained by the Court. As explained below with the comparison between credit life insurance and LPI, credit life insurance is an example of the A to B to C transaction. But that description fails for LPI because there is no requirement that the lender/servicer charge the borrower for LPI, because there are examples of LPI insurance – blanket LPI – for which no charge is assessed individual borrowers and because lender/servicers are not subject to regulation by state insurance regulators.

A challenge to kickbacks in LPI charges by the lender/servicer to the borrower does not challenge state insurance regulator's authority to approve rates. This is evidenced by the fact that the LPI class actions and subsequent settlements do not involve changes to rates or challenges to state insurance regulatory authority to review and approve rates. It is further evidenced by the fact that state insurance regulators have continued to review and approve LPI rates filed by Assurant and Balboa (and its successor QBE) despite the LPI class action lawsuits and settlements involving these insurers.

LPI charges by a lender/servicer to a borrower are not insurance premiums and not subject to state insurance rate regulation. No borrower paid a premium to an insurance company for LPI. No insurance company paid a refund to any borrower when a lender/servicer's LPI coverage was canceled. No lender/servicer's LPI coverage was canceled because a borrower failed to make a payment to a lender/servicer for LPI. Had a borrower actually been charged an insurance premium, these three characteristics would have been present. LPI is a commercial insurance policy between the LPI insurer and the mortgage lender/servicer. The lender/servicer is the policyholder and the insured. The mortgage lender/servicer pays the premium for the LPI to the LPI insurer. The LPI rates filed by LPI insurers are rates charged to lender/servicers. LPI insurers do not charge rates or premiums for LPI to individual borrowers.

The conclusion that a lender/servicer's LPI charges to a borrower are not insurance premiums is supported by the fact that LPI is a commercial insurance policy issued by LPI insurers to a commercial entity – a lender/servicer. LPI is not treated as a personal insurance policy by state insurance regulators and LPI insurers file LPI policy forms as commercial insurance products.

A comparison between the treatment of consumer credit insurance – such as credit life insurance sold in connection with a consumer loan – and LPI demonstrates why LPI charges by the lender/servicer to the borrower are not insurance premiums. The table below shows the differences between LPI and credit life insurance and the role of the lender/lender/servicer. With credit life, there is an A to B to C relationship between the insurer, the lender and the borrower. With credit life insurance, the lender is a licensed agent who collects premium on behalf of the insurer from the borrower. If the borrower fails to pay the insurance premium to the lender, the insurer cancels the credit life insurance. In contrast, with LPI, the lender/servicer is responsible for paying the premium for the insurance coverage. The insurer does not terminate LPI coverage if the borrower fails to pay the lender/servicer, but only if the lender/servicer fails to pay the premium billed to the lender/servicer by the LPI insurer.

Criteria to Determine Whether A Charge is an Insurance Premium

Criteria	LPI	Credit Life
Who pays premium to insurance company?	Lender/Servicer	Borrower
Is coverage canceled if borrower fails to make required payment?	No	Yes
To whom is refund paid if coverage is canceled?	Servicer	Borrower
Commercial Lines Insurance?	Yes	No
State Insurance Regulation?	Lender/Servicer Not Regulated by Insurance Department	Creditor Regulated as Licensed Insurance Agent by Insurance Department

In addition, the lender/servicer is not licensed or regulated by state insurance regulators. This fact – and consequently the fact that a lender/servicer's LPI charges to borrowers are not insurance premiums – is evidenced by the lack of authority by state insurance regulators over the charges a lender/servicer makes to a borrower or the lender/servicer's creation and operation of a borrower's escrow account. The lack of regulatory authority was stated by the California Insurance Commissioner in a 2002 regulatory proceeding. In the 2002 order, Commissioner Low states the Insurance Department had no jurisdiction over the scope or reasonableness of charges by a lender to a borrower for LPI:

> Insofar as Petitioners ask the Department to decide whether premium charges "are improperly passed on" to Petitioners, the Commissioner cannot and does not express an opinion. The jurisdiction of the Commissioner extends to issues concerning the reasonableness of insurance rates vis-a-vis Respondent as the insurer and Norwest as the insured. The Department has no jurisdiction to decide the scope of charges which would be reasonable as between a lender and its borrower.[1]

[1] Footnote 3, page 6 of 2002 Order In the Matter of Rates, Rating Plans or Rating Systems of American Security Insurance Company before the Insurance Commissioner of the State California.

[1] Page 7 of 2002 Order by California Insurance Commissioner.

In summary, an evaluation of ***objective*** criteria and characteristics of an insurance premium charge clearly shows that the LPI charge by a lender/servicer to a borrower is not an insurance premium. In addition, court opinions regarding the filed rate doctrine provide no guidance to this working group regarding the inclusion or exclusion of tracking expenses in LPI rates. That decision is firmly within the realm of state insurance regulatory authority to exclude unreasonable expenses from filed rates.

Allied's Arguments on Tracking Expenses in LPI Rates are Incorrect and Contradictory.

Allied makes the contradictory argument that "Each borrower must comply with the terms of the credit agreement to provide adequate physical damage insurance," but that tracking this requirement is somehow a reasonable ***insurance*** cost. The credit agreement requires a borrower to maintain certain insurance to protect the vehicle or property servicing as collateral for the loan. It is clear that tracking borrower's compliance with this credit agreement requirement is a responsibility of the lender who requires the insurance. Allied acknowledges this when it later states: "Second, the purpose of tracking insurance coverage is to enforce a contractual requirement to maintain insurance to protect the value of the vehicle."

The LPI policy or insurer does not require a borrower to maintain voluntary coverage; the lender and the loan agreement make this requirement. Expenses associated with monitoring compliance with this loan agreement requirement are a portfolio wide expense of the lender/servicer as part of the loan servicing function. In addition, for lender/servicers who establish escrow accounts for borrowers for taxes and insurance, tracking is essential for the lender to monitor when a voluntary insurance premium payment is due and to pay the premium from the borrower's escrow. This function of insurance tracking clearly has nothing to do with the administration of an LPI policy.

Allied next incorrect and contradictory statements are: "The CPI master policy, as filed with the state insurance regulators, specifically requires the tracking of the insurance status of the vehicles. Under the terms of a CPI master policy with an insurance tracking program in place, a failure to identify an uninsured vehicle still provides the borrower with automatic coverage for an uninsured loss." No CPI policy includes a requirement for insurance tracking. The automatic coverage feature of CPI master policies means that coverage is present even if the lender/servicer has failed to identify a lapse in coverage at the time of the lapse in coverage. The error in this argument is further evidenced by the existence of blanket CPI products for which no tracking is performed because the premium is based on total exposures and does not involve a separate charge to a borrower.

Allied next offers the following *non sequitur:*

> A benefit of insurance tracking is that it allows for the earliest detection of uninsured collateral. The written notices serve to educate and motivate the borrower to comply with the requirement of the credit agreement to obtain physical damage insurance. A side benefit is an uninsured borrower's purchase of the basic state-mandated liability coverage which is required when purchasing physical damage insurance.

The fact that a lender must perform (or contract out for) insurance tracking is not evidence that tracking is a reasonable LPI expense. Allied's arguments above simply point to the reasons for insurance tracking and notice requirements to borrowers before a lender/servicer charges a borrower for LPI. We also note that LPI notices sent to the borrower – Allied's second sentence in the paragraph above – are notices sent by lender/servicer to the borrower. The lender/servicer pays the LPI premium to the LPI insurer whether or not the borrower pays the lender's LPI charge to the lender.

Allied describes the tracking activities which lender/servicers have contracted with Allied to perform:

> The notice letters combined with these other practices ultimately results in lower false placement. For instance, during a recent 12 month period, while Allied tracked over 12 million loans in its portfolio and sent 4.1 million notices to borrowers, only about 1 % of loans resulted in placement of lender placed coverage.

The fact that a lender/servicer contracts with an LPI vendor for insurance tracking does not transfer the ultimate responsibility for insurance tracking to the contractor. The lender/servicer is simply fulfilling its servicing responsibilities through a contractor. If the lender/servicer contracts with an LPI vendor for insurance tracking, including notices to borrowers for whom evidence of required insurance is missing, regulatory agencies hold the lender/servicer responsible for failing to send the required notices. The activities cited above by Allied are activities required of the lender/servicer to enforce the lender's credit agreement requirement for maintaining insurance.

Allied next turns logic on its head when it states:

> Third, removing the tracking costs from the rate calculation would result in a discriminatory impact to approximately 99% or more of the borrowers who are compliant. A lender who must find the resources to pay for tracking would necessarily cause those costs to be borne by all borrowers in the form of increased interest rates and administrative or loan processing fees.

Allied makes the absurd argument that the cost of tracking insurance on all loans in the lender/servicer's portfolio is not a portfolio wide servicing expense of the lender/servicer, but somehow an expense to be piled onto the 1% of borrowers who are charged for LPI. Clearly, the 1% of borrowers charged for LPI are either subsidizing the 99% of borrowers who are not charged for LPI or subsidizing the lender/servicer's servicing costs. The illogic of Allied's argument is vividly demonstrated simply by noting that even if no single borrower lapsed his or her coverage, the lender/servicer would still be required to track insurance on all borrowers.

