

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

BANK OF AMERICA, N.A., a national banking association,

Plaintiff,

vs.

Old Republic Insurance Company, a Pennsylvania corporation,

Defendants.

Case No.: 3:10-cv-553

COMPLAINT FOR:

- 1) DECLARATORY JUDGMENT**
- 2) BREACH OF CONTRACT**
- 3) BREACH OF THE DUTY OF GOOD FAITH AND FAIR DEALING**
- 4) BAD FAITH**

DEMAND FOR JURY TRIAL

Plaintiff Bank of America, N.A. (“BANA”), by its undersigned counsel, brings this action against Defendant Old Republic Insurance Company (“Old Republic”), and in support thereof, alleges as follows:

I. NATURE OF THE ACTION

1. For reasons unrelated to the coverage provided by its insurance policy, Old Republic has denied and continues to deny hundreds of millions of dollars in valid mortgage insurance claims submitted by BANA, based on unreasonable interpretations of the language contained in the standard mortgage insurance policy issued by Old Republic to BANA. BANA seeks to recover these wrongfully withheld payments from Old Republic.

2. This is a civil action with respect to an actual controversy for declaratory relief, brought pursuant to 28 U.S.C. § 2201(a), relating to a second-lien mortgage insurance policy issued by Old Republic, damages arising out of Old Republic’s breach of its contractual obligations to pay losses under the terms of that mortgage insurance policy, damages arising out of Old Republic’s breach of the implied covenant of good faith and fair dealing, and Old Republic’s bad faith refusal to pay thousands of individual claims for which it did not have a

reasonable basis to deny its payment obligation to BANA.

3. In more prosperous times, Old Republic reaped hundreds of millions of dollars through its participation in the home mortgage market, selling mortgage insurance policies to insure against losses to lenders, such as BANA, in the event of default by borrowers of certain residential mortgage loans. Old Republic now, however, faces the reality of steep financial losses because of a significant economic downturn and has failed to pay claims in accordance with the mortgage insurance policy that it issued and for which it received more than \$40 million in premiums from BANA alone.

II. THE PARTIES

A. The Plaintiff

4. BANA is a national banking association organized under the laws of the United States of America with its main office, as set forth in its articles of association, located at 101 Tryon Street, Charlotte, North Carolina 28255. BANA originated and acquired mortgage and home equity loans, including the loans insured by Old Republic that are the subject of this suit. BANA is the Assured on the mortgage insurance policy at issue in this action.

B. The Defendants

5. Old Republic is a corporation incorporated under the laws of the Commonwealth of Pennsylvania, maintains its principal place of business outside of North Carolina, and regularly transacts business in the State of North Carolina. Old Republic is in the business of issuing mortgage insurance policies for residential home mortgage loans and is a sophisticated market actor in this area. Old Republic Insured Credit Services, Inc. (“ORICS”) acted as the agent of Old Republic, and had the authority to underwrite, negotiate, price and issue mortgage insurance policies on behalf of Old Republic. Old Republic is liable for any and all acts and omissions of ORICS as Old Republic’s agent. Old Republic and ORICS will be collectively referred to as “ORIC” hereinafter, unless individual reference to Old Republic or ORICS is warranted.

III. JURISDICTION AND VENUE

6. This Court has diversity jurisdiction pursuant to 28 U.S.C. § 1332(a), as there is complete diversity of citizenship between the parties, and the amount in controversy exceeds \$75,000, exclusive of interest and costs.

7. This Court has personal jurisdiction over ORIC by virtue of its business activities within North Carolina.

8. Venue is proper in the Western District of North Carolina pursuant to 28 U.S.C. § 1391, as a substantial part of the events giving rise to this Complaint took place in Charlotte, North Carolina.

IV. THE MORTGAGE INSURANCE POLICY

9. BANA purchased a second-lien mortgage insurance policy from ORIC to insure certain home equity loans (“HELOANs”).

10. Although the ORIC policy at issue in this litigation is termed a Credit Insurance Policy, it functions as a mortgage insurance policy in that ORIC agreed to insure BANA for losses in the event of default by borrowers of certain residential mortgage loans.

