Property Insurance/ Forced Placed Insurance

Insurance Companies Face Liability Exposure When Offering Insurance Policies for Forced Placement by Lenders

In a Lengthy Opinion, a Federal District Judge Examines Lender Force-placed Insurance Issues

Wilson v. Everbank, N.A., __ F. Supp. 3d __, 2015 WL 265648 (S.D. Fla. January 6, 2015)

Case at a Glance

The case of *Wilson v. Everbank, N.A.*, ___ F. Supp. 3d ___, 2015 WL 265648 (S.D. Fla. Jan. 6, 2015), was filed as a class action arising out of Lender Force-Placed Insurance practices in residential mortgages. The homeowner-borrower pays the premium charged on every force-placed insurance policy, including in this case. The original complaint contains eleven (11) claims or causes of action against four defendants, two lenders and two insurance companies which offered insurance policies that were force-placed on the plaintiffs. Some of the named plaintiffs' claims invoked Federal law and the rest invoked the law of three State jurisdictions in addition: Florida, New York, and Illinois. The District Court dismissed some claims and declined to dismiss others, leaving several claims intact as alleged against the lender and both insurance company defendants.

Summary of Decision

To an audience of readers of *Insurance Litigation Reporter*, the claims (or, as the Federal Judge described them, the "causes of action") of greatest interest are those alleged against the insurance companies in this case. The plaintiffs sued American Security Insurance Company ("ASIC") and Standard Guaranty Insurance Company ("SGIC") for alleged unjust enrichment, tortious interference, Racketeer Influenced and Corrupt Organizations Act ("RICO") violations, and for alleged violations of the New York Deceptive Trade Practices Act ("NYDPA").

Tortious Interference Claims Against the Insurance Company Defendants. The tortious interference counts or claims were not the first ones alleged against ASIC and SGIC in the plaintiffs' complaint, but the court's disposition of them is remarkable: In every lender force-placed insurance case that the author has found, including this one, every single claim alleged against an insurance company which provides insurance policies to be placed on borrowers by force, has survived a motion to dismiss based on alleged tortious interference with the borrower's business relationship with a lender.

To date, each of these cases has been filed in South Florida, specifically, in the United States District Court for the Southern District of Florida. The decision in the present case joins that lineup; in this case, too, the court denied the force-placing insurance companies' motion to dismiss the tortious interference claim alleged against them. Simply put, the insurance company defendants in this and other lender force-placed insurance cases allegedly paid "kickbacks" and compensation by other names, in exchange for a lender adding their names to an approved list used by the lender to force-place insurance on residential mortgagors. The lender thereafter selects the pay-to-play insurance company's policy when the lender force-places the insurance and the premium on the borrower. "Because Plaintiffs have adequately pled that EverBank [their lender-mortgagee] breached their mortgage agreements and that the Insurer Defendants intentionally and unjustifiably induced such breaches, Plaintiffs have stated valid tortious interference claims." *Wilson v. Everbank, N.A.*, No. 14-CIV-22264, 2015 WL 265648, *26 (S.D. Fla. Jan. 6, 2015).

At times, the court's summary of the insurance company defendants' arguments against tortious interference in this case almost seemed to include an argument that tortious interference should not lie here, because the insurance companies did not induce *the plaintiffs* to breach their mortgage contracts whether by failing to make payments on the mortgage or by allowing their homeowner's policies to lapse, or in some other, unspecified way. That has nothing to do with the tort of tortious interference with a business relationship in a lender force-placed insurance case, of course. The tort is directed toward

the mortgage contract relationship existing between the plaintiffs-borrowers and the lender-mortgagee. When the plaintiffs plead and, ultimately, if the plaintiffs prove that the insurance companies paid kickbacks to the lender in order to be able to charge the borrower a higher premium for force-placed insurance, the cost of which is added to the borrowers' monthly mortgage payments as they alleged here, then the tort of tortious interference with a business relationship will lie, again as it did here and as it has done in every case found to date.

