02-41464

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FRED M. MOORE and RONALD C. HEARN, on behalf of themselves and all other persons similarly situated
Plaintiffs-Appellants,

v.

RADIAN GROUP INC., RADIAN GUARANTY INC., NORWEST CORP., NORWEST FINANCIAL SERVICES, INC., WELLS FARGO FINANCIAL SERVICES, INC., NORWEST MORTGAGE, INC., WELLS FARGO HOME MORTGAGE, INC., WELLS FARGO & CO., AND WFC HOLDINGS CORP.
Defendants-Appellees.

On Appeal From The United States District Court
For The Eastern District Of Texas

BRIEF OF APPELLEES RADIAN GROUP INC. AND RADIAN GUARANTY INC.

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Local Rule 28.2.1, Appellees Radian Group, Inc. and Radian Guaranty, Inc. certify that the following persons and entities have an interest in the outcome of this appeal:

PLAINTIFFS/APPELLANTS:
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Ronald C. Hearn

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DEFENDANTS/APPELLEES:
Radian Group Inc.
Radian Guaranty Inc.
Norwest Corporation
Norwest Financial Services, Inc.
Norwest Mortgage, Inc.
Wells Fargo Financial Services, Inc.
Wells Fargo Home Mortgage, Inc.
Wells Fargo & Company
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Respectfully submitted,

_____
Sidney Powell

RECOMMENDATION ON ORAL ARGUMENT

Plaintiffs/Appellants did not request oral argument, and they have advised the court that argument is not necessary. Radian agrees. This is a Class II case that can be affirmed on the summary calendar. Plaintiffs appeal a Rule 12(b)(1) dismissal for lack of subject matter jurisdiction that Judge Ward entered only after he had given Plaintiffs several opportunities to replead an injury-in-fact to remedy their lack of standing. Although the record is 13 volumes, those consist of pleadings, many of which are duplicates or are repetitive of prior motions and memoranda filed in relation to each of the Plaintiffs' four substantially similar complaints. The facts are undisputed, and the legal issues are clear. The briefs and record excerpts contain the materials needed to decide the case. Oral argument is not necessary.

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STATEMENT OF JURISDICTION

This is an appeal from the dismissal without prejudice of Plaintiffs' Fourth Amended Class Action Complaint for lack of standing. The district court found that it lacked subject matter jurisdiction because Plaintiffs failed to allege any injury-in-fact or damages (R1:188-203). After dismissing their Third Amended Complaint and giving Plaintiffs ample opportunity to replead to correct the deficiencies (Radian RE:1-2), the court dismissed the case as to all parties and all claims, and denied any further leave to amend the complaint. Plaintiffs timely appealed (RI:1; Plaintiffs' RE:B).

The parties agree that this Court has jurisdiction to review this final dismissal. 28 U.S.C. § 1291 provides that the courts of appeals have jurisdiction over appeals from all "final decisions" of the district courts. A dismissal without prejudice can be appealed as a final order when, as a practical matter, it prevents the parties from further litigating in federal court. *Amazon, Inc. v. Dirt Camp, Inc*., 273 F.3d 1271, 1275 (10th Cir.2001)*; Davis Forestry Corp. v. Smith,* 707 F.2d 1325, n.1 (11th Cir. 1983); *Allied Air Freight, Inc. v. Pan Am. World Airways, Inc*., 393 F.2d 441, 444 (2d Cir.), *cert. denied*, 393 U.S. 846 (1968); *Rinieri v. News Syndicate Co*., 385 F.2d 818, 821 (2d Cir.1967); 9 MOORE'S FEDERAL PRACTICE § 9110.08[1] (1982).

This is especially true where, as here, the court specifically denied leave to amend the complaint. *Strong v. David*, 297 F.3d 646, 648 (7th Cir. 2002) (while "an

order to patch up the complaint, or take some other easily accomplished step, is no more reviewable than the resolution of a discovery dispute or equivalent interlocutory ruling....[w]hen plaintiff cannot cure the defects, the dismissal is effectively with prejudice and appealable no matter what language the district judge uses"); *Sanford v. Motts,* 258 F.3d 1117, 1118 (9th Cir. 2001) (dismissal of action was final, and thus appealable, where court dismissed entire action without prejudice, rather than merely dismissing complaint with leave to amend); *Domino Sugar Corp. v. Sugar Workers Local Union 392 of United Food and Commercial Workers Intern. Union*, 10 F.3d 1064, 1067 (4th Cir.1993) (holding that "a plaintiff may not appeal the dismissal of his complaint without prejudice unless the grounds for dismissal clearly indicate that 'no amendment [in the complaint] could cure the defects in the plaintiff's case'"); *see also Carroll v. Andrews*, 438 F.2d 1221 (5th Cir. 1971) (reviewing without question district court's dismissal of complaint which failed to allege facts to support claim and where district court denied motion to amend). When a district court's dismissal "finally disposes of the case so that it is not subject to further proceedings in federal court, the dismissal is final and appealable." *Amazon*, 273 F.3d at 1275.

STATEMENT OF THE ISSUES

1. Whether the district court properly dismissed Plaintiffs' Fourth Amended Complaint for lack of standing when, despite the court's direct instructions to do so, Plaintiffs declined to allege any injury-in-fact to support Article III jurisdiction?

2. Alternatively, whether the district court's dismissal may be upheld (i) based on the Filed-Rate Doctrine, which precludes consumers from challenging insurance rates that are deemed *per se* reasonable pursuant to a state regulatory scheme; or (ii) by application of the governing statute of limitations?

STATEMENT OF THE CASE

A. Course Of Proceedings And Disposition Below.

Putative class representatives Fred Moore and Ronald Hearn ("Plaintiffs") filed this action for damages and declaratory and injunctive relief against defendants Radian Group, Inc. and Radian Guaranty, Inc. ("Radian"), Norwest Corp. and Norwest Financial Services, Inc. ("Norwest"), Wells Fargo Financial Services, Inc., Wells Fargo Home Mortgage, Inc., Wells Fargo & Company, and WFC Holdings Corporation ("Wells Fargo"), alleging violations of the anti-kickback provision of the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2607(a).[1] Following dismissal of

[1] Actually, Moore filed the initial action alone. Hearn was added in the Second Amended Complaint after the defendants moved to dismiss the first Complaint on grounds including affidavits evidencing that Moore's loan was not insured by a PMI

Plaintiffs' third complaint and giving them detailed instructions on how to amend to satisfy standing, the district judge dismissed their Fourth Amended Class Action Complaint, without prejudice, on September 10, 2002 (RI:188, 200; Plaintiffs' RE:C; Radian RE:1-2). He also denied any further leave to amend the complaint (RI:189). The judge found that Plaintiffs had again failed to allege an injury-in-fact sufficient to invoke Article III jurisdiction (RI:189, 193, 195-96, 200).