11. BANA insured its HELOANs in groups based upon policy years subject to the terms and conditions of Mortgage Insurance Policy No. T90 (the “Policy”). A true and correct copy of the Policy is attached hereto as Exhibit A.

12. The original loan amount and maximum cumulative liability per policy year is as follows:

Policy Year	Original Loan Amount	Maximum Cumulative Liability
2002	\$ 174,717,548	\$ 17,471,754
2003	\$ 300,053,364	\$ 30,005,336
2004	\$ 264,379,634	\$ 26,437,963
2005	\$ 359,551,095	\$ 35,955,109
2006	\$ 503,866,763	\$ 50,386,676
2007	\$ 623,716,762	\$ 62,371,676

13. The Policy has an aggregate maximum cumulative liability in excess of \$220 million for all six policy years.

14. BANA, as the Assured, has paid ORIC more than \$40 million in premiums for the Policy.

15. BANA has further performed all material conditions, covenants, and promises required to be performed in accordance with the terms and conditions of the Policy, and is and has been at all times, ready, willing, and able to perform any and all conditions required to be performed in accordance with the terms and conditions of the Policy. To the extent BANA has not substantially complied with the terms and conditions of the Policy, then ORIC waived and/or is estopped from asserting such a defense given that its actions and course of conduct have been inconsistent with an intention to enforce requirements under the Policy.

V. FACTUAL BACKGROUND

16. BANA at all relevant times had substantial business in home equity lending throughout the United States. ORIC at all relevant times has been in the business of issuing mortgage insurance policies for residential home mortgage loans and is a sophisticated market actor in this area.

17. ORIC sold the Policy to BANA and in return received substantial premiums, totaling in excess of \$40 million, which premiums are continuing at a rate of more than \$870,000 per month. Under the Policy, ORIC agreed to insure against losses to BANA in the event of default by borrowers of certain residential mortgage loans.

A. Mortgage Insurance Industry

18. Over the last decade, BANA was a leading home equity lender in the United States. As part of that business, BANA established strategic business relationships with mortgage insurance companies, including ORIC, which were essential to its success in its mortgage business.

19. During this period of time, there was great competition in the mortgage insurance market and ORIC engaged in an aggressive marketing campaign to convince businesses such as BANA to purchase its mortgage insurance products and services. In its marketing brochures and on its website, ORIC advertised how it could assist lenders by insuring their loan portfolios,

increasing their ability to write more and more loans and, therefore, increasing profitability. ORIC stated that it “provides lenders with the tools necessary to enhance loan portfolio performance and profitability,” and that it insured “property related consumer loan portfolios against default loss for virtually any reason.” ORIC stated to its prospective customers that, by using its products and services, lenders could (1) “increase loan volume”; (2) “increase yield performance”; (3) “increase interest income”; (4) “increase borrower satisfaction”; (5) “decrease losses due to borrower default”; (6) “decrease costs associated with originations and foreclosures”; and most importantly (7) “decrease losses due to unforeseen economic circumstances.” (Emphasis added).

20. According to ORIC, since 1954 it has provided more than 3600 financial institutions, or “lending partners” with “credit enhancement programs that expand the lender’s second mortgage production and performance.” In order to accomplish this, ORIC urged that through the use of mortgage insurance, lenders could issue more loans. Lenders could “empower” their loan officers to “easily up-sell or cross-sell,” and to build loan portfolios with borrowers they “previously turned away.” Lenders could do so because ORIC promised that, when the lender decided that a loan was uncollectable, “it becomes our expense not yours. We pay you the loan amount at time of default and you have the power to immediately reinvest your funds. Your yield is enhanced with your insured loan portfolio; your collection processing is outsourced and your interest income is protected.”

