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# Class Litigation of Lender-Placed Hazard Insurance

September 01, 2014

Also co-authored by Abigail K. Kortz, a former associate at Carlton Fields. *In the wake of the mortgage crisis, a multitude of class actions were filed against the country's largest mortgage lenders focusing on asserted abuses in LPI programs. Class action allegations include kickbacks, backdating of policies, duplicate and excessive coverage, RICO schemes, and RESPA and TILA violations. Many of the cases have been dismissed on motion, are on appeal, or have been refused class certification. However, five major lenders have agreed to settle class challenges and other cases remain pending. The authors describe the litigation and the structure of the emerging settlement model.* It is an unsafe and unsound banking practice for mortgage lenders to fail to maintain insurance coverage on the collateral securing their loans. For this reason, virtually all mortgage instruments require borrowers to maintain hazard — and, depending on the geographic location of the real estate, flood or wind — insurance. Such coverage also benefits borrowers since catastrophic, uninsured loss would erase their equity and leave them homeless and personally liable for the outstanding balance on their loans. Despite its mutual benefits, some borrowers ignore their obligation to maintain acceptable insurance coverage. Anticipating those circumstances, the uniform security instruments promulgated by government sponsored entities (e.g., Fannie Mae and Freddie Mac) prudently include terms allowing lenders to secure insurance on the property's improvements once it becomes clear that borrowers will not maintain coverage. Because of the circumstances under which these insurance products are used, and the lack of property-specific underwriting, "lender-placed insurance" ("LPI") policies are typically, though not universally, more expensive than traditional hazard coverage. To identify lapses quickly and place coverage wherever and whenever needed, lenders maintain master insurance policies with LPI carriers who monitor the lenders' portfolios and issue coverage, sight unseen, upon any lapse. As a result, the costs associated with monitoring the coverage status of loans in any portfolio are risk-management expenses for LPI underwriters, and are included as expense components in the policy premiums approved by state insurance regulators. In addition, LPI premiums account for the added risk inherent in foregoing the underwriting process. Finally, as is typical with many insurance procurement transactions, insurers often pay commissions to lender-affiliated agents/producers for the production of the master LPI insurance relationship and the millions of individual policy placements in each portfolio. Commissions are a routine part of the insurance industry, and LPI

insurers often include them as expense components of their filed premiums. Until recently, there has been nothing untoward or unlawful about paying producers commissions in the LPI context. In class actions across the country, borrowers recently have challenged longstanding LPI programs. Plaintiff borrowers complain that lenders/servicers exceed the authority granted in the mortgage instruments by purchasing coverage in circumstances where a lender's agency or corporate affiliate obtains a benefit, or where the LPI underwriting groups supposedly provide below-cost outsourcing services, such as administration of loss drafts following insurance claims. Plaintiffs also complain about quota-share reinsurance agreements between LPI underwriters and corporate affiliates of lenders/servicers, even though these arrangements are rate-neutral. Many LPI class actions also complain about the necessary process of ensuring continuous coverage on collateral through "automatic issuance" provisions, whereby LPI underwriters provide coverage automatically whenever there is a lapse in coverage. This way, any latent or unreported loss that takes place after a lapse is covered, and both lenders and borrowers are protected. Plaintiffs pejoratively refer to this practice as "backdating," even though it is permitted by the security instruments, recommended by numerous federal regulators and required by the secondary mortgage market. **THE RISE OF LPI CLASS LITIGATION** Lender-placed insurance is neither novel nor peculiar in the mortgage context. But mortgage LPI gained notoriety during the mortgage crisis in the late 2000s, especially given that defaulting borrowers were the most likely to allow concurrent lapses in hazard coverage. In 2010, certain class action lawyers enlisted a sympathetic journalist to focus on the benefits received by loan servicers in connection with the purchase of LPI. Critical articles in first one and then several major publications led to regulatory interest and the filing of a multitude of large class actions in federal courts across the country. These cases targeted many of the country's largest mortgage lenders, including Bank of America, Wells Fargo, HSBC, JP Morgan Chase, PNC Bank, Nationstar, and Ocwen, often joining the two largest LPI underwriting groups, Assurant and QBE. The cases assert overlapping claims and typically derive from challenges to the lenders receiving purported unauthorized "benefits," below-cost services, and charging borrowers allegedly "exorbitant" LPI premiums. For the past few years, both sides have litigated the adequacy of plaintiffs' substantive theories in the form of dispositive motions and, in cases surviving Rule 12 motions, class certification disputes. An emerging body of jurisprudence has led to a Darwinian claim and defense selection, the identification of which is one aim of this paper. The case law also reveals certain trends, including the likely settlement of most claims related to the largest lenders' portfolios. But even with the expected negotiated resolution of LPI claims in larger servicer portfolios, LPI class litigation is likely to continue, especially now that the plaintiffs' bar will view these landmark settlements as "models" for the efficient and guided resolution of substantial though smaller portfolios. This paper begins with an overview of the distilled claims, as well as judicial reaction to those claims in LPI class litigation. We then turn to identifiable trends on the class certification front, including the serious hurdles that have thus far frustrated the certification of any contested nationwide class. Finally, the discussion will conclude with an overview of the still-evolving structures of the LPI settlement agreements. **CLAIMS AND EMERGING TRENDS** Insurers and servicers have enjoyed substantial success defeating many theories alleged by plaintiffs in the LPI class actions, including at the appellate level