B. Statement Of The Facts.

Plaintiffs' Fourth Amended Complaint alleges that in connection with their home mortgages, Plaintiffs' lenders purchased "pool insurance" from Radian at allegedly low prices in exchange for the lenders' referral of private mortgage insurance ("PMI") business to Radian (R9:2270-72). Purchased by lenders, not borrowers, PMI mitigates the risk of a borrower's default when the amount of the borrower's mortgage exceeds eighty percent of the property value. Borrowers benefit from this because they are allowed to purchase homes with a smaller down payment–something that is often critical to their ability to purchase a home. Although PMI premiums are paid by the lender, they are reimbursed by the borrower (RE:C, D).

Pool insurance policies are a separate layer of insurance above PMI. They

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policy issued by Radian (R9:2229, 2231-32; R12:3532, 3565, 3584; R13:3690-3721). Moreover, neither named Plaintiff had any complaint or concern about his PMI insurance until he was contacted by Plaintiffs' counsel (R9:2223, 2226).

insure large groups or "pools" of mortgages against the risk of loss from defaults by borrowers whose loans are in the pool. Plaintiffs assert that Wells Fargo has used pool insurance policies it bought from Radian to obtain reductions in guaranty fees it has paid to the Federal National Mortgage Association ("Fannie Mae") and Federal Home Mortgage Corporation ("Freddie Mac"), the government-sponsored enterprises ("GSEs"), to which it resells mortgage loans. Congress authorized the creation of the GSEs, at least in part, to promote access to mortgage credit throughout the country by fostering a secondary market for home mortgage loans.

Mortgage lenders such as Wells Fargo in essence recycle the money available for home mortgage loans by assembling the loans they originate into "pools" and selling those pools to the GSEs. The GSEs charge the mortgage lenders a guaranty fee based upon the perceived risk inherent in a particular loan pool. One way to reduce that risk–and thereby reduce the guaranty fee–is to purchase a pool insurance policy under which a commercial insurer such as Radian will, for a fee, take on some of the GSEs' risk of owning the pool of loans (R8:2198-99; 9:2279-80; Plaintiffs' RE:D).

Plaintiffs assert that Radian's sale of pool insurance at allegedly low rates to the same financial institutions that buy PMI from Radian violates § 2607(a) of RESPA. They request treble damages in the amount of the total PMI price paid as well as declaratory and injunctive relief against the defendants (R9:2270-72).

What Plaintiffs fail to allege, however, is exactly how the defendants' conduct caused Plaintiffs any injury or harm (R9:2270-72). Plaintiffs do not claim that they were charged excessive PMI prices, that their PMI was of inferior quality, or that any portion of the PMI charge was kicked-back for an alleged referral (R9:2270-2298; R1:129). Indeed, Plaintiffs concede on appeal that they claim no actual injury,[2] but maintain that an injury should be presumed because a mere allegation of wrongdoing under RESPA triggers a presumption of injury sufficient to satisfy Article III standing (R9:2284-86;1:130, 137-38).

Plaintiffs' Fourth Amended Complaint contains many pages about RESPA and defendants' conduct but only conclusory assertions that they suffered "distinct and palpable injury" and that the lenders were "unjustly enriched" (R9:2284-85). They complain that the lenders did not "pass through" any savings realized by allegedly lower pool insurance premiums, but Plaintiffs do not cite any statute or legal ground imposing such an obligation[3] (R9:2281). Further, Plaintiffs did not buy pool insurance at all. Radian sold pool insurance directly to the government-sponsored entities (R8:2197).

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[2] *See e.g.,* (Plaintiffs' Br. 3, 4, 9, 10, 28).

[3] Indeed, as explained in detail *infra* Part II, only the approved rate can be charged under the Filed-Rate Doctrine.

Plaintiffs also assert that § 2607(a) implicitly includes a private right to truthful settlement information, but must acknowledge that nothing in that statute addresses a duty of communication or disclosure (R9:2283, 2295). Section 2607 does not provide a private cause of action for disclosure at all, but only for wrongful kickbacks. 12 U.S.C. § 2607(a). Ultimately, Plaintiffs allege only that they believe the defendants violated RESPA § 2607(a), and that they should recover three times the total amount of PMI premium they paid, regardless of whether they were actually injured (R9:2293).

The district judge dismissed Plaintiffs' Fourth Amended Complaint on the same grounds as their prior complaint: Plaintiffs' failure to allege injury precluded a finding of a case or controversy or constitutional standing to satisfy Article III subject matter jurisdiction (R1:188-02). In his prior order dismissing Plaintiffs' Third Amended Complaint, the judge had specifically instructed Plaintiffs to articulate in their next complaint exactly how they had been harmed by the defendants' alleged conduct or he would dismiss the case (Radian RE:1-2). Plaintiffs failed to do so in their Fourth Amended Complaint, and the court appropriately dismissed their case without leave to amend (R1:189).

SUMMARY OF THE ARGUMENT

The district court properly dismissed Plaintiffs' complaint for lack of subject matter jurisdiction because Plaintiffs did not allege any injury to support a case or

controversy or constitutional standing, have no legal right to ask for an injunction, and cannot state a claim for unlawful failure to disclose under § 2607(a). The cases on which Plaintiffs rely concern statutes expressly authorizing a citizen suit–unlike the very limited provisions of RESPA here. In this case, Plaintiffs do not even contend that they paid too much for their PMI or that they did not receive what they were promised. They allege no actual injury.

Alternatively, this Court may affirm the district court's dismissal of Plaintiffs' complaint on the ground that the Filed-Rate Doctrine bars Plaintiffs' putative challenge to insurance rates that are the state-established reasonable rates pursuant to a state regulatory scheme. Plaintiffs paid only the approved rates for their PMI. Finally, Radian incorporates by reference the statute of limitations argument made by Wells Fargo in its brief. The judgment should be affirmed.

ARGUMENT AND AUTHORITIES

I. BECAUSE PLAINTIFFS ALLEGED NO INJURY AS A RESULT OF DEFENDANTS' ALLEGED VIOLATION OF § 2607(a), PLAINTIFFS LACKED STANDING TO SUE, FAILED TO STATE A CASE OR CONTROVERSY, AND DEPRIVED THE DISTRICT COURT OF SUBJECT MATTER JURISDICTION.

