No. 99377-7

SUPREME COURT
OF THE STATE OF WASHINGTON

SPENCER ALPERT,

Plaintiff-Appellant,

v.

NATIONSTAR MORTGAGE LLC, ET AL.,

Defendants-Appellees.

BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS

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I. INTRODUCTION

United Policyholders (UP) submits this brief as *amicus curiae*. When a homeowner with a mortgage fails to maintain hazard insurance on the mortgaged property, a loan servicer, to protect the loan owner's interest in the collateral, may obtain hazard insurance called "force-placed" or "lender-placed" insurance ("LPI"). Under typical contractual terms between the loan owner, the loan servicer, and the homeowner, the loan servicer may seek reimbursement from the homeowner for the cost of the LPI. The allegations in the action are that servicers are reimbursing themselves at homeowners' expense for costs *not* associated with insuring the loan-collateral property.

Plaintiff Spencer Alpert alleges his loan servicer sought reimbursement for more than merely the cost of obtaining LPI. Alpert alleges that his loan servicer had an arrangement under which the insurer paid consideration back to the servicer—not for any bona fide service but merely as a concession for the servicer's business. Alpert alleges his servicer actually paid less for LPI insurance than the servicer asked Alpert to reimburse, disguising the true cost through an arrangement to pay a stated cost and receive back a separate concession.

In proceedings below, the filed rate doctrine was invoked to prevent Alpert from obtaining a remedy. UP urges this Court *not* to

expand the application of the filed rate doctrine to prevent homeowners from challenging the contractual reimbursement sought by loan servicers.

If true, Alpert's allegations describe an unfair and anticompetitive practice. This Court's stated rationale for the filed rate doctrine does not support applying that doctrine to prevent review of Alpert's allegations directed at the contractual reimbursement he was asked to pay. The ultimate cost of LPI insurance falls largely upon distressed homeowners least able to afford extra charges, let alone extra charges supporting no bona fide service of value. While Alpert ultimately must prove his allegations, he and others like him should not be precluded from challenging in court practices such as he alleges.

II. IDENTITY AND INTEREST OF *AMICUS CURIAE*

Founded in 1991, UP is a non-profit organization that serves as a voice and information resource for insurance consumers in all 50 states. UP is a tax-exempt § 501(c)(3) entity sustained by individual and corporate donations and grants from foundations. Volunteers across the country donate thousands of hours each year to support the organization's work. Through its *Roadmap to Recovery*™ program, UP promotes insurance and financial literacy, and helps individuals navigate the insurance claim process and recover fair and timely settlements. UP has been providing claim and recovery assistance to Washington State

residents for decades, including the 2014 Carlton Complex Fire in Pateros, and the 2020 Labor Day Complex fires in Okanogan and Douglas Counties. Through its *Advocacy and Action* program which includes coordination with Washington Insurance Commissioner Mike Kreidler and his staff, UP helps solve insurance problems by working with public officials, other non-profit and faith-based organizations, and a diverse range of other entities, including insurers and producers.

III. STATEMENT OF THE CASE

In an amended complaint filed in the federal trial court, Alpert alleged that his insurance coverage lapsed on a mortgaged property he owned in Seattle. E.R. at 76.[1] His deed of trust allowed the lender to "obtain insurance coverage, at Lender's option and Borrower's expense." E.R. at 75. The deed of trust stated that in case of Alpert's failure to perform his covenants and agreements, the lender was entitled to "do and pay for" whatever is "reasonable and appropriate" to protect its interest in the property. E.R. at 76.

Alpert alleges that his loan servicer, Nationstar Mortgage, LLC ("Nationstar"), together with a related-party broker, Harwood Servicing

[1] Because the federal trial court dismissed Alpert's claims potentially impacted by the filed rate doctrine pursuant to Fed. R. Civ. P. 12(b)(6), the parties appear not to have conducted discovery on these claims and the record before this Court is accordingly limited to the pleadings.

Company LLC ("Harwood"), obtained LPI on Alpert's property. E.R. at 60. UP assumes for purposes of this brief that the insurers in fact charged to Nationstar the stated rates.

