

IN THE CIRCUIT COURT  
FOURTH JUDICIAL CIRCUIT, IN  
AND FOR NASSAU COUNTY,  
FLORIDA

CASE NO. 04-365-CA  
DIVISION A

KENNETH E. HIGGINS and DEETTE P.  
HIGGINS on behalf of themselves  
and all others similarly situated,

Plaintiffs,

v.

COMMONWEALTH LAND TITLE INSURANCE  
COMPANY,

Defendant.

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**ORDER GRANTING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

Plaintiffs move for certification of a class of persons who allegedly were overcharged for title insurance in connection with refinancing of real property transactions. On February 2, 2010, this Court held an evidentiary hearing and oral argument. The Court has reviewed and considered (a) Plaintiffs' Motion for Class Certification and Memorandum of Law in Support, dated November 5, 2009; the Declaration of Robert J. Axelrod in Support of Plaintiffs' Motion for Class Certification, dated November 5, 2009, and Exhibits 1-23 annexed thereto; (b) Defendant's Memorandum in Opposition to Plaintiffs' Motion for Class Certification, dated December 7, 2009, together with Exhibits 1-41 annexed thereto; (c) Plaintiffs' Reply in Further Support of their Motion for Class Certification, dated January 4, 2010; and (d) the Affidavit of Barbara Rice, dated February 1, 2010, and Exhibits E-O annexed thereto.

Plaintiffs allege two causes of action, one for breach of third-party beneficiary

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contract and the other for unjust enrichment. They charge that the Defendant, Commonwealth Land Title Insurance Company (“Commonwealth”), uniformly, systematically and unlawfully overcharged for title insurance premiums for lender’s title insurance policies on refinance transactions, in excess of premiums mandated by Florida law. Plaintiffs, Kenneth E. and Deette Higgins, state that they and the Class were entitled to a discount title insurance rate known as the Reissue Rate, but were charged a higher title insurance rate known as the Original Rate. They state that the purpose of this action is to provide compensation to tens of thousands of Florida property owners who, like Plaintiffs, had owners’ policies of title insurance on property they owned and were overcharged for lenders’ policies of title insurance when they refinanced.

Under Florida law, the reissue rate must be charged in refinancing transactions for “mortgage policies issued on refinancing of property insured by an original owner’s policy which insured the title of the current mortgagor.” Thus, reissue rate applies to a refinance transaction under these circumstances: (1) a lender’s policy is being sold in the current refinancing transaction; (2) applying to property insured by an original owner’s policy; (3) an original owner’s policy insuring the title of the current mortgagor (the borrower) is in existence; and (4) the agent and the insurer retain a copy of the prior owner’s policy. *See Fla. Stat. § 627.7825(2)(b) (1999-2002) and Fla. Admin. Code R. 69O-186.003(2)(b).*

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The difference has been explained as follows:

In 1999, the Florida Legislature enacted legislation for title insurance premium rates, specifying the amounts to be charged when issuing a new policy (“original rates”) and when reissuing a policy (“reissue rates”). The reissue rates established by the Legislature are substantially lower than the original rates. *See § 627.7825(1), (2), Fla. Stat. (1999); see also Fla. Admin. Code R. 69O-186.003 (providing for the same original rates and*

reissue rates that were codified in subsections 627.7825(1) and (2) of the Florida Statutes from 1999 through 2002). Title insurance companies and their agents are required to charge the rates specified by statute and set by the Florida Insurance Commission.

*Grosso v. Fidelity Nat'l Title Ins. Co.*, 983 So. 2d 1165, 1168 (Fla. 3<sup>rd</sup> DCA 2008).

The pertinent subsection of the statute and promulgated rule regulation provide:

(b) *Provided a previous owner's policy was issued* insuring the seller or the mortgagor in the current transaction and that both the reissuing agent and the reissuing underwriter retain for their respective files copies of the prior owner's policy, the reissue premium rates in paragraph (a) shall apply to:

...

3. Mortgage policies issued on refinancing of property insured by an original owner's policy which insured the title of the current mortgagor.

Fla. Stat. § 627.7825(2)(b) (1999-2002) and Fla. Admin. Code R. 69O-186.003(2)(b).

Title insurance is "insurance of owners of real property or others having an interest in real property or contractual interest derived therefrom, or liens or encumbrances on real property, against loss by encumbrance, or defective titles, or invalidity, or adverse claim to title." Fla. Stat. § 624.608. A title policy protects the insured against loss or damages arising from defects in title to property, such as a lien or other "cloud" on the title to the property which may exist at the time the property is insured. Prior to issuing title policies, title insurers conduct searches of property records to determine that there are in fact no defects, liens, or other claims against the property.

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Through the issuance of such insurance, the title insurer represents the state of the title and warrants its accuracy by providing insurance against any title defects. *See Mitchell-Tracey v. United Gen. Title Ins. Co.*, 237 F.R.D. 551, 553 (D. Md. 2006).

Different types of title insurance cover different interests. An owner's policy is

purchased by the owner to protect the owner's title. In contrast, a lender's policy of title insurance is typically paid by the borrower in a refinancing transaction to protect the lender's security interest in the property. Without lenders' insurance protection, borrowers cannot refinance their property. While an owner's policy of title insurance remains in effect as long as the owner owns the property, the lender's policy remains in effect until the mortgage loan is satisfied.

There is no question that the title insurance industry in Florida is highly regulated, and that the rates are set as a matter of law. Both parties agree that under Fla. Stat. § 627.7825(2) (1999-2002) and Fla. Admin. Code R. 69O-186.003(2) (the identical rule duly promulgated by the Office of Insurance Regulation), title insurance companies and their agents are required to charge the rates specified by statute and set by the Florida Insurance Commission. The parties also agree that the language of the statute or regulation sets forth the conditions under which the reissue rate must be applied. The parties diverge, however, as to the legal meaning of the rule.

