DEFENSES TO CLAIMS BASED ON LENDER FORCE-PLACED INSURANCE PRACTICES

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INTRODUCTION

Mortgage indebtedness in the United States doubled from 2001 to 2007. During that same period, mortgage debt rose "almost as much" as it had since the United States was founded as a nation. The average amount of mortgage debt for each household rose by nearly $60,000 during those six

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years. "[I]t soon became apparent that what had looked like newfound wealth was a mirage based on borrowed money."[1]

Lender force-placed insurance (LFPI) premiums are a part of this mortgage business model and are added to monthly mortgage payments. If the LFPI premiums (including premiums charged under force-placed policies that lenders picked because they received kickbacks from the insurer) are not paid like every other charge included in the monthly mortgage payment, the mortgagee can declare a default and foreclose.[2] "[I]n the event of foreclosure, costs are passed onto investors."[3]

Homes can also be taken from homeowners because of the kickbacks imposed in LFPI premiums force-placed on borrowers because of the kickbacks imposed in LFPI premiums force-placed on the borrowers for insurance that does not usually provide them any protection. LFPI ordinarily protects the lenders and not the borrowers.

This is the challenging background against which defendants must defend themselves in LFPI cases. It is time to consider the available defenses.[4]

I. PREEMPTION

The first defense to be considered here is preemption. This defense is raised independently of alleged defects in the plaintiffs' claims in the LFPI cases, even when it is raised in the same motion with them, which it often is.

Preemption analysis begins by considering the conduct on which the claims are based, not just the categories of the claims. In basic terms, if

1. The Financial Crisis Inquiry Commission, The Financial Crisis Inquiry Report 7 (Jan. 2011) (Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States) [hereinafter FCIC], *available at* https://www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf, this version stated on-site to include "all corrections contained in the errata sheet issued by the Commission as found on the FCIC website as of February 25, 2011." Over all, "[h]ouseholds have lost $11 trillion in wealth since 2006." *Id.* at 23. The number of foreclosures recorded in 2010 reportedly equaled the record for the highest number of foreclosures in U.S. history. Mehrsa Baradaran, How The Other Half Banks 236 n.48 (2015).

2. *See* Paragraph 5 and Non-Uniform Covenant Paragraph 22 of Fannie Mae/Freddie Mac Form 3033 1/01 New York—Single Family, at 7–9, 17–18; Paragraph 5 and Non-Uniform Covenant Paragraph 22 of Fannie Mae/Freddie Mac Form 3010 1/01 Florida—Single Family, at 6–7, 15. *See also* Dennis J. Wall, Lender Force-Placed Insurance Practices §§ 1.1, 2.3 (2015).

3. Mar. 2013 (undated) Consent Order between N.Y. State Dep't of Fin. Servs., Fin. Fraud & Consumer Prot. Div. & Am. Sec. Ins. Co., Am. Bankers Ins. Co. of Fla. & Assurant, Inc., *In re* Am. Sec. Ins. Co., ¶ 2 ("Findings"). *See* http://www.dfs.ny.gov/about/letters/assur-order-130321.pdf (last accessed on Feb. 19, 2016).

4. The defenses considered here are in addition to the defects raised in the allegations and in the plaintiffs' claims. The procedural posture of LFPI cases at this time necessarily involves a review of the courts' consideration of defenses as directed to the allegations of the plaintiffs' complaints. As of Spring 2016, none of these cases has gone to trial. Instead, most, if not, all of the defenses are raised in these cases by a motion under Fed. R. Civ. P. 12(b)(6) for "failure to state a claim." A few cases represent decisions on a motion or motions for summary judgment.

the conduct on which the claims are based falls within the scope of the statute or regulations issued under the statute, the legal duty that the plaintiffs claim to arise from that conduct is preempted.[5]

The main source of federal-state preemption in LFPI cases is the National Bank Act (NBA), which governs federally chartered banks. Under the NBA, federally chartered banks are given "all such incidental powers as shall be necessary to carry on the business of banking."[6] The powers of federally chartered banks include real estate lending.[7] This broad grant of statutory authority is matched by a broad grant of authority from a regulation promulgated by the governing administrative agency, *i.e.*, the Office of the Comptroller of the Currency. Preemption by regulation under the NBA extends even to collateral protection insurance if state laws are contrary to "[t]he ability of a creditor to require or obtain private mortgage insurance, insurance for other collateral, or other credit enhancements or risk mitigants, in furtherance of safe and sound banking practices; . . . [or] terms of credit."[8]

On this ground of express preemption, at least one court has ruled that the NBA preempts all claims of every kind in an LFPI case based upon certain allegations against a federally chartered bank. The defendants in that case filed a motion to dismiss all of the plaintiffs' fourteen alleged counts on the ground of NBA preemption. The defendants invited the court to examine the underlying conduct in order to determine if the predicate of each claim was preempted by the NBA:

> This issue is not confined in a single claim or cause of action, but is instead a recurring theme throughout the Second Amended Complaint. Indeed, plaintiffs' assertion that defendants engaged in wrongdoing by force-placing hazard insurance in excessive coverage amounts for plaintiffs' home is sprinkled throughout many of the Selmans' 14 asserted causes of action as part (but not all) of the legal and factual basis for each of those claims.[9]

Accepting the defendants' argument that all claims based upon the alleged conduct that conflicted with the NBA were preempted and failed to state a claim upon which relief could be granted by the court in that LFPI case, the court dismissed all claims based on the alleged conduct of the federally chartered bank defendant to the extent either that the force-placed

5. *See* Ellsworth v. U.S. Bank, N.A., 908 F. Supp. 2d 1063, 1078 (N.D. Cal. 2012). The opinion of the U.S. Magistrate Judge in this case contains clear and concise explanations of the applicable rules of law.

6. 12 U.S.C.A. § 24.

7. 12 U.S.C.A. § 371.

8. 12 C.F.R. § 34.4(a)(2)–(4).

9. Selman v. Citimortgage, Inc., No. 12–0441–WS–B, 2013 WL 838193, at *3 n.4 (S.D. Ala. Mar. 5, 2013).

insurance was "excessive," or that the defendant conducted itself so as to obtain kickbacks or commissions:

> In light of the foregoing analysis, the Motions to Dismiss are granted, and plaintiffs' claims are dismissed, insofar as the Selmans seek to bring state-law claims challenging [the mortgage servicer's] conduct of obtaining force-placed insurance for the Selmans' residence in an amount that plaintiffs contend was excessive or in some way motivated by a desire to maximize kickbacks or commissions. Those claims are preempted by the National Bank Act and cannot be pursued herein.[10]

The court applied the quoted ruling to dismiss all three defendants from that case: the servicer of the Selmans' loan, another defendant which the court described as the owner of the beneficial interest in the Selmans' loan (Federal National Mortgage Association or "Fannie Mae"), and finally the insurer with which the mortgage servicer force-placed insurance coverage on the Selmans' residence.[11] The claims against the mortgage servicer qualified for NBA preemption, the court wrote, because under the law prevailing at the time it acted, the servicer was a subsidiary of a national bank.[12]

The other two defendants, Fannie Mae and the LFPI company, received the benefit of NBA preemption without discussion from the court. Apparently, however, since the main defendant responsible for the forced placement of insurance in this case, the servicer, was protected by preemption, it perhaps seemed to follow that the other two defendants with which it acted in connection with the allegedly "excessive coverage," and the kickbacks and commissions paid for it, would also be protected by the holding of preemption.

Just as preemption can be express, an exemption from the suggested preemption can also be express. According to an Office of the Comptroller of the Currency regulation, the National Bank Act does not preempt conflicting state laws where the state laws in question only *incidentally* affect the exercise of national banks' real estate lending powers. That regulation provides a specific exemption from preemption for any claim based on a state's law of contracts or torts.[13] In other words, state law cov-

10. *Id.* at *5.
11. *Id.* at *1.
12. *Id.* at *5.
13. 12 C.F.R.§ 34.4(b)(1) & (2). This express exemption from NBA preemption purports to incorporate a U.S. Supreme Court holding in a 1996 case:

> (b) State laws on the following subjects are not inconsistent with the real estate lending powers of national banks and apply to national banks to the extent consistent with the decision of the Supreme Court in Barnett Bank of Marion County, N.A. v. Nelson, Florida Insurance Commissioner, et al., 517 U.S. 25 (1996):
>
> (1) Contracts;
>
> (2) Torts; . . .

ering the same conduct as the National Bank Act is not preempted by the NBA.

Applying this express regulatory exemption to allegations in LFPI cases concerning kickbacks and backdating, the majority of courts have held that the NBA does not expressly preempt LFPI claims based on alleged kickbacks and backdating.[14]

In addition to being express, preemption can also be implied. Two of the current categories of implied preemption in the case law involve "field" preemption, in which the entire "field" of a subject is said to be preempted, and "conflict" preemption, in which a court decides that to allow a claim to go forward would "conflict" with a statute that did not contain an express provision for preemption. Courts in LFPI cases have looked at the allegations of conduct, as well as commonly alleged *legal* bases for the alleged claims in light of the legal purposes of the National Bank Act.

The majority view of implied preemption defenses raised in LFPI cases holds that the National Bank Act does not preempt state laws of a general nature. Specifically, the majority view is that the NBA does not preempt claims for breach of the implied covenant of good faith and fair dealing and claims for alleged unjust enrichment[15] or breach of contract or alleged violations of an unfair business practices act.[16] The same holding of no preemption under the NBA has been extended to state laws of a general nature that "incidentally affect the exercise of national banks' insurance activities."[17]

Moreover, the Dodd-Frank Act contains a provision limiting the application of NBA preemption in future cases. Congress's preemption limitation is found in 12 U.S.C.A. § 1465, which is titled "State law preemption standards for Federal savings associations clarified." In the statute, Congress wrote that, "[n]otwithstanding the authorities granted under sections 1463 and 1464 of this title, this chapter *does not occupy the field in any area of State law.*"[18]

14. *E.g.*, Leghorn v. Wells Fargo Bank, N.A., 950 F. Supp. 2d 1093, 1113–14 (N.D. Cal. 2013) (Spero, USMJ); *see, e.g.*, Lane v. Wells Fargo Bank, N.A., No. C12–04026 WHA, 2013 WL 269133, at *13 (N.D. Cal. Jan. 24, 2013); Kunzelmann v. Wells Fargo Bank, N.A., No. 9:11–cv–81373–DMM, 2012 WL 2003337, at *4–5 (S.D. Fla. June 4, 2012).

15. *E.g.*, *Ellsworth*, 908 F. Supp. 2d at 1069, 1078–81; *Kunzelmann*, 2012 WL 2003337, at *5; Williams v. Wells Fargo Bank, N.A., No. 11–21233–CIV, 2011 WL 4901346, at *10 (S.D. Fla. Oct. 14, 2011).