Allied next makes the contradictory arguments that insurers need insurance tracking to "identify exposures" but that "CPI premiums are not and cannot be rated on the individual driver and vehicle. Underwriting is correctly based on the overall loan portfolio of the lender." The second statement is correct. LPI insurers rely on loan portfolio characteristics to underwrite LPI policies and perform exposure and risk management. Since individual LPI coverages are not underwritten, the tracking cannot be part of the exposure and risk management process. Allied, like other industry commenters, misrepresents and confuses the need to get premium payment for coverage provided with exposure management. As discussed in earlier comments, by this logic, State Farm's efforts to collect premium for auto and homeowners insurance policies issues would be "exposure management" instead of the premium administration and accounting that it really is.

Allied then offers the industry boiler plate rationale for high LPI rates – that the coverages are high risk because they are not individually underwritten. As I pointed out in earlier comments, these assertions can be empirically tested by looking at the average claim cost per exposure across voluntary and force-placed insurance. When that analysis is done – at least for LPI home – the average claim cost per exposure for LPI is the same or slightly lower than for homeowners insurance. The reason that LPI rates are so high and loss ratios are half those of voluntary insurance is because of the unreasonable expenses unrelated to the provision of LPI included in LPI rates, such as insurance tracking expenses and the costs of other kickbacks from the LPI insurer to the lender/servicer paid for by borrowers charged for LPI.

Allied makes reference (echoing the comments of ABIA) to sections of the current model which permit the inclusion of insurance tracking expenses in LPI rates. That is not evidence of the reasonableness of such a provision, but evidence of a gross injustice condoned by the NAIC in 1996. The detailed investigation by the New York Department of Financial Services lays bare that free or below-cost insurance tracking provided by LPI insurers to lender/servicers is a kickback by the LPI insurer to the lender/servicer.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 16-12100

PANKAJ PATEL, *et al.*, on behalf of themselves and all others similarly situated,
Plaintiffs-Appellants,

vs.

SPECIALIZED LOAN SERVICING, LLC, *et al.*,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

INITIAL BRIEF OF PLAINTIFFS-APPELLANTS
PANKAJ PATEL AND LAKETHA WILSON

Adam M. Moskowitz, Esq.
Thomas A. Tucker Ronzetti, Esq.
Rachel Sullivan, Esq.
Robert J. Neary, Esq.
Kozyak Tropin & Throckmorton LLP
2525 Ponce de Leon Blvd., 9th Floor
Miami, Florida 33134
Tel: 305-372-1800/Fax: 305-372-3508
amm@kttlaw.com
tr@kttlaw.com
rs@kttlaw.com
rn@kttlaw.com

Additional counsel
on signature page.

Counsel for Appellants
Pankaj Patel, et al.

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The Plaintiffs-Appellants submit this list, which includes the trial judge, magistrate judge, and all attorneys, associations or persons, firms, partnerships or corporations known to have an interest in the outcome of this review.

1. ABI International
2. ABIG Holding de Espana, S.L.
3. A.C.N. 080 903 957 Pty Ltd
4. A.C.N. 081 035 752 Pty Ltd
5. Administar Services Group LLC
6. ALOC Holdings ULC
7. Alpine Fiduciary Services Inc.
8. American Bankers General Agency, Inc.
9. American Bankers Insurance Company of Florida
10. American Bankers Insurance Group, Inc.
11. American Bankers Life Assurance Company of Florida
12. American Bankers Management Company, Inc.
13. American Memorial Life Insurance Company
14. American Security Insurance Company
15. Assurant Argentina Compania de Seguros Sociedad Anonima
16. Assurant BARC Reinsurance Limited

17. Assurant Chile Compania de Seguros Generales S.A.
18. Assurant Co. Ltd.
19. Assurant Consulting Company Limited
20. Assurant Danos Mexico S.A.
21. Assurant Deutschland GmbH
22. Assurant Direct Limited
23. Assurant Direta Corretora de Seguros Ltda
24. Assurant General Insurance Limited
25. Assurant Group, Limited
26. Assurant Holding Mexico, S. de R.L. de C.V.
27. Assurant Holdings France SAS
28. Assurant, Inc. (AIZ)
29. Assurant Intermediary Limited
30. Assurant International Division Limited
31. Assurant Investment Management LLC
32. Assurant Italia Agenzia di Assicurazioni s.r.l.
33. Assurant Life Limited
34. Assurant Life of Canada
35. Assurant New Ventures, Inc.
36. Assurant Payment Services, Inc.

37. Assurant Reinsurance of Turks & Caicos, Ltd.
38. Assurant Seguradora S.A.
39. Assurant Service Protection, Inc.
40. Assurant Services Argentina, S.A.
41. Assurant Services Canada Inc.
42. Assurant Services de Chile, SpA
43. Assurant Services del Peru SAC
44. Assurant Services Hong Kong Limited
45. Assurant Services Italia s.r.l.
46. Assurant Services Korea Limited
47. Assurant Services Limited
48. Assurant Services, LLC
49. Assurant Services of Puerto Rico, Inc.
50. Assurant Services (UK) Limited
51. Assurant Servicios de Mexico, S.A. de CV
52. Assurant Servicos Ltda.
53. Assurant Solutions Assistance B.V.
54. Assurant Solutions Comercio e Servicos de Equipamentos Electronicos Ltda.
55. Assurant Solutions Holding Puerto Rico, Inc.

