

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

CASE NO. 04-78-CA  
DIVISION A

JAMES V. RAFFONE and PATRICIA  
RAFFONE on behalf of themselves  
and all others similarly situated,

Plaintiffs,

v.

FIRST AMERICAN 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 January 28, 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 October 22, 2009; the Declaration of Robert J. Axelrod in Support of Plaintiffs' Motion for Class Certification, dated October 22, 2009, and Exhibits 1-22 annexed thereto; (b) Defendant's Memorandum in Opposition to Plaintiffs' Motion for Class Certification, dated November 23, 2009, together with Exhibits A-Y and AA-GG annexed thereto; and (c) Plaintiffs' Reply in Further Support of their Motion for Class Certification, dated

December 21, 2009.<sup>1</sup>

Plaintiffs allege two causes of action, one for breach of third-party beneficiary contract and the other for unjust enrichment. They charge that the Defendant, First American Title Insurance Company, 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, James V. and Patricia Raffone, 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.

Plaintiffs argue that the common and predominant issue in this case is whether First American 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.

First American argues that this action cannot be maintained as a class action

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<sup>1</sup> Lettered and numbered exhibits cited herein refer to Defendant's and Plaintiffs' Exhibits, respectively.

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 First American'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.

First American contends that Plaintiffs ignore the complexity presented by the actual practices of First American's 1,500 independent title agents. Def's Br., at 9. First American states: "Each agent is free to adopt its own practices for advising borrowers of the potential availability of the reissue rate and for obtaining the copies of prior owner's policies to comply with that rate." *Id.* In that regard, First American has submitted 16 agent affidavits, three affidavits from lenders, and five affidavits from First American direct operations personnel. First American also submitted the Affidavit of Stacey Kalmanson, dated September 19, 2005. Kalmanson is identified as state counsel for LandAmerica Financial Group, Inc., the holding company for Lawyers Title Insurance Corporation and Commonwealth Land Title Insurance Co.

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. First American notes that Florida is one of only three states in the country where the state government promulgates the rates that title insurance companies must charge. 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.

Under Florida law, 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 insurance 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 insurance policies, title insurers conduct searches of property records to determine that there are in fact no defects, liens, or other claims against the property. 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. *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 dispute that, in a typical Florida refinancing, it is the lender or mortgage broker, not the borrower, who typically selects the title insurance agent or title insurance company, and that the lender’s title insurance policy is typically paid for by the borrower as part of the borrowers’ closing costs. According to the deposition testimony of First American’s designated representative, First American Vice President and Eastern Division Counsel, John T. LaJoie, typically there is no contact with the borrower until the

closing. LaJoie Dep. page 111, line 1 to page 112, line 1.

In a refinancing, the borrower is charged for lender's title insurance in the amount promulgated for the issuance of the discounted amount promulgated for the "reissue rate."

The difference has been explained as follows:

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).

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. Thus, the reissue rate must be charged under the conditions specified by the statute and regulation, rather than the original rate or some substantially higher rate that bears no relation to the reissue rate.

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. Deposition of Florida State Counsel Alan B. Fields ("Fields Dep.") (Axelrod Decl., Exh. 7), pp. 44-46; Newton Dep., pp. 44- 45. *See also* Fla. Stat. § 627.7825(2)(b) (1999-2002) and Fla. Admin. Code R. 69O-186.003(2)(b).

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. First American's position is that there is no legal requirement to advise the borrower of the existence of the reissue rate or its requirements, or that anyone other than the borrower has any duty to present a prior owner's policy. LaJoie Dep. p. 75, lines 8-11; p. 81, line 21 to p. 82, line 5, p. 82, lines 19-21; Newton Dep. p. 51, line 25 to p. 52, line 2.

Plaintiffs contend that First American has a nondelegable duty to price its title insurance premiums, including for refinancing transactions, in accordance with Florida law. They state that First American's position shifts the duty to determine the lawful rate to the borrower by requiring the borrower to present a prior owner's policy so as to be eligible for the reissue rate. They offer deposition testimony from First American indicating that the rule does not specify who should or must furnish the prior policy. Newton Dep. p. 63, lines 15-25. There was also testimony that, where First American itself issued the original owner's policy, there was no reason to ask the borrower for it. McQueen Dep. p. 53, ll. 11-20.

First American's agents enter into common agency agreements with First American, memorializing the principal-agent relationship. The agency contract provides that First American controlled their agents' practices and how their agents calculated title insurance rates. Axelrod Decl., Exh. 5.

Under the Agency Agreement, title to the agent's files vests in First American upon issuance of the title commitment or policy. Taulbee Dep. p. 23, lines 20-24; Deposition of Alan Almand ("Almand Dep.") (Axelrod Decl., Exh. 6), p. 30, lines 21-25. First American had the right to access these files whenever necessary. Taulbee Dep., pp. 23-25.