16. *Ellsworth*, 908 F. Supp. 2d at 1078–81. Specifically, the *Ellsworth* court held, "[t]he Court follows the weight of authority and finds that the NBA does not preempt the challenges that Ellsworth raises to the alleged kickbacks and backdating." *Id.* at 1081. The unfair business practices act mentioned in the text was California Business & Professions Code § 17200 and following.

17. *Williams*, 2011 WL 4901346, at *9. *Accord Lane*, 2013 WL 269133, at *12, *13; Cannon v. Wells Fargo Bank, N.A., 917 F. Supp. 2d 1025, 1048–50 (N.D. Cal. 2013).

18. 12 U.S.C.A. § 1465(b) (emphasis added).

The effective date of this provision is something of a jumble,[19] but Congress provided that it would "become effective on the designated transfer date,"[20] which is the date designated by the Secretary of the Treasury for the transfer of functions to the Consumer Financial Protection Bureau (CFPB). The designated transfer date selected by the Treasury Secretary was July 21, 2011,[21] which is the date when Congress's limitations on National Bank Act preemption took effect.[22] At the present time, there do not appear to be any cases in which courts have addressed these provisions.

Two additional statutes or sets of statutes have been raised as preempting claims in LFPI cases. One is the National Flood Insurance Act (NFIA). In *Jackson v. Wells Fargo Bank, N.A.*,[23] the court began with the same preemption analysis followed by the courts that analyze National Bank Act preemption defenses in LFPI cases. The court first looked at the alleged conduct. According to the court, there was no actionable breach of contract claim that pertained "to the administration and adjustment of a claim for proceeds under a flood insurance policy."[24] "To the contrary," the plaintiff's claim "pertains to conduct occurring in a mortgage transaction where, under plaintiffs' version of the facts, the improved property and thus the financial transaction did not require flood insurance."[25] The court concluded that the NFIA does not expressly preempt such a claim.

Further, the *Jackson* court held that "field preemption" does not apply where LFPI plaintiffs "do not seek to recover under a policy [of insurance] controlled by FEMA regulations" and they do not seek relief "based on conduct involving the administration of such a policy."[26] According to the court, "conflict preemption" did not apply under the NFIA, either: "Plaintiffs' contract claim is predicated on misconduct in connection with the procurement of a *mortgage*."[27] Or, as a federal district judge in the Middle District of Florida summed up the entire issue of NFIA preemption of claims arising from lender force-placed insurance:

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19. In general terms, many of the effective dates provided in the Dodd-Frank Act are a jumble. This is only one of them. For similar examples, see Wall, *supra* note 2, § 5.5.

20. Pub. L. 111–203, § 1048.

21. 75 Fed. Reg. 57252, 57252–53 (Sept. 17, 2010) (Fed. Reg. Doc 2010–24387) accessible online at https://www.federalregister.gov/articles/2010/09/20/2010-23487/designated-transfer-date (last accessed on Tuesday, April 5, 2016).

22. In *Selman v. CitiMortgage, Inc.*, No. 12–0441–WS–B, 2013 WL 838193, at *4 (S.D. Ala. March 5, 2013), the court held that the preemption limitation did not have any retroactive effect.

23. No. 2:12cv1262, 2013 WL 5945732 (W.D. Pa. Nov. 6, 2013).

24. *Id.* at *19.

25. *Id.*

26. *Id.*

27. *Id.* at *20.

> While the court agrees the Defendants are free to establish by contract a right to require that a borrower hold flood insurance coverage under the NFIA, *Plaintiff is relying on allegations regarding the conduct of the Defendants in administering the policies*, including the exchange of unearned kickbacks and commissions, and backdating flood insurance policies, *rather than whether the Defendants could require and force place flood insurance on the property. The Court finds that allegations of such actions are not those contemplated by the NFIA* such that this action would not stand as an obstacle to the accomplishment and execution of the Act. Thus, preemption under the NFIA is denied.[28]

The other set of statutes under which defendants have argued for preemption are statutes that permit lenders to implement force-placed insurance policies. In *Ellsworth v. U.S. Bank, N.A.*,[29] the force-placed insurance company argued that the plaintiff's claims against it were barred by the insurance carrier's compliance with the California Insurance Code concerning ratemaking. For the most part the defendant insurance company in this case presented this defense as "the filed rate doctrine" discussed below.[30] At times the carrier seemed to argue additionally or alternatively that Ellsworth's claims against it should be preempted. Although the court often seemed to treat the carrier's defense in this case as an invocation of the filed rate doctrine, the court's analysis of the conduct implicated by the claims that the plaintiff alleged against the carrier, which included claims for unjust enrichment and alleged violations of an unfair business practices act,[31] sounds the same as if the court were addressing a preemption defense: "Ellsworth does not challenge the rates or the premiums he paid but instead challenges the alleged kickbacks."[32] In any event, the force-placed insurance carrier's defense in this regard was rejected.

Another statute invoked in an insurance company's preemption defense came in a case with a different set of facts and an unusual lender force-placed insurance situation. *Burress-Taylor v. American Security Insurance Co.* involved a homeowner's policy issued by Hanover Fire Casualty Insurance Company for which the homeowner-mortgagor paid the premiums and a simultaneously effective force-placed policy "procured by the lender" that was issued by another insurance company.[33] Ms. Burress-Taylor's home sustained a fire loss and she claimed insurance under both insurance policies due to the size of the loss. The carrier which

28. Degutis v. Fin. Freedom, LLC, 978 F. Supp. 2d 1243, 1258 (M.D. Fla. 2013) (emphasis added).
29. 908 F. Supp. 2d 1063 (N.D. Cal. 2012).
30. *See* WALL, *supra* note 2, § 6.2.
31. *Ellsworth*, 908 F. Supp. 2d at 1069. The Unfair Business Practices Act in question in the *Ellsworth* case is California Business & Professions Code § 17200 et seq.
32. *Id.* at 1082.
33. 980 N.E.2d 679 (Ill. Ct. App. 2012).

provided the LFPI policy took the position that its lender-placed policy was excess coverage over and above her homeowner's insurance policy. In response, Ms. Burrell-Taylor filed a class action complaint under the Illinois Consumer Fraud Act.[34]

The LFPI carrier defended against a consumer fraud claim on the ground that Section 155 of the Illinois Insurance Code preempted the plaintiff's consumer fraud claim.[35] Section 155 is Illinois's "vexatious and unreasonable refusal to pay" statute, applicable, in basic and simple terms, to insurance companies that delay or deny the payment of claims. Section 155 preempts claims alleged as a separate and independent tort for what the Illinois courts view as only a breach of contract, all of which claims are based on the same conduct. Under Illinois law, "mere allegations of bad faith or unreasonable and vexatious conduct, without more, do not constitute a separate and independent tort," and claims based on such allegations "are preempted by section 155."[36]

In analyzing the defendant insurance company's Section 155 preemption defense, the Illinois Appellate Court followed the same analysis that federal courts have followed in analyzing preemption defenses raised in LFPI cases. The Illinois court looked first at the conduct alleged in the plaintiff's complaint concerning consumer fraud: "In resolving this issue, we look beyond the legal theory asserted in plaintiff's complaint to the conduct forming the basis of her consumer fraud claim."[37] Following this analysis, the court held that the Illinois Consumer Fraud Act claim provided an independent basis for a claim apart from a breach of an insurance contract and so Section 155 did not preempt the ICFA claim.[38]

In sum, preemption has been raised under a handful of statutes as a defense to claims in LFPI cases. The principal set of statutes that has been found to provide the basis for a holding of preemption of claims in an LFPI case is the National Bank Act. However, that holding was reached in a case involving conduct that took place in all material respects before July 21, 2011, the effective date of the Dodd-Frank Act's limitations on National Bank Act preemption. It is highly doubtful that any of the asserted bases for preemption of claims in an LFPI case would yield preemption of any such NBA-preemptive claims at the present time.

34. The Illinois Consumer Fraud Act is discussed in WALL, *supra* note 2, § 5.5.
35. 215 ILL. COMP. STAT. 5/155.
36. *Burress–Taylor*, 980 N.E.2d at 687–88.
37. *Id.* at 688.
38. *Id.* at 688–89.

II. FILED RATE DOCTRINE

If the filed rate doctrine is going to be transferred out of utilities regulatory law to insurance regulatory law, and particularly if the doctrine is going to be applied generally in insurance cases whether or not regulation is involved, then some rules ought to be recognized in the process. The filed rate doctrine originated and is still applied in lawsuits filed by consumers who pay rates charged by regulated utilities where the claims of consumers in such cases directly or indirectly challenge the reasonableness of the rates, and the regulated utility charges the rates approved by the governing administrative agency. Courts in such cases apply the judge-made filed rate doctrine to immunize the regulated utility from liability for charging rates approved by the relevant administrative agency.[39]

The filed rate doctrine is increasingly being raised as a defense in insurance cases. In insurance cases generally, the defense would arguably apply when a party pays insurance premiums that are approved by the relevant administrative agency and which the plaintiff claims are too high.

In the context of lender force-placed insurance in particular, however, application of the filed rate doctrine requires acceptance of the argument that, at bottom, the local insurance commissioner approved unauthorized and hidden charges in the premiums charged by the particular insurance carrier.

In lender force-placed insurance cases, moreover, force-placed insurance premiums are paid by lenders, but the lenders do not complain that the premiums are too high in contrast to the situation of consumers who claim in utilities rates lawsuits that a utility's rates are too high. The premiums are added as hidden charges in the borrower's monthly loan payment, but the borrower does not pay the force-placed insurance premiums as such. Nor do any lawsuits filed by borrowers over alleged lender force-placed insurance practices survive a motion to dismiss if they allege that such premiums are too high.

Rather, the only successful borrowers-as-plaintiffs in LFPI cases in the sense of surviving a motion to dismiss on this ground are the borrowers whose claims do not rest on an allegation that the force-placed insurance premiums are too high but rather that those charges are not authorized by the loan agreement. The filed rate doctrine arguably has no room in cases involving claims that the force-placed insurance premiums are unauthorized, or even that they are hidden "kickbacks" paid by insurance compa-

39. *E.g.*, Montana-Dakota Utils. Co. v. Nw. Pub. Serv. Co., 341 U.S. 246, 251, 71 S. Ct. 692, 695 (1951); Keogh v. Chicago & N.W. Ry., 260 U.S. 156, 163, 43 S. Ct. 47, 49 (1922); Tenore v. AT&T Wireless Servs., 136 Wash. 2d 322, 331–32, 962 P.2d 104, 108 (1998) (en banc), cert. denied, 525 U.S. 1171, 119 S. Ct. 1096 (1999).

nies to lenders which the borrowers are forced to pay and to which they did not consent.