If a legal counter to pleading a tortious interference claim exists for force-placing insurance companies, their challenge is to find it. They have not countered these alleged claims as yet. In the *Wilson* case, the insurance companies attempted to argue that tortious interference claims against them should be dismissed because the insurance companies' actions were privileged. The court refused to consider the issue of a privilege in conjunction with the insurance companies' motion to dismiss. Rather, privilege is an affirmative defense which must be proven. Besides, the court also noted, there is no privilege where the defendants asserting the privilege acted "in bad faith," including actions taken with malice or with conspiratorial motives. In the eyes of this court, "Plaintiffs have certainly alleged intentional and conspiratorial conduct by the Insurer Defendants here." *Wilson v. Everbank, N.A.*, No. 14-CIV-22264, 2015 WL 265648, *27 (S.D. Fla. Jan. 6, 2015). For all these reasons, the court in this case denied the insurer defendants' motion to dismiss the plaintiffs' tortious interference claim whether alleged under Florida, New York, or Illinois law.

Unjust enrichment claims. Unjust enrichment seems on its face to be the best fit for claims based on kickbacks and other illegal compensation. Just the sound of those two words—"unjust enrichment"—seems to describe the situation completely. The law does not see—or hear—it that way, however.

In lender force-placed insurance cases in particular, unjust enrichment claims do not have much success, although as in this case, the courts' discussions of these claims produce a lot of paper. In brief, unjust enrichment or quasi contract will not lie where there is a valid express contract. For that reason, unjust enrichment claims alleged against lenders-mortgagees have pretty uniformly been dismissed, just as the court in this case dismissed the plaintiffs' claims against their lender-mortgagee here. *Wilson v. Everbank, N.A.*, No. 14-CIV-22264, 2015 WL 265648, *8-*9 (S.D. Fla. Jan. 6, 2015).

Some States also allow *nonparties* to a valid express contract to raise the existence of the contract as a bar to unjust enrichment claims against *them*. So it was in this case, as to the unjust enrichment claim alleged against the insurance company defendants under New York law, because New York unjust enrichment law—unlike Florida law or Illinois law—allows even defendants who were not parties to the express contract in the situation to raise the existence of the contract as a bar to the claim. In this case, of course, there was a valid and express contract, the mortgage, and even though the insurance companies were not parties to the mortgage, they were permitted to raise the mortgage contract as a bar to unjust enrichment claims against them under New York law. The court accordingly granted the insurance companies' motion to dismiss the plaintiffs' unjust enrichment claim, to the extent that one plaintiff from New York raised the claim under New York law. The Florida and Illinois plaintiffs' unjust enrichment claims in this case were left intact. *Wilson v. Everbank, N.A.*, No. 14-CIV-22264, 2015 WL 265648, *23 (S.D. Fla. Jan. 6, 2015).

RICO Claims Against All Defendants. The plaintiffs alleged RICO claims "based on mail and wire fraud," which require allegations of "a scheme to defraud" and that the defendants intentionally participated in the scheme in order to state a claim upon which relief can be granted under 18 U.S.C. § 1962(c). The plaintiffs also alleged a RICO conspiracy which would have been actionable under 18 U.S.C. § 1962(d). However, the plaintiffs failed to allege actionable RICO claims and so the court granted all defendants' motions to dismiss them.

In this case, the court followed the majority view and held that alleged RICO violations have to be pled with the specificity required for allegations of fraud. Here, the plaintiffs failed to meet not only "the heightened pleading requirement" under Federal Rule of Civil Procedure 9(b) for claims of fraud, but in part they also failed to meet the standard of "requisite plausibility". Simply put, the plaintiffs did not present an actionable RICO claim based on allegations that EverBank mailed them notices which effectively "consisted of urging Plaintiffs to adhere to their obligations," and to obtain coverage other than the

coverage force-placed by the lender, thereafter including a small charge for "unearned commissions masked as authorized costs." Under such allegations, there was no plausible allegation that the plaintiffs were caused injury by these actions. The court dismissed the plaintiffs' RICO claims as to all defendants, including the conspiracy claims alleged by the plaintiffs under RICO. *Wilson v. Everbank, N.A.*, No. 14-CIV-22264, 2015 WL 265648, *13-*14 (S.D. Fla. Jan. 6, 2015).

New York Deceptive Practices Act Claim Against All Defendants. One of the named plaintiffs in this case, Mr. Jesus A. Avelar-Lemus, alleged a claim against all defendants under the New York Deceptive Practices Act ("NYDPA"), New York General Business Law § 349. This is the last of the claims alleged in *Wilson* to be considered here which included the insurance company defendants.

