

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 16-12100

PANKAJ PATEL, *et al.*, on behalf of themselves and all others similarly situated,
Plaintiffs-Appellants,

vs.

SPECIALIZED LOAN SERVICING, LLC, *et al.*,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

**APPELLANTS' RESPONSE IN OPPOSITION TO
MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF**

Additional counsel
on signature page.

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CERTIFICATE OF INTERESTED PERSONS

Plaintiffs-Appellants submit this list, which includes the trial judge, magistrate judge, and all attorneys, associations or persons, firms, partnerships or corporations known to have an interest in the outcome of this review.

1. ABI International
2. ABIG Holding de Espana, S.L.
3. A.C.N. 080 903 957 Pty Ltd
4. A.C.N. 081 035 752 Pty Ltd
5. Administar Services Group LLC
6. ALOC Holdings ULC
7. Alpine Fiduciary Services Inc.
8. American Bankers General Agency, Inc.
9. American Bankers Insurance Company of Florida
10. American Bankers Insurance Group, Inc.
11. American Bankers Life Assurance Company of Florida
12. American Bankers Management Company, Inc.
13. American Memorial Life Insurance Company
14. American Security Insurance Company
15. Assurant Argentina Compania de Seguros Sociedad Anonima

16. Assurant BARC Reinsurance Limited
17. Assurant Chile Compania de Seguros Generales S.A.
18. Assurant Co. Ltd.
19. Assurant Consulting Company Limited
20. Assurant Danos Mexico S.A.
21. Assurant Deutschland GmbH
22. Assurant Direct Limited
23. Assurant Direta Corretora de Seguros Ltda
24. Assurant General Insurance Limited
25. Assurant Group, Limited
26. Assurant Holding Mexico, S. de R.L. de C.V.
27. Assurant Holdings France SAS
28. Assurant, Inc. (AIZ)
29. Assurant Intermediary Limited
30. Assurant International Division Limited
31. Assurant Investment Management LLC
32. Assurant Italia Agenzia di Assicurazioni s.r.l.
33. Assurant Life Limited
34. Assurant Life of Canada
35. Assurant New Ventures, Inc.

36. Assurant Payment Services, Inc.
37. Assurant Reinsurance of Turks & Caicos, Ltd.
38. Assurant Seguradora S.A.
39. Assurant Service Protection, Inc.
40. Assurant Services Argentina, S.A.
41. Assurant Services Canada Inc.
42. Assurant Services de Chile, SpA
43. Assurant Services del Peru SAC
44. Assurant Services Hong Kong Limited
45. Assurant Services Italia s.r.l.
46. Assurant Services Korea Limited
47. Assurant Services Limited
48. Assurant Services, LLC
49. Assurant Services of Puerto Rico, Inc.
50. Assurant Services (UK) Limited
51. Assurant Servicios de Mexico, S.A. de CV
52. Assurant Servicios Ltda.
53. Assurant Solutions Assistance B.V.
54. Assurant Solutions Comercio e Servicos de Equipamentos

Electronicos Ltda.

55. Assurant Solutions Holding Puerto Rico, Inc.
56. Assurant Solutions Spain, S.A.
57. Assurant Vida Mexico S.A.
58. Axios Valuation Solutions, LLC
59. Baseline Capital Limited
60. Blue Bananas, LLC
61. Broadtech, LLC
62. BuckleySandler LLP
63. Burt, Franklin G.
64. Bushman, Howard M.
65. Caribbean American Life Assurance Company
66. Caribbean American Property Insurance Company
67. Carlton Fields Jorden Burt, P.A.
68. CDS International Pty Limited
69. CIS Company Secretaries Pty Ltd
70. Closed Joint Stock Company <<Computershare Registrar>>
(Russia)
71. Coast to Coast Dealer Services Inc.

72. Cohn, James I.
73. Commerce Financial Printers Corp.
74. Communication Services Australia Pty Limited
75. Computershare AB Sweden
76. Computershare A/S
77. Computershare Asia Limited
78. Computershare Canada Inc
79. Computershare Clearing Pty Limited
80. Computershare Communication Services GmbH
81. Computershare Communication Services Inc
82. Computershare Communication Services Pty Limited
83. Computershare Company Nominees Limited
84. Computershare Dealing Services Pty Ltd
85. Computershare Depositary Pty Limited
86. Computershare Deutschland GmbH & Co. KG
87. Computershare DR Nominees Limited
88. Computershare Finance Company Pty Limited
89. Computershare Finance Ireland Limited
90. Computershare Finance LLC

91. Computershare Financial Services, Inc.
92. Computershare Governance Services GmbH
93. Computershare Governance Services Inc.
94. Computershare Governance Services Limited (Ireland)
95. Computershare Governance Services Ltd (Canada)
96. Computershare Governance Services (UK) Limited
97. Computershare Holdings Inc.
98. Computershare Holdings LLC
99. Computershare Hong Kong Development Limited
100. Computershare Hong Kong Investor Services Limited
101. Computershare Hong Kong Nominees Limited
102. Computershare Hong Kong Trustees Limited
103. Computershare Inc.
104. Computershare International Information Consultancy Services
(Beijing) Company Ltd
105. Computershare Investments (Canada) (Holdings) ULC
106. Computershare Investments (Canada) (No.1) ULC
107. Computershare Investments (Canada) (No.2) ULC
108. Computershare Investments (Canada) (No.3) ULC

109. Computershare Investments (Canada) (No.4) ULC
110. Computershare Investments (UK) Limited
111. Computershare Investments (UK) (No.2) Limited
112. Computershare Investments (UK) (No.3) Limited
113. Computershare Investments (UK) (No.4) Limited
114. Computershare Investments (UK) (No.5) Limited
115. Computershare Investments (UK) (No.6) Limited
116. Computershare Investments (UK) (No.7) Limited
117. Computershare Investments (UK) (No.8) Limited
118. Computershare Investments (UK) (No.9) Limited
119. Computershare Investor Services (Bermuda) Limited
120. Computershare Investor Services (British Virgin Islands) Limited
121. Computershare Investor Services (Cayman) Limited
122. Computershare Investor Services (Guernsey) Limited
123. Computershare Investor Services Inc
124. Computershare Investor Services (IOM) Limited Isle of Man
125. Computershare Investor Services (Ireland) Limited
126. Computershare Investor Services (Jersey) Limited
127. Computershare Investor Services Limited (South Africa)

128. Computershare Investor Services, LLC
129. Computershare Investor Services Ltd
130. Computershare Investor Services PLC
131. Computershare Investor Services Pty Limited
132. Computershare Investor Services Pty Ltd (South Africa)
133. Computershare Italy S.r.l.
134. Computershare Limited [CPU.AX]
135. Computershare Limited (United Kingdom)
136. Computershare LLC
137. Computershare Ltd (South Africa)
138. Computershare Nominees (Channel Islands) Limited
139. Computershare Nominees NZ Limited
140. Computershare Nominees Pty Ltd
141. Computershare Offshore Services Limited
142. Computershare Outsourcing Limited
143. Computershare PEP Nominees Limited
144. Computershare Plan Co Pty Ltd
145. Computershare Plan Managers Pty Ltd
146. Computershare Registry Services Limited

- 147. Computershare (Russia) Limited
- 148. Computershare Services Canada Inc
- 149. Computershare Services Nominees (Ireland) Limited
- 150. Computershare Services Nominees Limited
- 151. Computershare South Africa (Pty) Ltd
- 152. Computershare S.p.A.
- 153. Computershare Systems (NZ) Limited
- 154. Computershare Technology Services Inc.
- 155. Computershare Technology Services Pty Ltd.
- 156. Computershare Technology Services (UK) Limited
- 157. Computershare Trust Company of Canada
- 158. Computershare Trustees (C.I.) Limited
- 159. Computershare Trustees (Ireland) Limited
- 160. Computershare Trustees (Jersey) Limited
- 161. Computershare Trustees Limited
- 162. Computershare US
- 163. Computershare US Services Inc.
- 164. Computershare Technology Services, Inc.
- 165. Computershare Trust Company, N.A.

- 166. Computershare Verwaltungs GmbH
- 167. Computershare Voucher Services Limited
- 168. ConnectNow New Zealand Limited
- 169. ConnectNow Pty Ltd
- 170. Consumer Assist Network Association, Inc.
- 171. Cooperatieve Assurant Netherlands U.A.
- 172. CPU (NZ) Share Plans Limited
- 173. CPU Share Plans Pty Limited
- 174. CRS Custodian Pty Ltd
- 175. CRS Nominees Ltd
- 176. CWI Corporate
- 177. CWI Distribution
- 178. CWI Group
- 179. CWork Financial Management LLC
- 180. CWork Solutions, LP
- 181. Digital Services (UK) Ltd.
- 182. Eagle Rock Proxy Advisors, LLC
- 183. EES Capital Trustees Limited
- 184. EES Corporate Trustees Limited

185. EES Nominees International Limited
186. EES Services (UK) Limited
187. EES Trustees Limited
188. eMortgage Logic, LLC
189. Engel, Sarah
190. Family Considerations, Inc.
191. FamilySide, Inc.
192. FAS-Nationstar, LLC
193. FAS-OWB Utilities, LLC
194. FAS-Tenant Access Utilities, LLC
195. Federal Warranty Service Corp.
196. Field Asset Services, LLC
197. Financial Market Software Consultants Pty Ltd
198. Florida Office Corp.
199. Georgeson Inc.
200. Georgeson International Inc.
201. Georgeson S.l Spain
202. Georgeson Securities Corporation
203. Georgeson Shareholder Analytics LLC

- 204. Georgeson Shareholder Communications Australia Pty. Ltd.
- 205. Georgeson Shareholder Communications Canada Inc
- 206. Georgeson Shareholder Communications Limited
- 207. Georgeson Shareholder SAS
- 208. Georgeson S.r.l.
- 209. Global eDelivery Group Pty Ltd
- 210. GP Legacy Place, Inc.
- 211. Gravante, John III
- 212. Grundstücksentwicklungs Gesellschaft "Am Schönberg" GmbH
- 213. GSC Shareholder Services Inc
- 214. GTU Ops Inc.
- 215. Guardian Travel, Inc.
- 216. Halliday, Katherine L.
- 217. Harke Clasby & Bushman, LLP
- 218. Harke, Lance A.
- 219. HELOC Funding II Trust
- 220. HML Mortgage Services Ireland Limited
- 221. Homeloan Management Limited
- 222. Hong Kong Registrars Limited

- 223. Insureco Agency & Insurance Services, Inc.
- 224. Insureco, Inc.
- 225. Interfinancial Inc.
- 226. I.Q. Data International, Inc.
- 227. Istifi d S.p.A.
- 228. Jhavbala, Farrokh
- 229. John Alden Life Insurance Company
- 230. Karvy Computershare Private Limited
- 231. Karvy Computershare W.L.L
- 232. KB Analytics Limited
- 233. KCC Class Action Services LLC
- 234. Kozyak Tropin & Throckmorton, LLP
- 235. Kurtzman Carson Consultants Inc.
- 236. Kurtzman Carson Consultants, LLC
- 237. Lamb, Archie Cleveland Jr.
- 238. Law Offices of Archie Lamb
- 239. LeBlanc, Stephen M.
- 240. Legotla Investments (UK) Limited
- 241. Lifestyle Services Group Ltd.

- 242. LSG Espana Ltd.
- 243. LSG Insurance
- 244. Merten, W. Glenn
- 245. Minu Limited
- 246. MobileServ 5 Ltd.
- 247. Morrison, Ross E.
- 248. Mortgage Systems Limited
- 249. Moskowitz, Adam M.
- 250. MS Diversified Corp.
- 251. MSR Robin Advances (Depositor) LLC
- 252. MSR Robin Advances Issuer Trust
- 253. National Insurance Agency
- 254. National Insurance Institute, LLC
- 255. Neary, Robert J.
- 256. 9167-1990 Quebec Inc.
- 257. NRC Investments (UK) Limited
- 258. Obadele Pty Ltd
- 259. Patel, Pankaj
- 260. Pathbold Limited

- 261. Perryman, Brian P.
- 262. Podhurst, Aaron S.
- 263. Podhurst Orseck, P.A.
- 264. Prieto, Peter
- 265. Property Casualty Insurers Association of America
- 266. Protection Holding Cayman
- 267. Proxitalia S.r.l.
- 268. Quattrone, Robyn C.
- 269. Q M Industries (N.S.W.) Pty. Ltd.
- 270. R&T Financial Services, Inc.
- 271. RCNG LLC
- 272. Registrar and Transfer Company
- 273. Registrar and Transfer Corporation – New York
- 274. Registrars Holding Pty Ltd
- 275. Registrar Nikoil Company (JSC)
- 276. Reliable Lloyds Insurance Company
- 277. Ronzetti, Thomas A. Tucker
- 278. Rosenthal & Company, LLC
- 279. Rosenthal, Stephen

- 280. Savings Management Limited
- 281. Seltzer, Hon. Barry S.
- 282. Sepon (Australia) Pty Limited
- 283. Serviceworks Management Pty Ltd
- 284. Settlement Recovery Group LLC
- 285. SG Vestia Systems Inc.
- 286. Sharemart NZ Ltd
- 287. Shipsurance Insurance Services, Inc.
- 288. Signal Financial Management LLC
- 289. Signal GP LLC
- 290. Signal Holdings LLC
- 291. Signal Northwest LLC
- 292. SLS Funding III LLC
- 293. SLS Investco LLC
- 294. SLS Servicer Advance Revolving Trust 1
- 295. Solutions Cayman
- 296. Solutions Holdings
- 297. Source One Communications Australia Pty Ltd
- 298. Specialized Loan Servicing, LLC

- 299. Specialist Mortgage Services Ireland Limited
- 300. Specialist Mortgage Services Limited
- 301. Specialized Asset Management LLC
- 302. Specialized Default Services LLC
- 303. Specialized Loan Servicing Holdings LLC
- 304. Specialized Title Services LLC
- 305. STAMS Holding Ltd.
- 306. STAMS Ltd.
- 307. Standard Guaranty Insurance Company
- 308. StreetLinks, LLC
- 309. Sullivan, Rachel
- 310. Sureway, Inc.
- 311. Switchwise Pty Ltd
- 312. Telecom Re, Inc.
- 313. The Signal LP
- 314. Time Insurance Company
- 315. Topaz Finance Limited
- 316. TrackSure Insurance Agency, Inc.
- 317. TS Holdings, Inc.