A further distinction between cases involving regulated utilities rates, and force-placed insurance premium rates, is that the filed rate doctrine applies in the former without the necessity of any examination of what went into the defendant's rate filing.[40] In the case of regulated rates charged by utilities, where the filed rate doctrine originated, the only question is whether the utility charged a rate approved by the administrative agency which is empowered to accept the utility's rate filing and approve, deny, or even modify it. If the answer is that the utility charged an approved rate, then the inquiry is over and the filed rate doctrine applies.[41]

In lender force-placed insurance cases, in contrast, acceptance of the filed rate doctrine means that courts would be required to answer the question of what exactly did the insurance company include in its rate filing when it sought the approval of the insurance commissioner. There is no known mechanism available for forcing this sort of examination. Insurance companies regularly "redact" or "seal" whole swaths of their rate filings.[42]

A significant problem with transferring the filed rate doctrine from utilities regulation to use in defense of insurance cases generally applies also to LFPI cases in particular. There is no known reporting system of administrative agency decisions in insurance law. Even decisions of regulatory agencies which are authorized by state statutes to receive and re-

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40. A leading LFPI case in which a defendant's motion to dismiss based on the filed rate doctrine was denied because the court would have to inquire into the elements of what went into the insurance company's filed rate, and the defendant did not provide the court with any evidence on this issue, is *Gallo v. PHH Mortgage Corp.*, 916 F. Supp. 2d 537, 546 (D.N.J. 2012):

> Defendant, the party bearing the burden to show dismissal is warranted under this doctrine, has not presented any authority to demonstrate that such pre-arranged side agreements are similarly filed with, approved by, or regulated and monitored in some way by a governing regulatory agency, such as the Department of Insurance, much like the filed rates for hazard insurance policies themselves.

Accord Cannon v. Wells Fargo Bank, N.A., No. C–12–1376 EMC, 2014 WL 324556, at *5 (N.D. Cal. Jan. 29, 2014); Simpkins v. Wells Fargo Bank, N.A., No. 12–cv–00768–DRH–PMF, 2013 WL 4510166, at *14 (S.D. Ill. Aug. 26, 2013).

41. *E.g.*, Hill v. Bellsouth Telecomms., Inc., 364 F.3d 1308, 1315–16 (11th Cir. 2004); Munoz v. PHH Corp., 659 F. Supp. 2d 1094, 1099–1101 (E.D. Cal. 2009) ("The filed rate doctrine (or filed tariff doctrine) is a judicially created rule and must be examined specifically in the context of the laws and regulatory structures at issue."); *see In re* Western States Wholesale Natural Gas Antitrust Litigation (Abelman Art Glass v. AEP Energy Servs., Inc.), 248 F. App'x 821, 822–23 (9th Cir. 2007).

42. *See, e.g.*, the Florida Office of Insurance Regulation administrative docket for the rate filing titled, *In the Matter of: American Security Insurance Company*, Case No. 141841–13, Rate File Log #13–04125.

view insurance premium rate filings are not reported in any systematic way. This drawback has major implications for applying the filed rate doctrine in insurance cases.

In three years of research into this area, the author employed both traditional and nontraditional research methods in a forensic investigation into rate filings and agency decisions surrounding them. The author's nontraditional research methods included internet searches beyond Thomson Reuters Westlaw databases, searching archives of online and traditional newspapers, and the limits of my own human memory of information the author personally accumulated since beginning the practice of law in 1978. I found with certainty only two instances in which insurance commissioners addressed the issue of approving commissions and other charges included in a forced-placed insurance company's rate filing. In both instances, a very small set to be sure, the governing insurance commissioners implicitly rejected the idea that their offices approved charges which were not authorized by any loan agreements. In one instance, the insurance commissioner went beyond rejecting any idea that the commissioner in that instance approved unauthorized charges and also expressly required an insurance company offering force-placed insurance policies in the state to exclude unauthorized commissions and other charges from its premiums.

One of the two such instances was mentioned in the course of one of the several rulings in the case of *Cannon v. Wells Fargo Bank, N.A.*[43] In *Cannon*, it was a defendant insurance company that revealed a previous insurance premium proceeding in California in which, it argued, the California Insurance Commissioner "responded that [its] 'commissions and tracking expenses are appropriate components of an insurance rate.'"[44] As the district court pointed out in *Cannon*, however, "[t]he Commissioner expressly noted that he lacked jurisdiction to consider whether it was proper for [***the lender-mortgagee***] to pass the commissions and tracking expenses onto the borrower."[45]

The other known instance of when an insurance carrier offering force-placed insurance policies filed an insurance rate proceeding also happened to be the first rate-filing proceeding in which the author provided comments. That rate filing was in 2013. The same LFPI carrier that filed the rate proceeding just discussed in California also instituted the filed rate proceeding in Florida. The LFPI carrier sought approval from the Florida Office of Insurance Regulation in that proceeding for rates it requested on lender force-placed insurance policies it would issue in the

43. Cannon v. Wells Fargo Bank, N.A., No. C–12–1376 EMC, 2014 WL 324556 (N.D. Cal. Jan. 29, 2014).

44. *Id.* at *5.

45. *Id.* (emphasis added).

State of Florida.[46] In that rate filing in 2013, the Florida Office of Insurance Regulation wrote that it "has raised concerns regarding [the LFPI carrier's] business practices as such practices relate to the payment of commissions . . . , payment of qualified expenses . . . , and placement of quota share reinsurance with reinsurers that are captives of Servicers."[47] Although the LFPI carrier denied that its conduct if any violated the Florida Insurance Code, it agreed in a Consent Order to make certain future "business practice reforms" including that it would not pay unauthorized "commissions" to lenders' mortgage servicers or pay "reinsurance premiums" to lenders' subsidiaries, among other things.[48] As recently as 2015 and in the Spring of 2016, the LFPI carrier contended in at least two lawsuits in the Southern District of Florida, one closed[49] and one pending,[50] that its

46. The Florida rate filing was riddled with redacted or unrevealed filings by the LFPI carrier. *See* the Florida O.I.R. administrative docket for *In the Matter of: American Security Insurance Company*, Case No. 141841–13, Rate File Log #13–04125, which was a rate filing proceeding initiated by ASIC in 2013. Without commenting one way or the other on the propriety of these redactions, the extent of them made the LFPI carrier's filings extremely difficult to follow.

47. Consent Order filed October 7, 2013 [hereinafter October 7, 2013 Consent Order with ASIC] in *id.*, ¶ 3, at p. 2 of 8.

48. In its Consent Order with the Florida Office of Insurance Regulation in 2013, ASIC consented to the following, among other things:

> 5. ASIC denies violation of the Florida Insurance Code with regards to the aforementioned business practices. Notwithstanding, ASIC agrees to the following business practice reforms for all LPI business in Florida:
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> > A. ASIC shall not pay commissions to a Servicer, or a person or entity affiliated with a Servicer on LPI policies obtained by that Servicer;
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> > * * *
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> > C. ASIC shall not reinsure LPI policies with a captive insurer of any Servicer;
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> > * * *
> >
> > F. ASIC shall not make any incentive payments, including but not limited to the payment of expenses, to Servicers or their affiliates for the purpose of securing LPI business.

October 7, 2013 Consent Order with ASIC, ¶ 5, at pp. 2–3 of 8.

49. The closed case is *Trevethan v. Select Portfolio Servicing, Inc.*, No. 15–61175–CIV–DIMITROULEAS/SNOW, 2015 WL 6913144, at *2–*3 (S.D. Fla. Nov. 6, 2015), in which the district court applied the filed rate doctrine and dismissed LFPI claims with prejudice ASIC filed a declaration in support of its filed rate doctrine defense in which the declarant testified that ASIC's force-placed insurance rates in 2013 had the approval of the Florida Office of Insurance Regulation (Insurance Commissioner). Docket Number 18–1, Ex. 1–C, *Trevethan v. Select Portfolio Serv., Inc.*, No. 15–61175–CIV–DIMITROULEAS/SNOW (S.D. Fla., filed July 2, 2015).

50. The pending case is Lowe v. Loancare Servicing, LLC (S.D. Fla. Case No. 1:15–cv–23700–KMM). ASIC's filed rate doctrine defense in that case is based in part on declaration testimony from the same individual whose declaration ASIC filed in *Trevethan*. The declaration testimony in the later case similarly recites that "LPI coverages issued in Florida under ASIC's MSP ["Residential Mortgage Service Program"] Program as of December 1, 2010 until January 13, 2014 were subject to these filed and approved rates." ASIC's Amended De-

force-placed insurance premium rates in 2013 were actually approved by the Florida Office of Insurance Regulation (the Florida Insurance Commissioner). It did not mention its Consent Order in either case.[51]

The filed rate doctrine applies where:

- A legislature has empowered an administrative agency to set the rates to be charged by the rate-seeking entity (originally, a utility).[52]
- The party seeking to charge the rates files an application with the administrative body, accompanied by supporting materials, to determine the reasonableness of its requested rates (in the case of an insurance company, the reasonableness of the premium rates it is asking to charge). The rate filings submitted by the applicant to the administrative agency, at least in the case of insurance companies, are a mix of open and secret information. The filings are partly public and partly kept confidential or redacted from public view.
- As a result of the administrative agency's jurisdiction over and determination of the applicant's rate filing, the payers of the rates (or, in the case of insurance companies, the policyholders who pay the premiums) are not permitted to challenge the amount or "reasonableness" of the filed rates that the administrative body is shown to have approved. Those rates are per se reasonable.[53] "[T]he rights

claration, Docket No. 35–1, at page 2 ¶ 6, *Lowe v. Loancare Serv., LLC*, (S.D. Fla. Case No. 1:15–cv–23700–KMM, filed Feb. 3, 2016).

51. Although executed in 2013, ASIC's Consent Order with the Florida Office of Insurance Regulation took effect in 2014. *See* Press Release, "Office Orders Praetorian Insurance Company to Modify its Business Practices for Lender-Placed Insurance in Florida," Florida Office of Insurance Regulation, April 11, 2014. The cited document is located online at http://www.floir.com/PressReleases/viewmediarelease.aspx?id=2054, last accessed on Wednesday, February 17, 2016.

52. *See* Simpkins v. Wells Fargo Bank, N.A., 2013 WL 4510166, at *14 ("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.").