Against this backdrop, the Raffones purchased their Florida property in 1999, and purchased an owner's title policy from First American through agent Alan Almand. The Raffones then refinanced in 2002, with the same title agent, Alan Almand. Almand Dep., p. 16, lines 2-10. The Raffones were charged the original rate for the 2002 refinance, despite the fact that there was a prior owner's policy issued in 1999. Almand Dep., pp. 64-66. At the time, the Raffones' prior owner's policy was still in Almand's files. Almand Dep. p. 66, lines 18-22.

Almand testified in his deposition that, nine months after the 2002 closing, he searched for Raffone in his operating system and determined that a prior owner's policy had been issued in the 1999 transaction. Almand Dep., p. 24, lines 13-22. But he and First American determined that, because he became aware of the existence of a prior owner's policy nine months after the closing, it "wasn't timely at that point" to give the Raffones the reissue rate. Almand Dep., p. 25, lines 2-3; pp. 26-27. Almand testified that, since 2003, it has been easy to recognize a prior customer because of the software in his office, but he does not actually use the software to search for prior owners' policies. Almand Dep., pp. 41-42; pp. 79-80.

First American counters that Almand testified that the Raffones' mortgage broker failed to indicate in a written document that the Raffones had a prior mortgage policy,

Almand Dep., pp. 94-95; and that Almand testified that he commonly did give the reissue rate and asked borrowers for prior owners' policies. Almand Dep., pp. 36, 76, 85. Def's Br., at 15.

A few months after this lawsuit was filed, in 2004, First American Escrow Operations Manager, Teresa McQueen sent a memorandum to all escrow personnel and branch managers in First American's direct operations in Florida. McQueen Dep., at 12, 24, 26, 29. The internal memorandum, entitled "Reissue Credit Notification," was only to its direct operations employees and not to agents. The memorandum instructed the branch offices to provide a Notice of Availability of Reissue Credit to each refinancing borrower, the person who is paying for the title insurance premiums. Axelrod Decl., Exh. 8; LaJoie Dep. p. 105, lines 16 to 21; p. 106, line 22 to p. 107, line 2; p. 109, lines 12-19; p. 119, lines 8-11; p. 129, lines 23-25; McQueen Dep. p. 12, lines 14-16; p. 29, lines 1-3 and 9-24; p. 30, line 24 to p. 31, line 4; p. 35, lines 7-15; Newton Dep. p. 85.

The memorandum stated that "[i]f a customer presents you with a prior policy you must give full reissue credit." It also stated that "[i]f a customer presents you with a prior policy within 5 working days after the closing date you must give a full reissue credit." Axelrod Decl., Exh. 8; LaJoie Dep. p. 111, lines 1-17. This requirement recognized that, as Mr. LaJoie testified, "often you don't see the customer until closing" and that if you ask for a prior owner's policy "it's kind of too late if you're already at closing." LaJoie Dep. pp. 111-112, lines 19-1.

The memorandum also stated that First American's direct operations employees must review and scan enumerated documentation "to see if there is an indication that a prior policy exists." The remainder of the memorandum referenced five sources to

determine the existence of a prior owner's policy in addition to asking the borrower. Prior to the present action being filed, testimony revealed that First American had performed no investigation concerning "whether reissue rates were consistently and properly being applied to First American's customers." McQueen Dep. p. 58-59. First American maintains that the notice of availability of reissue credit is a standard part of First American's document package that its FAST operating system generates for any refinance transaction. Def's Exhs. B, H, U, X. Further, First American maintains that its direct operations personnel are required to follow the 2004 memorandum. McQueen Dep., pp. 74, 83.

However, testimony further indicated that the directive to review and scan the enumerated sources for prior owners' policies was not intended to require any First American direct operations employee to do anything at all if the enumerated sources did exist. This was simply "an effort to comply with a litigation hold that any evidence whatsoever of any nature in a file must be *preserved*" in this case. LaJoie Dep. p. 119, lines 2-3; p. 120, line 24 to p. 125, line 7.

In contrast to its direct operations, First American did not send any bulletins specifically requiring its agents to give the reissue rate to qualifying refinancing mortgagors until December 2006, when it disseminated Bulletin FL-463. Axelrod Decl., Exh. 9; LaJoie Dep. p. 132, lines 8-14; Newton Dep. p. 86, lines 13-18. First American does not dispute that the 2006 Bulletin did not impose any actual requirements on First American's agents; it was merely a series of suggestions, as its witnesses had testified. Fields Dep. page 112 lines 14-18; LaJoie Dep. p. 145, line 15 to p. 146, line 4, p. 146, lines 12-19; Newton Dep. p. 92, lines 8-12; Fields Dep. p. 111-112.