56. Assurant Solutions Spain, S.A.

57. Assurant Vida Mexico S.A.

58. Axios Valuation Solutions, LLC

59. Baseline Capital Limited

60. Blue Bananas, LLC

61. Broadtech, LLC

62. Burt, Franklin G.

63. Bushman, Howard M.

64. Caribbean American Life Assurance Company

65. Caribbean American Property Insurance Company

66. Carlton Fields Jorden Burt, P.A.

67. CDS International Pty Limited

68. CIS Company Secretaries Pty Ltd

69. Closed Joint Stock Company <<Computershare Registrar>> (Russia)

70. Coast to Coast Dealer Services Inc.

71. Cohn, James I.

72. Commerce Financial Printers Corp.

73. Communication Services Australia Pty Limited

74. Computershare AB Sweden

75. Computershare A/S

76. Computershare Asia Limited

77. Computershare Canada Inc

78. Computershare Clearing Pty Limited

79. Computershare Communication Services GmbH

80. Computershare Communication Services Inc

81. Computershare Communication Services Pty Limited

82. Computershare Company Nominees Limited

83. Computershare Dealing Services Pty Ltd

84. Computershare Depositary Pty Limited

85. Computershare Deutschland GmbH & Co. KG

86. Computershare DR Nominees Limited

87. Computershare Finance Company Pty Limited

88. Computershare Finance Ireland Limited

89. Computershare Finance LLC

90. Computershare Financial Services, Inc.

91. Computershare Governance Services GmbH

92. Computershare Governance Services Inc.

93. Computershare Governance Services Limited (Ireland)

94. Computershare Governance Services Ltd (Canada)

95. Computershare Governance Services (UK) Limited

96. Computershare Holdings Inc.

97. Computershare Holdings LLC

98. Computershare Hong Kong Development Limited

99. Computershare Hong Kong Investor Services Limited

100. Computershare Hong Kong Nominees Limited

101. Computershare Hong Kong Trustees Limited

102. Computershare Inc.

103. Computershare International Information Consultancy Services (Beijing) Company Ltd

104. Computershare Investments (Canada) (Holdings) ULC

105. Computershare Investments (Canada) (No.1) ULC

106. Computershare Investments (Canada) (No.2) ULC

107. Computershare Investments (Canada) (No.3) ULC

108. Computershare Investments (Canada) (No.4) ULC

109. Computershare Investments (UK) Limited

110. Computershare Investments (UK) (No.2) Limited

111. Computershare Investments (UK) (No.3) Limited

112. Computershare Investments (UK) (No.4) Limited

113. Computershare Investments (UK) (No.5) Limited

114. Computershare Investments (UK) (No.6) Limited

115. Computershare Investments (UK) (No.7) Limited

116. Computershare Investments (UK) (No.8) Limited

117. Computershare Investments (UK) (No.9) Limited

118. Computershare Investor Services (Bermuda) Limited

119. Computershare Investor Services (British Virgin Islands) Limited

120. Computershare Investor Services (Cayman) Limited

121. Computershare Investor Services (Guernsey) Limited

122. Computershare Investor Services Inc

123. Computershare Investor Services (IOM) Limited Isle of Man

124. Computershare Investor Services (Ireland) Limited

125. Computershare Investor Services (Jersey) Limited

126. Computershare Investor Services Limited (South Africa)

127. Computershare Investor Services, LLC

128. Computershare Investor Services Ltd

129. Computershare Investor Services PLC

130. Computershare Investor Services Pty Limited

131. Computershare Investor Services Pty Ltd (South Africa)

132. Computershare Italy S.r.l.

133. Computershare Limited [CPU.AX]

134. Computershare Limited (United Kingdom)

135. Computershare LLC

136. Computershare Ltd (South Africa)

137. Computershare Nominees (Channel Islands) Limited

138. Computershare Nominees NZ Limited

139. Computershare Nominees Pty Ltd

140. Computershare Offshore Services Limited

141. Computershare Outsourcing Limited

142. Computershare PEP Nominees Limited

143. Computershare Plan Co Pty Ltd

144. Computershare Plan Managers Pty Ltd

145. Computershare Registry Services Limited

146. Computershare (Russia) Limited

147. Computershare Services Canada Inc

148. Computershare Services Nominees (Ireland) Limited

149. Computershare Services Nominees Limited

150. Computershare South Africa (Pty) Ltd

151. Computershare S.p.A.

152. Computershare Systems (NZ) Limited

153. Computershare Technology Services Inc.

154. Computershare Technology Services Pty Ltd.

155. Computershare Technology Services (UK) Limited

156. Computershare Trust Company of Canada

157. Computershare Trustees (C.I.) Limited

158. Computershare Trustees (Ireland) Limited

159. Computershare Trustees (Jersey) Limited

160. Computershare Trustees Limited

161. Computershare US

162. Computershare US Services Inc.

163. Computershare Technology Services, Inc.

164. Computershare Trust Company, N.A.

165. Computershare Verwaltungs GmbH

166. Computershare Voucher Services Limited

167. ConnectNow New Zealand Limited

168. ConnectNow Pty Ltd

169. Consumer Assist Network Association, Inc.

170. Cooperatieve Assurant Netherlands U.A.

171. CPU (NZ) Share Plans Limited

172. CPU Share Plans Pty Limited

173. CRS Custodian Pty Ltd

174. CRS Nominees Ltd

175. CWI Corporate

176. CWI Distribution

177. CWI Group

178. CWork Financial Management LLC

179. CWork Solutions, LP

180. Digital Services (UK) Ltd.

181. Eagle Rock Proxy Advisors, LLC

182. EES Capital Trustees Limited

183. EES Corporate Trustees Limited

184. EES Nominees International Limited

185. EES Services (UK) Limited

186. EES Trustees Limited

187. eMortgage Logic, LLC

188. Engel, Sarah

189. Family Considerations, Inc.

190. FamilySide, Inc.

191. FAS-Nationstar, LLC

192. FAS-OWB Utilities, LLC

193. FAS-Tenant Access Utilities, LLC

194. Federal Warranty Service Corp.

195. Field Asset Services, LLC

196. Financial Market Software Consultants Pty Ltd

197. Florida Office Corp.

198. Georgeson Inc.

199. Georgeson International Inc.

200. Georgeson S.l Spain

201. Georgeson Securities Corporation

202. Georgeson Shareholder Analytics LLC

203. Georgeson Shareholder Communications Australia Pty. Ltd.

204. Georgeson Shareholder Communications Canada Inc

205. Georgeson Shareholder Communications Limited

206. Georgeson Shareholder SAS

207. Georgeson S.r.l.

208. Global eDelivery Group Pty Ltd

209. GP Legacy Place, Inc.

210. Gravante, John III

211. Grundstücksentwicklungs Gesellschaft “Am Schönberg” GmbH

212. GSC Shareholder Services Inc

213. GTU Ops Inc.

214. Guardian Travel, Inc.

215. Harke Clasby & Bushman, LLP

216. Harke, Lance A.

217. HELOC Funding II Trust

218. HML Mortgage Services Ireland Limited

219. Homeloan Management Limited

220. Hong Kong Registrars Limited

221. Insureco Agency & Insurance Services, Inc.

222. Insureco, Inc.

223. Interfinancial Inc.

224. I.Q. Data International, Inc.

225. Istifi d S.p.A.

226. Jhavbala, Farrokh

227. John Alden Life Insurance Company

228. Karvy Computershare Private Limited

229. Karvy Computershare W.L.L

230. KB Analytics Limited

231. KCC Class Action Services LLC

232. Kozyak Tropin & Throckmorton, LLP

233. Kurtzman Carson Consultants Inc.

234. Kurtzman Carson Consultants, LLC

235. Lamb, Archie Cleveland Jr.

236. Law Offices of Archie Lamb

237. Legotla Investments (UK) Limited

238. Lifestyle Services Group Ltd.

239. LSG Espana Ltd.

240. LSG Insurance

241. Merten, W. Glenn

242. Minu Limited

243. MobileServ 5 Ltd.

244. Mortgage Systems Limited

245. Moskowitz, Adam M.

246. MS Diversified Corp.

247. MSR Robin Advances (Depositor) LLC

248. MSR Robin Advances Issuer Trust

249. National Insurance Agency

250. National Insurance Institute, LLC

251. Neary, Robert J.

252. 9167-1990 Quebec Inc.

253. NRC Investments (UK) Limited

254. Obadele Pty Ltd

255. Patel, Pankaj

256. Pathbold Limited

257. Perryman, Brian P.

258. Podhurst, Aaron S.

259. Podhurst Orseck, P.A.

260. Prieto, Peter

261. Protection Holding Cayman

262. Proxitalia S.r.l.

263. Q M Industries (N.S.W.) Pty. Ltd.

264. R&T Financial Services, Inc.

265. RCNG LLC

266. Registrar and Transfer Company

267. Registrar and Transfer Corporation – New York

268. Registrars Holding Pty Ltd

269. Registrar Nikoil Company (JSC)

270. Reliable Lloyds Insurance Company

271. Ronzetti, Thomas A. Tucker

272. Rosenthal & Company, LLC

273. Rosenthal, Stephen

274. Savings Management Limited

275. Seltzer, Hon. Barry S.

276. Sepon (Australia) Pty Limited

277. Serviceworks Management Pty Ltd

278. Settlement Recovery Group LLC

279. SG Vestia Systems Inc.

280. Sharemart NZ Ltd

281. Shipsurance Insurance Services, Inc.

282. Signal Financial Management LLC

283. Signal GP LLC

284. Signal Holdings LLC

285. Signal Northwest LLC

286. SLS Funding III LLC

287. SLS Investco LLC

288. SLS Servicer Advance Revolving Trust 1

289. Solutions Cayman

290. Solutions Holdings

291. Source One Communications Australia Pty Ltd

292. Specialized Loan Servicing, LLC

293. Specialist Mortgage Services Ireland Limited

294. Specialist Mortgage Services Limited

295. Specialized Asset Management LLC

296. Specialized Default Services LLC

297. Specialized Loan Servicing Holdings LLC

298. Specialized Title Services LLC

299. STAMS Holding Ltd.

300. STAMS Ltd.

301. Standard Guaranty Insurance Company

302. StreetLinks, LLC

303. Sullivan, Rachel

304. Sureway, Inc.

305. Switchwise Pty Ltd

306. Telecom Re, Inc.

307. The Signal LP

308. Time Insurance Company

309. Topaz Finance Limited

310. TrackSure Insurance Agency, Inc.

311. TS Holdings, Inc.

312. Union Security Insurance Company

313. Union Security Life Insurance Company of New York

314. United Service Protection Corp.

315. United Service Protection, Inc.

316. VEM Aktienbank AG

317. Voyager Group, Inc.

318. Voyager Indemnity Insurance Company

319. Voyager Service Warranties, Inc.

320. Weinshall, Matthew P.

321. WePurchit.com LLC

322. Williams, Dawn B.

323. Wilson, Laketha

324. ZAO <<Ediniy Registrator>>

STATEMENT REGARDING ORAL ARGUMENT

Appellants respectfully submit that oral argument would assist the Court in resolving the issue on appeal. The decision below calls into question the extent of the filed-rate doctrine's reach; a decision affirming the district court's dismissal would mark the first occasion on which the Court has extended the doctrine to bar claims by a non-ratepayer against a party other than the carrier or utility that set and filed the rates in question. Consideration of the question on appeal has created a circuit split between the Second Circuit Court of Appeal on the one hand, and the Third and Sixth Circuit Courts of Appeal on the other, *compare Alston v. Countrywide Financial Corp.*, 585 F.3d 753 (3d Cir. 2009) and *Williams v. Duke Energy Int'l, Inc.*, 681 F.3d 788 (6th Cir. 2012), with *Rothstein v. Balboa Insurance Co.*, 794 F.3d 256 (2d Cir. 2015), but this Circuit has not yet considered the question.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

JURISDICTIONAL STATEMENT

The district court had jurisdiction over this action pursuant to the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. §§ 1332(d), 1453 and 1711-1715, because diversity existed between the plaintiffs and defendants, with the plaintiffs as citizens of Florida and ASIC and SLS as citizens of Georgia and Colorado, respectively, the amount in controversy exceeded $5,000,000, and there were at least one hundred members of the putative class.

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291, as this appeal is taken from the final judgment of a district court.

This appeal is timely. The district court entered its order dismissing the Class Action Complaint with prejudice on April 25, 2016 [D.E. 36]. Appellants Patel and Wilson timely filed their Notice of Appeal on May 2, 2016 [D.E. 37].

This appeal is from a final order. Appellants Patel and Wilson appeal the district court's order dismissing their claims in their entirety and with prejudice. [D.E. 36.]

ISSUE ON APPEAL

WHETHER THE FILED-RATE DOCTRINE BARS CLAIMS BY BORROWERS AGAINST THEIR MORTGAGE SERVICER AND ITS LENDER-PLACED INSURER FOR CHARGING MORE FOR INSURANCE THAN IS AUTHORIZED BY THEIR MORTGAGE AGREEMENTS?

STATEMENT OF THE CASE AND FACTS

The lender-placed or "force-placed" insurance practices challenged by Appellants below first came under scrutiny more than seven years ago. This scrutiny, by courts and consumer advocates alike, has forced mortgage lenders and servicers and their cooperating force-placed insurers to stop imposing on borrowers the precise charges at issue here. For example, in December 2013, Fannie Mae issued a servicing announcement prohibiting mortgage servicers handling its loans from including these charges in amounts passed on to borrowers for force-placed insurance and from seeking reimbursement for such charges from Fannie Mae. [*Id.*] Since that time, companies servicing Fannie Mae loans have overwhelmingly stopped including "commissions" and other illegitimate costs in the amounts charged to borrowers. There is thus little dispute that these charges are wrongful. The question for the Court is whether the filed-rate doctrine bars claims brought by homeowners who paid or still owe these charges for force-placed insurance.