21. ORIC explained the process as follows: “You make the loan under your credit guidelines, then you partner with [ORICS] to manage your risk exposure—it’s easy as 1-2-3:

1. You place your second mortgage loan in your [ORICS] program
2. You assign to [ORICS] any insured loan that defaults, when your normal collection procedures are unsuccessful (foreclosure not required)
3. You receive a check from [ORICS] to pay the loan off—in full.”

22. In other words, according to ORIC, “you have *no aggravating foreclosures* that waste your staff’s time . . . which can be better spent generating new loan business . . . and funds

are immediately redeployed to other profitable lending relationships.” Through this “risk partnership,” lenders can “minimize economic downturns and maximize” their “insured loan portfolio yield.”

23. During the course of the growth and development of BANA’s business, BANA regularly and routinely interacted with ORIC at all levels of business, ranging from senior executives discussing their strategic business relationship to clerk-level employees dealing with individual mortgage loans.

24. ORIC had substantial access to the details and procedures pursuant to which BANA operated its mortgage business. In fact, ORIC regularly: (i) reviewed individual mortgage loan data before loans became insured under a particular mortgage insurance policy and suspended some mortgage loans from coverage upon review; (ii) audited mortgage loans included in the pool insured by the policy and notified BANA if certain eligibility criteria was exceeded, causing BANA to pull loans after making premium payments; (iii) audited mortgage files after loans were originated but before any default had occurred; and (iv) handled numerous claims for insurance coverage under mortgage insurance policies over the years.

25. Over the years in which their business relationship has existed, ORIC acquired intimate knowledge of every aspect of BANA’s mortgage business, including how BANA structured mortgage transactions and underwrote individual loans, how loan underwriting guidelines evolved over time, and all other practices and procedures BANA followed in its mortgage business.

26. These regular interactions between BANA and ORIC occurred over the entire course of their business relationship. ORIC had access to detailed and comprehensive loan information from BANA.

27. In addition to having a sound understanding of how BANA operated its mortgage business, ORIC understood first-hand the risks associated with the mortgage lending business, given that ORIC insured many other mortgage lenders.

28. Over the last decade, the mortgage industry as a whole, including the mortgage insurance industry, began to offer and/or agree to insure a broader range of mortgage products. The trend made more loans available, increased consumer choice, and fostered increased homeownership. This evolution was common knowledge throughout all facets of the mortgage lending marketplace, including among the mortgage insurance industry generally and ORIC specifically. It also was discussed in both the mortgage trade press and popular media. The mortgage insurance industry, including ORIC, saw itself as an important player in the goal of making homeownership attainable to more and more people.

29. As the volume of mortgages being originated increased, the availability of mortgage insurance for this increased volume was never an issue. Members of the mortgage insurance industry, including ORIC, generated premium volumes substantially in excess of historic levels based upon this growth in the mortgage market.

30. Changes in the mortgage industry and the concomitant underwriting practices were publicly reported and well-known within ORIC. In SEC filings, BANA and other lenders insured by ORIC emphasized that underwriting guidelines took into account prevailing conditions in the residential market, new mortgage products and the investment market for residential mortgage loans. As far back as 2004, trade publications and even the popular press reported on lending practices and noted the evolution of underwriting guidelines across the entire mortgage lending industry.

ORIC's Selection of Insured Loans and Review of Selected Loans After Issuance of the Policy

31. BANA insured only a percentage of the loans it originated. ORIC was fully aware of this fact and jointly participated with BANA in selecting the loans that would be insured.

32. ORIC participated by: (i) establishing the parameters into which a loan must typically fit to qualify to be insured; and/or (ii) reviewing the details of the individual loans and

agreeing that a specific individual loan was appropriately insured under a particular policy. Then, ORIC determined the premium to which it was entitled and which BANA paid.

33. BANA provided to ORIC the same set of loan-level data for each submission of new eligible collateral on “mortgage data tapes” including numerous data fields concerning each of the individual loans that ORIC would insure. The documentation provided by BANA contained specific details regarding each loan, including the loan processing type, note rate for first and second lien, the loan closing date, CLTV ratio, FICO score, debt ratio, type of occupancy, type of property, purpose of the loan, location of the property, appraisal type, appraisal amount, loan amount, principle balance, first-lien principal balance, monthly loan payment and monthly income.