in the Seventh and Eleventh Circuits. This section explores plaintiffs' most popular theories and identifiable trends in judicial reaction to those theories. ***Kickbacks***
The most common theory espoused by plaintiffs is the so-called "kickback" theory, which asserts that insurers provide improper commissions, reinsurance premiums, "qualified expense reimbursements" or other payments to mortgage servicers (or servicer-affiliates), and/or provide below-cost tracking services in exchange for exclusive rights to place coverage on the servicers' portfolios. Plaintiffs allege that including commissions and other challenged expenses artificially inflates the cost of LPI and leads to unreasonably high premiums. In addition, plaintiffs claim that exclusive LPI arrangements rob servicers of the incentive to shop for the lowest LPI premium rates and provide a subsidy to servicers for non-insurance-related expenses. The Seventh Circuit found these "kickback" claims implausible in *Cohen v. American Security Insurance Company*, and the Eleventh Circuit followed suit in *Feaz v. Wells Fargo Bank, N.A.* The Cohen court chastised the plaintiff for seeking to hold her lender liable for the foreseeable consequence of her own breach of the mortgage agreement when she failed to maintain continuous insurance coverage. Affirming the district court's dismissal, the Seventh Circuit expressed no sympathy for the plaintiff, noting "a total absence of oppressiveness because all along she could have gone elsewhere to buy cheaper insurance."6 The Cohen court then specifically rejected the plaintiff's "kickback" theory:

Schilke's complaint characterizes the fee and commission to Wachovia and its insurance affiliate as "kickbacks." She seems to think that merely applying this label converts the bank's otherwise clear disclosures into a prohibited deceptive act. Not so. The substance of the transaction was clearly and fully disclosed; no material fact was omitted . . . the defining characteristic of a kickback is divided loyalties. But Wachovia was not acting on behalf of Schilke or representing her interests. The loan agreement makes it clear that the insurance requirement is for the *lender's* protection. This kickback analysis turned partly on uniform language found in the Fannie Mae/Freddie Mac standard mortgage agreement. The mortgage allows the lender to "do and pay for whatever is reasonable or appropriate *to protect the Lender's interest* in the Property and rights under this Security Instrument" (emphasis added). With that language, the *Cohen* court reasoned that the commissions were not kickbacks. Adopting this reasoning, the Eleventh Circuit in Feaz "agree[s] with the Seventh Circuit that 'simply calling a commission a kickback doesn't make it one.'" Other courts have rejected the "kickback" theory based on the filed-rate doctrine, an equitable doctrine created by the U.S. Supreme Court. "Simply stated, the doctrine holds that any 'filed rate' — that is, one approved by the governing regulatory agency — is *per se* reasonable and unassailable in judicial proceedings brought by ratepayers." The filed-rate doctrine advances "two companion principles: (1) preventing carriers from engaging in price discrimination as between ratepayers and (2) preserving the exclusive role of agencies in approving rates by keeping courts out of the rate-making process, a function that regulatory agencies are more competent to perform." The second of these principles — the doctrine's "non-justiciability strand" — "recognizes that (1) legislatively appointed regulatory bodies have institutional competence to address rate-making issues; (2) courts lack the competence to set rates; and (3) the interference of courts in the rate-making process would subvert the authority of rate-setting bodies and undermine the regulatory regime." State