The case below was just one of at least thirty putative class actions in the Southern District of Florida involving the forced-placed insurance practices of major mortgage lenders and servicers, and dozens more have been litigated nationwide.[1]

---

[1] *See, e.g., Edwards v. Seterus, Inc.*, No. 15-cv-23107 (S.D. Fla.); *Almanzar v. Select Portfolio Servicing*, No. 14-cv-22586 (S.D. Fla); *Wilson v. EverBank, N.A.*, No. 14-cv-22264 (S.D. Fla.); *Montoya v. PNC Bank, N.A.*, No. 14-cv-20474 (S.D. Fla.); *Persaud v. Bank of Am., N.A.*, No. 14-cv-21819 (S.D. Fla.); *Jackson v. U.S. Bank,*

Defendants have raised the filed-rate doctrine in their motions to dismiss in most of the cases litigated in the Southern District of Florida. The majority of the opinions issuing from the Southern District of Florida and district courts nationwide have rejected application of the filed-rate doctrine on a motion to dismiss. *See* pp. 12-13, 18, 20-21, *infra*.[2] Many of these cases ultimately settled on a nationwide claims-made basis, with the defendants returning a specific percentage of the amounts charged for force-placed insurance coverage to mortgagors who submit claims.[3]

Appellants' allegations in the district court were strikingly similar to those pled in other force-placed insurance litigation, as all of these class actions arise from a practice that is common among major mortgage lenders and servicers. Standard

---

N.A., No. 14-cv-21252 (S.D. Fla.); *Hamilton v. SunTrust Mortg., Inc.*, No. 13-cv-60749 (S.D. Fla.); *Saccoccio v. JPMorgan Chase Bank, N.A.*, No. 13-cv-21107 (S.D. Fla.); *Hall v. Bank of Am., N.A.*, No. 12-cv-22700 (S.D. Fla.); *Williams v. Wells Fargo Bank, N.A.*, No. 11-cv-21233 (S.D. Fla.); *see also, e.g., Laffan v. Santander Bank, N.A.*, No. 13-cv-4040 (E.D. Pa.); *Ellsworth v. U.S. Bank, N.A.*, No. C 12-02506 (N.D. Cal.); *Simpkins v. Wells Fargo Bank, N.A.*, No. 12-cv-00768 (S.D. Ill.).

[2] *See also, e.g., Longest v. Green Tree Servicing LLC*, 74 F. Supp. 3d 1289, 1299 (C.D. Cal. 2015); *Vitek v. Bank of Am., N.A.*, No. 8:13–cv–816, 2014 WL 1042397, at *3-4 (C.D. Cal. Jan. 23, 2014); *Smith v. SunTrust Mortg., Inc.*, No. 13-cv-0739, 2013 WL 5305651, at *5-6, 9 (C.D. Cal. Sept. 16, 2013). *But see* Order on Motions to Dismiss [D.E. 83], *Fowler v. Caliber Home Loans, Inc.*, No. 15-cv-24542 (S.D. Fla. July 8, 2016); *Patel v. Specialized Loan Servicing, LLC*, No. 15-cv-62600, 2016 WL 1663827 (S.D. Fla. Apr. 25, 2016); *Trevathan v. Select Portfolio Servicing, Inc.*, 142 F. Supp. 3d 1283 (S.D. Fla.) (S.D. Fla. 2015)

[3] *See, e.g., Braynen v. Nationstar Mortg., LLC*, No. 14-CV-20726, 2015 WL 6872519 (S.D. Fla. Nov. 9, 2015); *Saccoccio*, 297 F.R.D. 683 (S.D. Fla. 2014). *See also, e.g., Montoya, Hamilton, Hall, Williams, supra.*

mortgage contracts authorize mortgage lenders and servicers to "force" insurance coverage on a mortgagor's property when the mortgagor's voluntary coverage lapses, leaving the property uninsured. [D.E. 1 ¶ 7.] The lender or servicer may then charge the mortgagor for its cost of coverage, either by deducting the cost from the mortgagor's escrow account or adding it to the balance of his or her mortgage loan. [*Id.* ¶¶ 7, 25, 35.] Appellants' mortgage contracts provided, 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….
>
> 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.
>
> …
>
> **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, (b)

> there is a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under this Security Instrument (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture…), or (c) Borrower has abandoned the Property, 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.

[*Id.* ¶¶ 49, 62 & Exs. A & B (emphasis added).]

Section 5 authorized Appellee Specialized Loan Servicing, LLC ("SLS"), the mortgage servicer here, to procure insurance coverage in the event of a lapse and charge Appellants the "cost of insurance," or the amounts "disbursed" to procure coverage. [*Id.*] Section 9 further authorized SLS to "do and pay for whatever is reasonable or appropriate to protect [SLS's] interest" in Appellants' properties. [*Id.*]

Appellants alleged below, in a class action complaint filed on December 10, 2015 [D.E. 1], that SLS had breached these provisions of their mortgage agreements, as well as the implied covenant of good faith and fair dealing, by charging mortgagors more than SLS's "cost of insurance" and more than was "reasonable or appropriate" to protect SLS's interest in any mortgagor's property. [*Id.* ¶¶ 26-47, 85-99.] They also alleged that SLS's conduct violated the federal Truth in Lending Act, the federal Racketeering Influenced and Corrupt Organizations Act ("RICO"), and the Florida Unfair and Deceptive Trade Practices Act, because SLS did not disclose charges imposed beyond the cost of coverage, and, in the alternative to their contractual claims, that SLS was unjustly enriched by charging more than its true cost of coverage. [*Id.* ¶¶ 100-08, 122-66.] Appellants also brought claims against ASIC, SLS's insurer, for tortiously interfering with borrowers' mortgage agreements by facilitating SLS's breaches, participating in the operation of the alleged RICO enterprise and conspiracy, the purpose of which was to charge borrowers costs beyond that of coverage, and for unjust enrichment. [*Id.* ¶¶ 109-21, 134-56.]

The alleged scheme operated as follows. SLS and ASIC agreed that ASIC would serve as SLS's exclusive provider of force-placed insurance coverage. [*Id.* ¶¶ 27, 28.] Pursuant to their arrangement, ASIC contracted to undertake various loan-servicing obligations that would otherwise belong to SLS, and SLS purchased a master insurance policy from ASIC to cover SLS's entire mortgage loan portfolio. [*Id.* ¶¶ 28, 29, 31, 37.] The master policy was a commercial insurance policy bearing the title "Mortgagee Interest Protection"; its purpose was to protect SLS's interest in mortgagors' properties, the collateral for its mortgage loans. [*Id.* ¶ 46 & n.8.]

ASIC's role in the scheme was to issue the master policy to SLS and then execute SLS's mortgage-servicing functions pursuant to the Defendant-Appellees' outsourcing agreement. ASIC was responsible for monitoring SLS's loan portfolio for lapses in voluntary coverage and, when a lapse was identified, sending a cycle of notices to mortgagors on SLS letterhead notifying them that if the lapse was not cured, SLS would force new coverage on the mortgagor's property and charge his or her escrow account for the cost of the coverage or add that cost to the balance of borrower's mortgage loan. [*Id.* ¶¶ 29, 143, 148.] The letters also provided that an SLS affiliate would act as an insurance agent in procuring the coverage, and would receive a commission for its services in procuring the policy. [*Id.* ¶ 147.] The letters did not disclose, however, that mortgagors would be charged any amount beyond the cost of the coverage procured by SLS. [*Id.* ¶¶ 58, 59, 69.]

Appellants have alleged that SLS charged mortgagors more than the cost of the insurance to protect its interest in their properties, contrary to the express and implied covenants in their mortgage agreements and notices mailed to borrowers before coverage was forced. [*Id.* ¶¶ 33-36, 49, 59, 62, 68, 69, 89, 98.] These unearned charges were levied pursuant to an undisclosed kickback scheme: once SLS forced new coverage to protect its own interest in the mortgagor's property and paid ASIC the premium arising from its commercial master policy for that coverage, ASIC would kick a portion of that amount back to SLS, thereby reducing the ultimate cost of coverage. [*Id.* ¶¶ 32-44.] SLS and ASIC claimed that the payments were "commissions" or "expense reimbursements," but they were, in fact, gratuitous payments constituting an effective rebate on the cost of coverage to SLS. [*Id.*]

Although the letters to borrowers represented that an SLS affiliate might take a commission for work performed in procuring coverage for the mortgagor, a master policy was *already* in place and that affiliate, in fact, did *nothing* to earn a commission. [*Id.* ¶¶ 33, 34, 147.] Similarly, SLS took "expense reimbursements" notwithstanding the fact that ASIC issued coverage automatically from the master policy and SLS incurred no expense from the forced placement of new coverage. [*Id.* ¶¶ 33, 34.] Appellants have also alleged that ASIC paid kickbacks to SLS in the form of amounts for riskless reinsurance issued through an SLS affiliate and subsidies for below-cost loan servicing performed by ASIC. [*Id.* ¶¶ 37-42.]