Plaintiffs have failed to meet their burden of establishing standing to bring their claims because they have failed to demonstrate or allege any concrete or particularized invasion of any legally protected interest. "The party invoking federal jurisdiction

bears the burden of establishing [standing]." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). At the pleading stage, Plaintiffs must aver factual allegations of injury resulting from the defendant's conduct. Plaintiffs have failed to make any such factual allegations sufficient to show standing in this case.

Plaintiffs have not alleged that they paid too much for the PMI on their loans or that the quality of the policies was deficient. They have not alleged that any portion of the premium for the PMI was kicked back to anyone. As the district court found, they have not alleged any actual injury whatsoever. Instead, they contend that their injury should be presumed. There is no legal basis for their contention. Standing under § 2607(a) of RESPA is not presumed.

A. Standard Of Review.

Standing is a jurisdictional question that "goes to the constitutional power of a federal court to entertain an action." *James v. City of Dallas, Texas*, 254 F.3d 551, 562 (5th Cir. 2001). This Court reviews jurisdictional questions *de novo*.[4] *Id.*

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[4] Plaintiffs' assertion that a "motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted" is irrelevant because the district court dismissed the complaint on jurisdictional grounds, without prejudice, not for failure to state a claim. The court ruled pursuant to FED.R.CIV.P.12(b)(1), lack of subject matter jurisdiction. Thus, the focus in this case is purely whether Plaintiffs are the proper persons to bring these particular claims–not on the claims themselves or their merits. *Oster v. City of New Orleans, By and Through Morial*, 631 F.2d 71, 72 (5th Cir. 1980).

B. Because Plaintiffs Lacked Standing To Bring This RESPA Action, The District Court Lacked Article III Jurisdiction And Properly Dismissed Their Case.

Plaintiffs arguments are contrary to fundamental concepts of standing and of the RESPA statute itself. The sum of Plaintiffs' arguments is that they should be permitted to sue for supposed violations of the anti-kickback provision of RESPA even though they have not suffered the slightest personal injury. The Supreme Court has recognized three "irreducible constitutional minimum" requirements for Article III standing:

- First, the plaintiff must have suffered an "injury in fact"–an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical;

- Second, there must be a causal connection between the injury and the conduct complained of such that the injury is "fairly traceable" to the action of the defendant, and not the action of a third party; and

- Third, it must be likely, as opposed to merely speculative, that the relief requested will redress the alleged injury if granted by a favorable decision.

James, 254 F.3d at 563-64, 566 (*quoting Lujan*, 504 U.S. at 560-61). The party invoking federal jurisdiction bears the burden of establishing these requirements. *Lujan*, 504 U.S. at 561.

The standing inquiry implicates both the constitutional limit on federal courts to handle actual cases or controversies and the prudential limit on their ability to resolve

general grievances or third parties' rights or interests. *Warth v. Seldin*, 422 U.S. 490, 498 (1975); *Trinity Industries, Inc. v. Martin*, 963 F.2d 795, 798, n.8 (5th Cir. 1992). The inquiry does *not* implicate the merits of the plaintiff's contention of illegal conduct. *Id.* at 500. Instead, it turns on whether the plaintiff has demonstrated a sufficient *personal* stake in the litigation by clearly and specifically setting forth facts of injury, causation, redressibility, and proper party status to sue. *Id.* at 498-501. A federal court is powerless to create its own jurisdiction by embellishing upon deficient allegations. *Id.* at 500; *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990).

Here, Plaintiffs' Fourth Amended Complaint failed to satisfy the minimum constitutional requirements for standing. When Plaintiffs failed to cure their deficiencies–despite the district court's specific request to do so–the district court had no option but to dismiss their case for lack of jurisdiction. *Warth*, 422 U.S. at 501-02 (if after given opportunity to replead missing factual allegations, plaintiffs fail, the court "must" dismiss). The Supreme Court and this Court have held that when the named plaintiffs of a putative class action lack standing, the entire action must be dismissed. *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974); *Rivera v. Wyeth-Ayerst Laboratories,* 283 F.3d 315, 319 (5th Cir. 2002). The district court properly dismissed Plaintiffs' entire action (R1:189, 202).

1. Plaintiffs Failed To Allege Sufficiently Particularized Facts Of Injury, Causation, Or Redressibility Under RESPA.

Plaintiffs challenge Radian's offering of pool insurance to lenders under §2607(a) of RESPA, and they assert that the fact of their injury should be presumed (R9:2270-72). RESPA prohibits the giving or receiving of fees, kickbacks, or things of value as part of a real estate service charge purely for referrals, but permits such payments when they are made for goods, facilities, or services provided in making a real estate loan. 12 U.S.C. § 2607(a)(c)(2). HUD is the administrative agency charged with enforcing RESPA and prescribing appropriate rules, regulations and interpretations. 12 U.S.C. § 2617(a). HUD's Regulation X, which pertains to kickbacks, implements the general rule and exception of RESPA § 2607(a)(c). *See* 24 C.F.R. § 3500.14. Plaintiffs also rely on a letter from the then general counsel at HUD addressing the sale of pool insurance under RESPA, which, *inter alia*, states that the Department will review these arrangements on individual bases. Neither the letter nor the statements in it ever went through the process to become authoritative, and the letter makes no findings of impropriety here[5] (R9:2314-15).

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[5] Although this letter states that it was intended to be incorporated into a Statement of Policy, this never occurred, casting substantial doubt on whether HUD would even accept the author's analysis. Moreover, even if the letter were to represent HUD's view, the opinions expressed in the letter do not have the force of law, and are not entitled to the deference accorded to HUD rules, regulations or interpretations promulgated through more formal procedures. See 24 C.F.R. § 3500.4(a)(2) (opinion

Plaintiffs ignore the overall structure of RESPA, which unlike *Havens* and other cases cited by Plaintiffs, specifically limits and defines who may sue, when, and for what. By its terms, RESPA allows private citizens to sue only for actual damages suffered as a result of an alleged RESPA violation. 12 U.S.C. § 2607(d)(2). They may *not* sue based on a pure statutory violation. RESPA specifically places enforcement of the Act in the hands of the Secretary of HUD, State Attorney General, and State Insurance Commission. 12 U.S.C. §§ 2617(a); 2607(d)(4). Only these governmental representatives may enforce the Act and enjoin impermissible conduct, and only HUD may establish appropriate rules and regulations and issue declaratory interpretations. Private citizens have no such rights under this statute, which makes this case different from *Havens* and from the other cases on which Plaintiffs rely.

