IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-16585

RICHARD L. FOWLER, *et al.*,
Plaintiffs-Appellants,

v.

CALIBER HOME LOANS, INC., *et al.*,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida
Case No. 1:15-CV-24542-JG

BRIEF OF DEFENDANT-APPELLEE
AMERICAN SECURITY INSURANCE COMPANY

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Fowler v. Caliber Home Loans, Inc., No. 16-16585

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-2, defendant-appellee American Security Insurance Company certifies its belief that the Certificate of Interested Persons and Corporate Disclosure Statement contained in plaintiffs-appellants' opening brief is true and correct.

STATEMENT REGARDING ORAL ARGUMENT

Defendant-appellee American Security Insurance Company desires oral argument. This appeal is important not only to the parties to the appeal but also other residential mortgage lenders, servicers, and lender-placed insurance providers. Affirming the order of dismissal below effectively would foreclose other putative class actions and individual lawsuits pending in this Circuit asserting substantially the same claims and allegations. Furthermore, the Court's decision may guide courts outside of this Circuit in adjudicating similar litigation now pending.

STATEMENT REGARDING JOINDER IN OTHER BRIEFS

Pursuant to Fed. R. App. P. 28(i), defendant-appellee American Security Insurance Company states that it joins fully in the Brief of Defendants-Appellees filed in *Patel v. Specialized Loan Servicing LLC*, No. 16-12100, an appeal in this Court with which this appeal has been consolidated. In addition, American Security adopts by reference the "Summary of Argument" and "Argument" portions of that Brief.

American Security also joins in and adopts by reference the Brief of *Amicus Curiae* Property Casualty Insurers Association of America filed in the *Patel* appeal.

Further, American Security joins in and adopts by reference the Brief of Defendant-Appellee Caliber Home Loans, Inc., filed in this appeal.

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STATEMENT OF JURISDICTION

The District Court had original jurisdiction because the matter in controversy exceeded the sum or value of $5,000,000, exclusive of interest and costs, and was a class action in which members of the putative nationwide class are citizens of states different from defendants-appellees Caliber Home Loans, Inc. ("Caliber") and American Security Insurance Company ("American Security" and, together with Caliber, "Defendants"). *See* 28 U.S.C. § 1332(d)(2). The District Court also had original jurisdiction because the matter arose under laws of the United States, including the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq*. *See* 28 U.S.C. §§ 1331, 1367(a).

This Court has appellate jurisdiction because the District Court's amended order of dismissal was entered on September 13, 2016. *See* 28 U.S.C. § 1291. Plaintiffs-appellants Richard Fowler, Yvone Yambo-Gonzalez, and Glenda Keller (together, "Plaintiffs") filed a notice of appeal on October 13, 2016.

STATEMENT OF THE ISSUES

The issues presented for review are:

1. Did the District Court properly dismiss the action as barred by the filed-rate doctrine?

2. Was dismissal alternatively proper for reasons not reached by the District Court but supported by the record?

STATEMENT OF THE CASE

I. Nature Of The Case.

This appeal is procedurally and factually similar to another appeal pending in this Court, *Patel v. Specialized Loan Servicing LLC*, No. 16-12100. The appeals have been consolidated for oral argument. Briefing in *Patel* is now complete.

Both appeals arise from putative class actions filed in the United States District Court for the Southern District of Florida not only by the same counsel, but on the same day. Plaintiffs in both appeals are borrowers who failed to maintain property insurance required by the terms of their mortgages. When plaintiffs breached their contractual duties, the defendant loan servicers obtained replacement insurance issued by American Security covering the properties, as provided for by the mortgages' terms. This lender-placed insurance ("LPI") is the subject of both appeals.

The appeals involve parallel claims: Plaintiffs in both actions alleged that their servicer charged them for LPI premiums "inflated" by so-called "kickbacks." On this basis, plaintiffs asserted identical claims including: (i) against the servicers, breach of contract, breach of the implied duty of good faith and fair dealing, and violations of the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.*; (ii) against American Security, tortious interference with a business relationship; and (iii) against all defendants, unjust enrichment and RICO violations.[1] Plaintiffs also sought parallel relief – injunctions, damages, treble damages, and penalties.

Plaintiffs' claims here fail for the same reasons they fail in the *Patel* appeal. As both District Court judges held, the filed-rate doctrine bars all claims. Under that doctrine, any rate filed with and approved by a state insurance regulator is *per se* reasonable and unassailable in judicial proceedings. Even if a claim does not directly attack the approved rate, the doctrine forbids an award of damages that would, in effect, result in a judicial determination of the rate's reasonableness. And the claims independently fail for reasons apparent from the record and briefed to the District Court, but not reached below.

II. Facts And Course Of Proceedings.

A. Plaintiffs' Mortgages And Insurance Placements.

Yvonne Yambo-Gonzalez, a Florida resident, D.E. 1 ¶ 14, is the borrower of a mortgage loan given by nonparty Accredited Home Lenders. D.E. 1-1. Richard Fowler, another Florida resident, D.E. 1 ¶ 15, is the borrower of a mortgage loan given by nonparty Washington Mutual Bank. D.E. 1-2. Glenda Keller, a Pennsylvania resident, D.E. 1 ¶ 16, is the borrower of a mortgage loan given by

[1] The *Patel* appeal also includes a claim for violation of the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"), Fla. Stat. § 501.201 *et seq*. That claim is premised on the same allegations as the RICO claims.

nonparty Household Finance Consumer Discount Company. D.E. 22-1. Caliber is the servicer for each loan. D.E. 1 ¶ 1; D.E. 91 at 6.

Under the typical mortgage instrument, if a borrower's property insurance lapses or fails to provide sufficient coverage, the lender may purchase coverage on the mortgaged property and recoup the premium from the borrower. D.E. 1 ¶ 5. Plaintiffs' mortgages are no different. Section 5 of Ms. Yambo-Gonzalez's and Mr. Fowler's mortgages provides:

> Borrower shall keep the improvements now existing or hereafter erected on the Property insured against loss by fire, hazards included within the term "extended coverage," and any other hazards including, but not limited to, earthquakes and floods, for which Lender requires insurance. This insurance shall be maintained in the amounts (including deductible levels) and for the periods that Lender requires.
>
> *******
>
> If Borrower fails to maintain any of the coverages described above, Lender may obtain insurance coverage, at Lender's option and Borrower's expense. Lender is under no obligation to purchase any particular type or amount of coverage. Therefore, such coverage shall cover Lender, but might or might not protect Borrower, Borrower's equity in the Property, or the contents of the Property, against any risk, hazard or liability and might provide greater or lesser coverage than was previously in effect. Borrower acknowledges that the cost of the insurance coverage so obtained might significantly exceed the cost of insurance that Borrower could have obtained. Any amounts disbursed by Lender under this Section 5 shall become additional debt of Borrower secured by this Security Instrument.

D.E. 1 ¶¶ 48, 64. Under Section 9, if Plaintiffs do not "perform the covenants and agreements contained in this Security Instrument," then "Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and Lender's rights," including protecting "the value of the Property." *Id.* Ms. Keller's mortgage includes comparable provisions. *Id.* ¶ 77; D.E. 22-1.[2]

Yambo-Gonzalez. In June 2009, American Security sent Ms. Yambo-Gonzalez a letter on behalf of Caliber's predecessor-in-interest (Vericrest Financial, Inc.) advising that the hazard insurance covering her mortgaged property had expired and that, unless she acted, replacement insurance would be purchased. D.E. 23-2 Ex. 1. The letter further advised:

> The cost of such coverage may be substantially higher than the amount you would normally pay for hazard insurance coverage. However, this coverage may not provide insurance coverage for the full replacement cost of your dwelling. Affiliates of Vericrest Financial, Inc. may earn commissions or income in conjunction with the placement of this coverage.

Id.

[2] Although not appended to Plaintiffs' complaint, the Court may properly consider Ms. Keller's mortgage and the various letters and LPI policies sent to Plaintiffs. These documents are referenced repeatedly in the complaint, are central to Plaintiffs' claims, and their contents and authenticity were undisputed when Defendants introduced them in the record below. *See Fin. Sec. Assur., Inc. v. Stephens, Inc.*, 500 F.3d 1276, 1284 (11th Cir. 2007).

Breaching her mortgage obligation, Ms. Yambo-Gonzalez failed to obtain her own insurance. A second letter sent in July 2009 contained similar disclosures, advising her that "affiliates of Vericrest Financial, Inc. may earn commission or income," encouraging her "to contact your insurance company or agent to place adequate hazard insurance," reminding her of "the right to purchase insurance from the insurance company of your choice," and enclosing an insurance binder. *Id.* Ex. 2. The letter also advised that, if proof of insurance was received, the binder would be canceled with a refund of any unearned premium. *Id.* When that letter and its advisories were ignored, American Security issued LPI coverage for the property. *Id.* Ex. 3. Ms. Yambo-Gonzalez was advised of that in an August 2009 letter, which repeated the disclosures of the first two letters and enclosed the LPI certificate describing Ms. Yambo-Gonzales as an "additional insured." *Id.*

Since that time, Ms. Yambo-Gonzalez has been sent multiple similar letters reminding her of the lapse in coverage and advising that Caliber would obtain or renew LPI hazard and flood policies for one-year terms if she failed to provide proof of coverage. *Id.* Exs. 4-16. These letters made the same disclosures regarding the LPI's higher cost, limited coverage, and that commissions or other income would be paid. *Id.* The letters similarly advised Ms. Yambo-Gonzalez of her right to obtain insurance of her own choosing and encouraged her to do so. *Id.*

Because she did not provide proof of coverage in response to these letters, however, Caliber has renewed the LPI policies annually. D.E. 1. ¶¶ 50, 52.