As a result, the "cost of insurance" to SLS equaled the amount it had paid ASIC as a premium under the commercial master policy, *less* the value of the gratuitous rebates it took from ASIC after forcing coverage on a mortgagor's property. [*Id.* ¶¶ 32-42, 49, 62.] And the amount ultimately "disbursed" to ASIC under Section 5 of Appellants' mortgage agreements for coverage to protect the collateral for its mortgage loan was the same—the commercial premium minus *x*, with *x* representing the gratuitous and undisclosed kickbacks passed from ASIC to SLS. [*Id.*] Finally, SLS's ultimate cost of coverage plus *x* exceeded "whatever [wa]s reasonable or appropriate to protect [SLS's] interest in the Property." [*Id.*]

Both SLS and ASIC moved to dismiss, arguing that the filed-rate doctrine barred the claims asserted because Appellants had challenged ASIC's filed rates as excessive. [D.E. 22 at 4-7; D.E. 24 at 2-5.] Appellants responded that the filed-rate doctrine does not apply because, among other things, their claims did not challenge the reasonableness of the filed rates, but instead targeted SLS's improper conduct in charging borrowers more than its cost of coverage in violation of the mortgage agreements and notices mailed to borrowers, and the payment of kickbacks to SLS pursuant to side agreements. [D.E. 26 at 3-4; D.E. 27 at 1-7.]

ASIC and SLS filed their replies [D.E. 28, 29], and on April 25, 2016, without the benefit of a hearing, the District Court entered an order granting the motions to dismiss with prejudice pursuant to the filed-rate doctrine. *See Patel*, 2016 WL 1663827, at *3-5. Appellants now appeal the decision of the District Court.

This Court reviews *de novo* the grant of a motion to dismiss under Rule 12(b)(6) for failure to state a claim, "accepting the allegations in the complaint as true and construing them in the light most favorable to the plaintiff." *Shoup v. McCurdy & Candler, LLC*, 465 Fed. App'x 882, 884 (11th Cir. 2012) (quoting *Belanger v. Salvation Army,* 556 F.3d 1153, 1155 (11th Cir. 2009)). "A complaint must state a plausible claim for relief, and 'a claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Id.* (citation omitted).

SUMMARY OF THE ARGUMENT

The filed-rate doctrine does not bar claims by borrowers against a mortgage-loan servicer and its exclusive force-placed insurer challenging the servicer's practice of charging borrowers more than the servicer itself pays for force-placed insurance in violation of the mortgage contracts. Rates for force-placed insurance are set for commercial master policies designed for sale to mortgage lenders and servicers. State regulators approve the rates for commercial use, and mortgage lenders and servicers pay premiums calculated based on those filed rates. Appellants are not the customers for these commercial policies and have not challenged these rates; they have challenged instead SLS's practice of charging borrowers more than the "cost of insurance" for residential hazard coverage permitted by the terms of its standard mortgage contract. Appellants' claims focus on this breach of contract and the Appellees' concomitant misrepresentations and omissions to borrowers, without implicating ASIC's filed commercial rates. State insurance agencies do not regulate the conduct challenged, and it is therefore beyond the filed-rate doctrine's reach.

Courts rejecting application of the filed-rate doctrine in the force-placed insurance context have followed the same logic adopted by the Third Circuit in *Alston v. Countrywide Financial Corp.*, 585 F.3d 753 (2009). In *Alston*, the plaintiffs had challenged a kickback scheme like the one described by Appellants here. Although *Alston* involved alleged violations of the Real Estate Settlement Procedures Act ("RESPA"), the Third Circuit did not limit its holding to RESPA claims; it concluded generally that "[i]t [wa]s absolutely clear that the filed rate doctrine simply d[id] not apply … [because] Plaintiffs [had] challenged Countrywide's allegedly wrongful conduct, not the reasonableness or propriety of the rate that triggered that conduct." *Id.* at 765. The Sixth Circuit has also held that the doctrine does not bar claims challenging kickbacks or rebates paid pursuant to side agreements, but not the reasonableness of any filed rate. *See Williams v. Duke Energy Int'l, Inc.*, 681 F.3d 788 (6th Cir. 2012).

By contrast, the Second Circuit affirmed dismissal of borrowers' claims in *Rothstein v. Balboa Insurance Co.*, 794 F.3d 256 (2015), based on the filed-rate doctrine. The *Rothstein* court analyzed the imposition of force-placed insurance charges as an "A-to-B-to-C" transaction – where "A" is the insurer, "B" is the mortgage service purchasing the insurance, and "C" is the borrower – thereby extending the filed-rate doctrine to noncustomers. Such an analysis is flawed first and foremost because the contract pursuant to which the servicer purchases a master policy from the insurer is separate and distinct from borrowers' mortgage agreements, and application of the doctrine would leave borrowers with no recourse against their mortgage servicer for breaches of the provisions of their mortgages, which do not concern any filed rate. Borrowers, that is, are not the ratepayers in force-placed insurance transactions.

The *Rothstein* Court also misapplied the nonjusticiability and nondiscrimination principles underlying the filed-rate doctrine. Appellants' claims do not offend the nonjusticiability principle because disposition of their claims will not require the court to trespass on the authority reserved for state regulators. Appellants do not challenge the reasonableness of the rates that SLS pays for a master policy; they instead challenge SLS's imposition of charges beyond those authorized by their mortgage contracts, which allow only charges for "the cost of the insurance coverage." Further, the kickbacks that Appellants have challenged were paid pursuant to servicing agreements between SLS and ASIC; these agreements are not subject to regulatory approval and thus do not trigger the filed-rate doctrine.

Appellants' claims do not run afoul of the nondiscrimination principle because they are not the ratepayers for whom ASIC's filed rates are set and approved; SLS is the ratepayer, as are other mortgage servicers. Thus, the nondiscrimination principle in this case would prevent the Court from issuing an opinion that gave one mortgage servicer a preferred rate over another. Here, regardless of the result, the rate SLS pays would remain the same. Only the amounts paid by mortgagors pursuant to their contracts with SLS would be reduced.

The Court should reverse the district court's dismissal and remand this case for further proceedings.

ARGUMENT

THE FILED-RATE DOCTRINE DOES NOT BAR APPELLANTS' CLAIMS AGAINST SLS AND ASIC FOR CHARGING MORE FOR LENDER-PLACED INSURANCE THAN WAS AUTHORIZED BY THEIR MORTGAGE CONTRACTS.

A. The Filed-Rate Doctrine Does Not Apply on the Facts Alleged Below.

The filed-rate doctrine does not apply to claims challenging SLS's practice of charging mortgagors more than its actual cost of coverage for force-placed insurance, nor does it apply to those challenging ASIC's facilitation of SLS's contractual breaches and participation in a scheme designed to funnel unearned profits to SLS. As the more persuasive authority has reasoned, the filed-rate doctrine does not apply because (1) the plaintiffs have not challenged the reasonableness of the insurer's rates, but instead the manner in which the lender selects the insurer and the payment of kickbacks to the lenders;[4] (2) it is mortgage lenders, not borrowers, who are the "ratepayers" for whom force-placed insurance rates have been approved;[5] and (3) the side agreements pursuant to which insurers pay lenders

[4] *See, e.g., Wilson v. EverBank, N.A.*, 77 F. Supp. 3d 1202, 1233-34 (S.D. Fla. 2015) (plaintiffs had challenged defendants' manipulation of force-placed insurance market to charge borrowers for unearned fees unrelated to procurement of insurance); *Leghorn v. Wells Fargo Bank, N.A.*, 950 F. Supp. 2d 1093, 1115-16 (N.D. Cal. 2013) (claims did not challenge rates, but lender's decision to purchase coverage from particular insurer and the defendants' manipulation of the force-placed insurance market) *Gallo v. PHH Mortg. Corp.*, 916 F. Supp. 2d 537, 545-46 (D.N.J. 2012) (plaintiff had not challenged rate, but "the lawfulness and purpose of payments that PHH Mortgage received in the form of commissions, kickbacks, reinsurance premiums, or other financial benefits" and "the manner in which their mortgagees/loan servicers chose the specific force-placed insurance at issue"); *Abels v. JPMorgan Chase Bank, N.A.*, 678 F. Supp. 2d 1273, 1277 (S.D. Fla. 2009) (plaintiffs had not challenged rate, but defendant bank's choice of insurers).

[5] *See, e.g. Wilson*, 77 F. Supp. 3d at 1234 (plaintiffs not ratepayers to whom commercial rates applied); *Perryman v. Litton Loan Servicing, LP*, No. 14-cv-02261, 2014 WL 4954674, at *9 (N.D. Cal. Oct. 1, 2014) ("It is for this reason that courts in this district held that the filed-rate doctrine does not bar claims brought by homeowners, because 'they are not the ratepayers.'") (quoting *Ellsworth v. U.S. Bank, N.A.*, 30 F. Supp. 3d 886 (N.D. Cal. 2014)); *Jackson v. U.S. Bank, N.A.*, 44 F. Supp. 3d 1210, 1217 (S.D. Fla. 2014) ("The [filed-rate] doctrine is also inapplicable here because Plaintiffs are not ratepayers.") (citation omitted).

kickbacks are not subject to regulatory approval.[6]

On these facts, this Court's jurisprudence also advises against application of the doctrine, which operates between the carrier and its customer – here, the mortgage servicer. "The filed rate doctrine dictates that the rates a carrier charges its customers, once filed with and approved by [government regulators], become 'the law' and exclusively govern the rights and liabilities of the carrier to the customer[.]" *Hill v. Bellsouth Telecomms., Inc.*, 364 F.3d 1308, 1315 (11th Cir. 2004) (citation omitted); *see also Evanns v. AT&T Corp.,* 229 F.3d 837, 840 (9th Cir. 2000) ("Under the doctrine, once a carrier's tariff is approved … the terms of the federal tariff are considered to be 'the law' and to therefore 'conclusively and exclusively enumerate the rights and liabilities' *as between the carrier and the customer*.") (emphasis added). Notably, the *customer* is charged with notice of the filed rate and its terms, *Pfeil v. Sprint Nextel Corp.*, 284 Fed. App'x 640, 642 (11th Cir. 2008), having voluntarily entered into an arrangement governed by the filed rate.