- 318. Union Security Insurance Company
- 319. Union Security Life Insurance Company of New York
- 320. United Service Protection Corp.
- 321. United Service Protection, Inc.
- 322. VEM Aktienbank AG
- 323. Voyager Group, Inc.
- 324. Voyager Indemnity Insurance Company
- 325. Voyager Service Warranties, Inc.
- 326. Weinshall, Matthew P.
- 327. WePurchit.com LLC
- 328. Williams, Dawn B.
- 329. Wilson, Laketha
- 330. ZAO <<Ediniy Registrator>>

**APPELLANTS' RESPONSE IN OPPOSITION TO
MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF**

Appellants oppose the motion by Property Casualty Insurers Association of America (the “Insurers Association”) to file an amicus curiae brief. Although in certain circumstances such a motion might routinely be granted, this matter presents the precise situation when amicus briefing is inappropriate. It would be unfair and will not assist the Court to permit partisan supplemental briefing by a trade association in which one Appellee, American Security Insurance Company (“ASIC”), is a member, and represents at least two-thirds of the applicable market share. *See* Insurers Ass’n Br. at 9. The Insurers Association’s brief does not merely operate as a mechanism to exceed the Appellees’ page limitation, but also relies on hearsay testimony – including from ASIC’s president and its litigation expert in other cases – that could never have been introduced below. Beyond that, the proposed amicus brief only repeats arguments of ASIC, and provides little else. Accordingly, the Court should deny the Insurers Association’s motion for leave to file an amicus brief.

BACKGROUND

At issue in this case is whether, as a matter of law, the filed-rate doctrine bars claims by borrowers against a mortgage-loan servicer, Appellee Specialized Loan Servicing LLC (“SLS”), and its exclusive forced-placed insurance issuer, ASIC. The borrowers are challenging SLS’s practice of charging borrowers amounts

exceeding what is authorized under their mortgage contracts, a claim traditionally within the purview of the judicial system. Seeking to preserve their scheme that has improperly generated a fortune in revenues, Appellees mischaracterize the Appellants' claims as a challenge to the reasonableness of the rates the mortgage-loan servicer SLS pays for its own insurance – not the borrowers' insurance – to the commercial insurer of the servicer's mortgage portfolio, ASIC. The district court erroneously relied on Appellees' mischaracterization of Appellants' claims and dismissed the case based on the filed-rate doctrine, (D.E. 36, attached as Ex. A), and this appeal followed.

Despite the Appellees' enormous resources and comprehensive briefing, the Insurers Association, of which Appellee ASIC is a significant member, is moving for leave to file an additional brief, styled as an amicus brief. Much of the proposed brief consists of evidence not properly considered by a district court on a motion to dismiss, much less on appeal, and which is impossible for the Appellants to test or meet. The Insurers Association's evidence consists of partisan, hearsay testimony from officers of insurance companies, including from Appellee ASIC, and a litigation expert employed by ASIC in other cases. *See* Insurers Ass'n Br. §§ I-III. The rest of its brief re-argues legal points from the Appellees' Brief. *See id.* § IV. Simply put, the Insurers Association's brief is improper and unhelpful to the Court, and thus should not be allowed.

ARGUMENT

Pursuant to Federal Rule of Appellate Procedure 29(a), filing an amicus brief requires leave from the Court where, as is the case here, the moving party does not obtain consent from all parties. Whether the Court chooses “to allow the filing of an amicus curiae brief is a matter of judicial grace.” *Voices for Choices v. Ill. Tel. Co.*, 339 F.3d 542, 544 (7th Cir. 2003) (internal quotation marks omitted). For good reason, courts have expressed skepticism of amicus briefs:

[J]udges have heavy caseloads and therefore need to minimize extraneous reading; amicus briefs, often solicited by parties, may be used to make an end run around court-imposed limitations on the length of parties’ briefs; the time and other resources required for the preparation of, and response to, amicus briefs drive up the cost of litigation; and the filing of an amicus brief is often an attempt to inject interest group politics into the federal appeals process.

Id.; see also *Glassroth v. Moore*, 347 F.3d 916, 919 (11th Cir. 2003) (citing *Voices for Choices* and noting that amicus briefs are often used to evade page limitations).

Given these concerns, a movant should be required to demonstrate good cause to gain permission to file an amicus brief. See *Ryan v. Commodity Futures Trading Comm’n*, 125 F.3d 1062, 1064 (7th Cir. 1997). As explained in *Ryan*, “[i]n an era of heavy judicial caseloads and public impatience with the delays and expense of litigation, we judges should be assiduous to bar the gates to amicus curiae briefs that fail to present convincing reasons why the parties’ briefs do not give us all the help we need for deciding the appeal.” *Id.*

Although this Court has not yet provided specific guidance, the Seventh Circuit's decision in *Voices for Choices* explains reasonable standards for evaluating a motion for leave to file an amicus brief. *Voices for Choices* involved an appeal by a group of telephone companies challenging a district court's finding that the Federal Telecommunications Act preempted a state rate-setting statute. *Voices for Choices*, 339 F.3d at 543. In addition to the brief of the telephone company parties, two motions to submit an amicus brief were filed with the court. *Id.* The Illinois Legislature authored one brief, claiming that the Act preserved the legislature's authority to set rates. *Id.* at 544. The other brief, presented by a union whose members were parties to the case, also argued that the legislature could set rates without violating the Act. *Id.*

Acknowledging the legislature's and union's interest in the outcome of the case, the Seventh Circuit nevertheless refused to allow their proposed amicus briefs. The court did not want the appeal to resemble a "congressional hearing," emphasizing that "the voting or campaign-financing power of constituents and interest groups" is irrelevant to the judicial process. *Id.* at 544-45. In reaching this conclusion, the Seventh Circuit identified several criteria to consider when determining whether to permit an amicus brief: whether (1) one party is inadequately represented; (2) the amicus has a "direct interest in another case that may be materially affected by a decision in this case"; and (3) the amicus offers a "unique

perspective or specific information that can assist the court beyond what the parties can provide.” *Id.* at 545. None of the Seventh Circuit’s criteria was satisfied, and so the legislature’s and union’s motions for leave to file an amicus brief were denied. *Id.* at 546.

The Insurers Association’s proposed amicus brief suffers from defects worse than those plaguing the briefs in *Voices for Choices*. Appellees are powerful insurance and banking institutions with substantial resources to argue this appeal. In fact, Appellee ASIC controls *at least* two-thirds of the force-placed insurance market, *see* Insurers Ass’n Br. at 9, and now may control nearly the entirety of that market. The Appellees have also hired experienced counsel who are familiar with force-placed insurance litigation. Any suggestion that Appellees are inadequately represented obviously would be meritless.

Nor does the Insurers Association have a direct interest in another case that will be materially affected by the outcome of this case. Although the Insurers Association has indicated, without providing specifics, that some of its members are in similar litigation,¹ *see* Insurers Ass’n Mot. Leave ¶ 4, the Insurers Association itself is unaffected by this Court’s decision. At the same time, the Insurers Association’s interest, if any, is already represented here because its member,

¹ By letter, Appellants asked counsel for the Insurers Association to identify specifically any members who have an interest in the outcome of this litigation, but that request was refused.

Appellee ASIC, is a party to the case has a majority share of the applicable market.

The Insurers Association also fails to provide information that will assist the Court, while unfairly injecting evidence that can never be met in this procedural posture. A substantial amount of additional information the Insurers Association provides comes from hearsay testimony from Appellee ASIC's leadership. For example, the Insurer's Association Brief liberally discussed the testimony of John Frobose. *See* Insurers Ass'n Br. at 4 & n.1, 6, 7, 8, 9 & n.5, 13, 15, 16, and 18. The Insurers Association never fully identifies Mr. Frobose, but in fact he is the president of Appellee ASIC, in charge of its force-placed insurance business, and has testified as ASIC's representative in at least five different force-placed insurance class actions. *See* Comp. Ex. B (Frobose dep. excerpts from *Wilson v. Everbank, N.A.*, Case No. 14-cv-2264-Bloom/Valle (S.D. Fla. 2014) (Jan. 22, 2015 Tr. at 6 ("I'm the president of American Security Insurance Company.")); *Alexander v. Select Portfolio Servicing, Inc.*, Case No. 1:14-cv-22586-FAM (S.D. Fla. 2014); *Montoya v. PNC Bank, N.A.*, Case No. 14-cv-20474-Martinez/Goodman (S.D. Fla. 2014); *Jackson v. U.S. Bank, N.A.*, Case No. 1:14-cv-21252-FAM (S.D. Fla. 2014); and *Kunzelman v. Wells Fargo Bank, N.A.*, Case No. 11-cv-81373 (S.D. Fla. 2011)).

The Insurers Association also provides hearsay testimony from Sherri L. Scott, also never explaining who she is. *See* Insurers Ass'n Br. at 5 & n.4, 6, 8, 15, and 22. Ms. Scott, however, served as a litigation expert on behalf of ASIC or ASIC-

related entities in at least seven different forced-placed insurance cases. *See* Ex. C (excerpt from May 25, 2016 Scott dep. at 40 & Ex. 1, Ex. 1 at 3 from *Beber v. BB&T Co.*, Case No. 1:15-cv-23294-KMW (S.D. Fla. 2015) (listing expert witness declarations supplied in *Ellsworth v. U.S. Bank N.A.*, No. CV12-2506-LB (N.D. Cal.), *Fladell v. Wells Fargo Bank, N.A.*, No. 13-cv-60721-FAM (S.D. Fla.), *Simpkins v. Wells Fargo Bank N.A.*, No. 3:12-cv-00768-DRF-PMF (S.D. Ill.), *Gallo v. PHH Mortgage Corp.*, No. 1:12-cv-01117 (D.N.J.), *Montoya v. PNC Bank & American Sec. Ins. Co.*, No. 14-cv-20474-Goodman (consent case) [(S.D. Fla.)], *Cicero-Loudon & Cicero Green Tree Servicing, LLC, Green Tree Ins. Agency, Inc. and American Reliable Ins. Co.*, No. 14-cv-21384-MORENO (S.D. Fla.), and *Valdez v. Saxon Mortgage Servs., Inc. and American Sec. Ins. Co.*, No. 2:14-cv-0395-CAS-(MANx) (C.D. Cal.)).

The Insurers Association's masked use of testimony from Appellee ASIC's president and hired litigation expert is the type of "interest group politics" *Voices for Choices* warned against, but worse: the Insurers Association has injected biased, hearsay testimony into the Court's consideration of a dismissal at the pleadings stage, and cloaked that testimony of indisputable "legislative" background.

The Insurers Association offers no authority allowing it to provide such hearsay testimony in the context of an appeal of a Rule 12(b)(6) dismissal. Courts ordinarily "do not consider anything beyond the face of the complaint and

documents attached thereto when analyzing a motion to dismiss.” *Financial Sec. Assur. Inc. v. Stephens, Inc.*, 500 F.3d 1276, 1284 (11th Cir. 2007). It is true that the Court recognizes an exception “in cases in which a plaintiff refers to a document in its complaint, the document is central to its claim, its contents are not in dispute, and the defendant attaches the document to its motion to dismiss.” *Id.* That exception obviously does not permit the introduction of the testimony the Insurers Association relies upon, as the complaint never references such testimony. Indeed, the Insurers Association has not even attempted to argue that the exception applies. Certainly purported “amicus” status does not bestow an exception to the Federal Rules of Civil Procedure.

The Insurers Association’s Brief also circumvents the district court’s exclusion of evidence about filed rates. Below, the Appellants contended that the Appellees’ FPI evidence should not be considered on a motion to dismiss, but if it were, the district court should also consider a declaration of their expert, Birny Birnbaum. *See* D.E. 33 at 1 ¶ 2 (attached as Ex. D). Mr. Birnbaum disputed many of the basic contentions of Appellees and of the Insurers Association. *See id.* Ex. A. The district court, however, excluded declarations from both Appellants and Appellees, and considered only Appellee ASIC’s exhibits documenting the Florida Office of Insurance Regulation’s approval of ASIC’s rates. *See* D.E. 33 (Ex. A) at 4. The Insurers Association should not be permitted to supply evidence now, when

the Appellants had no ability to meet that evidence below.

The Insurers Association wants to litigate this case anew in this Court, while far exceeding what the district court could allow below. It is attempting to inject partisan hearsay as indisputable fact, leaving the Appellants no opportunity to challenge or meet that evidence. The Court should reject that attempt.

CONCLUSION

Appellee ASIC dominates the force-placed insurance market, has litigated this disputes many times, and has fully briefed the issues. The Insurers Association's proposed amicus brief on behalf of its member, ASIC – and relying on hearsay testimony from ASIC's president and hired expert – is an improper supplement to ASIC's brief used not merely to circumvent the court-imposed page limitations, but also to violate basic requirements of civil procedure and due process. This does not warrant the judicial grace of allowing amicus briefing. Accordingly, Appellants

respectfully request that the Court deny the Insurers Association's motion for leave to file an amicus brief.

Respectfully submitted,

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Counsel for Plaintiffs-Appellants Pankaj Patel and Laketha Wilson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 30, 2016 the foregoing document was filed with the Clerk of the Court using CM/ECF, and as a result electronic notice of the filing will be served upon all counsel of record.

s/ Thomas A. Tucker Ronzetti

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15-62600-CIV-COHN/SELTZER

PANKAJ PATEL and LAKETHA
WILSON, on behalf of themselves
and all others similarly situated,

Plaintiffs,

v.

SPECIALIZED LOAN SERVICING
LLC, and AMERICAN SECURITY
INSURANCE COMPANY,

Defendants.

ORDER GRANTING MOTIONS TO DISMISS

THIS CAUSE is before the Court upon Defendant American Security Insurance Company's Motion to Dismiss [DE 22] and Defendant Specialized Loan Servicing LLC's Motion to Dismiss Complaint [DE 24] (collectively, "Motions"). The Court has reviewed the Motions, Plaintiffs' Responses [DE 26 & 27], Defendants' Replies [DE 28 & 29], and the record in this case, and is otherwise advised in the premises. For the reasons discussed below, the Court will grant the Motions.