34. ORIC had an opportunity to review reasonable loan documentation and the right to choose which loans it would insure prior to and after issuing the Policy. It did both often.

35. Generally, after ORIC reviewed the “mortgage data tape” information, it would communicate with BANA regarding ORIC’s analysis of the population of the loans that had been submitted as candidates to be insured under a particular policy. ORIC representatives would contact BANA with data-related questions on a few loans in each file and provide feedback regarding which loans ORIC felt comfortable insuring.

36. If ORIC deemed a loan as not meeting its risk tolerance, BANA’s guidelines for issuing loans or the applicable terms and conditions pursuant to which it had agreed to insure loans under the Policy, ORIC could and would request removal of that individual loan from the pool of loans insured even if BANA had previously paid one or more premium payments on the loan to ORIC.

37. In response to ORIC’s analysis of the loan population, BANA would research the loans and/or data questioned by ORIC and either reaffirm BANA’s decision to include to the loan in the pool or confirm ORIC’s finding. Depending on the outcome of BANA’s research, BANA would either drop the subject loan or include the loan in the population for insurance.

38. Consequently, often before ORIC agreed to insure a pool of loans ORIC had (a) explicitly affirmed that it was satisfied with the inclusion of all of the selected loans in the pool and/or (b) required numerous loans to be removed from the pool. ORIC also had the opportunity to review the pool of loans after issuance of the Policy and request certain loans be removed or substituted even if BANA had remitted one or more premium payments to ORIC.

39. ORIC not only obtained detailed and comprehensive information from its dealings with BANA, it also obtained massive amounts of information from its relationships with other lenders. In marketing materials posted on its website during the relevant time period, ORIC touted how it had “partnered with over 3000 lenders since 1954” and how it had “helped originate billions in new loans.” A brochure published by ORIC stated, “Since 1954 we have helped over 3600 lenders successfully build their portfolio yield and originate billions of dollars in new loans.” ORIC further stated that it was able to keep costs down because it covered “such a large volume of consumer loans in all regions of the country.”

40. Through its “partnering” arrangements with thousands of lenders for over 50 years, ORIC undoubtedly has vast stores of information and data regarding the mortgage lending industry, far more information than any individual lender might possess. Among the material that ORIC has obtained is detailed information about each lender’s underwriting guidelines. Indeed, ORIC stated in its marketing materials that it worked with each lender’s underwriting guidelines to “establish a premium structure that is tailored” to the individual lender’s “operation.” Accordingly, ORIC has been privy to underwriting guidelines from thousands of lenders and has seen the development of underwriting practices and procedures since at least 1954.

41. In its marketing materials, ORIC stated that it uses its vast experience to assist its “partners” in avoiding risk. According to ORIC, its “seasoned underwriters” review lender portfolios “to spot quality trends before they negatively affect delinquency—recommendations are provided to help [lenders] correct problem trends and maximize insured portfolio development, in the most efficient ways possible.”

42. Despite all of ORIC's experience and information and its commitment to use its experience and information to help their customers avoid risk, ORIC did not make significant recommendations to BANA or identify problems that might negatively affect delinquency. Rather, ORIC audited BANA's loans and underwriting practices and affirmatively approved of them. ORIC never expressed significant concern to BANA about its underwriting practices until after the market collapsed and claims started to be made at an increasing rate. As long as the market remained relatively strong, and claims levels remained moderate, ORIC was happy to collect premiums on loans that were made based on existing underwriting practices, about which it was fully aware. Indeed, up until the time that the real estate market collapsed, ORIC was touting how it could help lenders "maximize . . . lending capabilities so that *lending opportunities are not missed*—by expanding" underwriting guidelines so that lenders could "book business otherwise left on the table." (Emphasis added).