The filed rates in this case, once approved by state regulators, do *not* govern the "rights and liabilities" of ASIC, the insurer, with respect to SLS's borrowers;

[6] *See, e.g., Jackson*, 44 F. Supp. 3d at 1217 ("U.S. Bank is not subject to administrative oversight by state insurance commissions"); *Simpkins v. Wells Fargo Bank, N.A.*, No. 12-cv-00768, 2013 WL 4510166, at *13-14 (S.D. Ill. Aug. 26, 2013) ("Defendants … have not given this Court any authority to demonstrate that 'such pre-arranged side agreements are … filed with, approved by, or regulated and monitored in some way by a governing regulatory agency[.]'") (citation omitted).

they instead govern ASIC's relationship with *SLS*, the party (and direct customer) who negotiated the terms of coverage. ASIC does not issue individual policies to SLS borrowers. It issues a master policy to SLS to cover the lender's entire portfolio of mortgage loans for a period of years. [D.E. 1 ¶¶ 27, 30, 44.] The master policy is a *commercial* policy between lender and insurer and is filed and approved as such. The terms are negotiated and rates set *for payment by the lender before* any borrower's coverage has lapsed. [*Id.* ¶¶ 27-34, 44.] ASIC charges SLS a premium based on the commercial rate, and later "kicks back" a portion to SLS, thus giving SLS a gratuitous rebate on the cost of coverage. [*Id.* ¶¶ 30-46.]

Once a borrower's lapse occurs, which may be months or years after the master policy has issued and rates are set, coverage is forced on the borrower's home from SLS's master policy. [*Id.* ¶ 28.] The borrower's mortgage contract, which controls the rights and liabilities of SLS and its borrowers, authorizes SLS to charge the borrower *only* amounts expended for "the cost of insurance coverage." [*Id.* ¶¶ 48, 64.] Borrowers, however, are charged more than the cost of coverage because SLS does not give them the benefit of kickbacks that it received. [*Id.* ¶¶ 3, 6, 30-46.] Just because the amount SLS charged borrowers rose to the full level of the approved rate does not somehow immunize SLS from violating the terms and spirit of its contractual obligation to its borrowers to charge no more than the "cost" of the insurance coverage.

In fact, SLS is the ratepayer here. The filed-rate doctrine would preclude *SLS* from challenging ASIC's approved rates. *See, e.g., Hill*, 364 F.3d at 1315 ("*[C]ustomers* are … charged with notice of the terms and rates set out in th[e] filed tariff and may not bring an action against a carrier that would invalidate, alter or add to the terms of the filed tariff.") (emphasis added). As explained by the court in *Wilson*, commercial-line rates for force-placed insurance are approved for payment by lenders and servicers, not mortgagors; thus, *SLS* is the ratepayer with respect to the filed-rate doctrine. *See Wilson*, 77 F. Supp. 3d at 1234; *see also Ellsworth*, 30 F. Supp. 3d at 910 ("Plaintiffs do not challenge the rates … or the process of rate-setting, and they are not the ratepayers.").

This critical distinction is reflected in Appellants' Complaint, which raises no challenge to ASIC's filed rates.[7] Appellants have challenged SLS's act of charging borrowers more than its actual cost of coverage, in violation of the express terms of their mortgages. [D.E. 1 ¶¶ 33-36, 49, 59, 62, 68, 69, 89, 98.] Extending the filed-rate doctrine to these facts would stretch its application beyond its original limits; it

[7] For this reason, the District Court should not have granted judicial notice to ASIC's exhibits documenting the approval of ASIC's rates in Florida as matters of public record. *See Patel*, 2016 WL 2016 WL 1663827, at *2. Appellants' claims do not implicate the rates that ASIC files in connection with its commercial policies, thus the rate filings submitted by ASIC (which bear the title "Mortgag*ee* Interest Protection"), are irrelevant to the claims asserted. *See, e.g., Couch v. Broward Cty.*, No. 11-62126-CIV, 2012 WL 2007148, at *1 (S.D. Fla. June 5, 2012) (declining to take judicial notice of irrelevant documents) (citations omitted).

would then apply to claims by non-ratepayers against non-regulated entities that merely touch upon a regulated product, in this case, insurance. *See Hill*, 364 F.3d at 1315. Because SLS's conduct is not reviewed by state regulators, the filed-rate doctrine does not bar claims addressing it. *See, e.g., Gallo*, 916 F. Supp. 2d at 546 (amounts billed plaintiffs for cost of insurance agreement between lender and insurer were not subject to regulatory scheme "in the same way that insurance rates are"); *Simpkins*, 2013 WL 4510166, at *14 ("Plaintiffs should not be barred … from challenging conduct … not otherwise addressed by a governing regulatory agency, particularly where defendants bear the burden on the issue of dismissal.").

This Court has never applied the filed-rate doctrine to bar claims against a party not subject to regulation with respect to the rate at issue, nor has it applied the doctrine to preclude claims by anyone other than a direct ratepayer. *See, e.g., Pfeil*, 284 Fed. App'x 640 (barring customer challenge to charge by telecommunications carrier); *Hill*, 364 F.3d 1308 (same); *Taffet v. S. Co.*, 967 F.2d 1483 (11th Cir. 1992) (barring suit by utility customers to recover charges). This precedent is in keeping with this Court's holding that filed rates "become 'the law' and exclusively govern the rights and liabilities of the carrier to the *customer*[.]" *Hill*, 364 F.3d at 1315 (citation omitted; emphasis added). "The characterization of the plaintiff's claim is therefore critical to whether the filed rate doctrine will apply." *Florida Mun. Power Agency v. Fla. Power & Light Co.*, 64 F.3d 614, 616 (11th Cir. 1995).

The Court's resolution of the question presented will be limited to the factual predicate presented by Appellants' claims. Still, a decision affirming the district court's dismissal would extend the filed-rate doctrine beyond the carrier-customer relationship, and apply the terms of their contract—the tariff itself—to a transaction between the customer (SLS) and a non-ratepayer (the mortgagor), and to agreements not subject to regulatory review. The Court should reverse the decision below.

B. The Court Should Follow *Alston* and *Williams*; *Rothstein* Fails to Persuade.

The Third Circuit applied the filed-rate doctrine to a just end in *Alston v. Countrywide Financial Corp.*, 585 F.3d 753 (3d Cir. 2009), the first appellate opinion to address application of the doctrine on facts analogous to those presented here. The *Alston* plaintiffs alleged that their mortgage lender, Countrywide, had accepted kickbacks from a private mortgage insurer through a Countrywide affiliate using a sham reinsurance scheme. *See Alston*, 585 F.3d at 757. Like SLS here, Countrywide had "accepted a portion of the PMI [private mortgage insurance] premiums but provided no services in return[,]" which resulted in overcharges to the plaintiffs for PMI. *Id.* The defendants raised the filed-rate doctrine because the rates used to calculate PMI premiums had been filed with Pennsylvania regulators; the plaintiffs countered that they had (1) "challenge[d] the payment of kickbacks, not the rates they [had] paid for PMI[;]" and (2) "challenge[d] only the commission of conduct proscribed by RESPA, such that the existence of a filed rate … [wa]s irrelevant." *Id.* at 764. The Third Circuit held that it was "absolutely clear that the filed-rate doctrine simply d[id] not apply … [because] Plaintiffs [had] challenge[d] Countrywide's allegedly wrongful conduct, not the reasonableness or propriety of the rate that triggered that conduct." *Id.* at 765.

Appellees argued below that *Alston* is inapposite, because it involved PMI and because the plaintiffs' claims were for violation of RESPA. But the kickback schemes in *Alston* and here are sufficiently similar for the analogy to this case to hold. *See, e.g., Burroughs v. PHH Mortg. Corp.*, No. 15-cv-6122, 2016 WL 1389934, at *4 (D.N.J. Apr. 8, 2016) (relying on *Alston* in force-placed insurance case and finding it to be "more sound" than *Rothstein*); *Gallo*, 916 F. Supp. 2d at 544 (finding *Alston* persuasive despite factual distinctions); *Laffan v. Santander Bank, N.A.*, No. 13-cv-4040, 2014 WL 2693158, at *4 (E.D. Pa. June 12, 2014) ("[T]he Third Circuit made clear in *Alston* that "the filed rate doctrine simply does not apply" in circumstances where, as here, a plaintiff challenges the defendant's allegedly wrongful conduct, not the reasonableness of the rate."); *Xi Chen Lauren v. PNC Bank, N.A.*, No. 2:13-CV-762, 2013 WL 5565511, at *5 (W.D. Pa. Oct. 8, 2013) ("In *Alston,* the Court … recognized the distinction between wrongful conduct and rate challenges and held that wrongful conduct claims were not barred[.]").

Opinions attempting to distinguish *Alston* are unpersuasive. The District Court, for example, sought to distinguish *Alston* on the ground that it involved claims for violation of RESPA, which creates a "unique statutory cause of action." *Patel*, 2016 WL 1663827, at *4. But the Third Circuit's reasoning in *Alston* did not focus on RESPA alone—the plaintiffs in *Alston* raised *two* arguments as why the doctrine did not apply: (1) they had challenged the payment of kickbacks, not the filed rates, and the kickbacks were not subject to regulatory review; and (2) they had challenged only the commission of conduct proscribed by statute. *See id.* at 764. The Third Circuit accepted *both* contentions, holding not only that applying the doctrine would run contrary to Congressional intent, but also that the plaintiffs simply had not challenged the reasonableness of the underlying filed rates. *See Alston*, 585 F.3d at 765 ("Plaintiffs challenge Countrywide's allegedly wrongful conduct, not the reasonableness or propriety of the rate that triggered that conduct.").