First American maintains that the 2006 Bulletin merely served as a reminder of existing practices, in that the 2006 Bulletin stated that the reissue rate is not optional but mandatory. It also maintains that its title agents are state-licensed, and that its standard agency agreement requires its title agencies to apply state-mandated rates and quotes the reissue rate language.

### **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. *Rollins v. Butland*, 951 So.2d 860, 868 (Fla. 2d DCA 2006); *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>

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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).

### **Numerosity**

By a preponderance of the evidence, the class is so numerous that joinder would be impracticable. First American has issued several hundred thousand non-simultaneous issue lenders' policies during the class period. Although First American contends that non-simultaneous issue lenders' policies are not effective proxies for lenders' policies, two letters from First American's attorneys indicate the existence of tens of thousands of lenders' policies involving refinancings and/or reissue rate policies. Axelrod Decl., Exh. 17. Even a fraction of this total is sufficient to satisfy the numerosity requirement. There is no dispute that most homeowners in Florida in fact have owners' policies of title insurance. Even if some homeowners do not have owners' title policies, as First American asserts, the substantial number of potential class members is sufficient to satisfy the numerosity requirement.

Plaintiffs have provided evidence, based on a sample of First American's closing files, whose images on a CD are in evidence, that roughly a third of more than 180 loan files involving refinancing transactions where First American issued lenders' policies reflected premiums charged to the refinancing borrower that were materially in excess of the reissue rate. Even as to this sample, numerosity is satisfied.<sup>2</sup> *Estate of Bobinger v. Deltona Corp.*, 563 So.2d 739, 743 (Fla. 2d DCA 1990).

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.

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<sup>2</sup> Although Defendant filed a late motion to strike Plaintiffs' summary of the evidence reflected in the files, the Court declines to do so in the exercise of its discretion. In any event, other evidence, cited above, adequately supports this Court's finding of numerosity.

### 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 First American adopted a policy or policies and 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 First American 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 First American breached its contracts with Plaintiffs and the Class by failing to properly apply the reissue rate;
6. Whether First American 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 First American 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.

In this case, 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.” *Id.* First American argues that the Raffones are not typical of the class because title agents' practices vary throughout the state. However, 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 Raffones, who had an owner's title policy but were not charged the reissue

rate, are typical of the class. Even if there were a distinction between the Raffones' claim and those of other class members, given the language of the rule, such a distinction would not be meaningful. Accordingly, Plaintiffs have satisfied their burden of showing typicality.

Based upon the evidence before the Court, the Court determines that the Raffones' claims are typical of the Class. All claims are based on the same theory that First American 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 First American 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).

### **Adequacy of Class Representation**

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.

First American 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 Raffones 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. Raffone testified that he only learned after the 2002 closing that if he refinanced his home and had a prior owner's policy he would be entitled to receive the reissue rate; he did not know this at the time of his 2002 refinance. Raffone Dep. p. 39, lines 4-9; p. 42, lines 21-24. Further, Raffone understands the duties as a class representative and is prepared to satisfy them. Raffone Dep. p. 100, lines 5-6.

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. 19-21), 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 Pomerantz Haudek Grossman & Gross LLP has been at the forefront of class action

litigation for more than 70 years and 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. 19. 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 Raffones' 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>3</sup>

The First District Court of Appeals in *Davis v. Powertel*, 776 So.2d 971 (Fla. 1<sup>st</sup>

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<sup>3</sup> Copies of the cited Preliminary Approval Orders were appended in a Compendium of Unpublished Materials to Plaintiffs' Reply, dated December 21, 2009.

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, "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).

In this case, Plaintiffs contend that the reissue rate statute and identical promulgated rule do not impose a presentment requirement on the refinancing mortgagor. Rather, Plaintiffs argue that 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 title agents requires individualized attention.

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>4</sup> *Id.* at 899. *See also Freedom Life Ins. Co. of America v. Wallant*, 891 So.2d 1109, 1119 (Fla. 4<sup>th</sup> DCA 2004) (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 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)

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<sup>4</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 that: “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.”).

(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 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).

As noted, the Court has reviewed the numerous affidavits submitted by First American 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>5</sup> The Court finds that individual issues do not overwhelm the common

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<sup>5</sup> The Kalmanson Affidavit, which is dated September 2005, states that a “99-04 Reissue Rate” bulletin was sent by Lawyers Title Insurance Corp. to its agents, attaching a “notice of entitlement to reissue rate,” to be signed by the borrower, stating that “the reissue rate is not applicable to this particular transaction.” Exh. J. Although First American contends that this bulletin was received by some of its agents, because some First American agents were also LTIC agents, the Kalmanson Affidavit says nothing about First American. Further, the Court notes that the LTIC bulletin states that: “The title

issues, but rather that the common issues identified above predominate.<sup>6</sup>

Based on the evidence and the above law, this Court determines that at least one common issue clearly predominates over individual circumstances: Whether First American 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. As a first step, this issue requires only that the Court determine, as a matter of law, what Florida law requires. The determination that this issue is predominant does not resolve this issue on the merits. First American's actions or inaction with respect to its obligation to apply the reissue rate can easily be examined on a class-wide basis. Moreover, whether First American can impose a burden on the refinancing property owner to produce a qualifying owner's 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 First American agents.