I. BACKGROUND

Plaintiffs Pankaj Patel and Laketha Wilson, on behalf of themselves and all others similarly situated, commenced this action on December 10, 2015, against Defendants Specialized Loan Servicing, LLC ("SLS") and American Security Insurance

Company ("ASIC").¹ See DE 1. SLS is a mortgage servicer and collections entity. Id. ¶ 18. The standard form mortgage agreements owned or serviced by SLS include a provision requiring the borrower to maintain hazard insurance, wind insurance, and in some instances, flood insurance. Id. ¶ 25. If the borrower allows the insurance coverage to lapse, the standard mortgage terms permit the lender to "force place" insurance to protect its interest in the property and charge the premiums to the borrower, rather than declare the borrower in default. Id. ¶¶ 25, 49, 62.

Although it was not disclosed in the mortgage agreements, SLS had an exclusive arrangement with ASIC and its affiliates to provide the forced placed insurance ("FPI") and mortgage servicing functions. Id. ¶¶ 26–28. The gravamen of Plaintiffs' Complaint is that SLS, in collaboration with ASIC, charged borrowers inflated or excess FPI premiums. Specifically, Plaintiffs claim that SLS received "kickbacks" in the form of unearned commissions and expense reimbursements, "illusory reinsurance," and discounted mortgage servicing functions. Id. ¶ 5. SLS did not pass these savings on to the borrowers, and therefore, Plaintiffs claim that they were improperly charged more than SLS actually paid to secure the lenders' interest in the property.

The Complaint asserts nine counts: Count I: Breach of Contract (against SLS); Count II: Breach of Implied Covenant of Good Faith and Fair Dealing (against SLS); Count III: Unjust Enrichment (against SLS); Count IV: Unjust Enrichment (against ASIC); Count V: Tortious Interference with a Contract or Advantageous Business Relationship (against ASIC); Count VI: Violations of the Federal Truth in Lending Act ("TILA"), 15 U.S.C. § 1601, et seq. (against SLS); Count VII: Violations of the Racketeer

¹ "[A] judge ruling on a defendant's motion to dismiss a complaint 'must accept as true all of the factual allegations contained in the complaint.'" Bell Atl. Corp. v. Twombly, 550 U.S. 544, 572 (2007) (citations omitted).

Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c) (against all Defendants); Count VIII: Violations of RICO, 18 U.S.C. § 1962(d) (against all Defendants); and Count IX: Violations of the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA") (against SLS).

Defendants argue in the instant Motions that the filed-rate doctrine precludes Plaintiffs' claims because it is undisputed that all of the rates billed to borrowers were approved by Florida's Office of Insurance Regulation ("OIR"). Alternatively, Defendants contend that each of Plaintiffs' claims should be dismissed for failure to state a claim upon which relief may be granted.

II. PRELIMINARY ISSUES

As an initial matter, the Court must consider whether the filed-rate doctrine is a challenge to the Court's subject matter jurisdiction or a defense on the merits. The Court recognizes that disagreement on this issue exists among federal courts, even those within this Circuit. However, the Court agrees with the weight of recent authority that a filed-rate argument should be treated as a defense on the merits, rather than an issue of standing. See, e.g., Lyons v. Litton Loan Servicing LP, No. 113CV513ALCGWG, 2016 WL 415165, at *5 (S.D.N.Y. Feb. 2, 2016) ("[T]his Court will analyze [Defendant's] filed rate doctrine claims under Rule 12(b)(6)"); Wilson v. EverBank, N.A., 77 F. Supp. 3d 1202, 1233 n.6 (S.D. Fla. 2015) (analyzing filed-rate arguments under Rule 12(b)(6)); Hoover v. HSBC Mortg. Corp. (USA), 9 F. Supp. 3d 223, 237 (N.D.N.Y. 2014) ("[F]iled rate argument is a defense on the merits, rather than a challenge to subject matter jurisdiction."); Perryman v. Litton Loan Servicing, LP, No. 14-cv-02261, 2014 WL 4954674, at *6 (N.D. Cal. Oct. 1, 2014) (noting, without ruling on

the issue, that the weight of recent authority considers the filed-rate doctrine a defense on the merits, not a jurisdictional challenge); Curtis v. Cenlar FSB, No. 13 Civ. 3007, 2013 WL 5995582, at *2 (S.D.N.Y. Nov. 12, 2013) (finding filed-rate doctrine a merits issue because “defendants are not contending that [the plaintiff] is the wrong individual to bring these legal claims; they are arguing that the claims are simply not legally cognizable”); Roberts v. Wells Fargo Bank, No. 4:12-CV-200, 2013 WL 1233268, at *9 (S.D. Ga. Mar. 27, 2013) (“[T]he Court finds it prudent to address the filed rate doctrine in the context of a 12(b)(6) motion”); but see Morales v. Attorneys’ Title Ins. Fund, Inc., 983 F. Supp. 1418, 1429 (S.D. Fla. 1997) (“At the core of the filed rate doctrine is the issue of standing.”). Accordingly, the Court will evaluate Defendants’ filed-rate arguments under Federal Rule of Civil Procedure Rule 12(b)(6).

Because the Court does not construe the filed-rate doctrine as a challenge to its subject matter jurisdiction, it will not consider the declarations and supporting evidence attached to ASIC’s Motion for the purpose of a Rule 12(b)(1) analysis. Nor will the Court consider the declaration that Plaintiffs submitted in response to ASIC’s supporting declarations for that purpose. See DE 33.

However, “[a] district court may take judicial notice of facts capable of accurate and ready determination by using sources whose accuracy cannot reasonably be questioned, including public records.” Chinn v. PNC Bank, N.A., 451 Fed. App’x. 859, 860 n.1 (11th Cir. 2012). The Court therefore takes judicial notice of ASIC’s exhibits documenting OIR’s approval of ASIC’s premium rates in Florida, as these documents are a matter of public record. See DE 22-7, DE 22-13, and DE 22-15 through DE 22-

18; see also Trevathan v. Select Portfolio Servicing, Inc., No. 15-61175-CIV, 2015 WL 6913144, at *2 (S.D. Fla. Nov. 6, 2015) (taking judicial notice of similar exhibits).

III. LEGAL STANDARD

A defendant may move to dismiss a complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) if the plaintiff has failed to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). “When considering a motion to dismiss, all facts set forth in the plaintiff’s complaint ‘are to be accepted as true and the court limits its consideration to the pleadings and exhibits attached thereto.’” Grossman v. Nationsbank, N.A., 225 F.3d 1228, 1231 (11th Cir. 2000) (quoting GSW, Inc. v. Long Cty., 999 F.2d 1508, 1510 (11th Cir. 1993)). All “reasonable inferences” are drawn in favor of the plaintiff. St. George v. Pinellas Cty., 285 F.3d 1334, 1337 (11th Cir. 2002).

To survive a Rule 12(b)(6) motion to dismiss, the complaint “does not need detailed factual allegations”; however, the “plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” Twombly, 550 U.S. at 555 (2007) (internal citations omitted). “Factual allegations must be enough to raise a right to relief above the speculative level” Id. The plaintiff must plead enough facts to “state a claim that is plausible on its face.” Id. at 570.

IV. DISCUSSION

“The filed rate doctrine (also known as the ‘filed tariff doctrine’) ‘forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority.’” Hill v. BellSouth Telecommc’ns, Inc., 364 F.3d 1308, 1315 (11th Cir. 2004) (quoting Ark. La. Gas Co. v. Hall, 453 U.S. 571, 577

(1981)). “Therefore, causes of action in which the plaintiff attempts to challenge the terms of a filed tariff are barred by the filed rate doctrine.” Id. Moreover, “even if a claim does not directly attack the filed rate, an award of damages to the customer that would, in effect, result in a judicial determination of the reasonableness of that rate is prohibited under the filed rate doctrine.” Id. at 1317.

The doctrine is grounded in two rationales: nonjusticiability and nondiscrimination. Id. at 1316. The nonjusticiability principle maintains that courts should not undermine the rate-making authority of an agency by upsetting the rates that it has approved. Rothstein v. Balboa Ins. Co., 794 F.3d 256, 261 (2d Cir. 2015) (citations omitted). The nondiscrimination principle holds that “litigation should not become a means for certain ratepayers to obtain preferential rates.” Id. The fact that plaintiffs bring an action on behalf of a putative class does not alleviate nondiscrimination concerns. Trevathan, 2015 WL 6913144, at *3 n.4 (citing Rothstein, 794 F.3d at 263). If a ratepayer’s claim against a rate filer would offend either the nonjusticiability or nondiscrimination principles, the claim is barred. Rothstein, 794 F.3d at 262.

The Court acknowledges that there is conflict of authority as to whether the filed-rate doctrine bars borrowers’ challenges to excess or inflated premiums where lenders or mortgage servicers forced placed insurance and passed the costs on to the borrowers. The Eleventh Circuit has not addressed this specific issue. However, the Second Circuit recently held in Rothstein, that the filed-rate doctrine precludes such claims, at least when asserted against the insurer. 794 F.3d at 262. In Rothstein, the plaintiffs alleged that “they were fraudulently overbilled because the rates they were

charged” by their mortgage servicer as reimbursement for FPI “did not reflect secret rebates and kickbacks that [the servicer] received from [the insurance company] through [the company’s] affiliate.” Id. at 259. The Second Circuit concluded that the claims implicated both the nonjusticiability and nondiscrimination principles, mandating their dismissal. Id. at 263, 266. As to nonjusticiability, the plaintiffs’ claims of overbilling effectively asked the Court to determine the reasonableness of the rates approved by state regulators. The Court explained that “whether insurer-provided services should have been reflected in the calculation of [FPI] is not for us to say; under the nonjusticiability principle, the question is reserved exclusively to the regulators.” Id. (citing Ark. La. Gas Co., 453 U.S. at 578–79). The claims also offended the nondiscrimination principle because any damages recovered by the plaintiffs “would operate like a rebate to give them a preference over other borrowers who were charged for [FPI].” Id. (quotation marks & alterations omitted).

In Trevathan, Judge Dimitrouleas of this District adopted the reasoning of Rothstein and extended the filed-rate doctrine to claims against lenders or servicers for excess FPI premiums. 2015 WL 6913144, at *3 (S.D. Fla. Nov. 6, 2015). Other courts in the Second Circuit have done the same. See, e.g., Clarizia v. Ocwen Fin. Corp., No. 113CV2907ALCHBP, 2016 WL 439018, at *3 (S.D.N.Y. Feb. 2, 2016) (“[T]he rationale of Rothstein makes clear that the filed rate doctrine bars Plaintiffs’ claims against Loan Servicing Defendants”); Lyons, 2016 WL 415165, at *10 (“[T]he logic of [Rothstein] applies to the claims against Loan Servicing Defendants as well.”).

Plaintiffs urge the Court to reject Rothstein and adopt the reasoning of the Third Circuit’s decision in Alston v. Countrywide Fin. Corp., 585 F.3d 753 (3d Cir. 2009).

Alston held that, for claims under section 8 of the Real Estate Settlement Procedures Act (“RESPA”), it “is absolutely clear that the filed rate doctrine simply does not apply [where the plaintiffs] challenge [the mortgage servicer’s] allegedly wrongful conduct, not the reasonableness or propriety of the rate that triggered that conduct.” 585 F.3d at 765. District courts within the Third Circuit have extended the logic of Alston to hold that the filed-rate doctrine does not bar claims for kickbacks in FPI and other mortgage contexts. See, e.g., Burroughs v. PHH Mortg. Corp., No. 15-6122 (NLH/KMW), 2016 WL 1389934, at *4 (D.N.J. Apr. 8, 2016) (holding that filed-rate doctrine did not preclude claims for FPI kickbacks); Weiss v. Bank of Am. Corp., No. 15-62, 2015 WL 9304506, at *10 (W.D. Pa. Dec. 22, 2015) (holding that filed-rate doctrine did not preclude claims for “conspiracy to defraud home mortgage borrowers into funding sham captive reinsurance arrangements through illegal kickbacks”).

The Court declines Plaintiffs’ invitation to follow the Alston line of cases. Alston involved claims under the anti-kickback provisions of RESPA, which created a unique statutory cause of action for persons challenging “any charge” for an “infected” service. Id. at 762–63. Plaintiffs do not bring their inflated-premium claims under any such unique statutory right.

Like Judge Dimitrouleas, the Court instead adopts the rationale of Rothstein and holds that the filed-rate doctrine bars Plaintiffs’ claims arising from FPI excess premiums because the rates charged were approved by OIR. The reasonableness of the commissions, reimbursements, reinsurance costs, and services calculated into those rates is a question reserved for the regulators. And Plaintiffs do not allege fraud in the regulatory process. All of Plaintiffs’ claims would require the Court to render an

opinion as to the reasonableness of the costs and services bundled into the premiums approved by OIR, which would offend the principle of nonjusticiability. Similarly, a damages award for Plaintiffs would effectively give them a preferential rate over those who paid for FPI from SLS and ASIC but did not participate in the lawsuit, thereby offending the principle of nondiscrimination.

Plaintiffs' arguments challenging the applicability of the filed-rate doctrine are unavailing under the Rothstein framework. First, Plaintiffs maintain that they are challenging SLS and ASIC's conduct in allowing kickbacks, not the rates themselves. But such a distinction "flies in the face of the Rothstein decision, which held that '[a] claim may be barred under the filed rate doctrine even if it can be characterized as challenging something other than the rate itself.'" Lyons, 2016 WL 415165, at *12 (citing Rothstein, 794 F.3d at 262). Second, Rothstein and Trevathan squarely rejected Plaintiffs' argument that they do not challenge the insurance transaction between the insurer and lender/servicer ("A-to-B" transaction), but rather the separate transaction between the lender/servicer and the borrower ("B-to-C" transaction). See Rothstein, 794 F. 3d at 265; Trevathan, 2015 WL 6913144, at *3. As the Second Circuit explained, the FPI "travels invariably 'A-to-B-to-C,'" so the filed-rate doctrine applies even when an intermediary, such as a loan servicer, passes along the filed rate. Rothstein, 794 F. 3d at 265; see Trevathan, 2015 WL 6913144, at *3. Plaintiffs' attempts to discredit the Rothstein Court's understanding of the nature of this relationship are unavailing. Third, Plaintiffs' attempt to distinguish between claims involving "commercial" lines of insurance and "personal" lines is also unpersuasive. See Lyons, 2016 WL 413104, at *13. As the Court in Lyons aptly explained, the nonjusticiability principle is implicated

regardless of whether a commercial or personal line of insurance is involved because, in either scenario, the Court “cannot examine the amount charged for reimbursement to Plaintiffs without considering the reasonableness of the filed.” Id. Finally, the types of kickbacks in this action are not unique and do not affect the applicability of the filed-rate doctrine. Although the form of kickbacks in Rothstein was free tracking services, courts have found the filed-rate doctrine equally applicable where the alleged kickbacks were in the form of reinsurance coverage, rebates, commissions, free services, and expense reimbursements included in the filed rate. See id. at *11; Clarizia, 2016 WL 439018, at *2–3; Trevathan, 2015 WL 6913144, at *3.