insurance statutes generally require insurers to file proposed LPI premium rates with the insurance commissioner or state regulatory authority. Once approved, those rates are deemed per se reasonable and in compliance with that state's laws. In most states, insurers must charge the approved rate, and only the approved rate, or face enforcement action. Commissions and other challenged expenses are included in the filed rates; thus, a lender may properly pass through to the borrower the approved rate components. Plaintiffs uniformly attempt to avoid application of the filed-rate doctrine by arguing that they are not challenging the approved rates, but rather payment of "kickbacks" in the first place, and the lender's selection of "kickback-paying" insurers. Several courts have rejected this argument as "semantical," "dubious," and "illusory," and have recognized that "[i]n order to calculate the amount of the alleged kickbacks, it would be necessary for this court to determine a reasonable rate and subtract it from the premium." Another recent decision also emphasized that the filed-rate doctrine applies regardless of the defendants' allegedly unlawful underlying conduct, stating that "'the culpability of the defendant's conduct or the possibility of inequitable results' simply does not matter." What matters instead is that the court must effectively assess the reasonableness of the rates in order to dispense relief, and that fact alone triggers application of the filed-rate doctrine. Thus, despite plaintiffs' best efforts to obfuscate, courts have discerned that the plaintiffs' real challenge is to the reasonableness of multiple components of the LPI insurers' premium rates and, therefore, implicates both rationales for application of the filed-rate doctrine. Courts have not, however, uniformly applied the filed-rate doctrine in the LPI context. For example, the Southern District of New York in *Rothstein v. GMAC Mortgage, LLC* concluded that the filed-rate doctrine did not control because the plaintiffs did not challenge the filed rates themselves, but "the [servicer's] method of choosing an insurer." The court also concluded that the doctrine does not apply where a third party (i.e., the servicer), rather than the regulated entity itself (i.e., the insurer), imposes a charge in the amount of the filed rates. As noted above, and as other courts in subsequent LPI opinions in the same district have found, this reasoning is flawed. For example, in *Miller v. Wells Fargo Bank, N.A.*, the court recognized that the same principles animating application of the filed-rate doctrine apply when those approved rates are charged by third parties, including servicers, explaining that the filed-rate doctrine's principles "are no less implicated when a plaintiff brings claims against an entity like Wells Fargo Bank, which acquired policies with premiums based on ASIC's filed rate, than when claims are asserted against the rate-filing entity itself." On April 3, 2014, the *Rothstein* court certified its holding for interlocutory appeal to the Second Circuit, and on June 25, 2014, the Second Circuit granted the petition for leave to appeal the interlocutory order. Other appeals may follow. ***Backdating***

Class action suits that include the "backdating" theory allege that servicers retroactively place LPI "covering periods of time in the past where coverage had lapsed," where borrowers experienced no loss during the lapse period, and for which the risk of loss purportedly had passed. Plaintiffs claim that "backdated" insurance is worthless, but an LPI insurer automatically covers the risk immediately upon any lapse of borrowers' voluntary insurance coverage. Automatic issuance of LPI is a necessary component for all LPI programs to maintain compliance with Fannie Mae and Freddie Mac servicing guidelines and the National Flood Insurance Act ("NFIA"), which require *continuous* hazard