That HUD and other governmental agencies alone are charged with the general enforcement of RESPA, while private citizens may sue only for actual damages, is clear from the statute, its legislative history, and the case law interpreting it. Section 2607(d) is the detailed remedial provision for § 2607(a)–the statute under which Plaintiffs sue. Section 2607(d) carefully and expressly addresses various categories of relief.[6] When

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letters are not rules, regulations or interpretations); *Christensen v. Harris County*, 529 U.S. 576 (2000) (opinion letters do not have force of law).

[6] Here, § 2607(d) details the various categories of damages available for violations of § 2607(a). Section 2607(d)(1) imposes criminal penalties. Section

a statute "expressly provides" a detailed remedial scheme, such as this one, the Supreme Court cautions that courts must "be chary of reading other [remedies] into it." *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979). When specific remedies have been enumerated, as they have been here, the Court has held that "Congress provided precisely the remedies it considered appropriate," absent strong indicia to the contrary. *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 15 (1981).

Section 2607(d)(4) empowers the Secretary of HUD and the State Attorney General and Insurance Commissioner to oversee the Act and bring an action to enjoin violations. If just any private person or governmental agency could do this, Congress would not have included this provision and would not have specifically enumerated these authorities. Likewise, given the care Congress took in crafting this statute, if it had intended to allow private citizens to seek an injunction or any other relief, Congress would not have limited the private action provision to one relating only to damages.

2607(d)(2) grants citizens a private right of action for treble damages, which turns on a determination of three times the amount of any illegal settlement overcharge. It provides:

> (2) Any person or persons who violate the prohibitions or limitations of this section shall be jointly and severally liable to the person or persons charged for the settlement service involved in the violation in an amount equal to three times the amount of any charge paid for such settlement service.

See Transamerica, and Middlesex, supra p. 11; *see also Mullinax v. Radian Guar., Inc.*, 199 F. Supp.2d 311, 333-34 (M.D.N.C. 2002) (thoroughly analyzing § (d) and explaining that no private injunctive relief is available under this detailed statute).

Regulation X and the HUD letter are in accord. The enforcement provision of Regulation X places RESPA oversight in the cooperative hands of specific federal and state authorities.[7] The HUD letter states that "*HUD* will look at the specific circumstances..." and "the *Department* [will] conclude... [whether] the arrangement will be regarded as impermissible under RESPA" (R9:2315) (emphasis added).

RESPA is structured primarily for governmental oversight, with a private right of action for actual damages only, because it relates to issues which historically have been reserved to state and local authorities. Congress stated: "Federal authority to establish rates for settlement charges would infringe on an area that has historically been of State and local concern and in some instances, would duplicate existing State regulatory schemes." S. Rep. No. 93-866 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6550. Congress expressly decided that RESPA should address abusive practices only,

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[7] Enforcement Policy. It is the policy of the Secretary regarding RESPA enforcement matters to cooperate with Federal, State, or local authorities having supervisory powers over lenders or other persons with responsibilities under RESPA. Federal agencies with supervisory powers over lenders may use their powers to require compliance with RESPA. In addition, failure to comply with RESPA may be grounds for administrative action by the Secretary . . .. 24 C.F.R. § 3500.19.

and that it should not attempt to structure rates. S. Rep. No. 93-866 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6546, 6548-50. Courts have taken note of Congress' purpose and found that RESPA is not a broad rate control statute, but rather a statute aimed at curtailing abusive practices that unnecessarily drive up settlement costs. *See e.g., Boulware v. Crossland Mortgage Corp.*, 291 F.3d 261, 265-67 (4th Cir. 2002); *Morales v. Attorneys' Title Ins. Fund, Inc.,* 983 F. Supp. 1418, 1423 (S.D.Fla. 1997).

Congress subsequently clarified that general RESPA oversight rests solely with HUD and state authorities. S. Rep. No. 94-410, *reprinted in* 1975 U.S.C.C.A.N. 2448. It amended RESPA, *inter alia*, to allow these authorities, in their discretion, to exempt certain transactions and payments from RESPA, and to vest the Secretary of HUD with the "specific authority to interpret all provisions of RESPA and to grant reasonable exemptions for classes of transactions." S. Rep. No. 93-866 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6546, 6549, 2454, 2456, 2457.

In sum, private citizens have standing to sue under RESPA § 2607(a) only if they can allege, in concrete and particularized detail, that they suffered actual damage as the result of an alleged violation. The general requirements of constitutional standing are intact. Otherwise, the treble damage provision of § 2607(d)(2) has no meaning and the complex regulatory scheme Congress so carefully created is ignored or thrown into disarray. RESPA § 2607(a) requires specific allegations of injury-in-fact, causation by

the defendant's conduct, and redressibility by the relief requested. Absent such a case or controversy and prudential standing, the court lacks Article III jurisdiction to hear the case.

Finally, for these reasons and more, Plaintiffs have also failed to demonstrate the requisite causal connection for standing and that their requested relief is legally available and narrowly tailored to redress their "injury." Absent an injury, Plaintiffs cannot show that anything is "fairly traceable" to defendants' conduct and can point to nothing that requires any redress. Plaintiffs do not allege that their PMI rates would have changed, nor could they. They also do not allege that they received any inferior product or service. They do not allege that any portion of the PMI charges were paid as a kick-back to anyone.

Moreover, as explained *infra*, Part II, the Filed-Rate Doctrine precludes Plaintiffs' challenge to Texas' state-approved PMI rate. The rate is deemed reasonable *per se,* and providers are neither legally required nor permitted to charge a different or lower rate. Under the Filed-Rate Doctrine, rate payers like the Plaintiffs have no legal right to pay any rate other than the state's filed-rate. *Morales*, 983 F. Supp. at 1426; *see also Taffet v. Southern Co.*, 967 F.2d 1483, 1494 (11th Cir.) (en banc), *cert. denied*, 506 U.S. 1021 (1992). Because Plaintiffs admit that they paid no more than the filed-rate for PMI, they cannot allege a cognizable injury or request any redress.

The Filed-Rate Doctrine forecloses this as a matter of law. *Morales,* 983 F. Supp. at 1426; *see also Taffet*, 967 F.2d at 1494.