### Manageability

First American argues that no legal or factual issue can be resolved without investigation of the circumstances of each of many transactions. In particular, First American argues that just to provide notice to the class five separate steps must occur which ultimately require 450,000 mini-trials. Its argument is premised upon its

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insurer or title agent has the responsibility of determining whether a prior policy exists and whether the reissue rate is applicable. ... [T]he reissue rate is mandatory and must be applied if the transaction falls within the parameters of Rule 4-186.003(2)(b)." Def's' Exh. J.

<sup>6</sup> First American 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.

interpretation of the reissue rate statute and rule. However, the predominant issue is whether First American's interpretation of the rule allows it and its agents to require refinancing lenders to present a prior owner's policy. Plaintiffs contend that this interpretation is contrary to the plain language of the statute. The Court finds and determines that the adjudication of this predominant issue is manageable.

First American objected that Plaintiffs' proposed class definition is defective because it has no start or end date, but the Court finds that the Class Period alleged in the Amended Complaint, July 1, 1999 to the date of this class certification order is more than sufficiently clear as to time period.

First American argues that the class as defined by Plaintiffs is an improper "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.

First American also argues that the class cannot be identified from its own records and databases. It proffers the Affidavit of Dr. Strombom, a micro-economist who, Plaintiffs object, is not qualified to provide expert testimony as a forensic database expert. The Court overrules this objection, but finds that the categorical opinions of Dr. Strombom are not credible or otherwise helpful to the Court as both speculative and conclusory. Dr. Strombom merely summarizes conversations with First American executive Edward Oddo, whose deposition testimony was offered as evidence by Plaintiffs. In addition, the testimony of First American executives, including Oddo himself, tends to indicate that First American has far more capabilities with respect to the proposed class than Dr. Strombom states. First American's arguments in this context

have been rejected by other courts in similar cases. *See Perez v. First American Title Ins. Co.*, 2009 U.S. Dist. LEXIS 75353 (D. Ariz. Aug. 12, 2009). Moreover, Dr. Strombom's analysis, opinions and conclusions are not helpful to the Court in that they assume facts unnecessary to a determination of the predominate legal question before the Court, to wit: whether a non-deligable duty exists to appropriately price title insurance and of necessity then to obtain and / or maintain the records necessary to do so.

The evidence provides a strong indication that the adjudication of the predominant class-wide issues identified here is manageable.

#### **Superiority**

Evidence was presented to this Court that First American made special efforts with respect to commercial borrowers, depending on the size of the transaction, to enable the reissue rate to apply, including communications with counsel for the commercial borrower. Moore Affidavit, Exh. M. Large commercial borrowers, according to the Moore Affidavit, are most of the time represented by Florida law firms that are sophisticated in real estate and title insurance. However, this affidavit testimony does not negate that classwide adjudication is superior to individual actions.

The Court also notes that the reissue rate is not applicable in some circumstances, such as where a refinancing property owner acquired land by inheritance or succession in interest, where the insured borrowers are different persons. Aaron Davis Affidavit, Exh. D, ¶ 10. There was also affidavit testimony that it is common for a property owner who has purchased a custom-built home from a developer not to purchase an owner's title policy prior to refinancing. Aaron Davis Affidavit, Exh. D, ¶ 11. Were such a property owner to refinance, the reissue rate would not apply because there would not be a prior

owner's policy. Therefore, and even crediting this affidavit testimony, the fact that such exceptional circumstances are clearly ascertainable and demarcated provides further indication that class-wide adjudication is a superior method of resolving the predominant issue of First American's non-delegable duty to price lender's title insurance in accordance with Florida law.

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."<sup>7</sup> *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 First American produce the names and addresses

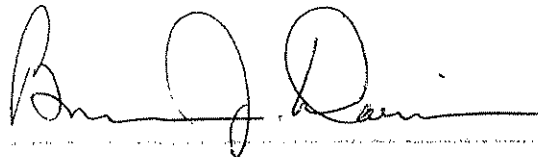
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<sup>7</sup> The Ohio District Court cases cited by First American, e.g., *Randleman v. Fidelity National Title Ins. Co.*, 2009 U.S. Dist. LEXIS 84431 (N.D. Ohio Sept. 15, 2009), are inapplicable because the rules at issue in that case explicitly precondition the discounted rate on the presentment of a prior policy.

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 450,000 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.

**SO ORDERED.**

March 16, 2010  
Fernandina Beach, Fla.



Hon. Brian J. Davis  
Judge, Circuit Court