and flood insurance. Notably, mortgages that are not serviced in conformity with these requirements cannot participate in the secondary mortgage market. And without a secondary mortgage market, borrowers would face higher interest rates and find fewer available lending resources. As with the "kickback" theory, Cohen dismissed the ubiquitous "backdating" theory: Again, nothing in the loan agreement prohibits this. Indeed, the loan agreement and related documents required Schilke to maintain *continuous* insurance coverage on her home, and reserved to the lender the right to do "whatever it deems reasonable or appropriate to protect the [lender's rights in the [p]roperty," . . . This broad language includes the purchase of backdated insurance, which is necessary to maintain continuous hazard coverage on the property. A district court in the Northern District of California also dismissed a backdating theory in *Cannon II.* As with *Cohen*, the court's analysis turned heavily on uniform language found in the vast majority of mortgages issued in this country, which allows the lender to place LPI "*for the periods that the Lender requires . . .*" and in a manner that the lender "*deems reasonable or appropriate* to protect the Lender's rights in the Property." The court dismissed all claims based on a "pure" backdating theory, finding that "the language in the mortgage does not preclude the practice [of backdating], and [that] Wells Fargo *has* articulated a reasonable basis for the backdating practice," including that "[s]ome damage may not be readily apparent" during the lapse period. Several other courts have joined *Cohen* and *Cannon II* in their rejection of the backdating theory. As a result, some plaintiffs have recently evolved their theory to acknowledge that the general practice of backdating is acceptable, but now claim that servicers charging them premiums for periods too far back in time (*e.g.*, more than 60 days) is "unfair" or "unjust." ***Duplicate and Excessive Coverage***

The "duplicate" coverage issue arises where the lapsed policy includes a Lender Loss Payable Endorsement ("LLPE") or standard mortgage clause, which "ensure that if a homeowner's insurance policy is cancelled for failure to pay premiums, the *lender's* interest in the property will continue to be insured for a period of time, to permit the lender either to make the premium payments itself, or to arrange for alternate coverage." Plaintiffs argue that the immediate placement of LPI upon any lapse is duplicative of coverage provided by the LLPE. This theory ignores that LLPE coverage applies solely to the outstanding principal balance of the loan and typically is effective for a very short term, usually about 10 days post-lapse. Since unpaid principal balance coverage is not acceptable coverage under Fannie Mae/Freddie Mac servicing guidelines, LLPE coverage fails to satisfy a borrower's insurance obligation under most security instruments. Nevertheless, some active cases continue to advance this "duplicative insurance" argument. Plaintiffs also argue that LPI is "excessive" if the lender insures property with limits sufficient to cover the fair market value of the improvements on the property, rather than just the outstanding principal balance of the loan. This argument has not fared well. Courts have zeroed in on language in the standard mortgage agreements requiring that "insurance shall be maintained in the amounts . . . that *Lender* requires" and authorizing lenders to do whatever is necessary, "including protecting ... the value of the property." Excessive coverage claims have focused on LPI flood placements. Although plaintiffs have attempted to distort the NFIA to suggest that it mandates the maximum coverage that can be placed, courts have recognized that the NFIA language requiring coverage "*at least* equal to the

outstanding principal balance of the loan or the maximum limit of coverage made available under the Act with respect to the particular type of property, whichever is less," sets a minimum coverage amount. In *McKenzie I* and *II*, the court concluded that the language of the Federal Housing Authority ("FHA") deed of trust, the NFIA requirements, Fannie Mae and Freddie Mac servicing guidelines, and Federal Emergency Management Agency ("FEMA") and Federal Deposit Insurance Corporation ("FDIC") recommendations establish that *at a minimum*, insurance must cover the outstanding principal balance of the loan, but that a sound risk-management strategy involves insuring the property up to its replacement cost value. Chief Judge Lynch of the First Circuit vindicated this reasoning in *Kolbe v. BAC Home Loans Servicing, LP*, where she explained that the mortgage agreement clearly "allow[s] the Bank to choose the amount of insurance for 'any hazards,' and that includes flood insurance." Beyond the technical construction question, a lender's interest in the property is greater than the outstanding principal loan balance because: if a flood destroys a home and insurance benefits are sufficient to repay only the loan, the lender is left without a performing loan, one that may have been gaining interest at a higher rate than possible under current market conditions. Lenders also incur loan origination costs arising from premature payment of the loan. Other courts have similarly concluded that a lender's interest is not limited to the outstanding principal balance of a loan. ***Racketeer Influenced and Corrupt Organizations Act ("RICO")***

