

GMAC Force-Placed Insurance Class Action Gets Judge's OK

By **Andrew Scurria**

Law360, New York (September 30, 2013, 6:31 PM EDT) -- A New York federal judge on Monday upheld a racketeering class action targeting kickbacks Balboa Insurance Co. allegedly paid to GMAC Mortgage LLC for force-placing hazard insurance policies, saying the lender may have gouged borrowers when demanding reimbursement for coverage.

U.S. District Judge Alison J. Nathan greenlit claims from a putative class of homeowners that GMAC broke federal racketeering laws by billing for the full cost of force-placed insurance policies it purchased despite secretly receiving mortgage tracking services from a Balboa affiliate for free. As the suit alleges, the free tracking services constituted a kickback from the insurer.

In so ruling, Judge Nathan refused Balboa's argument that the filed-rate doctrine — holding government-approved premiums to be unassailable in court — was fatal to the suit. Balboa's filed rates were approved for policies sold to loan servicers and lenders, while the plaintiffs purportedly reimbursed GMAC for force-placed coverage as required by their mortgage loan agreements, according to the order, a crucial distinction that the judge said vitiated the filed-rate defense.

"It would be fair to infer from these facts that the filed and approved rates were not meant to be directly applicable to individual residential mortgage loan borrowers, like plaintiffs, and that these rates were not approved for the direct application to such individuals," the judge said. "Defendants have provided no authority to support the contention that the court can, should or must grant 'per se reasonable' status to rates designed and approved for lenders when those rates are secondarily billed by the lenders to borrowers instead."

The ruling is the first in the New York district to address the filed-rate doctrine's applicability in lender-placed insurance suits, according to the order, and Judge Nathan relied heavily on a ruling **in Illinois federal court** last month rejecting the defense in a suit against Wells Fargo Bank NA and Assurant Inc.

After turning down the filed-rate defense, Judge Nathan declined to dismiss the suit's Racketeer Influence and Corrupt Organizations Act claims against Balboa, citing letters in which GMAC allegedly demanded reimbursement of its hazard insurance costs while concealing the free services it was obtaining from Balboa. The letters were sufficient to allege the predicate acts needed for a RICO claim, according to the order.

"It is fair to infer from the facts alleged that defendants had a strong financial interest in maintaining their relationship with [GMAC], that they knew that the actual costs of [lender-placed insurance] were lower than the amounts that were being asserted in the letters sent to plaintiffs and that they sent the notices containing the material misrepresentations," the judge said.

The judge then dismissed the suit's Real Estate Settlement Procedures Act claims, following other district courts that have concluded the law offers no protections beyond the initial property transaction.

GMAC allegedly admitted in testimony before New York regulators probing force-placed insurance arrangements that it outsourced tracking of borrowers' insurance coverage to Balboa affiliate

Newport Management Corp., which provided them for free.

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 GMAC from the suit in favor of ResCap's nonbankrupt parent Ally Financial Inc. As part of a proposed reorganization plan, Ally agreed to contribute \$2.1 billion to the ResCap bankruptcy estate and is expected to receive broad third-party releases barring creditor claims against Ally and its affiliates.

The plaintiffs filed a claim in the bankruptcy case and also **lodged an objection** to ResCap's disclosure statement, saying they would argue when the time comes that the nondebtor entities shouldn't be absolved of prepetition claims.

The issue of the third-party releases will likely be hotly contested by potential claimants in the ResCap bankruptcy. In the meantime, the bankruptcy court will hear arguments on Nov. 19 on whether the plaintiffs can pursue claims against Ally that could wind up released by the Chapter 11 plan. The case has been moving forward in the interim against Balboa and its affiliates only.

"We're very pleased with the court's well-reasoned opinion, and will continue to prosecute this case aggressively on behalf of the borrowers who were victimized by this scheme," said Mark A. Strauss of Kirby McInerney LLP, who represents the putative class.

The plaintiffs are represented in district court by Mark A. Strauss and J. Brandon Walker of Kirby McInerney LLP and in the bankruptcy case by Mary E. Augustine and Garvan F. McDaniel of Bifferato Gentilotti LLC.

The insurers are represented by Ross E. Morrison, Robyn C. Quattrone and Katherine L. Halliday of BuckleySandler LLP.

Ally is represented by Richard G. Haddad of Otterbourg Steindler Houston & Rosen.

The case is Rothstein v. GMAC Mortgage LLC et al., case number 1:12-cv-03412, in the U.S. District Court for the Southern District of New York.

--Editing by Stephen Berg.