43. Prior to the recent decline in the national residential real estate market, ORIC expressed its continued satisfaction with the manner in which BANA performed its underwriting of residential mortgages pursuant to an audit of a sampling of BANA's insured portfolio. For example, by letter dated December 28, 2006, ORIC reported to BANA that it had reviewed "a sampling of [BANA's] insured portfolio in order to summarize how it compares to the success of like Old Republic insured portfolios." ORIC stated that, after the review, it "felt that the underwriting was satisfactory and [sic] pleased with the results. [ORIC is] happy with the partnership developed with Bank of America and look forward to a continued relationship."

C. The National Housing Decline and "Mortgage Crisis"

44. As is now common knowledge, the once-booming housing market collapsed. ORIC continued to express satisfaction with BANA's underwriting practices even after the real estate market and mortgage business headed into crisis. As home-price appreciation continued to slow in certain markets, by early 2007 lenders selling subprime loans found it more difficult to sell those loans into the secondary markets, and some of those lenders downsized or failed. By late summer 2007, the secondary market that had existed for securitized mortgage loans (whether

subprime or prime in nature) largely dried up. Moreover, throughout 2007, real estate prices flattened and then began to decrease nationally in the first national home-price depreciation since the Great Depression, leading to substantial increases in default and foreclosure rates. Active participants in the real estate and mortgage markets, including ORIC, were well aware of these market conditions, and the popular press was full of news of a “mortgage crisis.”

45. The United States spiraled downward into a deep economic recession. The aforementioned decreases in home prices resulted in many homeowners finding themselves in a position of negative equity, *i.e.* these borrowers had debt higher than the value of the property. In addition to the collapse of the real estate market, employers have downsized, eliminating millions of employees as well as decreasing existing employees’ salaries. According to the United States Labor Department, the unemployment rate rose to over 10% in October 2009.

46. As a result of the factors above and other economic factors, the United States experienced a dramatic increase in the rates of defaults on residential mortgage loans. The increase of defaults is not limited to loans originated by BANA but is a phenomenon occurring nationwide that has impacted all mortgage lenders. This risk of default is exactly the type of risk ORIC agreed to insure.

D. Proper Submission of Claims For Coverage By BANA

47. Given the historic level of defaults nationwide, the number of claims submitted to ORIC by BANA for loans in default increased.

48. Loans insured under the Policy have been and continue to be in default, as that term is defined in the Policy. Defaults for loans insured by the Policy are expected to continue for some time.

49. Pursuant to the terms and conditions of the Policy, BANA timely notified ORIC of the loans insured under the Policy that were in default.

50. Pursuant to the terms and conditions of the Policy, BANA timely submitted a claim and proof of loss for the loans insured under the Policy that were in default.

51. The claims and proofs of loss that BANA submitted for the loans in default include documentation that complies with applicable terms and conditions of the Policy.

E. ORIC's Wrongful Claims Handling

52. Since the collapse of the real estate market, ORIC has unreasonably denied coverage, as evidenced by its claims-handling positions.

53. ORIC has denied claims for reasons that are unsubstantiated under the terms and conditions of the Policy. Despite ORIC's experience in this business, its transparent access to BANA's mortgage business information, and its review and re-review of substantial documentation related to the loans, ORIC now claims it somehow did not understand the risk involved in the Policy or the underwriting on the subject loans.

54. For example, ORIC has denied claims and threatened that it will seek to deny or rescind coverage for individual loans based on, among other things, improper post-loss underwriting (*i.e.*, attempting to avoid the very obligations it willingly undertook now that the risks it voluntarily underwrote became manifest) and purported but unsubstantiated borrower misrepresentations in the loan origination materials in the hopes that it can avoid its obligations under the Policy.

55. Now that the economy is in a deep recession and the number of defaults has increased, ORIC is seeking to blame BANA for the risks ORIC knowingly underwrote and to run from coverage. Before the market turned, ORIC benefitted from the expansion of the business and substantial premiums paid to it by BANA and others in this market. The fact that ORIC is now having to pay on claims it agreed to insure is no reason to seek to avoid its obligations.

56. ORIC willingly underwrote the Policy and marketed it under the premise that it would allow BANA to minimize its risk.