Appellees have attempted to distinguish *Alston* based on a footnote citing *Stevens v. Union Planters Corp.*, No. 00-cv-1695, 2000 WL 33128256 (E.D. Pa. Aug. 22, 2000), an opinion applying the filed-rate doctrine in a case involving force-placed insurance. [D.E. 28 at 2 n.2; D.E. 29 at 3.] Appellees read the footnote to mean that the Third Circuit would have applied the doctrine had *Alston* involved force-placed insurance, rather than PMI. But the holding in *Stevens* was not as broad as Appellees would like. As the Third Circuit in *Alston* explained: "*Stevens* is inapposite because the plaintiffs in that case *directly challenged the filed rate as unreasonable*." 585 F.3d at 764 n.13 (emphasis added). Appellants do not challenge

ASIC's rates; *Union Planters* carries no weight.

This conclusion finds support in *Stevens v. Citigroup, Inc.*, No. 00-cv-3815, 2000 WL 1848593 (E.D. Pa. Dec.15, 2000), an opinion involving the same plaintiff, mortgage, and hazard insurance as *Union Planters*, and issued by the same judge just four months later. The Court in *Citigroup* distinguished *Union Planters* based on the focus of the plaintiffs' allegations:

> [D]efendants rely upon this Court's decision in … *Union Planter's* … to support their Motion to Dismiss in this case. In that case, the plaintiff argued that the force placed insurance premium defendants charged plaintiff was excessive. Thus, when examining plaintiff's Complaint it was clear that plaintiff challenged the excessiveness of the insurance premiums. However, in this case, plaintiff does not appear to challenge the excessiveness of any one rate of insurance. Instead, plaintiff challenges the way in which the defendants' chose the insurance at issue. Thus, the Court will not dismiss all of plaintiff's claims except his RESPA claim at this time.

2000 WL 1848593, at *3.[8]

The more persuasive opinions addressing the doctrine's application to similarly pled claims have adopted this reasoning. *See, e.g., Santos v. Carrington Mortg. Servs., LLC*, No. 2:15–cv–864, 2015 WL 4162443, at *2-3 (D.N.J. July 8, 2015) (doctrine did not apply because plaintiff had "challenge[d] Defendants' conduct, not the reasonableness or propriety of the rate itself"); *DiGiacomo v. Statebridge Co., LLC*, No. 14-cv-6694, 2015 WL 3904594, at *7 (D.N.J. June 25,

[8] The court in *Gallo* noted this distinction and found that the plaintiffs' claims in that case had similarly challenged the manner in which the lender had selected the coverage at issue, rather than the filed rates. *See Gallo*, 916 F. Supp. 2d at 545.

2015) ("In imposing a rate that regulators deem reasonable, Defendants may nonetheless engage in conduct that violates … [consumer fraud] or RICO statutes or Defendants' contractual and fiduciary obligations."); *Almanzar*, 2015 WL 1359150, at *2; *Perryman*, 2014 WL 4954674, at *6-9 (doctrine inapplicable where plaintiff did "not dispute reasonableness of rates charged for insurance[,]" but "the amount of the rate which can be passed on to her under the terms of her contract").

The majority view finds further support in the Sixth Circuit's opinion in *Williams v. Duke Energy International, Inc.*, 681 F.3d 788 (6th Cir. 2012). The Sixth Circuit held that the filed-rate doctrine did not apply to claims brought by Ohio businesses and individuals against an electricity retail service provider, alleging that the service provider had violated the federal RICO statute, the Robinson-Patman Act, and Ohio state statutory and common law by paying "unlawful and substantial rebates to certain large customers … in exchange for the withdrawal by said customers of objections to a rate-stabilization plan that [the service provider] was attempting to have approved by the [Public Utilities Commission of Ohio (PUCO)]." *Williams*, 681 F.3d at 792-93. The plaintiffs characterized the payments as kickbacks paid in exchange for customers' silence. *See id.* at 797.

The Ohio district court had applied the filed-rate doctrine, reasoning that "[w]hether payments are rebates or kickbacks depends upon an analysis of the filed rate." *Id.* (quoting *Williams v. Duke Energy Int'l, Inc.,* 606 F. Supp. 2d 783, 790

(S.D. Ohio 2009)). The Sixth Circuit rejected this logic, explaining that the filed-rate doctrine does not bar all claims involving *analysis* of a filed rate, but only those challenging the *reasonableness* of a filed rate. *See id.* at 797-98. The court held:

> Plaintiffs allege that Defendants paid substantial sums of money to certain large customers in exchange for the withdrawal by the large customers of their objections to Defendants' proposed RSP. … This case does not involve the challenge by Plaintiffs of any filed rates. Rather, Plaintiffs challenge the lawfulness and purpose of payments made by Appellee Duke's affiliate DERS pursuant to various side agreements. Plaintiffs argue that these side agreements were not filed with any agency, including the PUCO, and are unlawful….
>
> Nor do the alleged "rebates" or "kickbacks" actually involve a challenge to the reasonableness of any filed rate. Plaintiffs do not challenge whether the rates set by the PUCO were reasonable; rather, they contend that Defendants conspired to aid certain favored companies in avoiding paying the actual filed rate, and that this action on the part of Defendants harmed Plaintiffs by giving the favored companies competitive advantage over Plaintiffs.

Id.

The Sixth Circuit held that challenges to kickbacks paid pursuant to side agreements do not constitute challenges to filed rates. Applying that reasoning here, where ASIC is alleged to have paid kickbacks to SLS pursuant to outsourcing and other agreements, the filed-rate doctrine does not bar Appellants' claims.

Creating a circuit split last year, the Second Circuit in *Rothstein v. Balboa Insurance Co.*, 794 F.3d 256 (2d Cir. 2015), applied the filed-rate doctrine to bar claims against a force-placed insurer, Balboa Insurance Company, challenging kickbacks arising from below-cost servicing subsidies that the insurer had paid to the lender. *See Rothstein*, 794 F.3d at 262-66. The court found that the doctrine applied because the filed rate paid by the lender had simply been "passed through an intermediary," and because resolution of the claims in the plaintiffs' favor would have undermined regulators' authority and given plaintiffs, characterized by the court as "the suing ratepayer[s]," a preferential rate. *See id.* at 259, 262-66.

Rothstein fails to persuade, first because the insurance policies at issue are *commercial* policies designed for sale to mortgage lenders. [D.E. 1 ¶ 46.] Regulators approved the rates attached to these policies for this purpose, with the lender in mind as the customer purchasing the policy. *See, e.g., Wilson*, 77 F. Supp. 3d at 1234 (lender is ratepayer); *Jackson*, 44 F. Supp. 3d at 1217 (same). Appellants were not the "ratepayers" for whom the commercial rates were approved, nor do they ask the Court to adjust those rates, which were paid in full by SLS. *See id.*

Nor have Appellants challenged these commercial rates. They have instead challenged Appellees' practice of providing SLS a discount on the cost of coverage, and then charging borrowers the pre-discounted amount in violation of their mortgage agreements and state and federal statutes. [D.E. 1 ¶¶ 27-47.] None of this conduct is subject to regulatory review, and "Plaintiffs should not be barred under the filed-rate doctrine from challenging conduct which is not otherwise addressed by a governing regulatory agency, particularly where defendants bear the burden on the issue of dismissal." *Simpkins*, 2013 WL 4510166, at *14. Stated differently, and as elaborated in Section C below, judicial oversight of Appellant's claims would not offend the nonjusticiability rationale underlying the filed-rate doctrine.

In addition, this case does not present the straightforward "A-to-B-to-C' transaction that the *Rothstein* Court described. In fact, there are *two* separate and distinct transactions: in the first, ASIC sells a master policy to SLS at a commercial rate to cover its entire loan portfolio; in the second, after the borrower's own coverage has lapsed, SLS charges the borrower an amount *that is purportedly SLS's cost of coverage*. [D.E. 1 ¶¶ 28-31; 35.] Appellants' claims arise from this second transaction, and only that aspect of it which, facilitated by ASIC, strays from SLS's promise to charge borrowers no more than the cost of coverage.

The court in *Burroughs* distinguished *Rothstein* effectively, reasoning that judicial action would not undermine agency authority because the plaintiff had challenged the defendants' relationship and their "scheme of hiding the nature of fees under the guise of regulatory-approved rates." The court continued:

> Regardless of the rate charged for LPI, what is being challenged here and in similar cases is not the rate itself, but rather the mortgage servicer's alleged exploitation of its ability to force-place hazard insurance in order to reap additional, unjustified profits in the form of payments disguised as purportedly legitimate fees. The protection of the filed rate doctrine should not be extended to shelter mortgage servicers and their co-conspirator insurers from liability for their fraud[.]

2016 WL 1389934, at *4 (internal citation omitted).

The Court should apply the same logic here and reverse the decision below.

C. Plaintiffs' Claims Offend Neither the Nonjusticiability nor the Nondiscrimination Principle of the Filed-Rate Doctrine.

The purpose of the filed-rate doctrine is "to ensure that rates are both reasonable and nondiscriminatory." *Security Sys., Inc. v. K-Mart Corp.*, 114 S. Ct. 1702, 511 U.S. 431, 435 (1994) (citation omitted). Courts have distilled this purpose into two underlying principles: the nonjusticiability principle, which protects the ratemaking authority of federal and state regulators from judicial intervention, and the nondiscrimination principle, which seeks to prevent litigation from becoming a means for ratepayers to secure preferential rates. *See Hill*, 364 F.3d at 1316-17.