Fowler. Mr. Fowler had a similar experience. In May 2014, American Security sent him a letter on Caliber's behalf advising that the hazard insurance covering his mortgaged property had expired and that, unless he acted, replacement insurance would be purchased. D.E. 23-1 Ex. 1. The letter urged Mr. Fowler to obtain his own hazard insurance, stating:

- "The insurance we buy: May be more expensive than the insurance you can buy yourself [and] May not provide as much coverage as an insurance policy you buy yourself."
- "You have the right to independently purchase acceptable insurance from the insurance agent or company of your choice, and we urge you to do so."
- "The insurance we obtain will remain in effect until you provide us with evidence of acceptable coverage, at which time the policy we obtained will be cancelled, and you will receive a refund of any unearned premium."
- "The cost of the insurance is likely to be higher than the cost of coverage you could obtain on your own."
- "The insurance we obtain may provide benefits to you but is primarily for the benefit of the lienholder."
- "WE HOPE YOU'LL AGREE THAT OBTAINING YOUR OWN INSURANCE IS IN YOUR BEST INTEREST."

Id.

When Caliber did not receive evidence of hazard insurance, it sent another letter in June 2014 providing a "second and final notice" to Mr. Fowler. D.E. 23-1 Ex. 2. The letter repeated each of the disclosures made in the May 2014 letter about the insurance's higher cost and limited coverage, estimated the insurance's cost, reminded Mr. Fowler that obtaining his own insurance was in his best interest, and enclosed an insurance binder. *Id.* And in July 2014, Caliber sent a third notice again reiterating the prior letters' disclosures. D.E. 23-1 Ex. 3. This letter enclosed an American Security "Residential Dwelling Certificate" describing (in an endorsement) Mr. Fowler as an additional named insured. *Id.*

Keller. Caliber sent Ms. Keller a letter in March 2015, advising that it had no record of hazard insurance on her property and requesting that she provide proof of coverage. D.E. 23-3 Ex. 1. The letter contained the same disclosures warning of LPI's disadvantages that were made in the multiple letters sent to Mr. Fowler. *Id.* Ms. Keller did not provide proof of coverage in response to that letter or a similar follow-up letter sent in April 2015. *Id.* Ex. 2. As a result, Caliber obtained an LPI policy from American Security in May 2015, as communicated to Ms. Keller in a third letter, again repeating the various disclosures. *Id.* Ex. 3. In an endorsement, the LPI policy describes Ms. Keller as an additional named insured. *Id.* Caliber has since renewed the LPI coverage. D.E. 1 ¶ 79.

B. Florida And Pennsylvania Approved The Premium Rates At Issue.

Florida. The premium rates about which the Florida Plaintiffs (Mr. Fowler and Ms. Yambo-Gonzalez) complain were filed with and approved by Florida's Office of Insurance Regulation ("the Office"). The Office regulates rates "to the end that they shall not be excessive, inadequate, or unfairly discriminatory." Fla. Stat. § 627.031(1)(a), *see also id.* § 627.062(1). A "premium" is "the consideration paid or to be paid to an insurer for the issuance and delivery of any binder or policy of insurance." *Id.* § 627.041(2). "'Premium' is the consideration for insurance, by whatever name called." *Id.* § 627.403. A "rate" is "the unit charge by which the measure of exposure or the amount of insurance specified in a policy of insurance or covered thereunder is multiplied to determine the premium." *Id.* § 627.041(1).

All rates, rating manuals, rating and surcharge schedules, premium credits or discount schedules, and changes thereto, must be filed for the Office's approval. *Id.* § 627.062(2)(a). "If at any time the office has reason to believe any such rate is excessive," it "is directed to take the necessary action" to cause the rate to comply with Florida law, *id.* § 627.031(2), including issuing orders disapproving rates, *id.* § 627.062(2)(h). "Upon receiving a rate filing, the office shall review the filing to determine if a rate is excessive," considering 14 specified factors. *Id.* § 627.062(2)(b). In reviewing and approving rates, "the Office may not directly or indirectly" prohibit insurers "from paying acquisition costs," including commissions, or "prohibit any such insurer from including the full amount of the acquisition costs in a rate filing." *Id.* § 627.062(1)(i)(1).

Once approved, Florida law requires that insurers charge only premiums calculated at the filed rate. *Id.* § 626.9541(1)(o)(2). Insurers charging premiums calculated at less than what the approved rate specifies are subject to substantial monetary fines. *Id.* § 626.9521(2). It is undisputed that all amounts charged for American Security-issued LPI for the Florida properties were exactly the amounts obtained by applying Office-approved rates to the amount of coverage provided. D.E. 91 at 9, 15, 30.

Pennsylvania. The premium rate about which Ms. Keller complains was filed with and approved by Pennsylvania's Insurance Commissioner. Like Florida, Pennsylvania heavily regulates the insurance industry to the end of protecting "policyholders and the public from excessive, inadequate or discriminatory rates." 40 Pa. Stat. § 710-2(1); *see also id.* §§ 1181, 1221. Insurers must "file every manual of classifications, rules and rates, every rating plan and every modification of a manual of classifications, rules and rates and a rating plan which it proposes to use in this Commonwealth." *Id.* § 710-6(a); *see also id.* §§ 1184(a), 1224(a). The term "rate" is defined as the "cost of insurance per exposure unit, whether expressed as a single number or as a prospective loss cost, with an adjustment to account for the treatment of expenses, profit and individual insurer variation in loss experience prior to any application of individual risk variations based on loss or expense considerations." *Id.* § 710-3.

The Commissioner may disapprove premium rates that "are determined to be excessive, inadequate or unfairly discriminatory." *Id.* § 710-7(b); *see also id.* §§ 1185(a), 1225(a). The Commissioner also may disapprove previously approved rates if it subsequently determines that the rates are excessive or otherwise contrary to law. *Id.* § 710-11(a)-(e); *see also id.* §§ 1185(b), 1225(b).

Once approved, Pennsylvania law requires insurers to charge premiums calculated at the filed rate. *Id.* § 710-5(a); *see also id.* §§ 1184(h), 1224(i). It is undisputed that amounts charged for the American Security-issued LPI covering Ms. Keller's property were the exact amounts obtained by applying the Commissioner-approved to the amount of coverage provided. D.E. 91 at 9, 15, 30.

C. Plaintiffs' Complaint And Its Dismissal.

Plaintiffs do not challenge Caliber's right to obtain LPI coverage. D.E. 1 ¶ 45. Plaintiffs instead posit the existence of "kickbacks" from American Security to Caliber in the form of: (i) "payments of illusory reinsurance premiums"; (ii) "below-cost" mortgage servicing functions performed on Caliber's behalf; (iii) "expense reimbursements" paid to Caliber for certain insurance-related services that Caliber performed; and (iv) "unearned" commissions paid to a Caliber-affiliated licensed agency. *Id.* ¶ 3. They assert that "Caliber essentially receives a rebate on the cost of the force-placed insurance" but that Defendants "do not pass on these rebates to the borrower." *Id.*

Plaintiffs do not dispute that they were charged the precise amounts mandated by regulator-approved LPI premium rates. D.E. 91 at 9 (quoting D.E. 74 at 119), 15, 30. Because Plaintiffs do not and cannot claim that they paid any amounts except those in accordance with approved rates, they argue that the approved rates included components that "inflate" the premiums to offset American Security's cost of providing "kickbacks" to Caliber. Their complaint repeatedly alleges that the premiums were "inflated." *See, e.g.*, D.E. 1 ¶¶ 6, 25, 29, 34-37, 42-45, 55, 69, 89, 111, 115, 117, 125, 133, 150, 153, 158, 159, 162, 166.

Plaintiffs do not seek to recover the *entire* LPI premium, only the amount of purported overcharges associated with rate components with which they take issue. D.E. 91 at 15 (quoting D.E. 74 at 107-08). That is, they seek damages equal to the rate components they characterize as "kickbacks," *id.* at 9, 15, 30, with Plaintiffs claiming "the difference between the amounts the contract obligated them to pay and what they were actually charged." Appellants' Br. at 16. Plaintiffs conceded below that they could not calculate these alleged damages "'without determining the amount of the commissions, tracking expenses, or other allegedly inflated, or unearned portions, of the LPI premium.'" D.E. 91 at 15 (quoting D.E. 74 at 105).

Plaintiffs also conceded that *all* of their claims are subject to dismissal if the filed-rate doctrine applies. *Id.* at 2-3, 21 n.12; D.E. 74 at 80 ("If Your Honor finds, like Judge Cohn, that the doctrine applies you can dismiss this case. Absolutely."). Defendants' motions to dismiss, D.E. 22, 23, which Plaintiffs opposed, D.E. 47, were granted for that reason. Citing *Rothstein v. Balboa Insurance Co.*, 794 F.3d 256 (2d Cir. 2015), and other decisions, the District Court held:

> Plaintiffs do not dispute that ASIC's LPI rates are regulated by the relevant states, and they were charged the exact LPI premiums required by ASIC's authorized rates. Plaintiffs' damages are allegedly being charged the components of their LPI premiums they call "kickbacks." Plaintiffs' claims require this Court to parse out the portion of the authorized LPI premiums that may be attributed to the alleged "kickbacks," and then award that portion to plaintiffs as damages. That exercise would necessarily trespass on the regulators' authority to determine ASIC's LPI rates and the components thereof, violating the nonjusticiability principle. Such damages would also have the effect of retroactively reducing plaintiffs' LPI premiums over other ASIC insureds, violating the nondiscrimination principle.

D.E. 91 at 39. Having determined that the filed-rate doctrine bars each claim, the District Court declined to reach the other, claim-specific grounds for dismissal that Defendants also raised. *Id.* at 10. Plaintiffs appealed. D.E. 93.

III. Standard Of Review.

This Court reviews *de novo* a complaint's dismissal. *Allen v. USAA Cas. Ins. Co.*, 790 F.3d 1274, 1277 (11th Cir. 2015). Dismissal is proper when, on the basis of a dispositive legal issue, no construction of the factual allegations will support a claim. *Id.* at 1278.

SUMMARY OF ARGUMENT

1. The filed-rate doctrine bars Plaintiffs' claims. Although Plaintiffs argue that the doctrine does not bar claims for LPI charges that exceed Caliber's "actual cost of coverage," and seek a "contractual remedy" not governed by state regulators, this misapprehends the doctrine's reach. The doctrine's application turns not upon a defendant's alleged conduct, but upon the relief being sought, and the impact of that relief on agency procedures and rate determinations. Like other insurers, American Security must charge only the dollar amount calculated in accordance with the applicable rate filed with and approved by the regulator. Plaintiffs conceded below that Defendants charged them exactly that rate-based amount – no more, no less. Plaintiffs now ask the Court to reinstate their claims because that rate-based amount supposedly exceeded the amount that their mortgages authorized. Doing so would contravene the filed-rate doctrine.

