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## Force-Placed Insurance Rate Defense Advances To 2nd Circ.

By **Andrew Scurria**

Law360, New York (April 4, 2014, 3:34 PM EDT) -- Balboa Insurance Co. won permission Thursday to mount a rare interlocutory appeal against a racketeering class action alleging it bribed GMAC Mortgage LLC for the right to provide force-placed hazard coverage, setting up a Second Circuit showdown over whether the suit fails because its premium rates are state-approved.

Southern District of New York Judge Allison J. Nathan allowed Balboa to appeal her Sept. 30 **refusal to dismiss the case**, in which a putative class of homeowners allege they were forced to reimburse GMAC for kickbacks from the insurer that were bundled into the cost of force-placed hazard policies.

Judge Nathan had declined to dismiss the suit based on the filed-rate doctrine holding state-approved premiums unassailable, saying that the borrowers were not challenging the rates charged to GMAC as the policyholder but rather the cost of their own reimbursement of those rates.

The ruling was the first in New York to decide the applicability of the filed-rate defense to force-placed insurance cases, and Judge Nathan held Thursday that it met the requirements for immediate appeal because it rested on unsettled legal conclusions and a reversal would terminate the case.

"If the filed rate doctrine does indeed apply to amounts charged as cost reimbursements based on filed rates, even if those amounts are not themselves filed and approved rates, and are further alleged to have been manipulated to include the cost of kickbacks, then plaintiffs' action would be barred," the judge said.

As the suit alleged, GMAC billed for the full cost of Balboa policies it purchased when a homeowners' own hazard coverage lapsed despite secretly receiving commissions and free mortgage tracking services from the insurer.

GMAC allegedly admitted in testimony before New York regulators probing force-placed insurance arrangements that it outsourced tracking of borrowers' insurance coverage to Balboa affiliate Newport Management Corp., which provided them for free.

Balboa's filed rates were approved for policies sold to loan servicers and lenders, while the plaintiffs purportedly reimbursed GMAC for force-placed coverage as required by their mortgage loan agreements, according to the judge, a crucial distinction that she said vitiated the filed-rate defense.

Balboa **then requested a certificate of appealability**, arguing that federal and state regulators have taken actions concerning force-placed premiums paid by borrowers, indicating that the proper venue for borrower complaints is with those regulators, not the federal courts.

Judge Nathan noted Thursday that her conclusions of law had subsequently been contradicted by two other judges in the same federal district and that an appeal was justified because a reversal would avoid protracted litigation given that the plaintiffs have yet to move for class certification.

The judge was also unpersuaded by the plaintiffs' contention that the appeal would inappropriately require the Second Circuit to make extensive factual findings.

"The question is whether the 'purchase and forced-imposition of the rates that [Balboa] filed and had approved is functionally equivalent to plaintiffs purchasing hazard insurance from [Balboa] directly' for purposes of the filed rate doctrine," the judge said.

The suit brings RICO claims on the basis of letters GMAC sent to borrowers that allegedly concealed the free services and commissions it was reaping from Balboa. The lender demanded these kickbacks as a condition of designating Balboa as its exclusive force-placed insurance provider, according to the complaint.

The suit originally **named GMAC as a defendant** but was complicated by GMAC parent Residential Capital LLC's May 2012 bankruptcy filing, which forced the plaintiffs to drop GMAC from the suit in favor of ResCap's nonbankrupt parent Ally Financial Inc., which the plaintiffs then dropped from the case last month, leaving only the insurers.

"In denying Balboa's motion to dismiss, the district court held that the filed-rate doctrine was inapplicable. We're confident that the Second Circuit will affirm that well-reasoned opinion," the plaintiffs' attorney Mark Strauss of Kirby McInerney LLP said.

Counsel for Balboa did not immediately respond to a request for comment.

The plaintiffs are represented by Mark A. Strauss and J. Brandon Walker of Kirby McInerney LLP.

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

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

--Editing by Chris Yates.