53. *See, e.g.*, Sapuppo v. Allstate Floridian Ins. Co., 739 F.3d 678, 679 n.1 (11th Cir. 2014); Hoover v. HSBC Mortgage Corp., 9 F. Supp. 3d 223, 239 (N.D.N.Y. 2014) ("In order for this Court to determine whether the flood insurance rates charged by the Defendants are 'per se reasonable,' Defendants must proffer evidence demonstrating that the regulating agency considered and approved of these agreements."); *cf. Ellsworth*, 30 F. Supp. 3d at 910 ("But Defendants do not identify any provisions specifically disclosing commissions, insurance tracking fees, or QERs, and the court is not going to wade through the filings. In any event, at the pleadings stage, Plaintiffs' allegations are plausible."); Kunzelmann v. Wells Fargo Bank, N.A., No. 9:11–cv–81373–DMM, 2013 WL 139913, at *12 (S.D. Fla. Jan. 10, 2013) (declining to certify a class including LFPI plaintiffs from Alabama, Arizona, Florida, Minnesota, New York, Texas, and Wisconsin, in part because "[t]o determine whether, and to what extent the filed-rate doctrine is applicable would require an analysis of each state's formulation of the doctrine and may require examination of the regulatory proceedings involved in approving the rate filed").

of the rate payer are defined by that scheme."[54] In LFPI cases, the "rate payer," or policyholder, is really the mortgage lender or servicer and not the borrower.[55]

Since the filed rate doctrine involves the premium rates charged by insurance companies offering lenders force-placed insurance policies, it has generally been held that this defense applies, if at all, in favor of the insurance company, at least where the allegations are that the insurance company's rates are too high for the lender force-placed insurance.[56] There is

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In the LFPI case of *Roberts v. Wells Fargo Bank, N.A.*, No. 4:12–cv–200, 2013 WL 1233268 (S.D. Ga. Mar. 27, 2013), the district court took a unique approach. The defendants did not establish that "the allegedly illegal 'commissions, kickbacks, and free services,'" of which the plaintiffs complained in that case, were included in the defendant insurance company's rate filing with the Georgia insurance commissioner. The district judge was of the view that the filed rate doctrine should be applied if the allegedly illegal commissions, kickbacks, and free services were approved by the Georgia insurance commissioner as a part of the defendant insurance company's rate filing, in this case, as a part of the rate filing by American Security Insurance Company (ASIC) and its parent (Assurant):

> Whatever else might be said about Roberts's claims, the damages she seeks can only be measured by the difference between the premiums she paid and what the premiums would have been absent the allegedly illegal "commissions, kickbacks, and free services" they contained. ECF No. 1 at 2. To calculate that amount " [*sic;* so in original but without any close quote found to complete the intended quotation] would, in effect, result in a judicial determination of the reasonableness of the premium Roberts paid. [Citation omitted.] And if the legislature has vested in the Commissioner authority to make that determination, allowing Roberts's requested relief would disrespect that statutory grant of rate setting authority.

Roberts, 2013 WL 1233268, at *13. The court also expressed its opinion concisely: "Regardless of the spin put on Roberts's allegations and claims, at bottom this case calls for relief that itself triggers application of the filed rate doctrine." *Id.* at *13 n.9.

Rather than require the defendant to proffer proof in support of its pleaded defense, then or in the future, the *Roberts* court certified the following question of law to the Georgia Supreme Court:

> WHETHER THE FILED RATE DOCTRINE APPLIES TO BAR CLAIMS WHOSE REQUESTED RELIEF NECESSARILY CHALLENGES RATES FILED WITH THE GEORGIA INSURANCE COMMISSIONER.

Id. at *14. In April 2013, plaintiff Lucy Roberts voluntarily dismissed her case. The district judge then entered an order of dismissal with prejudice. These events are unreported but are filed on the Clerk's Docket on PACER, the Public Access to [Federal] Courts Electronic Records.

54. *Kunzelmann*, 2013 WL 139913, at *11.

55. "Here, the gravamen of the complaint is not the premium rate per se, but the failure to disclose the fraudulent nature of the alleged commission *charged to borrowers* by *Wells Fargo.*" *Cannon*, 2014 WL 324556, at *6 (emphasis added).

56. *See, e.g.*, *Ellsworth*, 30 F. Supp. 3d at 910 (filed rate doctrine accordingly held inapplicable where "[p]laintiffs do not challenge the rates that were filed or the process of rate-setting, *and they are not the ratepayers*" because "[i]nstead U.S. Bank paid ASIC's premiums and then passed them on to Plaintiffs." (emphasis added); Schilke v. Wachovia Mortgage, FSB, 820 F. Supp. 2d 825, 835–37 (N.D. Ill. 2011) (applying filed rate doctrine defense in favor of defendant insurance company), *aff'd on other grounds sub nom.*, Cohen v. Am. Sec. Ins. Co., 735 F.3d 601, 607–08 (7th Cir. 2013).

some authority to the contrary, however, that would allow mortgage lenders and servicers to also plead the filed rate doctrine as a defense appearing from the plaintiff's complaint and so requiring dismissal as to those defendants.[57]

The results reached in the majority of LFPI cases are to the contrary. Courts have held that the filed rate doctrine defense cannot be raised by a lender bank,[58] or by a mortgage servicer,[59] in cases where these non-insurance company defendants are not the parties that filed or were required to file an application with a regulatory authority in order to receive approval for the force-placed insurance premium rates.

The question of whether the filed rate doctrine applies at all in a given LFPI case depends on whether the plaintiff's claims challenge an insurance company's ratemaking authority.[60] In an LFPI case, the plaintiff is

57. Decambaliza v. QBE Holdings, Inc., No. 13–cv–286–bbc, 2013 WL 5777294, at *7, *8–9 (W.D. Wis. Oct. 25, 2013) (dismissing complaint on basis of filed rate doctrine even as to non-insurance-company defendants where kickbacks formed the factual core of all claims alleged, listing cases stated to reflect the same or similar results).

58. *See, e.g.*, Gallo v. PHH Mortgage Corp., 916 F. Supp. 2d at 543–46; Abels v. JPMorgan Chase Bank, N.A., 678 F. Supp. 2d 1273, 1277 (S.D. Fla. 2009). The *Abels* court also discussed the defendant's reliance on what appears to be a related defense, which the court called "the doctrine of primary agency jurisdiction." The court in that case succinctly pointed out that the Florida Office of Insurance Regulation passes on insurance premium rates charged by insurance companies, not charges placed by a "financial institution" like the defendant at bar. Although financial institutions are regulated by the Florida Office of Financial Regulation, the Florida statutes that govern the O.F.R. do not "provide any type of administrative remedy." There was, in short, no "primary agency" with jurisdiction. Accordingly, the defendant was held not to be entitled to invoke that related "doctrine." *Abels*, 678 F. Supp. 2d at 1277–78.

59. *See, e.g.*, *Hoover*, 9 F. Supp. 3d at 230, 239 (holding filed rate doctrine unavailable to "the HSBC defendants," which the court in this case described as the mortgage lender-bank, together with its subsidiary "that operates as a residential mortgage lender, originator, and servicer" because "they are not insurers subject to the relevant regulatory regime."); *Cannon*, 917 F. Supp. 2d at 1038 (holding that filed rate doctrine does not bar claims against mortgage servicer based upon "manipulation of the rate").

60. *Ellsworth*, 908 F. Supp. 2d at 1082. In *Schilke v. Wachovia Mortgage, FSB*, 820 F. Supp. 2d 825 (N.D. Ill. 2011), *aff'd sub nom*. Cohen v. Am. Sec. Ins. Co., 735 F.3d 601 (7th Cir. 2013), the district court characterized the plaintiff's kickback allegations as "undisclosed fees": "Schilke alleges that the insurance premium that she was charged for the ASI [American Security Insurance Company] policy included undisclosed fees—which Schilke terms 'kickbacks'—paid to Defendants for the placement, maintenance, and servicing of the insurance." *Schilke*, 820 F. Supp. 2d at 830. The district court then denied the plaintiff's motion for leave to amend her complaint, in part because the court saw these allegations as triggering the filed rate doctrine. In the eyes of the court, "all of Plaintiff's claims against ASI continue to rest on the allegation that the insurance premium charged to Plaintiff by ASI was unreasonable and unlawful *because ASI failed to disclose that the premium contained fees to be paid to Wachovia*." *Schilke*, 820 F. Supp. 2d at 836 (emphasis added). The *Schilke* court's analysis appears to be wide of the mark in this case for at least two reasons. First, the point of the filed rate doctrine is not whether the allegedly unlawful fees were "disclosed" to the plaintiff; rather, the point of the filed rate doctrine is *whether the allegedly unlawful fees were disclosed to the regulatory authority in the application for higher premiums*. The kickbacks would not become immunized if they had been disclosed to the plaintiff. Second, it was not ASIC, the

rarely if ever challenging an insurance company's rates by filing a lawsuit that presents allegations of kickbacks, unauthorized or illegal commissions, backdating, and the like.[61]

Even if non-insurance company defendants could invoke the filed rate doctrine, the question would still be whether the plaintiff's claims challenge the rates filed by the insurance company that offered the force-placed insurance policies for sale. As the court recognized in *Kunzelmann*:

> I find that in this case Plaintiff's claims are not barred by the filed rate doctrine because he is not challenging the rates filed by Defendants' insurers. Rather, Plaintiff challenges the manner in which Defendants select insurers, the manipulation of the force-placed insurance process, and the impermissible kickbacks that were included in the premiums. [Citations to the record omitted.] Accordingly, Plaintiff's claims are not barred by the filed rate doctrine.[62]

It bears remembering in all cases that the filed rate doctrine was made by judges to bar claims challenging rates approved by administrative agencies charged with reviewing and approving rate increase requests. This line of thinking originated with the law of utilities regulation, including the regulation of rates charged by telecommunication companies. In this view, courts are not the place to seek decisions on whether a given rate subject to determination by an administrative agency is reasonable. Under this reasoning, sometimes courts sweep away cases with a very broad brush: "Thus, a claim may be barred even if it can be characterized as challenging something other than the rate itself."[63]

Where the insurance company's rates for lender force-placed insurance that it has been authorized to charge to the *lender* are not challenged, the filed-rate doctrine simply has no room to operate in an LFPI case. As the court put it in *Leghorn v. Wells Fargo Bank, N.A.*:

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insurance company, that charged the plaintiff with the insurance premium, it was *Wachovia*, and it was *Wachovia* that said it would "return to her any premium paid to ASI that proved to be unnecessary." *Schilke*, 820 F. Supp. 2d at 829–30 (emphasis added). Wachovia was the "ratepayer" and policyholder here, not the homeowner.

This may be why on appeal the Seventh Circuit panel refused to address the filed rate doctrine in deciding this case: "As for the filed-rate doctrine, we question whether it applies. . . . We can avoid the nuanced questions of federal preemption and the filed-rate doctrine here." *Cohen*, 735 F.3d at 607–08.