Because all of Plaintiffs’ claims are premised on the allegation that SLS, in collaboration with ASIC, charged borrowers inflated premiums as a result of kickbacks, all counts of the Complaint are barred by the filed-rate doctrine. Accordingly, the Court need not address Defendants’ other arguments regarding the sufficiency of Plaintiffs’ claims, and the Complaint shall be dismissed with prejudice.

V. CONCLUSION

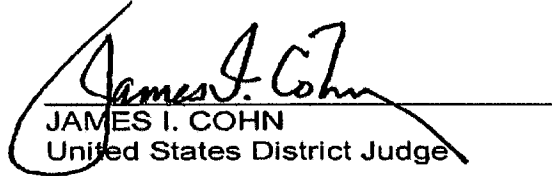
For the reasons set forth herein, it is hereby

ORDERED AND ADJUDGED that as follows:

1. Defendant American Security Insurance Company’s Motion to Dismiss [DE 22] and Defendant Specialized Loan Servicing LLC’s Motion to Dismiss Complaint [DE 24] are **GRANTED**.
2. Plaintiffs’ Complaint [DE 1] is **DISMISSED with prejudice**.
3. The Clerk of Court is directed to **CLOSE** this case and **DENY as moot** any pending motions.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County,

Florida, on this 25th day of April, 2016.



JAMES I. COHN
United States District Judge

Copies provided to:
Counsel of record via CM/ECF

EXHIBIT B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

DWIGHT WILSON, JESUS A.
AVELAR-LEMUS, JESSIE CROSS,
ON BEHALF OF THEMSELVES
AND ALL OTHERS SIMILARLY
SITUATED,

Plaintiffs, CIVIL ACTION FILE
Vs. NO: 14-CIV-2264-BLOOM/VALLE

EVERBANK, N.A.; EVERHOME
MORTGAGE; ASSURANT, INC.;
STANDARD GUARANTY INSURANCE
COMPANY; AND AMERICAN
SECURITY INSURANCE COMPANY,

Defendants.

30(B)(6) DEPOSITION OF
JOHN FROBOSE
January 22, 2015
10:00 a.m.

260 Interstate North Circle, SE
Atlanta, Georgia 30339

Pam Hope, RPR-B-1988

1 30(b)(6) Deposition of John Frobose

2 January 22, 2015

3
4 (Reporter disclosure made pursuant to
5 Article 8.B of the Rules and Regulations
6 of the Board of Court Reporting of the
7 Judicial Council of Georgia.)

8
9 JOHN FROBOSE,

10 having been first duly sworn, was deposed and testified as
11 follows:

12 CROSS-EXAMINATION

13 BY MR. BUSHMAN:

14 Q Good morning, Mr. Frobose.

15 A Good morning.

16 Q My name is Howard Bushman, and I represent the
17 plaintiffs in this matter.

18 Can you please state your name for the record.

19 A John Frobose.

20 Q Mr. Frobose, you have been designated by American
21 Security Insurance Company and Standard Guaranty
22 Insurance Company under Federal Rules of Procedure
23 30(b)(6) to testify on one topic that was noticed for
24 today.

25 Are you aware of that?

1 Is there any reason that you cannot answer my
2 questions truthfully today?

3 A No.

4 Q You're not on any medications or drugs that would
5 prevent you from answering my questions truthfully,
6 are you?

7 A I don't believe so.

8 Q What is your current position at Assurant?

9 A I am president of the lending solutions business
10 unit at Assurant.

11 Q And do you have a position with American Security
12 Insurance Company?

13 A I do.

14 Q What is your position with them?

15 A I'm the president of American Security Insurance
16 Company.

17 Q Do you have a position with Standard Guaranty --

18 A Yes.

19 Q -- Insurance Company?

20 A Yes.

21 Q What is your position with Standard Guaranty?

22 A The same.

23 Q President?

24 A Yes.

25 Q What about American -- I'm sorry. Strike that.

1 IN THE UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF FLORIDA

3 CASE NO: 1:14-CV-22586-FAM
4

5 JUAN ALEXANDER, and JOCELYN
6 EVANS on behalf of themselves
7 and all other similarly situated,
8 Plaintiffs,

9 vs.

10 SELECT PORTFOLIO SERVICING, INC.,
11 STANDARD GUARANTY INSURANCE COMPANY,
12 and AMERICAN SECURITY INSURANCE
13 COMPANY,

14 Defendants.
15

16 Telephonic Deposition of John Frobose
17 taken on behalf of the Plaintiffs pursuant to
18 the stipulations agreed to herein, before
19 Cindy C. Jenkins, Certified Court Reporter
20 Notary Public, at 260 Interstate North Circle,
21 Southeast, Atlanta, Georgia, on the 22nd day
22 of April, 2015, commencing at 9:38 a.m.

23 (Signature Reserved.)
24
25

1 Assurant?

2 A. No.

3 Q. Did you talk to anyone at SPS?

4 A. No.

5 Q. Did you ask for any documents that
6 weren't provided by counsel?

7 A. No.

8 Q. Okay. And I'll go over your
9 personal background a little bit. What is
10 your position at Assurant?

11 A. I'm the president of the lending
12 solutions business unit.

13 Q. And as the president of lending
14 solutions, what would be your job
15 responsibilities related to lender-placed
16 insurance -- LPI, I'm going to say throughout.

17 A. I'm responsible for all things
18 specific to lender-placed insurance for LPI.

19 Q. And how many people do you have
20 that are direct reports to you?

21 A. Boy, I don't know the exact
22 number of direct reports. Seven or eight.

23 Q. And that would be related to LPI,
24 seven or eight?

25 A. LPI and some other related

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 14-20474-CIV-MARTINEZ-GOODMAN

ENRIQUE MONTOYA, and)
NEYSER COLONIA on behalf)
of themselves and all)
others similarly situated,)

Plaintiffs,)

vs.)

PNC BANK, N.A.; PNC MORTGAGE;)
ASSURANT, INC.; and AMERICAN)
SECURITY INSURANCE COMPANY,)

Defendants.)

* * *

Telephonic deposition of JOHN FROBOSE, taken on
behalf of the Plaintiffs, Pursuant to the Federal Rules
of Civil Procedure, before Debbie C. Hennings, Registered
Professional Reporter, at 260 Interstate North Circle,
SE, Atlanta, Georgia, on the 16th day of July 2014,
commencing at the hour of 9:15 a.m.

* * *

1 A. I was promoted at one point in time to the vice
2 president of hazard and flood product management. I later
3 acquired all the account executive roles, sale and marketing,
4 the business, essentially -- eventually operations, all the
5 individual pieces of the Lending Solutions, if you will,
6 corporate puzzle to, you know, that would produce -- created
7 the entire business model specifically.

8 Q. When you say that you acquired it, did you mean you
9 held them one by one or at some point they all kind of --

10 A. The second, one by one ultimately I earned
11 responsibility for each of them.

12 Q. And you said -- you mentioned that you ended up in
13 the Lending Solutions; what did you mean by that?

14 A. Lending Solutions is a kind of generic trade name
15 for a compilation of individual business models that we run
16 specifically under the heading of Assurant Specialty
17 Property, which is itself a name for a business set or
18 organization.

19 Q. So are Lending Solutions and Assurant Specialty
20 Property the same thing?

21 A. Yes.

22 Q. Okay. What is your current position?

23 A. President of the Lending Solutions division of
24 Assurant Specialty Property.

25 Q. And as far as -- who are you actually an employee

1 of?

2 A. I'm an employee of American Security Insurance
3 Company.

4 Q. Okay. So in your current position, you're president
5 of Lending Solutions division; can you describe for me your
6 responsibilities?

7 A. Yeah, my responsibilities would be overall
8 management of the lender-placed businesses and associated
9 pieces of the model that support the lender-placed
10 businesses.

11 Q. What does that mean, associated pieces of the model?

12 A. The operations piece, the claims piece, the -- all
13 the touch points specific to that business model.

14 Q. So when you say the business model, so you're saying
15 the management of the LTI business, meaning the companies
16 under that umbrella of Assurant Specialty Property, is that
17 what you're saying, I mean, ASIC and Standard Guaranty, that
18 type of thing?

19 A. That's a fair assessment, yes.

20 Q. And when you say the associated pieces of the model,
21 are those different companies or different duties or
22 divisions that are handled?

23 A. Well, you named the primary companies. You have
24 working divisions, you know, the operations and claims and
25 sales and marketing and the things that would roll up to

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MARK KUNZELMANN; on behalf of
himself and all others similarly
situated,

Plaintiff,

vs.

Case No. 11-CV-81373

WELLS FARGO BANK, N.A.; WELLS
FARGO INSURANCE, INC.,

Defendants.

CONFIDENTIAL VIDEOTAPED DEPOSITION OF

JOHN A. FROBOSE, IV

September 11, 2012

8:35 a.m.

Suite 3000, One Atlantic Center
1201 West Peachtree Street
Atlanta, Georgia

J. David Brown, RPR, B-1401

14

1 person. There's three or four people during that
2 period of time.

3 Q. But who's the other people?

4 A. Craig Carson and I think Ben -- my current
5 boss, Gene Mergelmeyer.

6 Q. Now, during this time, 1997, 2005, who
7 were you employed by?

8 A. American -- well, actually I was part of
9 American Security Group which moved -- became
10 different things due to acquisition. Ultimately I
11 was an employee of American Security Insurance
12 Company. I still am today.

13 Q. And you get paid by American Security
14 Insurance Company?

15 A. Correct.

16 Q. Was Pat Dennis an employee of Assurant,
17 Inc. at the time?

18 A. No.

19 Q. Who was he employed by?

20 A. American Security Insurance Company.

21 Q. Same with Craig Carson?

22 A. Correct.

23 Q. And same with Gene Mergelmeyer?

24 A. Correct.

25 Q. What happened in 2005 or '7? That's when

15

1 you got promoted to senior vice president?

2 A. Uh-huh.

3 Q. Is it 2005 or 2007?

4 A. Again, memory is not perfect here. Let's
5 say 2005.

6 Q. And how did your job change?

7 A. Very little. It is just a title change.

8 Q. And then did anything change from 2005,
9 2007 until today?

10 A. Yeah. Eventually I became president of
11 the Lending Solutions business group.

12 Q. When did that happen?

13 A. That was probably 2007, 2008. I couldn't
14 tell you exactly.

15 Q. How did your job responsibilities change?

16 A. At that point in time I was given
17 responsibility for operations, claims, those parts
18 of the business that didn't report to me at that
19 point in time.

20 Q. I'm sorry?

21 A. The parts of the business that did not
22 report to me. The operations part, the claims part
23 reported directly to Gene Mergelmeyer at the time.
24 Then it all became my responsibility.

25 Q. Oh, so in 2005 --

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

PHILIP JACKSON and
STEPHEN LARGESS on behalf
of themselves and all others similarly situated,

Plaintiffs,

vs. CASE NO.: 1:14-cv-21252-FAM

U.S. BANK N.A., and
AMERICAN SECURITY INSURANCE
COMPANY,

Defendants.

DEPOSITION OF: JOHN FROBOSE
30(b)(6) Assurant

DATE: August 10, 2015

TIME: 10:02 a.m.

LOCATION: 260 Interstate North Circle, SE
Atlanta, GA

TAKEN BY: Counsel for the Plaintiff

REPORTED BY: SHARON G. HARDOON, CSR
Court Reporter, Notary Public

1 Notice as Exhibit 1.

2 (PLF. EXH. 1, Notice of Deposition, was
3 marked for identification.)

4 BY MR. NEARY:

5 Q. Do you have Exhibit 1 in front of you?

6 A. I do.

7 Q. Okay. So you understand that you're being
8 put up for the corporate representative for American
9 Security?

10 A. Yes.

11 Q. And you're prepared to testify regarding the
12 topic you've been designated for?

13 A. Yes.

14 Q. As we've done in the past, I'll probably be
15 referring to Assurant today to kind of generally refer
16 American Securities, Standard Guaranty, Voyager, and
17 the underwriting companies there. If I want to ask
18 you a question about to the parent company, I'll say
19 Assured Incorporated or Assured, Inc. And if it's a
20 specific underwriter that one of us needs to refer to,
21 you know, please let me know. I may use the term ASIC
22 or A-S-I-C for those companies. And I'll also be
23 referring to U.S. Bank today, which would generally
24 include their predecessor companies, which have been
25 in some of the documents before. Is that fair to

1 you?

2 A. That's fine.

3 Q. Did you do anything to prepare for today's
4 deposition?

5 A. Yeah, I had a meeting with counsel last
6 week.

7 Q. Did you talk to anyone else at Assurant?

8 A. No, I didn't.

9 Q. Did you talk with anyone at U.S. Bank?

10 A. No, I did not.

11 Q. Did you review any documents or anything that
12 wasn't provided to you by counsel?

13 A. No.

14 Q. Okay. And you know your topic today deals
15 with the request for proposal, correct?

16 A. Correct.

17 Q. And before we go any further, can you remind
18 me again what your position at Assurant is?

19 A. I'm the president of the lending solutions
20 business unit.

21 Q. And how long have you worked at Assurant?

22 A. Twenty-two years.

23 Q. And in general, as far as responding to
24 requests for proposal, is that one of the
25 responsibilities of your position?

EXHIBIT C

CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER

Page 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

BERNARD BEBER and DIANE)
BEBER on behalf of)
themselves and al others)
similarly situated,)

Plaintiffs,)

vs.) Case No. 1:15-cv-23294

) KMW

BRANCH BANKING & TRUST CO.,)
and AMERICAN SECURITY)
INSURANCE COMPANY,)

Defendants.)