The NYDPA in basic terms exists to prohibit all deceptive acts or practices in any business, trade, commerce, or service in New York State. The court in this case dismissed Mr. Avelar-Lemus's NYDPA claim here because it suffered from the same defect as all the plaintiffs' alleged RICO claims, in the eyes of the court: Legally insufficient allegations of proximate cause of the claimed injury. *Wilson v. Everbank, N.A.*, No. 14-CIV-22264, 2015 WL 265648, *15 & *27 (S.D. Fla. Jan. 6, 2015).

Claims Allowed Against the Lender, EverBank: Claims Alleged for Breach of Contract; for Breach of the Covenant of Good Faith and Fair Dealing; and for Alleged Violations of the Truth-in-Lending Act ("TILA"). The motion to dismiss filed on behalf of the Lender Defendant in this case, EverBank, was denied as to certain claims. First, EverBank's motion was denied as to its alleged breach of the mortgage contract. Although the mortgage authorized EverBank to force-place insurance, the mortgage contained no express provision allowing EverBank to include the cost of kickbacks and other alleged costs in the price of premiums paid by borrowers for insurance force-placed by the lender. The claim for breach of the mortgage contract was accordingly sufficient to withstand EverBank's motion to dismiss in this case. *Wilson v. Everbank, N.A.*, No. 14-CIV-22264, 2015 WL 265648, *6 (S.D. Fla. Jan. 6, 2015).

The court clearly grasped the nature of force-placed insurance by describing the policies at issue as "master policies" previously obtained by the lender even before there was any valid opportunity to force-place insurance on a particular borrower. In particular, the court showed unusual insight into the nature of these policies by pointing out that the plaintiffs were complaining of more than the fact or amount of their lender's unauthorized addition of costs including kickbacks and other remuneration, to their, the borrowers'-plaintiffs', premium bills. This court recognized that such costs are "truly associated with insuring an ***entire loan portfolio*** and ***not*** the ***individual*** mortgaged property, and risk-free insurance costs." *Wilson v. Everbank, N.A.*, No. 14-CIV-22264, 2015 WL 265648, *6 (S.D. Fla. Jan. 6, 2015). [Emphasis added.]

The court slipped a little, without harming its thoughtful analysis of this particular issue in this case, by elsewhere in its opinion describing the force-placed insurance policies as "umbrella" policies just as they were described in the complaint. Complaint, Dkt. No. 1, ¶ 36, substantially quoted and cited by the court. *Wilson v. Everbank, N.A.*, No. 14-CIV-22264, 2015 WL 265648, *3 (S.D. Fla. Jan. 6, 2015)("the coverage comes through the master or umbrella policy already in place."). There is a master policy already in place in a case of force-placed insurance, but insurance practitioners know very well of course that it is incorrect to call it an "umbrella" policy. An "umbrella" policy is a type of excess policy, not a type of force-placed insurance policy.

In declining to dismiss the claims for alleged breach of the implied covenant of good faith and fair dealing, the court stumbled but did not fall when it lumped together the law of Florida, New York, and Illinois governing this claim. The court's discussion of this claim seemed shaky from the beginning. For example, this court referred to the contracting party which brings an action for alleged breach of the implied covenant as "the contract counterparty." *Wilson v. Everbank, N.A.*, No. 14-CIV-22264, 2015 WL 265648, *6 (S.D. Fla. Jan. 6, 2015). This is the language of finance, not the language ordinarily used by a Judge presiding over a lawsuit involving a contract and covenants implied in it.

In each State whose law was implicated in the implied covenant claims of the named plaintiffs in this case—Florida, New York, and Illinois—the implied covenant must relate to some express provision of the contract but the implied covenant will not be allowed to alter it. Thus, the court recognized that New York

law in particular will not recognize an implied covenant where there is an express contract provision that governs the matter, although the court held that the Federal Rules of Civil Procedure which allow alternative pleading trump State law on this question. *Wilson v. Everbank, N.A.*, No. 14-CIV-22264, 2015 WL 265648, *7 (S.D. Fla. Jan. 6, 2015). Inexplicably, the court treated Illinois law as somehow standing in "contrast" to New York law because Illinois law does not permit a separate claim for breach of the implied covenant but permits such a claim "within" a breach of contract claim.