In opposing class certification, Commonwealth contends that, in any individual case, it was and is *prohibited* from charging the reissue rate for lender's title insurance unless both the issuing underwriter and the title agent who issues the lender's policy actually retain copies of the prior owner's policy, and that the Plaintiffs cannot demonstrate liability for themselves or any absent member of the class. Def's Br. at 8-9.

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Commonwealth argues that the promulgated rule requires the borrower to produce a copy of her owner's title policy because the promulgated rule directs that the reissue rate can only apply to the face amount of the existing owner's title insurance, and that the undiscounted, original rate must apply to the amount of reissue insurance above the

originally insured amount. Def's Br. at 8-9, citing R. 69O-186.003(2)(c). Thus, in Commonwealth's view, the borrower must produce a copy of her original owner's title policy in order for Commonwealth to be able to correctly price the reissue rate for the new lender's policy. Def's Br. at 9.

Commonwealth argues that this action cannot be maintained as a class action because the Court would be overwhelmed by individualized issues, including whether each individual class member actually presented a copy of his or her owner's policy of title insurance to Commonwealth's representative or its agent, and, if not, whether the refinancing borrower was independently aware of the reissue rate, and whether the title insurer or the agent notified the refinancing borrower about the reissue rate. In particular, Commonwealth contends the common issues are "eclipsed" by the individualized issue of whether the mortgagor knows that she can avoid paying the original rate for lender's title insurance. Def's Br. at 26. The fact-finder, Commonwealth argues, will need to determine what disclosures were made or not made to any one borrower, what efforts the borrower made after learning that she was eligible for the reissue rate, and what efforts each title agent made to investigate whether there was a qualifying prior owner's policy. *Id.* at 2. At the same time, Commonwealth also expressly disclaims any affirmative duty to disclose the reissue rate. *Id.* at 11-12, 28.

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Plaintiffs contend that the plain language of the statute and identical regulation place no presentment burden upon the borrower. Fla. Stat. § 627.7825(2)(b) (1999-2002) and Fla. Admin. Code R. 69O-186.003(2)(b). In their view, Florida law simply directs that the reissue rate shall be applied "provided that a previous owner's policy has been issued." *Id.* Plaintiffs argue that the common and predominant issue in this case is

whether Commonwealth had a non-delegable duty to price the premium rates of title insurance policies, specifically lender's title insurance, in accordance with Florida law, *i.e.*, in accordance with the applicable statute during the time period 1999-2002 and in accordance with the identical administrative code provision from 2002 to the present. Plaintiffs maintain that the Court's interpretation of Florida's reissue rate statute and the identical regulation on this predominant issue will apply to all class members. In short, this common issue can be decided on a class-wide basis by determining the meaning of the promulgated rate rule.

Thus, the issue in contention between the parties is whether it is incumbent on the refinancing owner to present a prior owner's policy to the title insurer or agent. Which interpretation of the law is correct – Commonwealth's position that borrowers are responsible to know the existence of the reissue rate and must volunteer to produce a prior owner's policy or pay the original rate at closing, or Plaintiffs' position that there is nothing in the statute and regulation that shifts the burden of determining the existence of a prior owner's policy to borrowers – is the predominant common issue in this case.

The evidence presented by Plaintiffs indicates that Commonwealth executives conceded under oath that shifting the duty to determine the lawful rate to the borrower, by producing a prior owner's policy so as to be eligible for the reissue rate, finds no support in the law itself. Deposition of LandAmerica Underwriting Counsel John Elzeer<sup>1</sup>

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Elzeer Dep. page 54, lines 1-14 ((Declaration of Robert J. Axelrod in Support of Motion for Class Certification ("Axelrod Decl."), Exh. 7). *See also* Deposition of Senior Vice President and Eastern Regional Counsel F. Linton Sloan, page 67, lines 7-13 (Axelrod

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<sup>1</sup> LandAmerica was at one time Commonwealth's parent company.

Decl., Exh. 8). “[I]f a prior policy existed, the reissue rate applied.” Elzeer Dep., page 51, lines 23-25. George Grubbs, manager of Commonwealth’s direct operations office, testified that if Commonwealth had access to and located the prior owner’s policy the reissue rate would apply. G. Grubbs Dep. page 39, line 20 to page 41, line 9 (Axelrod Decl., Exh. 4).

Commonwealth asserts that a Bulletin issued in 1999 by an affiliate, Lawyers Title Insurance Corp. (LTIC”) (Commonwealth App. 3; Axelrod Decl., Exh. 9) “encouraged” Commonwealth agents to adopt a three-pronged practice of (1) telling borrowers about the potential availability of the reissue rate, (2) documenting the attempt to ask the borrower about a qualifying policy, and (3) having the borrower sign a waiver. Defs’ Br. at 10; Commonwealth App. 3; Axelrod Decl. Exh. 9.<sup>2</sup>

The 1999 Bulletin was issued in “in response to a letter ... received from the Title Insurance Coordinator for [Florida] Department of Insurance.” Defs’ Br. at 10. The Department of Insurance’s correspondence with Lawyers’ Title resulted from a letter from an attorney whose client had not been given the reissue rate. Elzeer Dep., page 31, lines 14-19. The 1999 Letter from Wally Senter, Title Insurance Coordinator for the Florida Department of Insurance (Commonwealth App. 2; Axelrod Decl., Exh. 9), stated:

I believe it is incumbent on an agent or insurer to apply the correct rate and that would include the re-issue rate, if applicable. *The rule is quite clear that the re-issue rate must apply if the transaction falls within the parameters set out in that rule. ... In determining whether or not the re-issue rate applies, I think the agent or insurer should determine if there is a prior policy.* If not, the rate does not apply. ... Please call me if this is not

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<sup>2</sup> In its brief, Commonwealth asserts that it issued the 1999 Bulletin. Commonwealth and Lawyers Title Insurance Corp. (LTIC”) were both previously owned by LandAmerica Financial Group. Both were sold on December 22, 2008 to Fidelity National Financial, Inc., and its underwriting subsidiaries.

clear in our position. Keep in mind that *the rule says the re-issue rate "shall be" the reduced rate. It is not optional.*

Commonwealth App. 2 (emphasis added).