Plaintiffs' RICO claims typically allege mail and wire fraud as predicate acts. More specifically, they allege that defendant lenders and servicers engage in a "scheme to defraud" by misrepresenting to plaintiffs the reasons for LPI's costs and that the LPI placement would benefit the defendants in various ways. Plaintiffs allege further that the defendants failed to disclose the "kickbacks," "backdating," and unwarranted benefits received by defendants. In most instances, however, mortgage servicers informed borrowers multiple times of details regarding LPI, including that LPI generally costs significantly more than insurance borrowers can obtain on their own, and that an affiliate of the servicer may receive a commission or other benefits in connection with the LPI transaction. These disclosures have made it difficult for plaintiffs to plead viable RICO claims. The facts and claims in *Gustafson v. BAC Home Loans Servicing, LP* are typical of those parroted in dozens of other complaints. There, the court dismissed the complaint for failure to plead the RICO fraud claim with sufficient particularity under the Fed. R. Civ. P. 9(b) standard: Plaintiffs have pointed to no specific misrepresentations or omissions and have provided no dates for when those misrepresentations or omissions occurred. Though Plaintiffs point to specific dates in which they themselves received letters from Bank of America and other Defendants regarding their hazard insurance, Plaintiffs have not specifically alleged that these communications contained misrepresentations or omissions, nor have they pointed to anything in or about those correspondences that were misleading or misrepresented. RICO claims have also failed due to inadequate allegations of an enterprise. In *Miller*, plaintiffs alleged an enterprise consisting of defendants and "other insurance producers and entities involved in force-placing insurance on behalf of the Wells Fargo Defendants not named as defendants herein," but did not allege the role of those "other insurance producers and entities." Since RICO requires that a plaintiff "'explain each

participant's role in the alleged course of fraudulent or illegal conduct,'" and plaintiffs did not satisfy that requirement, their RICO claim was dismissed. Although not construing RICO, the *Cohen* court rejected plaintiffs' state law fraud claims for reasons similar to *Gustafson*. As with most LPI cases, the complaint in Cohen did not explain why the defendants' practices were deceptive or misleading, and did not allege "a false statement of material fact" nor "facts or circumstances to support a finding of a duty to disclose." The court relied on the same sort of thorough and repeated disclosures identified in Gustafson to ultimately reject the fraud claim. "The loan agreement and Wachovia's disclosures, notices, and correspondence conclusively defeat any claim of fraud, false promise, concealment, or misrepresentation." These disclosures made unpersuasive the "common premise underlying these allegations . . . that if Schilke had known of the supposed kickbacks, she would not have paid the premiums for [LPI]." Cohen's analysis, although not specifically addressing RICO, calls into question the plaintiffs' ability to allege highly factual RICO requirements such as a racketeering enterprise, specific intent, or conspiracy. If plaintiffs cannot sufficiently plead a predicate fraudulent act, then it follows that they will have at least as much difficulty pleading a more demanding RICO cause of action. Reacting to the judicial resistance they have met on RICO allegations, plaintiffs have started pleading a different version of fraud known as "honest services" fraud, hoping courts will view this as a different claim, when in fact it is just a new flavor of the same basic fraud cause of action. Plaintiffs allege that loan servicers owe legal duties to borrowers to render certain services in an honest manner and breach those duties when they profit from LPI. This is simply a different spin on the same assertions that several courts have found to be implausible, and it remains to be seen whether this new approach is viable. ***Statutory Claims against Mortgage Servicers***

Not infrequently, plaintiffs tack on one or more federal statutory claims against lenders and servicers in addition to their general complaints about kickbacks, backdating, and excessive coverage. *RESPA*: Plaintiffs' attempts to plead violations of the Real Estate Settlement Procedures Act ("RESPA") have proved problematic. Courts have rejected plaintiffs' attempts to impose on servicers and insurers the newly minted requirements of Section 2605(m) that LPI charges be "bona fide and reasonable." Those requirements took effect on January 10, 2014, do not apply retroactively, and are therefore inapplicable to many of plaintiffs' claims. Even if Section 2605(m) did apply retroactively, filed and approved LPI premium charges do not violate the provision because they are "bona fide and reasonable." There is also judicial consensus that LPI does not qualify as a "settlement service" and courts have dismissed RESPA claims relying on 12 U.S.C. § 2607 — which prohibits any person from giving or accepting "any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service" – across the board. Less frequently asserted RESPA violations have fared no better. For example, an allegation that plaintiffs "are entitled to statutory damages under 12 U.S.C. § 2609(a)(1) for requiring plaintiffs to deposit an excess amount for insurance into their escrow account" fails since that particular section does not create a private right of action. The pleading requirements of 12 U.S.C. § 2605(e), which entitles plaintiffs to statutory damages if a servicer does not respond to a "qualified written request" within a statutorily prescribed time period, have also proved to be a challenging hurdle for plaintiffs. *TILA*: Nor have