VIDEOCONFERENCE DEPOSITION OF SHERI SCOTT
San Francisco, California
Wednesday, May 25, 2016
Volume I

CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER

Reported by:
JOANNA BROADWELL
CSR No. 10959
Job No. 2316858

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CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER

Page 40

1 A All right.

2 Q So have you provided expert testimony in any
3 other litigation besides these seven? And I also want
4 to caution you, I don't want to know about whether or
5 not you were, say, a consulting expert. I want to know
6 whether you provided a report or provided testimony live
7 or through deposition or provided a declaration,
8 something like that, or an affidavit, other than these
9 seven cases in any type of litigation?

10 A I have provided expert witness declarations in
11 the matters listed on Page 3 of my report.

12 Q What I'm trying to say is, anything else?

13 A Not expert witness declarations.

14 Q The reason I ask that is that I want -- these
15 were limited to -- these are seven force-placed
16 insurance cases. I'll represent that to you. And so I
17 wanted to make sure that you didn't limit your report to
18 only force-placed insurance declarations. I wanted to
19 know the total universe of times you provided expert
20 witness testimony. Do you understand that?

21 A I do. And if you're limiting it to private
22 complaints, like you said, then this is everything that
23 I can recall.

24 Q We'll get to regulatory later, but I just wanted
25 to confirm that this is the whole universe of private

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 1:15-cv-23294-KMW

BERNARD BEBER and
DIANE BEBER on behalf of
themselves and all others similarly situated,

Plaintiffs,

v.

BRANCH BANKING & TRUST CO. and
AMERICAN SECURITY INSURANCE COMPANY,

Defendants.

**DECLARATION OF SHERI L. SCOTT IN SUPPORT OF DEFENDANTS
AMERICAN SECURITY INSURANCE COMPANY AND BRANCH BANKING AND
TRUST COMPANY OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS
CERTIFICATION AND THE ALLEGATIONS AND CLAIMS ASSERTED IN THE
CLASS ACTION**

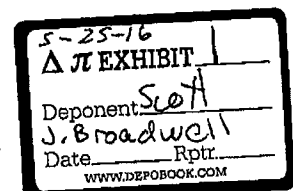
I, Sheri L. Scott, declare as follows:

QUALIFICATIONS AND BACKGROUND

1. My name is Sheri L. Scott. I am a principal and consulting actuary within the San Francisco office of Milliman, Inc., one of the world's largest independently owned consulting firms specializing in actuarial science and the management of risk.

2. I make this declaration pursuant to the provisions of 28 U.S.C. § 1746. I am over 21 years of age and competent to testify to the statements set forth herein.

3. The statements set forth in this declaration are based upon my personal knowledge, and upon facts or data that I have been made aware of or personally observed, including facts or data that other experts in the field of actuarial science would reasonably rely on in forming opinions on the subject of residential property insurance ("RPI") and lender placed insurance ("LPI").



- e. Other than presentations, I do not have any publications.
- f. I have provided expert witness declarations in the matters entitled:
 - I. *Stephen Ellsworth v. U.S. Bank N.A.*, No. CV12-2506-LB (N.D. Cal.),
 - II. *Fladell v. Wells Fargo Bank, N.A.*, No. 13-cv-60721-FAM (S.D. Fla),
 - III. *Simpkins v. Wells Fargo Bank, N.A.*, No. 3:12-cv-00768-DRH-PMF (S.D. Ill.),
 - IV. *Gallo v. PHH Mortgage Corp.*, No 1:12-cv-01117 (NJ), and
 - V. *Montoya v. PNC Bank and American Security Insurance Company*, No 1:14-cv-20474-GOODMAN (Consent Case).
 - VI. *Circeo-Loudon and Circeo v. Green Tree Servicing, LLC, Green Tree Insurance Agency, Inc., and American Reliable Insurance Company*, No. 14-cv-21384-MORENO (S.D. FLA.)
 - VII. *Valdez v. Saxon Mortgage Services, Inc. and American Security Insurance Company*, No. 2:14-cv-03595-CAS-(MANx) (C.D. Cal.)
- g. I have been deposed in *Gallo v. PHH Mortgage Corp. and Montoya v. PNC Bank*, listed above.
- h. Other than these matters, I have not previously provided expert reports or testimony. My 2016 billable rate is \$625 per hour payable to Milliman, Inc. for my actuarial consulting services, including expert witness support. My payment is not dependent on the outcome of this matter.

2. Assignment

- a. I have been retained by attorneys representing American Security Insurance Company (American Security) and Branch Banking & Trust Company (BB&T) to provide my professional opinions in the matter entitled *Bernard Beber and Diane Beber v. Branch Banking & Trust Co. and American Security Insurance Company*, No. 1:15-CV-23294-KMW, pending in the United States District Court for the Southern District of Florida. I offer these opinions in connection with the Opposition of American Security and BB&T to the Motion for Class Certification and the allegations and claims asserted in the Class Action Complaint (Complaint).
- b. I have been asked to address the following specific issues:
 - I. Whether there are differences in risk, ratemaking and other considerations between LPI and RPI (typically called homeowners insurance by RPI companies), focusing on the type of coverage provided to Mr. and Mrs. Beber.

EXHIBIT D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT FLORIDA

Case No. 0:15-cv-62600-JIC

PANKAJ PATEL and LAKETHA WILSON,
on behalf of themselves and
all others similarly situated,

Plaintiff,

v.

SPECIALIZED LOAN SERVICING LLC
and AMERICAN SECURITY
INSURANCE COMPANY,

Defendants.

**MOTION FOR LEAVE TO FILE DECLARATION
OF BIRNY BIRNBAUM IN RESPONSE TO ASIC'S MOTION TO DISMISS**

Plaintiffs move the Court for leave to file the Declaration of Birny Birnbaum in response to ASIC's motion to dismiss, and specifically in response to the declarations of Rebecca Voyles and Ronald Wilson, and state as follows:

1. Defendants filed motions to dismiss Plaintiffs' complaint on February 16, 2016. [ECF Nos. 22, 24.] ASIC moved to dismiss Plaintiffs' claims under the filed-rate doctrine, and submitted the declarations of Rebecca Voyles and Ronald Wilson in support of its argument. [ECF Nos. 22-1, 22-14.] ASIC contends that the Court may review the notices attached to both declarations because the filed rate doctrine presents an issue of standing, the rate filings (which are only one element of the declarations) are public record, and the declarations are central to the Complaint. [ECF No. 22 at 4 n.3.]

2. Plaintiffs maintain that the Court may not consider ASIC's declarations or their exhibits on a motion to dismiss. Neither Mr. Wilson's testimony nor Ms. Voyles' declaration and

its exhibits are incorporated into or central to its allegations, and the filed-rate doctrine is not an issue of standing to be considered under Rule 12(b)(1). *See, e.g., Wilson v. EverBank, N.A.*, 77 F. Supp. 3d 1202, 1234 n.6 (S.D. Fla. 2015) (“This Court agrees with several others that have recently addressed the issue in “determin[ing] that the filed rate argument is a defense on the merits, rather than a challenge to subject matter jurisdiction.”) (quoting *Hoover v. HSBC Mortg. (USA), N.A.*, 9 F. Supp. 3d 223 (N.D.N.Y. 2014); other citations omitted)); *Perryman v. Litton Loan Servicing, LP*, 2014 WL 4954674, at *6 (N.D. Cal. Oct. 1, 2014) (weight of recent authority considers doctrine defense on the merits, not jurisdictional challenge). Should the Court consider these declarations, however, Plaintiffs request that the Court also consider Birny Birnbaum’s countervailing declaration, which Plaintiffs attach as **Exhibit A**.

3. Plaintiffs’ counsel have conferred with opposing counsel in accordance with Local Rule 7.1(a)(3), and have been informed that Defendants oppose the relief sought herein.

CONCLUSION

WHEREFORE, for the foregoing reasons, Plaintiffs’ counsel respectfully requests that the Court enter an order granting Plaintiffs leave to file Mr. Birnbaum’s declaration.

Respectfully submitted this 18th day of April, 2016.

By: /s/ Rachel Sullivan

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<p>Lance A. Harke, Esq. Florida Bar No. 863599 lhharke@harkeclasby.com Sarah Engel, Esq. Florida Bar No. 991030 sengel@harkeclasby.com Howard M. Bushman, Esq. Florida Bar No. 0364230 hbushman@harkeclasby.com HARKE CLASBY & BUSHMAN LLP 9699 NE Second Avenue Miami Shores, Florida 33138 Telephone: (305) 536-8220 Facsimile: (305) 536-8229 <i>Counsel for Plaintiffs</i></p>	

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was filed electronically via CM/ECF on the 18th day of April, 2016 and served by the same means on all counsel of record.

/s/ Rachel Sullivan

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

Case No. 1:15-CV-23294-KMW

PANKAJ PATEL and LAKETHA WILSON
on behalf of themselves and all others similarly
situated,

Plaintiffs,

v.

SPECIALIZED LOAN SERVICING LLC and
AMERICAN SECURITY INSURANCE
COMPANY,

Defendants.

**DECLARATION OF BIRNY BIRNBAUM IN RESPONSE TO
DECLARATIONS OF RONALD WILSON AND REBECCA VOYLES**

March 25, 2016

1. I, Birny Birnbaum, hereby make this declaration pursuant to 28 U.S.C. § 1746.

2. I am a consulting economist and former insurance regulator specializing in insurance rates, regulation and policy, with expertise in credit-related auto and property insurance. I have significant experience with lender-placed or “force-placed” insurance (“LPI”) and, by serving as an expert in numerous class actions like this action against SLS and ASIC, I have become thoroughly familiar with the claims and defenses at issue in this case. I also have 25 years of experience with regulatory review of insurance rate filings. Exhibit A includes a more detailed description of my education and experience along with a copy of my CV.

3. The purpose of this declaration is to respond to the declarations submitted by Rebecca Voyles and Ronald Wilson in support of Defendants’ Motions to Dismiss.

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March 25, 2016

4. Defendants' Specialized Loan Servicing LLC ("SLS") and American Security Insurance Company ("ASIC") argue, in separate Motions to Dismiss, that the claims in this matter are barred by the filed-rate doctrine because the amounts SLS charged Class Members for LPI are insurance premiums based on rates filed and approved by state insurance regulators. I have reviewed Defendants' pleadings, including the declarations of Rebecca Voyles and Ron Wilson. My findings are summarized as follows:

a. Defendants' argument for the filed-rate doctrine is based on the assertion that the amounts SLS charged borrowers for LPI are insurance premiums subject to state insurance regulation. SLS and ASIC have provided no evidence to demonstrate that the amounts SLS charged Class Members for LPI were or are insurance premiums. The declarations of Voyles and Wilson contain no evidence that the amounts SLS charged Class Members for LPI were or are insurance premiums.

b. The available evidence unequivocally shows that the amounts SLS charged Class Members for LPI were and are not insurance premiums.

c. State insurance regulators did not and do not approve specific provisions in insurance rates for the services agreements between ASIC and SLS.

d. SLS is clearly not "an intermediary passing along rates." ASIC makes contradictory arguments regarding SLS's role as an "intermediary."

e. The claims in this matter do not disrupt or interfere with the insurance regulatory structure or with state insurance regulators' review and approval of rates, or place the Court in the position of acting as an insurance regulator.

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f. If we assume Defendants' argument that the amounts SLS charged Class Members for LPI were insurance premiums based on rates approved by state insurance regulators, there is no administrative remedy for a Class Member to challenge the LPI rates associated with the Class Member's LPI charge by SLS.

The Available Evidence Unequivocally Shows That The Amounts SLS Charged Class Members For LPI Were And Are Not Insurance Premiums.

5. LPI charges by SLS to Class Members are not insurance premiums and not subject to state insurance rate regulation. No Class Member paid a premium to an insurance company for SLS LPI. No insurance company paid a refund to any Class Member when SLS LPI coverage was canceled. No SLS LPI coverage was canceled because a Class Member failed to make a payment. Had Class Members actually been charged an insurance premium, these three characteristics would have been present. LPI is a commercial insurance policy between the LPI insurer and the mortgage servicer. The mortgage servicer is the policyholder and the insured. The mortgage servicer pays the premium for the LPI to the LPI insurer. The LPI rates filed by ASIC are rates charged to mortgage servicers, like SLS. LPI insurers do not charge rates or premiums for LPI to individual borrowers.

6. The conclusion that SLS's LPI charges to Class Members are not insurance premiums is supported by the fact that LPI is a commercial insurance policy issued by ASIC to a commercial entity – SLS. LPI is not treated as a personal insurance policy by state insurance regulators and Assurant files LPI policy forms as commercial insurance products.

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7. A comparison between the treatment of consumer credit insurance – such as credit-life insurance sold in connection with a consumer loan – and LPI demonstrates why LPI charges by the servicer to the borrower are not insurance premiums. The table below shows the differences between LPI and credit-life insurance and the role of the lender/servicer. With credit-life, there is an “A-to-B-to-C” relationship between the insurer, the lender, and the borrower. With credit-life insurance, the lender is an intermediary – a licensed agent – who collects premium on behalf of the insurer from the borrower. If the borrower fails to pay the insurance premium to the lender, the insurer cancels the credit-life insurance. In contrast, with LPI, the servicer is solely responsible for paying the premium for the insurance coverage. The insurer does not terminate LPI coverage if the borrower fails to pay the servicer, but only if the servicer fails to pay the premium billed to the servicer by the LPI insurer.

Table 1: Criteria to Determine Whether a Charge Is an Insurance Premium

Criteria	LPI	Credit Life
Who pays premium to insurance company?	Servicer	Borrower
Is coverage canceled if borrower fails to make required payment?	No	Yes
To whom is refund paid if coverage is canceled?	Servicer	Borrower
Commercial Lines Insurance?	Yes	No
State Insurance Regulation?	Servicer Not Regulated by Insurance Department	Creditor Regulated as Licensed Insurance Agent by Insurance Department

8. In addition, the servicer is not licensed or regulated by state insurance regulators.

This fact – and consequently the fact that a servicer’s LPI charges to borrowers are not insurance premiums – is evidenced by the lack of authority by state insurance regulators over the charges a

Declaration of Birny Birnbaum
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servicer makes to a borrower or the servicer's creation and operation of a borrower's escrow account. The lack of regulatory authority was stated by the California Insurance Commissioner in a 2002 regulatory proceeding. In the 2002 order, Commissioner Low states the Insurance Department had no jurisdiction over the scope or reasonableness of charges by a lender to a borrower for LPI:

Insofar as Petitioners ask the Department to decide whether premium charges "are improperly passed on" to Petitioners, the Commissioner cannot and does not express an opinion. The jurisdiction of the Commissioner extends to issues concerning the reasonableness of insurance rates vis-a-vis Respondent as the insurer and Norwest as the insured. The Department has no jurisdiction to decide the scope of charges which would be reasonable as between a lender and its borrower.¹

9. The description of LPI premium charges by an LPI insurer to a servicer and a servicer's subsequent charge to a borrower for LPI as an A-to-B-to-C transaction is incorrect. As explained above with the comparison between credit life insurance and LPI, credit life insurance is an example of the A-to-B-to-C transaction. But that description fails for LPI because there is no requirement that the servicer charge the borrower for LPI, because there are examples of LPI insurance – blanket LPI – for which no charge is assessed individual borrowers, and because servicers are not subject to regulation by state insurance regulators.