Plaintiffs' attempt to parse each LPI placement into two separate, sequential transactions – insurer-to-servicer and servicer-to-borrower – is legally meaningless and factually misguided. Claims challenging approved rates are subject to the doctrine whether or not the rates are passed through intermediaries. Regardless of whether Plaintiffs paid the premium directly or only a charge in an amount identical to the premium, any award of damages measured by components of the approved rate would subvert regulators' authority to decide which components should be included in a reasonable rate. There are not two "separate transactions" anyway – LPI travels invariably insurer-to-servicer-to-borrower. Not only are Plaintiffs themselves insureds together with Caliber under the LPI policies, they are the mortgage-designated ratepayers and, in approving LPI rates, state insurance regulators were well aware of these facts.

2. Plaintiffs' claims fail for other reasons argued below, but not decided by the District Court. The RICO claims allege neither a plausible fraudulent scheme nor how Defendants proximately caused Plaintiffs' purported injuries. Plaintiffs were encouraged *not* to allow the LPI to be placed and were instead encouraged to obtain their own less-expensive insurance. Furthermore, the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*, "reverse-preempts" the Florida Plaintiffs' RICO claims. The tortious interference claim fails not only because American Security could not have induced a servicer's breach of mortgages to which the servicer is not a party, but because American Security's actions were legally justified, and neither "tortious" nor in "bad faith." The unjust enrichment claim fails too. Not only is there nothing "unjust" about Defendants' financial arrangements, the claim arises from allegedly tortious conduct, not any quasi-contractual liability.

ARGUMENT

I. The Filed-Rate Doctrine Bars Plaintiffs' Claims.

According to Plaintiffs, this appeal "presents only one question":

> [W]hether the filed-rate doctrine bars claims by mortgagors challenging force-placed insurance charges imposed by their mortgage servicers beyond the servicer's actual cost of coverage, without notice and in violation of their mortgage contracts, where the servicer has taken kickbacks or rebates from its force-placed insurer, but did not pass its savings on to mortgagors.

Appellants' Br. at 1. Even accepting as true this question's mischaracterizations, the only logical answer is "yes." Plaintiffs were charged amounts exactly equal to premiums based on state-approved rates, amounts that American Security is legally *required* to charge. To establish their alleged damages, Plaintiffs must subtract from the rate-based charge whatever lesser amount they supposedly should have been charged. Even if this differential exceeded the servicers' "actual cost of coverage" or breached the mortgages' terms – allegations that Defendants dispute – any award of damages would unavoidably impugn the approved rate. Put simply, Plaintiffs suffer "no legally cognizable injury by virtue of paying the filed rate." *Taffet v. S. Co.*, 967 F.2d 1483, 1494 (11th Cir. 1992) (en banc).

The filed-rate doctrine's nuances were surveyed in the *Patel* appeal, and need not be fully repeated here. American Security adopts by reference the arguments asserted in Argument Part I of the Brief of Defendants-Appellees filed in the *Patel* appeal, and in the Brief of *Amicus Curiae* Property Casualty Insurers Association of America, also filed in the *Patel* appeal. The doctrine "'forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal [or state] regulatory authority.'" *Hill v. BellSouth Telecommc'ns, Inc.*, 364 F.3d 1308, 1317 (11th Cir. 2004) (quoting *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 (1981)). Two principles underlie the doctrine: "(1) nondiscrimination – 'preventing carriers from engaging in price discrimination as between ratepayers' and (2) nonjusticiability – 'preserving the exclusive role of federal [and state] agencies in approving rates … that are reasonable by keeping courts out of the ratemaking process, a function that the federal [and state] regulatory agencies are more competent to perform.'" *Id.* at 1316 (quoting *Marcus v. AT&T Corp.*, 138 F.3d 46, 58 (2d Cir. 1998)).

Of particular relevance here, the doctrine's applicability is not diminished if a plaintiff only indirectly challenges a filed rate. "Even if such a challenge does not, in theory, attack the filed rate," under the nondiscrimination principle, "an award of damages to the customer-plaintiff would, *effectively*, change the rate paid by the customer to one below the filed rate paid by other customers." *Id.* (emphasis added). Similarly, under the nonjusticiability principle, "even if a claim does not directly attack the filed rate, an award of damages to the customer that would, *in effect*, result in a judicial determination of the reasonableness of that rate is prohibited under the filed rate doctrine." *Id.* at 1317 (emphasis added). "Thus, a claim may be barred even if it can be characterized as challenging something other than the rate itself." *Rothstein*, 794 F.3d at 262. The filed-rate doctrine depends not upon the nature of the misconduct alleged, but on the nature of the relief sought. *See Taffet*, 967 F.2d at 1495.

Nor does it matter that a plaintiff might seek a contractual or tort remedy supposedly not governed by state regulators. Once approved, rates "become 'the law' and exclusively govern the rights and liabilities of the carrier to the customer." *Hill*, 364 F.3d at 1315; *see also In re Olympia Holding Corp.*, 88 F.3d 952, 956 (11th Cir. 1996) ("This doctrine requires that a common carrier adhere to its rates on file with the ICC, irrespective of any rate it may have separately negotiated with a shipper."). "The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier." *Keogh v. Chicago & Nw. Ry.*, 260 U.S. 156, 163 (1922). "And they are not affected by the tort of a third party." *Id.* This Court "has steadfastly maintained that the filed rate must prevail as the *only* legal rate, notwithstanding any equitable defenses." *Olympia Holding*, 88 F.3d at 956 (emphasis added). In this way, "filed rates serve the additional purpose of supplying the price term for the transactions. They thus complete the terms of a unilateral agreement by disclosing the rate to which parties will be bound, and upon which a carrier may collect." *Id.* at 956 n.6.

A. Legally, Plaintiffs' "Separate Transactions" Theory Is A Distinction Without A Difference.

Plaintiffs all but concede that, had they solicited LPI directly from American Security, the filed-rate doctrine would bar their claims. In an effort to escape that outcome, they posit "two sequential but separate contractual arrangements" involved with LPI, "the first between" American Security "and its customer, Caliber, and the second between Caliber and its mortgagors." Appellants' Br. at 11. The gist of Plaintiffs' theory is that American Security charged Caliber the LPI premium and Caliber in turn charged Plaintiffs an amount denominated as something other than the premium, even though the dollar amounts were identical. Plaintiffs further posit that they "challenge conduct arising only from the second transaction," *id.* at 11-12, which is neither "subject to regulation by state departments of insurance," nor involves "the borrower's purchase of any service the price of which was calculated based on a filed rate." *Id.* at 14.[3]

[3] For the same reason, Plaintiffs contend in a footnote that the District Court should not have taken judicial notice of American Security's LPI rate filings, calling the filings "irrelevant." Appellants' Br. at 16 n.3. Plaintiffs do not contend that judicial notice was otherwise improper, whether because the filings are inauthentic, incomplete, or inaccurate. The filings are relevant to determining whether amounts charged were proper, under the filed-rate doctrine or otherwise. Where "the court is supplied with the necessary information," the court "must take judicial notice if a party requests it." Fed. R. Evid. 201(c)(2). Regarding the LPI rate filings, Plaintiffs conceded below that "the Court has wide discretion to take judicial notice of many publicly available items. *And, of course, it is not reversible error whether you do or don't.*" D.E. 74 at 46 (emphasis added).

This depiction of unconnected LPI transactions is baseless, as explained in Part I.B, *infra*. But even if they had not mischaracterized LPI, Plaintiffs' "separate transactions" distinction could not resurrect their dismissed claims – "such claims have the *effect* of challenging the filed rate." *Hill*, 364 F.3d at 1315 (emphasis added). "The filed rate doctrine is not limited to transactions in which the ratepayer deals directly with the rate filer. The doctrine operates notwithstanding an intermediary that passes along the rate." *Rothstein*, 794 F.3d at 264.

Plaintiffs do not argue that Caliber passes on to its borrowers anything other than the approved premium, inclusive of so-called "kickbacks." "Plaintiffs do not dispute that they were charged only the exact LPI premiums authorized by state-approved rates." D.E. 91 at 9 (citing D.E. 74 at 119). State law *mandates* that only the approved premium be charged. *See* Fla. Stat. § 626.9541(1)(o)(2); 40 Pa. Stat. § 710-5(a). Plaintiffs conceded below that they could not calculate damages "'without determining the amount of the commissions, tracking expenses, or other allegedly inflated, or unearned portions, of the LPI premium.'" D.E. 91 at 15 (quoting D.E. 74 at 105). And in another LPI "kickback" lawsuit, Plaintiffs' counsel likewise "seemed to concede that the 'unearned' commission, about which [the plaintiff] complained, is part of the rate filed by the insurance carrier in each state." *Kunzelmann v. Wells Fargo Bank, N.A.*, 2013 WL 139913, at *12 (S.D.

Fla. Jan. 10, 2013). Based upon this concession, it "seem[ed] apparent" that "the filed-rate doctrine is an issue that must be addressed." *Id.*

Regardless of whether they paid premiums directly to American Security or were charged identical amounts by an intermediary like Caliber, Plaintiffs' claims thus violate the twin aims of preventing judicial interference in ratemaking and ensuring uniform treatment of ratepayers. To award damages, a court would have to determine some counterfactual amount Plaintiffs should have been charged that differs from the approved amount Plaintiffs actually were charged. Because the amount actually charged is rate-based, commutatively, any such determination would impugn the rates' reasonableness. Because every penny charged was state-approved, complaints about unregulated insurer-servicer agreements are irrelevant – there were no charges to Plaintiffs based on such agreements. In short, assessing damages would require "unbundling" the rate, not calculating payments *outside* of the rate. The nonjusticiability principle is thus implicated by the relief sought.