57. ORIC is now manufacturing excuses for its failure to pay valid claims and seeking to blame BANA for problems that are endemic to the economy as a whole. ORIC's actions are a transparent effort to shift the consequences of insured risks it has agreed to accept,

risks that result not from any actions of BANA but from the unforeseen deterioration in the real estate market across the country.

58. Between 2009 and 2010, claims paid by ORIC under the Policy fell by 75%, with no indications from ORIC as to the reason for the dramatic decrease.

59. In more prosperous times, ORIC reaped hundreds of millions of dollars through its participation in the home mortgage market by selling mortgage insurance policies. In fact, ORIC has received in excess of \$40 million in premiums from BANA alone for the Policy at issue in this litigation, which premiums are continuing to be paid at a rate of over \$870,000 per month. Now, however, ORIC faces the reality of steep financial losses – hundreds of millions of dollars – because it has to pay on the insurance it issued.

FIRST CAUSE OF ACTION: DECLARATORY JUDGMENT

60. BANA hereby repeats and incorporates by reference paragraphs 1 through 59 as if fully set forth herein.

61. ORIC received all premiums due under the Policy. All of the other terms, provisions, and conditions precedent of the Policy have been complied with.

62. BANA has timely submitted claims and proofs of loss for losses due to defaults by borrowers in the repayment of loans. In submitting these claims and proofs of loss, BANA has substantially complied with all terms, provisions, and conditions of the Policy.

63. To the extent BANA has not substantially complied with terms, provisions, and conditions precedent of the Policy, then ORIC waived and/or is estopped from asserting such a defense given that its actions and course of conduct have been inconsistent with an intention to enforce requirements under the Policy.

64. As alleged above, ORIC agreed under the terms and conditions of the Policy to insure that the borrowers for each of the residential mortgage loans made payment of principal and interest and in the event of borrower default, to pay the amounts of such default to BANA so it would be made whole on losses.

65. Actual and justiciable controversies presently exist between BANA and ORIC

concerning ORIC's obligations to pay for losses due to defaults by borrowers, pursuant to the terms of the Policy, within thirty (30) days after presentation of satisfactory evidence of loss to ORIC through claims and proofs of loss that substantially complied with all terms, provisions and conditions of the Policy.

66. For example, ORIC engages in post-loss underwriting, using evidence beyond that required by BANA's underwriting guidelines and acquired by ORIC after the fact, to assert that alleged misrepresentations at the time of loan origination justify rescission of the Policy with respect to that loan. BANA, in contrast, asserts that rescission is not justified where the loan was approved in accordance with BANA's underwriting guidelines.

67. ORIC has also asserted its right to deny or rescind coverage for specific loans based on purported borrower misrepresentations in the loan file, whereas BANA disagrees that such misrepresentations exist and if they do indeed exist, the purported borrower misrepresentations are insufficient to justify rescission.

68. The parties further dispute the quality and quantity of proof necessary to constitute a claim for coverage under the policy. ORIC asserts that missing documents having nothing to do with the loss in question are a sufficient basis for ORIC to deny the claim. BANA disputes this and asserts that so long as BANA has substantially complied with the requirements of the policy, then BANA has filed a valid claim.

69. An actual and justiciable controversy also presently exists regarding the interpretation of various other provisions in the Policy and the proper processing of BANA's claims by ORIC under the Policy.

70. For these reasons, it is appropriate for this Court to declare, pursuant to 28 U.S.C. § 2201(a), the rights and obligations of the parties under the Policy with respect to, among other things, the issues described above.

SECOND CAUSE OF ACTION: BREACH OF CONTRACT

71. BANA hereby repeats and incorporates by reference paragraphs 1 through 70 as if fully set forth herein.

72. As alleged above, ORIC agreed under the terms and conditions of the Policy to insure BANA for losses due to defaults by borrowers in the repayment of loans.

73. ORIC received all premiums due under the Policy. All of the other terms, provisions, and conditions of the Policy have been complied with.