61. *E.g.*, *Abels*, 678 F. Supp. 2d at 1277 ("Plaintiffs are not complaining that they were charged an excessive insurance rate, they are complaining that the defendant bank acted unlawfully when it chose this particular insurance company and this particular rate.").

62. *Kunzelmann*, 2012 WL 2003337, at *3.

63. Rothstein v. Balboa Ins. Co., 794 F.3d 256, 262 (2d Cir. 2015) (apparently applying Second Circuit federal law). In fairness, the broad brush with which a Second Circuit panel swept away the claims in the insurance regulation arena in *Rothstein* appears to be suspect, or at the very least unpersuasive, given its lack of reasoning. *Filed Rate Doctrine Imported from Utilities Regulation to Insurance Law*, 37 Ins. Litig. Rep. 435 (2015).

> Plaintiffs' kickback claims against Wells Fargo boil down to an attack on Wells Fargo's decision to purchase insurance from QBE as opposed to any other insurer from which it could have obtained a more favorable rate. [Citation to record omitted.] The challenge is not to the lawfulness of QBE's rate—but to Wells Fargo's decision to choose QBE in order to obtain a kickback. [Citation omitted.] *Because Plaintiffs are not challenging QBE's rate in making their claim against Wells Fargo, the filed-rate doctrine and the relevant provisions of the California Insurance Code are inapplicable.*
>
> *For similar reasons, the filed-rate doctrine and the California Insurance Code do not bar the allegations against QBE.*
>
> . . .
>
> Put another way, Plaintiffs' theory is that QBE secured business that would otherwise have gone to other insurers by offering Wells Fargo, among others, kickbacks. As a result, Wells Fargo chose to purchase insurance policies from QBE. *As with Plaintiffs' claim against Wells Fargo, this does not amount to a challenge to QBE's rate but to a challenge to QBE's manipulation of Wells Fargo's purchasing decision*.[64]

To summarize, where the reasonableness of alleged kickbacks charged to a *borrower* by a *mortgage lender* was not a part of the insurance company's application for approval of a premium rate, the filed rate doctrine is not a part of the LFPI case.[65] This includes cases involving challenges to manipulation of the forced-placed insurance purchasing decision of a lender alleged as a part of the business relationship between mortgage lenders and the insurance companies that offer lender force-placed insurance policies. The alleged kickbacks manipulate the lender's purchasing decision, in other words, and not the premiums charged to the lender by the insurance company for the force-placed insurance.[66]

III. VOLUNTARY PAYMENT DOCTRINE

"The voluntary payment doctrine is an affirmative defense that bars the recovery of money that was voluntarily paid with knowledge of the facts."[67] Viewed from the perspective of lenders and their lawyers, this must look like an attractive defense, at least at first. Many borrowers-homeowners in lender force-placed insurance cases have paid the LFPI

64. Leghorn v. Wells Fargo Bank, N.A., 950 F. Supp. 2d 1093, 1115–16 (N.D. Cal. 2013).

65. *See, e.g.*, *Ellsworth*, 30 F. Supp. 3d at 910; *Leghorn*, 950 F. Supp. 2d at 1115–16; *Gallo*, 916 F. Supp. 2d at 543–45.

66. *E.g.*, *Cannon*, 917 F. Supp. 2d at 1038; *Gallo*, 916 F. Supp. 2d at 546; *Abels*, 678 F. Supp. 2d at 1277.

67. *Ellsworth*, 908 F. Supp. 2d at 1083 (applying California substantive law). *Accord*, *Gallo*, 916 F. Supp. 2d at 553 n.11 (Pennsylvania substantive law); *Kunzelmann*, 2012 WL 2003337, at *3 (Florida substantive law).

charges, whether through their escrow accounts or directly to the lenders or the insurance companies.[68] However, the voluntary payment doctrine is an affirmative defense. This means, of course, that the defendant bears the burden of proving it. Unless it appears from the face of the complaints that LFPI plaintiffs voluntarily paid the charges even while knowing the facts about which they now complain, the voluntary payment doctrine is an "affirmative defense [which] is not apparent as a matter of law from the face of the complaint," and may not be raised as a ground to dismiss the complaint at the pleading stage.[69]

In order for the voluntary payment doctrine to be successful in a case involving lender force-placed insurance, the defendant asserting it would have to prove that the plaintiff voluntarily paid the force-placed insurance charges assessed by the mortgagee or its servicer—with full knowledge that the charges of lender force-placed insurance included kickbacks or backdated policies or unnecessary insurance coverage. These are the very things about which the LFPI plaintiffs file complaints, so it is unlikely that it will appear from these plaintiffs' complaints that they voluntarily paid these charges and knew all the facts even though they have filed a lawsuit because of those charges.[70]

IV. ARBITRATION PROVISIONS, CLASS ACTION WAIVERS, AND MORE

This section will address the placement of arbitration provisions, class action waivers, and other similar provisions in mortgage contracts. Defenses in the sense of defects in a chosen claim or alleged cause of action are outside the scope of this discussion.

A. *Mandatory Arbitration Provisions*

Arbitration is riding an unbroken trend of approval with no record of disapproval by the previous majority of the U.S. Supreme Court in a variety of consumer and commercial transactions. As a result, companies have

68. Dennis J. Wall, *Force-Placed, Lender-Placed Insurance Class Actions: Is the Lender Placement of Insurance Authorized by Law, or Simply Beyond the Reach of the Courts?*, 35 Ins. Litig. Rep. 221, 222 (2013).

69. *E.g.*, *Gallo*, 916 F. Supp. 2d at 553 n.11 (applying Pennsylvania law under which the voluntary payment doctrine is an affirmative defense and since this affirmative defense did not appear from the face of the complaint it "is not properly considered at the motion to dismiss stage of this case when the factual record is insufficient to determine its viability"); *Ellsworth*, 908 F. Supp. 2d at 1083 (California substantive law). A similar holding has been reached "under the more lenient standard of judicial notice for a motion to dismiss for lack of subject matter jurisdiction." *Kunzelmann*, 2012 WL 2003337, at *3.

70. *See, e.g.*, *Ellsworth*, 908 F. Supp. 2d at 1083 (denying motions to dismiss on this ground: "The affirmative defense [of the voluntary payment doctrine] is not apparent as a matter of law from the face of the complaint.").

been called upon to swiftly insert arbitration provisions in their contracts.[71] The question here is a narrower one: whether arbitration provisions in mortgage contracts represent a good defense for lenders in lender force-placed insurance cases.[72]

Arbitration is commonly recited as presenting two questions to consider. The first is generally stated as an inquiry into whether the party invoking an arbitration provision can prove a valid agreement to arbitrate. The second, more frequent question in determining the legal validity of an arbitration demand is whether the particular dispute between the parties is within the scope of the arbitration provision at issue.[73] There is really a third question to answer, however, in determining the application of an arbitration provision in any contract: whether arbitration is prohibited by law in the particular context.[74]

In the context of residential real estate mortgages, there is a fairly longstanding regulatory restriction on arbitration provisions in mortgage contracts purchased by Freddie Mac and Fannie Mae. The restriction, which has been in place since at least February 20, 2008, is contained in § 4202.9 ("Mandatory Arbitration") in the Freddie Mac Single Family/Single-Family Seller/Servicer Guide:

> Freddie Mac will not purchase any Mortgage if any of the Mortgage documents—including the Note, any Note addendum, the Security Instrument

71. *See, e.g.*, Matt Bakota & Dan Carter, *Cause for Pause/The Supreme Court's Pro-Business Ruling Should Spur Revisions in Arbitration Clauses*, 2 CLAIMS MGMT. 31 (Sept. 2013); *cf.* Note, *Randolph v. Green Tree Financial Corp.: Are Consumer Arbitration Agreements That Are Silent as to the Apportionment of Arbitral Expenses Enforceable?*, 4 N.C. BANKING INST. 319, 319–20 (Apr. 2000), which provides a snapshot of the then-relatively new concept of mandated arbitration of financial disputes and particularly mandated arbitration of consumer transactions:

> Arbitration has emerged as a cost-effective alternative to the uncertainty associated with time-intensive litigation, and courts have shown an increased willingness to enforce mandatory arbitration provisions in contracts of adhesion. Mandatory binding arbitration is a relatively new concept in the financial services industry, and though banks have been slow to explore the arbitral option, the use of arbitration agreements in consumer loan transactions is likely to increase.

According to a table published by the Pew Charitable Trusts in April 2014, the percentage of banks *without* a mandatory arbitration provision in their account agreements fell to 31 percent in 2014 from 40 percent in 2013. *Checks and Balances 2014 Update* 33, at Fig. 19 (Pew Charitable Trusts 2014).

72. The concept of mandatory arbitration provisions in mortgage contracts was explored theoretically in the last decade of the twentieth century. *See, e.g.*, Comment, *A Solution to Force-Placed Insurance Litigation for Lenders: Disclosure and Arbitration*, 26 CUMB. L. REV. 537 (1995–1996) (often cited as one of the early manifestations in the legal literature to consider the role that arbitration provisions might play in mortgage contracts).

73. *E.g.*, Khazin v. TD Ameritrade Holding Corp., No. 13–4149 (SDW) (MCA), 2014 WL 940703, at *6 (D.N.J. Mar. 11, 2014), *aff'd on other grounds*, 773 F.3d 488 (3d Cir. 2014).

74. This question occupied much of the court's time and of the *Khazin* court's opinion, for example. *Khazin*, 2014 WL 940703, at *7–8 (D.N.J. Mar. 11, 2014), *aff'd with opinion stated "affirmed on other grounds,"* 773 F.3d 488 (3d Cir. 2014).

> or any Security Instrument rider—contain a "mandatory arbitration" clause, that is, a clause that obligates the Borrower to submit to arbitration any dispute arising out of or relating in any way to the mortgage transaction.
>
> Freddie Mac's Uniform Instruments do not provide for mandatory arbitration, and the addition of a mandatory arbitration clause is not an authorized change to the Uniform Instruments. No ancillary Mortgage document may contain a mandatory arbitration provision.[75]

This is a regulatory restriction and not an outright prohibition on mandatory arbitration provisions or clauses in residential mortgage contracts. However, since Freddie Mac and Fannie Mae between them ultimately purchase the vast majority of residential mortgages in the United States in what is known as the secondary market for residential mortgages, they are in a powerful position to exert a very strong influence against the use of mandatory arbitration provisions in residential mortgage contracts.