A damages award also would discriminate between ratepayers by making non-Caliber borrowers and non-class members pay the full rate-based amount while Plaintiffs (and putative class members) would effectively pay some lesser amount. The filed rate, however, "must prevail as the *only* legal rate," whether or not a mortgage or other contract requires a different rate. *See Olympia Holding*, 88 F.3d at 956 (emphasis added). The nondiscrimination principle is also implicated.

"Based on these two principles, 'the doctrine is applied *strictly* to prevent a plaintiff from bringing a cause of action even in the face of apparent inequities whenever either the nondiscrimination strand or the nonjusticiability strand underlying the doctrine is implicated by the cause of action the plaintiff seeks to pursue.'" *Hill*, 364 F.3d at 1316 (quoting *Marcus*, 138 F.3d at 59) (emphasis added). Accepting Plaintiffs' "separate transactions" distinction, however, relaxes the doctrine, exposing many rates to judicial second-guessing. Under Plaintiffs' reasoning, for example, retail purchasers of electricity could defeat the doctrine by alleging that the filed wholesale rate passed on by an intermediary was too high. That is not the law. *See Wah Chang v. Duke Energy Trading & Mkt'g, LLC*, 507 F.3d 1222, 1226-27 (9th Cir. 2007).[4] Or family members of prison inmates could bring claims for damages challenging "kickback"-inflated telephone tariffs based on "vertical arrangements" between telephone companies and prisons. That is not

[4] Plaintiffs cannot meaningfully distinguish *Wah Chang*. They argue that, unlike themselves, the *Wah Chang* plaintiff "contracted to purchase electricity at a retail price calculated based on a filed and approved rate, and challenged that rate head-on as unfair based on alleged market manipulation." Appellants' Br. at 24. That is analogous to Plaintiffs' allegations. Like Plaintiffs, Wah Chang argued that "it did not directly purchase wholesale power. Rather, it was a retail customer. That is an asthenic distinction at best." *Id.* Here, too, Plaintiffs contracted to purchase LPI at filed rates, which "supply[] the price term," completing "the terms of a unilateral agreement by disclosing the rate to which parties will be bound." *Olympia Holding*, 88 F.3d at 956 n.6. And like *Wah Chang*, Plaintiffs' complaint "seeks what amounts to having the courts determine what rates [Defendants] should have charged instead of the rates they did charge." 507 F.3d at 1226.

the law either. *See Arsberry v. Illinois*, 244 F.3d 558, 566-67 (7th Cir. 2001) ("the filed-rate doctrine pops back in as a jurisdictional bar" to such antitrust claims).

Unsurprisingly, a growing number of courts have rejected Plaintiffs' "separate transactions" distinction as legally immaterial to the filed-rate doctrine. Aside from *Rothstein* itself, 794 F.3d at 262-65, within this Circuit the courts in *Patel v. Specialized Loan Servicing LLC*, 183 F. Supp. 3d 1238, 1244 (S.D. Fla. 2016), *Trevathan v. Select Portfolio Servicing, Inc.*, 142 F. Supp. 3d 1283, 1288 (S.D. Fla. 2015), and *Roberts v. Wells Fargo Bank, N.A.*, 2013 WL 1233268, at *13 (S.D. Ga. Mar. 27, 2013), together with the District Court below, have rejected Plaintiffs' view that borrowers are only challenging defendants' payment of "kickbacks," not LPI rates themselves. Another judge who initially accepted a representation by Plaintiffs' counsel that that the doctrine did not apply, *Kunzelmann v. Wells Fargo Bank, N.A.*, 2012 WL 2003337, at *3 (S.D. Fla. June 4, 2012), later confirmed that, in fact, "the filed-rate doctrine is an issue that must be addressed." *Kunzelmann*, 2013 WL 139913, at *2.

Outside this Circuit, many courts have applied the filed-rate doctrine to bar LPI "kickback" claims, often expressly rejecting the "separate transactions" distinction. For example, in *Decambaliza v. QBE Holdings, Inc.*, the plaintiff alleged that her servicer had a "pre-arranged agreement with an insurance provider to purchase forced-placed policies at high-priced premiums" and that, "in turn, the insurance provider pays the servicer a fee, commission, rebate or other consideration. In addition to kickbacks, lenders and loan servicers often have other financial incentives to force-place insurance, such as receiving discounted or free insurance tracking." 2013 WL 5777294, at *2 (W.D. Wis. Oct. 25, 2013). The *Decambaliza* court held that these alleged kickbacks "are part of a premium that was approved by a regulatory entity." *Id.* at *7. Although the state insurance regulator might not directly police the servicer-borrower portion of LPI transactions, "it does regulate the premium rate ultimately charged to plaintiff. Try as she might, plaintiff cannot avoid the fact that she is asking this court to determine what rate the insurance company defendants should have charged instead of the rates they did charge." *Id.* at *8.[5]

B. In Fact, There Are Not Two "Separate Transactions," But A Single Two-Party Transaction Between Insurer And Borrower.

Plaintiffs' "separate transactions" theory is not only legally immaterial to the filed-rate doctrine's application, it misrepresents the LPI arrangement.

[5] *See also Alpert v. Nationstar Mortg. LLC*, 2017 WL 1079916, at *3-4 (W.D. Wash. Mar. 22, 2017); *Lyons v. Litton Loan Servicing LP*, 158 F. Supp. 3d 211, 224-30 (S.D.N.Y. 2016); *Johnson v. Green Tree Servicing LLC*, 2015 WL 2452680, at *2 (N.D. Miss. May 22, 2015); *Miller v. Wells Fargo Bank, N.A.*, 994 F. Supp. 2d 542, 553-54 (S.D.N.Y. 2014); *Curtis v. Cenlar FSB*, 2013 WL 5995582, at *3 (S.D.N.Y. Nov. 12, 2013); *Singleton v. Wells Fargo Bank, N.A.*, 2013 WL 5423917, at *2 (N.D. Miss. Sept. 26, 2013); *Schilke v. Wachovia Mortg., FSB*, 758 F. Supp. 2d 549, 560 (N.D. Ill. 2010), *aff'd on other grounds sub nom. Cohen v. Am. Sec. Ins. Co.*, 735 F.3d 601 (7th Cir. 2013); *Stevens v. Union Planters Corp.*, 2000 WL 33128256, at *3 (E.D. Pa. Aug. 22, 2000).

In *Rothstein*, the Second Circuit confronted and rejected the notion "that the filed rate doctrine does not apply at all because the doctrine addresses only a 'simple A-to-B transaction – in which A, the insurer, approved a rate and charged it to B,' not the 'A-to-B-to-C' arrangement at issue here, in which the insurer billed the lender and the lender in turn billed the borrower." 794 F.3d at 264. Plaintiffs espouse that same discredited notion here. D.E. 74 at 120 ("We are not going to talk about the A to B ever…. We are just going to look at the B to C.").

The *Rothstein* court explained Plaintiffs' fallacy:

> The distinction between an "A-to-B" transaction and an "A-to-B-to-C" transaction is especially immaterial in the LPI context because LPI travels invariably "A-to-B-to-C." The purpose of LPI is to enforce the borrower's contractual obligation to maintain adequate hazard insurance; the lender acts on the borrower's behalf and in the borrower's place to "force place" a transaction that the borrower should have entered. There are three participants in the transaction (insurer, lender, borrower), but the lender is a go-between that connects the insurer (the party selling insurance) to the borrower (the party actually paying for it). Thus LPI is an A-to-B-to-C transaction that implements a two-party transaction between the insurer and the borrower.

794 F.3d at 265 (internal citation omitted). Plaintiffs offer no credible reason for the Court to break with the Second Circuit on this point.

That "LPI travels invariably 'A-to-B-to-C,'" *id.*, is beyond doubt. As Plaintiffs admitted below, "anybody would understand that these rates eventually are going to be passed on to the homeowner." D.E. 74 at 50-51. This admission belies their assertion on appeal that "Appellants do not allege that they purchased insurance from ASIC through an intermediary." Appellants' Br. at 26. There is only one product at issue – LPI issued by American Security (A) – and Caliber (B) unquestionably required Plaintiffs (C) to bear its cost.

In approving American Security's LPI rates in Florida, the Office equally understood that borrowers would bear the premium's cost. D.E. 91 at 29 n.14. The Office explains on its website that the LPI premium "may ultimately be borne by the homeowner," *id.*, and the Office-approved LPI policies provide that the "named insured" (*i.e.*, Caliber) "is authorized to advance all funds to be recovered from the borrower" for the insurance. *See, e.g.*, D.E. 23-1 Ex. 3; *id.* Ex. 5. The National Association of Insurance Commissioners has similarly explained that, for LPI, "the lender chooses the coverage provider and amounts, yet the consumer is obligated to pay the cost of coverage." D.E. 1 ¶ 11; *see also Rothstein*, 794 F.3d at 266 ("Thus the quintessentially 'A-to-B-to-C' character of LPI transactions was known to regulators who approved Balboa's rates.").[6]

[6] Plaintiffs cite a 2001 order in which a California Insurance Commissioner stated that he lacked jurisdiction to address whether certain costs in LPI rates are improperly passed on to borrowers. *See* Appellants' Br. at 15, 26. Plaintiffs offer no reason to believe that Florida or Pennsylvania regulators approach the issue this way. To the contrary, Plaintiffs and their *amicus curiae* make clear that the Office has actively investigated LPI costs for borrowers. *See id.* at 12-13 & n.2; *Amicus Curiae* Br. at 5-7; *see also* Part II.A.2.b, *infra*.

The "A-to-B-to-C transaction" is reflected in Plaintiffs' mortgages. Each mortgage states that the lender or servicer (B) will charge the borrower (C) for insurance obtained from a third-party insurer (A): "If Borrower fails to maintain any of the coverages described above, Lender may obtain insurance coverage, at Lender's option and Borrower's expense." D.E. 1 ¶¶ 48, 64; D.E. 22-1. Moreover, "Borrower acknowledges that the cost of the insurance coverage so obtained might significantly exceed the cost of insurance that Borrower could have obtained" and "amounts disbursed by Lender" become "debt of Borrower secured by this Security Instrument." *Id.* In other words, Caliber "may obtain insurance coverage" and Plaintiffs will be charged for "the cost of the insurance coverage *so obtained*," not some lesser "kickback"-free "cost of insurance." No mortgage term says that the servicer-to-borrower charge is limited to some net "cost of insurance." *See Anapoell v. Am. Express Bus. Fin. Corp.*, 2009 WL 766532, at *3 (10th Cir. Mar. 24, 2009) (similar "net cost" claim "is reading language into the Agreement that does not exist"; rejecting any "unwritten requirement that the Defendants may only 'pass on' their actual insurance-related expenses" to borrower).