2. Congress Did Not Eliminate The Requirement That Private Citizens Suing Under RESPA Must Allege A Concrete And Particularized Personal Injury.

The crux of Plaintiffs' case is that RESPA allows them recovery without any allegation of personal injury or damage. However, a violation of a statute, alone, does not create an injury-in-fact. While an "actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing,'" *Warth*, 422 U.S. at 500 [citations omitted], statutory broadening of the *categories* of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury. *See Lujan*, 504 U.S. at 579. In fact, even where Congress has created a right to sue for the invasion of some statutorily created right, the law is clear that "Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Raines v. Byrd,* 521 U.S. 811, 820 n.3 (1997).

It cannot be said, then, that the injury Plaintiffs have suffered is a *per se* violation of RESPA's anti-kickback provision where they have alleged no personal right under RESPA to be free from illegal kickbacks and have alleged no personal stake in ensuring

compliance with RESPA's prohibitions other than a general distaste for defendants' conduct.[8]

RESPA is not the type of statute that abdicates personal injury as the bedrock requirement of Article III standing. As the district court properly found, there can be no presumed or *per se* injury under RESPA (R1:194-95). Indeed, RESPA legislates the opposite. In enacting RESPA, Congress meticulously detailed the remedial provision of § 2607(a). It expressly limited private citizens to suits for damages based on actual injury, 12 U.S.C. § 2607(d)(2), and placed the power to oversee application of RESPA, to declare when conduct does or does not violate its provisions, and to enjoin unlawful conduct under RESPA, solely in the hands of HUD and certain interested state authorities. 12 U.S.C. § 2607(d). Congress respected the role of state authorities in rate-setting and insurance regulation, and chose to regulate only abusive conduct–through federal and state governmental oversight of suspicious conduct and by allowing private citizens to recover when actually damaged. *See supra* pp. 11-14 (outlining legislative history and concerns of RESPA). Notably, in overseeing RESPA,

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[8] *See Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 156 (4th Cir. 2000) (Plaintiff must "suffer an invasion of a legally protected interest that is 'concrete and particularized' before he can bring an action. He must somehow differentiate himself from the mass of people who may find the conduct of which he complains to be objectionable only in an abstract sense. In other words, the alleged injury 'must affect the plaintiff in a personal and individual way.'")

the Secretary of HUD is to work in cooperation with specially involved state authorities–the State Attorney General and the State Insurance Commissioner. 12 U.S.C. §§ 2617(a); 2607(d)(4).

a. Plaintiffs' Cases Are Distinguishable.

This statutory structure stands in stark contrast to the statute at issue in *Havens*, on which Plaintiffs rely. While Congress may create statutory rights which, upon mere invasion, create standing to sue, RESPA does not contain such a provision. The other cases cited by Plaintiffs are also distinguishable.

In *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), the Fair Housing Act was at issue. That Act makes it unlawful "to *represent* to *any person* because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available." 42 U.S.C. § 3612(a) (emphasis added). The Court found standing because the plaintiffs were within the proper class of persons to sue under the FHA–i.e., "any person"–and the plaintiffs sufficiently alleged that the defendant had made false "representations" to them about the availability of apartments based on race. *Havens*, 455 U.S. at 373. The statutory requirements of FHA § 3612(a) were thus satisfied by a misrepresentation made to any person. There is no such provision in RESPA.

Reytblatt v. U.S. Nuclear Regulatory Com'n, 105 F.3d 715 (D.C. Cir. 1997), did

not involve "an action by a voter under the Freedom of Information Act,"[9] but a challenge by a citizens group to a final rule adopted by the NRC after the group had already participated in agency hearings on the matter. The new rule limited the required disclosure of information about nuclear testing under the Act and 10 C.F.R. § 2.206(a). To bring suit, the Act required (1) party status at the agency proceedings, which the plaintiffs had done, and (2) aggrieved person status, which the plaintiffs had demonstrated because the restriction on the information made it more difficult for them to take action under § 2.206(a). Like the "any person" language of the FHA in *Havens*, § 2.206(a) specifically entitles "any member of the public" to petition for revocation or modification of a plant's license based on information discovered through the disclosure. Thus in *Reytblatt*, as in *Havens*, the plaintiffs met the specific statutory

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[9] Apparently Plaintiffs intended to refer to *Akins v. FEC*, 101 F.3d 731 (D.C. Cir. 1996), where registered voters were determined not to have standing because they suffered an "informational injury" when the FEC refused to recognize a group as a political committee, subject to reporting requirements. The Supreme Court reversed the Circuit Court and found that the plaintiffs had standing to challenge the FEC's decision not to bring an enforcement action and treat the group as a political committee. *FEC v. Akins*, 524 U.S. 11 (1998). The Court determined that the injury-in-fact was the inability to obtain information because Congress specifically provided in the FECA that "*any person* who believes a violation of this Act . . . has occurred, *may file* a complaint with the Commission." 2 U.S.C. § 447g(a)(1) (emphasis added). The Act went on to provide that "*any party* aggrieved by an order of the Commission dismissing a complaint filed by such party . . . *may file* a petition" in district court seeking review of that dismissal. 2 U.S.C. § 437G(8)(A) (emphasis added). RESPA § 2607(a), in direct contrast, contains no such language.

language for standing.[10] *Reytblatt*, 105 F.3d at 721.

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[10] Notably, statutes which grant standing to sue based on violation alone often include the broad "any person" type of language and involve such things as civil rights and environmental violations–legal areas that are difficult to police absent citizen involvement and reports of alleged violations. As noted in *Lujan*, 504 U.S. at 578, in enacting these statutes, Congress "elevat[ed] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." Congress simply has not done that in RESPA.