Analysis of these two principles also instructs against application of the doctrine to Appellants' claims. The nonjusticiability principle seeks to preserve the regulatory agencies' role in approving filed rates, and to keep courts out of the rate-making process, *see Verizon Del., Inc. v. Covad Commc'ns Co.*, 377 F.3d 1081, 1086 (9th Cir. 2004), while the nondiscrimination principle "prevent[s] carriers from engaging in price discrimination as between ratepayers[,]" *Hill*, 364 F.3d at 1316.

Appellants' claims implicate neither principle. Nonjusticiability remains untouched because a decision in Appellants' favor would not trespass on insurance regulators' authority to set and approve rates for force-placed insurance. *See, e.g., Burroughs*, 2016 WL 1389934, at *4. State insurance regulators determine the reasonableness of filed *commercial* rates for master policies, which are paid by SLS to cover its entire portfolio of loans. [D.E. 1 ¶¶ 28, 46.] SLS is the ratepayer, and

Appellants have not challenged these rates, but instead the gratuitous kickbacks paid pursuant to servicing agreements between SLS and ASIC. [*Id.* ¶¶ 32-42, 47.] These agreements are not subject to regulatory approval; thus the filed-rate doctrine does not apply. *See, e.g., Gallo*, 916 F. Supp. 2d at 545-46 (plaintiff had not challenged rate, "[r]ather, Plaintiff [had] challeng[ed] the lawfulness and purpose of payments that PHH Mortgage received in the form of commissions, kickbacks, reinsurance premiums, or other financial benefits, pursuant to several alleged pre-arranged agreements designed to maximize profits for Defendant"); *Abels*, 678 F. Supp. 2d at 1277 ("because the bank is not subject to the extensive administrative oversight that insurance companies are, applying the filed rate doctrine in this instance would not serve either purpose").

The kickbacks passed to SLS are not disclosed to borrowers, and are not rendered legitimate simply because the total amount charged borrowers for coverage is the same as the premium amount paid by SLS. The notices mailed to borrowers disclose that "commissions" may be paid to an SLS affiliate in connection with the procurement of new coverage, [D.E. 1 ¶ 147], but these notices describe *actual* commissions presumably earned by the affiliate for work performed. Appellants have complained of gratuitous kickbacks or rebates that Defendants *labelled* as commissions and expense reimbursements to lend their scheme of legitimacy and avoid judicial review; these gratuitous charges were *not* disclosed to or approved by state regulators for inclusion in ASIC's filed rates, thus a judicial decision ordering their recovery would not impact the ratemaking process.

This type of word play was addressed by the court in *In re Managed Care Litigation,* 150 F. Supp. 2d 1330 (S.D. Fla. 2001), where the plaintiffs' claims turned on alternate definitions of "medical necessity," and the defendants asserted that their plans were reviewed by state authorities and the specific alleged misconduct alleged, which depended on a tortured definition of "medical necessity," was authorized by state law. *See id.* at 1345. The court reasoned:

> [I]n view of the Plaintiffs' allegations, it may be that the definition of "medical necessity" acquires an Alice–in–Wonderland flavor, whereby the managed care insurance company manipulates those words so that they mean one thing within the context of regulatory review but something quite different in actual practice. The Defendants' arguments would require a factual inquiry extending beyond the pleadings to verify whether, how and which practices have been reviewed, certified or statutorily authorized by governmental authorities. Therefore, it would be premature to undertake such an examination at this stage of the case.

Id.[9]

The court in *Managed Care* held that discovery was required to resolve the

[9] In *Klay v. Humana, Inc.*, 382 F.3d 1241 (11th Cir. 2004), this Court reviewed the order on class certification in *Managed Care*. The panel in *Klay*, led by Judge Tjoflat, focused "not [on] whether managed care is wrong, but [on] whether particular managed care companies failed to live up to their agreements[,]" and found that "[t]he plaintiffs [we]re seeking nothing more than the compensatory damages to which they [we]re contractually entitled, and the treble damages to which they are statutorily entitled." 382 F.3d at 1274.

plaintiffs' claims. Here, the district court dismissed plaintiffs' claims without allowing discovery on the true nature of the kickbacks paid to SLS, i.e. whether they were gratuitous as alleged, or earned by an SLS affiliate for procuring a master policy in the first instance, as SLS has claimed. [D.E. 24 at 7 n.2; D.E. 26 at 8 n.2.] At a minimum, discovery was warranted to determine the true nature of the charges that SLS passed on to its borrowers. *See, e.g., Montoya v. PNC Bank, N.A.*, No. 14-cv-20474, 2014 WL 4248208, at *6 (S.D. Fla. Aug. 27, 2014) (declining to "look under the proverbial hood of Plaintiffs' allegations and frame them in a way Plaintiffs have not[,]" and rejecting filed-rate doctrine on motion to dismiss).

Because SLS is the ratepayer, ASIC's rates would not require adjustment should the Court reverse the opinion below. Appellants do not ask the court to assess the propriety of the amount that ASIC charges to SLS for its master policy. Should the court ultimately find that SLS breached its contracts with its mortgagors, or is liable for nondisclosure, ASIC will not need to adjust its rates at all; it will remain free to charge *SLS* a premium based on the same filed and approved *commercial* rates. SLS, however, will only be allowed to charge the borrower its true cost of coverage.

This point is better illustrated imagining a kickback amounting to 100% of the commercial premium calculated based on ASIC's filed rate. If the filed-rate doctrine applied here, it would preclude borrowers from recovering their economic losses even if SLS had received a 100% discount on forced coverage, ultimately paying ASIC nothing, but still charged borrowers the full value of the commercial premium it had initially owed. In this scenario, SLS's "cost of insurance" and the amount ultimately "disbursed," would be zero; deducting thousands of dollars from a borrower's escrow account for coverage would constitute a clear breach of contract. A judicial opinion finding a breach would not impede on the provenance of state regulators because it would not pass on the reasonableness of ASIC's filed rates, or involve analysis of the rates at all. The court would only be called upon to analyze the relevant provisions of the mortgage contract, and the propriety of the payments paid to SLS pursuant to side agreements. These transactions are not subject to governmental oversight. *See, e.g., Jackson*, 44 F. Supp. 3d at 1217 ("U.S. Bank is not subject to … oversight by state insurance commissions; as a result, its authority to regulate and approve insurers' rates does not touch Plaintiffs' claims[.]"). The same holds true regardless of the percentage kickback that ASIC pays to SLS.

Similarly, Appellants' claims do not offend the nondiscrimination principle. *See, e.g., Williams*, 681 F.3d at 797-98 (no rate discrimination because kickbacks not subject to regulatory review). The reason is simple: Appellants' claims do not threaten the "scheme of uniform rate regulation"—their resolution will not result in SLS paying a lower rate than other similarly situated *lenders* because the master policy's commercial rates are not implicated. The rates among lenders—the ratepayers—comprise the playing field on which the filed-rate doctrine would prohibit discrimination. *See, e.g.*, *Hill*, 364 F.3d at 1316 (nondiscrimination "prevent[s] carriers from engaging in price discrimination as between ratepayers"). In concluding that Appellants' claims would transgress the nondiscrimination principle, the District Court focused on the wrong ratepayer.

Appellees have willingly "discriminated" among mortgagors when paying settlement funds only to those who submit claims in force-placed insurance settlements, which are not submitted for regulatory review. *See, e.g., Saccoccio*, 297 F.R.D. 683; *see supra* n.2. They do so because returning these charges to mortgagors does not affect ASIC's commercial rates or the premiums paid by servicers, but instead only the side agreements that provide for the gratuitous kickbacks and SLS's transactions with its borrowers. *See, e.g., Burroughs*, 2016 WL 1389934, at *4.

Appellants' claims do not offend the nonjusticiability or the nondiscrimination principle underlying the filed-rate doctrine. The district court thus erred in granting Defendants-Appellees' motions to dismiss.

CONCLUSION

The Court should reverse the opinion of the District Court and remand this case for further proceedings.

Respectfully submitted,

s/ Adam M. Moskowitz
Adam M. Moskowitz
Thomas A. Tucker Ronzetti
Rachel Sullivan
Robert J. Neary
KOZYAK TROPIN &
THROCKMORTON LLP
2525 Ponce de Leon Blvd., 9th Floor
Coral Gables, FL 33134
Tel.: 305-372-1800
Fax: 305-372-3508
amm@kttlaw.com
tr@kttlaw.com
rs@kttlaw.com
rn@kttlaw.com

Stephen F. Rosenthal
Aaron S. Podhurst
Peter Prieto
Matthew P. Weinshall
PODHURST ORSECK, P.A.
25 West Flagler Street, Suite 800
Miami, Florida 33130
Tel.: 305-358-2800
Fax: 305-358-2382
srosenthal@podhurst.com

Lance A. Harke
Howard M. Bushman
HARKE CLASBY & BUSHMAN LLP
9699 NE Second Avenue
Miami Shores, Florida 33138
Tel.: 305-536-8220
Fax: 305-536-8229
lharke@harkeclasby.com
hbushman@harkeclasby.com

Counsel for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE

Counsel for Appellants hereby certify that the type style utilized in this brief is 14-point Times New Roman proportionally spaced, and there are 7,908 words in the brief.

s/ Adam M. Moskowitz

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 13, 2016, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

s/ Adam M. Moskowitz