And the "A-to-B-to-C transaction" is reflected in the LPI coverage. As the policies and endorsements thereto reflect, American Security's coverage is "dual interest," meaning that it covers both the lender's and borrower's interests in the property. As additional insureds and additional named insureds, borrowers may and do file coverage claims. *See*, *e.g.*, D.E. 23-1 Ex. 3 (Mortgagee's Interest Protection Residential Property Florida Replacement Cost Endorsement; explaining that the terms "you" and "your" refer "to the financial institution as named insured and the borrower"); *id.* Ex. 5 (same); D.E. 23-3 Ex. 3 (same). Contrary to Plaintiffs' efforts to characterize LPI as protecting only the lender's interest, *see* Appellants' Br. at 12-13, LPI insures the lender *and* borrower alike.

Plaintiffs' recurring description of LPI as a "commercial" product is misguided. LPI is a hybrid, with both commercial and consumer uses. One court explained the meritlessness of the rationalization that, "because the Loan Servicing Defendants are the primary policyholders," LPI only "protects their commercial interest in the properties":

> Regardless of who is listed in what role, LPI serves to "mitigate the risk that the mortgaged property will be damaged or destroyed before the loan is repaid," and thus to protect the loan servicers' interest in the property. No matter the listed roles, "LPI travels invariably A-to-B-to-C," and "the lender or mortgage servicer is a go-between that connects the insurer (the party selling insurance) to the borrower (the party actually paying for it)." No matter what, the insurance ultimately protects the lender's interest in the property. Whether Plaintiffs or the Loan Servicing Defendants are the primary insured, the essential quality of the transaction remains unchanged, and so too does the application of the filed rate doctrine to Plaintiffs' claims.

Lyons, 158 F. Supp. 3d at 229-30 (quoting *Rothstein*, 794 F.3d at 259, 265).

C. The Nonjusticiability And Nondiscrimination Principles Apply.

Rehashing the same arguments discussed above, Plaintiffs conclude their brief by asserting that neither the nonjusticiability nor nondiscrimination principles apply. Regarding nonjusticiability, Plaintiffs reason that they

> do not ask the court to assess the propriety of the premium that ASIC charges to Caliber for its master policy. Should the court find that Caliber breached its contracts with its mortgagors, or is liable for nondisclosure, ASIC would not need to adjust its rates; it would remain free to charge *Caliber* premiums based on the same approved *commercial* rates.

Appellants' Br. at 29.

Plaintiffs' claims implicate the nonjusticiability principle. Caliber passes on to Plaintiffs an amount equal to the rate-based LPI premium, an amount Plaintiffs themselves contend include "'commissions, tracking expenses, or other allegedly inflated, or unearned portions, of the LPI premium.'" D.E. 91 at 15 (quoting D.E. 74 at 105). If a court were to cast doubt upon the propriety of a rate-based amount charged to Plaintiffs, the court would necessarily cast doubt upon the propriety of filed rates charged by American Security to Caliber. True, any "judgment awarding damages in such a case would not directly set a new rate; in effect, however, the judgment would do so indirectly … in the form of money damages." *Taffet*, 967 F.2d at 1491 n.9. Plaintiffs ignore that "even if a claim does not directly attack the filed rate, an award of damages to the customer that would, in effect, result in a judicial determination of the reasonableness of that rate is prohibited under the filed rate doctrine." *Hill*, 364 F.3d at 1317.

The nondiscrimination principle is equally implicated. Plaintiffs contend otherwise, arguing that a damages award "will not result in Caliber paying a lower rate than other similarly situated *lenders* because the master policy's commercial rates are not implicated." Appellants' Br. at 30. "The reason," Plaintiffs say, "is simple." *Id.* Rates charged to Caliber supposedly "comprise the playing field on which the filed-rate doctrine would prohibit discrimination." *Id.*

Plaintiffs' reasoning is too "simple." Borrowers, not servicers, are the true ratepayers. As Plaintiffs have admitted, "anybody would understand that these rates eventually are going to be passed on to the homeowner." D.E. 74 at 50-51. The mortgages permit Caliber to obtain insurance at Plaintiffs' expense. And the LPI policies make Plaintiffs insureds along with Caliber. Caliber-serviced borrowers who are not part of the putative class (*e.g.*, those that opt out, are outside the class period, or otherwise do not meet the class definition) would thus be treated less favorably than those within the class. *See Rothstein*, 794 F.3d at 263. Borrowers serviced by other servicers which, like Caliber, have LPI arrangements with American Security also would be treated less favorably. Below, "Plaintiffs conceded that ASIC had only one set of filed rates which were applied to all its LPI insureds regardless of the servicer." D.E. 91 at 42 n.19 (citing D.E. 74 at 17).

D. Neither *Alston* Nor *Williams* Assist Plaintiffs.

Plaintiffs only imagine a circuit split on the question they present. *No* federal court of appeals, save the Second Circuit, has decided whether the filed-rate doctrine bars LPI "kickback" claims, nor has *any* court of appeals accepted Plaintiffs' "separate transactions" distinction, in *any* context. Neither the Third nor Sixth Circuit decisions on which Plaintiffs rely support their view.

1. *Alston* neither conflicts with *Rothstein* nor controls here.

Plaintiffs rely on *Alston v. Countrywide Financial Corp.*, 585 F.3d 753 (3d Cir. 2009), but that decision is inapposite. "It is not *Alston* itself," the District Court found, "but some district courts within the Third Circuit, that extended *Alston* to LPI cases." D.E. 91 at 31. "Although it discussed the filed rate doctrine in the context of the Real Estate Settlement Procedures Act ('RESPA') in *Alston*, the Third Circuit has not yet decided whether the doctrine bars the claims at issue here." *Santos v. Carrington Mortg. Servs., LLC*, 2015 WL 11071479, at *1 (D.N.J. Sept. 2, 2015). Thus, "the Third Circuit may follow *Rothstein*'s reasoning and find that the filed rate doctrine bars the claims at issue." *Santos v. Carrington Mortg. Servs., LLC*, 2015 WL 7300500, at *3 (D.N.J. Nov. 18, 2015).

Alston addressed the filed-rate doctrine only "briefly," 585 F.3d at 759, and referred to neither the nonjusticiability nor nondiscrimination principles. *Alston* narrowly held that the doctrine does not bar RESPA claims based on charges for private mortgage insurance (not LPI) because of a unique remedial provision of RESPA, 12 U.S.C. § 2607(d). 585 F.3d at 758. RESPA provides that the *entire* charge, trebled, is the proper measure of damages. Because § 2607(d) fixes damages "at three times the total charge paid by the consumer in exchange for a settlement service, and not merely any overcharge," the Third Circuit explained, there was "no need to parse or second guess rates." 585 F.3d at 764.

Unlike *Alston*, neither *Rothstein* nor this proceeding involve RESPA or § 2607(d). *Alston* is irrelevant in non-RESPA contexts. *See Dolan v. Fid. Nat'l Title Ins. Co.*, 365 F. App'x 271, 275 n.2 (2d Cir. 2010) (in affirming dismissal based on filed-rate doctrine, distinguishing *Alston* as "inapposite because RESPA provides both an independent right, *see* 12 U.S.C. § 2607(a), and a remedy, *see id.* § 2607(d)(2), which plaintiffs do not invoke here"); *Patel*, 183 F. Supp. 3d at 1243 ("*Alston* involved claims under the anti-kickback provisions of RESPA, which created a unique statutory cause of action for persons challenging 'any charge' for an 'infected' service…. Plaintiffs do not bring their inflated-premium claims under any such unique statutory right."); *Schilke*, 758 F. Supp. 2d at 560 (distinguishing *Alston* because "Plaintiff is not suing under RESPA or any other federal law stemming from Congressional intent to circumvent the filed rate doctrine").

Nor is *Alston* in tension with Second Circuit precedent like *Rothstein*. To the contrary, in *Galiano v. Fidelity National Title Insurance Co.*, the Second

Circuit relied on *Alston* and distinguished *Dolan* (which distinguished *Alston* and affirmed dismissal based on the filed-rate doctrine) precisely because the *Galiano* plaintiffs asserted a RESPA § 2607(d) claim. 684 F.3d 309, 313 n.5 (2d Cir. 2012). It is logically impossible to assert, as Plaintiffs do, that the Second Circuit's precedents conflict with the Third Circuit's. More accurately, the Second Circuit distinguishes *Alston* where, as here, RESPA claims are not asserted.

Moreover, *Alston* implicitly *approved* applying the filed-rate doctrine to LPI "kickback" allegations. *Alston* distinguished the analysis before it from the case of *Stevens v. Union Planters Corp.*, *supra*, where – as alleged in *Rothstein* and in this proceeding – the plaintiff-borrower alleged that his servicer received "kickbacks" in connection with LPI, making the premium "excessive." 2000 WL 33128256, at *2. *Alston* found that "*Stevens* is inapposite because the plaintiffs in that [LPI] case directly challenged the filed rate as unreasonable." 585 F.3d at 764 n.13.

2. *N.J. Title* and *McCray* are more instructive.

A pair of post-*Alston* Third Circuit decisions confirm *Alston*'s limited reach. *See In re N.J. Title Ins. Litig.*, 683 F.3d 451, 454-60 (3d Cir. 2012); *McCray v. Fid. Nat'l Title Ins. Co.*, 682 F.3d 229, 235-42 (3d Cir. 2012). Like Plaintiffs, the *N.J. Title* and *McCray* plaintiffs alleged that the defendant title insurers "embed" within their premiums "payoffs, kickbacks, and other charges that are unrelated to the issuance of title insurance or the business of insurance" and "hide these costs from regulatory scrutiny by funneling them to and through title agents." *N.J. Title*, 683 F.3d at 454; *McCray*, 682 F.3d at 234-35. These claims would require courts "to determine the reasonable rate absent the alleged conspiracy," a function the regulator was more competent to perform. *N.J. Title*, 683 F.3d at 457; *McCray*, 682 F.3d at 241 n.11 & 242 (rejecting argument that doctrine did not apply because rates "include hidden costs based on kickbacks and other inducements unrelated to the business of insurance"). The filed-rate doctrine thus barred "kickback" claims.