74. To the extent BANA has not substantially complied with terms, provisions, and conditions precedent of the Policy, then ORIC waived and/or is estopped from asserting such a defense given that its actions and course of conduct have been consistent with an intention to enforce requirements under the Policy.

75. BANA has timely submitted claims and proofs of loss for losses due to defaults by borrowers in the repayment of loans. In submitting these claims and proofs of loss, BANA has complied with all terms, provisions and conditions of the Policy.

76. ORIC committed substantial and material breaches of its contractual obligations under the Policy by wrongfully denying full coverage, including failing and/or refusing to pay the losses due to defaults on claims within thirty (30) days after presentation of satisfactory evidence of loss to ORIC for loans that substantially complied with all terms, provisions and conditions of the Policy.

77. BANA has suffered, and continues to suffer, as a direct and proximate result of ORIC's contractual breaches of the Policy, substantial monetary damages totaling in excess of \$160 million, exclusive of interest and costs associated with this lawsuit.

THIRD CAUSE OF ACTION: BREACH OF THE DUTY OF GOOD FAITH AND FAIR DEALING

78. BANA hereby repeats and incorporates by reference paragraphs 1 through 77 as if fully set forth herein.

79. As alleged above, ORIC agreed under the terms and conditions of the Policy to insure BANA for losses due to default by borrowers in the repayment of loans.

80. Implied in every insurance policy is a covenant that the insurance company will act in good faith and deal fairly with its insured, that the insurance company will do nothing to

interfere with the right to receive benefits under the policy, that the insurance company will give at least as much consideration to the interests of the insured as it does its own interests, that the insurance company will exercise diligence, good faith and fidelity in safeguarding the insured's interests, that it will deal ethically with the insured and will fairly and adequately inform the insured with respect to the nature and scope of its insurance coverage (hereinafter, the "implied covenant of good faith and fair dealing").

81. ORIC has breached the implied covenant of good faith and fair dealing by, among other things:

- a) refusing to pay valid claims for reasons that are unsubstantiated under the terms and conditions of the Policy;
- b) denying BANA insurance coverage based on extraneous information, such as improper use of information developed or created after the loans to deny claims, rather than on the particular facts of each claim; and
- c) failing and/or refusing to promptly pay or deny claims properly submitted by BANA, resulting in \$28 million in claims filed and pending and an additional \$31 million in claims that ORIC stated it is unable to process.

82. ORIC's actions were taken for the purpose of consciously withholding policy benefits and placing its own interests above those of its insured's for the purpose of utilizing money which should have been paid under the terms and conditions of the Policy.

83. ORIC's actions, as set forth above, are without any reasonable justification, were undertaken in bad faith, and constitute a breach of its duty of good faith and fair dealing.

84. As a result of ORIC's breach of the implied covenant of good faith and fair dealing, BANA has suffered and will continue to suffer substantial monetary damages, including compensatory damages in the amount of unpaid insurance claims.

FOURTH CAUSE OF ACTION: BAD FAITH

85. BANA hereby repeats and incorporates by reference paragraphs 1 through 59 as if fully set forth herein.

86. As alleged above, ORIC agreed under the terms and conditions of the Policy to insure BANA for losses due to default by borrowers in the repayment of loans.

87. BANA has timely submitted valid claims under the Policy.

88. ORIC has refused to pay these claims even after recognizing that the claims are valid and that BANA is entitled to payment.

89. ORIC has acted in bad faith in denying coverage to BANA for losses due to the default by borrowers in the repayment of loans and in refusing to settle valid claims submitted by BANA for such losses by, among other things:

- a) taking unreasonable claims positions in denying claims submitted by BANA;
- b) willfully interpreting policy provisions so as to resolve ambiguities and uncertainties, if any, against BANA and in favor of ORIC's own interests;
- c) stopping payment on valid claims once the amount ORIC paid in claims reached the amount of premiums it received under the Policy, thus increasing its denial rate;
- d) unreasonably denying almost three (3) times the number of claims submitted by BANA under the policy than it has paid; and
- e) compelling BANA to initiate this case to obtain the insurance coverage to which it is entitled under the Policy.