plaintiffs had much success with Truth in Lending Act ("TILA") claims. After origination of a loan, TILA requires new disclosures for closed-end transactions, such as the mortgages at issue in LPI cases, only in the event of a refinancing, assumption of a loan, or interest rate change under a variable rate obligation. None of these circumstances are present in the LPI cases. In addition, plaintiffs' typical assertion that servicers change the terms of their loans when they add LPI charges to their loan balances is incorrect because LPI is contemplated in and authorized by the mortgage agreement. Courts have also agreed that servicers are not "creditors" as that term is defined under TILA, and are therefore not subject to TILA's requirements. Finally, courts agree that TILA does not apply to premiums for insurance when creditors (i.e., lenders) disclose upfront that borrowers may choose their insurance coverage. Since a standard mortgage agreement explains that "[t]he insurance carrier providing the insurance shall be chosen by Borrower" (emphasis added), lenders typically are exempt from the disclosure requirements. *BHCA*: Plaintiffs occasionally allege violations of the anti-tying provisions of the Bank Holding Company Act ("BHCA"), which prohibit a lender from extending credit or furnishing any service on the condition that the customer obtain additional credit or services from the same lender. Courts have not given any credence to plaintiffs' theory that a servicer acting as an insurance agent is the "tied product" and the servicer's purchase of LPI for borrowers is the "tying product." As one court explained: [T]he service of purchasing insurance and the service of being the agent for obtaining the insurance are really nothing more than two sides of the same coin. The purported distinction presented herein is even less viable than that presented in *McGee* where the Eleventh Circuit found that "loan and loan-related appraisal services are not two products because 'there is no legitimate consumer demand by a borrower to purchase loan-related appraisal services separate from the purchase of the loan itself.'" *S&N Equip. Co. v. Casa Grande Cotton Fin. Co.*, 97 F.3d 337, 346 (9th Cir. 1996). In the instant case, there is no functional distinction between the two putative services. Another court in the Northern District of California dismissed the tying theory after analyzing the issue in depth, explaining that "there are not two distinct products with separate consumer demand because purchasing insurance for someone and being an insurance agent for someone are the same thing." **CERTIFICATION** ***Only in the Context of Joint Requests for Settlement Approval Have Nationwide LPI Classes Been Certified***
On February 28, 2014, Chief Judge Federico A. Moreno of the Southern District of Florida in the *Saccoccio* case gave final approval to and certified the first nationwide LPI settlement class. Preliminary certification and approval of four other settlement classes followed Saccoccio. In all other instances where LPI defendants mounted an opposition, courts have denied certification of any nationwide LPI class. ***LPI Claims Are Too Amorphous for Certification***
Because LPI plaintiffs rely largely on state common law claims, the acknowledged variation among 50 separate bodies of jurisprudence makes certification of a nationwide class unmanageable. Referring specifically to *Kunzelmann v. Wells Fargo Bank, N.A.*, one of several cases denying certification of a putative nationwide LPI class, Judge Moreno noted that "there is strong authority to suggest that Plaintiff may not have prevailed" had the case continued. Judge Middlebrooks in Kunzelmann previously concluded that state law claims require too much "individualized scrutiny incompatible with class treatment." The *Kunzelmann* court also refused to certify even *statewide*