Commonwealth Vice Present and State Counsel Stacey Kalmanson testified as Commonwealth's representative that there was no requirement to follow the Insurance Department's position.<sup>3</sup> Kalmanson Fla. R. Civ. P. Rule 1.310(b)(6) Dep. page 200, lines 6-8. Deposition of Stacy Kalmanson ("Kalmanson Dep.") (Axelrod Decl., Exh. 1).

The author of the 1999 Bulletin was LandAmerica Underwriting Counsel John Elzeer. Elzeer testified that his intent in writing the 1999 Bulletin was to make clear that if a prior owner's policy existed, the reissue rate applied. Elzeer Dep. page 51, line 14 to page 52, line 6 (emphasis added).

Commonwealth's Senior Vice President and Eastern Regional Counsel F. Linton Sloan testified that the title insurance industry collectively decided that it was the borrower who had the responsibility to determine whether a prior policy existed, notwithstanding the Florida Department of Insurance's opinion directly to the contrary. "We took the position and that there was nothing that mandated that to the underwriter, whatever underwriter, title insurance underwriter." Sloan Dep. page 80, lines 1-3 (noting that "we" meant that it was "the position of all the underwriters in the state"); page 80, lines 7-8, page 81, lines 10-12. He noted that the title insurance "industry" disagreed with ~~the opinion, and was dismayed since Senter was usually viewed as an asset to the~~ industry. Sloan Dep. page 57, lines 16-24.

In 2005, Commonwealth issued a Bulletin requiring borrowers to sign a written

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<sup>3</sup> At the time of her deposition, Kalmanson was Florida State Counsel for LandAmerica Financial Group, then Commonwealth's corporate parent.

confirmation that they were advised of the availability of the reissue rate. Commonwealth App. 4; Axelrod Decl., Exh. 10 (Kalmanson Dep., Exh. 8). . Kalmanson drafted the 2005 Bulletin in conjunction with outside litigation counsel, in response to the filing of this and related litigation. Kalmanson Dep., page 213-14. Under the 2005 Bulletin, Commonwealth's direct operations employees and agents were instructed to request a prior owner's policy from the borrower, and to inform the borrower no later than Commonwealth's first contact that providing a prior owner's policy will permit charging the reissue rate rather than original rate. Moreover, the 2005 Bulletin mandated that where the reissue rate might apply, the branch or agent "should conduct a Back Title Search on LandAmerica's AgentXtraNet, if available to the branch or agent, for prior LTIC or CLTIC policies," and that "[i]t is also recommended that the branch or agent search any other title insurance databases available to it that might reveal the existence of a prior policy on the property at issue."

However, Commonwealth may not have followed its own directions. Underwriting counsel James McNabb did not advise direct operations employees or Commonwealth's agents to do anything other than ask the borrower. McNabb Dep., page 47, lines 3-12. When the borrower (or a broker or lender) did not provide the prior owner's policy, Commonwealth went no further. George Grubbs testified that "that's all we can do at that point." G. Grubbs Dep. page 57, lines 16-18. Yet, he conceded that

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Commonwealth could use RamQuest, which went on line in March 2005, to search for the existence of a prior owner's policy issued by any LandAmerica company. G. Grubbs Dep. page 58, lines 10-18. However, there was never any written documentation

requiring any such search or memorializing that direct operations ever did so beginning in March 2005. G. Grubbs Dep. page 59, line 22 to page 60, line 5.

There were no internal audits by Commonwealth concerning the reissue rate prior to the 2005 Bulletin. Kalmanson Dep. page 95, lines 4-7. After the 2005 Bulletin was disseminated, "Quality Assurance" searched for signed acknowledgments in closing files. Deposition of Internal Audit Manager Christopher Patrick ("Patrick Dep."), page 51, lines 2-7; page 58, lines 7-12; page 65, line 16 to page 66, line 12 (Axelrod Decl., Exh. 6). However, these audits did not go back retroactively to review pre-20005 closing files. Patrick Dep., page 68, lines 2-12.

Even the post-2005 Commonwealth audits would simply determine if a notice of availability was in the closing file, and auditors would recalculate rates. Significantly, however, the audit would *not* determine if a lender's policy was issued to a borrower but the original rate was wrongly applied. Patrick Dep. page 76, lines 10-14. Thus, this audit did not determine whether anyone complied with the 2005 Bulletin, or whether anyone complied with Florida's reissue rate law. Even more critically, even where it was determined that the reissue rate should have been given to a borrower, the borrower was *not* notified and Commonwealth gave no refund to the borrower. Patrick Dep. page 72, lines 6-16.

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~~The Affidavit of Commonwealth's Florida State Counsel, Stacey Kalmanson,~~

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asserts that Commonwealth does not control the procedures, forms or manner of operations of its approximately 1,000 title agents, except to the extent that Commonwealth provides standard form policies to be issued. Kalmanson Aff., ¶¶ 12-13. However, evidence submitted by Plaintiffs shows that Commonwealth authorized its

agents to issue and countersign commitments for title insurance policies, and to issue title policies. Kalmanson Dep. page 55, lines 10-13; page 73, lines 11-16 and 17-21; Deposition of Gene Rebadow ("Rebadow Dep.") (Axelrod Decl., Exh. 2) page 16, lines 19-21; page 30, lines 9-15. Agents also collected premiums payable to Commonwealth for title insurance policies. Kalmanson Dep. page 73, line 22 to page 74, line 1; Rebadow Dep. page 30, lines 16-18.

