

## 2nd Circ. Accepts Force-Placed Insurance Rate Defense

By **Jeff Sistrunk**

Law360, Los Angeles (July 22, 2015, 8:10 PM EDT) -- Balboa Insurance Co. prevailed in an interlocutory appeal before the Second Circuit on Wednesday in a racketeering class action alleging it bribed GMAC Mortgage LLC for the right to provide force-placed hazard coverage, when the appeals court found that the suit fails because the insurer's premium rates were state-approved.

A three-judge panel concluded that the claims brought by borrowers who allege they were overcharged by GMAC for lender-placed insurance sold by Balboa are barred by the filed rate doctrine, which holds up state-approved premiums as unassailable.

"We hold that a claim challenging a regulator-approved rate is subject to the filed rate doctrine whether or not the rate is passed through an intermediary," Circuit Judge Dennis Jacobs wrote for the panel. "The claim is therefore barred if it would undermine the regulator's rate-setting authority or operate to give the suing ratepayer a preferential rate."

The plaintiffs asserted Racketeer Influenced and Corrupt Organizations Act claims on the basis of letters GMAC sent to borrowers that they said concealed the free services and commissions it was reaping from Balboa. According to the suit, the lender demanded these kickbacks as a condition of designating Balboa as its exclusive force-placed insurance provider.

The suit originally named GMAC as a defendant but was complicated by GMAC parent Residential Capital LLC's May 2012 bankruptcy filing, which forced the plaintiffs to drop the company from the suit in favor of ResCap's nonbankrupt parent Ally Financial Inc. The plaintiffs then dropped Ally Financial from the case in March 2014, leaving only Balboa and affiliate Newport Management Corp. as defendants.

U.S. District Judge Alison J. Nathan refused to dismiss the suit based on the filed rate doctrine, saying that the borrowers were not challenging the rates charged to GMAC as the policyholder but rather the cost of their own reimbursement of those rates. The judge further determined that the plaintiffs' RICO claims were adequately pled but that their claims under the Real Estate Settlement Procedures Act were not.

In April 2014, Judge Nathan **allowed Balboa** to file an interlocutory appeal of her decision, which was the first to decide the applicability of the filed rate defense to force-placed insurance cases, saying that it rested on unsettled legal conclusions.

The Second Circuit panel said Wednesday that it had to consider whether the plaintiffs' claims would be at odds with either of two principles: the nonjusticiability principle, which states that courts shouldn't undermine agencies' rate-making authority by changing approved rates, and the nondiscrimination principle, which says that ratepayers shouldn't be able to use litigation as a means for obtaining preferential rates.

Plainly, the panel said, the borrowers' claims invite "judicial meddling" into issues of insurance policy and would undermine the rate-making authority of the state insurance regulators who approved Balboa's rates. Regulators have the final say as to what should or shouldn't be included in a rate, it said.

"Whether insurer-provided services should have been reflected in the calculation of [lender-placed insurance] is not for us to say; under the nonjusticiability principle, the question is reserved exclusively to the regulators," the opinion said.

The panel also found that damages recovered by the plaintiffs would effectively serve as a rebate, giving them preferential treatment over other borrowers charged for Balboa's lender-placed insurance.

"Plaintiffs' claims are barred by the filed rate doctrine for the separate — and independently sufficient — reason that they would result in plaintiffs paying preferential rates for [lender-placed insurance]," Judge Jacobs wrote.

An attorney for the plaintiffs declined comment. An attorney for Balboa did not immediately respond to a request for comment.

Circuit Judges Dennis Jacobs, Peter Hall and Gerard Lynch sat on the Second Circuit panel.

The plaintiffs are represented by Mark A. Strauss and Thomas W. Elrod of Kirby McInerney LLP.

The defendants are represented by Ross E. Morrison, Robyn C. Quattrone and Katherine L. Halliday of BuckleySandler LLP and by John C. Englander and Brian T. Burgess of Goodwin Procter LLP.

American Security Insurance Co., as an amicus curiae, is represented by Frank G. Burt, Denise A. Fee, W. Glenn Merten and Brian P. Perryman of Carlton Fields Jordan Burt.

The case is Rothstein v. Balboa Insurance Co., case number 14-2250, in the U.S. Court of Appeals for the Second Circuit.

--Editing by Brian Baresch.