90. ORIC's conduct, as described above, has been aggravating and outrageous.

91. BANA is informed and believes, and on that basis alleges, that in taking such actions, ORIC has been guilty of malice and/or wanton and reckless disregard of BANA's rights under the Policy and were carried on with the deliberate intent to injure BANA and advance ORIC's own pecuniary interest.

92. As a result of ORIC's bad faith denial of coverage and refusal to settle claims under the Policy, BANA has suffered and will continue to suffer substantial monetary damages in addition to the damages from unpaid claims.

93. ORIC's aggravated bad faith conduct also entitles BANA to an award of punitive damages in such amount as is sufficient to punish ORIC for its willful and tortious actions and deter future mortgage insurers from engaging in similar conduct.

PRAYER FOR RELIEF

WHEREFORE, BANA demands that this Court award judgment in its favor and against ORIC as follows:

1. With respect to the First Cause of Action, BANA requests that the Court declare the rights and obligations of the parties, including but not limited to, a declaration that:
 - (a) Pursuant to Section 4 of the Policy, ORIC must pay or make good all adjusted claims within thirty (30) days after presentation of satisfactory evidence of loss to ORIC for loans, and if ORIC does not respond to a claim or set forth with specificity its reasons for denying or otherwise avoiding coverage for a claim within thirty (30) days, ORIC is precluded from later asserting grounds for denying or otherwise avoiding coverage for a claim;
 - (b) Any time-limitation provisions imposed in the Policy or by law are tolled for both existing claims and future claims as a result of the filing of a suit, action or proceeding for the recovery of any claim under the Policy;
 - (c) "Substantial compliance" with the requirements under the Policy satisfies the Policy's requirements for filing a claim;
 - (d) A claim may not be denied under the Policy based on documents allegedly missing from the loan file unless such alleged missing documents are material to the evaluation of the claim and that absence of those documents has caused real and substantial prejudice;
 - (e) Claims or proofs of loss submitted by BANA under the Policy for claims processing are not required to include documents beyond those required by the underwriting guidelines applicable to the loans which are the subject of the claims;

- (f) If the timeliness of BANA's substantial compliance with providing the necessary supporting documents for a claim or proof of loss is at issue, the appropriate remedy under the Policy is to request supplemental information, not to forfeit coverage;
- (g) Addresses the rights and responsibilities of the parties as to timing issues involved under the policies and the law with regard to the filing of claims;
- (h) Coverage for a loan may not be rescinded where the loan was originated in accordance with the applicable underwriting guidelines and approved for insurance;
- (i) Claims on loans under the Policy may not be denied or rescinded based on post-loss underwriting;
- (j) Claims on loans under the Policy may not be denied or rescinded based on purported borrower misrepresentation; and
- (k) Any attempt by ORIC to rescind coverage by returning premiums is invalid and that any monies received by BANA should be credited against amounts that BANA owes.

2. With respect to the Second Cause of Action, BANA requests that the Court enter judgment against ORIC for actual money damages in excess of \$160 million for ORIC's breach of the Policy according to proof at trial, pre-judgment and post-judgment interest as allowed by law, and other such relief the court deems just and proper.

3. With respect to the Third Cause of Action, BANA requests that the Court enter judgment against ORIC for actual money damages in excess of \$160 million for ORIC's breach of the implied duty of good faith and fair dealing according to proof at trial, pre-judgment and post-judgment interest as allowed by law, and other such relief the court deems just and proper;

4. With respect to the Fourth Cause of Action, BANA requests that the Court enter judgment against ORIC for actual damages, punitive damages for ORIC's bad faith denial of

coverage and refusal to settle claims according to proof at trial, pre-judgment and post-judgment interest as allowable by law, and other such relief the court deems just and proper.

JURY DEMAND

1. BANA requests a trial by jury on all issues so triable.

Date: November 3, 2010

/s/ G. Michael Barnhill

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