Commonwealth's agents enter into a common agency agreement that provides, specifically, that Commonwealth controls its agents' practices and how they calculate title insurance rates. Axelrod Decl., Exh. 5 [Kalmanson Exh. 2]. Further, the Agency Agreement (Decl., Exh. 5) states: "Upon collection of premiums by agent, *principal shall be deemed the owner of the entire amount thereof and agent shall hold and maintain such premiums as trustee for principal* strictly in accordance with the terms of this agreement." *Id.* (emphasis added). Kalmanson Dep. page 102, line 18 to page 103, line 3, page 103, lines 17-20; Patrick Dep. page 20, lines 14-20.

When the Higgins purchased their Florida property in 1999, they purchased an owner's title policy. Axelrod Decl. Exh. 15. When they refinanced the same property in 2003, they were charged the original rate -- despite the fact that an owner's title policy had been issued to them. Axelrod Decl., Exh. 16, Exh. 17; K. Higgins Dep., page 57, lines 1-16. Cathy Callahan, who had worked at Global Title, the title agency handling the Higgins' refinance, testified that unless a prior title policy was physically attached to the title insurance commitment the agency would simply presume the original rate would apply. It would look no further. Deposition of Cathy Callahan ("Callahan Dep.")

(Axelrod Decl., Exh. 18), page 27, line 13 to page 28, line 6. Global Title took no steps at all to obtain the Higgins' prior owner's policy. Callahan Dep. page 177, lines 8-11.

Commonwealth also argues that some or all of its agents were encouraged at various points to use various information sources in order to find previously issued owners' title policies, although it also maintains that these sources of information were hit-or-miss or otherwise unreliable. Def's Br. at 21, citing Grubbs Dep. At 57-58, 63-65, 67, 72-75; Hyché Aff., ¶ 7; Van Hise Aff., ¶ 8; Foxworthy Aff., ¶ 7. In addition, Commonwealth maintained during the class hearing that Higgins' owner's policy of title insurance had not been issued by Commonwealth, but by First American Title Insurance Co., and therefore could not have been found by the refinance closing title agent. Hearing Transcript, page 102, lines 10-25.

There was evidence presented that Commonwealth's direct operations employees and its agents had numerous sources available to them to determine the existence of a prior owner's policy. Commonwealth's back title policies are scanned and searchable in a database, using keywords. Rebadow Dep. page 25, lines 12-19. One source, called Genesis, included the name of the owner, with some limitations, and permitted searching by the description of the property. Deposition of April Radix ("Radix Dep.") (Axelrod Decl., Exh.12), page 34, line 19 to page 35, line 2, page 36, lines 1-18.

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~~Another source available to direct operations employees is RamQuest, searchable~~  
by property owner, property address, and region. As of October, 2008, there was no region limitation for search of a prior owner's policy. Radix Dep. page 39, lines 16-17. Both Genesis and RamQuest permit searching for prior owner's policies issued by any LandAmerica insurer. Radix Dep. page 61, lines 2-6 (RamQuest would indicate prior

policy), page 37, lines 18-20. TitleWave also would allow search for prior owner's policies. Radix Dep. page 50, lines 14-19.

Commonwealth's employees also testified to additional sources to determine the existence of prior owner's policies. For example, employees could pull a copy of the owner's deed, determine that a title company had issued a prior owner's policy, and could request a prior policy from that title insurer. G. Grubbs Dep. page 63, lines 14-19. Employees could call the company's data system offices and with a policy number could retrieve prior owner's policies. Sloan Dep. Page 110, line 22 to page 111, line 2, page 112, lines 14-17. Agents could call Commonwealth's underwriting counsel, who could then call the same data system office. Sloan Dep. page 115, lines 2-10.

Commonwealth's agents had additional sources available to them to access prior owner's policies. For example, Agent Xtranet permits agents and direct operations employees to search for prior owner's policies. Kalmanson Dep. page 111, line 19 to 112, line 6; Elzeer Dep. page 60, lines 4-7; Rebadow Dep. page 40, lines 17-20 (agents could search for back title policies that had been issued by LandAmerica companies). Agents could also search their own databases, or other databases from other underwriters for which they were also agents. Elzeer Dep. page 60, lines 9-23.

Back Title Policy Index ("BPTIX") also permits search for prior owner's policies.

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~~Deposition of Senior Vice President and General Manager, Agency Services Center,~~

Maury Stokes ("Stokes Dep.") (Axelrod Decl., Exh.13), page 25, line 24 to page 26, line 15; Deposition of Back Title Policy Retrieval Manager, Agency Service Center, Darlene Grubbs ("D. Grubbs Dep.") (Axelrod Decl., Exh.14), page 5, lines 11-13. Darlene

Grubbs testified that “[w]e know that it’s an owner’s [policy] by looking at the image or a mortgage.” D. Grubbs Dep., page 10, lines 1-9, page 28, lines 6-10.

Yet another source, NPCIX, available from 1997, allows searching for prior owner’s policies. G. Grubbs Dep. page 75, line 23 to page 76, line 5; Stokes Dep. page 25, lines 21-23. Such owner’s policies have a separate code in NPCIX. Stokes Dep. page 13, lines 10-15. NPCIX receives policies from agents, and LandAmerica could track which agent a policy is associated with. Stokes Dep. page 5, line 19 to page 6, line 17, page 23, lines 3-6. No warehouse search was necessary; an appropriate query could be made in the NPCIX system. Stokes Dep. page 19, lines 11-17. Before prior policies were available electronically in NPCIX beginning in 1997, they were available in microfilm. There is a computerized index to the microfilmed prior owner’s policies. Stokes Dep. page 23, line 24 to page 24, line 15. Because the index contains policy number and property address, Commonwealth and its agents could search for prior owner’s policies. Stokes Dep. page 24, lines 16-24; page 25, lines 2-20.