The cases on which Plaintiffs mistakenly rely all concern challenges based on statutes containing citizen suit provisions that do not appear in RESPA: *Havens*, 455 U.S. 363 (plaintiffs had standing to sue pursuant to 42 U.S.C. § 3613(a)(1)(A), providing that an "aggrieved person may commence a civil action in an appropriate United States district court . . . to obtain appropriate relief with respect to such discriminatory housing practice . . ." and 42 U.S.C. § 3602 defining an "aggrieved person" as "any person who (1) claims to have been injured by a discriminatory housing practice; or (2) believes that such person will be injured by a discriminatory housing practice that is about to occur."); *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898 (2d Cir. 1993) (same); *Consumers Union of U.S.* v. FTC, 691 F.2d 575 (D.C. Cir. 1982) (Federal Trade Commission Improvements Act explicitly conferred upon "any interested person (including a consumer or consumer organization)" the right to file a petition for judicial review of an FTC rule); *National Wildlife Fedn. v. Coleman*, 400 F. Supp. 705, 710 (S.D.Miss. 1975) (plaintiffs had standing pursuant to Endangered Species Act citizen suit provision, 16 U.S.C. § 1540(g) conferring automatic standing on any person "to enjoin any person, including the United States . . . who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof. . ."); *Metropolitan Washington Coalition for Clean Air v. District of Columbia*, 511 F.2d 809 (1975) (plaintiffs had standing to sue pursuant to the citizen suit provision of the Clean Air Act (42 U.S.C. § 7604(a)) that provides, "any person may commence a civil action on his own behalf . . . against any person . . . who is alleged to have violated . . . or to be in violation . . ."). RESPA does not contain a similar provision.

Finally, Plaintiffs cite *Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096 (3d Cir. 1996), as a supportive "environmental interest" standing case. (Brief of Appellant at 14 n.4). *Hovsons*, however, was not an environmental case, nor was it even a standing case. Rather, *Hovsons* was based on a challenge to a denial of a variance to build a nursing home based on the FHA's "reasonable accommodations" provision, which

Finally, *Weil* and *O'Sullivan* are inapposite and do not help Plaintiffs' case. In both, the district court's discussion of RESPA centered on class certification, not standing, and in both, the plaintiffs alleged that they suffered injury due to excessive or improper settlement charges–allegations that Plaintiffs herein do not make. *Weil v. Long Island Savings Bank*, 200 F.R.D. 164, 168 (E.D.N.Y. 2001); *O'Sullivan v. Countrywide Home Loans, Inc.*, 202 F.R.D. 504, 512 (S.D.Tex. 2001). In *Weil,* the court merely found that common questions of law and fact sufficiently predominated for class certification, and that differences in the amount of the fees each plaintiff paid "relate[d] primarily to damages [and] [did] not render the class action valueless." *Weil,* 200 F.R.D. at 176. *Weil* did not address standing precisely because actual damages were alleged.

Although the district court reached a similar holding in *O'Sullivan*,[11] this Court recently reversed even the class certification, finding that commonality as to liability is insufficient under FED.R.CIV.P. 23 when disparity exists in relation to each plaintiff's

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prohibited the enforcement of zoning ordinances and local housing policies in a manner that denies people with disabilities access to housing on par with those who are not disabled. *Id.* at 1104. *Hovsons* is inapposite.

[11] *See* 202 F.R.D. at 512 (sufficient commonality of RESPA liability existed to justify class action, and individual damages could be "calculated by a simple formula based on the dollar amounts set forth" by each plaintiff)

individual damages.[12] *O'Sullivan v. Countrywide Home Loans, Inc.*, --- F.3d ---, No. 01-21028, *4-6 (5th Cir., Feb. 7, 2003). Both *Weil* and *O'Sullivan* are distinguishable because they involve class certification, not standing. Here, where Plaintiffs have alleged no actual injury, injury may not be presumed because the statute specifically requires actual injury to have Article III standing.[13] 12 U.S.C. § 2607(d)(2).

b. Standing Embodies Important Constitutional Requirements.

As the Supreme Court explained in *Warth,* 422 U.S. at 500, standing requirements exist so that courts "are not called upon to decide abstract questions of

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[12] The Court specifically stated that an illegal kickback or referral fee cannot be presumed because § 2607(c) allows the payment of reasonable fees for goods, facilities and services furnished. Whether such payment is *bona fide* turns on whether it is reasonably related to the value of the good or service. Notably, the defendants need not tie the disputed fee to a particular service so long as the total compensation paid is reasonably related to the total value received. *Id.* at *5. It is the allegation and proof that the fee is excessive which serves as evidence of an illegal kickback. *Id.* at *5-6 Without it, there can be no violation under § 2607(c). This Court specifically rejected the plaintiffs' argument that "the overall practice" of fee-splitting violates the Act. Section 2607(c) provides a defense dependent upon the reasonableness of each individual fee paid. *Id.* at 6.

[13] This Court did not address standing in relation to RESPA in *O'Sullivan.* Standing was only raised in relation to the plaintiffs' state law claim for unauthorized practice of law. *Id.* at *7. Under that statute, the plaintiffs had standing to sue because the state statute allows recovery of the entire fee paid to a non-lawyer guilty of unauthorized practice of law. Moreover, the statute itself grants this right to recoup the fee to any person who paid it, thus distinguishing the case from general Article III cases which require clear allegations of injury. *Id.* at *7; TEX.GOV'T CODE § 83.001.

wide public significance even though other governmental institutions may be more competent to address the questions. . . ." By requiring that Plaintiffs allege specific and concrete injury caused by the defendants and redressible by judicial intervention, standing necessarily incorporates the important doctrine of separation of powers that is opposite the notion advanced by Plaintiffs under RESPA. RESPA requires proof of personal injury before the relief chosen by Congress in § 2607(d)(2) can become available. It contains no provision for presumed or *per se* violations that are enforceable by private citizens, but instead vests HUD and interested state authorities with general oversight and enforceability of its provisions. 12 U.S.C. § 2607(d)(4). The HUD letter confirms this when it states that HUD will look at the specific circumstances surrounding the PMI payment to determine whether the arrangement is an illegal kickback under § 2607(a) or a legal payment under § 2607(c) (R9:2315). This belies any finding of presumed or *per se* injury based on a pure allegation of violation.[14]

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[14] In response to similar arguments regarding yield spread premiums, HUD specifically eschewed this position, stating that because § 2607(c) permits certain transactions, yield spread premiums could not be presumed or *per se* illegal. *Compare Heimmermann v. First Union Mortgage Corp.*, 305 F.3d 1257, 1263 (11th Cir. 2001) (because the circumstances influence legality, yield spread payment cannot be "presumed" an illegal referral fee under § 2607(a) merely because it is paid); *accord Schuetz v. Banc One Mortgage Corp.,* 292 F.3d 1004, 1008-11 (9th Cir. 2002), *cert. denied*, -- S.Ct.--, 2003 WL 167684 (2003); *Glover v. Standard Federal Bank*, 283 F.3d 953, 960-61, 964 (8th Cir.), *cert. denied*, 123 S.Ct. 344 (2002)

The separation of power and authority is clear. Contrary to Plaintiffs' assertions, RESPA is not a broad statute "designed to enable citizens to remedy harms and promote the public welfare" absent personal injury (Plaintiffs' Br. 13). This case is eminently different from *Havens*.[15] Although the district court gave Plaintiffs ample opportunity to replead to allege injury and establish standing, Plaintiffs refused to do so. Accordingly, their case could only be dismissed. *Warth*, 422 U.S. at 501-02.