Alpert alleged that the reimbursement Nationstar sought from him included charges that were not for insurance. Alpert alleged that Harwood performed "no substantive functions," but collected "fees normally called 'commissions' which are tied to a percentage of the cost of each force-placed insurance premium." E.R. at 60. Alpert alleged the existence of "[k]ickbacks" which "may also take the form of direct payments, 'expense reimbursements[,]' debtor forgiveness, or discounted administrative services." E.R. at 62. Alpert alleged the existence of sham reinsurance treaties that the insurers purportedly purchased from Nationstar that were, "simply a way to funnel profits" back to Nationstar. E.R. at 72. Alpert alleged that these and other "direct payments" were "disguised as 'commissions' or reimbursements," but in fact served only to allow the insurers to enjoy an "exclusive relationship" with the lenders and loan servicers. E.R. at 63.

While Alpert at times characterized the various payments as resulting in "inflated premiums" or "exorbitant prices," E.R. at 64, he also alleged that the reasons for these increased costs included that Alpert was wrongfully asked to reimburse for costs that were not "strictly for

insurance" because "a portion of the charge to the borrower is not, in fact, for insurance." E.R. at 64-65. Alpert specifically alleged that he was asked to reimburse costs that were not "costs of insurance, and [were] not applied to protecting any demonstrable right or risk related to Nationstar's rights or risk in the collateral." E.R. at 78.

If the above practices are allowed to continue, Alpert alleged, it would result in loan servicers being "financially motivated to utilize the insurer . . . that offers them the best financial benefit in the terms of 'commissions,' direct payments, discounted tracking services, or ceded reinsurance premium." E.R. at 74.

IV. ARGUMENT

A. A Payment from an Insurer to a Loan Servicer Other Than for a Bona Fide Service is Anticompetitive and Harmful to Consumers.

Under the deed of trust, Nationstar was entitled to "obtain insurance coverage" at Alpert's expense, to the extent "reasonable and appropriate." E.R. at 75-76. As a matter of general contract law, "the duty of good faith and fair dealing arises when one party has discretionary authority to determine a future contract term." *Rekhter v. State, Dep't of Soc. & Health Servs.*, 180 Wn.2d 102, 112, 323 P.3d 1036 (2014). The terms of the deed of trust, together with the duty of good faith and fair

dealing, do not support requiring Alpert to reimburse Nationstar more than it incurred *in fact* to "obtain insurance coverage." E.R. at 75.

It is well known—as Nationstar warned Alpert—that LPI is often many times more expensive than coverage available directly to consumers. Regulators have described the LPI market as characterized by "reverse competition."[2] Under "reverse competition," prospective insurers of Alpert's property did not compete against one another by offering lower prices; rather, the insurers "created incentives for [lenders] to buy force-placed insurance with high premiums by enabling [lenders], through complex arrangements, to share in the profits associated with the higher prices."[3] Allowing a loan servicer to steer to itself or a related-party subsidiary an insurance "commission" reflecting no bona fide services potentially allows the servicer to receive a windfall much greater than it receives for merely servicing the loan. In some documented cases, a servicer might make "less than $100 a year" to service a loan on a per-loan basis, but earn $7,000 in LPI commissions—making the servicer better off

[2] "Lawsky Urges Fellow Regulators to Reform Force-Placed Insurance Market," *Insurance Journal*, published April 9, 2013 (available at https://www.insurancejournal.com/news/east/2013/04/09/287749.htm) (last accessed May 10, 2021). The *Insurance Journal* article describes a settlement reached between New York State regulators and the insurance group involved in Alpert's case over arrangements such as those alleged by Alpert allowing lenders to receive consideration back from insurers in LPI transactions.