Defendants Have Provided No Evidence to Support the Claim That LPI Charges by SLS to Class Members Are Insurance Premiums.

10. I have reviewed Defendants' pleadings and the declarations of Voyles and

¹ Footnote 3, page 6 of 2002 Order In the Matter of Rates, Rating Plans or Rating Systems of American Security Insurance Company before the Insurance Commissioner of the State California.

¹ Page 7 of 2002 Order by California Insurance Commissioner.

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Wilson. There is no evidence in any of these documents to support the claim that SLS's LPI charges to Class Members are insurance premiums.

11. Voyles declares that ASIC filed and received approval from the Florida Office of Insurance Regulation for LPI rates and policy forms used by ASIC in Florida. Wilson declares that ASIC, on behalf of SLS, monitored loans in the SLS servicing portfolio for evidence of required insurance, sent letters regarding required insurance and LPI placement to borrowers, and initiated the placement of LPI when borrowers failed to provide evidence of required insurance. Wilson also declares that ASIC issued coverage under the Master LPI policy issued to SLS and charged SLS the LPI premium calculated correctly and pursuant to the rates filed by ASIC. These declarations provide evidence that the premium charges by ASIC – the insurer – to SLS – the policyholder – were made pursuant to filed rates. But these declarations provide no evidence that a charge labeled “LPI” by a servicer to a borrower is an insurance premium. The Voyles and Wilson declarations are irrelevant to the issue of whether a charge for LPI by a servicer to a borrower is an insurance premium.

12. SLS's motion provides no evidence to support its claims that the LPI charges by SLS to Class Members were or are insurance premiums. SLS's pleading simply assumes their conclusion. For example, SLS's motion states:

The Complaint's centerpiece theory is that SLS received money derived from the LPI premium in the form of “kickbacks” from ASIC and that SLS did not subtract these “kickbacks” from plaintiffs' premium charge. The LPI premium, however, was determined using filed and approved rates.²

Because the OIR approved ASIC's LPI rates, under *Rothstein* and others, the filed rate doctrine prohibits plaintiffs from challenging those rates; components of

² Memorandum of Law in Support of Specialized Loan Servicing LLC's Motion to Dismiss Complaint at p. 2

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those rates, including commissions or expense loads; or the resulting premiums.³

SLS assumes that its LPI charges to Class Members are insurance premiums, yet provides no evidence to support the assumption underlying the argument.

13. Similarly, ASIC's motion provides no evidence to support its claim that the LPI charges by SLS to Class Members were or are insurance premiums. ASIC's pleading simply assumes their conclusion. For example, ASIC's motion states:

ASIC filed the premium rates used to determine the amount of LPI premium charged to plaintiffs with the OIR, and the OIR approved them.⁴

But Plaintiffs were not charged insurance premiums. An insurance premium can only be charged by an insurance company. ASIC charged no Class Member an LPI premium. ASIC issued no LPI refunds to Class Members. ASIC canceled no LPI coverage because a Class Member failed to pay SLS. ASIC charged the LPI policyholder SLS an insurance premium. ASIC issued LPI refunds to SLS. ASIC would have canceled LPI coverage if SLS had failed to pay the LPI premium. SLS, a mortgage servicer and not an insurance intermediary – not an agent or broker licensed or regulated by state insurance regulators – charged Class Members for LPI to recoup amounts that SLS had paid to ASIC. As ASIC notes, the filed-rate doctrine bars challenges to filed rates – a policyholder cannot challenge the premium charges calculated

³ Memorandum of Law in Support of Specialized Loan Servicing LLC's Motion to Dismiss Complaint at p. 4

⁴ ASIC Motion to Dismiss at p. 4.

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pursuant to filed rates. But, for the filed-rate doctrine to apply to Plaintiffs' challenge to SLS's LPI charges, those charges must be insurance premiums. The SLS LPI charges to Class Members were not insurance premiums.

14. Plaintiffs challenge the LPI charges by SLS to Class Members because the amounts SLS charged Class Members for LPI were far in excess of the cost of protecting the properties serving as collateral for the mortgage and that excess amount was retained by SLS through a kickback scheme with ASIC. Plaintiffs have not challenged the rates or premiums that the insurance company ASIC charged the LPI policyholder SLS.

15. The only "evidence" supporting ASIC's filed-rate doctrine argument is the fact that SLS charged Class Members the same amount for LPI as the premium amount ASIC charged SLS for the coverage. By that logic, any amount charged a servicer for any product or service by an insurance company would be an insurance premium. ASIC provides a service to many mortgage servicers called "loss drafts" that is unrelated to the provision of LPI and for which servicers pay a fee to ASIC. Loss drafts refer to the process by which the servicer monitors repairs covered by insurance claim payments and releases the claim payments to borrowers. Servicers often outsource this mortgage servicing activity to a third party, like ASIC. Loss drafts have nothing to do with the provision of voluntary insurance, let alone LPI. Loss drafts are part of a servicer's responsibility to ensure insurance claim payments are used for repairs of the property serving as collateral for the mortgage. Using ASIC's logic about "charging the same amount," if SLS charged borrowers the same amount for loss drafts that ASIC charged SLS for those non-insurance services, then the loss draft charges would be transformed into insurance premiums – a clearly illogical and erroneous argument.

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SLS Is Clearly Not “an Intermediary Passing Along Rates.”

16. Defendants’ argument that SLS’s LPI charges to Class Members are insurance premiums is also premised on the claim that SLS is simply an intermediary passing along rates. The evidence indicates SLS is not remotely like a conduit for “rates.” As indicated above, if SLS were simply a conduit, then a borrower’s failure to pay SLS would lead to cancellation of the LPI coverage for non-payment of premium. That is not the case here – a borrower’s payment or non-payment of SLS’s LPI charges has no effect on LPI coverage.

17. SLS is not a licensed insurance agent and, consequently, has no authority to collect premiums on behalf of the insurer – to act as an “intermediary.” Further, SLS received back from ASIC a significant portion of the actual LPI premiums SLS paid to ASIC through cash payments and free or deeply subsidized services unrelated to the provision of LPI. An entity can hardly be called an intermediary if it pulls out 25% of the “rate” simply for selecting the LPI provider.

ASIC Offers Contradictory Arguments Regarding SLS’s Role as an Intermediary.

18. In its initial Motion, ASIC refers to the *Rothstein* opinion that premiums paid through an intermediary are still premiums subject to the filed-rate doctrine:

Rothstein also considered and rejected the argument that premiums paid through an intermediary, as is the case with all LPI transactions, are outside the doctrine: “The ... doctrine is not limited to transactions in which the ratepayer deals directly with the rate filer. The doctrine operates notwithstanding an intermediary that passes along the rate.” *Id.* at 264. For LPI, “the rate-regulated product necessarily passes through intermediaries before the rate is paid by the ultimate consumer,” so “it would make little sense for the doctrine to apply as between the rate filer and the intermediaries, but not when it comes to the ultimate ratepayers.” *Id.* at 265.⁵

⁵ ASIC Motion to Dismiss at p. 5.

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But, in its Reply Brief, ASIC argues that “SLS’s Intermediary Role is Irrelevant to the Application of the Doctrine.”⁶ ASIC then claims that Class Members are ratepayers – despite the facts that no Class Member paid a premium to ASIC, no Class Member ever received a refund from ASIC, no LPI coverage was ever cancelled because a Class Member failed to pay the LPI charge to SLS, and that SLS is not licensed or regulated by state insurance regulators. ASIC offers three “explanations” to support its borrower-as-ratepayer argument – the LPI policies are dual-interest, the mortgage agreements state that a lender may obtain coverage at borrower’s expense if the borrower fails to maintain coverage, and SLS charged the same amount to Class Members as SLS paid in premiums to ASIC. None of these “explanations” are evidence that SLS LPI charges to Class Members are insurance premiums. The “charge-the-same-amount” argument was discussed in paragraph 15, above, and shown to have no probative value in determining whether the SLS LPI charges to Class Members were insurance premiums.

19. The second explanation – that LPI policies are “dual-interest” – also fails to provide any information or evidence related to the issue of whether the SPS LPI charge was an insurance premium. The fact that under the Master LPI policy issued to SLS, which provided coverage automatically as needed, also provides some coverage rights to the borrower says nothing about the nature of the SPS LPI charge. Employers providing health care for employees purchase group health insurance policies providing coverage for enrolled employees. Many employers require a contribution from the employee towards the employer’s cost of health insurance and withholds part of the employee’s salary for that contribution. However, the fact

⁶ ASIC Reply Brief at p. 2.

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that the employee has coverage under the group policy does not translate that contribution to the employer into a health insurance premium. The employer remains responsible for paying the premium to the insurance company.

20. Consider an auto insurance policy purchased by a mother and father with a 17-year old driver. The policy provides coverage for the additional 17-year old driver, but the premium payments are due from the mother and father policyholders. Now suppose that the mother and 17-year old agree that the 17-year old will contribute to the cost of the auto insurance and pay \$25 per month to her parents. By ASIC's logic, this \$25 payment is an insurance premium – an absurd result. The fact that the SLS LPI policy was “dual interest” is not evidence that the SLS charges to Class Members are insurance premiums. Stated differently, a charge cannot be an insurance premium if that charge is not paid to an insurance company or licensed insurance agent or broker, cannot be an insurance premium if failure to pay the charge does not result in cancellation of the policy and cannot be an insurance premium if the payer of the charge does not receive a refund from the insurance company if the policy is cancelled before the end of the term. In contrast, a charge merely associated with insurance coverage is not necessarily an insurance premium, as illustrated by the examples above.

21. ASIC's third “explanation” that the SLS LPI charge to Class Members is an insurance premium is language included in the mortgage – if a lender obtains insurance coverage, the lender may charge the borrower for the costs of that coverage. This “explanation” clearly provides no evidence to support Defendants' claims. Servicers assess a variety of charges to borrowers as set out in the mortgage and these charges are clearly not insurance premiums just because the servicer assesses the charge and that charge may become part of the

Declaration of Birny Birnbaum
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borrower's debt. Stated differently, the mortgage language is completely consistent with the other evidence that the SLS LPI charge is not an insurance premium.

State Insurance Regulators Have Not Approved SLS's Charges to Borrowers in Connection with LPI and Have Not Approved the Various Kickbacks That Are Part of SLS's Contractual and Financial Arrangements with Its LPI Vendor Assurant.

22. There is no provision in the LPI policy or state insurance regulation that requires the mortgage servicer to charge borrowers for LPI. In fact, some LPI policies – called blanket policies – are paid for by the mortgage servicer with no subsequent charges to individual borrowers. The fact that state insurance regulators may approve LPI rates charged to mortgage servicers provides no justification for the servicer to include kickbacks and unreasonable expenses in the amounts the servicer charges borrowers for LPI.

23. Insurance regulators have authority over insurance companies and insurance agents. This authority extends to review and approval of rates and policy forms issued by the insurance company. However, insurance regulators do not have authority over mortgage servicers or over the charges a servicer may make to a borrower.

24. State insurance regulators approve rates which include general provisions for claims, claim adjustment expense, commissions, other acquisition expenses, administration, taxes, licenses, and fees and profit. The filed rates do not include approval of specific expenses for an individual servicer client of the insurer. State insurance regulators do not and did not approve the outsourcing agreements between servicers and LPI insurers, such as the agreements between SLS and ASIC.

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A Challenge to a Kickback Scheme Does Not Impede State Regulation of Insurance.

25. A challenge to kickbacks in LPI charges by the servicer to the borrower does not challenge state insurance regulator's authority to approve rates. This is evidenced by the fact that the LPI class actions and subsequent settlements do not involve changes to rates or challenges to state insurance regulatory authority to review and approve rates. It is further evidenced by the fact that state insurance regulators have continued to review and approve LPI rates filed by ASIC and other LPI insurers despite the LPI class action lawsuits and settlements.

26. Defendants' pleadings explain that the filed-rate doctrine is grounded on two rationales: SLS's motion states:

First, it preserves a regulator's authority to determine the reasonableness of rates and prohibits courts from second-guessing that determination (*i.e.*, the "nonjusticiability principle"). *See Uniforce Temp. Pers., Inc. v. Nat'l Council on Comp. Ins., Inc.*, 892 F. Supp. 1503, 1512 (S.D. Fla. 1995). Second, it ensures that regulated entities charge only those rates that have been approved and thereby prevents discrimination among insureds (*i.e.*, the "nondiscrimination principle").⁷

ASIC's motion states:

Twin principles underlie the doctrine: (i) nondiscrimination – preventing carriers from engaging in price discrimination as between ratepayers; and (ii) nonjusticiability – preserving the exclusive role of regulatory agencies in approving rates that are reasonable by keeping courts out of the ratemaking process, a function the agencies are more competent to perform. *Hill*, 364 F.3d at 1316. The nonjusticiability principle "prevents more than judicial rate-setting; it precludes any judicial action which undermines agency ratemaking authority."⁸

⁷ Memorandum of Law in Support of Specialized Loan Servicing LLC's Motion to Dismiss Complaint at p. 3

⁸ ASIC Motion to Dismiss at p. 5.

Declaration of Birny Birnbaum
Case Case No. 0:15-cv-62600-JIC, Patel and Wilson, et al. v. SLS and ASIC
March 25, 2016

Neither of these rationales is implicated in this action. Were this Court to determine that the LPI charges by SLS were excessive and unreasonable because SLS retained amounts of these charges through a kickback scheme with ASIC and, consequently, to determine that Class Members were entitled to restitution for these overcharges, such decisions by the Court would have no impact on the rates filed by ASIC with any state insurance regulator and no effect on the premiums paid by SLS to ASIC for LPI. This fact is evidenced by the numerous settlements in class action lawsuits which provided restitution to Class Members but had no impact on rates filed with insurance regulators.