Kalmanson’s affidavit stated that not all refinancing borrowers have a qualifying prior owner’s policy. Commonwealth App. 28, ¶¶ 14, 34. While this may be true it does not mean that some borrowers do not have a qualifying policy. Indeed, the 2005 Bulletin states that the reissue rate is “likely to be applicable in a majority of all refinancing transactions.” Commonwealth App. 4 (second page); Axelrod Decl., Exh. 10.

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### **Rule 1.220**

Under Florida Rule of Civil Procedure 1.220, a class action is “maintainable” if the Court determines that the four threshold elements of numerosity, commonality, typicality and adequacy have been satisfied, and for a Rule 1.220(b)(3) class, that

common issues of law or fact predominate, that a class action is manageable, and that it is superior to any other method of adjudicating the controversy. *Seven Hills, Inc., v. Bentley*, 848 So.2d 345, 352 (Fla. 1<sup>st</sup> DCA 2003).

In deciding a motion for class certification, the Court should not determine the merits of the case. *See City of Tampa v. Addison*, 979 So. 2d 246, 252 (Fla. 2d DCA 2007); *OCE Printing Systems, Inc., v. Mailers Data Services, Inc.*, 760 So.2d 1037, 1045 (Fla. 2d DCA 2000) (“matters of proof that go to the merits of the claim are inappropriate when considering class certification”). The only issue is whether Plaintiffs satisfy the four requirements of Fla. R. Civ. P. 1.220(a) – numerosity, commonality, typicality and adequacy -- and the requirements of Rule 1.220(b)(3) – predominance, superiority and manageability. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974).<sup>7</sup>

#### **Numerosity**

Between July 1999 and April 2006, which is only part of the proposed class period, Commonwealth issued 319,744 non-simultaneously issued loan policies. 975 So.2d at 1173. A non-simultaneous loan policy means that a lender’s policy was issued without an owner’s policy. While not dispositive, the Court reasonably infers that this was typically done when there had been a prior owner’s policy issued. Even a fraction of this total is sufficient to satisfy the numerosity requirement. Perhaps for this reason, Commonwealth does not contest numerosity, although the Court has an independent duty to make the appropriate factual and legal findings.

The First District Court of Appeals has noted that “classes as small as 25 have

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<sup>7</sup>Because Rule 1.220 is generally based upon Fed. R. Civ. Pro. 23, Florida courts may look to federal cases for guidance in interpreting Rule 1.220. *Seven Hills, Inc., v. Bentley*, 848 So.2d at 352-53; *Commonwealth Land Title Insurance Co. v. Higgins*, 975 So.2d 1169, 1175 n.5 (Fla. 1<sup>st</sup> DCA 2008).

fulfilled the numerosity requirement.” *Estate of Bobinger v. Deltona Corp.*, 563 So.2d 739, 743 (Fla. 2d DCA 1990). There is no “magic number of claimants to satisfy the numerosity requirement,” and courts are permitted to accept common sense assumptions. *Cohen v. Chicago Title Ins. Co.*, 242 F.R.D. 295, 299 (E.D. Pa. 2007) (citation and internal quotation omitted).

This Court finds Plaintiffs have met their burden of showing, by a preponderance of the evidence, that the proposed class is so numerous that joinder would be impracticable.

#### **Commonality**

In this case, there is one issue of law that is common to all class members: What is the meaning of the reissue rate statute and identical promulgated rate rule? I have explained above the differences between the parties as to the meaning of this rule, as well as the evidence adduced in class discovery demonstrating that Commonwealth’s policies and/or practices that, according to plaintiffs, are contrary to Florida law. The Court is careful to note that it is not deciding this issue on the merits at this juncture.

In addition, the following issues are common to all class members:

1. Whether Commonwealth has a non-delegable duty to price lender’s title insurance premiums in accordance with Florida law;
2. Whether presentation of a copy of an owner’s title insurance policy by the borrower is a condition precedent to the application of the reissue rate;
3. Whether a title insurer can avoid its duty to charge the reissue rate by having the borrower, *inter alia*, sign a notice of availability of reissue rate;
4. Whether a borrower who pays the premium for a lender’s policy of title insurance is a third-party beneficiary of the lender’s policy for the purpose of bringing a

- breach of contract action against the title insurer;
5. Whether Commonwealth breached its contracts with Plaintiffs and the Class by failing to properly apply the reissue rate;
  6. Whether Commonwealth was unjustly enriched by the monies collected from Plaintiffs and the Class by overcharging them for mortgage title insurance premiums; and
  7. Whether Florida law requires Commonwealth to charge the reissue rate for lender's title insurance in a refinancing if an owner's policy of title insurance exists for the same property being refinanced and thereby may be placed in the files of the insurer and agent.

Defendants to not challenge commonality, and I find that resolution of the merits of each of these issues will affect every member of the Class. Accordingly, the commonality requirement has been more than satisfied. Rule 1.220(a)(2) requires only that "resolution of the common issues affect all or a substantial number of the class members." *W.S. Badcock Corp. v. Myers*, 696 So.2d 776, 780 (Fla. 1<sup>st</sup> DCA 1996) (citation and internal quotation omitted); *see also Olen Properties Corp. v. Moss*, 981 So.2d 515, 520 (Fla. 4<sup>th</sup> DCA 2008) ("Appellants argue that different fees were charged for different individuals based on their circumstances, thereby negating any common issue. We disagree, as the issue is not whether the three types of fees were the same, but whether or not Appellants' practice of charging liquidated damages rather than actual damages violated Florida law or whether Appellants were required to credit tenants' accounts with rent it received from re-letting the premises.")

