Force-Placed Insurance May Not Be a Breach of Contract

Force-placed insurance under modern mortgage contracts—an introduction.

Force-placed insurance is home hazard insurance coverage that the mortgage lender has purchased for the owner due to the homeowner's failure to maintain sufficient coverage. In other words, if a homeowner fails to maintain full insurance coverage, then the mortgage lender buys insurance coverage on the home, often at inflated cost, and tacks it on to the mortgage loan debt. The inflated cost of the insurance can reach as much as quadruple or quintuple the market price of the same insurance, leading many to allege that the mortgage lenders are receiving kickbacks from their chosen force-placed insurance providers. Over the past several years, litigation over force-placed insurance has spiked, recently culminating in a $300 million settlement in Florida paid out by a leading national lender. The tendency of borrowers suing in these actions is to treat the imposition of force-placed insurance as either a breach of the mortgage contract or as some form of unjust enrichment (also known as money had and received or assumpsit) due to the excessive amount charged or the bank's receipt of kickbacks.

However, most modern mortgages expressly provide that the borrower must maintain hazard insurance for any periods that the lender requires, without lapses or gaps, and that if the borrower ever fails to maintain hazard insurance, the lender has the right to obtain insurance coverage, at the lender's option and at the borrower's expense. Further, modern mortgages expressly provide that this force-placed insurance may cost significantly more than the borrower's own insurance; e.g. the mortgage provides that "Borrower acknowledges that the cost of the insurance coverage so obtained might significantly exceed the cost of insurance that Borrower could have obtained." As discussed herein, because these contractual provisions are often indisputable, and because an express contract bars an unjust enrichment claim under Florida law, the Courts should dismiss any borrower's complaint brought under breach of contract, breach of implied covenant of good faith and fair dealing, or unjust enrichment, money had and received, or general

assumpsit. Accordingly, if a borrower wishes to recuperate damages for force-placed insurance, the borrower should use a different legal claim.

A borrower cannot state a claim for breach of contract under most modern mortgages for the imposition of force-placed insurance

Most modern mortgage contracts specifically permit the lender to purchase any listed policy for lapsed periods at rates significantly in excess of the borrower's obtainable rates. Thus, a borrower cannot state a cause of action for breach of contract because a plain reading of the mortgage reveals that there is no material breach of—and no actionable injury from—the express provisions of the mortgage. And, "[w]hen there is an inconsistency between the general allegations of material fact in the complaint (that the lender breached the mortgage contract) and the specific facts revealed by the exhibit (the express language in the mortgage contract), they have the effect of neutralizing each other and the pleading is rendered objectionable." *Greenwald v. Triple D Pros., Inc.*, 424 So. 2d 185, 187 (Fla. 4th DCA 1983).

To adequately plead a claim for breach of contract under Florida law, a borrower must allege the existence of (1) a valid contract; (2) a material breach; and (3) damages.'" *Merin Hunter Codman, Inc. v. Wackenhut Corr. Corp.*, 941 So. 2d 396, 398 (Fla. 4th DCA 2006) *(citing J.J. Gumberg Co. v. Janis Servs., Inc.,* 847 So. 2d 1048, 1049 (Fla. 4th DCA 2003)). To constitute a material breach, a party's nonperformance of a contract must be such as to go to the essence of the contract; it must be the type of breach that would discharge the injured party from further contractual duty on his part, but a party's failure to perform some minor part of his contractual duty cannot be classified as a material breach. *Beefy Trail, Inc. v. Beefy King Intern., Inc.*, 267 So. 2d 853, 857 (Fla. 4th DCA 1972).

In the circumstance of force-placed insurance, not only will the borrower be unable to allege breach of any particular contractual provision, but the borrower also must attach the mortgage contract as an exhibit to the complaint (Florida Rule of Civil Procedure 1.130), and that exhibit will usually specifically allow the lender to purchase any lapsed coverage at significantly greater cost for the periods that lender requires. The lender need only file a motion to dismiss, advising that the mortgage contract attached to the complaint specifically authorizes the lender to obtain, at its option, any coverage that the

borrower fails to maintain at a cost that may "***significantly exceed*** the cost of insurance that Dergham could have obtained." The borrower's own exhibits will demonstrate that the lender had the contractual right to purchase hazard insurance to cover the lender's property investment until the borrower reinstated her own coverage.