27. The second rationale – prevent certain ratepayers from receiving preferential treatment – is also not implicated in this matter. The “ratepayer” is SLS because SLS is the policyholder of the master LPI policy and the sole entity responsible for payment of premiums for coverage issued under that policy. Since the filed rates – and the resulting premiums charged SLS by ASIC – will not be affected, there can be no “discrimination” among ratepayers.

28. Plaintiffs are neither asking the Court to insert its judgment as to the reasonableness of rates over that of the insurance regulator nor asking the Court to “measure the difference between the approved premium rates were charged and some ‘mythical rate’ which would have been applicable but for ASIC’s alleged conduct.” Plaintiffs ask the Court in this matter – as in many other similar matters – to recognize that the amounts SLS charged class members were excessive and unreasonable because these amounts included kickbacks to SLS and to review the amounts of these kickbacks which I am able to quantify through review of normal business records of Defendants utilizing a damage methodology applied uniformly across Class Members and which has been accepted by several courts in other LPI kickback cases.

Declaration of Birny Birnbaum

Case Case No. 0:15-cv-62600-JIC, Patel and Wilson, et al. v. SLS and ASIC

March 25, 2016

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 25th day of March, 2016,

Birny Birnbaum

Birny Birnbaum

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

Case No. 1:15-CV-23294-KMW

PANKAJ PATEL and LAKETHA WILSON
on behalf of themselves and all others similarly
situated,

Plaintiffs,

v.

SPECIALIZED LOAN SERVICING LLC and
AMERICAN SECURITY INSURANCE
COMPANY,

Defendants.

**DECLARATION OF BIRNY BIRNBAUM IN RESPONSE TO
DECLARATIONS OF RONALD WILSON AND REBECCA VOYLES**

March 25, 2016

Exhibit A

Resume, Expert Testimony and Publications of Birny Birnbaum

Birny Birnbaum
Consulting Economist
1701 A South Second Street
Austin, TX 78704
(512) 448 3096

Birny Birnbaum is a consulting economist and former insurance regulator whose work focuses on insurance regulatory issues. Birny has served as an expert witness on a variety of economic and actuarial insurance issues in California, New York, Texas and other states. Birny serves as an economic adviser to and Executive Director for the Center for Economic Justice (www.cej-online.org), a Texas non-profit organization, whose mission is to advocate on behalf of low-income consumers on issues of availability, affordability, accessibility of basic goods and services, such as utilities, credit and insurance.

He has authored reports and testimony for numerous public agencies and consumer organizations, including the California Department of Insurance, the Florida Insurance Commissioner's Task Force on Credit Scoring, the Ohio Civil Rights Commission, the Cities of New York and Philadelphia, the United States Department of Justice and the Center for Economic Justice. Birny's reports and testimony have covered a wide variety of topics, including force-placed insurance, consumer credit insurance, title insurance, insurance credit scoring and insurance markets. Birny has served for many years as a designated Consumer Representative at the National Association of Insurance Commissioners and is a member of the Federal Advisory Committee on Insurance.

Birny served for three years as Associate Commissioner for Policy and Research and the Chief Economist at the Texas Department of Insurance. At the Department, Birny provided technical and policy advice to the Commissioner of Insurance and performed policy research and analysis for the Department. Birny was also responsible for the development of data collection programs for market surveillance and the analysis of insurance market for competition.

Prior to coming to the Department, Birny was the Chief Economist at the Office of Public Insurance Counsel (OPIC), working on a variety of insurance issue. OPIC is a Texas state agency whose mission is to advocate on behalf of insurance consumers. Prior to OPIC, Birny was a consulting economist working on community and economic development projects. Birny also worked as business and financial analyst for the Port Authority of New York and New Jersey. Birny was educated at Bowdoin College and the Massachusetts Institute of Technology. He holds two Master's Degrees from MIT in Management and in Urban Planning with concentrations in finance and applied economics.

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Education

1989	Massachusetts Institute of Technology	Cambridge, MA
Master's Degrees in Business (M.S., Management) and Urban Planning (M.C.P.). Concentration in finance and applied economics with coursework in econometrics, corporate, municipal and real estate finance and regional economic development.		
1976	Bowdoin College	Brunswick, ME
A.B., German and Political Economy. Wesleyan University Program in Germany, Bonn, West Germany, 1974.		

Professional Experience

1996 to Present	Economist and Executive Director Center for Economic Justice	Austin, TX
Serve as Executive Director for the Center for Economic Justice (www.cej-online.org), an organization dedicated to advocating on behalf of low-income and minority consumers before administrative agencies on credit, utility and insurance matters. Also provide expert economic, actuarial and policy analysis on behalf of CEJ. Served as designated consumer representative at the National Association of Insurance Commissioner on behalf of CEJ. Routinely provide testimony and presentations to insurance regulators and legislators on insurance regulatory and consumer protection issues from 1998 to present.		
1991 to Present	Consulting Economist Birny Birnbaum Consulting Inc.	Austin, TX
Provide economic and actuarial analysis on insurance, utility and credit matters to public organizations and consumers. Assignments include:		
<ul style="list-style-type: none">• Provided testimony on force-placed insurance markets and rates to the New York Department of Financial Services in May 2012, the Florida Office of Insurance Regulation in July 2012 and May 2013, the National Association of Insurance Commissions in August 2012, December 2012 and April 2013 and the California Department of Insurance in October 2012 on behalf of the CEJ.		

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- Provide analysis and testimony on credit insurance rates, regulations and market conduct problems in states on behalf of the Center for Economic Justice and other organizations. Authored state-specific reports on credit insurance in Alaska, Arizona, California, Indiana, Iowa, Maryland, Minnesota, New Mexico, Nevada, South Dakota, Texas, Wisconsin and Washington from 1997 through present.
- Provided testimony to the Michigan House Insurance Committee on the profitability of Michigan auto insurers and the condition of the No-Fault auto insurance system in Michigan on behalf the Coalition to Protect Auto No-Fault in October 2011.
- Presented testimony to Congress regarding the impact of the Dodd Frank Act on state insurance regulation and insurance markets on behalf of the Center for Economic Justice in July 2012.
- Presented testimony to Congress regarding effectiveness of state insurance regulation, including oversight of force-placed insurance, on behalf of the Center for Economic Justice in July 2011.
- Prepared analysis of title insurance agent expenses for the Pennsylvania Department of Insurance from 2009 to 2011. Project included unique data collection and analysis.
- Provided analysis of usage-based auto insurance rate filings in California on behalf of Consumer Watchdog in 2010.
- Participated in North Carolina Consumer Finance Study Group to evaluate the North Carolina consumer instalment loan market and proposals for modifying statutory interest rate and fee caps for these loans on behalf of the Center for Economic Justice in 2010.
- Provide analysis and testimony on credit insurance and debt cancellation products sold by credit unions on behalf of the United States Department of Justice 2008 to 2009
- Authored *An Analysis of Competition in the California Title and Escrow Industry* for the California Commissioner of Insurance in 2005. Provided assistance to California Department of Insurance in preparing and issuing requests for information to title insurance companies and title agents in California from 2005 to 2008.
- Provided testimony before Congress on insurance scoring on behalf of the Center for Economic Justice in October 2007

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- Provided testimony and analysis on title insurance markets, reverse competition, expenses and rates in 2007 and 2008 New Mexico Title Insurance Rate Hearings on behalf of New Mexico Attorney General Gary King.
- Prepared analysis of credit insurance regulatory performance by states from 2004 through 2008, including credit life, credit disability, credit involuntary unemployment, creditor-placed (force-placed), GAP and credit family leave insurance coverages for the Center for Economic Justice in 2009.
- Provided testimony on proposed auto insurance rating regulations and insurance scoring in Massachusetts in 2007 on behalf of the Center for Economic Justice.
- Provided testimony on proposed auto insurance rating regulations in California from 1993 through 2005 related to the rating factor requirements of Proposition 103 for the Foundation for Taxpayer and Consumer Rights.
- Provided technical assistance to the United States Department of Housing and Urban Development on an investigation of redlining in homeowner's insurance from 2005 to 2007
- Provided expert reports on insurers' use of credit scoring in connection with several litigations in Oregon regarding adverse action notification required by the Fair Credit Reporting Act from 2002 to present.
- Provided expert testimony in a hearing before the New York State Public Service Commission on a proposal by a utility to use credit scoring to establish customer deposits for utility service on behalf of the Public Utility Law Project in 2003.
- Provided technical assistance to the Federal Trade Commission regarding credit insurance sales and marketing practices from 2000 through 2002.
- Performed a market conduct examination on proposed credit scoring program by an automobile insurer on behalf of the Georgia Insurance Commissioner in 2003.
- Provide technical assistance to the Philadelphia Automobile Insurance Rate Reduction Task Force on behalf of the Mayor of Philadelphia from 2000 to 2003 and prepared a report evaluating the fairness of auto insurance rates in Philadelphia for the Task Force.

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- Provided analysis and a report to the Ohio Civil Rights Commission on the impact of insurers' use of credit scoring on availability and affordability of homeowners insurance for minority populations in Ohio in 2002.
- Appointed as party arbitrator by the Florida Insurance Commissioner on panels reviewing insurer protests of the Florida Insurance Commissioner's decision to disapprove homeowner's insurance filings in 2002 and a personal umbrella insurance filing in 2003.
- Provide analysis and testimony before the National Association of Insurance Commissioners on credit-related insurance, including force-placed insurance and credit scoring issues on behalf of the Center for Economic Justice from 1998 to present.
- Provided expert testimony in California rulemaking hearings regarding the setting of rates for credit life, credit disability, credit unemployment and credit property insurance on behalf of Consumers Union and the Center for Economic Justice from 2001 through 2005.
- Provided analysis and testimony to the Georgia Insurance Commissioner on insurers' use of credit scoring on behalf of the Georgia Governor's Office of Insurance Consumer Advocate in 2001.
- Provided analysis of individual insurer private passenger automobile insurance rate, risk classification and credit scoring filings on behalf of the Georgia Governor's Office of Insurance Consumer Advocate in 2000.
- Provided expert testimony on rates for credit life and credit disability insurance in Texas in a contested case rate hearing on behalf of the Center for Economic Justice in 1999.
- Provided a report on credit insurance experience and market problems countrywide and by state to the Center for Economic Justice and Consumers Union in 1999
- Provided analysis of creditor-placed credit insurance in New Mexico on behalf of the New Mexico Superintendent of Insurance in 1998.
- Developed feasibility study of targeted loan-programs for hail-resistant roofs on behalf of the Center for Economic Justice in 2000.
- Provided reports on Texas private passenger automobile insurance profitability to the Center for Economic Justice in 1998 and 1999.

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- Provided a report on Texas private passenger automobile insurance availability and redlining to Texas State Representative Lon Burnam in 1998.
- Advocate and analyst for residential and small commercial customer classes in the Austin, Texas Water and Wastewater Utility 1998-99 Cost of Service and Rate Design Study on behalf of the City of Austin.
- Provided analysis and testimony regarding private passenger automobile rate filings in New York on behalf of the City of New York 1996 through 1999.
- Authored report on economic and financial feasibility of a low-level radioactive waste disposal site in West Texas for the Sierra Blanca Legal Defense Fund in 1998.
- Provided analysis and testimony regarding private passenger automobile insurance rate filings in California on behalf of the Proposition 103 Enforcement Project in 1998.
- Provided a report on intergovernmental risk pools to the Texas Performance Review to the Texas Comptroller in 1998.
- Provided testimony regarding insurers' claims of trade secret for historic premium, exposure and loss data by zip code on behalf of the Missouri Department of Insurance in 1997.
- Provided testimony in litigation regarding public disclosure of insurer ZIP Code level data in Texas 1997 through 1999.
- Provided testimony regarding title insurance rates in Texas on behalf of the Texas Office of Public Insurance Counsel in 1997.
- Provided testimony in a California administrative hearing regarding compliance with applicable statutes and regulations of private passenger automobile class plans filed by insurers on behalf of the Proposition 103 Enforcement Project 1997 through 1999.
- Authored reports on auto insurance markets and redlining in Texas on behalf of the Center for Economic Justice in 1997.

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1993-96 **Chief Economist & Associate Commissioner for Policy and Research**
Texas Department of Insurance Austin, TX

Senior adviser to Commissioner on policy, ratemaking and other technical issues. In addition, specific responsibilities included:

- Review and approve prior approval automobile and residential property rate and manual filings.
- Review and analyze proposals for decisions from administrative law judges and advise the Commissioner on industry-wide rate decisions and individual company manual filings.
- Expert witness for the Department in contested case proceedings regarding unfairly discriminatory or excessive rates.
- Custodian for underwriting guidelines submitted by residential property and private passenger automobile insurers.
- Oversight of process to designate Texas statistical agents for collection of insurer premium, exposure and loss experience.
- Review and present proposals to the Commissioner for modification of statistical plans governing data collection.
- Analyze and make recommendations to the Commissioner regarding determination of areas underserved for residential property and private passenger automobile insurance.
- Represent the Department at meetings of the National Association of Insurance Commissioners with specific responsibilities for insurance credit scoring, credit insurance, market conduct, underwriting, data collection, and catastrophe insurance issues.
- Liaison to the Texas assigned risk auto program (TAIPA) with responsibility for developing proposals for TAIPA quota calculations, quota credits for underserved areas, quota credits for voluntary and mandatory take-outs and for reporting of take-out activity.
- Oversight of organizations operating as advisory organization in Texas to ensure compliance of such organizations with Texas requirements.

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1991-93

Chief Economist

Texas Office of Public Insurance Counsel

Austin, TX

The Office of Public Insurance Counsel represents consumers of insurance before the Commissioner of Insurance and other forums.

- Performed economic, actuarial, financial, statistical and policy analyses on issues of concern to consumers in various lines of insurance.
- Provided expert testimony in contested cases concerning various lines of insurance on behalf of the Office of Public Insurance Counsel. Topics included expected losses, expense provisions, insurer rate of return, investment income, underwriting profit, the degree of competition in Texas insurance markets, insurance availability, redlining and the validity of certain rating factors for pricing insurance. Lines of insurance included automobile, residential property, title, credit and workers' compensation.

1989-91

Consulting Economist

Mt. Auburn Associates

Somerville, MA

Responsible for business development, project management and substantive analysis.