The court was apparently distracted by the particular features of Illinois law, for the court actually wrote that since the plaintiffs alleged the violation of "an *express* contract term," that this "substantiates" their *implied* covenant claim. The court regained its focus, however, on the gist of the plaintiffs' implied covenant claim and on why the court sustained that claim against EverBank's motion to dismiss in this case:

> Further, Plaintiffs' claim for breach of the implied covenant is not duplicative of their breach of contract claim. The former focuses on EverBank's charging Plaintiffs for costs beyond the cost of coverage and not permitted under their mortgage agreements, while the latter focuses on EverBank's exercise of the discretion afforded it under Plaintiffs' mortgage agreements to select and impose insurance coverage. Therefore, Plaintiffs' claim for breach of the implied covenant of good faith and fair dealing survives. The court interprets the Crosses claim for breach of the implied covenant [under Illinois law] as a claim for breach of contract.

Wilson v. Everbank, N.A., No. 14-CIV-22264, 2015 WL 265648, *7 (S.D. Fla. Jan. 6, 2015).

The court also denied EverBank's motion to dismiss the plaintiffs' TILA (Truth-in-Lending Act) claims in this case. The court held the plaintiffs' allegations sufficient to state a claim for failure to disclose what were allegedly new terms of the lender's extension of credit. *Wilson v. Everbank, N.A.*, No. 14-CIV-22264, 2015 WL 265648, *10 (S.D. Fla. Jan. 6, 2015). In this decision, the *Wilson* court joined the majority view that TILA claims are sustainable in lender force-placed insurance cases.

Claims Denied Against the Lender, EverBank: Claims Alleged for Asserted Violations of the Florida Deceptive and Unfair Trade Practice Act ("FDUTPA") and Breach of Fiduciary Duty. In granting EverBank's motion to dismiss two claims alleged solely against EverBank as the plaintiffs' lender, the court in the Wilson case joined the majority view in both respects. First, this court denied the plaintiff Mr. Wilson's claim alleged under FDUTPA principally because that Act, by its own terms, simply does not apply to Federally regulated banks or savings and loan associations like EverBank. *Wilson v. Everbank, N.A., No. 14-CIV-22264, 2015 WL 265648, *9 (S.D. Fla. Jan. 6, 2015).*

Second, the court granted the lender defendant's motion to dismiss the plaintiffs' alleged breach of fiduciary duty claims. In general there is no fiduciary duty between a lender and a borrower. Although in special circumstances a lender accepts an actionable fiduciary relationship with a borrower, no such special circumstances appeared in this complaint to this court and so EverBank's motion to dismiss was granted in this regard. *Wilson v. Everbank, N.A.*, No. 14-CIV-22264, 2015 WL 265648, *11-*12 (S.D. Fla. Jan. 6, 2015).

Other Issues Decided by the Court in Wilson: *Whether a Subsidiary of the Lender is a Proper Party (Held: Negative); Whether Plaintiff Avelar-Lemus Failed to Perform Presuit Notice Conditions to Sue His Mortgagee, EverBank (Held: Negative); Whether Failure to Join Plaintiff Wilson's Spouse Was Failure to Join a Necessary Party (Held: Negative); Whether the Florida Plaintiff, Mr. Wilson, Failed to Undertake Administrative Remedies Under Fla. Stat. § 627.731 (Held: Negative); and Two Remaining Issues Worthy of a Little Further Comment, Below.* The heading of this part of the *Wilson* Case Summary concisely summarizes the court's disposition of several ancillary issues. Two, however, draw a little further comment: ASIC's and SGIC's Motion to Dismiss for Lack of Subject-Matter Jurisdiction, and the two Insurer Defendants' Motion to Dismiss Based on the "Filed Rate Doctrine".

The two insurance company defendants in the *Wilson* case filed what the court called "the 'Motion on Jurisdiction'." ASIC and SGIC argued in this motion that the *Wilson* plaintiffs could not proceed on their

claims as a nationwide class, because the *Wilson* plaintiffs "lack Article III standing to assert state common law claims for unjust enrichment and tortious interference under the laws of the states in which they do not reside and in which they do not claim to have been injured." *Wilson v. Everbank, N.A.*, No. 14-CIV-22264, 2015 WL 265648, *16 (S.D. Fla. Jan. 6, 2015).