There is no legal authority prohibiting the contractual rights and duties provided in force-placed insurance provisions of modern mortgages, there is no Florida law prohibiting the back-dating of insurance policies to provide full coverage for any prior lapses, and there is no Florida law prohibiting the significant price differential of force-placed insurance, issued automatically without evaluating the risk characteristics of the property. *See e.g. Nat'l Am. Ins. Co. v. Baxley By and Through Baxley*, 578 So. 2d 441, 442-44 (Fla. 1st DCA 1991) (holding that insurance company may grant authority to back date the insured's policy to expiration date of the policy to obtain full coverage). In fact, both back-dating and forward-dating insurance policies is a regular insurance practice. *See e.g. Furlong v. Scrima*, 281 So. 2d 539, 540 (Fla. 3d DCA 1973); *Nat'l Am. Ins. Co.*, 578 So. 2d at 442; *Gilman v. John Hancock Variable Life Ins. Co.*, 2003 WL 23191098, at *2 (Oct. 20, 2003 Fla. 15th Cir. Ct). As a threshold matter, a borrower must have some legal authority to support a claim, otherwise the Court's dockets would be flooded with frivolous and unsubstantiated cases—lawsuits of hair-pulling and name-calling. Since a lender's purchase of a force-placed hazard policy is expressly allowed under most mortgages, the borrower cannot properly state a claim for breach of contract.

Further, the borrower will have difficulty properly pleading damages. Most borrowers allege monetary losses in the form of increased insurance premiums, interest payments, and other charges. These alleged injuries consist of overpriced insurance premiums and the costs associated with a borrower's failure to pay those costs when they became due. However, under most modern mortgages, the borrower has no contractual right to pay less than insurers' rates or to choose the most advantageous policy. In Florida, insureds have "no legal right to pay anything other than the promulgated [insurance] rates" and therefore, cannot suffer "cognizable injury by virtue of paying said rates." *Morales v. Attorneys' Title Ins. Fund, Inc.*, 983 F. Supp. 1418, 1429 (S.D. Fla. 1997) (dismissing insureds' claims for failure to assert an injury in fact).

Accordingly, because a lender does not breach the terms of the modern mortgage contract as a matter of law, and because the borrower cannot allege an actionable injury

(damages), a borrower cannot state an action for breach of contract, and the Courts will likely or should dismiss any complaint based on breach of contract (NOTE: of course, that all depends on the skill of the lawyers involved in the litigation).

A borrower cannot claim an independent breach of covenant of good faith and fair dealing under Florida law for the imposition of force-placed insurance

The Courts cannot sustain a borrower's claim for breach of covenant of good faith and fair dealing as an independent cause of action. As discussed above, a lender imposing force-placed hazard insurance does not violate an express term of most modern mortgages. Because there is no independent cause of action for breach of an implied covenant of good faith and fair dealing under Florida law, the Courts must dismiss a borrower's independent good faith and fair dealing claim.

By way of background, there are two restrictions on causes of action for breach of implied covenant of good faith and fair dealing under Florida law: first, the implied covenant of good faith should not be invoked to override the express terms of the agreement between the parties, and second, a claim for breach of the implied covenant of good faith and fair dealing cannot be maintained absent an allegation that an express term of the contract has been breached. *Ins. Concepts and Design, Inc. v. Healthplan Sers., Inc.*, 785 So. 2d 1232, 1234 (Fla. 4th DCA 2001); *QBE Ins. Corp. v. Chalfonte Condo. Apartment Ass'n, Inc.*, 37 Fla. L. Weekly S395 (Fla. 2012). Both of these restrictions bar a borrower's independent claim for breach of implied covenant of good faith and fair dealing in the circumstances of imposition of force-placed insurance.

First, as discussed above, the express terms of the modern mortgage permit the lender to purchase any lapsed coverage at a cost significantly in excess of the insurance that the borrower could have obtained. The borrower agreed to those express terms by executing the mortgage, and cannot later invoke the implied covenant of good faith to override those express terms. *See Ins. Concepts and Design, Inc.*, 785 So. 2d at 1234 (finding that the implied covenant of good faith should not be invoked to override the express terms of the agreement between the parties).

Second, as discussed above, any allegation in a borrower's complaint that the lender breached the mortgage will be directly refuted by the necessary exhibits to a borrower's complaint, rendering the borrower's express breach allegations meaningless, objectionable, and thus, void. *See Greenwald*, 424 So. 2d at 187. Because the borrower's express breach allegations will have been vitiated, the same borrower's allegations for breach of the implied covenant of good faith and fair dealing cannot be maintained independently. *See Ins. Concepts and Design, Inc.*, 785 So. 2d at 1234 (finding that a claim for breach of the implied covenant of good faith and fair dealing cannot be maintained under Florida law absent an allegation that an express term of the contract has been breached).

Thus, the Courts must dismiss any independent action on force-placed insurance for breach of the implied covenant of good faith and fair dealing. A borrower seeking a remedy for force-placed insurance should look elsewhere. (NOTE: again, this all depends on the skill of the lawyers involved in the litigation).

