



profession specified in Item 7 of the Declarations." (Policy at 2.) Item 7 of the Declarations was substituted with Endorsement 6, which states:

INSURED'S PROFESSION: Solely in the performance of providing professional services as a mortgage banker, which are specifically identified as a loan origination, loan processing, loan marketing, loan closing, warehousing, loan accounting and loan servicing for others for a fee.

(Endorsement 6.) The Policy was effective from July 1, 2000 to November 6, 2001. (Policy at Declarations Item 2.) The limit of liability is \$5,000,000.00 with a \$15,000.00 deductible, and upon payment of a \$46,575.00 premium. (Policy at Declarations Items 3-5.)

The insured, Radian, has been sued in two separate lawsuits (the "Underlying Lawsuits"), in the United States District Courts for the Middle District of North Carolina and for the Eastern District of Texas, for alleged violations of the anti-kickback provision of the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. §§ 2607 et seq. See Mullinax v. Radian Guaranty, Inc., No. 00-1247 (M.D.N.C.) and Moore v. Radian Group, Inc., No. 01-023 (E.D. Tex.). The plaintiffs in the Underlying Lawsuits assert, on behalf of putative classes of persons whose home mortgages are insured by primary mortgage insurance ("PMI") issued by Radian to their mortgage lenders, that Radian obtains PMI business from mortgage lenders by underpricing other services and insurance products it sells to those mortgage lenders. Those

services and other products include contract underwriting, pool insurance, captive reinsurance and performance notes. The plaintiffs in the Underlying Lawsuits allege that the underpricing is a kickback under RESPA, for which they seek damages of three times the premiums paid for the PMI policies.

Radian contends that, after an analysis of the complaints in the Underlying Lawsuits and the terms of the Policy, dismissal is proper under Federal Rule of Civil Procedure 12(b)(6) since: (1) Nutmeg cannot establish any set of facts which would allow it to evade its contractual duty to defend Radian in the underlying actions; and (2) the issue of indemnification is not yet ripe for this Court to decide. The crux of Nutmeg's response thereto is that since the RESPA violations in the Underlying Lawsuits do not allege wrongful conduct by Radian in the context of rendering professional services as a mortgage banker, that, therefore, the pleadings do not give rise to potential coverage pursuant to the terms of the Policy.

Attached to Nutmeg's Complaint for declaratory judgment are the amended complaints in the Underlying Lawsuits and the Policy.<sup>1</sup> Nutmeg also submits to the Court additional exhibits

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<sup>1</sup> Radian brings to the Court's attention the fact that the claims-made policy dated April 4, 2001 and attached as Exhibit C to Nutmeg's Complaint for declaratory judgment is not the policy under which Radian timely served its Notice of Claim since the attached policy post-dates the filing dates of the Underlying Lawsuits. While Radian concedes that the attached policy is substantially similar to the Policy at issue, if Nutmeg

downloaded from Radian's website purporting to illustrate Radian's organizational structure, and excerpts of a summary judgment brief filed in an unrelated lawsuit in a federal district court in California.

If matters outside the pleading are presented to, and not excluded by, the Court, Federal Rule of Civil Procedure 12(b)(6) permits the Court to treat a motion to dismiss as one for summary judgment, so long as "all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Fed. R. Civ. P. 12(b). Since additional exhibits have been submitted for the Court's consideration in this matter, we will construe Radian's Motion to Dismiss as a Motion for Summary Judgment. Further, since Radian has requested reasonable opportunity to take discovery and provide materials to the Court should we decide to convert its Motion to Dismiss to a Motion for Summary Judgment, an appropriate Order setting forth the filing schedule for summary judgment follows.

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indeed attached a copy of the wrong policy, then Nutmeg should file with the Court a true and correct copy of the Policy at issue at its earliest opportunity.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NUTMEG INSURANCE COMPANY,	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	
	:	
RADIAN GROUP INC.,	:	
RADIAN GUARANTY INC. and	:	
AMERIN GUARANTY CORPORATION,	:	
Defendants.	:	No. 03-606

O R D E R

**AND NOW**, this                    day of November, 2003, in consideration of the Motion to Dismiss filed by Defendants Radian Group Inc., Radian Guaranty Inc. and Amerin Guaranty Corporation ("Defendants") (Doc. No. 5), the Memorandum in Opposition to Defendants' Motion Dismiss filed by Plaintiff Nutmeg Insurance Company ("Plaintiff") (Doc. No. 8), the Certification of Timothy C. Russell, Esquire, Counsel for Plaintiff (Doc. No. 9), and Defendants' Supplemental Memorandum in Support of Motion to Dismiss (Doc. No. 10), it is **ORDERED** that Defendants' Motion to Dismiss **SHALL** be converted to a Motion for Summary Judgment pursuant to Federal Rule of Civil Procedure 12(b).

**IT IS FURTHER ORDERED** that the parties shall file all relevant papers according to the schedule set forth below:

1. Any motions and memoranda of law in support of summary judgment shall be filed no later than December 15, 2003.
2. A response in opposition to summary judgment shall be

filed no later than December 29, 2003.

3. A reply brief shall be filed no later than January 12, 2004.

BY THE COURT:

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JAMES MCGIRR KELLY, J.