### **Typicality**

The typicality requirement under Rule 1.220(a)(3) "considers the relationship of

the class representatives' claims to the claims of the other members of the class." *W.S. Badcock Corp. v. Myers*, 696 So.2d at 780. Commonwealth argues that the Higgins are not typical of the proposed class because the practices of the Higgins title agent in their refinancing, Global Title, varied over time,<sup>4</sup> and the practices of Global Title would not necessarily be typical of the practices of any other Commonwealth agent or Commonwealth's direct operations.. Def's Br. at 29 n.7.

Commonwealth argues that the variation in disclosure practices over time, from agent to agent and from transaction to transaction, and the variation in the amount of effort expended by any one title agent in failing to locate a prior policy in any given transaction, as well as the fact that the prior issuance of an owner's policy of title insurance was by another underwriter than Commonwealth, renders the Higgins atypical of any other class member.

The Court finds otherwise. The premise of Plaintiffs' claims is that the promulgated rate rule, including the statute, does not provide for a distinction between the practices of title agents; nor does it distinguish between types of property owners. The only relevant distinction in the rule is whether a refinancing mortgagor has a prior owner's policy of title insurance.

The promulgated rate rule has remained the same through the proposed class period. ~~The Higgins, who had an owner's title policy but were not charged the reissue~~  

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rate, are typical of the class. The factual distinctions proffered by Commonwealth, given the language of the rule, would not be meaningful.

Based on the weight of the evidence, the Court determines that the Higgins'

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<sup>4</sup> After 2005, Global Title began to ask borrowers for copies of their owners' title policies. Callahan Dep. at 80-81.

claims are typical of the Class. All claims are based on the same theory that Commonwealth breached its non-delegable duty to price lender's title insurance for refinancing mortgagors in accordance with the reissue rate statute and identical promulgated rule. *Badcock*, 696 So.2d at 780 (“Commencing in July 1990, all Badcock purchasers of consumer goods financed by Badcock were required to pay the non-filing fee based on a form captioned ‘Badcock Easy Purchase Plan Credit Agreement.’ All claims are based on the same legal theory that the non-filing fee was a finance charge which Badcock failed to disclose, thereby committing a deceptive and unfair trade practice and violating the TILA; and all class members seek the same remedy.”) “The claims of the class members and the representative plaintiffs arise from the same course of conduct used by [Commonwealth] in charging the full premium rate when the reissue rate would have applied.” *Scott v. First American Title Ins. Co.*, 2007 U.S. Dist. LEXIS 90987, at \*8-\*9 (D.N.H. Nov. 29, 2007).

The Court also notes that other courts have rejected the argument that agents' varying practices defeat typicality. *See, e.g., Mitchell-Tracey*, 237 F.R.D. at 558 (dismissing argument that local agents defeat typicality as not “remotely persuasive”); *Alberton v. Commonwealth Land Title Ins. Co.*, 247 F.R.D. 469, 477 (E.D. Pa. 2008) (citing cases).

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#### **Adequacy of Class Representation**

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Due process requires that the class representative adequately represent the other class members. *City of Tampa v. Addison*, 979 So.2d 246 (2d DCA 2007). Fla. R. Civ. P. 1.220(a)(4) requires that the Plaintiffs' interests not be antagonistic to the other members of the Class, and that Plaintiffs are represented by counsel of sufficient diligence, experience and competence to vigorously litigate the class claims. *Addison*,

979 So.2d at 253-54. Adequate representation "is met if the named representatives have interests in common with the proposed class members and the representatives and their qualified attorneys will properly prosecute the class action." *Badcock*, 696 So.2d at 780.

Commonwealth does not contest adequacy. However, pursuant to Rule 1.220(a)(4), I must make an independent finding that the adequacy requirement is satisfied. As noted, the Higgins were not charged the reissue rate for lender's coverage in their 2002 refinancing transaction, despite the fact that they had a prior owner's policy.

In his deposition, Mr. Higgins testified that he knew what a class action was, and understood his duties as a class representative. Higgins Dep. page 26, lines 6 to page 27, line 21, page 32, line 3 to page 33 line 1, page 37, line 15 to page 38, line 4. The Higgins were not charged the reissue rate in the 2003 refinancing transaction, despite the fact that they had a prior owner's policy. *Id.*; see Deposition of Deette Higgins ("D. Higgins Dep.") (Axelrod Decl., Exh. 19), page 25, line 25 to page 26, line 22 to page 27, line 3, page 56, lines 7-11, page 122, line 21 to page 123, line 9.

The competence, experience, and ability of the proposed representatives' counsel also must be considered by the Court. Moreover, having reviewed the firm resumes of proposed class counsel (Exh. 20-22), the Court concludes that these attorneys are competent, highly experienced, and able to prosecute the action. These attorneys have represented Plaintiffs since the inception of this litigation. Moreover, the Court notes that

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Pomerantz Haudek Grossman & Gross LLP has served as class counsel in several other litigations of this type, and that other courts have recognized the firm's competence in similar matters. Axelrod Decl., Exh. 20. Mr. Liggio, another of Plaintiffs' counsel, has successfully litigated on behalf of class litigants in insurance matters in the highest courts

of this State. See, e.g., *Freedom Life Ins. Co. of America v. Wallant*, 891 So.2d 1109 (Fla. 4<sup>th</sup> DCA 2004). Based upon the evidence, the Court determines that the Higgins' interests are not antagonistic to those of the class, and that their proposed class counsel is adequate. Cf. *Grosso v. Fidelity National Title Ins. Co.*, 983 So.2d 1165, 1173 (Fla. 3d DCA 2008). The adequacy factor is satisfied.