3. The Statute Does Not Create A Private Cause Of Action For "Truthful Real Estate Settlement Practices," And Plaintiffs Have No Standing To Sue Under § 2607(a).

Plaintiffs alternatively allege that § 2607(a) includes a right to "truthful real estate practices" that this section simply does not contain (R9:2283, 2295). Plaintiffs then attempt to analogize this imagined statutory right to the one at issue in *Havens* which, as explained *supra*, involved a different statutory scheme.

Section 2607(a) addresses illegal kickbacks for referrals, nothing more.[16] It does

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[15] Plaintiffs acknowledge this when they recognize that in *Havens*, the FHA created a justiciable statutory legal right that did not depend, by its very terms, on any showing of a personal and specific injury. (Plaintiffs' Br. 16). RESPA is an entirely different, carefully limited legislative scheme.

[16] (a) Business referrals. No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.

not create a reporting or disclosure obligation. *See Pedraza v. United Guar. Corp.*, 114 F. Supp.2d 1347, 1357 (S.D.Ga. 2000) ("Plaintiff alleges only that Defendant engaged in a kickback scheme with lenders in violation of § 2607(a)). Yet, this provision does not create any duty on the part of Defendant to disclose the existence of such a scheme to Plaintiff or other members of her class."); *accord Moll v. U.S. Life Title Ins. Co.*, 700 F. Supp. 1284, 1289 (S.D.N.Y. 1998).

While other provisions of RESPA address a lender's or loan servicer's duty to disclose information,[17] § 2607(a) was designed with a different goal in mind, namely, to prevent unnecessarily high settlement costs.[18] S. Rep. No. 93-866 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6546, 6551. Section 2607(a) does not require the defendants to disclose the terms of the PMI referral to the borrower, and Plaintiffs' complaint is

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[17] *See* 12 U.S.C. §§ 2603 (lenders duty to disclose uniform settlement standards), 2604 (lender's duty to provide information booklets), 2605 (lender's and loan servicer's duty to notify of change in loan servicer), 2609 (servicer's duty to give notices relating to escrow accounts).

Even under these statutes, there is no authority for a private cause of action. *See e.g.,* §§ 2603(b), 2609(d) (providing only for civil penalties assessed by HUD); *Collins v. FMHA-USDA*, 105 F.3d 1366, 1367-68 (11th Cir. 1997) (no private right of action under § 2604 (c)).

[18] Subsequent amendments to RESPA reflect a loosening of reporting requirements which proved too onerous from an administrative standpoint, tended to increase the cost of closure as a result, and which were not all that helpful to borrowers who, for the most part, find the settlement process to be "something of a mystery." *See* S. Rep. No. 94-205, *reprinted in* 1975 U.S.C.C.A.N. 2448, 2451, 2451-52.

devoid of any other statutory allegation. Plaintiffs do not assert a violation of any disclosure statute, nor could they, and, even then, Radian is not a lender or servicer, and thus would not have had a duty disclose.[19] Unlike *Havens*, the statute at issue in this case does not turn upon a duty to represent accurate information. The district court properly dismissed Plaintiffs' action for lack of jurisdiction because Plaintiffs alleged nothing in their complaint that could support Article III standing under this specific and limited statutory scheme.

II. PLAINTIFFS REFUSED TO INCLUDE AN INJURY IN THEIR COMPLAINT BECAUSE IF THEY HAD DONE SO, THE FILED-RATE DOCTRINE WOULD REQUIRE DISMISSAL.

Any attempt by Plaintiffs to remedy their failure to plead injury would have been thwarted by the Filed-Rate Doctrine. In framing their complaint without any clear allegation of injury, Plaintiffs attempted to steer a course between a § 2607(a) damage claim, for which they had no standing, and an allegation of an inflated PMI charge, which would defeat their suit by triggering the Filed-Rate Doctrine. The Filed-Rate

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[19] Although Plaintiffs mention the Truth In Lending Act in their brief, they do not cite or rely upon that statute in their complaint. Moreover, Senate Report 94-410 specifically eliminated any requirement that Truth in Lending information be included as part of loan closure settlement statements. S. Rep. No. 93-866 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6556, 2457. Congress specifically declined to include a TILA provision within the RESPA Act. S. Rep. No. 94-205 (1975), *reprinted in* 1975 U.S.C.C.A.N. 2463, 2464. Thus, any belated argument by Plaintiffs that Defendants somehow violated RESPA through TILA is both waived and erroneous as a matter of law.

Doctrine precludes courts from exercising jurisdiction over the rates charged by certain regulated industries such as the insurance industry. *Korte v. Allstate Ins. Co.,* 48 F. Supp.2d 647, 651 (E.D.Tex. 1999). It "recognizes that where a legislature has established a scheme for ... rate-making, the rights of the rate-payer in regard to the rate he pays are defined by that scheme." *See Morales*, 983 F. Supp. at 1426. The filed rates are deemed "per se reasonable and unassailable in judicial proceedings brought by ratepayers." *Wegoland Ltd. v. NYNEX Corp.*, 27 F.3d 17, 18 (2d Cir. 1994); *Korte*, 48 F. Supp.2d at 649 n.6. Several courts have held that the Filed-Rate Doctrine applies to RESPA claims challenging state-accepted insurance rates. *See e.g., Morales*, 983 F. Supp. at 1426-30; *Stevens v. Union Planters Corp.,* 2000 WL 33128256 (Aug. 20, 2000 E.D.Pa.).

Texas has a regulatory scheme in place to set rates for PMI. *See* TEX.INS.CODE arts. 21.50, 5.11. Insurance providers are required to file all policy forms and rules with the Board, and must file all rate information at least fifteen days before the effective date to charge the rate. TEX.INS.CODE art. 21.50 § 1(A)(b)&(f). The rate must not be excessive, inadequate, or unfairly discriminatory and must be reasonable in light of the benefit provided. TEX.INS.CODE art. 21.50 §1(A)(f). If the Board finds that an insurance provider's rate does not meet these requirements, the Board may hold a hearing and enter an order withdrawing Board acceptance of the rate. TEX.INS.CODE

art. 21.50 §1(A)(k).