- Evaluated economic impact of business lending by New York State agencies with reference to overall development finance policy.
- Trained 50 state program managers in the use of development loan funds as strategic economic development tools.
- Market development for recycled, or secondary, materials in Connecticut and New York with emphasis on achieving environmental and economic development goals -- reducing environmental pollution, increasing manufacturing using secondary materials, developing advanced technology.

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1986-89 **Senior Business and Financial Analyst**

Port Authority of New York & New Jersey

New York, NY

The Port Authority operates the interstate transportation facilities for the Port of New York (tunnels, bridges, PATH train, airports, oceanborne cargo) and a set of world trade and economic development facilities (World Trade Center, Teleport, XPORT Trading Company, industrial parks).

Project Finance

- Evaluated and structured Port Authority investments in public-private economic development ventures, including commercial, residential, industrial and marine real estate and business developments.
- Trained 120 property negotiators and finance staff from all operating departments in the use of discounted cash flow analysis in creating value during lease negotiations.

Development Finance

- Evaluated alternative techniques for funding the Port Authority's \$5 billion capital improvement program.
- Secured Export-Import Bank certification to improve the XPORT Trading Company's export finance capabilities.

Business Strategy

- Managed the development of the first comprehensive business plan for the World Trade Center, balancing revenue and economic development goals and resulting in physical redevelopment efforts.
- Designed decision-support computer models for senior Treasury staff adopted for use in the capital planning process.

1980-86 **Consulting Economist**

Self-Employed

Seattle, WA

Cambridge, MA

- Crafted a strategic economic analysis of the wood products industries for the Northern Tier (Massachusetts) Task Force.
- Assessed the location determinants of high technology and service industry firms as part of a critique of standard business climate indices for Mt. Auburn Associates and the Corporation for Enterprise Development.

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- Evaluated effect of State economic development policy and programs on economic performance in Massachusetts for the Committee for Economic Development.
- Conducted 50 seminars on energy expenditures and local economic development for local officials and community groups in Washington State for the State Energy Office.
- Presented recommendations to the Seattle City Council and Seattle City Light on cost allocation and rate design, resulting in a modified rate structure, as a member of the Mayor's Citizen Rate Advisory Committee representing the ratepayer's organization, the Light Brigade.
- Interim Director of Citizens for a Solar Washington, a statewide organization educating and advocating for energy conservation and renewable energy resources.

1978-80

Northwest Field Representative

National Center for Appropriate Technology

Seattle, WA

- Supervised grant awards and provided technical assistance to public and private organizations for community development projects and programs throughout the Northwest and Alaska.
- Provided expert testimony on key Federal and State food and energy legislation, including the Public Utilities Regulatory and Policy Act.

1977-78

VISTA Volunteer

Grant County Community Action Council

Moses Lake, WA

- Trained the staff of 30 Washington State community action agencies in the concept and application of appropriate technology for enabling poor people to meet energy and food requirements.
- Organized local enterprises, including a farmers' market and community cannery.

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Birny Birnbaum Expert Testimony in Litigation

Trial Testimony

- Case No. 9:12-cv-80372-KAM , Martorella v. Deutsche Bank National Trust Company, et al, United States District Court, Southern District Of Florida, 2015.
- Cause No. 06 CH 09489, Colella, et al v. Chicago Title Insurance Co. and Chicago Title and Trust Co., in the Circuit Court of Cook County, Illinois, 2013.
- Cause No. 06 CH 09488, Chultem, et al. vs. Ticor Title Insurance Co., et al, in the Circuit Court of Cook County, Illinois, 2013.
- Case No. 08 C 0057, Community First Credit Union v United States of America, United States District Court, Eastern District of Wisconsin, 2009.
- Civil Action No. 08-cv-1071-REB-KMT, Belco Credit Union v United States of America, United States District Court, District of Colorado, 2009.
- Civil No. CV 01-1446-BR, Ashby v. Farmers Insurance Company of Oregon in the United States District Court, District of Oregon, 2009.
- Cause No. 96-34235, Siebenmorgen v. The Hertz Corporation, in the 234th district court of Harris County Texas, 1998.
- Cause 97-09206, National Association of Independent Insurers, et al. v. Dan Morales, The Attorney General of Texas, et al, in the 98th district court of Travis County Texas
- Cause No. CV-001297, Nationwide General Ins. Co. et al v. Attorney General of Texas, et al, in the 261st district court of Travis County Texas.

Deposition Testimony

- Case No. 14-cv-20474-JEM, Montoya, et al v. PNC Bank, NA et al, United States District Court, Southern District of Florida, 2015.
- Case No. 502009CA034657XXXXMB AD, Wells Fargo Bank, N.A. et al v. Rico, Circuit Court of the 15th Judicial Circuit, Palm Beach County, Florida, 2014.
- Case No. 9:12-cv-80372-KAM , Martorella v. Deutsche Bank National Trust Company, et al, United States District Court, Southern District Of Florida, 2014.
- Cause No. 06 CH 09489, Colella, et al vs. Chicago Title Insurance Co. and Chicago Title and Trust Co., in the Circuit Court of Cook County, Illinois, 2013.
- Case No.: SACV-11-00915-JST-AN, Gustafson, et al v. BAC Home Loans Servicing, LP et al, United States District Court, Central District of California, 2013.
- Case C/A No.: 0:11-464-MBS, Mary K. Mungo, et al v. Founders Federal Credit Union, et al, United States District Court South Carolina, Rock Hill Division, 2013.
- Case No. 11-CV-81373-DMM, Kunzelmann, et al v. Wells Fargo Bank, N.A., et al, United States District Court, Southern District of Florida, Miami Division, 2012.
- Case No. 1:11-CV-21233-Altonaga/Simonton, Williams, et al v. Wells Fargo Bank, N.A., et al, United States District Court, Southern District of Florida, Miami Division, 2011.
- Civil Action No. 2:08-cv-311-GZS, Douglas Campbell and Denise Campbell v. First American Title Insurance Company United States District Court, District of Maine, 2011.

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Deposition Testimony (con't)

- Case No. CV 2004-742-2, Smith and Evie, et al v. Collingsworth, Pugh, United American, et al, Circuit Court of Saline County, Arkansas, 2011.
- Civil Action No. 08-cv-1071-REB-KMT, Belco Credit Union v United States of America, United States District Court, District of Colorado, 2009.
- Case No. 08 C 0057, Community First Credit Union v United States of America, United States District Court, Eastern District of Wisconsin, 2009.
- Civil No. CV 01-1446-BR, Ashby v. Farmers Insurance Company of Oregon in the United States District Court, District of Oregon, 2007.
- Case No. 3:06-cv-295, Furniture Distributors, Inc dba Kimbrell's v. Voyager Life Insurance Company, United States District Court for the Western District of North Carolina, Charlotte Division, 2007.
- Civil Action No. 00-CP-15-275, Wright v. American Bankers Life Assurance Co. of Florida, Court of Common Pleas, Colleton County, South Carolina, 2007.
- Civil Action No. 01-C-43, Bender v. American General Finance, in the Circuit Court of Boone County, West Virginia, 2004.
- Civil No. 01-2688-09 VSM, Miprano, et al v. Progressive Hawai'i Insurance Corp., et al in the Circuit Court of the First Circuit, State of Hawai'i, 2004.
- Class Action No. 99-L-393A, Sims, et al v. Allstate Insurance Company, in the Circuit Court, Twentieth Judicial Circuit, St. Clair County, Illinois, 2004.
- File No. 02 CVS 2398, Richardson, et al v. Bank of America, et al, in the General Court of Justice, Superior Court Division, Durham County, North Carolina, 2003.
- Civil Action, Beverly Porter, et al v. First Family Financial Services, Inc., in the Circuit Court of Claiborne County, Mississippi, 2002.
- Case No. 02-C1-00077, Lawson v. American Bankers Life Assurance Company of Florida, Commonwealth of Kentucky, Jessamine Circuit Court, Civil Branch, 2002.
- Civil Action No. 99-0162, Bertha Gamble, et al v. MS Loan Center, Inc., et al in the Circuit Court of Jefferson County, Mississippi, 2002.
- Cause No. 00-2861, Wendell Gordon v. Vicky Lynn Miller, et al in the 68th district court of Dallas County, Texas, 2001.
- Case No. 99-1298-CIV, London, et al. v. Wal-Mart Stores, Inc., et al. in the Miami Division, Southern District of Florida, United States District Court, 2000.
- Case No. 98-1281-CIV, Fabricant v. Sears, Roebuck & Co., et al. in the Miami Division, Southern District of Florida, United States District Court, 2000.
- Civil Action File No. 97-1-3977-35, Wood, et al. v. Associates Financial Life Insurance Company, et al in the Superior Court of Cobb County, State of Georgia, 2000.
- Case No. 97-281-TUC-JMR-JCC, Siemer, et al., v. Associates First Capital, et al. in the Arizona District of the United States District Court. 2000
- Cause No. 96-34235, Siebenmorgen v. The Hertz Corporation, in the 234th district court of Harris County Texas, 1998.
- Cause 97-09206, National Association of Independent Insurers, et al. v. Dan Morales, The Attorney General of Texas, et al, in the 98th district court of Travis County, Texas, 1997.

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Expert Reports

- Case No. 15-cv-23107-DPG, Edwards, et al. v. Seterus, Inc. et al, United States District Court, Southern District of Florida, 2016.
- Case No. 15-23294-CIV-WILLIAMS, Beber, et al. v. Branch Banking & Trust Co., et al., United States District Court, Southern District of Florida, 2016.
- Case No. 14-CIV-21252, Jackson, et al. v. U.S. Bank N.A., et al, United States District Court, Southern District Of Florida, 2015.
- Case No. 14-CIV-21384, Circeo-Loudon, et al. v. Green Tree Servicing, LLC, et al., United States District Court, Southern District Of Florida, 2015.
- Case No. 14-CIV-22264, Wilson, et al. v. EverBank N.A., et al, United States District Court, Southern District Of Florida, 2015.
- Case No. 14-cv-20474-JEM, Montoya, et al v. PNC Bank, NA et al, United States District Court, Southern District of Florida, 2015.
- Case No. 502009CA034657XXXXMB AD, Wells Fargo Bank, N.A. et al v. Rico, Circuit Court of the 15th Judicial Circuit, Palm Beach County, Florida, 2014.
- Case No. 9:12-cv-80372-KAM , Martorella v. Deutsche Bank National Trust Company, et al, United States District Court, Southern District Of Florida, 2014.
- Case No. 1:12-cv-01117, Gallo, et al v. PHH Mortgage Corporation, United States District Court, District of New Jersey, 2014.
- Case No. 13-60749-CIV-ROSENBAUM, Hamilton, et al v. SunTrust Mortgage Inc., et al, United States District Court, Southern District Of Florida, 2014.
- Case No. CV 12-2506 LB, Ellsworth, et al. v. U.S. Bank, N.A. and American Security Insurance Company, United States District Court, Northern District of California, 2013
- Case No. 0:13-cv-60721-WPD, Fladell, et al v. Wells Fargo Bank, NA, United States District Court, Southern District of Florida, 2013.
- Case No. 4:13-CV-00708-JCS, Leghorn, et al v. Wells Fargo Bank, NA, United States District Court, Northern District of California, 2013.
- Case No. 3:11-CV-04965-JCS, McKenzie, et al v. Wells Fargo Bank, NA, United States District Court, Northern District of California, 2013.
- Cause No. 06 CH 09489, Colella, et al v. Chicago Title Insurance Co. and Chicago Title and Trust Co., in the Circuit Court of Cook County, Illinois, 2013.
- Cause No. 06 CH 09488, Chultem, et al. vs. Ticor Title Insurance Co., et al, in the Circuit Court of Cook County, Illinois, 2013.
- Case No. C 12-04026 WHA, Lane, et al v. Wells Fargo Bank, NA, United States District Court, Northern District of California, 2013.
- Case No.: SACV-11-00915-JST-AN, Gustafson, et al v. BAC Home Loans Servicing, LP et al, United States District Court, Central District of California, 2013.
- JAMS Ref No. 1130005569, Arbitration of Kenneth and Jerry Still v. Beneficial Financial I Inc., dba Beneficial Member HSBC Group and fka Beneficial California, Inc., 2013.
- Case C/A No.: 0:11-464-MBS, Mary K. Mungo, et al v. Founders Federal Credit Union, et al, United States District Court South Carolina, Rock Hill Division, 2012.
- Case No. 11-CV-81373-DMM, Kunzelmann, et al v. Wells Fargo Bank, N.A., et al, United States District Court, Southern District of Florida, Miami Division, 2012.

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Expert Reports (con't)

- Case No. 1:11-CV-21233-Altonaga/Simonton, Williams, et al v. Wells Fargo Bank, N.A., et al, United States District Court, Southern District of Florida, Miami Division, 2011.
- Civil Action No. 2:08-cv-311-GZS, Douglas Campbell and Denise Campbell v. First American Title Insurance Company United States District Court, District of Maine, 2011.
- Case No. CGC 05-446073, Rick L. Schwartz, et al v. Provident Life and Accident Insurance Company, et al, Superior Court of California, County of San Francisco, 2011.
- Civil Action No. 08-cv-1071-REB-KMT, Bellco Credit Union v United States of America, United States District Court, District of Colorado, 2009.
- Case No. 08 C 0057, Community First Credit Union v United States of America, United States District Court, Eastern District of Wisconsin, 2009.
- File No. 02 CVS 593, Tillman, et al v. Commercial Credit, et al, in the Superior Court of Vance County, North Carolina, 2008.
- Case No. BC 329482, Sjobring, et al v. First American Title Insurance Company, et al, Superior Court of the State of California for the County of Los Angeles, 2008
- Case No. 3:06-cv-295, Furniture Distributors, Inc dba Kimbrell's v. Voyager Life Insurance Company, United States District Court for the Western District of North Carolina, Charlotte Division, 2007.
- Civil Action No. 00-CP-15-275, Wright v. American Bankers Life Assurance Co. of Florida, Count of Common Pleas, Colleton County, South Carolina, 2006.
- Civil No. CV 01-1446-BR, Ashby v. Farmers Insurance Company of Oregon in the United States District Court, District of Oregon, 2005, 2006 and 2009.
- Civil Action No. 01-C-43, Bender v. American General Finance, in the Circuit Court of Boone County, West Virginia, 2004.
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