### Predominance

The common issues identified above are also the predominant issues. The interpretation of the statute and identical promulgated rate applies to every instance where a mortgagor with an owner's policy of title insurance refinanced the property whose title was insured and paid a premium for lender's title insurance that was in excess of the reissue rate. See *Bleich v. Chicago Title Ins. Co.*, 2007-15721-CA-01 (Fla. 1<sup>st</sup> Jud. Cir. May 19, 2009), *slip op.* (Exhibit 22); *Devick v. Attorney's Title Ins. Fund, Inc.*, Preliminary Approval Order ("P.A.O."), dated Aug. 29, 2005; *Evans v. Stewart Title Guaranty Co.*, P.A.O., July 6, 2006; *Hawley v. American Pioneer Title Ins. Co.*, P.A.O., dated Nov. 30, 2005; *Rhodes v. Old Republic National Title Ins. Co.*, P.A.O., dated April 24, 2006; *Thula v. Lawyers' Title Ins. Corp.*, P.A.O. dated Nov. 10, 2005.<sup>5</sup>

The First District Court of Appeals in *Davis v. Powertel*, 776 So.2d 971 (Fla. 1<sup>st</sup> DCA 2000) also addressed similar circumstances: In *Davis v. Powertel*, the Defendant was engaged in the practice of selling brand name cellular phones to its subscribers without telling them that the phones would only work with the Defendant's wireless services. Because the Defendant's deceptive sales practice had reduced the value of every phone it sold, even to those who continued to subscribe to the Defendant's service,

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<sup>5</sup> Copies of the cited Preliminary Approval Orders were appended in a Compendium of Unpublished Materials to Plaintiffs' Reply, dated December 21, 2009.

“plaintiffs’ inability to prove reliance in every case cannot be used to justify a finding that individual issues will predominate over the class claims.” *Id.* See also *S.D.S. Autos v. Lexus of Jacksonville*, 982 So.2d 1 (Fla. 1<sup>st</sup> DCA 2007).

Plaintiffs contend that the reissue rate statute and identical promulgated rule do not impose a presentment requirement on the refinancing mortgagor. Rather, Plaintiffs argue, Florida law requires that the reissue rate be applied where a qualifying owner’s policy of title insurance exists and can therefore be retained in the files of the underwriter and title agent. The Court need not decide what the statute means at this time. The Court need only determine that the issue of whether the Defendant has had a non-delegable duty to price lender’s title insurance properly from July 1, 1999 to the date of this order, and related issues identified above, predominate. No issue of disclosure, reliance, or the varying practices of individual agents requires individualized attention. Plaintiffs have adequately established that there is a predominant issue, applicable to all class members, which the Court need not decide at this juncture, of whether Commonwealth had a non-delegable to properly price lender’s title insurance in accordance with Florida law.

This case is also similar to *Paladino v. American Dental Plan, Inc.*, 697 So.2d 897 (Fla. 1<sup>st</sup> DCA 1997), where the interpretation of the capitation clause of a contract common to all class members “predominates over the other questions of law or fact affecting the individual class members.”<sup>6</sup> *Id.* at 899. See also *Wallant*, 891 So.2d at

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1119 (lower court did not err in certifying class under Rule 1.220(b)(3), “because the common issues that predominate are the enforceability of the dispute resolution provision

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<sup>6</sup> See also *Brodeur v. Dale E. Peterson Vacations, Inc.*, 7 So.3d 567, 569 (Fla. 1<sup>st</sup> DCA 2009) (court in *dicta* opined: “It appears clear to us, based on the trial court’s findings, that the predominant issue will be the interpretation of identical language in contracts between one defendant and many similarly situated plaintiffs.”).

which is common to all class members' policies and the question of whether statutory violations have occurred that should result in monetary recovery for denied and delayed claims. ... [I]t is not inappropriate to certify a class under the circumstances at bar because common issues predominate and subclasses, or other innovative solutions, are available to address any individualized pitfalls. Therefore, because the common issues involving the enforceability of the dispute resolution provision and compliance with statutes, predominate to an extent that minimizes the risks stemming from any individualized damages inquiry required, certification under Rules 1.220(b)(3) was appropriate.”)

Individualized damages issues do not prevent a finding that common issues predominate and may be addressed with a variety of case management tools. *Oulette v. Wal-Mart Stores, Inc.*, 888 So.2d 90, 91-92 (Fla. 1<sup>st</sup> DCA 2004) (outlining variety of post-certification case management tools); *Badcock*, 696 So.2d at 780. The Fourth District Court of Appeals has explained predominance thus:

Class certification becomes inappropriate only when the need to prove damages on an individualized basis will play such a predominant role in the litigation as to *significantly outweigh* any benefits to be gained by a class action lawsuit.

*Equity Residential Properties Trust v. Yates*, 910 So.2d 401, 403 (Fla. 4<sup>th</sup> DCA 2005) (claim that landlord charging fees for early termination and insufficient notice failed to credit tenants charged such fees for rent collected upon re-letting apartment; plaintiffs

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sought certification of class of thousands of persons who had been charged such fees).

“For purposes of class certification, ... liability – not damages – is the focus of the inquiry.” *Id.*, citing *OCE Printing Sys. USA v. Mailers Data Servs., Inc.*, 760 So.2d 1037, 1043 (Fla. 2d DCA 2000). In this regard, the Supreme Court of Florida has held

that a class may be certified as to particular issues, and that the determination of damages issues and pragmatic means of resolving such issues may be deferred until after a class-wide determination as to liability or even more particular issues has been made. *Engle v. Liggett Group, Inc.* 945 So.2d 1246, 1267-71 (Fla. 2006) (defendant's right to jury trial under Fla. Const. Art. I, § 22, not violated by bifurcating trial into several phases, including first phase as to liability, in which jury considered common issues relating exclusively to defendant cigarette maker's conduct and general health effects of smoking).