None of Plaintiffs' cited cases even mention *N.J. Title* or *McCray*. If any Third Circuit precedent is persuasive here, it is *N.J. Title* and *McCray*, not *Alston*. In this regard, the District Court did not concede "that *Alston* and *Rothstein* conflict," as Plaintiffs suggest. Appellants' Br. at 17. The District Court held that "[i]t is apparent from *N.J. Title Ins. Litig*. that when the Third Circuit faces a true filed-rate issue, it undertakes a detailed analysis of nonjusticiability and nondiscrimination exactly like the Second Circuit did in *Rothstein*." D.E. 91 at 32.

3. *Williams* did not involve a rate challenge.

The decision in *Williams v. Duke Energy International, Inc.*, 681 F.3d 788 (6th Cir. 2012), is even less apposite than is *Alston*. *Williams* concerned rebates paid to secure a rate-stabilization plan's approval, and did not hold that any ratepayer should recover as damages components bundled into the rate's structure.

The *Williams* plaintiffs alleged that the defendant retail electricity service provider "paid unlawful and substantial rebates to certain large customers, including General Motors, in exchange for the withdrawal by said customers of objections to a rate-stabilization plan that [defendant] was attempting to have approved by the [regulator]." 681 F.3d at 793. The *Williams* court "distinguished between challenging the setting or reasonableness of a specific rate, which is barred by the filed-rate doctrine, and challenges that involve discussion of rates but do not challenge their reasonableness, which are permitted." *Id.* at 796. In *Williams*, "Plaintiffs' challenge [did] not concern the particular rate set by the [regulator], but rather payments made outside of the rate scheme." *Id.* at 797.

Here, by contrast, "Plaintiffs' counsel provided an unequivocal 'no' answer to the following question: 'can you calculate damages without determining the amount of the commissions, tracking expenses, or other allegedly inflated, or unearned portions, of the LPI premium?'" D.E. 91 at 15 (quoting D.E. 74 at 105). Unlike the claims in *Williams*, Plaintiffs' claims necessarily challenge, directly or indirectly, components of approved LPI rates.

E. The *Amicus Curiae*'s Arguments Can Be Summarily Rejected.

Amicus curiae United Policyholders lends no credence to Plaintiffs' arguments; instead, the *amicus* manufactures entirely new ones. It argues that the filed-rate doctrine does not bar the Florida Plaintiffs' claims because, in an October

2013 consent order, the Office "rejected the unauthorized charges contained in the insurance rates" and, relatedly, in the same consent order American Security "voluntarily agreed with the Florida regulator not to include the unauthorized charges" in the LPI rates. *Amicus Curiae* Br. at 3-4.

These are arguments Plaintiffs have *never* advanced, in the District Court or this Court. No reference to the consent order appears in Plaintiffs' appellate brief or brief below opposing Defendants' motions to dismiss. D.E. 47. Nor does a reference to the consent order appear in the transcript of the oral argument below, D.E. 74, or the order of dismissal, D.E. 91. Without exceptional circumstances, *amici curiae* may not expand the scope of an appeal to implicate issues not presented by the parties to the district court. *Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248, 1257 (11th Cir. 2017); *see also S. Realty Mgmt., Inc. v. Aspen Specialty Ins. Co.*, 2010 WL 966426, at *5 (N.D. Ga. Mar. 12, 2010) (disallowing proposed United Policyholders *amicus* brief because it "contains arguments that were not made by Plaintiffs").[7]

Regardless, the arguments lack merit. The *amicus* writes that, in the consent order, American Security agreed to prospectively refrain from paying commissions

[7] The *amicus* notes that American Security and the District Court referenced *other* Office materials, including the Office's website. *See Amicus Curiae* Br. at 1-2. The *amicus* does not identify any reference to the consent order by Plaintiffs, much less any argument premised upon the consent order.

to servicers or their affiliates, reinsuring LPI with servicers' captive insurers, paying contingent commissions based on underwriting profitability or loss ratios, providing below-cost outsourced services to servicers, or making "incentive payments," including payments for expenses, to servicers. *See Amicus Curiae* Br. at 10-11. "Therefore," the *amicus* concludes, "those charges are not included in the force-placed insurance rates filed in Florida." *Id.* at 10. This proves too much. If purported "kickbacks" were not paid following the consent order's entry, then they could not be the subject of Plaintiffs' claims here.

II. Plaintiffs Fail To State Viable Claims For Other Dispositive Reasons.

As Plaintiffs conceded below, if the filed-rate doctrine applies, then it bars each claim. The doctrine *does* apply, so the District Court properly dismissed the case. Dismissal, however, could be alternatively affirmed on grounds raised but not reached below. "This Court may affirm for any reason supported by the record, even if not relied upon by the district court." *Allen*, 790 F.3d at 1278.

Plaintiffs' counsel argued in the *Patel* appeal, and likely will argue here, that the Court should not address these alternative grounds. But a lower court's decision "*must* be affirmed if the result is correct although the lower court relied upon a wrong ground or gave a wrong reason." *SEC v. Chenery*, 318 U.S. 80, 88 (1943) (emphasis added). "The reason for this rule is obvious." *Id.* If the same result can be reached on other grounds apparent from the record, remanding would be "wasteful." *Id.* The Court regularly affirms Rule 12(b)(6) dismissals on grounds other than those relied on by the lower court. *See, e.g., Lord Abbett Mun. Income Fund, Inc. v. Tyson*, 671 F.3d 1203, 1207 (11th Cir. 2012); *Ironworkers Local Union 68 v. AstraZeneca Pharm., LP*, 634 F.3d 1352, 1360 (11th Cir. 2011).

A. Plaintiffs' RICO Claims Fail.

1. Plaintiffs plausibly allege neither deceptive conduct nor proximate causation of an injury.

Plaintiffs' RICO § 1962(c) claim fails for the same reasons it fails in the *Patel* appeal, including because: (i) the supposedly "fraudulent" letters sent to borrowers warned of the LPI's higher cost, narrower coverage, and that commissions or other amounts would be paid to the servicer or its affiliate, negating any alleged scheme to defraud, *see Feaz v. Wells Fargo Bank, N.A.*, 745 F.3d 1098, 1110-11 (11th Cir. 2014); *Robinson v. Standard Mortg. Corp.*, 191 F. Supp. 3d 630, 640-43 (E.D. La. 2016); *Wilson v. EverBank*, 77 F. Supp. 3d 1202, 1227 (S.D. Fla. 2015); and (ii) allegations that the supposed scheme caused injury because borrowers would have refused to pay the LPI premiums are "senseless," *see Cohen*, 735 F.3d at 614; *Robinson*, 191 F. Supp. 3d at 645-46; *Wilson*, 77 F. Supp. 3d at 1227. Because the substantive § 1962(c) claim must be dismissed, so too must the adjunct § 1962(d) conspiracy claim. *See Douglas Asphalt Co. v. QORE, Inc.*, 657 F.3d 1146, 1153 (11th Cir. 2011). In these regards, American

Security adopts by reference the arguments asserted in Argument Part II.D of the Brief of Defendants-Appellees filed in the *Patel* appeal.

Plaintiffs' counsel argued below and in *Patel* that the letters' warnings are irrelevant because Plaintiffs were not specifically warned that they would be charged amounts net of the LPI's "actual cost." That misses the point. No purported misrepresentation or omission about a product's internal pricing could be part of a plausible scheme to defraud where, as here, the consumer was warned of the product's higher cost, implored *not* to purchase the product, informed that doing so would *not* be in their best interest, and advised to purchase a different product. As this Court has held, letters warning of an imminent bad deal and urging one to seek better are not calculated to deceive. *See Feaz*, 745 F.3d 1110-11 (allegation that lender "committed fraud" by charging "a commission, a 'kickback,' or 'other compensation' – any amount above the net cost … of obtaining the force-placed flood insurance –" failed because lender disclosed that borrower "would incur higher costs if it force-placed the insurance for her").

Plaintiffs' counsel also argued below and in *Patel* that their theory of causation is not "senseless" because, once LPI charges were levied in breach of the mortgages, further performance on their part was excused. Not only is this novel argument incompatible with *Cohen*, *Robinson*, *Wilson*, and other courts rejecting fraud-based LPI "kickback" claims on causation grounds, it ignores that Plaintiffs knew that they could obtain less-expensive insurance, were given opportunities to avail themselves of that option to avoid a known higher cost, but took no action. The relevant question is not whether Plaintiffs' contractual performance was excused, but whether Defendants' alleged scheme to defraud caused Plaintiffs to allow LPI to be placed on their properties.

2. The McCarran-Ferguson Act reverse-preempts the Florida Plaintiffs' RICO claims.

The Florida Plaintiffs' RICO claims run afoul of the McCarran-Ferguson Act, which "reverse-preempts" federal laws of general application. Reinstating those claims would: (i) permit a private right of action where none exists under the Florida Unfair Insurance Trade Practices Act ("FUITPA"), Fla. Stat. § 626.951 *et seq.*; and (ii) effectively displace the FUITPA's administration into federal court.[8]

In the McCarran-Ferguson Act, Congress "declare[d] that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States." 15 U.S.C. § 1011. Accordingly, "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of

[8] American Security does not concede that Ms. Keller's RICO claims are not similarly reverse-preempted by Pennsylvania insurance law.

regulating the business of insurance" unless "such Act specifically relates to the business of insurance." *Id.* § 1012(b).