Here, Plaintiffs concede that they paid the Texas filed-rate for PMI (R1:145) ("Plaintiffs do not claim that they paid anything but the filed rate."). Plaintiffs have no legal right to pay any rate other than the filed rate under the Filed-Rate Doctrine. *Morales*, 983 F. Supp. at 1426.

In *Morales,* 983 F. Supp. 1426-30, the plaintiffs attempted to side-step the judicial bar to rate scrutiny by claiming three times the entire PMI rate paid, just as the Plaintiffs do here. They did not limit their claim to three times the allegedly excessive amount of PMI. The court saw through this ploy:

> The reason for the plaintiffs' posture is evident from an examination of the ... statute, ... [which] provides for the recovery of "actual damages," thereby requiring a [rate] comparison....
>
> To avoid this pitfall, the plaintiffs argue that RESPA allows recovery of the *entire* ...insurance and ... charges each one of them paid, rather than the *portion* of such charges that allegedly represent a kickback or split prohibited by RESPA. *Id.* at 1427.

Finding–as the district judge did here–that recovery under § 2607(d)(2) of RESPA is limited to three times the amount of the illegal overcharge, *id.*, the court found that the plaintiffs' proposed damage claim lacked statutory basis and that their claim, which necessarily called for rate comparison under RESPA, must fall under the Filed-Rate Doctrine. *Id.* at 1428. Indeed*, if* Plaintiffs were allowed to recover three

times the entire PMI paid, which the statute and jurisprudence do not allow,[20] then Plaintiffs' recovery would offend the interests underlying the doctrine. It would create discrimination in rates among ratepayers, and undermine justiciability of determining reasonable rates when a regulatory agency has exclusive authority. *Id.* Recovery of three times the entire PMI rate would unfairly benefit the Plaintiffs and discriminate against other rate payers by absolving Plaintiffs of the obligation to pay any rate at all while all others paid the legally prescribed rate. *See also* TEX.INS.CODE art. 5.09 (prohibiting discrimination in insurance rates.).

Plaintiffs' theory would allow judicial scrutiny of *per se* reasonable rates to the detriment of rate-control agencies and the regulatory schemes they devise to ensure fair and reasonable rates without undue administrative costs to consumers. *Id.; Taffet*, 967 F.2d at 1491. The same result would occur here because Plaintiffs' theory is the same as in *Morales*. *See also Wegoland*, 27 F.3d at 19 (recognizing that rate challenge is prohibited to promote these dual purposes).

Finally, based on Plaintiffs' admission that they paid nothing more than the filed-rate, Plaintiffs can show no injury as a matter of law, and therefore are entitled to no recovery. Under the Filed-Rate Doctrine, Plaintiffs have no legal right to pay anything other than the filed-rate and, having done nothing more–and received nothing less,

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[20] *See supra* p. 11, n. 6.

Plaintiffs can show no cognizable injury.[21] *Taffet*, 967 F.2d at 1494; *Morales*, 983 F. Supp. at 1429.

III. FOR THE REASONS STATED IN CO-DEFENDANT WELLS FARGO'S BRIEF, THE COURT COULD ALSO HAVE DISMISSED PLAINTIFFS' CASE BASED ON THE STATUTE OF LIMITATIONS.

Radian adopts the arguments in the brief of co-defendant, Wells Fargo. *See* FED.R.APP.P. 28(i). Specifically but without limitation, Radian adopts Wells Fargo's argument that the statute of limitations contained in § 2614 operates as jurisdictional bar to Plaintiffs' § 2607 lawsuit.

CONCLUSION

In sum, Plaintiffs lack standing to sue under § 2607(a) of RESPA, both because they alleged no injury sufficient to support Article III jurisdiction and because they suffered no legal injury by application of the Filed-Rate Doctrine. In any event, the Filed-Rate Doctrine precludes Plaintiffs' veiled challenge to Radian's PMI rates, which

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[21] Notably, while the Filed-Rate Doctrine precludes Plaintiffs' lawsuit, it does not immunize insurance providers from scrutiny. Under the state regulatory scheme, government officials remain free to investigate the reasonableness of rates when the circumstances warrant. The Texas Insurance Board is charged with the responsibility for regulating and supervising mortgage insurance in Texas. Moreover, under RESPA, HUD, the Texas Attorney General, and the Texas Insurance Commissioner may also act to curtail abusive practices that tend to unnecessarily increase real estate closure costs. *See Wegoland*, 27 F.3d at 22; *Morales*, 983 F. Supp. at 1429. The proper safeguards are in place, but they require executive and agency actions--not private lawsuits by private citizens.

reflect the rate approved under the comprehensive scheme of the Texas Insurance Board. For these reasons, this Court should affirm on the summary calendar the district court's dismissal of Plaintiffs' Fourth Amended Complaint and its denial of any further leave to amend the complaint.

Respectfully submitted,

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Sidney Powell

CERTIFICATE OF SERVICE

I hereby certify that two true and correct hard copies, and an electronic copy in Word Perfect version 10.0, of the Brief of Appellees and a hard copy of the Record Excerpts was served on the following attorneys of record for Plaintiffs via first class mail, postage prepaid, this 19th day of February, 2003:

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CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32.3, undersigned counsel certifies this appellate brief complies with the type-volume limitations of 5th Cir. R. 32.3.

1. EXCLUSIVE OF THE EXEMPTED PORTIONS OF FED.R.APP.P. 32(a)(7)(B)(iii), THE BRIEF CONTAINS 7,884 WORDS.

2. THE BRIEF HAS BEEN PREPARED IN PROPORTIONALLY SPACED TYPEFACE USING WORD PERFECT 10.0 FOR WINDOWS IN TIMES NEW ROMAN TYPEFACE AND 14 POINT FONT SIZE.

3. UNDERSIGNED COUNSEL IS ALSO PROVIDING AN ELECTRONIC VERSION OF THE BRIEF TO THE COURT AND OPPOSING COUNSEL.

4. UNDERSIGNED COUNSEL UNDERSTANDS THAT A MATERIAL MISREPRESENTATION IN COMPLETING THIS CERTIFICATE, OR CIRCUMVENTION OF THE TYPE-VOLUME LIMITS IN FED.R.APP.P. 32(a)(7)(B)(iii), MAY RESULT IN THE COURT'S STRIKING THE BRIEF AND IMPOSING SANCTIONS AGAINST THE PERSON SIGNING THE BRIEF.

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