[3] *Id.*

if the "commissions" are repaid through a foreclosure sale than if the homeowner had been able to continue paying the underlying loan and insurance.[4] An article describing the incentive relationships between insurers and services reported that the insurer group involved in Alpert's case warned in a regulatory filing that the pressure to divert a greater share of premium to large servicers risked "compressing margins."[5]

To the extent insurers provide incentives to servicers offsetting the stated premiums, they are in fact offering the insurance coverage at lower than the stated prices. To the extent servicers are permitted to obtain incentive payments from the stated premiums *and require homeowners to reimburse the stated premiums*, the servicers are incentivized to find higher-priced policies, with better incentive offerings, rather than lower-priced policies. The net result is the opposite of the normal effect of price rebates to the consumer, which are "a form of price competition that should improve efficiency by putting pressure on brokerages to provide better services at lower prices." Robert W. Hahn, Robert E. Litan, and Jesse Gurman, *Bringing More Competition to Real Estate Brokerage*, 35

[4] Stacy Johnson, "Next Bank Scandal? Forced-Place Homeowners Insurance," published Nov. 15, 2010 (available at https://www.moneytalksnews.com/next-bank-rip-off-forced-place-homeowners-insurance/) (last accessed May 10, 2021).

[5] Jeff Horwitz, "Ties to Insurers Could Land Mortgage Servicers in More Trouble," published Nov. 9, 2010 (available at https://www.americanbanker.com/news/ties-to-insurers-could-land-mortgage-servicers-in-more-trouble) (last accessed May 10, 2021).

Real Est. L.J. 86, 107 (2006). When the servicer is entitled to enrich itself at the homeowner's expense—and then have the courts hold under the filed rate doctrine that the homeowner is barred from challenging the servicer's actions—the result is much higher prices for the consumers least able to bear them.

B. This Court's Rationale for the Filed Rate Doctrine Does Not Support Applying the Doctrine to Bar Review of Nationstar's Reimbursement Charges to Alpert.

The incentive arrangements Alpert alleges do not comport with the loan servicer's contractual duty of good faith, Washington's prohibition of "[u]nfair methods of competition," RCW 19.86.020, nor the stated rationales of the filed rate doctrine.

1. To the extent Alpert genuinely disputes the actual amount Nationstar paid for LPI coverage, Alpert's challenge does not implicate the reasonableness of the premium rates approved by the OIC.

Under the filed rate doctrine, "once an agency approves a rate, such as [an] insurance premium, courts will not reevaluate that rate because doing so would inappropriately usurp the agency's role." *McCarthy Fin., Inc. v. Premera,* 182 Wn.2d 936, 938, 347 P.3d 872 (2015). As acknowledged by this Court, there are two rationales for the filed rate doctrine: "(1) to preserve the agency's primary jurisdiction to determine the reasonableness of rates, and (2) to insure that regulated entities charge only those rates approved by the agency." *Id*. at 942

(quoting *Tenore v. AT & T Wireless Servs.*, 136 Wn.2d 322, 331-32, 962 P.2d 104 (1998)).

Assuming for purposes of this brief that the LPI insurers nominally charged Nationstar the rates approved by the OIC, that does not answer the question whether Nationstar *in fact* paid those rates if Alpert's allegations are true that Nationstar received incentive payments back from the insurers. Contrary to Nationstar's arguments, and contrary to the non-Washington authorities it relies on, the price it paid *in fact* is relevant to the reimbursement it was entitled to seek from Alpert under the contractual terms of the deed of trust. In seeking reimbursement from Alpert, Nationstar was subject to the limitation of good faith and fair dealing imposed by Washington law. *Rekhter*, 180 Wn.2d at 112.

Moreover, if, through incentive schemes, Nationstar *in fact* paid a price for coverage less than the filed rate, then Nationstar's actions merely thwart the regulatory process rather than support it. By its stated rationale, the doctrine should not logically protect any scheme to disguise the actual rate being charged to the disadvantage of a third party.

2. The stated rationales of the filed rate doctrine do not embrace incentive payments from insurers to loan servicers.

Washington statutory law imposes a series of requirements on all participants in an insurance transaction which limit the extent to which the

Court can infer a legislative intent to restrict consumer challenges based on the filed rate doctrine. RCW 48.01.030 requires that "all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters."