In this way, "McCarran-Ferguson reverses the doctrine of preemption in cases involving state insurance laws, such that a state law specifically regulating the business of insurance shall preempt a conflicting federal law unless that federal law specifically relates to the business of insurance." *Blackfeet Nat'l Bank v. Nelson*, 171 F.3d 1237, 1244 (11th Cir. 1999). The Act thus "seeks to protect state regulation primarily against inadvertent federal intrusion – say, through enactment of a federal statute that describes an affected activity in broad, general terms, of which the insurance business happens to constitute one part." *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 39 (1996).

"RICO is not a law that 'specifically relates to the business of insurance.'" *Humana, Inc. v. Forsyth*, 525 U.S. 299, 307 (1999). And the FUITPA was specifically enacted "to regulate trade practices in the business of insurance in accordance with the intent of congress as expressed in the [McCarran-Ferguson Act] by defining or providing for the determination of all such practices in this state which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined." Fla. Stat. § 626.951(1). The Court therefore need only determine whether applying RICO here would "impair" the FUITPA's governance of the business of insurance.

What it means to "impair" state law is not in doubt. "When federal law does not directly conflict with state regulation, and when application of the federal law would not frustrate any declared policy or interfere with a State's administrative regime, the McCarran-Ferguson Act does not preclude its application." *Forsyth*, 525 U.S. at 311. "Conversely, when federal law does directly conflict with state regulation, or when application of the federal law would frustrate any declared policy or interfere with a State's administrative regime, the McCarran-Ferguson Act precludes its application." *Kondell v. Blue Cross & Blue Shield of Fla., Inc.*, 187 F. Supp. 3d 1348, 1358 (S.D. Fla. 2016). "In *Forsyth*, the Court rejected the view 'that Congress intended a green light for federal regulation whenever the federal law does not collide head on with state regulation,' explaining: 'The dictionary definition of 'impair' is 'to weaken, to make worse, to lessen in power, diminish, or relax, or otherwise affect in an injurious manner.'" *Id.* (quoting 525 U.S. at 309-10). "In other words, 'to 'impair' a law is to hinder its operation or 'frustrate a goal' of that law.'" *Id.* (quoting 525 U.S. at 311).

a. Allowing Plaintiffs' RICO claims would frustrate the FUITPA's remedial scheme.

No Private Right of Action. Affording Plaintiffs a private civil remedy under federal RICO would frustrate a declared state policy because it would afford them a remedy that does not exist under the FUITPA. "[T]he Florida legislature created a private cause of action for certain FUITPA violations but not others."

Buell v. Direct Gen. Ins. Agency, 267 F. App'x 907, 909 (11th Cir. 2008). The Act's enforcement was primarily entrusted to the Office, not private litigants. *See, e.g.*, Fla. Stat. § 626.9561 ("Power of department and office"), *id.* § 626.9571 (authorizing administrative hearings, subpoenas, and document productions); *id.* § 626.9581 (authorizing administrative cease-and-desist and penalty orders); *id.* § 626.9601 (authorizing penalties for violating cease-and-desist orders).

Where the FUITPA does permit a private right of action, the right is heavily restricted. In particular, Fla. Stat. § 624.155 requires that a notice of the claim be provided as a prerequisite to filing suit, *id.* § 624.155(3)(a), gives a "safe harbor" barring claims if a violation is corrected within 60 days, *id.* § 624.155(3)(d), limits the recovery of punitive damages, *id.* § 624.155(5), and forbids class actions, *id.* § 624.155(6), among other restrictions.

Here, Plaintiffs' RICO claims are bottomed on allegations that Defendants misrepresented the LPI's "actual cost," D.E. 1 ¶ 156, one of the policy's terms. The FUITPA governs this as "the business of insurance," prohibiting that which "misrepresents the benefits, advantages, conditions, or terms of any insurance policy." Fla. Stat. § 626.9541(1)(a). That Act, however, does not provide a private right of action for such misrepresentation. *See Joseph v. Bernstein*, 612 F. App'x 551, 557 (11th Cir. 2015).

Plaintiffs also allege that "kickbacks" constituted "rebates," D.E. 1 ¶ 3, and "bribes," *id.* ¶ 156, such that "Caliber was effectively paying much less than what it charged to Plaintiffs." *Id.* ¶ 159. The FUITPA also governs this as "the business of insurance," prohibiting "any unlawful rebate of premiums payable on the contract, any special favor or advantage in the dividends or other benefits thereon, or any valuable consideration or inducement whatever not specified in the contract." Fla. Stat. § 626.9541(1)(h). "An insurance company's methods of inducing people to become policyholders pertain to the company-policyholder relationship and thus constitute an integral part of the business of insurance." *Gilchrist v. State Farm Mut. Auto. Ins. Co.*, 390 F.3d 1327, 1334 n.7 (11th Cir. 2004) (internal quotation marks omitted). Yet the FUITPA provides no private right of action for "rebates" or "special favors." Reverse-preemption thus applies. *See Pedraza v. United Guar. Corp.*, 2000 WL 36692425, at *5-9 (S.D. Ga. Aug. 14, 2000) (where insurers allegedly entered into a scheme with lenders whereby, in exchange for the lenders' referral of business, the insurers agreed to pay "kickbacks," the McCarran-Ferguson Act reverse-preempted a RESPA claim).

Where, as here, "state insurance laws closely regulate the very activity forming the basis of a plaintiff's claim, the absence of a state-level cause of action counsels in favor of barring the federal lawsuit if the federal law does not specifically relate to the business of insurance." *In re Managed Care Litig.*, 185 F.

Supp. 2d 1310, 1322 (S.D. Fla. 2002). Primarily for this reason, courts hold that the FUITPA reverse-preempts RICO claims under the McCarran-Ferguson Act.[9]

"RICO does more than simply duplicate the Florida regulatory scheme." *Bristol Hotel*, 20 F. Supp. 2d at 1350. Unlike the FUITPA, RICO "grants a private cause of action to any injured person" and "grants the extraordinary remedy of treble damages, as well as costs and attorney's fees, to victorious plaintiffs." *Id.* "Under these circumstances, it is simply impossible to say that to allow a RICO challenge to an allegedly illegal insurance practice would not 'invalidate, impair, or supersede' Florida's detailed insurance regime. Indeed, given the incredible advantages that RICO affords to an aggrieved party, to permit Plaintiffs to proceed under RICO would render Florida's recovery scheme obsolete." *Id.* at 1351.

Citing Fla. Stat. § 626.9631, one district court conversely held that, in enacting the FUITPA, "the Florida Legislature made clear that all state common law and statutory remedies were preserved." *Montoya v. PNC Bank, N.A.*, 94 F. Supp. 3d 1293, 1316 (S.D. Fla. 2015). Although under § 626.9631 the FUITPA's provisions "are cumulative to rights under the general civil and common-law, and

[9] *See, e.g.*, *Kondell*, 187 F. Supp. 3d at 1361; *Managed Care*, 185 F. Supp. 2d at 1322; *Braunstein v. Gen. Life Ins. Co.*, 2002 WL 31777635, at *4 (S.D. Fla. Nov. 19, 2002); *Weinstein v. Zurich Kemper Life*, 2002 WL 32828648, at *3 (S.D. Fla. Mar. 15, 2002); *Bristol Hotel Mgmt. Corp. v. Aetna Cas. & Sur. Co.*, 20 F. Supp. 2d 1345, 1350-51 (S.D. Fla. 1998). Some of these same courts also distinguished *Forsyth* because, in *Forsyth*, the McCarran-Ferguson Act did not reverse-preempt RICO based on the unique circumstances of Nevada-specific law.

no action of the department, commission, or office shall abrogate such rights to damages or other relief in any court," this Court has made clear that § 626.9631 only preserved those causes of action that a party had available *prior* to the FUITPA's enactment. *See Keehn v. Carolina Cas. Ins. Co.*, 758 F.2d 1522, 1524 (11th Cir. 1985). The FUITPA was enacted before RICO; no private cause of action under RICO preexisted the FUITPA and § 626.9631 cannot apply.

The *Montoya* court also cited Fla. Stat. § 626.9541(1)(o), which is privately actionable under the circumscribed right defined in Fla. Stat. § 624.155. 94 F. Supp. 3d at 1316. That subsection prohibits either "collecting any sum as a premium or charge for insurance, which is not then provided, or is not in due course to be provided" or "collecting as a premium or charge for insurance any sum in excess of or less than the premium or charge applicable to such insurance, in accordance with the applicable classifications and rates as filed with and approved by the office, and as specified in the policy." That conduct is not at issue here. Plaintiffs complain about *post-collection* "rebates" paid to Caliber – "rebates" that, as noted above, are specifically prohibited by a subsection, Fla. Stat. § 626.9541(1)(h), for which there is no private right of action. And even if Fla. Stat. § 626.9541(1)(o) applied here, § 624.155's circumscribed procedural and remedial limitations show that a class action for RICO treble damages would be incompatible with the FUITPA's more modest remedial scheme.

Other Factors. Other factors suggest that applying RICO here would impair Florida insurance law. Comparable private rights of action do not exist under other Florida statutes. Florida has its own Florida RICO Act, Fla. Stat. § 895.01 *et seq.*, and Civil Remedies for Criminal Practices Act, Fla. Stat. § 772.101 *et seq.*, which are patterned after federal RICO, but which do not list FUITPA violations among their predicate acts, and do list other inapplicable Insurance Code violations. *See id.* § 895.02(1)(a). In addition, the Florida legislature categorically exempted persons and activities regulated under Florida insurance laws from the state's general consumer protection law, the FDUTPA. *See id.* § 501.212(4).

Because the FUITPA is a statutory scheme complete with its own remedies and enforcement devices, parallel common-law claims cannot be based on its violation. *See Buell*, 267 F. App'x at 909-10 (plaintiffs "may not evade the Florida legislature's decision to withhold a statutory cause of action for violations of the pertinent provisions of FUITPA by asserting common-law claims based on such violations"); *Keehn*, 758 F.2d at 1524. Moreover, Florida common-law claims do not reward plaintiffs with the attorney fees and treble damages mandated by RICO.