The Dodd-Frank Act contained many amendments to federal statutes, one of which specifically concerns mandatory arbitration provisions in residential real estate mortgage contracts. Codified in the Truth-in-Lending Act,[76] it provides in pertinent part:

> (e) Arbitration
>
> (1) In general
>
> No residential mortgage loan and no extension of credit under an open end consumer credit plan secured by the principal dwelling of the consumer may include terms which require arbitration or any other nonjudicial procedure as the method for resolving any controversy or settling any claim arising out of the transaction.[77]

The quoted amendment prohibiting mandatory arbitration provisions was scheduled by Congress to become effective either on July 22, 2010, the

75. Freddie Mac Single Family/Single-Family Seller/Servicer Guide § 4202.9 (Mar. 2, 2016) [hereinafter Freddie Mac Servicer Guide]. Freddie Mac first published § 4202.9 (formerly published in identical form as § 22.34) in a Bulletin it issued to "All Freddie Mac Sellers and Servicers" on Feb. 20, 2008. Freddie Mac's purpose in publishing the new section was "to reinforce Freddie Mac's long-standing position against mandatory arbitration clauses in Mortgage documents." Freddie Mac Bulletin No. 2008–1, at 5 ("Other changes") (Feb. 20, 2008). Freddie Mac chose to publish § 4202.9 to reinforce its "long-standing position against mandatory arbitration clauses in Mortgage documents" in the opening months of the Great Recession. It is reasonable to assume that either the decision makers at Freddie Mac were already confronted with inquiries from lenders that wanted to arbitrate residential mortgage contracts rather than litigate and that undoubtedly wanted to conserve their financial resources, or alternatively, that Freddie Mac's decision to publish § 4202.9 was made in an effort to preemptively bar demands for arbitration of residential mortgage contracts, or both. In any case, it is unlikely that the officials at Freddie Mac acted spontaneously in issuing new § 4202.9.

76. The litigated results in force-placed insurance cases of claims based on the Federal Truth-in-Lending Act are discussed at length in Wall, *supra* note 2, § 5.5.

77. 15 U.S.C.A. § 1639c(e)(1).

general effective date of most provisions in the Dodd-Frank Act, or on January 21, 2013, which is the date eighteen months after the date designated by the Secretary of the Treasury for the transfer of functions to the Consumer Financial Protection Bureau.[78]

Since no regulations were issued or implemented before January 21, 2013, that would seem to be the effective date of the quoted prohibition on mandatory arbitration provisions in residential mortgage documents.[79]

Turning to reported decisions of courts available as of this writing, courts have considered the effective date of this prohibition in two cases found to date. In both cases, the courts involved went on to also address the separate question of whether the Dodd-Frank prohibition is retroactive. In both cases, the courts' observations seem to have questionable validity to other mortgages in other cases, if they are not downright dicta.

In one, *Weller v. HSBC Mortgage Services, Inc.*,[80] the U.S. District Court for the District of Colorado effectively held that the statutory prohibition on arbitration provisions in residential mortgages became effec-

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78. *See* Pub. L. 111–203, § 1400(c)(2) and (c)(3). Overall, the Dodd-Frank Act is confusing, especially the effective date provisions of its many amendments. It is as if the Dodd-Frank Act was the final result of numerous compromises between people who wanted the Act to pass and those who did not want it to be implemented. In this context, before every pronouncement on things like the effective dates of particular provisions can be generally accepted, they probably must await final resolution from courts of competent jurisdiction. Anything less is a guess, perhaps an educated guess or even an informed guess, but a guess nonetheless.

79. The Dodd-Frank Act's provision prohibiting mandatory arbitration clauses in residential mortgage loans is contained in Title 14, which has its own effective date provision. However, in the case of the prohibition on arbitration clauses it circles back once again to January 21, 2013, i.e., the date that is "18 months after the designated transfer date":

> (2) **Effective date established by rule.**–Except as provided in paragraph (3), a section, or provision thereof, of this title [meaning title 14 of the Dodd-Frank Act] shall take effect on the date on which the final regulations implementing such section, or provision, take effect.
>
> (3) **Effective date.**–A section of this title [again, this is a reference to title 14 of the Dodd-Frank Act] for which regulations have not been issued on the date that is 18 months after the designated transfer date shall take effect on such date.

Pub. L. 111–203 § 1400(c)(2) & (3).

If this process is difficult to follow, it appears that it was supposed to be difficult to understand when the Act was passed. As if the issues were not made sufficiently complicated already, the Act hinged the effective date of some of its provisions on the *implementation* of administrative regulations and the effective dates of other provisions on the *issuance* of administrative regulations by the CFPB. *See* Pub. L. 111–203 § 1400(c)(2) & (3), quoted immediately above.

As a result of Congress's limitations in subsections (c)(2) and (3) of § 1400, which are quoted in the text, it certainly seems unlikely at best that these effective date provisions apply to any other title, section, or provision of the Dodd-Frank Act. When researching the effective date of any other provision, section, or title of Dodd-Frank as a result, each research question ought therefore ought to be treated as a new and separate question.

80. 971 F. Supp. 2d 1072 (D. Colo. 2013).

tive as applied to mortgage contracts entered into on or after the effective date of this prohibition.[81]

The district court further opined in *Weller* that the Dodd-Frank bar on mandatory arbitration provisions was not retroactive, but the mortgage at issue in *Weller* was not subject to the Dodd-Frank Act.[82]

A circuit court judge in Kanawha County, West Virginia, rendered the other decision which has been found to address the issue of the effective date of the Dodd-Frank prohibition on inserting arbitration provisions into residential mortgage contracts. In that case, the court ruled that the Dodd-Frank arbitration provision took effect on the "general effective date" of July 22, 2010.[83] The circuit judge reasoned that the statutory arbitration provision in Dodd-Frank prohibiting arbitration clauses in residential mortgage contracts did not actually depend on regulatory implementation. In his view, the provision took effect "on the general effective date of the Dodd-Frank Act" on July 22, 2010, regardless of when the regulations were issued.

The home mortgage loan contract at issue in that case was reached in October 2006, much earlier than either the 2010 or 2013 dates. The Supreme Court of Appeals of West Virginia wrote that it did not decide the issue of the effective date of Dodd-Frank's prohibition of arbitration provisions because it was not necessary to reach that issue to decide the appeal.[84] Instead, the court ruled that Dodd-Frank's statutory prohibition of mandatory arbitration clauses in residential mortgage contracts would not be applied retroactively.[85]

In sum, even if the Dodd-Frank Act's prohibition on mandatory arbitration provisions in residential mortgages is not held to be retroactive, to date the prohibition has been applied in the available case law to mortgages entered into on or after July 21, 2011. The size of the sample of judicial decisions on these issues is very small, however, so that arguments

81. *See id.* at 1077–79. The court in that case mistakenly stated that "the effective date of the Dodd-Frank amendment is *July 21, 2010*, several years after the arbitration agreement at issue here was executed." *See id.* at 1077. Even if the general effective date of the Dodd-Frank Act on July 22, 2010, were the effective date of this provision, it would have to be applied retroactively if it were to be applied at all. As discussed elsewhere in Wall, *supra* note 2, § 6.4, July 22, 2010, was the general effective date of the Dodd-Frank Act amendments and provisions. Obviously, calculating the effective date of the provision at issue in the *Weller* case as beginning from the designated transfer date, July 21, 2011, adds several more years after the arbitration agreement at issue was executed so the court's main point is unchanged, even after taking account of the actual effective date of this amendment.

82. *Weller*, 971 F. Supp. 2d at 1079.

83. We owe this report of the otherwise unreported decision of the Kenawha County Circuit Court to the Supreme Court of Appeals of West Virginia. State *ex rel.* Ocwen Loan Servicing, LLC v. Webster, 752 S.E.2d 372, 379 n.3 (W. Va. 2013).

84. *Ocwen Loan Servicing*, 752 S.E.2d at 379 n.3.

85. *Id.* at 386.

can certainly be made in favor of other effective dates as well as for or against retroactivity.

B. *Class Action Waivers*

A class action waiver in basic terms is a contract provision written by a lender or seller in a commercial transaction under which the consumer waives her or his rights to participate in a class action proceeding in any claim arising under or as a result of the contract to lend money or sell a product.

There are no class action waivers in the Uniform Mortgage Instruments in use in the United States, although one case has been found in which a "non-uniform" provision was addressed by a Court, discussed below. No prohibition in any Federal or State statute or regulation has been found which would bar outright the inclusion of class action waivers in Uniform Mortgage Instruments, in any case. In theory, a mortgage lender could add language to a Uniform Mortgage Instrument which would require the borrower to waive her or his rights to participate in class actions, but given the clear prohibition on inconsistent provisions and the history of explicit prohibitions on arbitration clauses in the Uniform Mortgage Instruments, the success of any such effort seems highly doubtful at best. A previous majority on the U.S. Supreme Court wrote about class action waivers with an enthusiasm probably equal to the robust support they displayed for the use of mandatory arbitration clauses in consumer contracts.[86] However, just as no express statutory or regulatory prohibitions on class action waivers in the Uniform Mortgage Instruments have been found, so likewise there appear to be no judicial decisions that address the use of class action waivers in the specific context of residential real estate mortgage transactions.

On the other hand, a class action waiver in a *non-uniform* mortgage instrument was applied and upheld without discussion by the district court in *Weller*. There do not appear to be *any* other decisions on the point, and the *Weller* court's treatment of the class action waiver issue was too brief to provide much value as precedent.[87]

86. *See generally* Comment, *AT&T v. Concepcion: The End of the Modern Consumer Class Action*, 14 Loy. J. Pub. Interest L. 205 (Fall 2012). The favorable reception these provisions tend to receive at least in federal courts following these views seem to be showing up in bank checking account agreements. According to a table published by the Pew Charitable Trusts in April 2014, the percentage of banks *without* a mandatory class action waiver clause in their account agreements fell to 34 percent in 2014 from 46 percent in 2013. *Checks and Balances 2014 Update*, Fig. 20 (Pew Charitable Trusts 2014). The obverse observation must also be true, of course: the percentage of banks *with* mandatory class-action waiver clauses in their account agreements rose dramatically to 66 percent in 2014 from 54 percent in 2013.