unjust enrichment and breach of implied covenant claims, concluding that such common law claims are too dependent on each putative class member's individual facts: With substantial notice, and a high degree of awareness of the relative cost of LPI, Mr. Kunzelmann, while apparently considering a lawsuit, chose to pay his pro-rata premium. Other borrowers undoubtedly knew much less; moreover, only a portion of borrowers ever actually pay the premium. The individual circumstances of each borrower are central to any determinations of injustice. Underscoring the truly amorphous nature of what the plaintiffs' bar had been trying to pass off as a homogonous class, the court further distinguished Mr. Kunzelmann's case from those of many of his fellow class members: Contrast Mr. Kunzelmann's particular circumstances with another scenario not uncommon during the housing crisis. Many borrowers, underwater on their mortgage and owing far more than their home is worth, choose to walk away from their property. These borrowers stop making mortgage payments, allow their insurance to lapse, and quit maintaining their property, but nevertheless continue to live in the house with no intention to pay, while awaiting eviction. While such a borrower would be within the proposed class, I question whether that borrower has conferred a direct benefit on the defendant by being charged a premium that he or she never intends to pay. *Kunzelmann's* analysis is typical of the other courts denying certification in the LPI context. The significant variation in governing state law, and the fact-sensitive nature of the claims chosen by plaintiffs, have resulted in no nationwide class certifications in contested proceedings. ***Named Plaintiffs Lack Standing to Assert State Law Claims on behalf of Nationwide Classes***
Plaintiffs' inclusion of state common law claims hurt their prospects of nationwide certification in another key way. Class representatives do not have Article III standing to press state law claims under the laws of states in which they have never resided or which have no connection to their purported injury. For example, a plaintiff residing in Florida suing on an LPI placement that took place on her Florida home and pursuant to her Florida mortgage does not have standing to assert a claim for unjust enrichment under the law of California or any state other than Florida. This is a relatively recent challenge being posed by the defense bar, but it has produced some encouraging early results. In Lauren v. PNC Bank, N.A., the named plaintiff brought an LPI class action which, typical of dozens of others, included a claim for unjust enrichment on behalf of a putative nationwide class. On motion by American Security Insurance Company, an indirectly owned subsidiary of Assurant, Inc., the court concluded, "Lauren lacks standing to assert unjust enrichment claims based on the laws of states other than [plaintiff s home state]." The Lauren court largely relied upon the sound reasoning originating from a neighboring district: A named plaintiff whose injuries have no causal relation to, or cannot be redressed by, the legal basis for a claim does not have standing to assert that claim. For example, a plaintiff whose injuries have no causal relation to Pennsylvania, or for whom the laws of Pennsylvania cannot provide redress, has no standing to assert a claim under Pennsylvania law, although it may have standing under the law of another state. The plaintiff in *Lauren* tried to avoid this result by arguing that any determination of a named plaintiff's standing to assert claims on behalf of a still putative nationwide class was premature, and that such an inquiry should take place only after the court decided to certify the class. But the *Lauren* court rejected this argument because standing is traditionally a threshold matter, and "the requirement that a named plaintiff

have standing is no different in the class action context." The court additionally noted that "deferring ruling on standing until the close of the class certification process would not be consistent with Rule 1 because such deferral would trigger extensive discovery costs and delay." This analysis is consistent with an emerging consensus of federal courts that dismissal of multi-state class allegations for lack of subject-matter jurisdiction is an essential precursor to certification proceedings because: (1) constitutional standing is a "threshold requirement;" (2) named plaintiffs "have no standing to bring claims for injuries under the laws of [foreign] states" because "[s]uch injuries, if they occurred, were suffered by other people;" and (3) the Article III standing analysis cannot be merged with the Rule 23 certification analysis because under the Rules Enabling Act a procedural rule cannot alter a constitutional minimum. Dozens of federal courts in non-LPI cases have agreed that courts should not postpone the standing inquiry until certification, and this authority does not bode well for plaintiffs' prospects of gaining certification of a nationwide class seeking recovery under state common law claims. The standing issue is merely a symptom of a larger, systemic defect in LPI class actions. As they are now defined, putative LPI classes seek relief under too many differing bodies of law and pursue claims which are too sensitive to the individual facts of each putative class member. These deficiencies have thus far prevented the certification of even a single contested nationwide class. **SETTLEMENTS** ***Structure of the Settlement Model***