A borrower cannot state a claim for unjust enrichment for the imposition of force-placed insurance

A borrower's unjust enrichment claim is legally barred under Florida law because an express contract always exists, the lender has paid out for a conferred benefit, and that conferred benefit directly benefits the borrower and only indirectly benefits the lender.

Because an express contract—the mortgage—always exists in the circumstance of force-placed insurance, the equitable remedy of unjust enrichment is not available: Florida law is clear that "a plaintiff cannot pursue an equitable theory, such as unjust enrichment . . . to prove entitlement to relief if an express contract exists." *Ocean Commc'ns., Inc. v. Bubeck*, 956 So. 2d 1222, 1225 (Fla. 4th DCA 2007) (collecting cases); *see also Moynet v. Courtois*, 8 So. 3d 377, 379 (Fla. 3d DCA 2009) ("With regard to the count for unjust enrichment, where there is an express contract between the parties, claims arising out of that contractual relationship will not support a claim for unjust enrichment.").

Additionally, because the lender has *paid out* for the benefit of continuous hazard coverage, the borrower's claim for unjust enrichment is legally unsustainable: "unjust

enrichment is equitable in nature and cannot exist where payment has been made for the benefit conferred." *Gene B. Glick Co., Inc. v. Sunshine Ready Concrete Co., Inc.*, 651 So. 2d 190 (Fla. 4th DCA 1995). Put simply, the borrower received the hazard insurance coverage and the lender has not been unjustly enriched by paying for coverage based on insurance rates filed with the State of Florida. Florida Statutes ensure that insurance rates are not excessive by requiring insurers to file their rates with the Florida Office of Insurance Regulation, which predefines reasonable and unreasonable rates through its approval process. Thus, statutorily removing the lender's ability to purchase unreasonable insurance or breach implied covenants of good faith and fair dealing. § 627.062, Fla. Stat. (2013); *Meruelo v. Mark Andrew of Palm Beaches, Ltd.*, 12 So. 3d 247, 250 (Fla. 4th DCA 2009).

Further, the borrower, by eventually repaying the lender for the insurance premiums now accounted for as debt secured by the mortgage, has not (and will not) confer a direct benefit on the lender, but rather on the insurer. In order to state a claim for unjust enrichment under Florida law, a party must allege that it had *directly* conferred a benefit on the defendant. *See Extraordinary Title Servs., LLC v. Florida Power & Light Co.,* 1 So. 3d 400, 404 (Fla. 3d DCA 2009); *Della Ratta v. Della Ratta*, 927 So. 2d 1055, 1059 (Fla. 4th DCA 2006).

Accordingly, the Courts must dismiss a borrower's claim for unjust enrichment for the imposition of force-placed insurance. Any borrower seeking a remedy for force-placed insurance should look elsewhere, or find an attorney that is well versed in force-placed insurance litigation.

A borrower cannot state a claim for money had and received for the imposition of force-placed insurance

An action for "money had and received" is simply an action for unjust enrichment, "whether one labels it with the terminology of the old common count 'for money had and received' (indebitatus assumpsit) or the more current 'restitution' to prevent 'unjust enrichment.'" *Moore Handley, Inc. v. Major Realty Corp.*, 340 So. 2d 1238, 1239 (Fla. 4th DCA 1976); *Stock Fraud Prevention, Inc. v. Stock News Info, LLC, Slip Copy*, 2012 WL 664381 at p. 10 (S.D. Fla. 2012); *Hall v. Humana Hosp. Daytona Beach*, 686 So. 2d 653, 656 (Fla. 5th DCA 1996). Further, under Florida law, the elements of a claim for unjust enrichment and

"money had and received" are the same. *James D. Hinson Elec. Contracting Co., In.c v. BellSouth Telecommunications, Inc.*, 275 F.R.D. 638, (M.D. Fla. 2011); *Kelly v. Palmer, Reifler, & Associates, P.A.*, 681 F. Supp. 2d 1356, 1359 (S.D. Fla. 2010). Thus, if a borrower's claim fails under the label "unjust enrichment," they must fail under the label "money had and received."

Accordingly, if a borrower wishes to recuperate damages for force-placed insurance, the borrower should use a different legal claim or retain an attorney that is well versed in force-placed insurance litigation.

A good litigation Florida attorney who is experienced in real estate litigation and consumer finance matters should know how to navigate a force-placed insurance lawsuit. As discussed above, force-placed insurance generally cannot be a breach of contract, breach of implied covenant of good faith and fair dealing, or unjust enrichment. However, there are several exceptions, and any borrower or lender handling a force-placed insurance matter should contact a capable attorney.