Equally important, "no other state statutory or common-law claim available would permit Plaintiff to seek relief on behalf of a putative class for Defendant's alleged misrepresentations." *Kondell*, 187 F. Supp. 3d at 1361. "Florida law is clear that fraud claims are inappropriate for class treatment as a matter of law because of the individual questions presented." *Id.* (internal quotation marks omitted). "Applying RICO in this case would therefore permit Plaintiff[s] to seek relief otherwise unavailable under Florida law." *Id.* at 1362.

b. Allowing Plaintiffs' RICO claims would displace administration of Florida law into federal court.

The McCarran-Ferguson Act also reverse-preempts the Florida Plaintiffs' RICO claims because it would interfere with an October 2013 consent order issued by the Office regulating the very business practices at issue in this case (the same order that *amicus curiae* United Policyholders emphasizes, *see* Part I.E, *supra*).[10]

Having reviewed American Security's LPI rate filing and business practices, the consent order recites, the Office "raised concerns regarding ASIC's business practices as such practices relate to the payment of commissions to affiliates of Servicers, payment of qualified expenses directly to Servicers, and placement of quota share reinsurance with reinsurers that are captives of Servicers," *i.e.*, the same so-called "kickbacks" alleged here. American Security denied violating extant Florida insurance laws, but agreed to "business practice reforms for all LPI business in Florida." These included refraining from paying commissions to servicers or their affiliates, reinsuring LPI with a servicer's captive insurer, paying

[10] The Court may take judicial notice of this governmental record, which is available on the Office's Internet website at http://www.floir.com/siteDocuments/AmericanSecurity141841-13-CO.pdf. *See Dimanche v. Brown*, 783 F.3d 1204, 1213 n.1 (11th Cir. 2015).

contingent commissions based on underwriting profitability or loss ratios, providing below-cost outsourced services to servicers, or making "incentive payments," including payments for expenses, to servicers.

In the consent order, the Office expressed its intent "that these new business practice reforms apply to all LPI insurers issuing LPI coverage in the state of Florida," and sought to "ensure that a level playing field exists for all LPI insurers in this state." The consent order required American Security to re-file its LPI rates with the Office every year and disapproved an existing rate filing. Finally, American Security agreed that any failure to adhere to the consent order's prospective terms and conditions "shall constitute a violation of a lawful order of the Office, and shall subject ASIC to administrative action by the Office."

"Direct conflict with state law is not required to trigger [the McCarran-Ferguson Act]; it is enough if the interpretation would 'interfere with a State's administrative regime.'" *Doe v. Mut. of Omaha Ins. Co.*, 179 F.3d 557, 563 (7th Cir. 1999) (quoting *Forsyth*, 525 U.S. at 310). If federal courts are to determine the lawfulness of American Security's business practices, with or without reference to the Office's consent order, "they will be stepping on the toes of state insurance commissioners." *Id.* at 564. Even if the alleged business practices are unlawful under both federal and state law, "displacing their administration into *federal* court – requiring a federal court to decide whether an insurance [business practice] is consistent with *state* law – obviously would interfere with the administration of the state law. The states are not indifferent to who enforces their laws." *Id.* Ruling on the things Plaintiffs allege here "would mean asking the same questions as state insurance regulators ask and effectively double-checking their work. In other words, such review is just the sort of case-specific intrusion and interference we have held the McCarran-Ferguson Act forbids." *Ludwick v. Harbinger Group, Inc.*, ___ F.3d ___, 2017 WL 1359477 (8th Cir. Apr. 13, 2017).

B. Plaintiffs Fail To State A Tortious Interference Claim.

Plaintiffs' tortious interference claim fails for the same reasons it fails in the *Patel* appeal, including that: (i) logically, American Security could not have induced a servicer's breach of mortgages to which the servicer is not a party; and (ii) American Security's actions were legally justified, not "tortious" or "improper." *See Gunder's Auto Center v. State Farm Mut. Auto. Ins. Co.*, 422 F. App'x 819, 822 (11th Cir. 2011) (Florida law); *Ira G. Steffy & Son v. Citizens Bank of Pa.*, 7 A.3d 278, 288-89 & n.13 (Pa. Super. 2010) (Pennsylvania law). In these regards, American Security adopts by reference the arguments asserted in Argument Part II.C of the Brief of Defendants-Appellees filed in the *Patel* appeal.

Plaintiffs' counsel argued below and in *Patel* that Defendants' conduct was unjustified because it was performed in "bad faith." Three federal appellate courts, including *this* Court, have rejected that premise at the pleadings stage, holding that the financial arrangements on which the claims are predicated are neither "kickbacks," *Cohen*, 735 F.3d at 611-12; *Feaz*, 745 F.3d at 1110-11, "oppressive," *Cohen*, 735 F.3d at 610, nor "abusive self-dealing." *Kolbe v. BAC Home Loans Servicing, LP*, 738 F.3d 432, 454 (1st Cir. 2013) (equally divided en banc opinion).

In *Feaz*, this Court explained that "[a] bank does not act in bad faith when acting to protect its legitimate interests through contractually authorized actions." 745 F.3d at 1110. "Moreover," the Court continued, the notice the borrower received "gave her ample opportunity to avoid the higher-cost force-placed insurance and warned her about the cost." *Id.*

In *Cohen*, as here, "notices and disclosures clearly warned" that LPI "could cost up to five times more than a borrower's self-purchased policy." 735 F.3d at 612. The borrower was "continuously reminded" that "she could avoid this expensive alternative by restoring her own insurance coverage for the property – even retroactively – and receive a *pro rata* refund of the lender-placed insurance premium." *Id.* "On these facts," the Seventh Circuit held, "any claim that [the lender] dealt with [the borrower] in bad faith is not plausible." *Id.* On this basis, the Seventh Circuit affirmed dismissal of a tortious interference claim. *Id.* at 613.

Similarly, in *Kolbe*, the servicer sent letters warning the plaintiff "of the potential negative consequences of lender-placed insurance" and "implored him to purchase his own insurance." 738 F.3d at 454. The servicer's "disclosure and warning hardly support a claim of abusive self-dealing," the First Circuit ruled. *Id.*

Here, too, Plaintiffs were each warned, repeatedly, that LPI offered limited coverage and would cost more than anything they could obtain on their own. Planitiffs were afforded time, encouragement, and opportunity to obtain their own coverage, and nothing which can be characterized as a "kickback" was paid. There is nothing abusive, oppressive, tortious, or bad faith about any of this.

C. American Security Was Not Unjustly Enriched.

Plaintiffs' unjust enrichment claim also fails for the same reasons it fails in the *Patel* appeal, including that: (i) the conduct alleged was not "unjust," *see Feaz*, 745 F.3d at 1104, 1111; *Cohen*, 735 F.3d at 615; and (ii) the claim is predicated on supposedly wrongful conduct, not quasi-contractual liability. *See Guyana Tel. & Tel. Co. v. Melbourne Int'l Commc'ns, Ltd.*, 329 F.3d 1241, 1245 n.3 (11th Cir. 2003) (Florida law); *Allegheny Gen. Hosp. v. Philip Morris, Inc.*, 228 F.3d 429, 446-47 (3d Cir. 2000) (Pennsylvania law). In these regards, American Security adopts by reference the arguments asserted in Argument Part II.E of the Brief of Defendants-Appellees filed in the *Patel* appeal.

Plaintiffs' counsel argued below and in *Patel* that their unjust enrichment claim does not arise from the same basic "wrong" as their other claims. Their own complaint betrays them. The unjust enrichment claim is premised upon allegations that "ASIC received below-cost payments from Caliber" but "did not reduce the charges," D.E. 1 ¶ 124, and "paid significant monies to Caliber in kickbacks" to "receive the corresponding inflated insurance charges," *id.* ¶ 125. These are the *same* allegations underpinning the tortious interference claim. *See* D.E. 1 ¶ 133. Plaintiffs may not bring tort actions for unjust enrichment; that is, they may not allege, as they do, that Defendants' actions harmed them and then assert that Defendants should not be permitted to profit from those actions.

Finally, to state a claim, "the benefit must be conferred directly from the plaintiff to the defendant." *City of Miami v. Bank of Am. Corp.*, 800 F.3d 1262, 1287 (11th Cir. 2015), *cert. granted*, 136 S. Ct. 2544 (2016) (Florida law); *Virgilio v. Ryland Group, Inc.*, 680 F.3d 1329, 1337 (11th Cir. 2012) (same); *Kunzelmann*, 2013 WL 139913, at *10 (Florida and Pennsylvania both "require a benefit to pass directly from the defendant to the plaintiff"); *accord Pittsburgh Baseball, Inc. v. Stadium Auth. of City of Pittsburgh*, 630 A.2d 505, 510 (Pa. Commw. 1993) (Pennsylvania law); *CMR D.N. Corp. v. City of Philadelphia*, 829 F. Supp. 2d 290, 306 (E.D. Pa. 2011) (*Pittsburgh Baseball* "narrows the application of an unjust enrichment claim, holding that a party who bestows an indirect benefit on another is not entitled to a quasi-contract remedy"). Assuming the correctness of their "separate transactions" distinction, Plaintiffs only indirectly conferred a benefit on American Security. They argue point-blank that they "are not" the "direct ratepayer." Appellant's Br. at 14. Plaintiffs cannot have it both ways. *See Sekula v. Residential Credit Solutions, Inc.*, 2016 WL 1559142, at *5 (M.D. Fla. Apr. 18, 2016) (LPI "kickback" unjust enrichment claim would fail if borrowers did not directly pay insurer); *Kunzelmann*, 2013 WL 139913, at *5-6 (same).

CONCLUSION

Plaintiffs fail to state any claim upon which relief can be granted. The Court should affirm the District Court's dismissal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and 11th Cir. R. 32-4, I hereby certify that the foregoing Brief of Defendant-Appellee American Security Insurance Company does not exceed the type-volume limitation imposed by Fed. R. App. P. 32(a)(7)(B). The brief was prepared using Microsoft Word 2010 and contains 12,992 words of proportionally spaced text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The typeface is Times New Roman, 14-point font.

/s/ Frank G. Burt
Frank G. Burt

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief of Defendant-Appellee American Security Insurance Company was filed via the ECF system on April 19, 2017, and that as a result electronic notice of the filing will be served upon all counsel of record.

/s/ Frank G. Burt
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