This argument has great appeal to lawyers who litigate constitutional questions. On its face, this argument even has appeal to lawyers who do not necessarily litigate constitutional questions so much as they litigate questions involving subject-matter jurisdiction. There are cases holding that an alleged nationwide class cannot be certified in a given case because the claims asserted by the named plaintiffs are too diverse under varying State laws to be common to the class. Taking this line of cases one step further, the courts in such cases arguably do not have jurisdiction over the subject matter, or, at the least, lack jurisdiction over those claims which cannot be presented on behalf of a nationwide class of people.

The *Wilson* court's response to this argument is instructive. The court spent several pages discussing class action procedures, knowledge of which is helpful in understanding the issue. The *Wilson* court's opinion explaining class action procedures is extremely understandable. *Wilson v. Everbank, N.A.*, No. 14-CIV-22264, 2015 WL 265648, *16-*19 (S.D. Fla. Jan. 6, 2015).

Ultimately, however, the court ruled that it would not confront this issue at the pleading stage but would confront it instead when and if the plaintiffs' action is certified as a class. Dismissal of nationwide claims is no substitute for considering class certification under Federal Rule of Civil Procedure 23, the Federal class action rule, said this court: A contrary ruling "would in effect impose a requirement that, in a multistate class action involving state common law claims, there be a named plaintiff from every state…. [T]hat is contrary to established practice and highly inefficient." The issues of standing and Rule 23 are not the same. *Wilson v. Everbank, N.A.*, No. 14-CIV-22264, 2015 WL 265648, *18 (S.D. Fla. Jan. 6, 2015).

The Filed Rate Doctrine is an Affirmative Defense. It is extremely common to find a filed rate doctrine defense raised at the pleading stage in lender force-placed insurance cases. Since the filed rate "doctrine" defense applies in other insurance-related cases, it too merits a little further discussion here. Parenthetically, I put the word "doctrine" in quotes just now because the filed rate doctrine argued in the *Wilson* case by the insurance company defendants does not look anything like the actual filed rate doctrine worked out in the decided cases.

The filed rate doctrine originated in utility rate-making proceedings. The idea behind the defense is that if a regulatory authority of competent jurisdiction, i.e., a regulatory authority charged with approving or denying rate requests, has already approved a given rate charged by the utility (or by the defendant claiming to be clothed as a utility in this respect), then the judiciary may not alter the rate approved by the rate-making authority.

There are problems with that defense in insurance cases, including in lender force-placed insurance cases like *Wilson*. The doctrine is an affirmative defense. Therefore the filed rate doctrine is legally insufficient to defeat a claim unless the doctrine appears from the face of the allegations in the complaint. That was not the case in *Wilson*, and so the *Wilson* court declined to rule on the efficacy of this affirmative defense at the pleading stage of this case. *Wilson v. Everbank, N.A.*, No. 14-CIV-22264, 2015 WL 265648, *19 (S.D. Fla. Jan. 6, 2015).

In addition, the filed rate defense is available only to those who pay the rates in question. In *Wilson*, as in most lender force-placed insurance cases and as in most insurance cases of any kind, the plaintiffs were not the ratepayers. The plaintiffs' *lender* procured "the group master policies" that were sold by the defendant insurance companies. *Wilson v. Everbank, N.A.*, No. 14-CIV-22264, 2015 WL 265648, *21 (S.D. Fla. Jan. 6, 2015).

Finally, the *Wilson* court held that the filed rate doctrine could not defeat the plaintiffs' claims at the pleading stage because the plaintiffs did not challenge the defendant insurance companies' rates: The plaintiffs took exception to *additional* charges which the defendant insurance companies allegedly added on to their rates. In short, the plaintiffs' objection was not to being charged rates for force-placed insurance but rather to being charged for kickbacks allegedly paid by the insurers to the plaintiffs' lender. *Wilson v. Everbank, N.A.*, No. 14-CIV-22264, 2015 WL 265648, *20-*21 (S.D. Fla. Jan. 6, 2015).

In sum, Wilson v. Everbank, N.A. is a decision which Westlaw prints out at 54 pages, and which runs

to 52 pages in the court file. Given the length of this opinion, at times during the writing of this Case Summary (and undoubtedly also during the reading of any summary of the *Wilson* case), it has seemed that the issues confronting the court in this case would never stop. All told, the court's disposition of these issues is masterful and well worth reading in order to begin to understand the many issues presented. // Wall

[Editor's Note: Dennis J. Wall is the author of "Lender Force-Placed Insurance Practices" to be published by the American Bar Association in Spring, 2015).]