As of this writing, five major lenders have agreed to settle class challenges to all or part of their LPI programs. As discussed above, Judge Moreno in the Southern District of Florida has already granted final approval of the *Saccoccio* settlement involving JP Morgan Chase ("Chase"), disposing of claims arising from placement of hazard coverage by Chase. Settlement agreements involving four other major lenders - HSBC, Wells Fargo, Bank of America, and Citibank - are structured similarly to *Saccoccio* and have all been preliminarily approved. The Wells Fargo and Citibank settlements seek to resolve all LPI claims, including hazard, flood, and wind, while HSBC's, Bank of America's, and Chase's arrangements currently include only hazard LPI claims. The deals involving HSBC, Wells Fargo, Bank of America, and Citibank are all under Judge Moreno's auspices, making him uniquely familiar with the merits of the LPI claims, and the structure and soundness of the settlement model now emerging. These settlements are all based on a claims-made structure, and all provide monetary relief based on a percentage of net LPI premium paid by or charged to each class member." Prospective relief includes, for a defined period of time, a promise by lenders not to accept financial benefits associated with the placement of LPI coverage. The agreements make clear, however, that loan tracking expenses are risk-management costs appropriately included in LPI approved premiums. The insurance carriers also typically agree not to provide certain specified benefits to the lenders for a defined period of time, including payment of commissions and provision of "below-cost" or free outsourced services (again not including tracking services). In exchange, class members agree to a full, unconditional release of the lender and insurer for all claims that were or could have been brought in connection with the LPI placements. ***Objections to the Model***

The predominant LPI settlement structure has withstood spirited challenges by segments of the plaintiffs' bar that stand to lose fees in competing class cases. One plaintiffs' group filed objections to the *Saccoccio* deal challenging, among other things, the claims-made structure of the settlement.

The court in *Saccoccio* found these and other arguments meritless, and in one instance, “laughable.” The court approved use of the claims-made structure, noting that otherwise the sheer volume of class members would require defendants to review manually hundreds of thousands of loan files to determine which class members paid premiums, and, if so, how much. There is nothing inherently unfair about requiring class members to file claims and requiring them to provide their own readily available information to the settlement administrator, especially given that as plaintiffs, they would have that obligation if they attempted to advance their claims in federal court. The court similarly disagreed that the settlement agreement vested defendants with unilateral authority to reject claims, noting that the settlement required the retention of an independent settlement administrator to ensure the integrity of the claims process. The objecting group has appealed the *Saccoccio* court’s final approval order and judgment, though their standing to mount that appeal is being challenged. That and the substantive issues on appeal have not yet played out. It is clear, however, that with each new settlement, use of a claims-made settlement structure in this context gains credibility. Assuming the HSBC, Wells Fargo, Bank of America, and Citibank settlements secure final approval, and assuming the final approval of *Saccoccio* withstands appeal, the impact of these deals may be far-reaching. Because Wells Fargo and Citibank’s settlements address hazard, flood, and wind, further class litigation against those lenders should come to a close. Litigation against HSBC, Bank of America, and Chase will continue, though solely in the flood context. Those claims may settle pursuant to a similar framework. **CONCLUSION** As the plaintiffs’ bar continues to settle LPI challenges against the nation’s largest loan servicers (both depository and non-depository), and with an available settlement model that will likely withstand both district and circuit court scrutiny, plaintiffs predictably are beginning to shift their focus to servicers with smaller portfolios, including those whose volume of LPI placements previously were too insubstantial to justify the cost of pursuit. That cost/benefit analysis will change, especially with a well-mapped and tested resolution model looming in the wings. This is not to say, however, that all cases will proceed to settlement and, in fact, plaintiffs should not be surprised if certain servicers refuse to settle. Also influencing this calculation will be the continued development of case law regarding plaintiffs’ and defendants’ substantive claims and defenses. Most notably, the outcome of the interlocutory appeal in *Rothstein* on the filed-rate doctrine issue has the potential to significantly alter the respective sides’ risk calculations and the emerging settlement structure. *Originally published by The Review of Banking & Financial Services, Vol. 30, No. 9 (September 2014).*

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