Moreover, Nationstar dramatically misquotes RCW 19.86.170, claiming it states that the Consumer Protection Act (CPA) "does not apply" to "transactions . . . regulated" under the insurance code. Opposing Br. of Defs.-Appellees at p. 15. RCW 19.86.170 in fact says the exact opposite. It states that "actions and transactions prohibited or regulated under the laws administered by the insurance commissioner ***shall*** be subject to the provisions of RCW 19.86.020." RCW 19.86.170 (emphasis added). The statute goes on to provide that "nothing required or permitted to be done pursuant to Title 48 RCW" shall be construed as a CPA violation. *Id*. The CPA in turn prohibits not only unfair and deceptive acts or practices, but more generally "[u]nfair methods of competition." RCW 19.86.020.

Taken together, the general requirement of good faith in the insurance code together with making insurance transactions subject to the CPA reveals that the legislature cannot have intended the OIC's approval of rates based on a given set of representations, standing alone, to bar

consumers from challenging otherwise fraudulent, unfair, or deceptive schemes merely because they implicate approved rates.

Nationstar's own explanation of the rationales supporting the filed rate doctrine all are absent from the scenario Alpert alleges. Nationstar identifies four grounds supporting the filed rate doctrine. *See* Opposing Br. of Defs.-Appellees at p. 16 n.1 (citing *Keogh v. Chicago & Northwestern Ry. Co.*, 260 U.S. 156 (1922)). These four grounds show the filed rate doctrine should not bar Alpert's claims that Nationstar *in fact* obtained LPI coverage at a lower price than it sought to charge him:

(1) In *Keogh*, the complainant "had a remedy" before the administrative body approving the rate. Opposing Br. of Defs.-Appellees at p. 16 n.1. In contrast, Alpert has no remedy through OIC if Nationstar demands reimbursement in excess of its actual costs. The contractual deed of trust governing Alpert's obligations to Nationstar is not an insurance contract, contains no transfer of risk, and is not subject to the OIC's authority. *See* RCW 48.01.040 (defining "insurance").

(2) In *Keogh*, a successful suit would have resulted in a preferential rate for the individual claimant, thwarting Congressional intent to have uniform rates. By contrast, success by Alpert in establishing that Nationstar paid less for LPI than it charged him would not undermine any stated legislative intent for a particular uniformity in any rate. If there is

legislative intent for rate uniformity, it would be undermined by an incentive scheme allowing insurers to disclose one rate and charge another, with loan servicers benefitting from the difference. Resorting to the filed rate doctrine to prevent Alpert from disputing the rate Nationstar *in fact* paid only undermines legislative intent.

(3) In *Keogh*, measuring damages would require a re-calculation of rates that was in the province of the regulator. But one formulation of Alpert's allegations is that he does not challenge the nominal rate the insurers charged to Nationstar, as opposed to its costs *in fact* that it seeks to have reimbursed pursuant to the deed of trust. It is possible to determine that Nationstar received an incentive payment as a price rebate without ever reevaluating the OIC analysis of the original filed rates. It may be that the stated rate was reasonable, and even *per se* reasonable. It does not follow as a matter of Washington contract law that Nationstar could recover that amount from Alpert if Nationstar did not *in fact* pay it.

(4) Finally, in *Keogh*—critically—because Keogh was a shipper it could simply pass along the tariff rates to its own customers. *See* Opposing Br. of Defs.-Appellees at p. 16 n.1. Alpert cannot do this. At bottom, Alpert is at the mercy of the price of the insurance Nationstar decided to obtain. General contract law, as well as the legislative intent of the Washington insurance code and the CPA, speak in terms of good faith

and abstention from unfair or deceptive practices. Nothing about Washington law supports the conclusion that Nationstar was entitled to demand that Alpert pay a sham price when in reality Nationstar was paying a lower price through artful schemes designed to return a portion of that price to itself. Washington's filed rate doctrine does not contemplate Nationstar charging Alpert more than it *in fact* paid for LPI.

V. CONCLUSION

UP respectfully asks the Court to limit its application of the filed rate doctrine to avoid preventing Washington homeowners from challenging the prices lenders and loan servicers *in fact* pay and demand to be reimbursed when obtaining LPI.

RESPECTFULLY SUBMITTED this 10th day of May, 2021.

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CERTIFICATE OF SERVICE

I, Kris P. Bartlett, certify that on the date below, I caused a copy of the foregoing document to be served via the Supreme Court File Upload Manager, on the individuals identified below:

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