87. The district court's entire discussion of the class action waiver provision is contained in a single sentence in a footnote: "I further agree that the arbitration agreement contem-

The district court did not quote the class action waiver in its opinion. The entire class action waiver considered in *Weller* is actually contained in Section 7 of a non-uniform document titled "Arbitration Agreement," which was written by the lender, and which can be found in the electronic court file in the *Weller* case:

> Section 7: NO CLASS ACTIONS, PRIVATE ATTORNEY GENERAL ACTIONS OR JOINDER
>
> Notwithstanding any other provision in this Arbitration Agreement, if You or Lender elect to arbitrate a Claim, neither You nor Lender will, without written consent of the other party, have the right to: (1) participate in a class action in court or in arbitration as a class representative; (2) act as a private attorney general in court or in arbitration; or (3) join or consolidate Claims with claims of any other person. The validity and effect of this Section shall be determined exclusively by a court and not by an arbitrator. Neither the Arbitration Administrator nor any arbitrator shall have the power or authority to waive, modify, or fail to enforce this Section 7, and any attempt to do so, whether by rule, policy, arbitration decision or otherwise, shall be invalid and unenforceable.[88]

Whether written in terms similar to the quoted language, the question still is whether a class action waiver is enforceable in mortgage contracts. There being no express prohibitions on class action waiver provisions in Uniform Mortgage Instruments, apparently, the answer to the question of whether such provisions are enforceable requires consideration of how analogous non-uniform mortgage provisions have fared when lenders and servicers have tried to enforce such provisions.

Dodd-Frank's mandatory arbitration prohibition, Section 1639c(e)(1), does not specifically apply to class action waivers. However, another of the Dodd-Frank amendments arguably would apply more broadly to prohibit non-uniform or inconsistent provisions, including class action waivers. Section 1639c(e)(3) provides the following bar to contract provisions in opposition to its requirements concerning residential mortgage loans:

> (3) No waiver of statutory cause of action
>
> No provision of any residential mortgage loan or of any extension of credit under an open end consumer credit plan secured by the principal dwelling of the consumer, and no other agreement between the consumer and the creditor relating to the residential mortgage loan or extension of credit referred to in paragraph (1), shall be applied or interpreted so as to bar a consumer from bringing an action in an appropriate district court of the United States,

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plates that Mr. Weller's claims must be arbitrated on an individual, not a class-wide, basis." *Weller*, 971 F. Supp. 2d at 1083 n.11.

88. Undated "Arbitration Agreement," Section 7, page 4, Dkt No. 53–4, filed in Weller v. HSBC Mortgage Servs., Inc., No. 1:13–cv–00185–REB–MJW (D. Colo. 2013).

> or any other court of competent jurisdiction, pursuant to section 1640 of this title or any other provision of law, for damages or other relief in connection with any alleged violation of this section, or any other provision of this subchapter, or any other Federal law.[89]

It should be noted that the title of this statute is probably misleading in its reference to "no waiver of statutory cause of action." There is good reason why the titles of statutes are not ordinarily a part of the statutes' construction or interpretation. The quoted provision refers not only to an action brought under one of several statutes but an action pursuant to "any other provision of law." Although this statute has not been interpreted to date on the question of class action waivers, the provision is available and ready for interpretation. How the courts will work out the broad prohibition enacted in this statute remains to be seen.

Freddie Mac's Mortgage Servicing Guide is not explicit about class action waivers, either. Although its wording and intent are pretty clear from the preceding discussion, no provision of the Servicing Guide, including § 4202.9, has been found that addresses class action waivers in particular. It perhaps bears repeating that the above-quoted § 4202.9 is titled "Mandatory Arbitration"[90] and that Freddie Mac's announced purpose in publishing it was "to reinforce Freddie Mac's long-standing position against mandatory arbitration clauses in Mortgage documents."[91]

C. *Jury Trial Waiver*

Judicial decisions addressing jury trial waivers in residential mortgage contracts have been found from only one jurisdiction: Florida. Those decisions are all from the U.S. District Courts in Florida and not from Florida State Courts. That all such decisions have been rendered in Florida seems to be a direct result of the fact that apparently only Florida is permitted to include a "nonuniform provision" for jury trial waivers in the "Uniform Mortgage Instruments" promulgated by Fannie Mae and Freddie Mac for use throughout the United States.

Otherwise "uniform" mortgage forms published by Freddie Mac for use in Florida mortgages contain a "nonuniform" covenant in paragraph "25," which is a "jury trial waiver."[92] Paragraph 25 appears in the cases in which federal judges have interpreted jury trial waivers in Florida mortgages.[93]

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89. 15 U.S.C.A § 1639c(e)(3).

90. *See* FREDDIE MAC SERVICER GUIDE, *supra* note 75, § 4202.9.

91. Freddie Mac Bulletin Number 2008–1, at 5 ("Other changes") (Feb. 20, 2008).

92. Paragraph 25 of **FLORIDA**—Single Family—**Fannie Mae/Freddie Mac UNIFORM INSTRUMENT** Form 3010 1/01, at 15 (boldface in original).

93. *E.g.*, *Martorella*, 2013 WL 1136444, at *1; *Madura*, 851 F. Supp. 2d at 1294; Anderson v. Apex Fin. Grp., Inc., No. 8:08–CV–949–T–30MSS, 2008 WL 2782684, at *1 (M.D. Fla. July 16, 2008).

The federal courts in all these cases that interpret jury trial waivers in residential mortgage contracts recite the same four-part test of the waivers' enforceability that they recite in other cases involving jury trial waivers. They uniformly trace the origin of the four-part test to the U.S. Constitution's Seventh Amendment guarantee of the right to jury trial. The answers to this test are designed to determine whether a particular jury trial waiver is knowing and voluntary. The answers to this test must be taken as a whole; no one factor determines the outcome:

1. Is the waiver provision conspicuous?
2. What is the relative bargaining power of the parties?
3. What is the degree of sophistication of the party contesting the waiver of jury trial?, and
4. Were the terms of the contract at issue negotiable?[94]

A concise summary of these determinations is contained in the judicial precept that the ultimate question of enforceability rests on whether the court finds that the particular jury trial waiver is "'unconscionable, contrary to public policy, or simply unfair'"[95] under all the circumstances.

Decisions on this issue in residential mortgage cases really revolve around an initial determination that the jury trial waiver is conspicuous. The other three tests, which involve determining the parties' relative bargaining power, the challenging party's "sophistication," and negotiability of the waiver, are actually decided in mortgage interpretation cases by the prior determination that the waiver provision is conspicuous in the mortgage contract.

Questions of whether the jury trial waiver is conspicuous, as well as bargaining power and negotiability of the provision are all determined by the fact that this "uniform"–"nonuniform" covenant in Florida mortgages is located right above the signature line.[96] However, there is no

94. *E.g.*, Madura v. BAC Home Loans Servicing, L.P., 851 F. Supp. 2d 1291, 1294 (M.D. Fla. 2012), *appeal dismissed* (unreported), No. 12–12550 (11th Cir. July 6, 2012); *see, e.g.*, Fleeger v. Wachovia Bank, No. 5:12–CV–294–Oc–32PRL, 2013 WL 1760190, at *2 (M.D. Fla. Apr. 24, 2013); Martorella v. Deutsche Bank Nat'l Trust Co., No. 12–80372–CIV, 2013 WL 1136444, at *2 (S.D. Fla. Mar. 18, 2013).

95. *E.g.*, *Fleeger*, 2013 WL 1760190, at *2; *Martorella*, 2013 WL 1136444, at *2; *Madura*, 851 F. Supp. 2d at 1294.

96. *E.g.*, *Martorella*, 2013 WL 1136444, at *3; *Fleeger*, 2013 WL 1760190, at *3; *see Anderson*, 2008 WL 2782684, at *1. The jury trial waiver was conspicuous; therefore, it was disclosed, is valid, "and as such, cannot be considered to be hidden within the document." *Anderson*, 2008 WL 2782684, at *1 n.2. A representative example of the courts' general approach to this issue was written in the opinion in *Gordon v. Chase Home Finance, LLC*, No. 8:11–cv–2001–T–33EAJ, 2013 WL 256743 (M.D. Fla. Jan. 23, 2013). After reaching an opinion that the jury trial waiver provision was conspicuous, only one thing remained for the court to say, apparently. The judge followed the lead of many other judges addressing

jury trial waiver provision in the Freddie Mac/Fannie Mae Uniform Instruments intended for use in states other than Florida. It is unknown at present why this is the case. Accordingly, the author has requested an explanation from both the Federal Housing Finance Agency and Freddie Mac itself. As of this writing, no answers have been received.[97]

V. IMMUNITY

There are likely to be several sources of potential immunity defenses in LFPI cases. Most are unknown because the defense apparently has not been raised in any LFPI cases, whether reported or not. Nonetheless, there are several known sources of potential immunity that are likely to find their way into the case law.

The Federal Real Estate Settlement Procedures Act (RESPA) provides immunity for good faith compliance with any rule, regulation, or interpretation issued either by the CFPB or by the U.S. Attorney General:

> (b) Liability for acts done in good faith in conformity with rule, regulation, or interpretation
>
> *No provision of* this chapter or *the laws of any State imposing any liability shall apply* to any act done or omitted *in good faith* in conformity with any rule, regulation, or interpretation thereof by the Bureau or the Attorney General, notwithstanding that after such act or omission has occurred, such rule, regulation, or interpretation is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.[98]

There are no known incidents of immunity invoked or adjudicated under this statute to date. The effective date of this provision was July 20, 2011. This provision is one of the statutory amendments made with passage of

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jury trial waivers in Florida residential mortgage contracts and concluded that the plaintiffs could simply walk away from the mortgage contract offer at issue in the case. The judge in this case added that the plaintiffs could use their refusal to waive their right to jury trial as a "bargaining chip" if they walked away from the offered deal. *Gordon*, 2013 WL 256743, at *9–*10. The court apparently did not realize, or if it did realize it, the realization did not affect the outcome, that paragraph 25, the "nonuniform" mortgage contract provision of a jury trial waiver, is found in every Florida residential mortgage contract.

97. Contact letters posted to Freddie Mac and to the Federal Housing Finance Agency, on their respective websites, on July 2, 2014. Copies on file with the author.

98. 12 U.S.C.A. § 2617(b) (emphasis added). The emphasized language in this particular quotation highlights the breadth and a limitation of this immunity provision. The breadth of the immunity conferred by Congress under this provision extends not only to immunity from liability under RESPA but also immunity from liability under the laws of any state. A limitation of this immunity provision is that compliance with the rules, regulations, or interpretations in question must be done or omitted in good faith in order to earn the immunity. This implies if it does not express a requirement that the party invoking immunity under this section must prove its good faith compliance.

the Dodd-Frank Act.[99] So far, there is only the general statement in the statute as quoted above; there are no judicial decisions interpreting it and no cases found in which it has been raised as an affirmative defense.

This section was addressed, however, in the first "Official Bureau Interpretations" issued by the CFPB, which also denominated its first official interpretations as a "Supplement to Part 1024" and as "[t]his commentary." The CFPB provided in the second sentence of its interpretations that good faith compliance confers immunity from liability under the quoted statute: "Good faith compliance with this commentary affords protection from liability under section 19(b) of the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. 2617(b)."[100]

With general immunity provisions understandably in place for good faith compliance with rules, regulations, or interpretations, lenders and their servicers and insurance companies will achieve immunity for their respective mortgage servicing business practices if those business practices are protected by rule, regulation, or interpretation (or by statute).