The Court has reviewed the numerous affidavits and depositions submitted by Commonwealth and finds that while these may indicate that there are individual differences in the details of the transactions involving individual class members, these details do not defeat the predominant issues here, which turn on the meaning of the statute and promulgated rule.<sup>7</sup>

Based on the evidence and the above law, this Court determines that at least one common issue clearly predominates over individual circumstances: Whether Commonwealth had a non-delegable duty to price title insurance premiums in accordance with Florida law. Addressing this issue does not require the Court to determine what each individual borrower knew or did not know or should have known. Commonwealth's actions or inaction with respect to its obligation to apply the reissue

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rate can easily be examined on a class-wide basis, and whether Commonwealth can impose a burden on the refinancing property owner to produce a qualifying owner's

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<sup>7</sup> Commonwealth asks this Court to rely on *Chase Manhattan Mortgage Corp. v. Porcher*, 898 So.2d 153 (Fla. 4<sup>th</sup> DCA 2005). However, the resolution of the issue in that case turned on whether each class member paid her mortgage on time, not on any common issue that would decide the case for all. *Porcher* does not apply here.

policy as precondition for the reissue rate remains a predominant issue. This issue does not require the cross-examination of individual property owners or testimony from multitudes of Commonwealth agents. As a first step, this issue requires only that the Court determine what Florida law requires.<sup>8</sup>

### Manageability

Commonwealth does not contest class certification on the basis of manageability. However, Commonwealth has argued that liability cannot be resolved without investigation of the circumstances of each of many transactions, and the Court disagrees. The evidence discussed above with respect to predominance also indicates that adjudication of the predominant class-wide issues identified here is manageable.

Commonwealth also has argued that its sources of information are unreliable, hit-or-miss. Commonwealth's argument is contradicted by evidence from the *Coordinated Title Cases*. The title insurance companies in the New York *Coordinated Cases*, including Commonwealth, were able to provide the claims administrator with files containing the names and addresses of 649,765 potential class members who had refinanced their properties in New York, and over 1,400,000 potential class members were mailed a notice packet. *See* Affidavit of Patrick M. Passarella, dated August 3, 2006 (Plaintiffs' Compendium of Unpublished Materials). Other evidence of

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Commonwealth's technological capabilities with regard to title policies, databases and search capabilities is set forth at length above.

Commonwealth argues that the class as defined by Plaintiffs is an improper

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<sup>8</sup> The Ohio District Court cases cited by First American, *e.g.*, *Randleman v. Fidelity National Title Ins. Co.*, 2009 U.S. Dist. LEXIS 84431 (N.D. Ohio Sept. 15, 2009), are inapplicable because the rules at issue in that case explicitly precondition the discounted rate on the presentment of a prior policy.

“failsafe” class. However, this Court determines that defining the class in terms of Florida’s statutory criteria under the promulgated rule is sufficient for class adjudication. A similarly defined class was certified in *Bleich*. Slip Op. at 38. “[E]ligibility as a class member here is not dependent upon a legal conclusion.” *Alberton v. Commonwealth Title Ins. Co.*, 2010 U.S. Dist. LEXIS 6650, at \*12-13 (E.D. Pa. Jan. 26, 2010).

### **Superiority**

In this case, the potential size of the class is large, but the individual recoveries are small; there is one predominant issue, resolution of which does not require individualized fact-finding. Class adjudication is clearly superior in such circumstances. This case presents the quintessential scenario for class action treatment. “‘The purpose of the class action is to provide litigants who share common questions of law and fact with an economically viable means of addressing their needs in court.’ *Johnson v. Plantation Gen. Hosp. Ltd. Partnership*, 641 So. 2d 58, 60 (Fla. 1994). It is highly improbable that the class members would have the resources to challenge, individually, [the insurance company’s practice complained of].” *Colonial Penn Ins. Co. v. Magnetic Imaging Sys. I*, 694 So. 2d 852, 854 (Fla. 3d DCA 1997).

This Court notes the recent decision by the Fifth Circuit in *Mims v. Stewart Title*, 2009 U.S. App. LEXIS 26842, at \*21-\*22 (5<sup>th</sup> Cir. Dec. 9, 2009), where the court held that “Class certification is not precluded simply because a class may include persons who have not been injured by the defendant’s conduct.” The Court also notes the recent decision in *Perez v. First American Title Ins. Co.*, 2009 U.S. Dist. LEXIS 75353, at \*18 where the court rejected First American’s contention that an unjust enrichment claim was “inappropriate for class certification because of the need for individual proof of

inequitable circumstances,” and noted that the plaintiffs had made clear that the unjust enrichment claims “flows directly from a determination that they were overcharged for title insurance.” *Id.*

Accordingly, the Court hereby certifies the following class under Fla. R. Civ. P.

1.220(b)(3):

All persons or entities in Florida (excluding governmental entities, Defendant and its employees, agents, present and former parents, subsidiaries, and affiliates) who, from July 1, 1999 to the date of this Order, paid a title insurance premium to Defendant in mortgage refinancing transactions in an amount in excess of that allowed by Florida law as set forth in Section 627.7825 of the Florida Insurance Code, or 690-186.003 of the Florida Administrative Code.

The Court hereby ORDERS that Commonwealth produce the names and addresses of members of the Class (or those who paid for non-simultaneous lender’s policy within this same period, which the Court understands consists of at least 319,774 persons or entities) to Class Counsel within 14 days of the date of this Order. Class Counsel is ORDERED to provide notice to each member of the Class, pursuant to Rule 1.220(d)(2) “who can be identified and located through reasonable effort.” The notice shall include the items enumerated in Rule 1.220(d)(2). Class Counsel shall, by affidavit, inform the Court that notice was provided to members of the Class, and list the names of any class member who requested exclusion. The Court shall not entertain any motion on the merits of this action by any party until receipt of this affidavit.

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**SO ORDERED.**

MARCH 19<sup>th</sup>, 2010  
Fernandina Beach, Fla.



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Hon. Brian J. Davis  
Judge, Circuit Court