As among rules, regulations, interpretations, and statutes, an "interpretation" is by far the easiest to obtain. An example of an interpretation that confers implicit approval of and immunity on lender force-placed insurance business practices concerns the issue of backdating insurance policies. There is a current conflict in the case law over whether backdating allegations provide a basis for claims against defendants in LFPI cases. In the eyes of courts in which backdating allegations have been held to support claims alleged in LFPI cases, backdating means one of two things; either one in their view is actionable. Backdating a force-placed insurance policy means either that the homeowner is consequently charged a premium that includes coverage for a period of time that has already passed, or that the premium for that period has already been paid by the lender-servicer but the homeowner is charged an additional and higher premium for the same period.[101]

The Consumer Financial Protection Bureau provided immunity for backdating in its initial set of interpretations. The effective date of this interpretation is from and after January 1, 2014. There is no rule or regulation approving backdating. There is only the Bureau's interpretation of rules it issued implementing RESPA's mandate that lender force-placed insurance charges must be bona fide and reasonable.

Congress charged the CFPB with implementing certain amendments to RESPA made in the Dodd-Frank Act. RESPA provides that all charges

99. *See, e.g.*, WALL, *supra* note 2, § 5.5.

100. Supplement I to Part 1024, "Official Bureau Interpretations," 12 C.F.R. Pt. 1024, Supp. I, "Introduction 1. Official status."

101. *See* WALL, *supra* note 2, §§ 3.7 & 3.8.

"related to force-placed insurance imposed on the borrower by or through the servicer shall be bona fide and reasonable."[102]

Again, there is no rule or regulation approving backdating as a bona fide or even as a reasonable charge related to force-placed insurance imposed on the borrower. The CFPB issued a rule effective on January 1, 2014, which purports to implement the RESPA mandate in regard to bona fide and reasonable charges related to force-placed insurance imposed on the borrowers-homeowners. RESPA does not contain a provision allowing backdating of lender force-placed insurance. Like RESPA, the CFPB rule was written to address force-placed insurance, but the CFPB rule itself is silent about whether a servicer can impose a charge for backdated LFPI insurance on a borrower.[103]

The CFPB instead issued an "official interpretation" of its own final rule in the Federal Register,[104] under which the CFPB will permit a servicer to charge backdated LFPI premium to a borrower from and after January 1, 2014.[105]

Backdating LFPI premiums has the effect of rewarding the lender's purchase of a master inventory insurance policy to be force-placed on borrowers. The lender's master insurance policy exists before the borrower's mortgage exists. The lender has already paid a premium and made arrangements for paying future premiums as the lender (or its agent, the mortgage servicer) adds properties to the master policy. Backdating coverage means adding coverage for a particular property under an insurance policy that was already issued. The practice of backdating is manifestly a

102. 12 U.S.C.A. § 2605(m).

103. The CFPB Rule is codified as 12 C.F.R. § 1024.37.

104. CFPB Final Rule; Official Interpretations, Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. 10696 (Feb. 18, 2016), https://federalregister.gov/a/2013-01248. This set of "official interpretations" of the CFPB's RESPA rules is 401 printed pages long.

105. 78 Fed. Reg. 10891, 10891–92 (Feb. 14, 2013), interpreting 12 C.F.R. § 1024.37(c)(1)(i). The permissive retroactive interpretation that the Bureau would interpret as "insurance" reads in full as follows:

> *Paragraph 37(c)(1)(i).*
>
> 1. *Assessing premium charge or fee.* Subject to the requirements of § 1024.37(c)(1)(i) through (iii), if not prohibited by State or other applicable law, a servicer may charge a borrower for force-placed insurance the servicer purchased, retroactive to the first day of any period of time in which the borrower did not have hazard insurance in place.

Here is a link to this interpretation online, which otherwise can be very difficult to locate. The following link is via the Cornell Legal Information Institute website, https://www.law.cornell.edu/cfr/text/12/part-1024/appendix-Supplement (last accessed Feb. 22, 2016). The link is to the entire Official Bureau Interpretation; search terms will be required in order to access any particular Section and Paragraph in the Bureau's Interpretation.

low-cost substitute that takes the place of an inspection of the property added to the master policy.[106]

Besides furthering a goal of keeping costs as low as legally possible, the genesis for backdating as a substitute for inspection seems to have been the making of additional money from LFPI and the related allocation of risk. In the typical situation of a master policy, the policyholder certifies that the thing being added to coverage is insurable. Defects in things, such as houses, for which the insurance policy provides coverage and that are not disclosed to the insurance company, and in addition past losses to those things that are also kept from the inquiring insurance company, are risks that in applications for all other types of insurance fall upon the policyholder rather than the insurance company.[107]

In situations involving LFPI master policies, in contrast, the risk of undisclosed loss or potential for loss does not fall on either the policyholder or on the insurance company. The risk of "backdated" LFPI "insurance" falls on the borrower-homeowner who did not ask for the LFPI but pays the LFPI premium.

In the end, the real issue behind backdated insurance is that it is not insurance. At least for the period covered by the backdating, the risk is allocated 100 percent to a nonparty to the insurance policy, the borrower-homeowner, who pays all of the premiums (and more) and ordinarily receives none of the coverage.

In addition to congressional amendments of RESPA, and CFPB rules and interpretations issued with respect to RESPA, two additional sources of potential immunity defenses in Federal law are the Truth-in-Lending Act and the National Flood Insurance Act (NFIA). The Truth-in-Lending Act's immunity provision is similar to RESPA's immunity provision quoted above:

> (f) Good faith compliance with rule, regulation, or interpretation of Bureau or with interpretation or approval of duly authorized official or employee of Federal Reserve System
>
> No provision of this section, section 1607(b) of this title [which concerns enforcing agencies and statutes], section 1607(c) of this title [which addresses "overall enforcement authority of the Federal Trade Commission"], section 1607(e) of this title [which is titled "Adjustment of finance charges; procedures applicable, coverage, criteria, etc."], or section 1611 of this title ["Criminal liability for willful and knowing violation"] imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the [Consumer Financial Protection] Bureau[108] or

106. *See* Wall, *supra* note 2, §§ 3.8 & 3.9.
107. *See* Wall, *supra* note 2, § 3.4.
108. 15 U.S.C.A. § 1602(b) ("The term 'Bureau' means the Bureau of Consumer Financial Protection.").

> in conformity with any interpretation or approval by an official or employee of the Federal Reserve System duly authorized by the Bureau to issue such interpretations or approvals under such procedures as the Bureau may prescribe therefor, notwithstanding that after such act or omission has occurred, such rule, regulation, interpretation, or approval is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.[109]

Congressional amendments of the NFIA may also serve as a basis for immunity. In contrast to the absence of judicial construction of any of the relevant RESPA amendments, rules, or interpretations, courts have adjudicated the effect of the congressional amendments to the NFIA provisions authorizing force-placed flood insurance.

Depending on how they are viewed, the NFIA amendments concerning lender force-placed insurance practices appear at a minimum to severely restrict future liability exposure of lenders and servicers, if in fact the NFIA amendments do not immunize practices with regard to force-placing flood insurance. In the NFIA, Congress provided an express effective date: the amendments concerning lender force-placed insurance apply to mortgages "*outstanding or* entered into on or after the expiration of the 2-year period [i.e., July 6, 2014] beginning on the date of enactment of this Act [July 6, 2012]."[110] The NFIA amendments will permit lenders to charge borrowers in connection with lender force-placed flood insurance "for the cost of premiums and fees incurred by the lender or servicer for the loan in purchasing the insurance, including premiums or fees incurred for coverage beginning on the date on which flood insurance coverage lapsed or did not provide a sufficient coverage amount."[111] In other words, the NFIA amendments will permit lenders to charge borrowers for premiums for backdated force-placed flood insurance.

There is something of a conflict in the case law in the interpretation and application of the NFIA amendments in the context of resolving the question of whether these amendments should be applied retroactively. The vast majority of courts have held that the NFIA amendments approving backdating charges in force-placed flood insurance represent a change in the law and will not be applied retroactively.[112] Under a much less

109. 15 U.S.C.A. § 1640(f).

110. Pub. L. 112–141, Div. F, Title II, § 100209(b), July 6, 2012, 126 Stat. 920 (emphasis added).

111. 42 U.S.C.A. § 4012a(e)(2). This effective-date provision was repealed and replaced in a law enacted on Mar. 26, 2014. Pub. L. 113–89, § 25(b)(2), 128 Stat. 1032. Since there appears to be no congressional replacement for, as opposed to repeal, of this effective-date provision, it appears at this time that the likely new effective date would be from and after the date of repeal of this provision, or from and after Mar. 21, 2014. *See* WALL, *supra* note 2, § 3.7.

112. *E.g.*, *Leghorn*, 950 F. Supp. 2d at 1112.

followed line of cases, in contrast, courts have held that these NFIA amendments "codify" pre-existing law allowing backdating of LFPI premiums.[113]

Finally, at least some state unfair and deceptive trade practices acts may contain their own immunity provisions. If so, those provisions seem to remain largely untested at least in LFPI cases. No LFPI cases have been found as of this writing in which a defendant raised a state statutory immunity as a bar or as a defense otherwise to the action.

For example, New York's General Business Law Section 349, also known as the New York Deceptive Practices Act,[114] contains an immunity provision in the following words:

> (d) In any such action it shall be a complete defense that the act or practice is, or if in interstate commerce would be, subject to and complies with the rules and regulations of, and the statutes administered by, the federal trade commission or any official department, division, commission or agency of the United States as such rules, regulations or statutes are interpreted by the federal trade commission or such department, division, commission or agency or the federal courts.[115]

In sum, future cases of lender liability arising from backdated premiums for LFPI may be greatly limited, if not rendered nonexistent, by immunity conferred by the NFIA or by the existing interpretation issued by the CFPB, as applicable. To date, the defense of immunity has not been raised in lender force-placed insurance cases except to the extent that lenders force-placing flood insurers have argued that their charges to borrowers for backdated coverage should be allowed by retroactive application of amendments to the NFIA. The potential defense of immunity is waiting to be developed in LFPI cases.

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113. *E.g.*, *Cannon*,2013 WL 3388222, at *6–7. *See* WALL, *supra* note 2, § 3.8.
114. The New York Deceptive Practices Act is discussed in WALL, *supra* note 2, § 5.5, together with other significant state unfair and deceptive practices acts, and federal acts such as RESPA, TILA, and RICO.
115. N.Y. GEN. BUS. LAW § 349(d).